

# THE WISDOM OF SOFT JUDICIAL POWER: MR. JUSTICE POWELL, CONCURRING

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President Theodore Roosevelt believed in talking softly while carrying a big stick.<sup>1</sup> Justice Lewis F. Powell, Jr., who served on the Court from 1972 to 1987 after a distinguished career in private practice, also talked softly but wielded a great deal of influence without using a stick, and sometimes just by agreeing with the majority. *Branzburg v. Hayes* is perhaps the clearest example. Writing for a five-person majority (that included Powell), Justice Byron White refused to create a First Amendment privilege for newsmen, rejecting the argument that the burden on news gathering created by grand jury subpoena was sufficient to override the “public interest in law enforcement.”<sup>2</sup> White thereby declined the opportunity to create a First Amendment privilege for newsmen seeking to shield their sources, a privilege not available to other citizens.

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We are not offering here an overall assessment of Justice Powell’s jurisprudence. Such ground has been well tread. See, e.g., Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 9 (1987) (critical of Powell’s “representative balancing”); William D. Bader, *The Jurisprudence of Justice Powell, Jr.*, in GREAT JUSTICES OF THE U.S. SUPREME COURT: RATINGS AND CASE STUDIES, 305–08 (William D. Pederson & Norman W. Provizer eds., 1993) (generally supportive of Powell’s approach); Jacob W. Landynski, *Justice Lewis F. Powell, Jr.: Balance Wheel of the Court*, in THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES 311 (Charles M. Lamb & Stephen C. Halpern eds., 1991) (noting that Powell was “the justice most often in the majority in close 5–4 decisions throughout the 1980s). Our focus is somewhat narrower—only on an aspect of his jurisprudential role: his ability to influence the path of the law through his concurrences.

1. Letter from Theodore Roosevelt to Henry L. Spraug (Jan. 26, 1900) (on file with the Library of Congress), available at <http://www.loc.gov/exhibits/treasures/images/at0052as.jpg>.

2. *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972).

While joining the majority opinion, Justice Powell also penned a short separate concurrence to “emphasize . . . the limited nature of the Court’s holding.”<sup>3</sup> Attempting to cabin the Court’s opinion to the facts of the case, Powell proposed a case-by-case balancing test that would take into account the First Amendment interests as well as the public interest in ensuring truthful testimony during grand jury inquiries. Powell agreed with White that bad-faith prosecutions seeking information from the press would not be tolerated, but went further, stating that “the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.”<sup>4</sup>

Despite his having joined a majority opinion that seemingly rejected the creation of a First Amendment newsmen’s privilege, Powell’s separate opinion actually spurred recognition of a “qualified reporter’s privilege” in many subsequent lower court cases.<sup>5</sup> Many of these courts reasoned that because Powell cast the “deciding” vote to create the majority, his analysis stands as that of the Court.<sup>6</sup>

True to his role as a vital center of the Court, *Branzburg* was not the only case where Justice Powell took steps to cast the majority opinion in a different, more restrained light. Indeed, Powell often preferred a short concurring opinion as the means of expressing his differences with a majority rationale. While many of his contemporaries may have preferred the clarity of a dissent, Powell sought both agreement and the benefits of signaling a potentially limiting rationale in future cases by simultaneously purporting to join the majority rationale, while often stating what he saw as the “limited nature”<sup>7</sup> of the holding, or why the Court was right in “this case.”<sup>8</sup>

Embracing one’s differences in a concurring opinion is certainly not the only way a Justice can approach those differences. Dissents are, of course, a good deal more common. A dissent can

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3. *Id.* at 709 (Powell, J., concurring).

4. *Id.* at 710.

5. *See, e.g.*, *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983) (construing *Branzburg* as a plurality opinion, and finding a qualified privilege); *Zenrilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) (limiting *Branzburg* to the criminal context and explaining that Powell’s test should govern in the civil context); *Riley v. City of Chester*, 612 F.2d 708, 715–16 (3d Cir. 1979) (noting that Powell cast the deciding fifth vote in *Branzburg* and adopting his test for a journalist’s privilege).

6. *Zenrilli*, 656 F.2d at 711.

7. *Branzburg*, 408 U.S. at 709 (Powell, J., concurring).

8. *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976) (Powell, J., concurring).

aim at two different goals. First, a Justice may dissent along the lines of Justice Harlan in *Plessy v. Ferguson*, noting that the Court had made a grave error in approving “separate but equal” laws and urging future decisionmakers to hold such laws inconsistent with the Constitution.<sup>9</sup> In this way, the Justice implores a future jurist or lawmaker to find that the decision of the day was wrong and that a different result should be reached. Harlan proved prescient by the time of *Brown v. Board of Education*.<sup>10</sup>

Second, a Justice may write a passionate dissent—a geshrei<sup>11</sup> of sorts—aimed at arousing public interest in the issue and hopefully spurring a popular response to the Court’s seemingly obvious mistake. This can be done either for the purpose of securing congressional action, as may have been Justice Ginsburg’s goal in *Ledbetter v. Goodyear Tire & Rubber Co.*,<sup>12</sup> or to prompt constitutional amendment as Justice Iredell’s words in *Chisholm v. Georgia*<sup>13</sup> led to the adoption of the Eleventh Amendment. Such opinions are often described as “passionate” and may be seen as “chastising” the majority for its decision on the particular issue. This approach cannot be used in every case of disagreement because its effect depends on the probability of securing a popular response and it requires a weighing of the costs of diminishing political capital with one’s colleagues.

Typically, where a Justice joins the majority opinion, it is the majority, and not the concurring, opinion, that constitutes precedent for future decisions. Of course, where there is a rule there is an exception, and this rule is, well, no exception. Powell’s concurrence in *Branzburg* is one example, but so, too, is Justice Robert Jackson’s famous concurrence in *The Steel Seizure Case*,<sup>14</sup> or Justice Felix Frankfurter’s concurrence in *Brown v. Allen*.<sup>15</sup> So naturally, this is not a new phenomenon—rare, perhaps, but certainly not new.

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9. *Plessy v. Ferguson*, 163 U.S. 537, 559, 564 (1896) (Harlan, J., dissenting).

10. 347 U.S. 483 (1954).

11. Yiddish for a kind of emotional outburst.

12. 127 S. Ct. 2162, 2178 (2007) (Ginsburg, J., dissenting). Congress amended the antidiscrimination laws to implement Justice Ginsburg’s criticism. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 112-2, 123 Stat. 5 (2009).

13. 2 U.S. (2 Dall.) 419, 429 (1793) (Opinion of Iredell, J.).

14. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). Jackson concurred both in the judgment of the Court and in the opinion of the Court penned by Justice Black.

15. 344 U.S. 443, 488, 73 S. Ct. 437 (1953) (Opinion of Frankfurter, J.). Justice Frankfurter concurred in Justice Reed’s lead opinion, but only insofar as it addressed the effects of a denial of certiorari on a future federal district court’s consideration of an applicant’s petition for a writ of habeas corpus. He dissented from the rest of Reed’s opin-

What is unusual about Justice Powell, however, is the frequency with which he utilized the approach. Over the 1975-1980 period, Powell wrote 91 concurring opinions. Of those concurring opinions, twelve, or roughly 13.2%, were invoked by later courts as stating the holding of the Court. Of his contemporary brethren, Powell had the largest number of concurrences, and the highest ratio of concurrences to dissents—evincing his clear preference for establishing his differences in a concurring opinion.<sup>16</sup>

The chart below shows the breakdown of Powell's preference for concurrence as compared with his peers:

Opinion and Voting Trends in the Supreme Court Terms 1975-1980

Justice	Opinions Written				Total	Dissenting Votes			Joining Majority	
	Of the Court	Concurring	Dissent	C/D ratio		Opinion	Mem.	Total	W/o opinion	% joined
Blackmun	81	87	73	1.192	241	124	33	157	617	71.66%
Brennan	82	52	122	0.426	256	282	63	345	464	53.89%
Burger	93	45	41	1.098	179	16	5	21	795	92.33%
Douglas*	0	1	1	1.000	2	2	1	3	~	~
Marshall	84	30	108	0.278	222	282	59	341	490	56.91%
Powell	89	91	74	1.230	254	100	26	126	644	74.80%
Rehnquist	91	36	107	0.336	234	201	66	267	558	64.81%
Stevens	76	72	124	0.581	272	170	61	231	555	64.46%
Stewart	90	46	86	0.535	222	155	34	189	626	72.71%
White	91	49	70	0.700	210	124	32	156	656	76.19%
Per Curiam	84	~	~	~	84	~	~	~	~	~
<b>Total</b>	861	509	806	~	2176	1456	380	1836	~	~

\*Justice Douglas retired due to illness on November 12, 1975. Because he cast a vote in only four cases during the 1975 Term, his statistics are ignored for purposes of comparison to Justice Powell during the 1975-1980 Terms.

A Justice can either concur in both rationale and judgment with the majority, or just in the judgment, before they write separately. The concurrence rate mentioned above includes both categories. The more interesting instances are naturally where the Justice signs on to the majority opinion in both judgment and

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16. Powell concurred 91 times and dissented 74 times, giving him a ratio of 1.230. Justice Blackmun was the next closest, concurring 87 times and dissenting 73 times, for a ratio of 1.192. The statistics used for these numbers were compiled from the Harvard Law Review's Annual Supreme Court Review and encompassed the 1975 through 1980 Terms, beginning with 90 HARV. L. REV. 56, 276-82 (1976) through 95 HARV. L. REV. 91, 339-45 (1981).

rationale, but then concurs in a separate opinion, and—à la *Branzburg*—that separate opinion is read by later courts to establish the binding rationale.

## THE VARIETIES OF JUSTICE POWELL'S INFLUENCE

### 1. CONCURRING WITH THE MAJORITY AND WRITING SEPARATELY

Powell's *Branzburg* opinion stands out as perhaps the most striking example of where despite joining the majority's opinion, a Justice's concurrence has been viewed with precedential weight in the subsequent decisions of the lower courts. But there are others.

One characteristic of Justice Powell's jurisprudence is his preference to "balance" competing interests in constitutional cases.<sup>17</sup> This concern for "balance" came through in *Branzburg*, and also later in *Kelley v. Johnson*.<sup>18</sup> In the latter case, ruling on a challenge to a county's ordinance regulating the grooming standards for its police force, Justice Rehnquist for the Court stated that while there was a constitutional interest at stake, the challenger bore the burden of showing that there was no rational relationship between the ordinance and the public interest in police safety. In a brief concurring opinion, Justice Powell noted that "no negative implication . . . with respect to a liberty interest within the Fourteenth Amendment" could be found in the majority's opinion, and that "there must be a weighing of the degree of infringement of the individual's liberty interest against the need for the regulation."<sup>19</sup>

Courts in at least three circuits have cited with approval Powell's "no negative implication" language in cases dealing with regulations aimed at personal grooming standards. In *Doe v. Houston*, the court stated that "Justice Powell's concurring opinion in *Kelley* is the view shared by this Court, that 'no negative implication' as to the more general liberty interest in personal appearance is to be drawn from the *Kelley* majority opinion."<sup>20</sup> Similarly, the Second Circuit stated that Powell's *Kelley*

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17. William D. Bader, *The Jurisprudence of Justice Powell, Jr.*, in *GREAT JUSTICES OF THE U.S. SUPREME COURT: RATINGS AND CASE STUDIES* 305-08 (William D. Pederson & Norman W. Provizier eds., 1993).

18. 425 U.S. 238 (1976).

19. *Id.* at 249 (Powell, J., concurring).

20. 489 F. Supp. 76, 80 (S.D. Tex. 1980).

concurrence “reinforces the view we share that ‘no negative implication’ as to the more general liberty interest in personal appearance” arises from Rehnquist’s opinion.<sup>21</sup> There, the court undertook a rather lengthy balancing approach, exploring “the individual interests at stake” and “the state’s countervailing interests” before reaching the conclusion that the challenged ordinance was “one of those purposeless restraints to which Mr. Justice Harlan referred.”<sup>22</sup> The Northern District of Georgia has similarly employed Powell’s balancing approach in *Nalley v. Douglas County*, invoking Powell’s “no negative implication” language and finding a regulation on the facial hair of roadside workers “so unconnected to any legitimate state goal” that it was unconstitutional as applied to the plaintiff in a § 1983 action.<sup>23</sup>

Interestingly, *Kelley* was decided by a vote of 6-2; thus, Powell’s vote was not necessary to the formation of a majority, as it was in *Branzburg*. Some lower courts nevertheless referred to Powell’s position as “casting the deciding vote” as a basis for their adoption of his reasoning.<sup>24</sup> This is a testament to Justice Powell’s influence, whatever the merits of the underlying reasoning of the lower courts.

Powell’s vote in *Herbert v. Lando* was similarly not necessary to create a majority opinion.<sup>25</sup> Decided by a 6-3 margin, *Lando* addressed whether press protection was available under the First and Fourteenth Amendments during the discovery process when a member of the press was sued for defamation. Justice White’s opinion for the Court flatly refused to recognize First Amendment limitations to discovery of the editorial process. By contrast, Justice Powell, concurring, stressed that in applying the rules of discovery, the trial judge should take into account the First Amendment interests of the press in “measur[ing] the degree of relevance required in light of both the private needs of the parties and the public concerns implicated.”<sup>26</sup> Noting a concern that the discovery process could be

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21. *East Hartford Educ. Ass’n v. Board of Educ. of East Hartford*, 562 F.2d 838, 841 (2d Cir. 1977).

22. *Id.* at 846 (internal citation omitted).

23. 498 F. Supp. 1228, 1230 (N.D. Ga. 1980).

24. *See, e.g., Riley v. City of Chester*, 612 F.2d 708, 716 (3d Cir. 1979).

25. *Herbert v. Lando*, 441 U.S. 153, 154 (1979). Justice White’s majority opinion gained the votes of the Chief Justice and Justices Blackmun, Rehnquist, and Stevens, in addition to Powell. Thus, even if Powell had chosen to dissent, the case would have stood with a 5-4 majority supporting White’s opinion.

26. *Id.* at 179 (Powell, J., concurring).

abused in libel cases against the media. Powell urged courts to supervise the process against the risk of abuse.

Even though Powell's vote was not necessary to the *Lando* majority, his balancing approach has carried the day. In a defamation suit against Merrell Dow, the D.C. Circuit remanded part of the appeal to the district court, urging it to limit discovery "to the extent feasible to those questions that may sustain summary judgment." In so doing, the court noted Powell's *Lando* concurrence and the district court's "duty to consider First Amendment interests as well as the private interests of the plaintiff."<sup>27</sup> Numerous district courts have similarly relied on Powell's concurrence. The district court for the Southern District of New York noted that "we must carefully balance the plaintiffs' interest in the requested discovery with the First Amendment interests sought to be protected."<sup>28</sup> In denying a plaintiff's request for an order compelling the appearance of the AFL-CIO in a deposition, the district court for the District of Columbia noted that "the first amendment interests delineated in . . . *Herbert v. Lando* . . . compel denial of plaintiff's discovery request."<sup>29</sup> The court noted that the inquiry into the political activities of the AFL-CIO would impinge on the organization's First Amendment interests, and that counseled against a finding that their appearance would be relevant in discovery.

Powell took care to preface his opinion in *Lando* by stating that "I do not see my observations as being inconsistent with the Court's opinion."<sup>30</sup> This gloss may have encouraged lower courts to adopt his position in evaluating the relevance of certain discovery requests. Interestingly, the conflict between the majority and Powell in *Lando* was similar to the conflict in *Branzburg*: in each case, the majority rejected the application of any absolute First Amendment privilege against inquiry into certain press activities, and in each case, Powell noted that the First Amendment interests should be taken into account in the appropriate balance.

Also decided by a 6-3 margin was *Monell v. Department of Social Services*, addressing municipal liability under what is now 42 U.S.C. § 1983, initially enacted as part of the 1871 Civil Rights

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27. *McBride v. Merrell Dow & Pharms., Inc.*, 717 F.2d 1460, 1467 (D.C. Cir. 1983).

28. *Rosario v. New York Times, Co.*, 84 F.R.D. 626, 631 (S.D.N.Y. 1979).

29. *Walther v. Fed. Election Comm'n.*, 82 F.R.D. 200, 202 (D.D.C. 1979).

30. *Lando*, 441 U.S. at 177-78 (Powell, J., concurring).

Act.<sup>31</sup> Justice Brennan, writing for the majority, revisited the Court's decision in *Monroe v. Pape* regarding municipal immunity to suit arising from § 1983 violations. Concluding that the *Monroe* Court had misread the legislative history surrounding the enactment of § 1983, Brennan concluded "that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies."<sup>32</sup> Under the majority's rationale, municipalities could be held liable for their policy decisions but could not be held liable for actions of its agents in violation of those policies.

Possibly concerned that the majority had left the door open to a *Bivens*-type implied cause of action against municipalities that would not be limited to policy decisions, Justice Powell wrote a concurrence addressing this concern. First roundly approving of the Court's examination of the legislative history and its narrowing of the reach of *Monroe*, Powell went on to address "the question whether we should, by analogy to our decision in *Bivens*, imply a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in § 1983."<sup>33</sup> Noting that a factor in the inquiry would be whether, in the absence of congressional authorization of municipal liability, persons injured by the unconstitutional official policies of a city would need the backstop provision of some other remedy, Powell tried to preempt judicial recognition of an implied cause of action *in addition* to § 1983 liability by suggesting that a *Bivens*-type action against municipalities could not co-exist with § 1983 municipal liability. Thus, he stated: "Rather than constitutionalize a cause of action against local government that Congress intended to create in 1871, the better course is to confess error and set the record straight, as the Court does today."<sup>34</sup>

Here, too, the Powell concurrence has influenced the path of the law, as lower courts, picking up on its reasoning, have made reference to the availability of § 1983 municipal liability as an important factor counseling against a constitutional cause of action. Directly following Justice Powell's rationale in *Monell*, the federal court for the District of Vermont dismissed a plaintiff's cause of action under the Fourteenth Amendment against a

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31. 436 U.S. 658, 660 (1978).

32. *Id.* at 690 (emphasis deleted).

33. *Id.* at 712 (Powell, J., concurring) (internal quotation and citation omitted).

34. *Id.* at 713.

municipality because the plaintiff had already established a cause of action under § 1983. The court noted that although the question was not squarely presented for decision in *Monell*, Justice Powell's concurrence addressed the contention. Similarly the Second Circuit has followed Powell's guidance,<sup>35</sup> as have district courts within the First Circuit.<sup>36</sup>

In each of these cases, Powell purported to join the majority opinion in full—both its judgment and rationale—and yet chose to write a separate opinion to preserve his view of the issues. Moreover, Powell's vote here was not necessary to create a "Court," as contrasted with *Branzburg*.

## 2. A "NARROW-GROUND" CONCURRENCE IN THE JUDGMENT OF THE COURT

Plurality opinions were a rare thing in the early history of the Supreme Court—so rare, in fact, that fewer than forty-five of them were handed down between 1800 and 1956.<sup>37</sup> Since then, they have become a fairly frequent occurrence, complicating the ability of lower courts and practitioners to determine what a majority of the Justices had agreed on in a particular case. The Court tried to give some direction to the lower courts in *Marks v. United States*, where it stated that in the plurality context "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."<sup>38</sup> In such an instance, if no five-Justice majority of the Court agrees on one point of law, and one Justice files a con-

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35. *Ohland v. City of Montpelier*, 467 F. Supp. 324, 348 (D. Vt. 1979) (citing precedent of the Second Circuit in *Turpin v. Maliet*, 591 F.2d 426 (2d Cir. 1979), and of the Fourth Circuit in *Cale v. City of Covington*, 586 F.2d 311 (4th Cir. 1978)).

36. See *Leite v. City of Providence*, 463 F. Supp. 585, 587-88 (D.R.I. 1978) (noting that Powell had "mentioned that little reason now existed for resorting to a *Bivens*-type cause of action"); *DeVasto v. Faherty*, 479 F. Supp. 1069, 1071 (D. Ma. 1979) (reading Powell's concurrence in *Monell* to supplement the First Circuit decision in *Kotska v. Hogg*, 560 F.2d 37 (1st Cir. 1977), and granting summary judgment to dismiss the plaintiff's constitutional claim). But see *DiMaggio v. O'Brien*, 497 F. Supp. 870, 876 (E.D. Pa. 1980) (describing Powell's rejection of a constitutional cause of action against a municipality as dictum, and expressing concern for the gap created by a rejection of both *respondeat superior* liability and constitutional liability).

37. John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 60 (1974) (citing Comment, *Supreme Court No-Clear Majority Decisions: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99, 99 (1956)). The Chicago Law Review Comment does not cite to any authority for this proposition, but the Davis and Reynolds article refers to the Comment as "an analytical study of plurality decisions." *Id.* at 60 n.1.

38. *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.)).

ccurring opinion that is logically narrower than any of the other opinions, the narrower opinion is seen to carry the “holding” of the Court. Such an approach gives undeniable weight to the Justice who authors the concurring opinion which proves to be narrower. Not surprisingly, the author of the Court’s opinion in *Marks* was Justice Powell.

The “narrowest-grounds” approach has attracted some criticism, even from the Court itself.<sup>39</sup> However, much of that criticism seems to stem from the fact that it has been applied in situations in which the concurring opinion is not truly “narrower” than its companion plurality opinion.

One example of Powell’s impact via application of the “narrowest-grounds” approach was in *Robbins v. California*.<sup>40</sup> Writing for a four-Justice plurality, Justice Stewart laid down a bright-line rule that any warrantless search of containers found in an automobile was per se unreasonable. Powell, concurring in the judgment, declined to join in the formulation of the bright-line rule, instead claiming that a court should determine whether or not the defendant had “manifested a reasonable expectation of privacy in the contents of the container.”<sup>41</sup> Powell listed a set of factors that would be relevant to this inquiry, and rejected the plurality’s bright-line rule as merely promoting simplicity at the expense of Fourth Amendment protections.

Because *Robbins* was a 4–1–1–3 decision (Chief Justice Burger concurred in the judgment without opinion), there was no governing rationale on which five Justices agreed. When the Second Circuit was confronted with the container-search issue in *United States v. Martino*, it invoked the “narrowest-grounds” approach of *Marks* to construe the holding of *Robbins*. Although the Court had never fully explained what was meant by “narrowest-grounds,” the appeals court interpreted it “as referring to the ground that is most nearly confined to the precise fact situation before the Court, rather than to a ground that states more general rules.”<sup>42</sup> Thus, because Powell’s opinion could reasonably be construed as “narrower” than the plurality’s—a rule holding that *this* container could not validly be searched being narrower than a rule holding that *no* container could validly be searched—the Second Circuit adopted his reasoning as the true

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39. See, e.g., *Nichols v. United States*, 511 U.S. 738, 745–46 (1994).

40. 453 U.S. 420 (1981).

41. *Id.* at 434 n.3 (Powell, J., concurring in the judgment).

42. *United States v. Martino*, 664 F.2d 860, 872–73 (2d Cir. 1981).

holding of *Robbins*.<sup>43</sup> The Texas Court of Appeals has taken a similar line of reasoning in finding Powell's approach to be the binding force behind *Robbins*.<sup>44</sup>

Powell was able to retain influence through his concurring opinions even when he did not join the majority, and, in fact, even when the "narrowest-grounds" approach would have been technically inapplicable. Take, for instance, his opinion in *Goldberg v. United States*.<sup>45</sup> Justice Brennan authored the opinion for the Court which interpreted a provision of the Jencks Act<sup>46</sup> as creating a *per se* rule requiring an *in camera* examination of prosecutorial notes made during the pre-hearing interview of a witness in every case where it was requested. Justice Powell, concurring in the judgment, expressly disagreed with this part of the majority opinion, noting that "had the trial judge ruled that Newman's testimony was insufficient to justify further inquiry, rather than relying on the 'work product' privilege, I would have affirmed the denial of Goldberg's motion."<sup>47</sup> Instead, Powell claimed, the defendant must meet a threshold burden of providing "probative evidence" showing that he is entitled to the statements under the Act before a trial judge should grant any motion for production.

Although Brennan's opinion was joined by seven Justices, and Justice Powell's opinion garnered only the assent of Chief Justice Burger, lower courts have relied on his refusal to require an *in camera* hearing in every instance. The Fourth Circuit, in *United States v. Maryland and Virginia Milk Producers Cooperative Association, Inc.*, cited at length a passage in Justice Powell's *Goldberg* concurrence, and then noted that "an *in camera* inspection is not *per se* required."<sup>48</sup> There, the court found relevant the fact that no basis had been established for production of the notes, and that to allow an *in camera* inspection "would be akin to sanctioning a fishing expedition."<sup>49</sup> Similarly, the Fifth Circuit has held that an *in camera* inspection is not required in every case where a Jencks Act issue arises, citing as one reason Pow-

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43. *Id.* at 873.

44. *See Adams v. State*, 634 S.W.2d 785, 792 n.4 (Tex. App. 1982).

45. 425 U.S. 94 (1976).

46. 18 U.S.C. § 3500 (1970).

47. *Goldberg*, 425 U.S. at 117 (Powell, J., concurring in the judgment).

48. 1992 U.S. App. LEXIS 22748 at \*34 (4th Cir. Sept. 15, 1992).

49. *Id.* at \*35.

ell's concern that to do so would be to sanction the delay of the trial for resolution of unnecessary collateral issues.<sup>50</sup>

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The foregoing shows Justice Powell's consistent use of concurring opinions as a conduit for differentiation from majority opinions. This history shows the wisdom of soft judicial power—that at least some Justices may be able to achieve greater influence by limiting the scope of disagreement with the majority rather than writing for a broader audience. This was certainly the approach (and which enhanced the influence) of Justice Powell. We have described six Powell concurrences that have been treated by lower courts as stating the holding of the Court, even where Powell's vote was not necessary to form a majority. In another piece, one of us has shown that nearly 15% of the concurring opinions Powell authored during the 1975-1980 Terms were used by later courts as stating the effective holding of Supreme Court precedent.<sup>51</sup> This is an aspect of Justice Powell's jurisprudence that remains understudied and underappreciated in the legal community, and suggests useful lessons for members of the present Court.

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50. *United States v. Osgood*, 794 F.2d 1087, 1091-92 (5th Cir. 1986).

51. Tristan Pelham-Webb, *Powelling for Precedent: "Binding" Concurrences*, N.Y.U. ANN. SUR. AM. L. (forthcoming 2009) (manuscript at 1 n.8, on file with author).