Revelations on the Road to Roe
The papers of Lewis Powell reveal a new, more complicated dynamic behind the Court's historic struggle over abortion rights
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SUPREME COURT JUSTICE Harry Blackmun has long been seen as the primary architect of the landmark 1973 abortion decision in Roe v. Wade--with particular encouragement coming from his two most liberal colleagues, William Brennan and Thurgood Marshall. But a close reading of the papers of the late Justice Lewis Powell, Jr.--only recently made available to anyone other than his official biographer--provides a striking revelation about the profound influence that the centrist Southern justice had on the historic case. The Powell Papers make clear that clerk Larry Hammond, drawing from a contemporaneous lower federal court abortion opinion written by Judge Jon O. Newman, helped provide Powell with the analytical insight that persuaded a seven-justice majority to broaden Roe's new protection of abortion rights from the first trimester all the way to the threshold of fetal viability.

For many years the Powell Papers--located at Washington and Lee University Law School in Lexington, Virginia--were exclusively available to the justice's biographer, University of Virginia law professor John Jeffries, Jr. Jeffries's 1994 book, Justice Lewis F. Powell, Jr., is an excellent and highly valuable piece of work, but even a very selective exploration of the Powell Papers reveals that they contain some notable disclosures that do not appear in the ballyhooed papers of the late Justice Thurgood Marshall and that Jeffries was unable to address in full detail in a 500-page account of Powell's entire life.

Roe v. Wade is a striking example. Powell had joined the Court only in January 1972, a month after both Roe and its equally important companion case, Doe v. Bolton, had first been argued. Only after the two cases were held over for reargument in October 1972 did Powell and his fellow new appointee, William Rehnquist, first begin to participate in the cases' consideration.

With the reargruments scheduled for October 11, Powell on October 2 reviewed the draft opinions that Blackmun and Justice Byron White had circulated back in May. Blackmun had wanted to void Texas's comprehensive antiabortion statute on the grounds that it was unconstitutionally vague, rather than that it infringed upon individual rights, but White had persuasively challenged Blackmun's vagueness argument. In Doe, a case challenging Georgia's more limited antiabortion statute, Blackmun's draft had accepted the individual rights claim.

Powell jotted his own initial reaction to Blackmun's drafts in the margin: "I doubt the validity of the Texas statute as unduly restrictive of individual rights (privacy) but I am not persuaded it is vague." He added, "Why not consolidate Texas + Ga. cases + rely on Ga. type analysis--if we are to invalidate these laws?" On White's draft, Powell again noted, "I agree that Texas statute is not unconst. vague. But I'm not clear as to where this draft leaves the Texas statute. Does J. White think Tex. statute is valid?"

Four days later, Powell told Larry Hammond, the clerk who was helping him with Roe and Doe, that two lower federal court decisions in a similar case challenging Connecticut's antiabortion statutes might well prove instructive. "When we come to decision time in the pending abortion cases, keep in mind that we may wish to take a look at the [J. Edward] Lumbard/[Jon O.] Newman opinions."

Soon thereafter Hammond gave Powell a 13-page bench memo on Roe and Doe. Hammond noted how Blackmun's May drafts had been "hurried efforts," and agreed that White's attack on Blackmun's vagueness argument had left it "a hard position to stand behind." Noting how "you have suggested that we should scrap the vagueness rationale since we reach the fundamental rights determination in the Georgia case anyway," Hammond had "read carefully Judge Newman's recent Connecticut opinion and have attached a copy for your use."

Hammond summarized for Powell the constitutional privacy analyses that different justices had offered in the landmark 1965 birth control case, Griswold v. Connecticut, and concluded that "it would not be difficult for this Ct. to find a fundamental right of a woman to control the decision whether to go through the experience of pregnancy and assume the responsibilities that occur thereafter." Hammond suggested that "you might reason as Judge Newman does that the state interest becomes more dominant when the fetus is capable of independent existence (or becomes `viable')." Alluding to Texas's and Connecticut's claims that fetuses become constitutional "persons" at the "moment of conception," Hammond noted how "the crux of Judge Newman's analysis is that the state may not bar abortional freedom altogether on the basis of a proposition that is subject to such a great public debate and affects individuals so personally." Hammond concluded by observing that "I do believe that a well-reasoned opinion can be written reaching this result without placing the Ct. in the position of deciding as a super legislature whether it will permit abortions at any specific point in time."

When Roe and Doe were reargued on October 11, Powell's colleague Potter Stewart had Newman's name on the tip of his tongue when one of the attorneys, citing the Connecticut ruling, sought to name the decision's author. When the nine justices privately discussed the two cases at conference two days later, Stewart again invoked Newman's reasoning. Lewis Powell's notes from that conference supplement and closely track the previously available notes taken by Justices William Douglas and William Brennan, Jr. All three sets of notes suggest that the justices' remarks were quite succinct, with Stewart, White, and Blackmun saying the most. Powell's notes indicate that while White believed that a "woman must have some const. right to protection," he nonetheless was "unwilling to second-guess state leg. as to its interest. Pure convenience of woman can't override state interest," and the Court "can't allow abortion on demand." Powell's notes fail to indicate, as both Brennan's and Douglas's do, that it was Powell's own comments that led Blackmun to say that he would jettison his void-for-vagueness approach to Roe and make the Texas case, rather than the Georgia one, the "lead" decision.

During conference, only William Rehnquist had expressed agreement with White, but when Blackmun circulated heavily revised new drafts of the two opinions in late November, Powell's file discloses that a previously unrevealed private response from Rehnquist was one of the first that Blackmun received. Rehnquist acknowledged that "although I am still in significant disagreement with parts of them, I have to take my hat off to you for marshaling as well as I

think could be done the arguments on your side. I think I will probably still file a dissent, although more limited than I had contemplated after the conference discussion."

Blackmun's November drafts, unlike the final Roe and Doe opinions the Court handed down on January 22, 1973, held that states must leave the abortion decision to a woman and her doctor only during the first trimester of pregnancy. Subsequent to those first three months, states could restrict legal abortions to carefully specified therapeutic categories. Thus Rehnquist asked Blackmun, "Ought not your Texas opinion to invalidate the Texas abortion statute only as applied to a litigant who seeks abortion within the first `trimester,' rather than, as I understand you to do, invalidating it in toto?" Rehnquist also similarly wondered, whether in Doe, "Would you permit any more latitude to Georgia in her procedural requirements after the first trimester" as opposed to during it?

Rehnquist's subdued feelings about Roe, which contrast starkly with his far more intense expressions in subsequent abortion cases, do not come as a complete surprise. But his letter to Blackmun, like Blackmun's newly available private response, adds significant richness to Roe's history. In reply, Blackmun told Rehnquist that he would have "conceptual difficulty" in voiding the Texas statute only as it pertained to the first trimester, and reiterated how he still believed the law was unconstitutionally vague, even though his opinion now bypassed that issue entirely. In response to Rehnquist's second question, Blackmun expressed accord: "I agree that after the first trimester a state is entitled to more latitude procedurally as well as substantively."

But it fell to Lewis Powell to first broach to Blackmun the biggest question that his November drafts raised, namely whether the Court's forthcoming constitutional ruling should indeed be limited primarily to abortions during just the first trimester of pregnancy. Larry Hammond had highlighted the issue in a six-page memo to Powell on November 27. Hammond was pleased that Blackmun "has embraced the straightforward constitutional view taken by Judge Newman in the Connecticut case," but was unhappy with how Blackmun had identified the end of the first trimester as legally decisive. "Since the statutory prohibition [in Texas] was total, it is unnecessary to the result that we draw the line. If a line ultimately must be drawn, it seems that `viability' provides a better point. This is where Judge Newman would have drawn the line."

Powell noted in the margin of Hammond's memo, "Unnecessary to draw line--but may be desirable," and he boldly scrawled "yes" next to Hammond's subsequent sentence: "Most people would probably agree that the state has a much greater interest in protecting a viable entity than it does at some earlier time."

Hammond closed by questioning Blackmun's description of abortion as "inherently ... a medical" decision for which primary responsibility "must rest with the physician."

"Doesn't it seem that this language overstates the doctor's role and undercuts the woman's personal interest in the decision?" asked Hammond, following with the recommendation that Powell should advocate the Court instead say that the responsibility would rest "with the physician and his patient."

Within a day of receiving Hammond's memo, Powell wrote a private letter to Blackmun. "I am enthusiastic about your abortion opinions. They reflect impressive scholarship and analysis." But Powell quickly got to his real question, which was "whether you view your choice of `the first trimester' as essential to your decision." Powell noted how Blackmun himself had volunteered that this choice was "arbitrary" in the cover memo that had accompanied his new drafts, and voiced his own--or his and Hammond's--proposal: "I have wondered whether drawing the line at `viability'--if we conclude to designate a particular point of time--would not be more defensible in logic and biologically than perhaps any other single time."

Quoting Judge Newman's language about the constitutional importance of fetal viability, Powell told Blackmun that "I rather agree with the view that the interest of the state is clearly identifiable, in a manner which would be generally understood, when the fetus becomes viable. At any point in time prior thereto, it is more difficult to justify a cutoff date." Powell observed that the Court did not have to say anything, and that Newman's opinion "pointed the way generally toward `viability' without making this an explicit ruling," but Powell's letter was the first intra-Court communication to put the option of extending constitutional protection for abortion choice all the way to fetal viability explicitly on the table.

Harry Blackmun replied to Powell five days later in a previously unquoted private letter that ironically reveals how highly reluctant Roe's author was to extend the ruling to the point that the Court's actual decision indeed reached:

> I have no particular commitment to the point marking the end of the first trimester as contrasted with some other point, such as quickening or viability. I selected the earliest of the three because medical statistics and the statistical writings seemed to focus on it and to draw their contrasts between the first three months and the remainder of the pregnancy. In addition, I thought it might be easier for some of the justices than a designated later point.
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> I could go along with viability if it could command a court. By that time the state's interest has grown large indeed. I suspect that my preference, however, is to stay with the end of the first trimester for the following reasons: (1) It is more likely to command a court. (2) A state is still free to make its decisions on the liberal side and fix a later point in the abortion statutes it enacts. (3) I may be wrong, but I have the impression that many physicians are concerned about facilities and, for example, the need of hospitalization, after the first trimester. I would like to leave the states free to draw their own medical conclusions with respect to the period after three months and until viability. The states' judgments of the health needs of the mother, I feel, ought, on balance, to be honored.
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> I would be willing to state, either in the opinion or in a footnote, what is essentially the obvious--namely, that a state is free to leave the decision to the attending physician and to regulate at a later date than the end of the first trimester.

Blackmun closed by telling Powell that "these are just passing thoughts," but a week later Blackmun sent all of his colleagues a memo, previously cited in my 1994 history of Roe, that did

not name Powell but recounted in extensive detail how one colleague had suggested that his opinions be recast to draw the crucial line at viability rather than at the end of the first trimester.

Larry Hammond expressed elation at Blackmun's memo, telling Powell in a cover note that Blackmun "expresses what I feel is the most important practical consideration. For many poor, or frightened, or uneducated, or unsophisticated girls, the decision to seek help may not occur during the first 12 weeks. The girl might be simply hoping against hope that she is not pregnant but is just missing periods. Or she might know perfectly well that she is pregnant but be unwilling to make the decision--unwilling to tell her parents or her boyfriend." Powell drew a crisp bracket around these sentences when he read Hammond's note, and scrawled a bold, dark "yes" in the margin.

In response to Blackmun's explicit request for reactions, both Thurgood Marshall and William Brennan quickly endorsed the shift to viability first suggested by Powell. After reviewing Hammond's note, Powell too prepared a letter to Blackmun, saying that "once we take the major step of affirming a woman's constitutional right, it seems to me that viability is a more logical and defensible time for identifying the point at which the state's overriding right to protect potential life becomes evident." Powell noted how "the women who most need the benefit of liberalized abortion laws are likely to be young, inexperienced, unsure, frightened and perhaps unmarried," and observed that "if there is a constitutional right to an abortion, there is much to be said for making it effective where and when it may well be needed most." Powell closed by again mentioning that he was "favorably impressed" with how Jon Newman had "identified viability as the critical time from the viewpoint of the state."

Powell left his letter to Blackmun unsent, perhaps in the belief that Marshall's and Brennan's expressions of support had already made the point, or perhaps because he reiterated his views face-to-face. In any event, on December 15 Harry Blackmun notified all of his colleagues that he would be revising his Roe and Doe opinions in the manner recommended, and six days later, new all-but-final drafts were distributed as well.

History has correctly recorded Harry Blackmun as the hardworking author of Roe v. Wade, but until now neither the crucial influence of Lewis Powell--nor that of Larry Hammond and Jon Newman has--been fully appreciated.

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