

JUSTICE LEWIS F. POWELL, JR. – Interview

John C. Jeffries

John C. Jeffries, clerked for Justice Powell and is now the Emerson Spies Professor and the Horace Goldsmith Research Professor at the University of Virginia School of Law.

Powell stated his position most succinctly in an early memorandum, urging his colleagues not to hear McCleskey's case. First, it was hard to know what to make of statistics. "Sentencing judges and juries are constitutionally required to consider a host of individual-specific circumstances in deciding whether to impose capital punishment. No study can take all of these individual circumstances into account, precisely because they are fact-specific as to each defendant." Of course, taking all factors into account was precisely what Baldus and his colleagues had tried to do, but Powell was uneasy with this kind of evidence. As he said elsewhere, "My understanding of statistical analysis . . . ranges from limited to zero."

He also did not know what constitutional weight to give to the statistical effect of the victim's race. "One would expect that if there were race-based sentencing, the Baldus study would show a bias based on the defendant's race, but the study suggests no such effect. . . ." Differential treatment of defendant: based on the race of their victims was hard to understand as racial bias against defendants.

Finally, Powell thought the overall picture revealed by the figures was decidedly positive. The "study tends to show that the system operates rationally as a general matter. The death penalty was most likely in those cases with the most severe aggravating factors and the least mitigating factors, and least likely in the opposite cases. The pattern suggests precisely the kind of careful balancing of individual factors that the Court required in Gregg." . . .

[P]owell did not see the case as condoning racism but simply as recognizing the inevitable variations in any nonmandatory death penalty. . . .

[I]n conversation with the author in the summer of 1991, Powell was asked whether he would change his vote in any case:

"Yes, McCleskey v. Kemp."

"Do you mean you would now accept the argument from statistics?" "No, I would vote the other way in any capital case."

"In any capital case?"

"Yes."

"Even in Furman v Georgia?" "Yes. I have come to think that capital punishment should be abolished."