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## SYMPOSIUM REMARKS: PLEA FOR THE NEXT GREAT WAVE OF REFORM

*Burnele V. Powell\**

I am truly delighted for this opportunity to address you as part of this important conference on “Judging Judges’ Ethics.” Not least of the reasons for my enthusiasm is that I have had the honor twice before in recent years to explore themes regarding some important issues of lawyers’ ethics with groups here at Hofstra.

Two years ago, my subject was the need to get on with the unfinished task of reforming the lawyer regulatory system. My suggestion, captured in the title of those remarks, was that despite recent big debates such as MDP, Ethics 2000, and MJP, there was still much to be done in the area of lawyers’ ethics and that what was needed was “So Obvious, And Yet So Easily Done.”

Last winter, on the occasion of the Howard Liechtenstein Legal Ethics lecture, I spoke on “The Limits of Morality (or Why Cabinets Need Locks).”

My point there was that if we are truly serious about lawyer regulatory reform, in the future we will pay a lot more attention to regulating the structure of the environment in which lawyers practice—and devote a lot less time to efforts to decipher the psychological motivations of lawyers.

At some point we must accept that even good people or those who know the rules and usually play by them will do bad things. If we put them in situations where the bad is advantageous and apparently unlikely to be detected, for far too many simply knowing the ethical thing to do will not be enough. Hence, cabinets have locks because by placing them there, we can largely succeed in structuring the environment in a manner that takes away the opportunity to do the wrong thing.

For those first remarks, I chose food as the metaphor and urged that just as it is true that we are what we eat, we should also remember that

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when it comes to lawyers' ethics, we are what we do, not what we tell people we do or what we think we ought to do.

The second time around, as already mentioned, I used the locked cabinet as the metaphor and urged that we will not achieve the ethical profession that we want until we come to understand that ethics are a reflection of human context, the way we interact with the network of people and circumstances around us. As a matter of strategy, I argued that we should act in every available way to organize the practice environment in a way that steers lawyers (including judges) towards ethical conduct.

In contemplating what I wanted to say to you today, in connection with my plea for the next great wave of reform, I searched hard for the appropriate metaphor, like food or locks for the cabinet. When initially no thought came to mind, I knew from experience that one thing that often helps is to feed the muse by seeking a different perspective on the topic, anything that could help translate an abstract idea into a memorable thought.

To feed the muse, I resorted first to my favorite book of word origins, John Ayto's *Dictionary of Word Origins*.<sup>1</sup> Perhaps there was something thematic that I might say about "judging," "judicial," or "ethics."

But I had finally to concede, "There's nothing here!" There is nothing compelling in noting that, etymologically speaking a "judge" is "someone who speaks the law," or that "judicious" is derivative of the word "judex," or that the term "ethical" entered the English language in the nineteenth century as a reflection of Aristotle's use of the term to mean a "distinctive characteristic."

I next turned to another source of interesting ideas: Magill's *Quotations in Context*.<sup>2</sup> Well, here was something:

"Justice, sir, is the great interest of man on earth."<sup>3</sup>

Now, there's inspiration! In context, the speaker was revealed to be Daniel Webster, twice Secretary of State and at the time, Senator, and arguably the most eloquent speaker in America.

Speaking in 1845 before the Suffolk Bar at the funeral of Mr. Justice Story, who had died unexpectedly, Webster predicted that Justice Story's name would live on through his memorable opinions. Those

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1. See JOHN AYTO, *DICTIONARY OF WORD ORIGINS* (1991).

2. See FRANK N. MAGILL, *QUOTATIONS IN CONTEXT* (Tench Francis Tilghman ed., 1st ed. 1965).

3. *Id.* at 526.

opinions, said Webster, had “stamped his name, all over the civilized world.” He then observed that dedicating one’s life to the pursuit of justice was a commitment to civilization’s highest ideals,” and as Magill put the quotation in context, Webster concluded his remarks:

Justice, sir, is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and progress of our race.<sup>4</sup>

Now here was a good start! Speaking at a forum on judges and judicial ethics, I could, at least, begin by reminding the audience of the great tradition to which judges are heirs. And in invoking tradition, I could say to the judges, lawyers, and academics alike, that I believe with G. K. Chesterton that, “Tradition does not mean that the living are dead but that the dead are alive.”<sup>5</sup>

But still, I was not quite where I wanted to be. I had yet to find a way to personalize what I wanted to say and to stamp it with sufficient urgency. I had yet to say that my plea related to concerns that were imperative and universal. With an additional helping hand from the muse, though, it occurred to me to look for support in another of my favorite places: the Internet’s historical calendars—its many “This Day in History” sites.

What I found was that this day in history, September 15th, is marked by many highs and lows. There is no need to dwell on the fact that it is the anniversary of: The deaths of the four children killed in 1963 in the bombing of the black Baptist church in Birmingham, Alabama;<sup>6</sup> The Massacre at Attica Prison in 1971; or that despite the fact that only the effected families, veterans of the Civil Rights Movement, and the judges will take note: Today is also the date of the death of Governor George Wallace in 1998.<sup>7</sup>

But this date is also noteworthy for other events:

Agatha (Marie Clarissa) Christie (Miller) (writer: *Murder on the Orient Express* and 65 other mysteries; playwright: *The Mousetrap*, the

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4. *Id.*

5. JACOB M. BRAUDE, BRAUDE’S SECOND ENCYCLOPEDIA OF STORIES, QUOTATIONS AND ANECDOTES 378 (3d ed. 1960).

6. Family Education, *September 15: Today in History*, at <http://www.familyeducation.com/article/0,1120,1-8824,00.html> (last visited Aug. 25, 2004).

7. The History Channel, *This Day in History*, at <http://www.historychannel.com/tdih/today.html> (last visited Aug. 25, 2004).

world's longest running play), was born on this date in 1890.<sup>8</sup> “The Battle of Britain reached its climax on this date in 1940, when the Royal Air Force (RAF) downed 56 invading German aircraft in two dogfights lasting less than an hour.”<sup>9</sup> The costly raid convinced the German high command that the Luftwaffe would not be able to gain air superiority over Britain and led to Hitler's decision a few days later to postpone indefinitely “Operation Sea Lion”—the long-planned amphibious invasion.<sup>10</sup>

But the reference that caught my eye had to do with President and Chief Justice William Howard Taft, who was born on this date in 1857. And wait, I thought! There is another connection, perhaps unknown by the biographers. It was Chief Justice Taft who in 1922 headed the ABA Commission on Judicial Ethics that drafted the original Canons of Judicial Ethics approved by the ABA in 1924.<sup>11</sup>

As I read deeply into his biographical summary, what I noted was that in an effort to make the Court work more efficiently, he advocated passage of the 1925 Judges Act enabling the Supreme Court to give precedence to cases of national importance by such reforms as the elimination of automatic right of review in all but a few cases.

As the Federal Judicial Center's website summarized it:

With authority to determine a greater number of the cases it heard, the Supreme Court became primarily a forum for deciding questions of constitutional principle, while the circuit courts of appeals issued the final decisions in the great majority of appeals cases.<sup>12</sup>

This, then, was the image I was looking for!

This was a situation of judicial leadership that was both bold and principled. It is the kind of leadership that I want now to urge is required as we begin the next great wave of legal reform: The Joint Commission to Evaluate the Model Code of Judicial Conduct. The Joint Commission is the product of the efforts of the ABA Standing Committee on Judicial Independence and the ABA Standing Committee on Ethics and

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8. 440 International, *Those Were the Days: September 15*, at <http://www.440.com/twtd/archives/sep15.html> (last visited Aug. 25, 2004).

9. The History Channel, *This Day in History*, at <http://www.historychannel.com/tdih/today.html> (last visited Aug. 25, 2004).

10. *Id.*

11. Library of Congress, *Today in History*, at <http://memory.loc.gov/ammem/today/sep15.html> (last visited Aug. 25, 2004).

12. Federal Judicial Center, *Landmark Judicial Legislation: The Judges' Bill expanded the jurisdiction of the Courts of Appeals and allowed the Supreme Court to determine many of the cases it would hear*, at <http://www.fjc.gov/history/home.nsf> (last visited Aug. 25, 2004).

Professional Responsibility (with funding from the Joyce Foundation). The charge of the eleven-member commission, under the chairmanship of Mark Harrison, of Phoenix, is to undertake the first comprehensive evaluation of the Model Code of Judicial Conduct in almost fifteen years. Their work will begin in earnest next month in Chicago.

At this early stage, then, I want to make a quite public plea for the Commission to recognize and honor the importance of its undertaking. One of the things that this means is that it must determine and then properly apply the learning of past Commissions.

Consider for a moment just one experience from our last great wave of reform, the Ethics 2000 Commission. Under the able leadership of Chief Justice Norman Veasey of Delaware, the Commission worked for two years and succeeded in drafting a report that resulted in approximately ninety percent of the recommendations it laid before the ABA House of Delegates being adopted. Of equal significance is that the Commission's chief loss was a proposed rewrite of Model Rule 1.6(b), which would have permitted lawyers the discretion to breach client confidentiality when a lawyer's services were used to commit the fraud. Despite the loss in the House of Delegates in 2002, a similar such recommendation narrowly passed the House of Delegates during its Annual Meeting last month (August) in San Francisco.

My complaint though—and admittedly it is a small one when measured against the overwhelming good that the Ethics 2000 Commission accomplished—is that the Commission chose at the very outset of its work not to undertake a comprehensive review and rewrite of the Model Rules of Professional Conduct. Despite having been charged with the task of modernizing a code that had in many ways become anachronistic, the Commission made quite clear from the very outset that its mantra would be “If it ain't broke, don't fix it!” As I have noted, this approach did not mean that no significant work was done. The record clearly belies that. It did mean, however, that work was not done that could have arguably benefited from the Commission weighing in on one side or the other.

To the expansion of the disclosure for fraud provision that I have already mentioned, I would also add several other issues to a partial list: Law firm discipline; The problem of in-bound foreign lawyers; Pay-to-play political contributions; the Acceptance of Judicial Appointments; special problems relating to the representation of the elderly and the poor; and special problems arising from service as a prosecutor, or as part of a public legal services office.

Please note that my claim here is not that Ethics 2000 would have achieved anything different even if they had chosen to undertake a broader inquiry. It is only to declare my agreement with Herbert N. Casson in his observation that:

“Safety first” has been the motto of the human race for half a million years; but it has never been the motto of leaders. A leader must face danger. He must take the risk and the blame, and the brunt of the storm.<sup>13</sup>

In the context of the Joint Judicial Commission’s efforts, there will be many opportunities for it to face danger and risk of blame. Indeed, a few concerns are already crying out for its attention: The Supreme Court has recently had its say in *Republican Party of Minnesota v. White*,<sup>14</sup> declaring it unconstitutional for a state to impose ethical restrictions on judicial campaign speech. But the case was the Court’s first look at the issue and even when viewed most sympathetically, it must be recognized that the Court’s examination was in the context of litigation, the crudest of all of our political instrumentalities for shaping public policy. Another look is warranted to determine whether it is constitutionally possible to insulate judicial selection from the intentionally partisan demands of representational politics.

I would also cite the problem posed by the need to finance judicial elections and, in particular, the perceived need for lawyers to give to such campaigns. The growing importance of contributions by those having business before the courts is part of what is fueling a crisis of confidence in our legal system. The Commission should address the problem and seek a remedy. And I note too that the responsibility of the courts to maintain judicial institutions that are open to all of our citizenry, without reference to race, religion or politics, must be affirmed. The recent fiasco involving Chief Justice Moore of Alabama may well simply be the opening shot of what will be a decades-long battle as the nation grows from a substantial white population that is dominant in terms of race, economics, religion and politics to a more demographically heterogeneous society. The Commission ought to consider the implications of a partisan Judiciary for our increasingly diverse and mobile society. The Commission ought also to take a fresh look at its judicial recusal standards. In a post-Enron world, it may well

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13. Herbert N. Casson, *available at* <http://www.quotemeonit.com/Cassonh.html> (last visited Sept. 17, 2004).

14. *See* *Republican Party v. White*, 536 U.S. 765 (2002).

be that courts must acknowledge public cynicism and strive for even stronger rules to govern the interest, both direct and indirect, of judges, their families, and their friends.

It is my hope, then, that the Joint Commission does not begin its work by taking things off the table. This is an opportunity to think not only about the longstanding, easy things that can be done. It is an opportunity to think hard about properly structuring the environment in which judges serve. We should take it as an opportunity to introduce transparency, review, and accountability, not as simply a way of reminding judges about ideals with which they are already familiar.

The Commission should join Daniel Webster in declaring that “the great interest of man on earth is justice.” They should seek, like Chesterton, to keep “the memories of the dead alive,” as challenges and inspiration; they should learn from the Royal Air Force, that fighting the battle at hand with everything that is available may well forestall the need for future battles; and, like Chief Justice Taft, they should remember that the task at hand is not simply to bring order, but to set the pilings in place that will support the institutions of justice for years to come.

As Justice Harlan Stone, reminded us: “The law itself is on trial in every case as well as the cause before it.”<sup>15</sup> In the next great wave of reform, the court should take this observation to heart and strive not only to make necessary changes, but also to make a significant difference.

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15. DAVID S. SHRAGER & ELIZABETH FROST, *THE QUOTABLE LAWYER* 34 (1986).



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