APPENDIX II

"Will Lawyering Strangle Democratic Capitalism: A Retrospective"

by The Honorable Laurence H. Silberman[1]

Over twenty years ago while I was at the American Enterprise Institute among a group of refugees from the Ford Administration, pondering our government service–and the harms we inevitably caused–I wrote an essay for the first issue of our newly launched magazine, *Regulation*. The title, "Will Lawyering Strangle Democratic Capitalism?" may well have been a bit hyperbolic, but it was suggested by 1another editor with greater dramatic flair. The essay received some modest attention; even the American Bar Journal gave it a not-unsympathetic review. My proposition was straightforward. Although the legal process, by which I meant all the work performed by lawyers, judges, and legal regulators–for which the number of practicing lawyers is an accurate proxy–is essential to democratic capitalism, too great an expansion of the legal process actually causes harm to both our economy and our polity. In other words, there is a theoretical tipping point, and we had, in my view, long passed it.

Looking back, I see that the themes that I touched on in that piece have been expanded by others, including Walter Olsen, a subsequent editor of *Regulation*. He, some years later, published *The Litigation Explosion*. The tipping-point concept, analogous to the Laffer curve, has been pursued extensively in economic literature by Stephen Magee Professor of Finance and Economics at the University of Texas. I was certainly not original in noting the rise of litigation or in decrying what Nathan Glazer had called the "Imperial Judiciary," which I, in

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[1] Of the United States Court of Appeals for the District of Columbia Circuit. Given at Drake University School of Law, Des Moines, Iowa, March 30, 2000.

part, blamed for attracting too many persons into the profession. But, I focused on the entire legal process as an integrated whole. I used cancer as the metaphor; the legal process had become a cancer which constituted both a major drag on our economy as well as an interference with the scope of democratic choice.

I employed Say's Law to suggest that the growth of the supply of lawyers was in part pushing the demand. By this, I meant that the demand for lawyers has a defensive nature. For example, few businessmen will attend a meeting if their counterparts are accompanied by counsel without being similarly protected; introducing one lawyer into a transaction causes a multiplication of lawyers. The Supreme Court, in its *Walters* decision (which upheld the *de facto* ban on paid lawyers in veterans benefit cases), recognized this phenomenon. It noted that an existing system of awarding veteran benefits, operated essentially without lawyers, would be changed fundamentally if some claimants hired counsel. Other claimants, in order to protect their share of a finite pie, would be obliged to retain attorneys, inevitably increasing the cost of the whole system.

Perhaps my most controversial observation–at least within the profession–was the notion that a disproportionate amount of intellectual talent, for the health of the nation's economy, was being drawn into law. Derek Bok, who, after serving as Dean of the Harvard Law School, became President of Harvard University and presumably gained a broader perspective, made the same point in a major address some years later.

I also noted that socialism had never achieved major political respectability in this country, and, therefore, the socialist impulse had been sublimated into the legal process. It was used to restrict the influence of those major economic institutions that would be owned publicly

in a socialist economy. Professor Marc Galanter, in a series of articles starting in the early 1980s, implicitly agreed with that diagnosis but applauded rather than criticized those developments.

Dean Robert Clark of the Harvard Law School, on the other hand, in an effort to blunt the increasing acceptance of the cancer metaphor, argued that the economy actually might benefit from the enormous increase in the number of lawyers. As befitting a specialist in corporate law, he distinguished those lawyers engaged in advising or implementing business transactions from those involved in litigation. The former, the majority of the profession, he suggested, performed work essential to the stability of transactions. Their greater need was dictated by, among other economic trends, the increase in international trade. He maintained that the work of transaction lawyers should be thought of as mere "normative ordering" and should not be viewed as implicating the authority of the state.

The primary difficulty I find with Dean Clark's heroic effort is that his division of the profession into the more-productive business-counseling portion and the litigation portion is quite artificial. The demand for increased use of lawyers as business advisors is tied inextricably to the risk of litigation. No one uses a lawyer without at least thinking of the prospect of either pursuing or avoiding litigation. If one seeks norm-ordering not enforceable in court, one goes to a clergyman. And once one sees the legal process as an interconnected whole, it should be apparent that its character has quasi-governmental aspects because the end point, litigation, which takes place before judges, necessarily implicates the sovereign power of the state. I had observed that state legislatures, Congress, or activist judges could often achieve a regulatory objective as easily by creating a private cause of action as by establishing a regulatory agency.

Dean Clark also suggested that the growth of the number of lawyers could be

explained in part by the increasing economies of scale *in the use* of lawyers achieved by large organizations. I do not doubt that such economies of scale exist. It has often been noted that large corporations have a competitive advantage over their smaller competitors in dealing with regulation, and, as I have noted, the legal process includes and complements regulation. But increasing that particular kind of competitive advantage is hardly welfare-enhancing. The optimal growth of our economy depends very much on our creating a climate in which new entrepreneurs and small companies will flourish.

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So much for theory; how justified were my fears? The growth of lawyers over the last 20 years, at least looking at that period as a whole, continued apace. According to the Bureau of Labor Statistics, the number of lawyers in the United States nearly doubled between 1977 and 1996, from 448,000 to 880,000. Over the same time-span, the total population of the country only grew from approximately 219 million to 268 million. That means that the percentage of lawyers in the general population increased from .204% to .332%. If one goes way back to 1961, the year I graduated from law school, one can see that the trend since then has been inexorable. Although BLS statistics are not available for that year, the ABA's are. According to the ABA, in 1961 the United States had only 257,403 lawyers. The population was then approximately 183 million, so the percentage of lawyers in the general population was .141%, less than half of the 1996 figure of .332%. It is also worth noting that, while the number of lawyers has increased by almost 100% since 1977, Gross National Product (in real terms) has increased only 56%.

Society seems to be resisting, however; the growth of the legal process is

encountering real friction. First, and perhaps most important in a democracy, the public's regard for lawyers appears to track the growth of the size of the profession in inverse terms; the more the number of lawyers grows, the less lawyers are respected.

A 1992 poll commissioned by the ABA revealed surprisingly widespread dissatisfaction with lawyers.

- Only 40% of respondents held a favorable impression of lawyers. The only professions that scored worse were stockbrokers (28%) and politicians (21%).
- 56% replied that today's lawyer is no longer a leader in the community.
- Only 36% said that most lawyers are "a constructive part of the community."
- Only 22% felt that the phrase "honest and ethical" described lawyers.
- 51% believed that most lawyers filed "too many lawsuits and tie up the court system."

Just last year, a Harris Poll confirmed this trend when it reported that those who thought a lawyer's occupation was one of "very great prestige" had dropped from 36% in 1977 to 19% in 1997. I *know* this poll is reliable because journalists were at the bottom–only 15% thought that occupation highly prestigious. The invariable reaction of leaders of the bar to such dismal news is to speak of the need for a public-relations offensive, particularly calling attention to the profession's *pro bono* activities and urging that lawyers increase their *pro bono* efforts.

Even my colleague, Chief Judge Edwards of the D.C. Circuit, who cogently has described some of the profession's difficulties and distressing trends at the law schools, thinks an answer to the lawyer's declining image might lie in even greater emphasis on *pro bono* work. He suggests that partnership decisions should turn in part on a candidate's *pro bono* efforts. I

believe, somewhat heretically I am sure, that all this talk of *pro bono* activities is quite counterproductive. Implicit in the emphasis on *pro bono* is the profession's acknowledgment (if not Judge Edwards's) that its normal work is not really something to brag about. It does not seem to have occurred to leaders of the bar that the public's view of lawyers–and what lawyers do–is influenced by the lawyers' own view of what they do. If one does not believe in the intrinsic value of one's work, one can hardly expect that others will have a different opinion.

When I entered Harvard Law School in 1958, Dean Griswold told the entire assembled class that if we wished to earn a great deal of money we should go across the river to the business school. Oh, we would certainly do all right, but a lawyer's satisfaction came largely from the value of the service he or she performed to society as a whole. (Admittedly, he was more than a little parochial about the businessman's role.) In other words, practicing law itself was regarded as *pro bono*. Perhaps working directly for the government could be thought *pro bono* plus. Being a judge, of course, was super *pro bono*. Our professors thought the practice of law was an honorable and valuable calling, no matter who we were representing. Today, however, particularly at our elite law schools, most professors teach a quite cynical view of the law and the work of lawyers–at least those representing the productive sectors of the economy. The disdain for the capitalist system is palpable, and much legal scholarship is warmed-over Marxism with the only variation being in how the oppressed class is described–the oppressors, the analogue to Marx's bourgeoisie, typically are white males. It follows that the actual practice of law–sometimes even for a few years–is perceived often as a corrupting disqualification for those seeking academic positions. It is no wonder, then, that today's lawyers, reflecting this academic culture, hide behind the shield of *pro bono* activities when attacked. Lawyers see *pro*

bono services as the penance they pay for serving a capitalist system. (Much *pro bono* work–which, is more and more handsomely compensated because of fee-shifting statutes–is really an effort to seek redistribution of money or power by circumventing the political process.)

American lawyers simply refuse to face the obvious explanation for their increasing unpopularity. The American people are reacting negatively to the vast increase in the number of lawyers and the growth of the legal process that this increase represents. These developments have had, as one would expect, political consequences. Litigation "reform" is increasingly an issue before state and federal legislatures. (I put reform in quotes because I do not wish to take a political position.) It is and will be a tough struggle, however, and not just because of the increasingly aggressive direct and indirect political activities of lawyers and associations of lawyers. Even if the majority of the public is disgusted with our tort system, for instance, they may be of two minds about legislative changes; everyone, after all, hopes to win the jackpot. But just because you play the horses doesn't mean you have respect for bookies.

The public as a whole are not the only ones to react to the trend line. Institutional clients have adopted an interesting defensive strategy. Lawyers have been hired as employees and brought in-house, so to speak, to staff rapidly growing general counsels' offices. It is often said that this development stems from efforts by corporations and other organizations to control their fees. I think that factor does not explain the trend adequately. I actually rather doubt that it has been all that effective in limiting total legal expenses. As an ex-corporate executive who created a general counsel's office, I learned that the efforts many general counsel and their staffs take scrutinizing legal bills and micro-managing legal output are of dubious value. If a law firm's performance is not worth its cost, a client should simply get another firm.

The general counsel's office really developed, I think, because CEO's and other organization heads instinctively wished to gain control of an increasingly important area of the institution's concern. Any executive worth his or her salt wants to control as much of his organization's environment as possible. As the legal process grew, the CEO wanted to bring the general counsel inside the corporation and as much of the company's legal activity as possible.

Once the general counsel worked inside the corporation, he or she naturally wanted to control all the company's legal affairs. If only the general counsel and his close associates were familiar with the points at which the corporate business brushed up against the legal process, his relative influence in the corporation was enhanced. To this effect, many general counsel began to disperse their corporations' legal work widely, and they increasingly delegated only specific tasks to individual law firms, often litigation. In the process, law firms lost their institutional ties to the corporation. Professor Abram Chayes, with his wife Antonia, traced this development in an insightful 1985 article in the *Stanford Law Review*. They observed, quite correctly, that the general counsel–and his staff–have become responsible for painting their corporation's big legal picture and integrating that picture into the even-larger competitive setting. Under the general counsel's tighter, if not necessarily more productive, control, the senior partner of the outside law firm, once looked to as the wise counselor to the organization, has become outmoded.

The inevitable consequence of this development was the diminished status of lawyers in private firms–even litigators. Today, the senior partner of a major law firm typically takes his "instruction" and provides his services to a rather junior lawyer in the general counsel's office. If your "client," the person to whom you give legal advice or provide legal services,

slides down the organizational structure, your own status declines accordingly.

Not surprisingly, this trend has robbed the whole profession of much of its luster. To be sure, lawyers, at least at the high end of the market, are actually making more money in real terms than was true 30 years ago. In 1961, when I graduated from law school, a young lawyer at an upper-crust New York law firm could expect to earn the equivalent, in today's dollars, of approximately $40,000. That same young lawyer started at $87,000 in 1996, and this year the figure is approaching $150,000. Some young lawyers after clerkships are making more than the federal judges for whom they clerked.

I think there are two reasons for this enormous increase. First, the most talented lawyers have been driven by the market into narrower and narrower specialties in order to add value to the general counsel's office. Insofar as they do so, they can charge commensurately higher billings. Second, law firms seem almost desperate to increase their billable hours to levels that we once would have thought unbearable. Many of my contemporaries, reaching the end of their legal careers, cannot understand what has happened to them. They make a good deal more money than they ever expected, but they hate what the practice of law has become. They would gladly trade a good portion of their incomes to recover the old client-law firm relationship.

Why, it might be asked, are law firms so anxious to increase their revenues and profitability? I think the core reason was identified by the famous anthropologist Robert Ardrey who, you may recall, wrote such important books as *The Territorial Imperative* and *African Genesis*. His thesis was that humans, like all mammals, have two drives (other than the basic ones): to acquire property and status. If you depress the opportunity to acquire one, the second becomes much more important. When I was an ambassador to a Communist country, where

property acquisition was quite restricted, I observed that an individual's official status was a good deal more important than in this country.

As lawyers' place in society, and their status *vis-a-vis* their clients, have dropped, they have been driven to acquire more property. Efforts to repress that drive–running as they are counter to human nature–are doomed. That lawyers would gladly trade a portion of their income to regain the previous equilibrium between status and property is of no avail. Unless we significantly reduce the number of lawyers as a percentage of the population, thereby cutting back the legal process, lawyers will not regain their once respected place in our society.

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What is my prognosis? We see some very recent indications that the growth of lawyers and the legal process is slowing down. The number of college graduates going on to law school has stabilized; law school enrollment peaked in 1991 at approximately 130,000 and has remained close to, but below, that figure since. It is perhaps a good sign, regarding my concerns about the percentage of our most-talented college graduates going to law school, that for the '94-'95 school year, applications for Stanford Law School dropped by 19%, while applications to Stanford Business School increased by 50%. To be sure, salaries for new associates this year have jumped through the roof and one might think that is an indication of explosion of demand for lawyers. But the truth is more complex. These salary increases are a defensive reaction to the enormous demand for analytical talent–not necessarily for lawyers qua lawyers–mounted by the new technological companies. They have sucked people out of the consulting firms, investment banks, even students out of the best business schools before graduation, as well as young lawyers out of firms. The last may well be a desirable "brain drain." In any event, the

general counsel of corporate clients have already indicated that it will be difficult for firms to pass through these costs to their clients–which means, of course, the billable hour requirements will be terrible.

Still, the important question is why so many college graduates were drawn to law school in the latter half of the twentieth century? In my 1977 article, I pointed to the proliferation of regulatory legislation and increasingly bold judicial activism as factors, besides high earnings, that promised greater influence and power to those serving the legal process and that therefore attracted too many college graduates to law school. Regulatory legislation has gone somewhat out of fashion recently. But judicial activism remains and is still a crucial factor explaining the vast number of American lawyers. For the more the judiciary reaches out to decide issues heretofore outside of the legal process, thereby expanding the law's reach, the more relatively attractive lawyering becomes, notwithstanding countervailing influences. To be sure, it is not clear how much judicial activism is a product of the manner in which the typical law professor and lawyer thinks about the legal process, and how much it is a cause of the problem.

The heyday of the present cycle of judicial activism began in the late 1950s led by the Warren Court. It is revealing, as my colleague Judge Randolph recently mentioned, that before that trend was apparent, a special committee of the ABA in 1959 worried that "the law is becoming a dwindling profession–not enough people wanted to be lawyers." The Warren Court seems to have saved us from that fate.

Although one hears increasing protests against judicial activism, few signs indicate that it has been significantly discredited. Opponents have often been rather short-sighted in attacking the capillaries rather than the jugular. The jugular–the core problem in my view–is

the Supreme Court. The Supreme Court is the key, not because it is the worst offender–in this respect, the Rehnquist Court is a vast improvement over the Warren Court and certainly much less troublesome than the State Supreme Courts–but because, by example if not by direct control, the Court is the dominant influence on American judges. When the Supreme Court engages in activism it has an exaggerated impact throughout the judicial system. Power, after all, is quite enticing; even judges around the world, trained in less judicially robust systems, are entranced with the activism of the American judiciary. Unfortunately, the Supreme Court has never recognized that the *manner* in which it decides cases–its example if you will–is much more important than what it actually decides in the relatively few cases it takes.

Defenders of judicial activism have been effective in sowing confusion in the public's mind as to just what is judicial activism. One particularly ridiculous view of judicial activism–what I call the Nina Totenberg school–asserts that it is judicially active for a federal court to declare unconstitutional an act of Congress, particularly an act approved of by Washington journalists. Congressional acts are, of course, products of majority will. But the Constitution is a body of positive law that sets congressional parameters. Whether an act in question is properly declared unconstitutional depends entirely on whether a court's interpretation of both the Constitution and the statute is correct–and whether the court is activist depends on *how* the court approaches its task of interpretation. A more subtle distortion–advanced last year by Jeffrey Rosen in his *New York Times Magazine* article–equates incrementalism with judicial restraint. According to Rosen, expanding the Constitution in small steps so as to trail (and perhaps amplify) changing public opinion shows restraint, but deciding cases with "sweeping gestures" and against public opinion is activist. Professor Rosen, it should

be understood, mixes up judicial restraint with political restraint.

Because there is so much controversy as to what it means to be judicially active, I will offer a definition. Although it would certainly be helpful if I could illustrate by reference to specific cases, as a judge I am reluctant to discuss specific Supreme Court decisions because their progeny may come before me. So, I will speak only of doctrine.

Judicial activism simply means policymaking in the guise of interpreting and applying law. Policy issues are those questions of public concern on which the body politic or political institutions have free range of choice. When legislatures or constitutional conventions make law, they resolve certain policy issues and crystallize the majority view into rules. Of course, these rules are not on equal footing: constitutional rules trump statutory rules. What is true for both is that, if a judge exercises policy choice when deciding what these rules mean, that is judicial activism. It is my firm conviction that if a judge believes that it is legitimate *in any case* to exercise choice as to a case's outcome, he or she will inevitably be, at least to some degree, an activist.

That is why it is absolutely imperative as a matter of theory that judges believe that there is a theoretical right legal answer to *every* case. Of course, given human imperfections, judges who try to find the right answer often fail. But our only legitimacy as judges lies in the pursuit. Justice Thomas made a similar point in his address at Kansas Law School a few years ago. Once one asserts that there are even some cases in which there is no theoretical right answer, one is on the road to perdition, because one judge's subset of such cases will inevitably be different from another's and pretty soon no cases have right answers. This simple notion is not generally accepted. Indeed, a justice for whom I have a good deal of respect and affection

said publicly some years ago that it was naive to think cases in the Supreme Court had theoretical right answers. If cases there do not have right answers (and one assumes the Supreme Court is a court), I do not see how it can be said that cases in lower federal courts have right answers.

Several important corollaries or subordinate principles guide judges opposed to judicial activism. One was put brilliantly by Justice Scalia in his Holmes Lecture at Harvard in 1989, "The Rule of Law as a Law of Rules." A court should articulate the broadest legal principle–the rule if you will–that governs the case before him or her and, I would add, that governed the behavior of the parties at the time they acted. (In other words, the rule should be *ex ante* not *ex post*.) When a court focuses too much on the unique factors in any particular case, it permits itself to decide differently in the next case, making all too clear that it is really engaged in *ad hoc* decision-making or calibrated policymaking in small, sometimes zig-zagging, steps. That is why Professor Sunstein, generally sympathetic to judicial activism, saw a silver lining when commenting on the 1997 Supreme Court Term, a Term generally thought if as a "conservative" year. The Court shrank from articulating clear principles that might inhibit it from further constitutional expansion.

Second, a restrained judge will honestly and fully set forth his or her reasons for a decision–what my colleague Judge Williams has called "truth-in-judging." If the true reasoning is revealed, it is impossible to hide policy choices. This is a good deal rarer than it should be, particularly in the Supreme Court. As a part-time law professor, I tell my classes that the reason it takes so long to teach law students how to recognize the holding of a case is because judges seldom tell the truth. Justice Ginsburg, in a lecture shortly before she was nominated to the Supreme Court, spoke of the virtues of speaking in a "judicial voice"–by which she meant

decorously. The careful use of judicious language, however, is often designed to obscure policymaking. It is only the relentless, and sometimes not so decorous, logic of dissenters that expose this technique. One should also be aware of the dangers of stirring rhetoric, for instance, statements that something "shocks the conscience of the court." This also serves as a cloak for judicial policymaking.

Honest reasoning includes honest treatment of governing precedent. That is not to say that any court–including the Supreme Court–is engaging in judicial activism if it overrules a prior illegitimate decision; that is another favorite accusation of the journalistic crowd. But it does mean that a court must either follow the principle of a governing precedent or overrule the precedent, and that a court must not–as so often happens in the Supreme Court–put forth a blatantly unpersuasive distinction. The Court and American law are not well served by attempts to gain swing votes through disingenuously expressed reasoning. Justice Scalia, in his recent book, speaks critically of the common law tradition, what might be called twist and turn jurisprudence. He compares it unfavorably to statutory interpretation. I am quite sympathetic to his view. There is, as Jefferson recognized, entirely too much policymaking in the common-law technique to comport with a modern democratic legislative system. Nevertheless, there is as sharp a distinction, which Justice Scalia does not acknowledge, between honest and dishonest treatment of governing precedent as there is between honest and dishonest interpretation of statutes. The defects of the common-law tradition hardly justify the Supreme Court's characteristically disrespectful treatment of its own precedent.

Finally–and I think this is a matter of prime importance–it is a hallmark of judicial activism for a court to reach out to decide issues not presented by the parties. Indeed, it is the

first step on the slippery slope of activism. When a court does not limit itself to the questions presented, it behaves exactly like a legislature. The temptation to "straighten out" the law, to impose one's own construct on a general area of the law, can be quite powerful, but there can be no right answer to a question not asked. The entire Supreme Court is unashamedly guilty of this vice.

Opponents of judicial activism have trained their fire on lower federal courts. Given the recent raft of state supreme court decisions ostensibly interpreting "evolving" state constitutions, the federal courts may be a relatively minor problem. But whether activism is found in the decisions of the state courts or the lower federal courts (particularly the Ninth Circuit) those opinions can find some justification in the stated reasoning of past Supreme Court opinions. The Supreme Court is simply much more politically prudent than the lower federal courts; it takes care to issue judicially active judgments that have achieved a consensus among the elite, and it will rarely confront a view held firmly by an overwhelming percentage of the public, for instance, the constitutionality of capital punishment. To put it numerically, the Court, no matter how its prior reasoning points, will seldom confront over 55% of the American voters. That self-imposed limitation still leaves the Court enormous leeway, for, in a democracy, most divisive issues are located, if I may use a football metaphor, between the 45-yard lines.

Since the most influential agent of judicial activism in this country is the Supreme Court, legislative efforts to attack the problem are problematic. The Court's example dominates American jurisprudence. If one wishes to shrink the legal process significantly to restore more ground to the political process and reduce economic impediments imposed by lawyers, one must seek a "little judiciary" (recall Gladstone's proud espousal of a "little England"). A Supreme

Court that behaves like a traditional and limited court, deciding only the cases and controversies before it in accordance with judicially principled standards, is an indispensable prerequisite.