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Reflections on Recent Remarks of "that unnecessary and dangerous Officer"

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Before I speak to my principal theme, I would like to comment briefly upon another matter. A few years back, I wrote a law review article entitled: "Confronting the Communication Crisis in the Legal Profession." In that article, I wrote of the increasing incapacity of all segments of the legal profession to communicate effectively. My goal was to focus attention on the expressive deficiencies of lawyers in their various capacities as counselors, litigators, adjudicators, legislators and educators. I really do think that lawyers need to communicate more effectively with clients, judges, government agencies, the general public and with each other. It is the communication gap in the courtroom milieu that I of course am most familiar with. Although I no longer preside at trials, I do have the opportunity, indeed the duty (but often not the pleasure) of reading transcripts of trials. Day after day I read trial transcripts, along with the briefs of counsel. For that is the lot of the appellate judge. It is in this reading that I have come to a full understanding of the problems of courtroom communication. I also have come to an understanding of

ineffective briefwriting. But that is a story for another day. The exchange between lawyers and witnesses in the courtroom often demonstrates that the lawyer has not prepared the witness, that the witness does not understand the lawyer or that the lawyer does not know how to ask the question. I have carefully collected some of these instances of ineffective communication in the courtroom and offer them for your consideration. These examples come directly from trial transcripts:

[Questions and Answers from Transcripts]

Now to my principal theme. I have found myself drawn in recent years to a closer examination of the origins of our federal Constitution. Such a study certainly is helpful to a federal judge who must deal with current issues of constitutional law. I also find that advancing age makes me more keenly aware of history. Then, of course, there is the matter of simple intellectual curiosity. Currently, I am poring over those most interesting debates between the so-called Federalists, who supported the ratification of the Constitution formulated at Philadelphia in 1787, and the Anti-Federalists, who sought to defeat it. It is interesting to note at this point that the Parish of St. Peter's, having already been in existence for some years, was reorganized in 1787, the same year as the Constitutional Convention, by a Special Act of the New York State Legislature. Lined up on the side of the Federalists were Hamilton, Jay and Madison, whose brilliant series of essays, The Federalist Papers, played a great part in convincing the

citizenry of the benefits of the new Constitution. A number of distinguished statesmen were lined up in the Anti-Federalist camp, including Robert Yates and John Lansing of New York, who abandoned the Constitutional Convention, Luther Martin of Maryland, and George Mason of Virginia.

Mason was a great patriot and a close friend and neighbor of George Washington. He was deeply suspicious of the government structure established in the new Constitution and accurately predicted future problems arising from a strong central government. He objected to the new Constitution also for its failure to include civil rights provisions. He was among the Anti-Federalists who wrote essays urging rejection of the new Constitution. In one essay, Mason wrote of the constitutional provision for what he called "that unnecessary and dangerous Officer, the Vice President: who for want of other employment is made President of the Senate." If Mason thought that the Vice President was dangerous and unnecessary in theory, he should have seen how it would work out in practice. If he were alive today and were able to contemplate the present holder of the office, I am sure that he would say, "I told you so."

"For want of other employment," as George Mason put it, presidents over the years have assigned to their vice presidents various make-work tasks. Some of these, such as attending state funerals and ribbon-cutting ceremonies are harmless. Other tasks are more substantial, although they also are unnecessary because they can better be performed by other government officials.

There certainly are enough of those. It is in the performance of some of these assigned tasks, however, that vice presidents demonstrate the dangerousness of which Mason warned. Take, for example, the recent remarks of the incumbent Vice President regarding the legal profession of which he is a member. It is said that he is so astute a lawyer himself that he can examine any contract and tell at once whether it is oral or written. It is said that early in his career he was assigned the defense of one accused of crime. Meeting with his client at the jail, he is reported to have said: "I will examine within the next few days some possible defenses to be raised on your behalf, including justification, insanity, duress and entrapment. Meanwhile, try to escape!"

It seems that the remarks of the Vice President upon which I reflect this morning were a consequence of his appointment to chair the President's Council on Competitiveness. The ostensible purpose of the Council is to explore ways and means of improving the competitiveness of American business in the global market place. And what does this Vice President find to be the greatest obstacle to American primacy in world business today? We all strained to hear his report. Was it our mounting budget deficits? Our educational system? Our crumbling infrastructure? Was it the trade barriers erected by our trading partners? Is it a problem with labor? Capital? Do we have too much government regulation? Not enough government regulation? Do we spend too much on social programs? Not enough on social programs? Should

business be given tax credits and other incentives? Do we have problems with product quality, delivery or service? It is none of these. The greatest obstacle, so we are told, to American success in world markets is LAWYERS! The United States trails in worldwide competitiveness because of its lawyers. That is the reason and none other. The more lawyers we get rid of, the more competitive America will be throughout the world. This of course is great rubbish.

In his remarks to the American Bar Association, our dangerous and unnecessary officer observed that "[o]ur system of civil justice is . . . a self-inflicted competitive disadvantage." "[L]et's ask ourselves," he said, "[d]oes America really need 70 percent of the world's lawyers? Is it healthy for our economy to have 18 million new lawsuits coursing through the system annually?" "The answer is no," he said, noting also that litigation costs in the nation add up to more than 300 billion dollars each year.

To begin with, it seems almost certain that all his figures were wrong. The 300 billion dollar figure has been demonstrated to be a product of casual speculation and not derived in any sense from investigative or statistical analysis. As to the 18 million civil suits which, according to the Vice President, make us "the most litigious society in the world," it appears that this figure is seriously skewed. The number includes millions of routine cases such as small claims, probate proceedings and divorce matters. It is estimated by various experts that the

correct number of contract and tort cases filed in general jurisdiction trial courts is about 2-1/2 million, hardly enough to maintain the charge that we are the most litigious nation on earth.

As for having 70 percent of the world's lawyers, it just is not true. Marc Galanter, a respected law professor and expert on the so-called "litigation explosion" said that American lawyers probably make up somewhere between 25 and 35% of all the world's lawyers. Galanter, who is Director of Legal Studies at the University of Wisconsin Law School, asks "Is that too many?" and gives this very thoughtful answer in the April issue of the American Lawyer:

> [The proportion of American lawyers to all the lawyers in the world] is roughly the U.S. proportion of the world's gross national product and less than our percentage of the world's expenditure on scientific research and development. The United States is a highly legalized society that relies on law and courts to do many things that other industrial democracies do differently. And it is worth noting that one realm in which this country has remained the leading exporter is what we may call the technology of doing law -- constitutionalism, judicial enforcement of rights, organization of law firms, alternative dispute resolution, public interest law. For all their admitted flaws, American legal institutions provide influential (and sometimes inspiring) models for the governance of business transaction, the processing of disputes, and the protection of citizens in much of the world.

The Vice President's remarks were spawned by a subsidiary of the Council on Competitiveness known as The Federal Civil Justice Reform Working Group, composed of political appointees from

various government agencies as well as the White House. One of the members of the Working Group was Jay Lefkowitz of Albany. He is employed in the White House on the Domestic Policy staff. Does anyone know Jay? I know him and like him. He is out of law school about twenty minutes, yet is part of a Group that advises the President on what is wrong with our Civil Justice System. Age and experience are no longer qualities sought by those who govern. The delegation of important responsibilities to young staff members is what is wrong with our government today. But I digress. The Civil Justice Reform Working Group that made the snowballs for the Vice President to throw put out the blatant, unsubstantiated statement in its report that, due to liability concerns, 47 percent of U.S. manufacturers have withdrawn products from the market; 25 percent of U.S. manufacturers have discontinued some forms of product research; and approximately 15 percent of U.S. companies have laid off workers as a direct result of product liability experiences. More rubbish!

According to the American Bar Association Journal, these statistics are seriously flawed, being based on 500 responses from 4,000 business executives, who received a mailed questionnaire. Statisticians call this a "self-selected" sample. Actually, it appears that products liability suits are on the decline. Even if they were not, what do they have to do with competitiveness? Foreign products manufacturers also are subject to suit in the United States. And what is wrong with the system anyway? Elimination of unsafe products, warnings to consumers of

risks undertaken, and protection of the environment certainly are socially desirable goals that are advanced by current law. The citizenry relies upon courts and lawyers to advance these goals. Other branches of government just don't seem to do as well. It seems clear that much of the statistical information relied upon by the Council on Competitiveness has origins that are suspect, to say the least.

The Council on Competitiveness has adopted the agenda for civil justice reform recommended by the Working Group. That agenda includes such brilliant and innovative changes as greater use of alternative dispute resolution procedures; reform of pre-trial discovery; more effective trial procedures such as the early scheduling of trial dates; reform of the rules governing expert witnesses; reform of punitive damages; strengthening sanctions against frivolous filings; and a rule requiring losers to pay attorneys fees. I dare say that there is not one new idea in the bunch. Lawyers, law professors, judges and others interested in legal reform have been studying and experimenting with all these techniques for some time. I venture to say that even if all fifty recommendations were adopted in our Civil Justice System immediately, we would not be one whit more competitive than we are today. I say, work on the economy and leave the improvement of the legal system to those who know something about it.

The theme of Law Day 1992 is "Struggle for Justice." In this nation, lawyers always have been at the forefront of the

struggle for justice. The nations of the former Soviet Union are seeking to adopt that system with all deliberate speed. They are seeking to confer upon their lawyers and judges the independence and freedom that have served us so well in this country. At a time when our profession and system of justice are so well respected and emulated abroad, it makes little sense to denigrate them here. American lawyers always have understood the need to reform as well as preserve. They have maintained that balance since the founding of the Republic and can be expected to maintain it in the future. The countries of Eastern Europe have come to realize that the continuation of a free society and the preservation of the rule of law depend upon a strong, vigorous and vital legal profession. Our citizenry has realized this truth since the earliest beginnings of our nation. It is therefore important to strengthen our profession and not to deprecate it. I think that we should celebrate lawyers on Law Day.

The stirring up of anti-lawyer passion can be most harmful to society. It may be politically expedient in the short run but it is dangerous in the long run. And as for our dangerous officer -- we must be vigilant, lest he become even more dangerous.

Thank you.