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Lawyer as Policy Maker

Rex E. Lee

President Romney, President Oaks, President Wilkins, Dean Hawkins, Judge Wallace, members of the faculty, members of the charter class, ladies and gentlemen: I think you know how honored Janet and I are that you asked us to be with you on this occasion. There are few tributes that could please us as much.

Each class that graduates from this Law School will have a place all its own and will make its own distinctive mark. Clearly, there will never be another class like this one—a fact, I might add, that is a source of some solace and comfort to the members of the faculty. Never again will the quantity or the intensity of effort in recruiting and admitting each individual class member be repeated. Nor, for that matter, will it ever need to be, thanks largely to you and the fact that three years ago you were willing to come and share with us the joys and, at that time, the risks, of a new law school.

[A] . . . second thought that I want to leave with you concerns the role of the lawyer as a policy maker. There is no other profession whose members find themselves, as a necessary consequence of the work that they do, so continually involved in important policy-making functions. I believe that for most lawyers this is a plus.

It is equally clear that there are some problems—some of them personal in nature, but more of them institutional. I have no doubt that one of the reasons for the increased interest in law school over the last seven years is that so many law students perceive, and perceive correctly, that law training provides an access to what Dean Hawkins has termed “the levers of power.”

It is, I believe, one of life’s ironies that those who enter the profession for this reason not only miss the broader satisfactions that the practice of law has to offer but also fail to achieve their immediate objective, the exercise

of influence, as fully as those who see the broader service aspects of the lawyer's calling and for whom the exercise of influence is an unsolicited by-product. It is, if you will, another manifestation of the biblical injunction that he who would save his life must lose it.

For some, the role of the lawyer in policy formulation and implementation is direct and predominant. In my view, it is more than coincidence that a disproportionately high percentage of legislators and government administrators come from the members of our profession. I am convinced that the tools that are acquired at a first-rate law school, such as the one that you have attended, qualify the graduate for a direct role in policy formulation and implementation.

But the function of our profession in policy matters is more subtle and of much wider scope than the passage, interpretation, and enforcement of laws. The practicing lawyer who operates in the most traditional lawyering ways—trying lawsuits, drafting contracts, counseling clients—is also a policy maker. Note the choice of verb in the preceding sentence. It is not that he has the opportunity to be a policy maker; he *is* a policy maker. The question is not whether but how well and how consciously. It is on the premise that there is a probable relationship between the consciousness of one's participation in the lawyer policy-making function and the quality of that participation that I have selected this as one of my four points.

The inevitability of the lawyer as a policy maker is rooted in the unique characteristic of our common law system: the pivotal role of the judge. Under our system, the resolution of disputes among private parties not only results in determining who owes whom how much; it is also an important source of law. Unlike his civilian counterpart, the common law judge is not confined to interpreting what some legislative body probably meant. In addition, he has the power and the duty in appropriate cases to make law where there is no law and to fill in the interstices of legislative judgment where they exist.

This, I submit, is the essence of policy making. And it is not restricted to judges. A foundational premise of our adversary system is that we best approach the determination of truth when the facts and the law supporting each opposing position are marshaled and presented by skilled advocates and then leave the ultimate judgment to a neutral arbiter, whether judge or jury. Necessarily, therefore, the trial lawyer, as an officer of the court, plays an integral role in the common law judge's policy-making function.

Similarly, the substance of commercial document drafting and client counseling is determined in large part by the lawyer's anticipation of how the courts probably would decide particular issues if called upon to decide them. This necessarily involves the same basic kind of policy formulation, even though on an anticipatory level, that the courts themselves pursue. This anticipatory policy-making process, when undertaken by skilled

craftsmen, in turn has an effect on the decisions of the person whose judgment is anticipated, namely the judge.

So I hope that you will enter the profession conscious of your role as a policy maker. Your entrances come at a time when the profession faces policy issues of great magnitude.

For example, unless some rather bold steps are taken during the course of your professional lifetime, the ability of the American courts to perform their tasks will be seriously jeopardized. An article published last year in the *Stanford Law Review* by Professor John Barton pointed out that if federal appellate cases continue to grow at the same rate as they have grown for the past ten years, then by the year 2010 the United States Circuit Courts of Appeal will be required to decide over 1,000,000 cases each year, which will require 5,000 appellate judges to make the decisions and 1,000 new volumes of the Federal Reporter to report them.

When you consider that for every case that reaches Judge Wallace's level in our system there are ten cases that are filed in the federal district courts, and when you consider further that in one state, California, there are four times as many lawsuits filed each year as in the entire federal system, you begin to develop a feel for the real crisis that currently faces the courts, the place where you will work. Proposals have been advanced, including (1) the identification of certain matters such as probate and divorce that traditionally have been handled by the courts but that might better be solved by simpler and more effective alternative means; (2) exercising some control over the ever-increasing tendency of Congress and state legislatures to impose new burdens on the judiciary without any corresponding increases in judicial resources; and (3) doing away with jury trial in civil cases.

These and other proposals are not without serious costs. Participation in the resolution of these kinds of complex, societal-impacting issues, unlike the policy roles necessarily involved in the lawyer's day-to-day work, is largely optional. It is an option that I hope most of you will take.

Now, as long as we are talking of policy, I would particularly invite your attention to a bill that is now in the hatching stage among some of the most thoughtful people in the Department of Justice. This bill has not yet come to the attention of the attorney general, and, in fact, if it did, there would probably be a few replacements. But it promises to be one of the most far-reaching pieces of legislation in the history of our republic. Title I, Section 1, would initiate the process for partial repeal of that provision of Article I of the Constitution that no title of nobility can be granted by the United States. Section 2 of Title I then provides that any person elected to any House of Congress shall have the option of designating himself to any title of nobility of his own choosing, whether duke, earl, marquis, or whatever, together with all the traditional perquisites of nobility, an annual

stipend of \$100,000 for life, and the right once each year to select a representative of the Executive Branch to be subjected to the rack, screw, or any other appropriate torture device. The only quid pro quo is the modest undertaking never to exercise any of the powers conferred by Article I of the Constitution.

Title II provides for the appointment of a special president, chosen from the ranks of living presidents or, if there is none, at random from the Manhattan phone book. The function of the special president will be to review the acts of all ex-presidents and conclude without exception that they were within the public interest.

Title III provides for judicial reform. It would require that all judges' opinions prior to publication be submitted to a board consisting of college freshmen logic students and eighth-grade grammarians.

Having perfected only three titles thus far, the architects of this bill are now working on Title IV, which deals with government bureaucrats and still needs some work. Section 1 provides for a resident reasonable man in each department and agency of government. To any first-year law student, the need for such a position is obvious. But since he will function much like an oil filter, he will have to be replaced every six months, and there is a serious problem what to do with him in his clogged-up condition. The most promising suggestions to date have been that he could teach tax or that he could write evidence exams. Section 2 of Title IV requires an embroidered notice to be hung in the office of every government administrator, in letters at least four inches high, stating, "If stupidity is an adequate explanation for what has happened, don't look for any other."

If this bill becomes law, it will obviously solve most of the policy problems facing our nation. If it does not, then you will continue to fill the lawyer's role as policy makers. . . .

I [also] want to discuss the unusual expectations that lawyers and non-lawyers hold concerning the standards of professional conduct to be observed by the members of this class. This involves your relationships with your clients, with your fellow lawyers, and with the community at large.

Of those three groups, the one with which you should be most concerned is your fellow lawyers, because it is they who will be most influential in establishing your reputation for high ethical standards. Whatever the community in which you practice, you will shortly come to an understanding that there are certain members of the bar within that community whose oral assurance is all that you will ever need as a basis for confident reliance. There is no advantage that any lawyer enjoys that compares with that kind of reputation among his brethren at the bar.

In some respects, I think that people are trying too hard to find differences between you and the graduates of other law schools. But with regard

to standards of professional conduct, I have no objection to the unusually high expectations of you that I perceive among the members of the profession that you are about to enter. I am convinced that these expectations exist. You should not consider their existence threatening but only supportive of the standards of professional conduct that you should be willing to demonstrate.

Remember that like any great edifice, a lawyer's reputation cannot be quickly built, but it can be quickly destroyed. Remember also that there are enormous opportunities and temptations to trade long-range benefits, including your reputation, for short-term advantages. It is the same kind of trade-off that Jacob proposed to Esau some three millennia past. It was not a good deal then, and it hasn't improved with age.

So I'm hopeful that in your dealings with your fellow lawyers you will always lean a little on the careful side. When those opportunities come, as they surely will, to harvest an advantage in a particular case at the cost of your long-range relationship with your fellow lawyers: Don't do it.

I come now to my final point. In a sense, it is the most important of all in achieving a proper fit of your professional activities within your broader whole existence and interests. It is a subject that we first discussed on that memorable day three years ago when we first met as a class in the Jesse Knight Building. It is a subject that has warranted and has received continual attention, discussion, and dialogue since that time, involving not only you but also your spouses.

The graduation of this class coincides with the centennial of our university and the bicentennial of our nation. I recently finished a novel by James Michener bearing the title *Centennial*. It is a fictional history of a Colorado community and surrounding areas since the beginning of time. A consistent theme that emerges from the events that are the subject of that novel is that at any given time in the development of our country, those who were fortunate enough to be present and participating labored under an assumption that the prevailing way of life and the circumstances that made it possible would last forever.

During the early 19th century, the rivers and streams of the Rocky Mountains abounded with beaver. There were literally millions of them. The trappers and traders who were the only white inhabitants of the area could not conceive of such a vast wilderness ever being useful for anything but a harvest ground for pelts.

A little farther east, and a little later in time, the historic treaty of Fort Laramie in 1851 assumed that the Great Plains would always be inhabited by buffalo. Since the land had no possible utility for any other purpose, the treaty confidently assured that the Great Plains would belong to the Indians for as long as the water flowed and as long as the grass still grew.

The pattern repeated itself as the buffalo gave way to the cattlemen, who in turn saw their great open-range empire broken up by the sod-busting farmer, armed with that curious new invention, barbed wire.

The continuing recurrence of the familiar pattern led me to contemplate how rewarding it would have been to have personally witnessed, for example, the annual gathering of the great northern and southern buffalo herds—sixty million of them—or to have been present at one of the raucous trader/trapper rendezvous during the early 1800s. Inevitably those who were witnesses to such events would have seen them in a different perspective if they had realized that they were part of our American heritage that would one day reach a stopping point and never be repeated.

But the main function of history is to give some guidance to the present and future, not just to satisfy curiosities about the past. In a very real sense, every case that you will work on as lawyers is unique. The savoring of those experiences need not be retrospective only.

The practice of law can be a much richer experience if at the time that you are working on each of these unique cases you will appreciate it at that time for what it is, for the societal and economic environment in which it arises, and for the contribution that it makes to the community in which you live and to your individual development as a lawyer. That kind of approach reaches beyond the professional experience.

I want to show you a picture. Some of you may remember that little face. I do too. The only place you can see that face today is in a picture. It is true that we still have a Wendy. But she's three and a half years older. Never again will there be opportunities to have and to love this Wendy at this stage of her existence, to share her experiences, and to contribute to her happiness. She's nine years old now. Pretty soon she'll be ten, and then when she's twice as old as she is now, she probably will be gone from our home. She also has brothers and sisters, and each new day brings a new opportunity for loving, for sharing, for understanding.

I have no greater hope for this class than that you will fully appreciate not only your professional opportunities at the time that they occur but also the individual, personal, and family opportunities.

Now I'm going to say something that I hadn't really planned to say but that I want to be the last words that you hear as a part of your official law school program. A dominant feature of your law school training has been to instruct you in the skills of skepticism. This has been a necessary part of your training as advocates. But I want you to hear one last time from me that although I value those skills as highly as anyone, and though I feel very strongly that the Law School must continue to give that kind of rigorous, intellectual training, there are absolutes in this world, and just as there is a place for skepticism, there is also a place where skepticism is as inappropriate as

it is unnecessary. I have serious doubts concerning the eternal verities of the Rule of Shelley's Case, the doctrine of prior restraint, the law of offer and acceptance, or even, as much as it pains me to say so, the Rule of Reason under the Sherman Act.

But I want you to know, my brothers and sisters, that there are eternal verities. I was not present on the spring day in 1820 when Joseph Smith saw the Father and the Son, nor was I present some nine years later when he and Oliver Cowdery had hands laid upon their heads and the Aaronic Priesthood was restored. But I want you to know with all of the surety of one who was not there at that time that it really happened and that those truths are far more important than anything that you ever learned in Law School, and I leave this with you in the name of Jesus Christ. Amen.

This convocation address was given to the charter class of the BYU Law School on April 23, 1976. Reprinted from the Clark Memorandum, Fall 1999, 2–7; a fuller version also published “Convocation 1976,” Utah Bar Journal, vol. 4, nos. 4–9, 36–42, Summer–Fall 1976 and “Convocation Address 1976,” in Speeches at the 1st Convocation of the J. Reuben Clark Law School, Brigham Young University, April 23, 1976, 3–8.

Rex E. Lee (1935–96) received his J.D. from the University of Chicago in 1963, clerked for Justice Byron R. White of the U.S. Supreme Court 1963–64, served as founding Dean of the J. Reuben Clark Law School 1976–81, Solicitor General of the United States 1981–85, and President of Brigham Young University 1989–95.