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John Paul Stevens

OPENING ASSEMBLY ADDRESS, AMERICAN BAR ASSOCIATION ANNUAL MEETING, ORLANDO, FLORIDA, AUGUST 3, 1996

HONORABLE JOHN PAUL STEVENS*

Supreme Court opinions are plagued with roman numerals, Capital Letters and sometimes even Arabic numerals to guide the reader in following the intricacies of a developing argument— and sometimes to enable a Justice to join all but Part III, C, 4 of the opinion—but since I have exhausted my quota of opinions for this Term—and will not in any event speak for a Court, or even a plurality this afternoon, I shall give you no such guidance. Instead, I shall say a few words about the interest in diversity and the unreliability of judicial predictions, offer some reflections on the adversary system, and conclude with a reference to an extraordinarily eloquent opinion. I shall preface these profound remarks by mentioning three of the many reasons why I am proud and happy to have the privilege of making the opening address at this August convention.

First, as the few members of the audience who have read my opinion in *Widmar v. Vincent*[1] already know, I have long admired the genius of Walt Disney. *Widmar* is one of the cases in which I have expressed concern about overly rigid applications of the Court's First Amendment rules prohibiting official discrimination among speakers on the basis of the content of their speech. In that case I questioned the validity of the Court's logical analysis because it might have the unfortunate consequence of prohibiting state universities from preferring Mickey Mouse cartoons over amateur performances of Hamlet when allocating scarce resources among competing extra-curricular activities. Surely the invitation from the American Bar Association to speak at this location

* Associate Justice, Supreme Court of the United States.
[1] 454 U.S. 263 (1981).

can fairly be interpreted as an endorsement of my less rigid First Amendment jurisprudence.

Second, I am tempted to construe the invitation as a consolation prize because I am one of the few former second-vice presidents of a major bar association who never became either first vice-president or president. Despite that frustration, I retain my firmly held views about the value and the importance of active participation in bar association work.

Association activities provide significant rewards, both tangible and intangible, to the individual lawyer, to the profession, and to the community at large. Although countless examples illustrate that point, I shall mention only one in which I was heavily involved—the screening of candidates for judicial office. In those jurisdictions that continue the most unwise practice of electing their judges—a practice that in my judgment is comparable to allowing football fans to elect the referees—an impartial appraisal of the integrity, the temperament, and the competence of the prospective judge is an essential guide to informed voting. Moreover, in jurisdictions where judges are appointed—either directly or indirectly by the leader of the dominant party—a careful screening by those in the best position to evaluate the nominee's professional qualifications is invaluable—not only as an aid to the selection of competent judges, but also—and this point is sometimes overlooked—because it provides the person with the appointment power with an acceptable reason for refusing to appoint unqualified candidates who have strong political credentials. On more than one occasion in the 1960's, Mayor Daley informally expressed his gratitude to officers of the Chicago Bar Association for providing him with a proper justification for refusing to endorse a political supporter who had earned the Mayor's patronage but was not qualified for judicial office.

Even though such a committee may on occasion misjudge the merit of a particular nominee, that is surely not a sufficient reason for condemning a practice that has repeatedly demonstrated its value. The invitation to speak to you today is thus gratifying because it gives me the opportunity to urge you to continue to offer the Attorney General of the United States your assistance in maintaining the high quality of the federal judiciary.

The third reason why the invitation from your President was especially welcome is that it was extended by Roberta Ramo. I

first met her in her office in Albuquerque about 15 years ago; although our paths have crossed only a few times since then—most recently when we both participated in the dedication of a courtroom named in honor of James Parsons, the first African-American to serve as a federal district judge—I have followed her career with some of the reactions of a Monday-morning quarterback whose team is on a winning streak. I thank her for her comments urging lawyers to speak out in defense of members of the judiciary who are subjected to uninformed and unfair criticism.

It is, moreover, a source of special pride that the first woman president of the American Bar Association invited me to open this Assembly. I congratulate her and I congratulate the Association for its introduction of an element of diversity into this esteemed office of national importance. As has been true of so many other "firsts," her performance in office has confirmed the validity of Chief Justice Burger's reasoning in *Reed v. Reed*.[2] A long and unbroken tradition of preferring males over females does not provide a rational basis for refusing to appoint a qualified woman to high office. Indeed, because I firmly believe that the interest in diversity is legitimate, such a tradition actually provides an added justification for selecting a superbly qualified female candidate.

In 1975 when my nomination to the Supreme Court was under consideration by the Senate Judiciary Committee, the National Organization of Women (NOW) vigorously opposed my confirmation for two main reasons: based on two or three court of appeals opinions that I had written, NOW predicted that I would not be an impartial judge in cases presenting gender discrimination issues; moreover, given the fact that the first 100 members of the Court had all been men, the organization believed that the interest in diversity would be served by appointing a female justice. I have persuaded myself that the fact that in 1996 the nation's foremost woman lawyer extended this invitation is evidence that NOW was inaccurate in 1975 when it predicted that I would be biased against the class that includes my wife, our five daughters, and our 12 granddaughters. The force of NOW's second objection, however, continues to be a subject of vigorous debate among litigators as well as political adversaries. What weight, if any,

[2] 404 U.S. 71 (1971).

should be given to the interest in diversity when evaluating the qualifications of candidates for office in either the public or the private sector of our society?

Although NOW's argument did not prevail in 1975, the interest in diversity may have played an important role in President Reagan's first two choices among three superbly qualified potential nominees to our Court: Sandra Day O'Connor, Antonin Scalia and Robert Bork. Given his record of public service, including his exceptional advocacy before the Court on behalf of the government as Solicitor General, the President's advisers might reasonably have concluded that Judge Bork possessed the strongest qualifications of the three. Nevertheless, fulfilling a campaign promise to appoint a woman to the Court if given the opportunity, President Reagan's first choice was Justice O'Connor. It is said that his second otherwise extremely difficult choice between Judges Bork and Scalia was simplified when he realized that he had an opportunity to appoint the first Italian-American justice. Even if the interest in diversity played a decisive role in both of those selections, subsequent history undeniably confirms that diversity concerns can be accommodated without sacrificing qualifications.

It is nevertheless ironic that two of those three superbly well qualified nominees were overwhelmingly endorsed by the Senate whereas the third was rejected. To the extent that Judge Bork's rejection rested on reason rather than false and misleading rhetoric, the irony is heightened because the supposed rational basis for the rejection was nothing more than a prediction that Judge Bork would probably vote in important cases exactly as the Senators might have predicted that Judge Scalia would vote when they unanimously confirmed him.

There is, of course, a vast difference between predictions and actual performance. Harry Truman demonstrates the point. The prediction that Governor Dewey would win the 1948 presidential election by a landslide is familiar history. I have an even more vivid memory of the weeks following the death of Franklin Roosevelt when there was great distress concerning the transfer of power to Truman, a supposedly unqualified leader. In the ensuing years, a remarkable series of momentous decisions demonstrated the fallibility of the pessimistic predictions about Truman's ability to lead the nation.

My experience as a judge has enlightened me about the fallibility of predictions in another context: anticipating how judges will resolve novel legal issues. The doctrine of stare decisis and the clarity of the basic fabric of our law makes predictions about the outcome of routine cases reasonably reliable. The efficient operation of our complex economy is heavily dependent on the consistent enforcement of rules that are definite and certain. A major part of the practice of law involves prediction that is generally accurate and reliable. Similarly, in well over 90% of the cases that our Court is asked to review, our decision to deny certiorari is unanimous. Indeed, even in the relatively few cases in which we heard argument on the merits this Term, our judgment was unanimous about 50% of the time.

Nevertheless, both in practice and as a judge I have repeatedly been surprised by the number of occasions when it is necessary to form a judgment about an unresolved legal question. I must also confess that my own predictions—particularly about how my colleagues will vote in specific cases—are often erroneous. One reason predictions are unreliable is that lawyers are capable of persuading judges to change their minds. I cannot tell you how often a case seemed perfectly clear when I finished reading the blue brief, equally clear the other way after reading the red brief, and back again to the petitioner's side after the yellow brief and the advocates' oral arguments were digested.

When I went through the confirmation process in 1975, the constitutionality of the death penalty was an open question. Because the Court had been closely divided in the *Furman*[3] case, I anticipated that some Senators might ask me to state my views about the issue. Never having sat on a capital case, any such views would have been tentative and potentially misleading because I knew that competent counsel might raise arguments that I had not considered. A prediction could have been construed as the equivalent of a commitment, which no judge could properly make without first reading the briefs and hearing argument. I therefore decided to decline to answer such questions and to explain my refusal by referring to a novel case in which I had participated as a circuit judge in 1972. Having waited in vain for the Senators to

[3] Furman v. Georgia, 408 U.S. 238 (1972).

ask me the dreaded question, I shall now share my answer with you.

The 1972 case arose out of the designation, in 1970, of a Republican Secretary of State in Illinois. According to the allegations of the complaint, the new Secretary promptly discharged all of the non-civil service employees who had been hired by his Democratic predecessor. The plaintiffs—who had held jobs as janitors, clerical workers, license examiners and the like—alleged that they had been discharged because they refused to become Republicans and to support the Republican party. Because the case was dismissed in advance of trial, the appeal presented the legal question whether such non-policy making employees could be discharged for refusing to transfer their political allegiance from one political party to another.

When I first looked at the papers, I was happy to have such an easy case to decide. Like both of my colleagues on the panel, I thought it obvious that patronage practices that had long been entrenched in American history must be constitutional. If a Senator had asked me to predict my vote in such a case before studying the briefs and hearing the argument, I might well have characterized the issue as "frivolous." Nevertheless, argument and study of the First Amendment cases cited by the Court in *Perry v. Sindermann*,[4] convinced me that the plaintiffs had alleged an impermissible basis for their discharge. I concluded my rather laborious opinion—which neither of my colleagues joined—by observing that even though "the patronage system is defended in the name of democratic tradition, its paternalistic impact on the political process is actually at war with the deeper traditions of democracy embodied in the First Amendment."[5] The separate concurrence written by Judge Campbell made it perfectly clear that he also had not expected to appraise the case as he ultimately did. Thus, while I assumed that Senators who were far more familiar with the patronage system than I might well disagree with the holding in the case, I thought it might persuade them that a judge's pre-argument predictions are sufficiently unreliable to be inadmissible in confirmation hearings.

[4] 408 U.S. 593 (1972).

[5] Illinois State Employees Union v. Lewis, 473 F.2d 561, 576 (7th Cir. 1972).

The opinions in four later Supreme Court cases—each raising a question similar to the one that Judge Campbell and I confronted on the Seventh Circuit—also support that proposition. In 1976, in *Elrod v. Burns*,[6] the Court upheld a similar complaint arising out of the Cook County Sheriff's patronage practices. Justice Powell, joined by Chief Justice Burger and then-Justice Rehnquist, dissented. In 1980, in *Branti v. Finkel*,[7] the Court held that two assistant public defenders were protected from discharge because of their political beliefs. Although Justices Powell and Rehnquist again dissented, Chief Justice Burger joined the majority, notwithstanding his earlier vote in *Elrod*. Ten years later, the Court held in *Rutan v. Republican Party of Illinois*,[8] that the rule of *Elrod* and *Branti* applied not only to discharges, but also to promotion and hiring decisions. Chief Justice Rehnquist, as well as Justices O'Connor and Kennedy, joined Justice Scalia's dissent. In the Term just ended, the Court considered whether the petitioner in *O'Hare Truck Serv. v. City of Northlake*[9] stated a cause of action by alleging that the Mayor of Northlake, Illinois, removed his company from a list of firms eligible to perform towing services at the city's request because he had refused to contribute to the mayor's election campaign. In an opinion authored by Justice Kennedy and joined by Chief Justice Rehnquist and Justice O'Connor, the Court held that the rule of *Elrod* and *Branti* applies to independent contractors.

In each of these cases the decision of the Court was faithful to the law as it had previously developed. However, I cite them—not for that reason—but because they demonstrate the difference between prediction and performance. While I cannot speak for any of my colleagues, it seems likely that just as Judge Campbell and I were persuaded to change our minds in 1972, pre-argument predictions about how Chief Justice Burger would vote in *Branti*, or how Chief Justice Rehnquist and Justices O'Connor and Kennedy would vote in the *City of Northlake* case, would have been far less significant than knowledge that they would analyze the cases with an open mind and with respect for the law as it existed at the time of decision. I remain convinced that predictions about how Judge

[6] 427 U.S. 347 (1976).
[7] 445 U.S. 507 (1980).
[8] 497 U.S. 62 (1990).
[9] 116 S. Ct. 2353 (1996).

Bork might have voted in specific cases—even predictions that he might have made himself—are less relevant indicators of his qualification for service on our Court than his record as an advocate, a judge, a scholar, and a citizen.

The patronage cases also implicate the interest in diversity which I mentioned a few moments ago. In each case, the Court protected the employee or the independent contractor from an official sanction imposed because of his refusal to endorse the views of a representative of the majority. The right to adhere to unpopular convictions warrants constitutional protection not only because of our respect for individual freedom but also because diversity in debate, in research, in virtually every use of our mental faculties, tends to advance our quest for the truth. Indeed, our adversary system of justice is premised on the assumption that diverse interests will engender the investigation, the research, the arguments and the counter-arguments that will produce the best resolution of disputed questions of law or fact.

The patronage cases illustrate one of the familiar benefits of our adversary system—the capacity of reasoned argument to influence the decisions of judges. The same benefit is available when the power of decision is entrusted to a jury selected from the diverse components of our society. The adversary nature of the proceeding provides lawyers with the incentive to develop the evidence and the arguments that inform the decision. There are, of course, many cases in which competent counsel promptly recognizes the value of settlement. But there are also a surprising number in which what begins as nothing more than a good faith attempt to provide adequate representation in defense of an apparently hopeless cause leads, first, to the advocate's sincere conviction that justice is on her side, and second, to a similar judgment by a judge or jury. Our competitive adversary system is admittedly imperfect, but it is surely the method most likely to produce a fair resolution—or at least a resolution that will be accepted as fair—for the host of controversies that inevitably arise in a complex society.

Even the best can usually be made better. The preamble to our Constitution enjoins us constantly to strive for a "more perfect" Union. Citizens who join an honored profession—those who become officers of our courts and, more narrowly, those who volunteer to serve in associations dedicated to the improvement of their

profession—implicitly promise to strive for a "more perfect" system of administering justice. Of the many possible suggestions for improving our adversary system that have occurred to me, I would like to comment briefly on four subjects that affect the quality of the lawyer's advocacy and the quality of judicial decisions.

The first two subjects are really nothing more than unrequested and probably unnecessary advice to the young lawyers in the audience. I have long held the view that a lawyer's most important asset is her reputation for integrity. Few lawyers would dispute—in the abstract—the wisdom of maintaining your integrity while advocating on behalf of your client. What is often not recognized, however, is that the temptations to bend ethical standards in the practice of law are frequent and attractive. For example, in responding to discovery you may find that a requested file contains an unknown document that appears devastating to your client's interests. Whenever the temptation to overlook such a document arises, I urge you to reflect on the value of your reputation in the legal community and on your oath as an officer of the courts.

In the same vein, let me remind you how often the paths of lawyers cross and recross over and over again. Even though the profession has grown immensely and many of you practice in more than one community, I venture the prediction—and this is a reliable prediction—that you will encounter one another far more often than you might expect. Lawyers have long memories, particularly about the conduct of colleagues or adversaries. My favorable impression of Thurgood Marshall was first formed when, as a law clerk, I watched him argue in the Supreme Court; it was confirmed when he was an adversary in a litigated matter in the 1960's; and reconfirmed when I was privileged to become his friend and colleague in recent years. I have an equally vivid memory of my first meeting with Byron White at Pearl Harbor; of reading, in 1947, memoranda Byron had written as a law clerk to Chief Justice Vinson; of an interview with him when he was Deputy Attorney General; and of course of our work together on the Court.

I recognize that these examples are not typical, but they illustrate the point that lawyers' contacts with one another are often memorable. Virtually everything you do in your professional capacity becomes an indelible part of your reputation. An advocate who does not command the confidence of the judge bears a much

heavier burden of persuasion than one who never misstates either the facts or the law. Moreover, litigation is far more difficult and time-consuming when opposing counsel do not trust one another. Bluffing may be worthwhile at the poker table; in serious negotiation and in litigation it usually does nothing more than cast an enduring shadow on the advocate's credibility.

Second, let me remind you of the importance of civility. A polite rejection of a settlement proposal can be just as firm as a show of indignation, and a succinct objection as telling as an unnecessary harangue. We are all familiar with the aphorism that an attorney should emphasize the facts when they are with her, concentrate on the law when it is favorable, and make lots of noise when both the facts and the law support her opponent. Perhaps we judges sometimes leap to conclusions more promptly than we should, but I can assure you that most judges regard the incivility of counsel as a confession that they would rather not discuss the relevant facts or the controlling law. Courtesy is an essential element of effective advocacy.

My final two reflections concern structural aspects of our adversary system. I wholeheartedly endorse the Association's efforts to make competent legal assistance available to those who do not have the financial ability to employ counsel of their choice. An effective adversary system requires adequate representation for both parties to the controversy. The unfortunate consequences of an imbalance in the system are perhaps most dramatically illustrated by the cases in which the innocence of death row inmates has been established in protracted post-conviction proceedings.

Finally, we must maintain and improve the quality of our judges. As I have already suggested, the screening of judicial candidates by those most familiar with the character of their reputations is an indispensable part of the selection process. In my judgment, the Bar should work for a much more important change in the selection process in those jurisdictions in which judges are elected and must stand for reelection. Persons who undertake the task of administering justice impartially should not be required—indeed, they should not be permitted—to finance campaigns or to curry the favor of voters by making predictions or promises about how they will decide cases before they have heard any evidence or argument. A campaign promise to "be tough on crime," or to "enforce the death penalty," is evidence of bias that should disqualify

a candidate from sitting in criminal cases. Moreover, making the retention of judicial office dependent on the popularity of the judge inevitably affects the decisional process in high visibility cases, no matter how competent and how conscientious the judge may be. My good friend Justice Ben Overton of the Florida Supreme Court is quoted as saying that it was "never contemplated that the individual who has to protect our individual rights would have to consider what decision would produce the most votes."[10]

My conviction that the practice of electing judges is profoundly unwise is one that I have held throughout my period of service as a federal judge.[11] I must confess, however, that my review of capital cases has reinforced that conviction because the emotional impact of those cases gives rise to a special risk of error. The recent development of reliable scientific evidentiary methods has made it possible to establish conclusively that a disturbing number of persons who had been sentenced to death were actually innocent. The fact that our adversary system has misfired in such cases, coupled with the extraordinary burden such litigation imposes on both lawyers and judges, makes it appropriate to raise the question whether either the deterrent value of the death penalty or its therapeutic effect on a community outraged by vicious crime, justifies its continued popular support. Our friends in Western Europe are unwilling to assume the risk of injustice associated with the execution of an innocent defendant. Although the question was not raised at my confirmation hearings, before and after those hearings I have pondered, but have never been able to explain, why our country must assume that appalling risk.

Let me conclude with a reference to an opinion by Justice Jackson, who spoke for a majority on a politically-charged issue only because three of his colleagues had been persuaded to change the position they had previously endorsed. In 1940, the Court upheld the authority of a Pennsylvania school district to expel two children for refusing to salute the national flag as part of a daily school exercise.[12] Justices Black, Douglas and Murphy joined Jus-

[10] *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 814 (1995).

[11] *See* John Paul Stevens, *The Office of an Office*, CBA REC., 276, 276-85 (May/June 1974).

[12] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

tice Frankfurter's majority opinion in that case. In response to the decision, West Virginia enacted a statute that not only required expulsion of students who refused to salute the flag, but also authorized criminal sanctions against their parents.[13] Jehovah's witnesses, whose children had been expelled because they adhered to their faith when confronted with the choice, sought an injunction against enforcement of the statute. As you know, the Court granted them relief. Justice Jackson's opinion, which Justices Black, Douglas and Murphy *joined*, is one of the shining stars of our First Amendment jurisprudence. I have always been moved by these sentences which so vividly identify the difference between a tolerant society and others in which religious strife is so prevalent. He wrote:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.
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> But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
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> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[14]

[13] West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
[14] *Id.* at 638-42.