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Keynote Address: Protecting the Pillars of Our Legal System

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REMARKS

THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW
FRIDAY, NOVEMBER 18, 2011

**KEYNOTE ADDRESS:
PROTECTING THE PILLARS OF OUR LEGAL SYSTEM**

Bernard W. Nussbaum

Thank you Dean Blaze for those kind words.

I would also like to express my appreciation to Wyc and Lynn Orr for sponsoring this lecture series and for all the good work they do. Additionally, I would also like to pay tribute to my friend, Todd Campbell, a distinguished graduate of this law school, who is now serving as Chief Judge of the Middle District of Tennessee. He could not be here today, but I know we share happy memories. Judge Campbell and I worked in the White House together in the early years of the Clinton Administration — he was counsel to the Vice President and I was counsel to the President. To put it mildly, there is sometimes internal competition in the White House between a President's staff and a Vice President's staff, but there was none between the two counsels' offices. And one of the great things President Clinton did in 1995 was to nominate Judge Campbell to the bench. He has had a most distinguished career.

Let me say that I am also honored to follow those other Lions of the Bar who have given this lecture — Jim Neal, Bobby Lee Cook, Fred Bartlit and James Brosnahan — all very distinguished lawyers. But I must tell you that compared to them I feel like a young lion, perhaps even a cub. But I am not really that young, and late in my career I have begun to appreciate a simple thing. It's not a specific case, nor a particular institution, nor [a particular] client. It is true, that some of the things I have been fortunate to do

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have been quite exciting. It's hard to describe the feeling of walking into the West Wing as White House Counsel to work with the President on various issues.

There is a similar rush of energy every time you walk into a courtroom — after a lot of pretrial preparation — ready to fight for your client, when his life, his career, or the life of his company is on the line. And, of course, it's hard to capture in a few words the experience of working for a committee of the House of Representatives considering the impeachment of a President of the United States, which I was privileged to do in 1974.

But more than any one of these experiences, one of the things I now appreciate is the blessing of *perspective*. It comes with age.

I have seen the highs and lows of our legal system — and I continue to marvel at its importance and its value. It is easy to read about attacks on lawyers in the papers, or to see dramatic depictions (for better or worse) of the legal profession in movies or television, and to become, well, cynical. I'm sure there were times during law school when you wondered what you were getting yourselves into.

Well, I'm here to tell you that, from my perspective, you could not be entering a more noble field — and your work as new lawyers will be more important than ever to preserve the strengths of our legal system, to be the champion for those, rich and poor, white and black, who need the protection of the law. The legal profession today is more open and more vibrant than it has ever been. There are all sorts of opportunities to do good and to do well. So, in many ways, you are quite fortunate to soon be entering the world of law.

But I am concerned about certain disturbing trends I see, trends that will demand your attention as you enter the legal profession. In recent years, three pillars of our legal system have come under assault.

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1. The independence of attorneys is in peril, as the attorney-client relationship is being steadily eroded by attacks on the attorney-client privilege;
2. The right to counsel, for those unable to afford counsel, is at risk;
3. And our judges — in our state *and* federal courts — have been treated poorly by other branches of government on the issue of adequate judicial compensation, demeaning and demoralizing the Judiciary.

I want to briefly discuss these trends.

I will tell you how I have tried to respond — and how important it is for you to join this cause to defend the profession you are about to enter.

I. Attorney Independence: Attacks on the Privilege

Criticism of lawyers in popular culture is nothing new. Shakespeare and Dickens reviled lawyers in their famous works. And lawyers have been the butt of jokes for as long as there have been lawyers.

What is new, however, and merits our concern, is the transformation of this anti-lawyer sentiment into a new brand of attack on lawyers and their legitimate practices in representing their clients — particularly when a client, or a cause, is unpopular, or subject to political attack.

At first blush, this problem might seem to be limited to my former line of work in the White House. And it is, indeed, a problem that any White House Counsel must face (as some of my successors have learned)-or for that matter, any other lawyer representing a public official. But the problem is not so confined. It has spilled over into the private arena. And it will continue to do so.

I am worried, in particular, about the attack on the attorney-client privilege. The oldest of the privileges, the

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attorney-client privilege protects communications between lawyers and their clients from being divulged to others.

The purpose, of course, is to encourage full and frank discussions between lawyers and their clients — so a lawyer is in a position to adequately defend a client. But that purpose is undermined unless there is a guarantee of confidentiality. And in recent years, this guarantee has, in fact, been undermined for government attorneys and for private attorneys. To some extent, it is our courts that have failed to protect the role of the lawyer.

Several federal appeal courts have ruled, for example, that there is no attorney-client privilege protecting the advice a White House Counsel gives to the President, at least in connection with a possible criminal investigation. That legal advice must be disclosed. Why? Because White House lawyers, and other government lawyers, ultimately owe a so-called *duty to the public*.

This rationale — while rhetorically satisfying — is not sound. All lawyers, whether in the public or private sector, take an oath to uphold the Constitution of the United States. All attorneys must promise to follow the law as a requisite for admission to the Bar. All lawyers are officers of the court. And all clients, private or public, are expected to follow the law.

At least one federal appeals court, the Second Circuit, has wisely pushed back. It acknowledged that government lawyers are public servants and [that] there is a public interest in ensuring that grand juries collect all relevant information.¹ But, unlike its sister circuits, it found that objective outweighed by the public interest in having state officials receive and act upon the best available legal advice.

In fact, the Second Circuit noted, the rationale for the attorney-client privilege applies with "special force" in government, because officials must be encouraged to seek

¹ *In re Grand Jury Investigation*, 399 F.3d 527, 534 (2d Cir. 2005).

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out and receive fully informed legal advice while conducting the public's business.² But this issue remains unresolved as there is a split among our federal courts — and it is a dangerous one.

The decisions eviscerating the attorney-client privilege rest, I think, ultimately on the fundamental misunderstanding of the appropriate role and value of lawyers. And this threat is not limited to government attorneys. Just as courts limiting the privilege in government have focused on duties to the public, it's not difficult to see courts applying this rationale about a “duty to the public” to the private commercial contest.

After all, business entities, like government ones, have many constituencies, including public ones. The Supreme Court has hailed the “public watchdog” function of *accountants* in limiting protections of the confidentiality of their work product.³

So lawyers in the private bar face this threat, too. Take the recent tobacco wars, for example. As part of the battle being waged against the unpopular tobacco industry, tobacco companies and their lawyers have been forced to divulge thousands of privileged documents.

Apart from the tobacco wars, prosecutors have regularly required business entities to waive the attorney-client privilege if they sought leniency from the government. A “culture of waiver” took hold where prosecutors insisted on companies waiving their privilege as a matter of course, or they were threatened with indictment. Believe me, an indictment alone — much less a criminal conviction — can destroy a business enterprise.

One commentator has observed these trends could lead to “the complete elimination of the attorney-client

² *Id.*

³ *United States v. Arthur Young & Co.*, 465 U.S. 805, 818 (1984).

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privilege in the corporate context.”⁴ If that happens — if attorney-client privilege in the private context is eroded by a so-called “public” duty — it will have a serious negative effect on the quality of legal services provided to individuals and corporations in this country.

By chilling candor and openness between a lawyer and a client, erosion of the attorney-client privilege will undermine nothing less than the independence of our lawyers in the public and private sectors. It will undermine the rule of law.

For — and this is my basic point — make no mistake about it, compliance with law in a country of 300 million is *not*, in the first instance, dependent on prosecutors, on courts, on judges — it is dependent upon honest lawyers giving candid, knowledgeable advice to clients. And that cannot be achieved without a level of trust and confidence between lawyer and client.

To interfere with that relationship — to break down the bond between lawyers and clients — to tear away the veil of confidentiality, which is necessary to induce candor and openness — undermines law enforcement. It undermines the rule of law. And that is why it must be resisted.

Let me turn to another issue.

II. Judicial Pay

I am also concerned about the terrible and growing disparity between judicial salaries and the compensation of lawyers in private practice. I have a particular interest in this matter, because for the last four years I have been representing the New York State Judiciary on this issue. Despite heroic efforts by our former Chief Judge in New York, Judith Kaye, and her successor Jonathan Lippman, to

⁴ Paul R. Rice, *How the Tobacco Company Industry Lost Its Attorney-Client Privilege*, LEGAL TIMES, May 4, 1998.

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have judicial pay raised to an adequate level, the dispute resulted in litigation.

We, on behalf of the judges, were forced to sue the Governor and the Legislature.⁵ You see, judicial salaries in New York have been frozen for over a decade — twelve years in fact — resulting in the diminution of their compensation by about forty percent, in real terms, because of inflation — while the salaries of virtually all other state employees were raised by that amount to keep them even with inflation.

As a result, New York judges, who were once among the highest paid in the country, went to being the lowest paid in the country, taking into account the cost of living. They went from number one to number fifty.

This growing disparity between judicial compensation and the private sector is nothing less than an assault on the legal profession and on our system of justice. And ultimately it will have an impact on the quality of the bench and the rule of law. And it was not always this way.

In New York, for example, in 1909, a State Trial Judge was paid \$17,000 a year. In 1935, in the middle of the depression, that Judge earned \$25,000 a year. Both these amounts are equivalent to well more than \$400,000 a year in today's dollars. In 1935, a senior partner at a successful New York law firm made about \$25,000 a year. A few made more, some made less. But parity is the point — judges had parity with senior partners.

Today we know that judges, state and federal, not only do not have parity with senior partners — they do not have parity with first year associates. They do not have parity with their own law clerks, who leave to become associates in law firms in metropolitan areas.

To tie judicial salaries to executive or legislative salaries, as is normally done today in federal and state

⁵ *Maron v. Silver*, 925 N.E.2d 899 (N.Y. 2010); *Chief Judge of N.Y. v. Governor of N.Y.*, 887 N.Y.S.2d 772 (Sup. 2009).

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governments, is sheer folly. As we all know, executive branch officials — especially White House counsels — do not have lifetime jobs. Individuals in those positions have the option and ability, which they often exercise, to step into the more lucrative private world. Also, legislators can and do earn outside income while in office.

None of this, of course, is true for judges. A federal judge is appointed for life; a state judge is elected for a term of many years, and they are expected to serve out those terms. That is their sole job. That is, with minor exceptions, their sole income. That tenure gives them strength and independence. In the long run, that strength, that independence, will be eaten away if judges are not fairly compensated.

What's more, this practice of linking judicial salaries to other issues is not only folly; it is unconstitutional. Indeed, this is one of the major arguments we made on behalf of the Chief Judge and our State Judiciary. And, after hearings in the trial and intermediate appellate courts, the New York Court of Appeals last year vindicated our position. We won.

For the first time anywhere in the country, our state's highest court declared that holding judicial pay hostage to unrelated political priorities, like legislative salary raises, or whatever, is unconstitutional. It violates the separation of powers in our State Constitution.

The Court also declared, for the first time, that the separation of powers in our Constitution requires that judicial compensation must be adequate. Otherwise the independence of the judiciary as a co-equal branch of government is undermined.

Our Court of Appeals then left it to the other branches of government to remedy this situation — saying, that if they did not do so, we could return to court. This was a significant victory for the judiciary in the State of New York and, indeed, for all our state courts. That decision led

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our State Legislature, last December, to pass, and the Governor to sign, a law creating an independent Judicial Pay Commission to determine, on an objective, non-partisan basis, what the salaries of judges shall be in the future.

And that is what the Commission did a few months ago — it raised state judicial salaries in New York to the federal level, from \$136,700 to \$174,000, to go into effect over a period of two and one-half years starting next April. But this battle is not over. The issue remains front and center in many states across the country and in our federal courts. The demeaning of our courts in this manner has had, and will continue to have, a negative impact on our system of justice until it is corrected.

And that situation is in no one's interest — lawyers, judges, or the public.

III. The Right to Counsel

My final concern — again part of the attack on our legal system — is the refusal of government to provide those who cannot afford it with a meaningful right to counsel.

My friend Evan Davis, when he was president of the New York City Bar Association years ago, wrote a column addressed to the then-Governor of New York. The title of the column was *George Pataki: Raise Assigned Counsel Rates Now*. The column began with the following words:

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“What would the visitor from Mars say about a society where 1) top business lawyers have billing rates well in excess of \$500 per hour, 2) billing rates for normal individual work range well in excess of \$200 per hour, yet 3) lawyers assigned to represent indigent clients who have a right to counsel under the law are fixed by the State at \$25 per hour for out-of-court time and \$40 for in-court time?

The visitor from Mars would say that in that society the right to counsel is a cruel joke that exists on paper only. With respect to the State of New York, the visitor from Mars would be absolutely right.”⁶

That is what Evan wrote. He was right then — and he is right now. After litigation — yes, again it took *litigation* — the reimbursement figures for assigned counsel were raised somewhat. But they are still inadequate. They are still way below typical billing rates in private practice. The gap in fact has grown larger.

That is why it is so important [that] as lawyers, we not only contribute to causes that help raise funds for meaningful representation — but also that we help to provide it, and we fight for it. I need not tell you that it is an essential principle of our society that *all* are entitled to adequate legal representation.

⁶ Evan A. Davis, Governor Pataki: Raise Assigned Counsel Rates Now, 44th Street Notes (ABCNY), Jan. 2001.

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All are entitled to equal justice under law — as is emblazoned on the façade of the U.S. Supreme Court — and equal opportunity for justice is only possible with real, meaningful legal representation, with lawyers, fairly compensated, doing their duty.

IV. Conclusion

Each of the battles I have mentioned is not easy. I've tried to give you a sense of these issues, but they are far from simple when you are in the trenches.

Take, for example, the attorney-client privilege that I discussed at the beginning of these remarks. Going back to my own experience in Washington, it became fashionable for a time to assert that the “Counsel to the President” is really “Counsel to the Presidency” — that I should have dedicated myself to the office, to the institution, to the White House, rather than to the person.

In part, I understand that view. My role did include defending the institutional interests of all Presidents — even Republicans. And I agree that there are some purely personal matters that should be handled by a private attorney.

But I also know that the Counsel's responsibility to the institution of the Presidency begins with advising the particular individual in that office. You do not give advice to a building or an office. You can only advise its current occupant, who is a human being.

That human being — in his or her official capacity — *is the client* to whom you are bound by an ethical duty. And that duty includes the duty to preserve his confidences, to represent him zealously, and to help him achieve his legitimate objectives.

These are duties that a lawyer has in representing any client. They cannot be compromised because the client happens to be President of the United States or some other

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government official. If a Counsel to the President is forced to diverge too far from the role of a lawyer generally, we will have weakened both the Office of Counsel and the Office of President.

And let me be clear, I am not saying presidential power or judicial power must reign supreme over the Legislature. I was very much on the other side of the line from both of those institutions in 1974, as a member of the staff of the House Judiciary Committee, conducting the impeachment inquiry involving President Nixon.

My views are not based on defending one branch of government over another. My views arise from where I started this morning — from my perspective on our legal system and its importance in our society. And the vital role that lawyers play. To me, it is all of a piece — these attacks on the independence of lawyers, on judges, and on those who provide legal help for those who cannot afford it.

None of these are simple issues, but they represent threats to our legal system. As such, they represent a threat to the Rule of Law. That is why we as lawyers have to respond; that is why we have to resist; that is why we have to fight back.

We can never rest.

Enough. Enough talk about battles on this wonderful day. You have before you many exciting days in courts, in boardrooms, in the halls of government.

Regardless of what area of the law you choose to enter, you will have the privilege of using your skills to fight for others, to fight for things you believe in.

And I do hope, as you become lawyers, you will remember it remains a noble profession — and you will work to defend it, at every turn, during the great careers I know you all have ahead of you.

I wish you the best.

Thank you.

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