

Now You're Thinking Like a Lawyer

by Michael Kinsley

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The popularity of legal careers requires no elaborate explanation. Lawyers run the country.

As a matter of fact, almost every major political reform of the past decade—with the significant exception of no-fault auto insurance—has had the important side effect of increasing business for lawyers. The Tax Reform Act of 1969 is known in professional circles as the “lawyers and accountants relief act,” because of the wide areas of complicated litigation it opened up. The same could be said of the Freedom of Information Act, the campaign spending reform act, and the acts creating new regulatory commissions, such as the Environmental Protection Agency.

It would be absurd to suspect that this common feature of such disparate reforms—all associated with what has come to be called the “public interest law movement”—is the result of a conspiracy led by Ralph Nader and Senator John Tunney, secretly financed by the American Bar Association. But it would be equally absurd to write it off as a coincidence. It is actually the result, not of any overt conspiracy but of a process taught at all law schools across the country and known as “thinking like a lawyer.” Thinking like a lawyer means believing that legal tools—primarily the adversary system—are ideally suited to solving all problems.

What the adversary system does is pit two sides against one another, with self-interest motivating their lawyers less toward the pursuit of truth and justice than toward the pursuit of victory. Between the lawyers stands a judge, who in the dominant tradition of American law is not a seeker after truth or justice either but rather a neutral referee seeking only to ensure that combatants obey the rules of fair play.

It is possible for disputes to be handled otherwise—by judges who do seek justice and truth (as they do in England in at least some cases), who keep lawyers out of their courtrooms and take responsibility themselves for protecting each party's rights (as they do in a few American small claims courts). It is also possible for disputes to be handled by mediators who seek solutions that are fair to both sides and that will enable the disputants to go forward as friends rather than enemies.

But lawyers are doing very little to encourage any solution of disputes outside the adversary system.

When the Los Angeles County Bar Association attempted to provide arbitration of disputes between attorneys and their clients, the lawyers refused arbitration more than half the time.

Death brings out what would seem to be an inevitable need for lawyers. You need a lawyer when you make a will and your family may need a lawyer when you die. But even these real needs are not as great as the legal profession would have you believe. Most wills, for example, are almost all “boiler plate”—chunks of colorful but standardized verbiage required, where simple declarative sentences might otherwise do, to satisfy the voodooistic needs of the legal profession. Determining which chunks of boiler plate you need is usually a simple process that could be done quite cheaply by walk-in clinics. As for probate, Wisconsin is the first state in the country with a do-it-yourself probate law. It permits you to settle your parents' or your spouse's estate without paying thousands of dollars to lawyers, as you do in most states. Naturally it was opposed by the state bar.

The other occasions when everyman needs a lawyer are divorce and auto accidents. Both can be solved by the no-fault concept. Under the adversary concept in divorce cases, every Othello not only must suffer an Iago but must pay him for his services. Desdemona must do the same. Under no-fault, simple forms are filed with the court and a divorce may be obtained without involving the parties in life-long hatred of each other.

The auto accident is the most absurd situation of all for adversary proceedings. Remember the word is “accident.” No one did it deliberately or recklessly—if someone did, there would be criminal prosecution. In the typical “accident” case, each party is trying to prove the other was at fault when no one was really at fault. This involves both parties in lying, which in turn makes them hate the other guy even more. In no case does our righteous anger against the lies of another mount to such heights as when we are lying, too.

This particular charm of the adversary system was well illustrated in a recent corporations class at Harvard Law School. The professor proposed a “hypothetical”: Two men want to buy a photography business owned by a third man. Although they have not settled on the exact price, all three are amicably agreed on the general contours of the deal. They come to you to write up a contract for them. What's the first thing you should do? The answer: send

WHO'S WHO

The appointment of **John Tower** as secretary of defense and of **Brent Scowcroft** as national security adviser are said to reflect **George Bush's** gratitude for their incuriosity as members of the Tower Commission about his role in the Iran-contra affair. The commission's report let Bush off the hook even though, as **Jane Mayer** and **Doyle McManus** point out in *Landslide*, the book they wrote about the affair, "He had the entire deal laid before him in clear unsparing terms but . . . raised no objections."

Another Bush appointment that may have been a reward for incuriosity is that of **Robert Gates** as deputy national security adviser. When he testified about his response, when he was a deputy director of the CIA, to a warning from a subordinate about Iran-contra, he said his reaction was that he "didn't want to hear any more about it." . . .

One person who could implicate George Bush in Iran-contra, **Donald Gregg**, his national security adviser during the vice presidency, is being dispatched as far away from potential investigators as possible, half-way around the world in fact, as ambassador to South Korea . . .

Did you know that there is a senator who likes to be whipped? No, not politically, but in S&M. Or that a Reagan ambassador kept her lesbian lover stashed away in the embassy? The reporters who know about these cases have presumably—and we think properly—decided not to disclose them . . .

A similar decision was apparently made by the press in the case of the rumored long-term romance between **Jennifer Fitzgerald**, who has just been appointed deputy chief of protocol, and George Bush. This may become known as the One Affair Rule. One affair, the media must reason, is not that bad in an era of compulsive sex addicts like **Gary Hart**. We accept this view, but regret that the same standards are not applied to **Henry Cisneros**, the liberal mayor of San Antonio whose one known affair was disclosed by the press last fall, and that a fear that he would be treated like Cisneros instead of Bush, led, as we reported last year, one extremely capable Democratic senator not to run for president.

What worries veteran observers here much more than whether George Bush had an affair with Fitzgerald is his overreaction to leaks. They recall the trouble that **Richard Nixon** got into with his "plumbers"—remember they were organized to halt leaks—and are dismayed by a report in *The Washington Post* that Bush "went bananas" over a harmless leak. A president will learn more from leaks than he is harmed by them, and, except for those that involve genuine military and intelligence

secrets, it is foolish to fret about them . . .

Unfortunately, **Lauro Cavazos**, the secretary of education, seems to have the same problem as Bush. His chief of staff, **Bill Phillips**, is said by a *Washington Times* source to have gone on a rampage about leaks. "He's screaming at people, threatening to monitor phone calls." To the best of our knowledge, there are no secret submarine plans in the offices of the Department of Education . . .

It appears that **John Sununu** is being surrounded. Three of his top aides are Bush loyalists, unlike **Donald Regan's** "mice," who were dedicated to Regan, not Reagan . . .

In—White House: President—**George Bush**. Vice President—**Dan Quayle**. Cabinet secretary—**David Q. Bates**. Staff secretary—**James A. Cicconi**. Deputy National Security Adviser—**Robert M. Gates**. Chief of Staff for the Vice President—**Bill Kristol**. Chief of Protocol—**Joseph V. Reed Jr.**
State: Deputy Secretary—**Lawrence S. Eagleburger**. Assistant Secretary for Public Affairs—**Margaret D. Tutwiler**. Assistant Secretary for Legislative Affairs—**Janet G. Mullins**. Assistant Secretary for East Asian and Pacific Affairs—**James Lilley**. Ambassador to West Germany—**Vernon A. Walters**. Ambassador to Britain—**Henry E. Catto**. Ambassador to South Korea—**Donald P. Gregg**. Counselor—**Robert B. Zoellick**. Director of Policy Planning Staff—**Dennis B. Ross**.

Out—White House: President—**Ronald W. Reagan**.

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