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REMARKS ON DEALING WITH CONFLICT IN THE COURTS AND IN THE MEDIA: DEDICATION OF THE MARTIN H. LEVIN ADVOCACY CENTER COURTROOM

David Westin[*]

I am very pleased to be here for the dedication of this fine moot courtroom given by Fredric Levin in honor of his son, Martin. It is a magnificent facility that compares favorably with some of the best federal courtrooms that I have been in over the years. As we gather here today, we cannot help but think of the lawyers of tomorrow who will learn here how we go about resolving our legal disputes in this country. But I would like us to consider as well what courtrooms like this can teach those who are not called to the legal profession about how to resolve conflicts that are not, strictly speaking, legal disputes.

As a country, we are in the middle of debates over questions as fundamental as how we will finance our government, who should be allowed to become Americans, whether and how we should provide for our elderly and those less fortunate, and how we will protect ourselves from those who would do us harm. Whether or not issues such as these ultimately turn into legal disputes, there is no question that there are many non-legal disputes about them. These are issues people are arguing over every day in our government, and much of what I have to say could well apply to some of our politicians. But what I know best is the media, so I will focus my remarks on ways in which the media could learn a thing or two from the judicial process in the way that it addresses conflicts such as these.

Give and take between the courts and the media is nothing new. They deal with each other every day in a wide variety of ways. Courts are often asked to decide whether the media should be reined in one way or another—and how much reining in of the press the Constitution allows. How far can the media go in covering trials? Should reporters be punished for not revealing their sources that they have promised to protect? Should a news organization have to pay damages when it gets its reporting wrong?

For its part, the media turns to judicial proceedings for much of the news that it reports. Every day in this country some court somewhere is issuing a decision in a case that could affect all of us. Alexis de

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Tocqueville, himself a lawyer, famously said, "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." And even when there is not an issue of major national importance, the media cannot resist telling some of the great stories that come up in courtrooms all over the country.

As much time as reporters spend on what the courts decide, they do not spend nearly as much on how those decisions are reached. We take it for granted that our courts will reconcile what seems irreconcilable – and do it every day in a way that the parties will accept so that they can go on with their lives.

I saw this sort of conflict resolution first hand during my first year of law practice. It happened in a courtroom not nearly as grand as this one, presided over by an administrative law judge in a trial proceeding before the Federal Trade Commission. I was the junior member of a three lawyer team representing a chemical company that made lead-based antiknock compound. The FTC was charging that our client, along with three others, was announcing prices for its product in a way that discouraged competition on price. Our defense was that our clients' practices were not anti-competitive and that, in any event, they had legitimate, pro-consumer business reasons that justified them.

As part of the government's rebuttal case, it called an expert economist. It fell to me to cross-examine the economist on behalf of my client, but the government had refused to turn over to us one memorandum the expert had written on the case. Its excuse was that, although the memorandum went to the question whether our clients' conduct was anti-competitive, it did not touch upon our claim of business justification. The judge decided that he would not order disclosure until he had heard the expert's testimony to see how far it went.

After the direct testimony was concluded, the lawyers representing the other companies and I renewed our motion that the document be produced, arguing that at least in one or two respects, the witness had gone beyond the narrow boundaries the government had laid out. The judge patiently heard us out and then called us over for a private discussion at the side of the bench. At the sidebar, he said that he would—reluctantly—give us what we had asked for. He was doing so out of an abundance of caution, as he believed the document still fell outside the scope of what the expert had testified to. But in no circumstances should we move the memo into evidence; period.

Well, when we got a look at the memorandum, we saw immediately why the government had fought so hard to keep it from us. In five or six pages, the government's own expert economist had completely rejected its entire theory for the case. We could not have said it any better ourselves.

Over a break before cross-examination was to begin, I called back to consult with the two senior lawyers on my team. Everyone was excited about the substance of the memorandum, but I explained the judge's admonition that we should not even try to move the document into evidence. "Was it on the record?" the partner asked. No, I admitted that the sidebar was not transcribed and would not appear on the record. Then, the partner said that I had to figure out some way to get it on the record so that we could preserve the issue for appeal in case we lost.

So, I went back into the courtroom to begin my cross-examination. I focused on the credibility of the expert, seeking to impeach his testimony with what he had written. Over repeated objections from government counsel, overruled by the judge, I read into the record portions of the memorandum—enough so that on appeal there would be little doubt of the economist's views on the government's anti-competitive theory. After doing this for several minutes, I respectfully asked the judge to admit the underlying document into evidence. I said that I understood that he had requested that I would not do so, but I submitted that the document was too probative on the most fundamental issue in the entire case. So, I made my motion and stood to take my medicine.

The trial judge, Earnest Barnes, was an old-school type of trial judge: professional, straight-forward, and invariably civil. I saw him angry only once, and this was it. He leaned over the bench toward me, turned red in the face, and dressed me down for what seemed like ten or fifteen minutes (It was probably closer to two or three). I have no real recollection of what he said. But I do remember that he emphatically denied my motion.

I was shaken. This was my first trial. I had been in law practice less than a year. And I had managed to get seriously cross-wise of the judge who was going to render the verdict in my case.

One of our co-defendants was represented by a senior litigation partner at another large Washington law firm. Dan Gribbon was tall, silver-haired, unfailingly polite, but very intense. Walking back to our offices along K Street that afternoon, Dan came up and put his arm around my shoulders. He said: "That was well done. Always remember, you do not win cases by making friends out of judges."

Throughout my career, I have remembered one thing that I learned in Judge Barnes' courtroom that day: that I had to be willing to do the right thing even if it displeased someone in authority. No one can hope to run a network news operation well without being prepared to do this.

But, as I have watched the public debate about important policy issues become more and more heated, I have come to believe that there was another lesson that courtroom experience thirty years ago was teaching me—a lesson about how we resolve our differences as a

country—or at least how we should resolve them.

I have now spent eighteen years away from law practice. For the last fourteen years, I served as the head of ABC News—something that was the last thing I expected when I began my law practice. I saw a fair amount during my time at ABC News—the impeachment and trial of a U.S. President, a tie presidential election, the terrorist attacks of 9/11, the wars in Afghanistan and Iraq, and the worst economic crisis we have had since the Great Depression. I saw people at their very best and sometimes less than their very best.

The news in the past few years has given us plenty of things—important things—to discuss—plenty of things over which reasonable minds can differ. But, sometimes it seems as if people debating these issues on television are not willing to concede that a reasonable mind could have a viewpoint different from their own. It is not enough that they disagree about something. Some people feel the need to disagree with every single thing that their opponent says—or ever has said. Sometimes it seems as if they disapprove of the person doing the talking every bit as much as they disagree with what they are saying.

We see the verbal combat among the politicians. But we see it every bit as much in some of the media covering those politicians. We have the Glen Becks of this world accusing an African American President, not just of being wrong, but of being a "racist." We have the Keith Olbermanns not just disagreeing with President Bush about the War in Iraq, but linking him to acts of "domestic terrorism."

I do not claim to have discovered a new strain of divisiveness in the country. At the very beginning of our country, there were the partisan broadsheets that printed outrageous things about some of our founding fathers—including John Adams, and Thomas Jefferson, and even George Washington. More recently, we have had major conflicts within our country over things such as the War in Vietnam. Those of us old enough can remember how bitter that debate became.

It does strike me, though, that the public disagreements and attacks we see in the media are more personal and more strident than we have seen for some time. Some of this no doubt simply reflects what is going on in the political arena, where the ways we elect our leaders appear at times to drive away from the middle and toward the extremes. For example, although "gerrymandering" has been with us since before our country was founded, the political parties today use re-districting as a systematic, national strategy to gain the upper hand. Since 2004, the Supreme Court has pretty much told the federal courts they should stay away from reviewing the political questions of how districts are drawn. Similarly, the move to almost universal use of primaries as the way to choose candidates sometimes emphasize our differences, requiring many candidates to make sure they appeal to the "base" of their party.

We may not have gerrymandering or primaries in the media, but there are forces every bit as powerful that today are encouraging some news media to spend more time exploring the extremes than they spend on the middle. First of all, there is simply more opinion in the news media. It started with talk radio and moved into cable news, first with Fox News and then MSNBC. We certainly see the blossoming of opinion everywhere we look on the Internet.

It makes sense that there is more opinion in the media. Opinion is vivid, it gets people's attention, and it is inexpensive to produce. It costs a good deal less to have pundits with strong opinions come into a studio than it does to hire reporters, producers, and crews and deploy them around the world to cover major news events.

In cable news, mixing healthy doses of partisan opinion in with the news also appears to be rewarding companies with more revenue. This is an important shift from broadcast news, which is paid for with advertising revenue. When advertising is key, the incentive is to appeal to as large an audience as possible, and taking extreme positions typically hurts more than it helps. But cable channels receive at least as much revenue from subscriber fees as they do from advertising. This means that there is not the same reticence to express partisan opinion. If the size of the audience was once what mattered most, today in cable news it is the passion of the audience that counts. This is part of the reason we see, for example, a Fox News Channel or an MSNBC succeeding financially when they actually reach a relatively small portion of the news audience—only a small fraction of what the broadcast network news programs reach. But that relatively small fraction is deeply committed to these channels, and that commitment translates into financial success.

This trend toward more extreme opinion interlaced with news coverage may not seem disturbing to some. People are getting a wider range of views and at least some of them appear to enjoy very much what they are getting. An important question, however, is whether emphasizing the extremes makes it even more difficult to resolve basic differences over important questions we face together as a nation.

At least some of us appear to be uncomfortable with the rise in partisan opinion in the news media. We see it in polls, and we see it in some of the commentary calling for bi-partisanship in Washington. I believe we also saw our discomfort in the aftermath of the tragic shooting of Congressman Gabby Giffords and the murder of Federal District Court Judge John Roll and five others.

Within hours after news broke of the shooting in Tucson, some in the media began asking whether there was a connection with some of the hostile political rhetoric directed at the wounded Representative. Representative Giffords herself had appeared on MSNBC a few months

before, registering her own concern about such political rhetoric and warning that such talk could have "consequences." The Sherriff in Tucson who was responsible for the investigation into the shooting took to the airwaves and seemed to blame the heated rhetoric for shootings such as this.

But then the facts began to come out and they did not fit as neatly with the first theories of cause and effect that people had been speculating about. As far as we can tell right now, there was no direct connection between the young man with the gun and what any politician or person in the media had been saying. It appears that this instead was a single, deeply disturbed person who was bent on death and destruction. Why were so many of us so quick to draw the connection between extreme rhetoric and a tragic shooting?

I believe that so many of us were quick to draw the connection because we already had some deep doubts about the wisdom of what we were seeing and hearing—and perhaps what some of us were doing and saying ourselves. We were worried that we might be having the very effect that Representative Giffords had warned us about.

It is more difficult to formulate the solution than it is to identify the problem of intensifying partisan rhetoric in the media. But I do believe that the way that courts around the country deal with disputes could be instructive even to those of us who do not regularly appear in one.

We cannot and should not simply stop disagreeing with one another. In that Washington courtroom thirty years ago I disagreed strongly with my opponent. We argued strongly in front of the judge about our differences. Judge Barnes, having heard the arguments, certainly disagreed—strongly—with me. None of us would have been doing our jobs if we had not pressed our disagreement forcefully. We will not successfully resolve our important differences by keeping our thoughts to ourselves.

As important as it is to argue, it is just as important to keep firmly in mind why we are having the argument in the first place. The ultimate goal of all the disputes we are seeing around us on the national stage has to be reaching a resolution that we all can live with—not merely proving the other side wrong. And even worse than winning for the sake of winning, would be just enjoying a good fight. I understand that Winston Churchill liked to say, "When two boys are throwing rocks at a frog in a pond, it may seem like good, clean fun to the boys, but to the frog it is serious business."

In our disagreements with one another over important issues of public policy, we need to make sure that the rocks we are throwing are at the arguments and not at the people making them. I am sure that Judge Barnes was genuinely upset with me when I disregarded his instructions not to move that memorandum into evidence. He had strong

views about my position, and he did not hesitate to express those views. But as strongly as we disagreed, I never felt that Judge Barnes took issue with me as a person. He recognized that I was representing my client to the very best of my ability. Our disagreement was about rules of evidence—not about whether we were good people.

I have seen strong disagreements play out time and again in depositions, in trial proceedings, in appellate court arguments, and in the Supreme Court of the United States. Advocates argue strongly for their clients and disagree strongly with one another. But, all of these arguments and the decisions that resolve them remain "on the merits." This is not an accident. The success of the judicial system is rooted in a shared set of beliefs and a shared commitment to the bedrock principles of jurisprudence. This commitment is more important than the positions the lawyers fight for; it is more important even than their duty to their clients. This is what I understand being an "officer of the court" means. It is what I take to be the central importance of the rule of law.

We too often lack this in the public arena today. It may be too much to ask that people leave their passion behind when the debate gets heated. But it should never be too much to ask that those in the public arena keep in mind that they share with their opponents a deep commitment to the common principles that bind us together as a nation. A belief that we are all created equal—that we all have the right to life, to liberty, and to pursue our own happiness. And yes, the right to be wrong.

How could we reinforce our shared commitment to uphold these principles, even as we disagree over how to apply them? First, if I am right that the courts have more to teach us than we have yet learned, then we need to see more of how they do what they do. All federal court proceedings should be televised. Yes, I believe this should include Supreme Court oral arguments. Not all of those arguments will make great television, but it would be good for Americans to see how carefully the Court listens to the arguments and absorbs them—and the respect that all parties show to one another, even in the most high profile and contentious cases.

It is possible that televising federal court proceedings could have the opposite effect. It could turn the reasoned debates now taking place in courtrooms around the country into the sort of circus that we sometimes see on cable television or even on the floor of the Congress. But, I have faith in the rule of law, in the shared commitment to the rules of procedure, and in the judiciary. Yes, I still have faith in the Ernie Barnes of this world.

If the media has been, to some extent, part of the problem, then it has to be part of any solution. Beyond televising judicial proceedings, one modest first step could be for those interviewing newsmakers and

pundits on television to demand of their guests that they talk not only about how they disagree with some policy or some person, but also where there is true common ground shared by those with competing viewpoints. I am not talking about vague, general statements, but a substantive talk about where people agree and at what point that agreement turns into disagreement. The opinion-oriented cable channels will of course continue to push their point of view, but they could make sure that even the most strident disagreements are always cast against a backdrop of our shared commitment to common principles.

I am not suggesting in any way that the government should impose a requirement for discussion of shared principles. The First Amendment would not permit it. But, there are forces more powerful than the government. One of those is the power of the people themselves. If audiences began to reward interviewers who included in their interviews both the disagreements and the agreements between opponents, others would follow in short order.

I am hopeful that there are many other ways, big and small, that would help us toward focus on where we agree, as well as where we disagree. The starting point is a shared view that there must be better ways for us to debate the important matters in front of us and ultimately to reach some resolution, rather than simply coming back to fight another day. We are fortunate to have the judicial system to show us all that it can be done. Heated disputes can be resolved in ways that allow all of us to move forward together. We will see this happen in this courtroom, as it does in others around the country every day. This courtroom has the potential to teach those in the media and beyond every bit as much as it will teach the young legal scholars who come here to learn.

Thank you.