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The Bar and Watergate: Conversation With Chesterfield Smith*

QUESTION: Over the past few years, the bar has come under increasing criticism because of the high number of lawyers involved in unethical and even illegal practices. Perhaps a new watershed was reached when the number of lawyers alleged to be involved in the Watergate scandal was revealed. Do you think lawyer involvement in Watergate indicates a new decline in lawyer morality or is it just a highly publicized symptom of the general moral condition of the profession?

Smith: I think it's just a highly publicized symptom. There have always been some bad lawyers and perhaps there always will be. I would hope that some day we could get to be lily-white, but realistically I don't believe that's possible. People ask me about the lawyers involved in Watergate and I was bothered a great deal. When I reviewed the experience of Howard Hunt, John Dean, John Mitchell, Egil Krogh, Spiro Agnew, and the others, I had all kinds of rationalizations. Then I decided, that's kind of silly, there are 80,000 people working for the government who are lawyers and any reasonable person knows that under the rules of probability in all areas there are some of the worst scamps, crooks, and cruds in the profession that have not been caught. Eighteen or twenty or twenty-two just scratch the surface out of 80,000. And I quit worrying about them. Instead, I started to say that I think there is a temporary, adverse impact on the profession. It's very easy to get against the legal profession. We are an adversary system, and half the people that get involved with us always feel bad about it. They believe in the righteousness of their cause or they wouldn't have seen a lawyer in the first place. Most people I know give credit for the breaking open of Watergate to the investigative reporters and they think maybe this is a proud day for the trade. I agree; it wouldn't have been revealed without it. But somewhere along about last June, July, or August the ball shifted from the news media to the bar—to the legal profession and to the system

* President, American Bar Association. This interview was undertaken at Hastings College of the Law, University of California, on February 25, 1974.

of justice. I now think that Watergate as it has been developed through the legal profession may turn out to have as beneficial impact for the future of our system in the long range as the Civil War had in the long range. It's traumatic now. We may have averted 1984. There may never be a 1984 in this country. We may have put on a pedestal again individual rights . . . and reestablished the right not to have Big Brother checking on you in every way. But more than anything else, the people in our country that I talk to are now beginning to believe that even when crooks and bad men are vice presidents of the United States or executive assistants to the president, or have positions at the highest levels of government, and they are engaged in mal-administration of government, that the law will make our system work. The law will get those people. The law will kick them out, and it will make them answer for any crimes. I'm very, very proud of Judge Sirica. Even though I think he did wrong in some of his sentencing techniques, I applaud his goals and his results. I honor and cherish my predecessor, Leon Jaworski, and Archibald Cox, William Ruckleshaus, Elliot Richardson, Howard Henry Baker and Sam Ervin, and scads and scadillions and plethora of lawyers all involved in making the law work for this country. I'm very proud of the profession, and people I talk to now say, "You know, the system is going to work. Even though these people did these unbelievable things, we can survive." Our Constitution is living. It is going to work. Our institutions withstood this tremendous assault and lawyers made them withstand it. So I'm very proud of the profession.

Question: In meting out discipline, bar associations have been notoriously timid. One outstanding exception is the Virginia Bar's action on John Dean. Do you think that disbarment or suspension should be limited to those cases in which the attorney is actually found guilty of criminal conduct?

Smith: I think criminal conduct as such is not the test and has nothing to do with it. Of course, under disciplinary sanctions a lawyer can be acquitted in a criminal proceeding and still be disbarred if, under the same facts, a different result was reached. For example, the burden of proof is different in a criminal case—to the exclusion of every reasonable doubt. In a disciplinary case, it is just by a preponderance of the evidence. The rules of evidence are different. In one case, the trier of fact is a jury, in the other the trier of fact is a judge. So I think if the facts warrant the disbarment, I can hardly imagine that they wouldn't also warrant some type of criminal imposition. But the fact that he was acquitted would not keep me from disbarring

him, if the facts were such, and a different trier of the facts reached a different result. There is no double jeopardy in any way involved, as they are different types of proceedings for different purposes.

Question: Would you apply this same rationale to a president?

Smith: Sure. I wouldn't bother a president with disciplinary sanctions while he was president. I would think that the future and destiny of my country and the present safety of myself, with him having the finger on the button, would mean that I shouldn't harass him while he was president. Because discipline is not to punish anybody, it's not to reimburse anybody, it's solely to operate prospectively. It's to keep somebody unworthy from practicing law. The president is not practicing law, and he won't practice law while he's president, so I would wait until his term expired, or for some other reason he is no longer president, before I proceeded. But then, certainly, they should apply equally to him as to all others.

Question: Do you think that removal of the president could only be based upon indictable offenses?

Smith: If you are talking about impeachment of the president, I believe that it does not include only indictable offenses and that it's not reviewable by the Supreme Court. I haven't heard anybody suggest that it's going to the United States Supreme Court. It seems to me pretty clear that it is not going to the United States Supreme Court until somebody has been impeached. I don't know what the American Bar Association would do but if it related to an issue like that in the courts, I would be in favor of them filing a brief if a majority approved of my position which I just stated. But if the majority believed otherwise I'd say we shouldn't file a brief!

Question: What do you think about the president sounding out Judge Byrne for the position of FBI Director while he was presiding over the Ellsberg trial?

Smith: I think that that was a violation of the Code of Professional Responsibility; the State Bar of California and the State Bar of New York ought to open a file on that. I have written them both. In Florida, where I practice law, and where I was involved in redrafting the state constitution, we would consider it a most reprehensible act and we would have suspended him from the practice of law for at least sixty days. I think that is enough for that. It is not as bad as breaking and entering or some other things that might have been done; in fact, there are other things that the president is accused of doing and are a lot worse to me than that. But that's very, very bad.

That's just as bad as it was for William Dubrovir of the Nader organization, who I happen to like, to play those presidential tapes. Dubrovir ought to be suspended for thirty days. I get people from the far right wing that feel like I'm attacking Nixon and say, well you gutless so-and-so, you attack a fine man like the president and you don't do anything about Dubrovir. Dubrovir ought to have something done to him—thirty days suspended. But I wouldn't hang him up by his thumbs because he played those tapes, and anybody that would is a fool.

Question: For many years the Canons of Professional Ethics were outdated and ineffectual. In the last decade the ABA undertook a substantial revision and produced a new Code of Professional Responsibility, which was adopted in 1969. In the five years that the code has been in effect, do you think it has had any significant influence on the discipline of the bar by providing a more definitive standard for professional conduct?

Smith: I haven't noticed any discernable impact of it. There is a much better and clearer code now, and anybody that is really interested in understanding the reasons for certain proscriptions or prohibitions can get it better. The guidelines are laid out better and it ought to have had some impact. I haven't noticed any material changes, however. It's now in effect in forty-eight states; California is one of the two that doesn't have it. They have something similar, of course. There are people who say, should not the Code of Professional Responsibility be revised in the light of Watergate and the fact that there was such a prevalent abuse of ethical standards? That's almost a ridiculous statement in my opinion. Breaking and entering, lying, obstructing justice, or perjuring oneself is a violation under any standard I've every heard of. That's wrong. We don't need to revise the standards, we need to get better people in the profession. Now how do you do that? I don't know. We have to work very hard to inculcate in everybody admitted to the bar a sense of honor and professionalism, yet there will always be those who stray. We have to make sure, above all, that every one of the members of the bar recognizes that the majority of us, when we catch them doing these things, are going to kick them out of the profession. That's what we are trying to do in the profession right now. We are trying to kick them out. You mentioned the Virginia Bar; I don't think that any of the bars have done wrong on professional discipline that I've seen. I'm very proud of the Maryland State Bar for rejecting the vice-president's plea for a year or two of suspension, and for asking instead for disbar-

ment. I'm glad that the panel of judges assigned initial consideration of the case have recommended that. I believe the Maryland Court of Appeals will probably reach a similar result. This is a case in which somebody at the highest level is being considered, not just a John Dean. It's easy in some states that were as strong for Nixon as Virginia was to jump on John Dean, because he's got very few friends anywhere. Those people who are of different political philosophies from Nixon don't really like Dean—he was on the other side, too. He's in no man's land without any friends, and anybody can jump on him. But Agnew was a former governor, he was right in his home state and I was real proud that the bar stood up there.

Question: Despite the bar response to John Dean and Spiro Agnew, bar enforcement often appears less than zealous. Would you urge a more aggressive disciplinary posture by state and local bar associations?

Smith: I would make disciplinary procedures public once we had passed the stage of adjudicating whether a complaint is frivolous. 90%-95% of the complaints made against lawyers, usually by a disgruntled client, are frivolous by their very nature because they grow out of an adversary system. My own experience is that most clients who lose still believe they were right; the court didn't convince them. They like their own lawyer because they saw he worked very hard and tried to do what they wanted done, and so they look around desparately for somebody to blame, never thinking "I was wrong." They tend to blame the other lawyer on the other side. They consider him unethical, concluding that he bought the judge or somebody else off. Clients always hate the other lawyer, never their own lawyer. Even when their own lawyer loses because of incompetency, they still tend to hate the other lawyer because they know their lawyer wanted them to win. With that adversary system, we can never have open all charges brought against lawyers, because some of them are scurrilous and scandalous, coming from crazy people who just lost a lawsuit. Once out of the investigative body that determines probable cause for disciplinary action I would have it absolutely open, to the public, to the press, exactly as is a criminal trial. The finding of probable cause is tantamount in criminal proceedings to an indictment. A grand jury proceeding is, and should be secret, as should bar investigations of initial complaints. But once probable cause has been determined or an indictment or information has been returned so that there is enough to justify an adversary due process hearing, then I would make the remaining proceedings open.

Question: One suggested method for improving bar conduct is a more aggressive effort on the part of law schools to educate in the field of legal ethics. The California Bar Examiners have recently decided to put a question concerning ethics on the Bar Exam. If you were to structure a course in ethics in a law school, how would you make it so that students would get a broad, realistic indoctrination in legal morals?

Smith: I have just gotten a $9,000 appropriation from my board of governors to try to answer that particular question. My own feeling is, and it is very difficult, but I believe that is one course in which you need clinical discussion from practicing lawyers. Every practicing lawyer I know lives with conflicts of interest. The smaller the town it is, the more conflicts of interest there are. You need to bring in lawyers, and I think it needs to be a clinical type discussion with other people instead of more on the nature of a lecture class course. Under our existing standards for law schools, we require that each law school in its curriculum give adequate attention to professional responsibility, professional history, and legal ethics. They can do it the way their faculty determines to meet that criteria. The State Bar of Arizona has advanced a view shared by, in my judgment, an overwhelming majority of the practicing bar, that most law schools do a very sorry job in this area. They want to change our standards for the approval of law schools to require that there has to be a clinical course in professional responsbility and legal ethics, and not that you can weave it into the other courses as many of the law schools are now doing. I go to all kinds of law schools—I've talked to over fifty since I've been an officer of the association, and very few of them are proud of their course in legal ethics. Most of them are kind of ashamed of it. We ought to do more about it.

Question: Many of the highest positions in all levels of government are held by attorneys. Full-time officials often refuse to give up their law practices, or indeed, refuse to comment about them. A prime example of this was the late Senator Everett Dirksen. Don't you think at least full-time government officials should be required to terminate their practices?

Smith: The ABA Code prohibits a public official from being a member of a law firm or having his name in a law firm unless he regularly and actively is engaged in the practice of law. It is my personal judgment that as of now, it is impossible for a United States senator to engage regularly and actively in the practice of law. This was not necessarily the case at the time Senator Dirksen started practicing, but

probably was at the time he ended practice. Some congressmen may practice. Most state legislators do regularly and actively practice law. I don't think it was ever intended in the Code that a lawyer could not be a public official. I think the Code is designed to prevent the lawyer from using public office as a feeder and from creating situations which might result in a conflict with his official duties. But, if he is regularly engaged, I don't believe that we ever intended that county seat lawyer in a rural county with 15,000 people could not go to the legislature and still have clients. Under some people's definition of a conflict of interest, a lawyer who is a public official and has clients has a conflict, he represents poor blacks in getting divorces, he couldn't be for a no-fault divorce law. I think that is ridiculous. Of course he could have a position on divorce—the fact that he represents parties to a divorce doesn't have anything to do with it. I'm not as concerned with conflicts of interest as most peple are, so long as there is an absolutely full, valid disclosure, without holding back. In fact, I believe that conflicts of interest are the vital blood by which we get stability, and do see that all viewpoints and interests are considered in reaching a consensus judgment.

Question: Do you think there will be a post-Watergate morality for for the legal profession?

Smith: The leaders of the legal profession have known for some years that our disciplinary procedures need substantial improvement. We have recognized that volunteer lawyers who were judging people they were closely associated with and were their friends were not doing the job they should be doing. Four or five years ago the American Bar Association created a national commission to study disciplinary procedures in all its phases. It was headed by Justice Tom C. Clark. He came in with a 200 page report that had all kinds of studies which in the end, found that most of the disciplinary systems in the states were deplorable. We set up certain standards and goals and approved them. We started implementing those, and were making substantial progress. But in many states we were meeting resistance from the bar, not necessarily because they disagreed with the conclusions or the targets, but simply because they did not want to pay higher bar dues so that we could hire investigators or full-time prosecutors. These state bars said, "Well, we don't have a real problem, we can do the job. These volunteers are doing it." Legislators were reluctant to vote more dues, just like they do not like to vote more taxes. In integrated bar states, supreme court justices or other elected judges were recalcitrant. Watergate has at least increased the

acceptability of those goals that we were already working on, and we have made some strides in many states since Watergate about which we were pessimistic before Watergate. To that extent, I think, there will be a beneficial overflow from Watergate in the area of lawyer discipline. Most bar associations are dominated by—not absolutely controlled by—but dominated by the practicing Bar, that is, people that have offices who are available to sell time to the general public. Law professors, judges, and house counsel, who are important to the Bar, do not exert the influence of the practicing lawyers. Most of these practitioners consider the bulk of the law-trained people in Watergate as actual lawyers. "They just went to law school and they were admitted to the bar, but hell, they were working for the government." They say, "Howard Hunt never had been a lawyer. He wrote novels and was a CIA man. We do not think of these people as showing the way the law is." This attitude represents the stiffened backs of some practitioners who resent being spattered by Watergate mud. As a consquence, they are not better prepared to adopt changes in bar rules and discipline. They feel, as I do, that the word "lawyer" must be made synonymous with "honorable person." There will not be a new morality in post-Watergate times; rather there will be an increased awareness and observance of the old morality.