



By Carolyn Raffensperger

## A Lawyer's Legacy Haunts Environment

In 1971, largely as a response to the national unrest around the Vietnam War and the successes of Ralph Nader, a lawyer named Louis F. Powell Jr. at a D.C. firm wrote a memo that changed the course of history, particularly the history of the courts. Published that summer in the U.S. Chamber of Commerce's influential *Washington Report*, Powell's memo helped to set the pro-business agenda that led to the founding of the Heritage Foundation, the American Enterprise Institute, and the Federalist Society. Elements of the 1994 Contract with America can be traced back to the document, and its intellectual influence will probably be felt when the new Congress convenes in January.

Only a month after his memo was published, Powell, a Democrat, was appointed by President Nixon to replace Hugo Black on the Supreme Court, where, with a few exceptions, he established a reputation as skeptic of the efficacy and wisdom of the federal pollution control laws, especially the Clean Air Act. Powell stayed on the Court until 1987 and died in 1998.

But the power of his memo lives on. It begins: "The American economic system is under broad attack." Powell urged business to use confrontational politics, partisanship, and litigation to force universities, the media, and churches to support the free enterprise system. In focusing on the legal system, Powell suggested that business imitate the ACLU's tactic of initiating or intervening in every possible case.

The Republicans in the 104th Congress used Powell's playbook in the

Common Sense Legal Reform Act, which President Clinton vetoed. The bill called for "loser pays laws, reasonable limits on punitive damages, and reform of product liability laws to stem the endless tide of litigation." The description and background of the legislation said, "The bill makes a number of legal reforms to, among other things, make sure that expert witness testimony is based on scientifically sound evidence, that product liability laws are uniformly applied, that abusive securities lawsuits are limited, and that opportunities for alternative dispute resolution are expanded."

Here is where the logic of the Powell memo became applied to science and the courts: The authors of the bill specifically proposed to amend Rule 702 of the Federal Rules of Evidence regarding expert witness testimony because, they argued, so-called experts too often base their opinions on "junk science" in order to justify absurd claims. With tort reform a hot issue, a similar bill, which would not be vetoed by President Bush, is more than a possibility.

And beyond possibility is the draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, which is being negotiated at the behest of the United States and U.S. business interests. The treaty would create jurisdictional rules governing international lawsuits and provide for recognition and enforcement of judgments by the courts of contracting states.

Consumer groups worry that corporations will be able to choose jurisdictions with the least consumer protections; for example, jurisdictions that prohibit class-action lawsuits or limit scientific evidence or in which nonprofits have no right to sue. The treaty sets out jurisdictional rules for specific types of actions, such as contract and tort actions. If a court exercises jurisdiction in accordance with the rule, courts in other contracting states must recognize and enforce the judgment. The U.S. government has blocked language that would allow consumers to bring an action in courts where they live. Businesses want the right to opt out of a country's consumer protection laws if they provide alternative dispute resolution procedures.

The larger point, however, is that

Powell, the Chamber of Commerce, and their allies believed that ideas have consequences and power. Their central ideas are that capitalism, the market, and free enterprise are the bedrock of the American system — and hopefully the global system; that the significant benefits of technology and growth outweigh any risks to public health or the environment; any problems that do occur can be rectified through market forces; and distant, unproven risks should not stand in the way. Drawing attention to inequitable allocation of natural resources, public health problems associated with toxic chemicals, or disposal of problem materials like garbage or radioactive waste are viewed as attacks on capitalism.

All indicators suggest that this experiment has generated what economist David Korten calls a "suicide economy." The legal community needs to find a way to a justice system that supports a living economy. One place to start would be for lawyers to make common cause with scientists who understand not only the rule of law but the rule of nature. Jane Lubchenco, a former president of the American Association for the Advancement of Science, has called for a new social contract for science that would ask scientists to focus on the biggest challenges facing the planet. This is a marvelous opportunity to engage scientists in the issues before the courts, since the science used in the courts today is systematically overriding and ignoring the natural world.

There is exciting work being done by scientists, lawyers, and economists. Ideas like the precautionary principle, the rights of future generations, the value of respect as a legal norm, and a populist economics point the way to an emergent law and economic system which will support life.

It's time for a vigorous debate about the consequences of continuing to use scientific uncertainty as a scapegoat in regulation and the courtroom. It is time to give voice to a vision that focuses on economics as if the earth mattered, as if communities mattered, as if democracy mattered, as if justice mattered.

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