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The Good Ole Boy System In Our Courts?

J. Clay Smith Jr.

"The Good Ole Boy System In Our Courts?"

(In Memory of Dean Gleason L. Archer)

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In a capital system driven by the free market one would doubt that an "old boy" anything could control the production of a group of people-black people, black lawyers. In modern times, the words "Old Boy Network" described the control of the marketplace by persons powerful enough to exclude others by predatory means. In less modern times, the term "Old Boy Network" would have applied only to men.

The point that is being made here is that the term "Old Boy Network" is more than a group of words that describe exclusion. These words conceptualize an economic regime--the regime of monopoly.

The "Old Boy Network" does not necessarily mean that poor white men and women were included in the legal power structure. So my remarks should not be taken to mean this. In fact, it was the Dean of Suffolk Law School, Gleason L. Archer, who, in 1929, stated, "The rich man's son is fully entitled to every educational advantage that wealth can give him. <u>But when school days are over and he is prepared for life he is not, in my judgment, entitled to</u>

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any exclusive monopoly of any profession or any office of honor this Republic. Gleason L. Archer, "Facts And Implications Of College Monopoly Of Legal Education," in 54 Report of The Fifty-Second Annual Meeting of American Bar Association 719, 722 (Oct., 1929) (original emphasis). Hence, the term "equality of opportunity" in the legal profession, as Dean Archer viewed the world, may have originated an affirmative action theme.

I have limited my presentation to particularize the effect of the "Old Boy Network" on the black lawyer. I use the conception of monopoly as a point of departure.

1) Before the American Revolution, no black lawyer is known to have been admitted to practice before the Inns of Court in England. See generally, A. Pulling, The Order Of The Coif 161-162 (1897) (discussion on first Inns of Court) and W.J. Loftle, The Inns of Court And Chancery (1893) (same).

Therefore, the common law as it developed in England is not known to have developed with the intellectual input of black people. Simply put, so far as we know, the black lawyer stamped no personality on the English common law as (1) lawyer (2) judge or (3) legislator before modern times. They were never in the marketplace as lawyers in Blackstone's England, or in the American proprietary colonies.

2) After the American Revolution, and during the formation of

the United States, the presence of slavery locked black people out of the definition of personhood under the constitution, under the Dred Scott and Plessy v. Ferguson opinions and beyond. Smith, Pure Legal Existence: Blacks and the Constitution, 20 How. L.J. 921 (1987).

3) However, neither the Dred Scott decision, decided in 1857, nor Plessy, decided in 1896, kept black people out of the legal profession.

4) The black lawyer entered the legal profession in 1844, 12 years before the Dred Scott decision. Macon B. Allen entered the bar under regulated circumstances: he took and passed a bar examination. Allen entered the American bar which had no experience with black people as advocates in law. So, one should now ask: what is the speaker driving at? What point is being made?

The point is: from 1844 forward, how has monopoly, the "Old Boy Network," affected the upward mobility of blacks in the law?

In economic terms, the legal profession, through state laws, customs directly and indirectly controlled the entry of black lawyers, and by doing so was able to maintain control of entry and the continued maintenance of power over their post entry activities. A.L. Abel, American Lawyers 99 (1989).

Let me now give you a few examples of how that power was maintained:

1. Intellectual doubt. The entry of the black lawyer in American law did not eradicate the predominate view that blacks were inferior. This view was carried forward by the "Old Boy Network." With doubt cast on the intellectual ability of blacks and the black lawyer, the network was able to control access to commercial legal work by the black lawyer. This intellectual doubt found its way into the exclusion of blacks from some law schools. More particularly, and because of white doubt, some black people themselves came to believe that black lawyers were intellectually incapable of mastering legal abstractions. The "Old Boy Network" maintained a monopoly in the legal marketplace.

2. Family Ties. "Old Boy Networks" are often cemented through family ties. Ties gua wealth, influence, and the police. The black lawyer brought little or no wealth to the law. Family influence was marginal, although during the Post-Reconstruction era some black lawyers were aided by their white fathers, and relatives. Family ties to the police was nil. Indirectly, the "Old Boy Network" was maintained.

3) Political disfranchisement. Voting was an essential element of gaining power or protecting individual or group rights. Political disfranchisement affected the black lawyer in ways that nearly destroyed them. Juries were selected from voting lists.

Disfranchisement meant that in some states blacks were never called for jury service. Effect: black criminal defendants were routinely found guilty, and the black community was driven to white lawyers because they believed that justice could not be obtained by black lawyers before white judges and juries. The "Old Boy Network" remained intact. (In modern times, blacks have been systematically excluded for juries. See e.g., Kamen, High Court Rules Against Exclusion of Blacks From Juries, Wash. Post., May 1, 1986, at 1, col. 2).

There are other examples that I could give to demonstrate how the "Old Boy Network" regime has impacted the black lawyer. Time is limited, so let me summarize.

•Today, there are fewer than 30 thousand black lawyers in the nation and about 700,000 white lawyers.

•There are no mega-size black law firms in America, and no white mega-size law firms with significant number of black lawyers. Karmel, Why Blacks Still Haven't Made It, The American Lawyer 121, March, 1984. Brenner, Minority Lawyers Missed Out On Hiring Boom, Wash. Post, Feb. 13, 1990, at A8, col. 1; Spire, Unlocking The Door For Minority Lawyers, 10 Bar Leader 119, March-April, 1985.

•There are some law faculties that remain white or near white, and few states have ever had a black lawyer on the Supreme Court.

Chused, The Hiring And Retention Of Minorities And Women On American Law School Faculties, 137 U. Pa. L. Rev. 537 (1988).

•The largest black firm is about 20 lawyers give or take 2 on each side of that figure. Reason: No corporate clients; no political benefactors. Armstrong, Tracking The Cases Minority-owned Law Firms Look to Corporate Clients, The Philadelphia Daily News, Nov. 7, 1991, at 25, col. 2.

•There are few black lawyers in high ranking positions in the national government, particularly in agencies that regulate major industries, e.g., SEC, FCC, ICC, Department of Commerce.

Naturally, Black lawyers have made progress since 1844. Perhaps, the next time I visit the George Washington American Inn of Court I can address this. As I see it, the concept of monopoly continues to be maintain by the "Old Boy Network." However, I am comforted by Dean Archer's declaration, and by many who adhere to it, that no person is "entitled to any exclusive monopoly of any profession...in the Republic." (For more information on Dean Gleason L. Archer, see D.L. Robbins, The Heritage Series Suffolk University A Social History 2 (1981)).