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## Judicial Independence

By Hon. Joseph M. Hood\*

First of all, I would like to thank you for the invitation to speak to you today. It is an honor to be here. No doubt I was selected not for my wisdom but for my brevity, and I shall try today to live up to that expectation.

I have been asked to speak on the subject of “judicial independence,” a subject on which I am far from expert. In a way, I believe, no one is (at least if you accept my definition of the term, which I will provide momentarily). But while far from expert, I have over my twelve (12) years on the bench—and many more before that as a federal magistrate judge—come to learn *something* about this nebulous concept, this so-called judicial independence, and it is that which I have learned that I shall share with you today.

Judicial independence. The term seems elastic and mysterious, and in many ways it escapes definition. For my purposes this is problematic, for it would seem that you cannot discuss something without first defining it. So, as an initial matter, I will attempt to do exactly that: define judicial independence.

Now, when I first started thinking about this speech I pondered the question for quite some time—unsuccessfully. I just could not come up with a succinct, meaningful definition. And so, I did what I always do when I cannot come up with an answer: I punted. I had my law clerk review the literature,<sup>1</sup> and he came up with the following definition, as set forth by the American Judicature Society World-Wide Web site: .

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\* Hon. Joseph M. Hood, District Judge, United States District Court for the Eastern District of Kentucky, Address at the National Association of Administrative Law Judges Annual Convention (Oct. 21, 2002).

1. The author would like to thank his law clerk, Benjamin Gerald Dusing, University of Kentucky, J.D., 2001, for his research and assistance in writing this speech.

Judicial independence is a concept that expresses the ideal state of the judicial branch of government. The concept encompasses the idea that individual judges and the judicial branch as a whole should work free of ideological influence. Scholars have broken down the general idea of judicial independence into two distinct concepts: decisional independence and institutional, or branch, independence. Decisional independence refers to a judge's ability to render decisions free from political or popular influence based solely on the individual facts and applicable law. Institutional independence describes the separation of the judicial branch from the executive and legislative branches of government.<sup>2</sup>

This is the best definition I could find; one that, I think, gets as close to the meaning of the principle as is possible.

This definition lends a semblance of structure to my talk, and I shall proceed by assessing its parts. But first, I would like to make a general point about the definition as a whole.

That point is this: the American Judicature Society, in defining judicial independence as "*an ideal state*," is on to something. Judicial independence, I have come to learn, is not the *natural* state—it is rather, a *goal*, something for which we should strive. And I like the definition in that it recognizes this reality. The truth is this: both federal and state constitutional structures establish judicial branches that are not naturally "independent"—at least, not in the strictest sense of that term. In the federal system, for example, the judicial branch is linked to the executive and legislative branches—from a judicial appointment perspective, through nomination and confirmation, respectively. In the state system—at least in those states that democratically elect their judges (an overwhelming majority)—the composition of the judiciary is linked directly, at least in theory, to the popular will. So, I reiterate: our American judiciaries, structurally, are not by nature "independent." Independence is a goal for which we must strive.

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2. American Judicature Society, *What is Judicial Independence?* (Nov. 27, 2002), at [http://www.ajs.org/cji/cji\\_whatjsi.asp](http://www.ajs.org/cji/cji_whatjsi.asp) (last visited Apr. 14, 2003).

Returning to the definition provided by the American Judicature Society, I would like to talk for a moment about the notion of “decisional independence.” Decisional independence, you will recall, refers to a judge’s “ability to render decisions free from political or popular influence based solely on the individual facts and applicable law.”<sup>3</sup>

Now, it seems to me that the concept of decisional independence is most relevant in the context of state judicial systems like Kentucky’s, where judges are elected. In such systems, structural independence is less of an issue—unlike the federal system, for instance, there is no executive nomination or legislative confirmation. No, for states in which judges are elected by popular vote, threats to judicial independence generally rear their ugly heads at the decisional level.

And this is no secret. I do not have to tell you that there is a growing concern, if not about the fact that judges are elected, then about *how* they are elected, and how the manner in which they are elected can come to bear on individual decisions. The problem, at least as I see it, is this: popularly-elected judges require elections, which require money, which requires contributions, which must come from contributors. Contributors that can—and, in fact, *do*—have occasion to appear before the very judges whom they helped to elect. Now, it cannot be denied that, whether these judges are biased or not (and, I must add, my experience has been that they are *not*), the mere prospect of a conflict-of-interest can create an impression of impropriety. This, of course, is unacceptable, for it goes without saying that it is just as important to maintain the *appearance* of judicial neutrality as it is the reality.<sup>4</sup> After all, justice that appears unjust is really no justice at all.

Threats to the decisional independence of elected judiciaries are manifested in many forms, not the least significant of which is the spiraling cost of judicial campaigns.<sup>5</sup> It is enough to say that, increasingly, such races have come to look much like those for legislative or executive positions. I do not purport to know the

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3. *Id.*

4. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990).

5. Richard Beliles, *Change Financing of Judicial Campaigns*, LEXINGTON HERALD-LEADER, Sept. 9, 2002, at A9.

answers to the emergence of such problems; I can only lend my voice to those who decry the trend. I *will* say this, however: money and special interest groups have come to play too great a role. The current system cries out for reform.

Along these lines, permit me a momentary tangent to say a few words about a recent United States Supreme Court decision that touches, if only indirectly, upon this subject of decisional independence. I predict that the case, *Republican Party of Minnesota v. White*,<sup>6</sup> shall have a tremendous affect upon the way in which judges are elected in the Commonwealth of Kentucky, and indeed, nationwide.

In *White*, a divided Supreme Court held that so-called “announce” clauses, provisions in state judicial conduct canons prohibiting candidates for judicial office (incumbents included) from “announcing his or her views on disputed legal or political issues,” are unconstitutional.<sup>7</sup> The Court, by a 5-4 margin with Justice Scalia writing for the majority, found that such clauses are inconsistent with the First Amendment of the United States Constitution.<sup>8</sup> The Court declined to rule, as would have the Court’s dissenting justices, that judicial elections are fundamentally different from legislative elections and that, therefore, the former could be regulated to a greater extent.<sup>9</sup>

Now, I will leave the debate over the soundness of the *White* opinion to legal scholars and the like, and I will not pass judgment as to the Court’s conclusion. But, I *would* like to underscore the decision’s significance, particularly as it relates to questions of decisional independence. The case, it would seem, makes the following very clear: while a judicial candidate must stop short of “pledging” or “promising” to rule in a certain manner in a certain case, statements expressing opinions on the wisdom of past decisions or expressing viewpoints on political views are perfectly permissible.<sup>10</sup> The decision demarcates the constitutional outer bounds of how states may go about attempting to de-politicize

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6. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

7. *Id.* at 768.

8. *Id.* at 788.

9. *Id.*

10. *See id.* at 780-81.

judicial contests.<sup>11</sup> It makes clear, as we pursue the path of reform, what we *cannot* do.

Given that most states have sought to ensure the decisional independence of their elected judges by regulating campaign-related judicial speech, the *White* decision effectively sends states back to the drawing board. The question thus arises: if we cannot ensure the decisional independence of our elected judges by regulating judicial speech, how *can* we do it? I am of the opinion that this question requires us to reexamine a more fundamental question, a question that goes to the heart of the very manner by which we determine the composition of state judiciaries.

In this respect, I would like to cite the concurring opinion of Justice O'Connor in *White*.<sup>12</sup> While agreeing with the majority that so-called "announce clauses" cannot withstand strict scrutiny under the First Amendment, Justice O'Connor expressed great concern about the popular pressures working to affect the impartiality—or, in the parlance of the American Judicature Society, the decisional independence—of elected judges.<sup>13</sup> In *White*, Justice O'Connor stated flatly and at the outset that, while she joined the opinion of the Court, she "wr[ote] separately to express [her] concerns about judicial elections generally."<sup>14</sup> She added that: "even aside from what judicial candidates may say while campaigning, the very practice of electing judges undermines this interest."<sup>15</sup>

We of course want judges to be impartial, in the sense of being free from any personal stake in the outcome of the cases to which they are assigned. But if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. "Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects."<sup>16</sup>

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11. *Id.* at 782-83.

12. *Id.* at 788-92 (O'Connor, J., concurring).

13. *Id.*

14. *Id.* at 788.

15. *Id.*

16. *Id.* (citing Julian N. Eule, *Crocodiles in the Bathub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 739 (1994)).

Now, I would like to say that I find Justice O'Connor's concurrence particularly instructive, for she speaks from experience. Unlike the other eight members of the present Court, Justice O'Connor herself at one time served as an elected judge (on the appellate bench in Arizona).

Before I conclude my remarks about decisional independence—and turn to the related question of “structural independence”—I would like to make this clear: I am *not* calling for the abolishment of the practice of popularly electing judges in favor of a system of appointment. I *am* calling for a renewed debate on the question how best to ensure decisional independence. And I will add, I think that this debate should consider *all* potential angles—including consideration of any potential benefits of appointment over election.

Thus far I have spoken to the issue of decisional independence, an issue of greatest relevance to those states, like Kentucky, that select their judges through popular election. I would now like to say a few things about structural independence—the American Judicature Society's second element of judicial independence.

Structural independence comes into play in those systems—like the federal government's—where judges are appointed. It is the nomination and confirmation functions—the former, of course, the privilege of the executive, the latter that of the Senate—that give rise to the issue. Among the questions that arise are the following: What is the scope of executive discretion in the nomination of candidates? What should be considered “legitimate grounds” for Senatorial rejection of such candidates? There are many others, of course, but I think it is fair to say that all of the questions—and controversies—surrounding the federal judicial selection process reduce to this question: To what extent is it permissible for a President to nominate or the Senate to reject a candidate on the basis of “judicial philosophy?” Stated more bluntly, what is the proper role of judicial perspective and viewpoint?

Of course, opinions abound. At the extremes, there are first those who advocate what I call the “beauty pageant” approach. Such people would completely discard a nominee's judicial ideology, viewpoint, and perspective. Instead, the question of qualification would go no further than consideration of a nominee's academic pedigree, legal reputation, or scholarship. On the other end of the spectrum are those who would place no limits on the role of ideology

and perspective. Such persons would give the President virtually unfettered discretion in the nomination process, and would consider the selection of federal judges to be more the province of the executive, and less that of the Senate. “Advice and Consent” would be abridged to simply “Consent.”<sup>17</sup>

But, it seems to me, the proper approach is one that seeks the middle ground. I will confess that this is not a novel—or even revolutionary—opinion; but I *do* think that it is one worth repeating. Article II of the United States Constitution makes very clear that neither the executive nor the Senate is to have exclusive control over the selection process; cooperation, it can be presumed, was intended.<sup>18</sup> In this sense, it is just as improper for a President to nominate an unabashed ideologue as it is for the Senate to reject an otherwise qualified nominee for reasons strictly political.

On this subject of balance—and, for that matter, on the subject of structural independence—I can only echo the comments of Judge Jon O. Newman, Senior Judge of the U.S. Court of Appeals for the Second Circuit, who recently spoke to this issue in an article entitled “Federal Judicial Selection.”<sup>19</sup> Addressing the selection process, Judge Newman eschewed the “beauty pageant” approach by stating, “[p]hilosophy matters, viewpoint matters, who we are matters. If it did not, you would not need judges at all. You would have a computer, you would put in the data, and it would spit out an answer.”<sup>20</sup> But, Judge Newman added, philosophy should not be the *only* thing and there should be obvious limits to the role of philosophy and viewpoint.<sup>21</sup> “[T]he two branches need to . . . come more into balance, [and to] avoid the extremes . . . . Extremism on the judiciary is . . . inappropriate.”<sup>22</sup> It seems to me that, in a way, Judge Newman is saying that in order to achieve structural independence—and, by implication, *judicial* independence—we must seek structural *balance*. We must recognize the legitimate and proper roles of both the executive *and* the Senate in the selection

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17. U.S. CONST. art. II, § 2, cl. 2.

18. *Id.*

19. Jon O. Newman, *Federal Judicial Selection*, 86 JUDICATURE 10(2002).

20. *Id.* at 12.

21. *Id.*

22. *Id.*



process, and avoid extremism at all costs.

Well, I have talked now for some time—longer than I promised, I suppose—and I thank you for indulging me. I have enjoyed speaking to you and, again, it is an honor to be here. I hope you have gotten something out of my talk, something more than fifteen minutes of sleep! If you have been napping, here is a summary: judicial independence is not the natural state, but rather an ideal, one for which we must strive. Judicial independence may be broken down into two components: decisional and structural independence, both being at once facets of and prerequisites for the larger principle.

Let me say one more thing before closing: Much has been made—particularly in the wake of 9/11—of this country’s “greatness.” And most often, it seems to me, we hear about this wonderful principle known as “majority rule.” It is often intimated that it is this principle that makes this country great, that sets it apart from the world’s other nations.

I must respectfully disagree. It is true that majority rule is a bedrock political principle of the United States and one that served to fuel the fires of the revolution through which, over 200 years ago, we threw off the oppressive yoke of old King George. But, still, as one looks around the world, most countries have come to adopt some variation of this principle; most have “seen the light” in some form or another. In this sense, we are no longer exceptional: around the globe, most majorities do, in fact, rule. And yet there remains a great deal of oppression; at least, a great deal more than that which exists in the United States.

No, I submit to you that it is not the “majority rule” principle that stands as the backbone of our uniquely American liberties, but rather something else: something that—with respect to majoritarianism—does not *empower*, but rather *limits*; something that prevents majority *rule* from becoming majority *domination*.

That “something,” I submit to you, is judicial independence. In my opinion, it is *this* that distinguishes our country, *this* that makes it great. *This* is the foundation of our freedom. *This* is our protector. *This* is what renders our rights *unalienable*. This—this elusive notion of judicial independence.

In my view, an independent judiciary is the greatest gift of our forefathers. In the form of judicial independence, they bequeathed us freedom.

Thank you.

