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PUBLIC PERCEPTIONS OF JUSTICE: JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

Keynote Address: National Association of Administrative Law Judges 1997 Annual Meeting And Conference Denver, Colorado

John L. Kane, Jr.*

It is a distinct pleasure and honor for me to be with you today and I hope that my remarks may hold some interest for you. A keynote speaker has a responsibility to present the centralizing issues of an assembly in a unifying manner. In this particular instance, I feel very much like I am preaching to the choir.

The excellent program your conference committee has prepared is already unified with its emphasis on judicial independence and accountability, professional licensure and development and the humane treatment of litigants. I am also very interested in the topic of Future Trends in Administrative Law.

In 1972 I was chairman of the Long Range Planning Committee of the Colorado Bar Association. After consulting with some well-known experts in the field of trend analysis like Alvin Toffler, the author of "Future Shock," I gave an oral report to the Board of Governors of the Colorado Bar Association.

To the unbridled laughter of that august body, I suggested that within the next ten to twenty years legal fees would exceed $200 per hour, law firms in Colorado would exceed one hundred lawyers, legal research would require a computer, solo practitioners would have the highest incidence of malpractice making them an endangered species,

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*Senior U. S. District Judge (Colorado). Keynote delivered at the 23rd Annual Meeting and Educational Program on Public Perceptions of Justice: Judicial Independence and Accountability. Monday September 29, 1997 in Denver, Colorado.

gasoline would cost more than one dollar per gallon, the airlines and railroads would be deregulated, real estate values would increase five-fold and Colorado would have branch banking.

The ideas were not mine, but the memory of a parliament of complacent owls hoot-hooting in the face of inevitability lingers on. If one insists on remaining ignorant, "Forewarned" is not necessarily "Forearmed."

My own prediction about the future of administrative law leads me to suggest that you should begin immediately to prepare for phenomenal growth. It is likely that entire areas of contemporary litigation will be turned over to administrative practice. Though it is only an informed guess, medical malpractice and related claims will probably require exhaustion of administrative remedies before suit can be filed. *Pro se* prisoner litigation, which presently accounts for nearly 25 % of the civil cases filed in the federal district courts, is already being invested with that process. In state jurisdictions, one should be open-minded enough to expect that all auto accident litigation will be converted to a system much like Worker's Compensation, and I don't think it is too imaginative to suggest that domestic relations and probate eventually will be integral topics on this Association's agenda. Indeed, if this nation doesn't declare an armistice very soon in its so-called War on Drugs, these shifts to administrative process will occur sooner than presently anticipated.

Predicting the future is not an exact science, but it rests on the certainty that change is inevitable. How we meet change is determined by the intelligence and objectivity with which we prepare for it. If we meet change, rather than being ambushed by it, we can preserve those values we cherish and we can shed those practices which give us cause for shame. History teaches us that nations fall when their values are sacrificed in response to transient convenience. To bring the point home, I think we can agree that law is a cherished value and *policy* is a transient convenience. Thus, it seems to me that this conference has no more vital issue to consider or cause to champion than that of judicial independence.

There is a lot to say about judicial independence with particular respect to the role of Administrative Law Judges in our justice system. I will say more about this in a minute, but I want to divert your attention very briefly to serious infringements of judicial independence with respect to the Article III courts. Of course you have an intellectual interest in these matters, but I think the stark reality of recent developments will underscore my opinion that an infringement of judicial independence any where and any time presents a danger everywhere and always.

In April 1996, after the Oklahoma City bombing trial against Timothy McVeigh was moved from Oklahoma to Denver, and U.S. Chief District Judge Richard P. Matsch of the District of Colorado was assigned to preside over the case, the U.S. Congress enacted a law stating that, notwithstanding any provision of the Federal Rules of Criminal Procedure to the contrary, in order to permit victims of crime to watch criminal trial proceedings where the venue of the trial is changed out of the state and more than 350 miles from the place where the proceedings would have taken place, "the trial court shall order closed circuit televising of the proceedings to that location for viewing by persons whom the court determines have a compelling interest in doing so and whom are otherwise unable to do so by reason of inconvenience and expense caused by the change of venue.

This statute has no conceivable application beyond the Oklahoma City bombing case.

Thereafter, Chief Judge Matsch ruled that witnesses in the bombing trial seeking to testify in the death penalty phase of the trial would be barred from the courthouse and the closed circuit television locale because their presence would violate the sequestration of witnesses rule invoked by the defendant. The Tenth Circuit Court of Appeals affirmed Judge Matsch's decision, however, President Clinton signed into law the Victims Rights Clarification Act of 1997 effectively overruling the decisions of both Judge Matsch and the Court of Appeals.

Legislation following the completion of a judicial proceeding to contravene or modify an unpopular result is not unusual in the U.S.

system. It is virtually unprecedented, however, for the legislative and executive branches of the federal government to interfere in an ongoing judicial proceeding as was done in this instance. Moreover, the absence of any recorded Congressional history of this legislation makes it impossible to know whether this unconscionable disregard for the independence of the judiciary was even considered.

The constitutional protections for judicial independence should be cherished, not challenged. We must note, however, that increasingly strident political criticisms of particular judicial decisions are taking place without much organized opposition. Moreover, with respect to this particular issue, the Press, which claims to be the "watchdog of our Liberty," has behaved more like a politician's toy poodle. We must all understand that judicial independence is not for the protection of judges, but for the protection of the public. If the life-time appointees under Article III of the Constitution are subject to such attacks, how secure in the integrity of their judgments can judges appointed for terms expect to be? "Ask not for whom the bell tolls."

The executive branch of any government has significant authority to limit individual rights and freedoms. These limitations can only be permissible if they are consistent with constitutional norms and traditional notions of fairness. It is the judge's task in any venue to examine the proper application of law and to check against the abuse of power by the executive. Therefore, protecting judges from improper interference in carrying out their duties is essential to preserving individual rights and maintaining a decent society.

As I see it, Administrative Law Judges are far too vulnerable to interference with their judicial function. First, and foremost, many states share with the federal government the absence of a separate structure for administrative law judges within the executive branch of government. For the past eighteen years I have responded to inquiries from some members of the Colorado congressional delegation about what legislation can be enacted to improve the administration of justice.

In each instance, I have said the most important thing is to create a separate department of administrative law judges within the executive

branch. Many legislators need to be reminded that there are more judges in the executive branch than in the judicial branch and that more cases are decided by them in a year than in ten years by the judicial branch.

In the briefest and perhaps most indelicate way of expressing my view, I think that having the agency or department that litigates before an administrative law judge exercise the power to appoint, promote or assign is the same as having the fox guard the henhouse. Even the most benign fox can be expected to make supper every now and then.

Aside, from the lack of institutional separation, the fundamental purpose of an agency is to further its policy, and that is often in direct conflict with the basic objective of adjudication. In some instances administrative law judges are coerced into what I think is no less than a conspiracy to subvert law in order to implement policy. I refer specifically to the so-called doctrine of "nonacquiescence."

As stated recently in the Congressional Record by Senator Campbell of Colorado, "[S]o many Federal agencies currently fail to comply with established case law when dealing with Americans' rights and legal claims. Instead, the very agencies whose function it is to serve the people of this country have been ignoring the law through the policy of nonacquiescence.... We require the American people and courts to adhere to judicial precedent. This policy of nonacquiescence completely undermines that principle.... If the people must adhere to judicial precedent, we should require no less of Government agencies.

I know that this Association supports passage of the "Federal Agency Compliance Act," and all I can say is: "More power to you!"

Aside from the ill effects of organizational structure and overt pressure such as the doctrine of nonacquiescence, the program for this Conference will also focus on accountability. I have a few observations in this regard that might prove helpful. Recently, a friend of mine who had been a prosecutor for a number of years resigned. He did not do so to enter a lucrative private practice. In fact, he is still unsure of what he

is going to do. He explained his resignation by saying he got to the point at which he thought everyone was a criminal. "It's almost impossible," he said, "to work in an asylum and not think the whole world is crazy.

When I examine administrative agency decisions by some truly excellent judges, I sometimes get the impression that they have confused the tree of agency regulations with the forest of the law. Let me hasten to add that I am constantly at risk of doing the same thing whenever I get a steady diet of a particular category of cases. It is, I think, the greatest danger of specialization. This phenomenon isn't confined to the law. Try, for example, to be examined by various medical specialists for an undiagnosed ailment and see how the resulting opinions are distributed among the different departments of the hospital.

The focus of a judge on a particular body of law can blind him or her to overriding principles embodied in the law and the Constitution. So, too, the demands of ever-increasing case assignments can pressure the judge to reach a decision before the litigant has a fair opportunity to be heard. A judge in a specialized court must be constantly alert to the limitations which define the specialty while simultaneously maintaining vigilance to insure that judicial power must be exercised so as to enforce fundamental rights. I think this is what makes the performance of your duties so difficult, and I have nothing but admiration for the way in which these duties are usually performed. Nevertheless, we are all accountable to our oath of office to uphold the law and not to the goals or expectations of bureaucracy.

There is an illusion that judges have no justice function. A philosophy teacher once remarked, "Indeed, almost the only group of people who seem suspicious of the concept of justice, who almost seem to avoid using the term, are professional lawyers and judges." But the people who appear before us have the right to expect justice. This view that we have no justice function is clearly wrong. It overlooks the fundamental purpose animating our very existence ---to accomplish justice within a framework of objective legal rules. To say that we

should blindly apply legal rules, without evaluating whether such application accomplishes justice is to view law as a series of valueless computations. It overlooks that law exists to perform a function in a living society to provide order where otherwise there would be madness, to afford dignity where otherwise there would be degradation, and to express our highest aspirations where otherwise there would be despair.

As judges, we are not the only people responsible for maintaining a free society, but it damn sure won't exist without our constant commitment to do justice in every case. In that pursuit I wish all of us well.