Keynote Address: Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence

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Judicial independence is a concept that forms the very foundation of our judicial system. This article discusses judicial independence from the perspectives of the judge, the litigant, and the spectator, describing why each values a judge's ability to perform his or her duties in a fair and impartial manner. The article then discusses some of the many threats to judicial independence, as well as the traditional and institutional safeguards that help to maintain an independent judiciary.

President Kirwan, Ms. Patterson, Chief Justice Moyer, Chief Justice Phillips, and distinguished faculty and participants in this conference entitled "Perspectives on Judicial Independence": I take the title of the conference as the theme of my remarks. I will speak about a few of the many perspectives on judicial independence. These are perspectives that intersect and interact, that must be weighed and balanced, and that present different challenges that perhaps call for different resolutions.

America has valued judicial independence since before the formation of the country. The American Revolution, a fight for national independence, was also a fight for judicial independence. Among the list of grievances justifying the American Revolution, the Declaration of Independence charged King George III with obstructing the administration of justice "by refusing his Assent to Laws for establishing judiciary powers"[1] and with making judges "dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."[2]

But judicial independence is more than the creation of a judiciary or tenure and salaries. Although the phrase is hard to define, the term "judicial independence" embodies the concept that a judge decides cases fairly, impartially, and according to the facts and law, not according to whim, prejudice, or fear, the dictates of the legislature or executive, or the latest opinion poll. At times, judicial

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[1] THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776).

[2] *Id.* at para. 15.

independence means making unpopular decisions, whether unpopular with the legislative or executive branch, the public, or judicial colleagues.

Judges make choices; by definition they exercise judgment. Not all judges reason alike or necessarily reach the same result even when presented with the same facts and the same law. If judges did not use judgment, they could be replaced by computers, which, when given the facts and law, would churn out an answer. Nevertheless, judicial independence does not mean that the judge is a loose cannon on the deck of justice, shooting in any direction he or she wishes.

Judicial independence is a means to an end—a fair trial according to the law.[3] The state constitutions and the Sixth and Fourteenth Amendments to the U.S. Constitution guarantee the right to an impartial judge in criminal and civil cases. And these guarantees of impartiality are the legal backbone of judicial independence.

Judicial independence must, however, be balanced against and paired with other values, namely, accountability and responsibility. All government officials are accountable. But to whom are judges accountable and for what?

Judges are accountable to explain their decisions and make these explanations available to the litigants, the public, the academy, fellow judges, and the media.

The judicial branch is responsible for processing cases expeditiously, offering everyone equal access to justice, and requiring judges and court personnel to be courteous and helpful. The judicial branch is responsible for administering justice free of discrimination. The judicial branch is responsible for spending its appropriations prudently and in accordance with sound fiscal practices. The judicial branch must give the bar and the public an opportunity to express their views about the system and to participate in the system through citizen boards and committees and volunteer programs.

With these principles in mind, I speak of five perspectives on judicial independence:

(1) the judge's perspective;
(2) the litigant's perspective;
(3) the spectator's perspective;
(4) threats to judicial independence; and
(5) safeguards for judicial independence.

The sixth perspective will be that of the participants in this conference and the reader.

The face of judicial independence changes according to one's vantage point. I will start by speaking about a judge's perspective on judicial independence. The

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[3] *See* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1083–84 (1996).

judge's perspective is an important one, because it is the judge alone who exercises judicial independence.[4]

Although all judges are expected to decide cases in a fair and impartial manner, judges work in different jurisdictions and in different roles. Regardless of these differences, judges are held to standards of judicial independence. The threats to that independence, however, and the means of preserving judicial independence may vary from one type of judge to another.

For example, I am an elected justice of my state's highest court, with a term of 10 years. I am a veteran of three contested, non-partisan elections, the last one being the most expensive judicial election in Wisconsin's history. That certainly gives me a perspective!

Other judges are appointed to the bench, particularly federal judges.

We are judges in the judicial branch of government. Still other judges work in the executive branch of state and federal governments. These judges, often called administrative judges, hearing officers, or examiners, work in administrative agencies and handle claims in such matters as social security, worker's compensation, and employment and housing discrimination.

These executive branch judges probably outnumber judges in the judicial branches of the state and federal governments.[5] These judges have their own perspective on judicial independence. They face unique challenges to their impartiality and judicial integrity. For example, immigration courts are attached to the U.S. Department of Justice, the prosecuting arm of the government, and immigration judges make significant, life-altering decisions. The National Association of Immigration Judges is complaining that the Justice Department is attempting to influence the decision-making of immigration judges.[6]

We cannot think only of American judges. We live in a global society. Judges in other nations also face challenges to their independence. In too many countries around the world, there is telephone justice: a telephone call directs the

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[4] For one judge's personal perspective on judicial independence, see Harlington Wood, Jr., *Judges' Forum No. 2: "Real Judges"*, 58 N.Y.U. ANN. SURV. AM. L. 259 (2001) (concluding that judicial independence is essential for impartial decision-making).

The literature on judicial independence is voluminous. For a bibliography relating to the subject, see Amy B. Atchison et al., *Judicial Independence and Judicial Accountability: A Selected Bibliography*, 72 S. CAL. L. REV. 723 (1999). For a selected bibliography, see Shirley S. Abrahamson, *Remarks of the Hon. Shirley S. Abrahamson Before the American Bar Association Commission on Separation of Powers and Judicial Independence, Washington, D.C., Dec. 13, 1996*, 12 ST. JOHN'S J. LEGAL COMMENT. 69, 88–91 (1996).

[5] Judith Resnik, Commentary, *Judicial Independence and Article III: Too Little and Too Much*, 72 S. CAL. L. REV. 657, 659 (1999); Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 612–21 (2002) [hereinafter Resnik, *"Uncle Sam Modernizes His Justice"*].

[6] Jason Hoppin, *INS Judges Seek Independence: They Share Bosses with U.S. Lawyers*, NAT'L L.J., Mar. 4, 2002, at A1.

judge how to rule on a case. Many countries are rejecting this way of conducting judicial business and are attempting to emulate our judicial system. Indeed, our judicial system is one of our most important exports.

Furthermore, judicial independence has been strongly emphasized by international organizations as a key to safeguarding human rights. The United Nations, which regularly assists countries in establishing systems of justice, set forth standards for achieving an independent judiciary in its Basic Principles on the Independence of the Judiciary, which were adopted in 1985.[7] Both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights enumerate an independent judiciary as an essential element for protecting human rights.[8] In fostering judicial independence in our country we must keep in mind and be guided by international norms.[9] "Global" is the key word in this decade.

A second perspective from which to view judicial independence is that of a litigant. A litigant is in court to resolve an important dispute, be it about family matters, personal liberty, employment, property rights, or privacy. For example, an airport scanner has been developed that is a "virtual strip search," producing a very graphic picture of your naked body.[10] With advancing technology, litigants will increasingly look to the courts to protect against invasions of privacy.

Let's be honest here. Most litigants would prefer a judge who is partial to them and their case. Each litigant might wish to have an unfair advantage for himself or herself.

But this kind of "self-serving behavior [is] intolerably risky."[11] Litigants cannot know whether they or the opposing side will have the greater clout to get a partial judge. So, because a litigant is unsure who the partial judge would favor, the litigant must choose the next best alternative, namely, a neutral, fair, impartial judge. From the perspective of a litigant's self-interest, judicial independence is the best approach.

Which brings us to a third perspective from which to view judicial independence—the standpoint of the public. Most people are not personally involved in litigation. They watch the courts as spectators. Of course, what they watch is mostly "Judge Judy" and "Law & Order."

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[7] *Basic Principles on the Independence of the Judiciary*, 7th U.N. Cong. on the Prevention of Crime and the Treatment of Offenders, at 59, U.N. Doc. A/CONF, 121/22/Rev.1 (1986).

[8] *See* Linda Camp Keith, *Judicial Independence and Human Rights Protection Around the World*, 85 JUDICATURE 195, 195 (2002).

[9] Courts have recognized the wisdom of looking to international norms for guidance. *See, e.g.*, Sterling v. Cupp, 625 P.2d 123, 130–31 & n.21 (Or. 1981) (citing international standards for treatment of prisoners).

[10] Mark Hansen, *No Place to Hide*, A.B.A. J., Aug. 1997, at 44, 46.

[11] John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 367 (1999).

But spectators, like the litigants, are interested in judicial independence because a system for fair, impartial, peaceful resolution of disputes is more likely to bring about a just result. Judicial independence, they know, furthers legal, constitutional, and democratic values and the rule of law.

A fair, impartial, and peaceful system to resolve disputes ensures the public an orderly society in which to live. Even when a decision is unpopular, the people will ordinarily abide by a judicial decision when they have confidence that the judiciary is a fair and impartial body.

Indeed we must conclude, from any of these three perspectives—judge, litigant, or public—that judicial independence is for the protection of litigants and the public, not for the protection of the judge.

An excellent example of these three perspectives on judicial independence and their interdependence occurred at the February 2002 Olympics, where we saw the results of partisan judging. As you know, Olympic figure skaters work hard for four years to prepare for three to four minutes of competition. They count on fair and honest judging and getting the medal they deserve. Rigging the outcome is disastrous for the judges and robs the competitors and the spectators of fair matches and a just result.

The Olympics in Salt Lake were a very smooth operation except for an alleged judging impropriety.[12] As you will recall, the Canadian figure-skating pair lost the gold medal to the Russians by a 5-4 vote. The French judge (a 15-year veteran in international judging) cast her vote for the Russians. But she apparently later announced at a routine, post-competition judges' meeting that she had been pressured by a French sports official to vote for the Russians in a vote-swapping deal. The reported deal was for her to assure a victory for the Russian figure-skating pair and the Russian judge would vote for the French in the next ice-dancing competition. In the ice-dancing competition no French judge sat and no Russian was expected to contend for the gold, making it possible to do the vote-swapping deal.

The French judge wound up in tears, felt she was under siege, and was suspended, with further investigation to follow. The International Skating Union threw out the French judge's vote four days later, and the Canadian team was given an unprecedented second gold medal.

This incident caused widespread distrust of the competitions and opened a Pandora's box of other countries' disputing rulings, calls, and drug test results. Imagine living with a judicial system that was subject to similar doubts and distrust. Chaos and corruption would ensue.

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[12] For a media report of the incident, see Selena Roberts, *Canadian Skaters Awarded Share of Olympic Gold; French Judge Suspended, Her Scoring Thrown Out*, N.Y. TIMES, Feb. 16, 2002, at A1.

The Olympics controversy points us to the fourth perspective from which to view judicial independence, namely, the many threats judicial independence faces.

Threats to judicial independence are not new. They have historically come from the executive and legislative branches. The legislative or executive branch of government may become unhappy with judicial decisions and try to influence judicial outcomes directly or indirectly.

For example, President Thomas Jefferson attempted to impeach U.S. Supreme Court Justice Samuel Chase because Chase enforced the Sedition Act.[13] During the Civil War era Congress apparently manipulated the size of the U.S. Supreme Court to ensure a favorable ruling on wartime legal tender legislation.[14] Congress also took away the Court's jurisdiction in a pending case to avoid a constitutional challenge to the Civil War Reconstruction legislation.[15] During the 1930s, President Franklin Delano Roosevelt tried to increase the size of the U.S. Supreme Court to pack the court with appointees friendly to New Deal legislation.[16] Later still, the unpopularity of the Warren Court's civil rights and criminal justice decrees in the 1960s sparked demands for the impeachment of Chief Justice Earl Warren.[17]

Threats from the legislative and executive branches continue, sparked by decisions on such issues as reapportionment, school funding, reproduction rights, gun control, tort reform, and affirmative action. Judges must continue to decide these cases even though the decisions may have significant repercussions for the judicial branch as an institution. The three branches of government are separate and equal branches, but the branches are interdependent. Will the legislature or executive respond to a judicial decision by refusing to increase the number of judgeships needed to keep up with increasing caseloads? By refusing to appoint judges? By refusing to increase judicial compensation? By refusing to fund courthouses and staff?

In more recent years, another threat to judicial independence has come from non-governmental groups. Using political, social, and economic resources, powerful non-governmental groups are attempting to influence judicial decision-making by influencing the selection and retention of judges. The danger is that

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[13] For an account and analysis of this incident, see WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992).

[14] For a brief summary of this event, see Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1448–49 (2001).

[15] Bruce Fein & Burt Neuborne, *Why Should We Care About Independent and Accountable Judges?*, 84 JUDICATURE 58, 59 (2000).

[16] For a brief summary of this event, see STEPHEN E. FRANTZICH & STEPHEN L. PERCY, AMERICAN GOVERNMENT: THE POLITICAL GAME 449 (1994).

[17] *See generally* William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483 (2002).

when individuals or groups are highly organized, ideologically driven, and well-funded, their self-interest in winning cases overcomes their interest in an independent judiciary. How do we keep the influence of these special interests in check and yet protect everyone's rights of free speech and association? These are the challenges we face.

For some, judicial elections themselves are a significant threat to judicial independence.[18] Over 80% of state trial and appellate judges are elected by the people,[19] and most state judges have limited terms, some as little as four years.[20] Without a doubt, campaigns have become nastier, noisier, and costlier than ever before.

How can elected judges remain impartial and rule on minority interests when they depend on the majority of the electorate to stay in office? How can elected judges remain impartial when they are dependent on certain groups or persons for financial support at election time?

Campaigning takes a judge away from judging. Judges must court voters who are apathetic. Campaign speech may call into question a candidate's future independence in a particular case or on a particular issue.[21] Raising funds to meet increasing campaign costs adversely affects the public's and judges' perception of judicial independence. I support the elective judicial system in Wisconsin, although I recognize that the elective process poses difficulties.[22] In exercising judicial independence, the stakes for the judges, that is, the loss of the judgeship, are clearly higher for judges with limited terms than they are for appointed judges with life tenure.

On the other hand, many believe the appointive system for selecting judges has also become a significant threat to decisional judicial independence. In the federal system some judges are appointed by the President "with the Advice and Consent of the Senate"[23] and "shall hold their Offices during good Behaviour,"[24]

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[18] "If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges." Republican Party of Minn. v. White, 122 S. Ct. 2528, 2544 (2002) (O'Connor, J., concurring).

[19] AM. BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS: PART TWO 3 n.1 (1998); Roy A. Schotland, Comment, *Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 149, 154–55 (1998).

[20] *See, e.g.*, ARIZ. CONST. art. 6, § 12; COLO. CONST. art. 6, § 16; GA. CONST. art. 6, § 7, ¶ 1; KAN. STAT. ANN. § 20-3006 (2001).

[21] In discussing free speech of candidates for judicial offices, Justice Kennedy suggests that states with an elected judiciary may wish to "adopt recusal standards more rigorous than due process requires and censure judges who violate these standards." *White*, 122 S. Ct. at 2545 (Kennedy, J., concurring).

[22] Abrahamson, *supra* note 4, at 76.

[23] U.S. CONST. art. II, § 2.

[24] U.S. CONST. art. III, § 1.

that is, for life. Nevertheless, many other federal judges, namely bankruptcy and magistrate judges, are appointed by federal judges themselves for limited terms.[25]

The threat here is that the appointive system has increasingly turned into a search for people with particular views about the law. Litmus tests abound.[26]

Yet another threat to judicial independence is intimidation of judges by vitriolic criticism and physical violence. For example, federal district court Judge Harold Baer was criticized by President Clinton and presidential candidate Robert Dole and threatened with impeachment for suppressing evidence in a particularly high-profile drug case.[27] A campaign controversy highlighting a notorious capital case ended the judicial career of Tennessee Supreme Court Justice Penny White.[28]

Judges have been threatened by fear of physical harm. Judges in divorce, domestic violence, and criminal courts sometimes must live under police protection. At a minimum, judges must be assured that they and their families are physically safe regardless of the decisions the judges make. Increased security measures have become necessary and visible in courthouses across the country.[29]

The threats abound. But there are also ways to safeguard and bolster judicial independence—which leads me to the fifth and final perspective (at least from me today) from which to view judicial independence. Fortunately, there are traditional and institutional protections for judicial independence.

Judges are constrained to maintain judicial independence by the law, their legal training, their expectations, and the judicial culture. The judicial culture and judicial education treasure intellectual honesty, fair and principled decisions, and rising above partisanship and the political moment. Peer pressure fosters judicial independence.

Judicial independence is also safeguarded by statutes and ethical codes requiring judges to conform to high standards and to disqualify themselves from sitting on cases in which their impartiality would be questioned. Judicial

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[25] Resnik, *"Uncle Sam Modernizes His Justice"*, *supra* note 5, at 674.

[26] For a discussion of threats to judicial independence by appointment of judges, see Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 987–91 (2001).

[27] For discussions of the Judge Baer controversy, see, for example, Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 310–11 (1997); Francis J. Larkin, *The Variousness, Virulence, and Variety of Threats to Judicial Independence*, JUDGES' J., Winter 1997, at 4, 6–7; Jon O. Newman, *The Judge Baer Controversy*, 80 JUDICATURE 156 (1997).

[28] For discussions of the Penny White campaign, see, for example, Bright, *supra* note 27, at 310; Traciel V. Reid, *The Politicalization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68 (1999).

[29] *See, e.g.*, Wisconsin Courthouse Security Manual (Nov. 2000) (available from the Wisconsin Supreme Court, Madison, Wis.).

discipline commissions and the courts can discipline judges for violations of these codes.

Despite these and other safeguards, we must recognize that we rely on the character of the judge. A judge needs courage. Judges with courage resist threats to judicial independence and actively advocate judicial independence. Those lacking courage should neither apply nor run for the office. We must foster a culture that supports and rewards courageous judges.

In the long and short run, the basic and most important underlying safeguard for judicial independence is public support for judicial independence. We must develop the public's understanding of, respect for, and confidence in the concept of judicial independence. We must act now while the public retains confidence in courts.

But earning that confidence and respect is a many-faceted process. The people must first understand the court system. Judges and lawyers must work with the public to help them become better informed about the work of the courts and to demonstrate the value of judicial independence.

The public must also have direct involvement in the work of the justice system. The public must have an opportunity to express its concerns, criticisms, and suggestions. Giving the users of the system opportunities for involvement in the courts does not impede judicial independence. On the contrary, only with public support for an independent judiciary can the judiciary be truly independent.

That is why this conference is so important. It brings together the bench, the bar, the academy, and the public. The League of Women Voters' co-sponsorship and the local community's involvement signal that public interest in judicial independence is growing. This conference is further evidence that a grassroots movement is spreading across the country.

The chief justices of many states and the National Center for State Courts have come together since the 2000 elections to grapple with the growing threats to judicial elections. On February 14, 2002, a new campaign for fair and impartial courts was launched, called "The Justice at Stake Campaign." It is a nationwide, nonpartisan partnership of more than thirty judicial, legal, and citizen organizations, including the American Judicature Society, the Brennan Center, the American Bar Association, the League of Women Voters Judicial Independence Project, the Ohio League of Women Voters, Ohio Citizen Action, Wisconsin Citizen Action, and the Wisconsin Democracy Campaign.[30]

Together these groups are working to educate the public and institute reforms to keep partisan politics and special interests out of the courtroom. It is a goal worth fighting for—whatever your perspective on judicial independence.

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[30] Justice at Stake Campaign, 717 D St., NW Suite 203, Washington, D.C. 20004, *at* http://www.justiceatstake.org (last visited Dec. 28, 2002).

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Please allow me to be provincial and close with the words of Edward Ryan at the 1846 Wisconsin constitutional convention: "The office of the judiciary is interpretation and interpretation cannot be a representative function.... [T]he judiciary represents no man, no majority, no people. It represents the written law of the land.... It holds the balance, and weighs right between man and man, between the rich and the poor, between the weak and the powerful."[31]

Shirley S. Abrahamson, C.J., concurs.

[31] THE CONVENTION OF 1846, at 594 (Milo M. Quaife ed., 1919).