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Austin Owen Lecture: Difficulties, Dangers & Challenges Facing the Judiciary Today

Robert E. Payne

AUSTIN OWEN LECTURE

DIFFICULTIES, DANGERS & CHALLENGES FACING THE JUDICIARY TODAY

*The Honorable Robert E. Payne**

Judge Payne presented this address at The Sixth Annual Austin Owen Lecture on November 18, 1997.

The Honorable Austin E. Owen attended Richmond College from 1946-47 and received his law degree from The T.C. Williams School of Law in 1950. During his distinguished career, Judge Owen served as an Assistant U.S. Attorney for the Eastern District of Virginia; a partner in Owen, Gray, Rhodes, Betz, Smith and Dickerson; and was appointed Judge of the Second Judicial Circuit of Virginia where he served until his retirement in 1990. The Law School community grieved the loss of this distinguished alumnus upon his death in March, 1995. In 1991, Judge Owen's daughter, Dr. Judith O. Hopkins, W'74, and son-in-law, Dr. Marbry B. Hopkins, R'74, established the Austin Owen Lecture which is held each fall at the Law School.

I have had a highly rewarding experience in the practice of law, and I envy those of you who are about to embark upon that experience because, notwithstanding the critical remarks often made about lawyers, the practice of law is a wonderful career. It presents an opportunity to serve society. It provides an opportunity to be challenged constantly. And, it is a vehicle for the enjoyment of rewarding personal experiences while you are being paid, not unhandsomely.

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* United States District Judge, United States District Court for the Eastern District of Virginia.

I appreciate very much the invitation to be here to participate in this lecture series. It is indeed a privilege to be included among the list of notable people who have presented the Austin Owen Lecture.

I asked for some information about the purpose for which the Lecture was endowed, and I was told that Judge Owen's daughter had said this about it: "The presentation needs to be one that teaches aspects of law that the students would not otherwise get during their regular curriculum." I have tried to follow that instruction faithfully, although in today's complicated legal world, I sometimes wonder whether there is any topic on which you do not receive instruction.

I have, therefore, chosen to raise with you some of the rather substantive difficulties confronting the federal judicial system today. How we as judges, how we as the judicial system, and how we as a society, address those troubles will in large measure determine how effective the federal judicial system continues to be in the 21st century. In many respects, these problems are shared by the state and federal judicial systems, but I will focus on the federal aspect of these problems.

First, there is an increasing tendency on our part as a society to look to the federal judicial system to solve a great many of society's problems. This is illustrated in the trend toward federalizing crime to secure more severe federal penalties and longer prison terms.

For example, we now have a federal law that criminalizes the failure to pay child support ordered by state courts.[1] That, of course, puts the federal courts into play in securing parental support payments from dead-beat parents who will not pay child support. We have statutes in the federal system directed to the resolution of the question of domestic and other violence against women.[2] We have made a federal crime out of intrastate carjacking.[3] It recently has been proposed that we federalize a drunk driving standard.[4] We are seeing an increase in

1. *See* Child Support Recovery Act of 1992, 18 U.S.C. § 228 (1994).

2. *See* Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.).

3. *See* Anti Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384 (codified as amended in scattered sections of 15 U.S.C., 18 U.S.C., and 42 U.S.C.).

4. *See* Eric Pianin, *Senate Ties Crackdown on Drunk Drivers to State Highway*

the federal prosecution of gun related crimes that for years have been considered state law enforcement matters.[5]

These are all serious issues in their own right. But, by resorting to the federal judicial system to solve these problems, we create other problems, perhaps of even greater seriousness. There is, of course, a threshold problem inherent in federalizing what are at base local crimes because that intrudes on the powers and duties of the states. Worse still, it allows the states to escape their responsibilities, and it takes from them the important job of local law-enforcement in prosecuting local crimes.

I suppose that one could always create a scenario in which federal interests are largely, significantly or importantly implicated in what one ordinarily would call local crimes. That would, of course, eliminate the argument that such crimes are essentially matters of local concern. But, it is, I think, important to maintain the balance between the federal and the state criminal justice system which is reflected in the Constitution. It is, therefore, important to resist the temptation to overlook the local nature of problems to justify federalizing the solution.

Perhaps, the larger question is whether it is wise turn to the federal law and the federal judicial system for the solution of these problems? Without any question, avoidance of child and spousal support in defiance of state law judgments creates economic impacts that are felt across the nation. But, is making the enforcement of obligations of that sort a federal criminal matter really necessary, and is it desirable? Violence against women, domestic or otherwise, is a serious problem. So too is intrastate car-jacking. So too is drunk driving. And, all of these problems have impacts that often are not confined to one state. But, what can federal law enforcement authorities who have limited enforcement capacities really do about these problems? Ask yourself, "Is there a federal police capacity large enough to enforce these laws?" And, if not, ask yourself, "Do we want to create a federal police capacity that is sufficient unto the task of enforcing them?" Unless we increase our federal policing

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Aid, WASH. POST, Mar. 5, 1998, at A12; *see also* Intermodal Surface Transportation Efficiency Act of 1997, S. 1173, 105th Cong.

5. *See* Jim Mason, *Police Unit Scores Bull's-Eye in City Gun Seizures*, RICH. TIMES-DISP., Feb. 5, 1998, at B1.

capacity, we cannot enforce all of these laws. And, with that in mind, think for a moment about what happens when government raises expectations that the legal and judicial systems can address problems when, in fact, those systems cannot meaningfully address them.

In that context, consider also that there are approximately 1000 federal district and circuit judges (if you include the active and senior status judges). It is, therefore, obvious that the federal judicial resource also is a limited one. What happens when this limited resource is devoted to essentially local problems, rather than to the federal issues, which the federal judiciary was established to address? There is, I suggest, the risk of unenforced law which means that societal expectations for the federal judiciary cannot be realized. And, the ensuing consequence is the diminished effectiveness of, and respect for, the federal judicial system as a whole.

The significance of that problem is even more serious when one considers that each year Congress tends to establish new species of federal civil claims about which the federal government and the federal courts, in reality, can do very little. Look, for example, at Title IX of the Civil Rights Act,[6] regulating all sorts of activities within schools. I am not talking about the part of Title IX which requires equal access in sports and to sports funding.[7] I am talking about regulations several inches thick which tell schools what they have to do to address basic problems associated with the operation of educational institutions, like the discipline of students and the prosecution of students who commit crimes of a very serious nature, including rape, on the campus.[8] These are serious matters which are worthy of attention. But, what can the federal judicial system do about them? The federal courts are not equipped to deal with problems of that sort. And what's going to happen, I fear, is that the law simply will not be enforced. And, then those people who were expecting the law to be enforced will be disappointed, and rightfully so.

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6. 20 U.S.C. § 1681(a) (1994)

7. *See* 34 C.F.R. § 106.41 (1997).

8. *See, e.g.*, 34 C.F.R. § 668.47 (1997) (discussing school crime and discipline reporting procedures).

Another place to look is in the employment law arena. Are those claims important? You bet they are. Is it critical that discrimination be rooted out of the work place? Yes. Is it wise to make everything that happens in the employment setting a matter which ought to be addressed in the federal courts? And, while we are at it, is it wise to set up an administrative system for handling employment discrimination claims that requires a claimant to go through an agency that does not have the time or the staff to consider the claims promptly—or perhaps not at all?

Consider just one example. The other day the Equal Employment Opportunity Commission ("EEOC") came into court and represented that it did not have the resources to take on a really significant issue.[9] The issue was, "Should employers be permitted in their employment contracts to establish an arbitration system for the resolution of employment related complaints?" I do not know of many topics in employment law that are more important than that one. But, this agency actually represented in court that it did not have the time or the resources to take on that issue.

If the EEOC does not have time or resources to address an issue of this sort, and if, at the same time, Congress is making new rights, new laws, and cutting budgets which further reduce judicial resources, what is it that citizens can expect of the federal judiciary in discharging its constitutional role in our system of government?

Add to that set of circumstances, the requirement of the Speedy Trial Act[10] that puts all criminal cases, no matter how insignificant, in a priority position over civil cases. As you can readily see, Congress has created a circumstance in which civil dockets are backlogged, and judges have less time to devote to civil matters. The consequence of that inevitably will be a decline in the quality of judicial decision making in the civil litigation arena.

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9. *See* Circuit City Stores, Inc. v. EEOC, No. 3:97CV538 (E.D. Va. July 18, 1997).

10. 18 U.S.C. § 3174 (1994).

We are fortunate that we do not have that problem in the Eastern District of Virginia at this time. We still are able to manage our civil dockets in an effective way, notwithstanding the Speedy Trial Act. But, in many courts, the situation in the civil area was perceived to be so bad that, not long ago, Congress passed the Civil Justice Reform Act[11] to address this widely occurring backlog in civil dockets.

Congress laid the blame for this problem on the judiciary.[12] And, no doubt, many courts were to be faulted for being too tolerant of lawyers and their seemingly insatiable quest for delay. Some courts also may have deserved criticism for not managing their dockets. Perhaps, there may even have been courts which were to be faulted for slack work habits. But, the real problem lies in the creation, by acts of Congress, of a vast array of federalized crimes which are principally state and local matters of concern and in the Congressional creation of an increasing number of new federal civil claims.

Unless there is some measure of restraint by Congress, the federal courts soon will have great difficulty in fulfilling their principal role in the federal system of government. There are other serious problems facing the judiciary today. I refer to the increasing number of attacks upon the independence of the judiciary. I digress for just a moment to remind you to take a look at *Evans v. Gore*,[13] where there is a thorough discussion about the importance of an independent judiciary, and about how critical the independence of the judiciary is to the proper functioning of the balance of powers established by the Constitution and to the enforcement of the Bill of Rights.[14] And, I ask you to keep that discussion in mind, when you read about current developments which affect the independence of the judiciary.

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11. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-482 (Supp. 1992)). The Act requires judges to publish semi-annually a list of all motions older than six months and all cases older than three years.

12. In a recent Senate floor debate concerning making the publication requirement permanent, Senator Biden commented that the requirement was needed because, "'sunlight is the best disinfectant.'" 143 CONG. REC. S8528 (daily ed. Aug. 1, 1997) (statement of Sen. Biden) (quoting Justice Brandeis).

13. 253 U.S. 245 (1920).

14. *See id.* at 249-53.

Take, for example, the excoriation of the judge in New York over a decision on a search and seizure issue.[15] He became a poster child in the campaign for the presidency. Republicans clamored for his impeachment.[16] And, even the President who appointed him let it be known that he might ask for the judge's resignation.[17] I ask you, "What does that say about judicial independence?" I am not defending that ruling; indeed, I have not read it. But, if the judge was wrong, there is a Second Circuit Court of Appeals which would have no difficulty in reversing an erroneous decision.

There is also the case of the judge who declared California's Proposition 209 an affirmative action.[18] Just look at the fire storm that was directed at him personally.[19] Personally, not just at his opinion.

Closer to home, we have judges in our own circuit, in our own district, who have been made campaign centerpieces themselves and have been castigated for being so-called "liberal judges,"[20] and "soft on crime."[21] If you read the opinions which led to those characterizations, I doubt that you could really endorse that description of those judges. But, that is not the point I seek to make.

Nor am I saying that judges should not be criticized for bad decisions; to the contrary, they should be. What we do is open to the public, and we ought to be openly criticized when we are wrong. Moreover, it is fair to disagree with any judicial decision (right or wrong) and to subject it to debate and analysis. But, that criticism ought not to be personalized and it ought not be designed to strike at the heart of the independence which is the linch pin of the ability of the federal judiciary to fulfill its role in our constitutional system. That is, however, where we may

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15. *See Washington Today: Concern over 'Political' Attacks on Federal Judges*, ASSOC. PRESS, Jan. 3, 1997, *available in* 1997 WL 4850313.

16. *See id.*

17. *See id.*

18. *See* Joan Beck, *Prop 209 Ends Preferences, Not Opportunity*, HOUS. CHRON., Apr. 17, 1997, at 32, *available in* 1997 WL 6551619.

19. *See, e.g., Discontinue Preferences, Deal with Racism Properly*, ATLANTA J. & ATLANTA CONST., Apr. 10, 1997, at A16, *available in* 1997 WL 3963778.

20. *See* Robert M. Kaufman, *Politics Creating Havoc in the Federal Courts*, CHI. TRIB., Aug. 25, 1997, at 13, *available in* 1997 WL 3581883.

21. *See id.*

be heading. Look, for example, at the proposals on the floor of the Congress to provide for impeachment of federal judges for making specific decisions.[22] Think for a moment, if you will, what that legislation, if it came to pass, would do to the independence of the judiciary.

There are, from the same sources and from conservative media personalities, proposals to eliminate life tenure of federal judges.[23] Life tenure is not the *sine qua non* of an independent judiciary, but it certainly is an important concept in our federal system. Indeed, it is a concept so basic, so important to the founders of the Constitution, that there was almost no disagreement in the constitutional debates over the proposition that judges in the federal system ought to be appointed for life and ought to be free of reductions in compensation, so long as they served upon good behavior.[24] That was, I submit to you, one of the few things that the founders of the Constitution were able readily to agree upon. And, we ought to be very reluctant to make systemic changes that alter the central role which judicial independence plays in our federal system of government.

State judges also are exposed to some of the same problems. Not long ago, the term of a state judge was not renewed and one of the reasons given was—there were several reasons given—but one reason given was that the judge had not granted a continuance to a lawyer-legislator who wanted it.

There was another state judge last term whose term was not renewed.[25] He was a perfectly good judge according to all the records, but his commission was not renewed because he did not give a gun permit to a prominent political figure.[26] Is that, I ask you, a valid reason not to renew the commission of someone who has done a good job as a judge? And, there was no question that he has done a good job serving the citizens of this

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22. *See Hearings Before the Subcomm. on the Constitution, Federalism and Property Rights of the Senate Comm. on the Judiciary*, 105th Cong. (1997) (statement of Timothy E. Flanigan), *available in* 1997 WL 11235718.

23. *See* Herman Schwartz, *One Man's Activist: What Republicans Really Mean When They Condemn Judicial Activism*, WASH. MONTHLY, Nov. 1, 1997, at 10.

24. United States *ex. rel.* Toth v. Quarles, 350 U.S. 11, 16 (1955).

25. *See Allen Ditches Judge Who Yanked North's Weapon Permit*, VIRGINIAN-PILOT & LEDGER-STAR, May 8, 1997, at B11.

26. *See id.*

Commonwealth. What kind of message does that send to the judges and to the populace at large? What effect do actions of that ilk have upon the independence of the state judiciary?

Remember that the notion of an independent judiciary is but a vehicle to assure fair and correct judicial decisions based on the principled application of law, free of pressures that have no proper role in the judicial decisional process. There is, inherent in our system, the certainty that a particular judge will err from time to time. However, the system provides redress for that circumstance. An independent judiciary is essential to our constitutional system. Any change in the system which diminishes that independence and which politicizes the application of the law, in turn, weakens our constitutional rights. That threat should not be ignored.

Now, there is no question that there is also a great danger to the federal judiciary from within. Sometimes we can be our own worst enemy. One of my colleagues says we must avoid at all costs the "goofy decision" syndrome.[27] I am not going to use the examples which he cited. But, federal judges have to be careful because the power of federal judges is great. The exercise of that power has to be circumscribed by self-discipline, and that means taking into account practicality and legality in deciding cases. It always will be necessary for judges to decide hard cases and sometimes in so doing to make cutting-edge decisions. That, of course, cannot be done by yielding to public opinion.

Nonetheless, the exercise of self-restraint in articulating the basis of our decisions and in limiting their reach to that which is essential to the issue presented for review makes it easier for the public to accept those difficult decisions on the cutting edge.

Judges also have to remember that they can be wrong, even when they think that they are right. As Learned Hand said when he quoted Oliver Cromwell, "I besiege you in the bowels of Christ think that we may be mistaken."[28] "I should like to have that written over the portals of every church," said Hand,

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27. *See The Fourteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 170 F.R.D. 534 (1996).

28. LEARNED HAND, THE SPIRIT OF LIBERTY 229-30 (Irving Dillard ed., 3d ed. 1974) (1952).

"every school and every courthouse, and may I say every legislative body in the United States, and I should like to have every court begin every day with the intonation, I besiege you in the bowels of Christ think that we may be mistaken."[29]

Too often it is easy for judges to forget that we may be mistaken. Of course, we should not be hesitant decision makers, but, in making our decisions, we have to remember that we may be mistaken, and that, in turn, ought to make us think harder and make us be more circumspect about what we do and more balanced in how we do it.

If we do that, I believe that we can avoid one of the biggest problems that any judicial system can have, and that is the ease with which judges can get out of touch with reality. It is particularly easy for federal judges to succumb to that circumstance. We are appointed for life. And it is easy to become self-absorbed, when everyone around you says, "Your Honor this, and Your Honor that" and when not many people are willing to take issue with you.

All judges, and particularly federal judges who have life tenure, have to guard against the risk of losing touch with those whom we serve: litigants, lawyers, and society at large. It is very, very important that we keep in mind who we are, what we are, and why we are there.

Now, the next segment of my presentation is on the media and the problems which it creates for the judiciary. And the following section is on the effects of the changes in the practice of law, and part of the first section is on cameras in the courtroom. And it's late. So I ought not give all of those remarks.

But, I do think that the judicial system as a whole must be cognizant of the risks posed today by the media. Too often, the media does its job without concern for accuracy. Too often the test for publication is what can be said first and what can be said sensationally, not whether what is said is right.

There is an increasing lack of appreciation on the part of the media for the effect of what the media says in reporting on events, particularly sensational ones. Pretrial statements in the

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29. *Id.*

media can adversely affect the right of the litigants to a fair trial by an impartial jury and can make it very difficult to select an impartial jury. Indeed, there seems to be little, or no, concern by the media about the damage done to the judicial system by erroneous reporting and by creating spectacles instead of just covering legal developments and trials accurately.

I do not know why that occurs; I just know that it does occur. I will not ascribe ill motives to people in the media. They are trying to do a job. And, many of them do a wonderful job, and not all of what I say applies to everybody in the media. But, the media must exercise restraint to make certain that, in fulfilling its role of informing the citizenry, it does not compromise the right of those accused of crimes and the right of society to a fair trial by an impartial jury.

The abuses in sensational cases are chargeable against the main stream, otherwise credible, media. The abuses occur in both print and broadcast media. And, the abuses are committed by media personalities and by media institutions. These abuses often threaten the fairness of judicial proceedings and they jeopardize the rights of the participants—the government and the accused.

The Simpson criminal case is a notable example.[30] But, I put to you this observation: Many notorious cases have proceeded from investigation to trial without the same problems. Examples of that kind of case are the Oklahoma City cases, the Unabomber case, and the World Trade Center cases.[31] I suggest that the principal reason for that is the timely imposition of orders by the courts curtailing lawyers' discussions with the media.[32] That was not done effectively in the Simpson criminal trial.

Additionally, the media simply has lost self-control in sensational cases. The media, in that kind of case, most usually is in a feeding frenzy, driven by money and ratings. The loser is our judicial system.

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30. *See* Catherine Cupp Thiesen, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 861 (1996).

31. *See generally* James E. Pfander, *Allerton House '96: Measuring the Tension Between Lawyers and the Press*, 84 ILL. B.J. 576 (1996).

32. *See id.*

A related problem is the incessant effort to bring cameras into the courtroom. I tell you frankly that I am glad that, in the federal courts, we do not allow it. Moreover, I hope that the Simpson criminal case and the consequent loss of respect for the judicial system sounded the death knell of cameras in the federal courts for a long time—certainly, I hope, beyond my life tenure.

Supporters of courtroom cameras respond that the judge let the lawyers run the Simpson trial, and that, in turn, allowed the press to turn the judicial mishap that was the Simpson criminal case into a circus. That response, I think, simply ignores the underlying problem, and it levies blame on a personalized basis, and I do not think that is appropriate. The real problem is that anytime you put people with egos the size of good trial lawyers into a courtroom and turn the camera on and give them a national publicity, they are going to perform for the cameras. That puts the lawyers at the focal point of the trial. And, that, in turn, takes the focus off of the evidence. When that occurs, the parties are deprived of a fair trial on the merits of the case.

Of course, there is another side of the camera issue. And, there are, I am sure, some good things that can be said about allowing cameras in the courtroom. But, I submit to you that Oklahoma City case and the World Trade Center cases have shown us how it is possible to run an efficient, fair trial without cameras and, at the same time, how media coverage—significant, informative, very valuable media coverage—can be integrated into a trial of that description. In so doing, those cases have restored a good measure of the public confidence that was lost as a result of what happened in the Simpson criminal trial.

The biggest challenge to the judicial system, however, may be in the changes in the practice of law which manifest themselves even now. For example, there is an increasing and disturbing lack of civility toward one's adversaries. And that is not healthy. There must be an effort to restore civility to our system. The responsibility for doing that rests with lawyers and judges.

There is also an increasing tendency, I fear, to have lawyers' own interests disproportionately affect the conduct of litigation because the stakes have become so large. One third of a billion dollars is a lot of money, but there are fees that large, and larger, at stake in some current litigation. And, from time to time, we see lawyers who overreach and overstate, and even misrepresent the facts and the law in the quest for victory. They are increasingly tempted in part to do that because the stakes are so high. Somehow, we must find a way to provide first quality legal service without making the interests of the participating lawyers in the outcome of litigation so financially large.

Today, I have but skimmed the surface of these problems which are among those currently facing the federal judiciary. I have raised them for your consideration without positing solutions. I have some ideas, but that, however, is the stuff of which the future debate about these issues will be conducted. And, the solutions are topics for other addresses. But, these problems are real in the profession for which you are preparing and into which you are about to enter. These problems, I do not think, are addressed in your regular curriculum. So, even though I have not postulated solutions, I hope that, by provoking you to think about these problems, I have fulfilled the principal purpose of the Austin Owen Lecture, and I hope that these remarks have served the important purpose for which the Lecture was chartered.

Thank you for the opportunity to be with you today. It's been my pleasure.