RANDOM OBSERVATIONS ON JUDICIAL INDEPENDENCE

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The following essay is excerpted from Professor Stanley Van Ness's lecture, delivered on May 8, 1984, as part of the Hughes Forum. This program is operated annually under the auspices of the Richard J. Hughes Chair for Constitutional and Public Law and Service at Seton Hall Law School. The Chair is endowed by the New Jersey Legislature in honor of the former Governor and Chief Justice of the Supreme Court of New Jersey. Professor Van Ness, who held the Chair from 1982 to 1984, is the former Public Advocate and Public Defender of the State of New Jersey.

I speak to you neither as a jurist nor a scholar, but as a bulk consumer, over the past fifteen years, of judicial services in the State of New Jersey. Jurists have occasionally written articles on judicial independence,[1] but with the somewhat defensive tone of an oft-criticized group seizing upon a rare chance to respond. I must also dispel any lingering illusion of scholarship surrounding me. During my two years at Seton Hall, I have taught more from experience than theory and this address is no exception. So again, my perspective is that of a bulk consumer of judicial services.

In this capacity I distinguish myself from the ordinary citizen or from the ordinary state senator who has had perhaps a few contacts with our judicial system and who has drawn some conclusions from those contacts. Usually that person's view of judicial confidence or judicial independence is colored very much by whether the person has won or lost in the courts. An extreme example that is hard to forgive, but not hard to understand, is why Senator Cardinale might generalize from a few specifics to threaten the career of one of the most outstanding jurists in the state.[2] Such action not only undermines confidence in our legisla-

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[1] *See, e.g.*, Burger, *The Interdependence of Judicial and Journalistic Independence*, 63 GEO. L.J. 1195 (1975); Hughes, *Judicial Independence*, 11 RUT.-CAM. L.J. 13 (1979); Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681 (1979); Mosk, *"Chilling Judicial Independence"—The California Experience*, 3 W. NEW ENG. L. REV. 1 (1980).

[2] In 1983, New Jersey State Senator Gerald Cardinale attempted to block the reappointment of New Jersey Superior Court Judge Sylvia Pressler through the exercise of "senatorial courtesy." This unwritten custom allows a home county senator to block, without explanation, a gubernatorial appointment. *See* N.Y. Times, Sept. 23, 1983, at B2, col. 1. Prior to becoming a Senator, Cardinale had been involved in four cases before Judge Pressler and had lost three of them. The (Newark) Star-Ledger, Sept. 20, 1983, at 22, col. 4. Because of Cardinale's appearances before Judge Pressler as a litigant, the State Senate refused his attempt to invoke senatorial courtesy, due to the ap-

ture, but also seriously threatens the independence of a large segment of the judges of this state. All those who have not yet reached seven years and been reappointed must now wonder whether some judge or senator will pop up at the time of reappointment to question whether a particular decision was appropriate or not. Fortunately, that effort was quashed.

What is this judicial independence that we're talking about, where does it come from, and what is its present and future place in a democratic society? The topic can be approached from two levels. First and most prevalent, judicial independence is the freedom of an individual judge to render a decision independent of influence or pressure. Second, it is this same freedom but preserved for the institution itself. Even an extremely condensed history of judicial independence shows the interdependence of these two levels. Thus Sir Edward Coke shortened his judicial career and nearly shortened his life by suggesting that King James I was wrong when he urged that all must recognize and bow to judicial prerogative. I believe Sir Edward suggested that the King's prerogatives are no greater than those which the law of the land have given him. After he said that, he spent the next several hours groveling on the floor in front of King James to preserve his head.[3] In 1616, the King decided he no longer needed his services. He was fortunately left with his head.

Perhaps Justice Coke's then outrageous views were tolerated because despite his protestations, the royal judiciary had no authority, no separate power. They served at the pleasure of the King. Their salaries

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parent conflict of interest. His three hour testimony before the Senate hearing included an attack on her dismissal of criminal charges against a defendant who later stabbed his mother. The late Justice John J. Francis of the Advisory Committee on Judicial Conduct testified that no complaints against Judge Pressler were ever filed during her tenure. N.Y. Times, Oct. 4, 1983, at B2, col. 2. The attempted use of senatorial courtesy brought renewed criticism of the custom. *See "Senatorial Courtesy": A Public Outrage*, 112 N.J.L.J. 313 (1983)(editorial denouncing the "ludicrous situation"); N.Y. Times, Oct. 4, 1983, at B2, col. 2 (Chief Justice Wilentz claims that custom threatens judicial independence and honesty); The (Newark) Star-Ledger, Sept. 18, 1983, at A22, col. 3 (Governor Kean characterizes senatorial courtesy as "dangerously bad"). *But see* Letter from William Dowd to the Editor of New Jersey Law Journal, *reprinted in* 112 N.J.L.J. 340 (1983)(defending "rule" for granting home county senator some much needed power to help offset Governor's power of appointment).

[3] E. COKE, ORACLE OF THE LAW 179 (1929). The exact exchange was as follows:

> 'The common law protecteth the King,' said Coke. 'That is a traitorous speech,' shouted James in great anger; 'the King protecteth the law, and not the law the King. The King maketh judges and bishops'; and he denounced Coke so fiercely and excitedly, rising in his chair and shaking his fists in Coke's face, that the Lord Chief Justice of the Court of Common Pleas, 'fell flat on all fower' before the King, and humbly begged his pardon; but it was not until Salisbury interposed on Coke's behalf that the King was somewhat mollified.

Id.

could be changed at will: if the coffers overflowed, perhaps more, if the King was displeased, perhaps less.

Eighty-five years after Coke had been dismissed as Chief Judge, judicial independence was recognized, at least as it related to the King vis-a-vis the Act of Settlement.[4] From that time on, the judges were to be appointed for life or good behavior, given fixed salaries, and removed from the bench only upon address of both Houses of Parliament. Parliament's claimed ascendancy over the King thus spawned political liberty in England.

However, colonial judges continued to be appointed by the King, and their salaries were established by Royal prerogative.[5] The criticism of King George III for this solitary exercise of will over the judges' tenure and salary was so substantial a grievance that it warranted inclusion in the Declaration of Independence.[6] After the Revolution, and after long debate, the Framers embraced a limited form of Government—a tri-partite form, which for the first time provided for a co-equal, independent branch of government known as the Judiciary. The Judges were to be appointed separate of the Congress and the Executive; their tenure and salary were to be fixed independently, and most important, the source of their power would flow directly from the Constitution rather than from the other branches of Government.

There were some who doubted the wisdom of that innovation. Edmund Randolph of Virginia, for one, declined to sign the Constitution because he viewed Article Three as an establishment of a judiciary *in terrorem*—suggesting that there was too much fear expressed in Article

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4 12 & 13 Will., ch. 2, § 3(7) (1701). That statute proclaimed, in part: "Judges' commissions be made *quamdiu se bene gesserit* (during good behavior), and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them." *Id.*

5 *See* C. MULLETT, FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION 1760-1776 (1933).

6 The relevant provision provides: "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence para. 11 (U.S. 1776). Perhaps the eighteenth century colonists were so infuriated because the earlier colonial constitutions had granted greater local autonomy for the administration of justice. *Compare* CONCESSIONS OF WEST NEW JERSEY, 1676, ch. XLI ("[A]ll the justices and constables [should] be chosen by the people . . . and chief justices . . . [should] be chosen by the General Free Assembly."), *reprinted in* W. MACDONALD, SELECT CHARTERS ILLUSTRATIVE OF AMERICAN HISTORY 1606-1775, at 182 (1898) *with* MASSACHUSETTS GOVERNMENT ACT, 1774, ch.VI ("[U]pon every vacancy of the offices of chief justice and judges of the superior court . . . the governor . . . without the consent of the council, shall have full power and authority to nominate and appoint the persons to succeed to the said offices, who shall hold their commissions during the pleasure of his Majesty."), *reprinted in* W. MACDONALD, *supra*, at 346.

Three of the other two branches of Government.[7] Alexander Hamilton, among others, attempted to reeducate Randolph, and Federalist No. 78 set forth the relationship that he saw: the judiciary balancing the other branches of Government. He said the judiciary would be the weakest of the three, that it would be least dangerous to citizens' rights under the Constitution. He went on to say that it would have "neither *FORCE* nor *WILL*, but merely judgment."[8]

We could all agree that Alexander Hamilton was the master of understatement. It was in 1803 when Justice Marshall asserted the supremacy of the judiciary: the judicial branch of the Government would determine what the law is and any law repugnant to the Constitution would be void.[9] This didn't sit well with Jefferson or with Congress; some intuited this as an usurpation of power. But when they searched through the Constitution they could find only the impeachment power.[10] And indeed, they successfully tried that out on a Judge by the name of Pickering, who was impeached for being a man of loose morals and bad habits.[11] History tells us that that wasn't too hard a charge to sustain in Judge Pickering's case. But when that same power was sought to be exercised against Justice Chase,[12] the result was different. It became very clear that the impeachment power was going to be a cumbersome vehicle by which to regulate the judiciary. So the other governmental branches started to recognize that there was a new boy on the block, as strong as the others. And though conflicts were sought to be avoided, they inevitably occurred. This is where the second aspect of judicial independence is most important—where the institution itself is in danger of being manipulated or controlled. Obviously, if the institution is not free, there will be little room for the free exercise of independent judgment by judges within the system. So in those two regards, I speak of judicial independence.

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7 *See* Friedlander, *Judicial Supremacy: Some Bicentennial Reflections*, 8 RUT.-CAM. L.J. 24, 29 (1976) (citing 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 310 (M. Farrand ed. 1966)).

8 THE FEDERALIST No. 78, at 523 (A. Hamilton) (J. Cooke ed. 1961).

9 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

10 U.S. CONST. art. II, § 4, provides that "the President, Vice-President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

11 *See* I. BRANT, IMPEACHMENT: TRIALS AND ERRORS 46-57 (1972). The constitutional question of whether the conduct of Pickering, an alcoholic, amounted to "high Crimes and Misdemeanors" was not addressed—the Senate merely found him "guilty as charged in the first article of impeachment" and hence removed him from office. *Id.* at 56.

12 Chase was acquitted. *See* S. SMITH & T. LLOYD, TRIAL OF SAMUEL CHASE (1805). The political nature of the attack on Chase, an ardent Federalist, is documented in Brant, *supra* note 11, at 58-83.

New Jersey was slow to emulate the Federal model. It wasn't until 1844 that we even instituted the separation of powers in our constitution. As the former Governor pointed out in his opening remarks, the judicial system under that constitution left a great deal to be desired.[13] In 1947, our judicial system came of age with the assistance of such notables as Learned Hand, Roscoe Pound, Arthur Vanderbilt, Nathan Jacobs, Al Clapp, and others. In 1947, delegates to that convention adopted a system of appointed judges and placed in a Chief Justice the authority and the responsibility to run the system. They also established an administrative office of the courts and recognized that there was rule-making power reposed within the state supreme court. Some say that Justice Vanderbilt immediately took the latter power and expanded it considerably when he decided the *Winberry* case,[14] but even after that decision, Roscoe Pound was heard to say that the best court system in the United States was the one that had been established here in New Jersey by the 1947 constitution.[15] I think that that reputation not only continues, but grows with modern innovations, such as the merger of the county and superior courts and the creation of a family court.

Let me hasten to add that I do not think that the system alone would have entitled us to that kind of evaluation, were it not for the fact that we have been very fortunate to have had at the helm of the court men such as Arthur Vanderbilt, Joseph Weintraub, Governor Hughes, and now Robert Wilentz. They have administered a system that is renowned for its demonstrated judicial competence, and almost entirely free of any taint of scandal. So much so that when former Governor Hughes commented in 1977 that the New Jersey court system was totally unpolitical and completely independent,[16] he could say so without fear of contradiction.

What then does this power of judicial independence mean in a democratic society? Under both Federal and state models the judges are

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[13] Former Governor Richard J. Hughes observed that the system of justice under that constitution "was considered the worst in the United States." Opening Remarks of Governor Richard J. Hughes, Hughes Forum (May 8, 1984).

[14] Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406 (1950).

[15] Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28 (1952). Dean Pound was unequivocal in his praise:

> New Jersey had definitely been put in the lead among American jurisdictions in provision of a judiciary organized and empowered to administer justice speedily, efficiently, and at no more than reasonable expense in the complex, urban, industrial society of today, charged also with definitely placed responsibility commensurate with the power.

Id. at 28; *see also* Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 8 BAYLOR L. REV. 1, 3 (citing New Jersey as the state with the most modernly organized court system).

[16] *See generally* Hughes, *supra* note 1.

appointed. Note that even if we were talking about an elected system, it would still be a question of appointment—it is just where the appointment takes place, whether it is at the clubhouse or the State House. In any event, the following questions can be asked: "By what right do these people who are elected by no one make rules which govern everyone? By what right do they tell us that we have to bus our children across town to integrate schools? By what right do they tell us that we can't pray in our schools? By what right do they tell us that we should administer our institutions in one way as opposed to another? By what right do they tell us how much we should spend for the education of a child? By what right do they tell us what our zoning ordinances should look like and what opportunities those ordinances should provide for the housing of lower and moderate income citizens in this state?"

There are a number of eminent scholars and lawyers who say "by no right." By no right does the Court have the power to act as it has been acting. Scholars such as Philip Kurland and Alexander Bickel have on occasion chided the United States Supreme Court for grasping for power.[17] The typical judge's response is that such judicial action is proper when the other branches of government fail to respond. A weak argument, however, may be made that if the Executive and Legislature, which have greater resources and opportunities to study whether these things should be done, choose not to do them, it is because no one knows how, or because there is not enough money to go around, or because the public just doesn't want them done.[18]

Scholars are not the only ones who have raised the question, "By what right?" Indeed a number of legislators at one time or another have said "by what right" when confronted by a particular decision, and have relied on the dubious precedent of *ex parte* McCardle[19] to say that they can introduce bills that will withdraw appellate jurisdiction from the Supreme Court. A number of such bills have been introduced—Governor Hughes mentioned thirty in his opening remarks, and I have no quarrel with that—touching on everything from the question of admissibility of confessions to school prayer to abortion. Any controversial decision by the United States Supreme Court has been matched by the

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[17] *See* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); Kurland, *Earl Warren, the "Warren Court," and the Warren Myths*, 67 MICH. L. REV. 353 (1968).

[18] A similar argument was advanced by New Jersey Legislators who were opposed to the active role taken by the state supreme court in prescribing housing allocations. *See* Rose, *New Additions to the Lexicon of Exclusionary Zoning Litigation*, 14 SETON HALL L. REV. 851, 886 (1984). *But see* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 102-03 (1980) (upholding judicial activism when the relative independence of the appointed judges will best serve as "channels of change").

[19] 74 U.S. (7 Wall) 506 (1868).

introduction of some bill to withdraw the jurisdiction from the Court. As clumsy and unsuccessful as it is, there is the occasional resort to the impeachment process. Most recently was the battle led by then Congressman Ford to impeach William O. Douglas—unsuccessful, thank God.

The courts, by what right? Well, I suppose you could even mention the vast segments of our population that have occasionally asked that question. The signs that suggested we impeach Earl Warren came from all sources—from the scholars, the lawyers, the legislators, the average person in the street. Yet through all the years of this republic, courts have maintained the support of the populace. People have voluntarily obeyed the mandates coming from the courts. When the independence of the court is threatened, the public reacts. When President Roosevelt sought to pack the Court in 1937, at the height of his political power, he found an immediate and emphatic repudiation of his activities in the election of 1938. In that year the electorate turned out many New Deal Congressmen—some say largely on the issue of judicial independence.

The public has supported the courts because I think they believe that the courts are honest, neutral, and fair. But there is another reason as well. Not only do the people view the courts as honest and neutral and fair, but there is a well-spring of fairness within the American people themselves. The American people are prepared to be convinced that they are better than they think they are. They are prepared to put aside their own self interests when someone points out to each how unfair the exercise of that self interest has been.

I don't think that there is any question but that the vast majority of Americans today would say it was unfair that blacks were segregated and discriminated against in the South and elsewhere in this country for so many years. The vast majority of Americans would say that it is unfair to deprive a patient in a mental hospital, or even an inmate in a jail, of humane treatment because of the cost associated with it. I think people here in New Jersey would say it is unfair to live in suburbs ringed by zoning laws that keep out the poor, because people have a right to decent housing. In these instances the courts have merely pointed out the fairness or the unfairness of a situation and the public has recognized and accepted it.

When I was young, I used to go to Ebbet's Field to watch the Brooklyn Dodgers play. I do not know how many of you ever had that experience, but the fans there were knowledgeable, vociferous, and some say rabid. On more than one occasion I would hear somebody shout, with great sincerity, "Kill the umpire" after some questionable call. Yet the game continued—not without argument, but without mayhem. I think that the umpire was safe because the people knew that if you

threatened, intimidated, or cowed the umpire, the game they loved so dearly would never be the same.

I think the American people know that if you allow the judiciary to be threatened, intimidated, or cowed, our government would never be the same again. I believe the courts can count on the support of an independent people for an independent judiciary. But I do not think the courts can take this support for granted. The courts must be worthy of the people's trust. Hence the importance of the state's committee—lay members—who can look impartially at the judiciary's conduct. Also the courts should not overreach. We cannot ignore the criticisms of the Kurlands or the Bickels. When it is possible to defer to the other branches of government, then that should be done. But where the constitutional mandate is clear, the courts cannot shirk their duty. As Justice Wilentz said in *Mount Laurel II*,[20] when confronted with the argument that this was not something that the judiciary should be doing—that it is something the legislature should be doing—he said, "[W]e may not build houses, but we do enforce the Constitution."[21] As long as the judges in this state and elsewhere enforce the constitution honestly and fairly, they will enjoy the support of the people, as well as their judicial independence. They should not enjoy it one day longer.

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[20] Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983).

[21] *Id.* at 213, 456 A.2d at 417.