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Surviving the Politics of Judging
National Association of Administrative Law Judges
Luncheon Address
September 13, 1999

Penny J. White*

This afternoon I am desirous of trying for a very few minutes to fill a role that Dr. Martin Luther King called a drum major for justice. Dr. King in a Testament of Hope described a drum major for justice as one who speaks the truth no matter how unwelcome it may be or how uncomfortable it may make the listeners.² Today I plan to do that: to speak the truth about surviving the politics of being a judge or a judicial officer—the truth as I know it, as I have experienced it, as I have witnessed it, and as I perceive it to be. And the truth that I deliver may make some of you uncomfortable. You know there are just some people who squirm when we talk about things like responsibility, and courage, and judicial independence. But I am going to talk about it anyway.

And for some my message will be unwelcomed, because I know there are some who don't regard their decisional independence as a matter appropriate for discussion certainly not in a public setting. But I'm going to do that too.

You may wonder how I can so boldly predict that some of you will be uncomfortable with my comments, that some of you will not welcome them. It is quite simply because I speak frequently on this topic and every time I do, some people in the audience are uncomfortable. On the other hand, most, and I am sure that is true of you, embrace the conversation as an opportunity to be reminded of why they have chosen the wonderful vocation of making decisions that

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²Martin Luther King, Jr., *A Testament of Hope*, in the ESSENTIAL WRITING OF DR. MARTIN LUTHER KING 267 (James M. Washington, ed. 1986).

affect the lives of others.

In fairness, I should begin with a confession. The title for this presentation was not chosen by me. Chances are it was chosen by your first choice for speaker who would not send me a copy of his speech when he was unable to attend. But working with the title, I will confess that I do not believe that the first and third words of the title of this talk “surviving” and “politics” should appear in the same epoch as the words “judge” or “decision maker” let alone in the same phrase. But not only are the words often juxtaposed with the words “judge” or “decision maker,” the two, judging and politics are often thought to go hand in hand.

And so we address politics and survival. And it’s really quite simple: the former may cost you the latter. Politics may cost you survival, at least job survival. As decision makers you may lose your job because of politics. I did. For those of you who do not know, I have the dubious distinction of being the only appellate judge in Tennessee ever to be turned out by the voters on a retention race. The details are not important but they have something to do with a governor, two United States senators, a newspaper, deceit, opportunism, and raw, partisan politics.

I joined a decision authored by my Chief Justice and issued by the Tennessee Supreme Court. It was a correct decision and honestly not really even a courageous one. It was simply the right thing to do.

Some folks were encouraged by the politicians who had their own agenda to speak out against the decision. They mischaracterized the decision and deceived and misled the public about the decision, about my background, and about me, personally. I could not correct the mischaracterization because the Code of Judicial Conduct prohibited me from commenting. I chose to follow the Code and I lost my job. It hurt—not only for the reason that any job loss, any rejection hurts, but because my sense of justice told me it was wrong and unfair. And because people who could have secured my survival did nothing for fear of losing their own.

It could happen to any one of you, maybe in a less public setting, certainly, but nonetheless the trauma to you would be the same: unemployed unfairly, and likely alone; not supported by those who fear that they might be judged like you if they stand by you.

Or it might not be as severe as job loss. Maybe it would just be

reassignment to the least attractive docket or the least attractive area; maybe your travel would be greatly increased; your budget greatly decreased. Maybe you will be denied leave for conferences or programs or encouraged not to belong to organizations such as this or participate in programs. Maybe you will be removed from a supervisory position or criticized by the legislature for your decisions. If the purpose of any of these actions is to impact your decision making, it is the same as if you are terminated and it is wrong at its very core. It is simply wrong.

About twenty years ago in Georgia the justices of the peace had a pretty interesting job. Justices of the peace were individuals who issued search and arrest warrants in Georgia and they got paid a fee *if* they issued a warrant but not if they did not. When a man by the name of John Connally was arrested as a result of a search of his house, he challenged the process. The justice of the peace in the Connally case was a man named Murphy, and he was an honest and decent man. He admitted that he worked as a justice of the peace to earn a living. When he was asked whether the fact that he got paid if he issued a warrant but received no pay if he did not entered his mind while he was contemplating issuing a warrant, he answered plainly. "It has."³ He went further. He said he would be a liar if he claimed it didn't enter his mind because in his words, "it's only human nature to me." I am confident that no one in this audience, no one we could approach on the street could think that the Georgia justice of the peace system as it then operated was fair. No one would support a justice system so invaded with bias and favor.

Yet that is exactly the system we have if we allow interference with decisions to come from agency pressure, public outcry, or political manipulation. If we perceive that a decision will negatively impact us, as would Mr. Murphy's decision to decline to issue a warrant, it's only human nature to decide accordingly. What I am saying, and what the Supreme Court said in the case of *Connally v. Georgia* is that when one accepts the title judge, ALJ, judicial decision maker, or any other title given to one with the responsibility to resolve disputes, to make decisions that affect people's lives, what I am saying is this: you have

³Connally v. Georgia, 429 U.S. 245, 246 n.3 (1977).

to go against human nature.⁴

In *Connally*, the last in a series of cases⁵ that explored whether temptations to rule in accordance with personal interests or benefits impugn the essence of the job of judging, the Supreme Court stated quite succinctly that the job of the jurist (in those cases a criminal jurist, but the test can be no different in the civil or administrative arena), is to hold the balance nice, clear and true between the parties.⁶

It might be argued that I have just made a giant leap, that surely what is true for those accused of crime, those who face deprivation of life or liberty, is different than what is required for those who challenge some agency ruling or request the enforcement of some agency regulation. In fact, I beg to differ with you for several reasons.

First, and most importantly, the *Connally* case and its requirement that judges hold the balance nice, clear, and true, is grounded in the due process clause as well as the fourth amendment.⁷ Secondly, it is equally important, if not more important, that decision making at the administrative level exude fairness for that level is in many cases the front line for securing the rights of people and assuring that government power does remain unchecked. An administrative law judge is often the only “judge” people see. They will form their opinion of the entire system based on justice in your hearing room. We cannot accept any of this “I’m not a so-called real judge excuse.” You are for many people, for many issues, not only a real judge but the only judge.

A third reason that I assert the importance of holding the balance nice, clear, and true in agency determinations comes from the applicable code of conduct. That code imposes upon administrative law judges the same obligation that the due process clause imposes on those who judge the criminally accused: the obligation to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

For some time now I have struggled to find a clause that would

⁴*Id.* at 251.

⁵See *Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Village of Monroe*, 409 U.S. 57 (1972).

⁶429 U.S. at 248 (quoting *Ward v. Village of Monroe*, 409 U.S. at 60).

⁷*Id.*

better communicate to the lay public what we mean by judicial independence; that would make them grasp the concept, because I believe that we have failed in educating the American public about the principle and more importantly, because, as I have predicted previously, I believe that if the American public understood the concept of judicial independence that they would march in the streets for it; that they would fight and die for it. After all their forefathers did.

But in my search for that new terminology, nothing really ever struck me until I reviewed the Model Code of Judicial Conduct for State Administrative law Judges. And there it is – plain and simple – judicial independence is judicial impartiality at any cost. And everyone who wants to adjudicate, whether they be a supreme court justice, a hearing board examiner, and ALJ, a hearing officer, or a commissioner, every person who undertakes the responsibility of making decisions that affects peoples lives accepts the responsibility of being impartial. And who decides issues based on pressure or threats, communicated or implied, is not impartial, is not independent, and is unqualified for the role of judicial decision maker.

Some would criticize the focus on these responsibilities as negative, as presupposing some neglect of responsibilities. I disagree. I think that the focus raises awareness, reemphasizes commitment, and augments our courage.

Being impartial requires courage. Being independent requires courage and it requires stamina. There is a parable about a widow who could not get justice because the judge was unjust.⁸ The judge was described as a judge who neither feared a supreme being nor respected persons, the worst kind of judge. A judge who was motivated by self interests, not by doing justice. As the parable goes, the widow was relentless. She returned day after day to the unjust judge and demanded justice, but got none. Finally, we are told that the judge granted her justice not because the judge feared or respected her, nor because she persuaded the judge as to the justness of her cause, but because the judge did not want to be further wearied by the widow's relentless request.⁹

You must be the relentless widow. When there are efforts to

⁸Luke 1-5 (King James).

⁹*Id.*

undermine your independence, to affect your impartiality, when there are implications that you owe allegiance to something or someone other than the rule of law, when you are treated in a disparate way because you exercise decisional independence, you must be the relentless widow. You must do justice again and again and again because to decline to do justice, to fail to be impartial and independent undermines respect for the administrative law system. Only if you are willing to undertake the responsibility to rule impartially and independently are you entitled to really be viewed as judges. If you succumb to human nature, if you fail to hold the balance nice, clear, and true, you are simply a conduit for disrespect for the law and for those whose job it is to enforce and apply it.

The widow's parable is instructive some additional ways. First, the widow sought justice. She did not seek favoritism or anything to which she was not entitled. She sought justice. When you are just, when you rule independently, you do not rule as you wish. Judicial independence is not ruling according to whim or personal preference, but ruling fairly as required by the facts and the law.

Lastly, the widow's actions took courage. At the time of the parable the widow was the least respected member of society. Because she was widowed she was without property, and because she was a woman without property, she was not entitled to an opinion, much less the right to voice it. And so in her relentless returns to the unjust judge, the widow demonstrated courage in the face of the greatest adversity, a society and a system that perceived her as wrong to even raise her voice.

It is easy for me to talk about courage for I am no longer called upon to exercise it. You, however, are. While my job is the easy one, yours is most difficult. I can tell you what I experienced and that I survived. I can tell you that there are things far worse than job loss, much worse, like knowing that pressure caused you to rule differently than the law and fact required. My job is easy, but yours is not. At times it will be more difficult than you ever anticipated. Every day, every decision includes the opportunity to undertake the responsibility of judging by being fair and impartial, or being the relentless widow, by continually delivering justice. Likewise, every day includes the temptation to succumb to human nature and emulate the unjust judge.

We need only return to the parable to see how simple the choice

is. Through courage through perseverance the relentless widow attains justice; the unjust judge, the justice of the peace who fails to hold the balance nice, clear and true, violate the fundamental rights of humankind.

Is there really any choice?

