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Penny J. White

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For lots of years I have had the opportunity to participate in and plan continuing education programs for educators, advocates, and jurists. I think, quite frankly, that I have never been associated with one of such an outstanding caliber as this 1996 Annual Conference of the National Association of Administrative Law Judges.

I commend each of you for your presence and participation here and I congratulate Judge Young and Judge Harwick and the other Conference members responsible for their leadership in organizing this challenging, provocative program for you. I am proud -- very proud -- to have the opportunity to share some time with you and be a very small part of this endeavor.

What impresses me about your program is the difficult nature of the many topics you are tackling -- evaluation of judges, ex parte communications, discrimination and bias, pro se litigants.

There is, of course, a bigger picture, a forest, if you will among the many trees of themes you'll be thinking about for the next four days. It is the common thread that motivates you to address each of these issues. That common thread that connects all these issues is their contribution to, their role in meeting, the essential, yet illusive challenge of Equal Justice Under the Law -- the Theme of your 1996 Conference.

And so it is, for example, that you will discuss ex parte communications assuring that justice is not influenced by unethical contact. You will address pro se litigation, assuring that justice is not determined by wealth; as well as discrimination and bias, assuring that justice does not depend upon race or gender.

All are important - all contribute to equal justice, we know, because we know that injustice anywhere is a threat to justice everywhere.

But I am here today to nobly proclaim without apology that the

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*Former Justice, Tennessee Supreme Court, speech delivered at National Administrative Law Judges' Conference, November 9, 1996, Nashville, TN.

greatest impediment to meeting the challenge of equal justice under the law is none of these. The greatest impediment, indeed the greatest obstacle to fulfilling that promise, a promise prominently chiseled over the entrance to the United States Supreme Court, penned in documents which breathed life into this nation,[1] recited by citizens vowing their allegiance to this country,[2] the greatest threat to meeting the promise of equal justice under the law is the erosion of the independence of the judiciary. And that erosion is hastened most quickly by judicial timidity.

I suggest to you that judicial independence is the sine qua non of due process, of equal protection, and of equal justice under the law.

I cannot claim any credit for this assertion. It did not come to me as a post-election realization. It precedes me and all of us by centuries.[3]

And interestingly enough, one of the first pronouncements of the principle of judicial independence was indeed an administrative law case. In 1610, in the case of Dr. Bonham, a graduate of Cambridge University brought suit against the Board of Censors of the Royal College of Physicians. The doctor was imprisoned for failing to submit to competency tests. A statute authorized the Board upon a finding of incompetency, to imprison and fine the doctor. One half of the fine would go to the college.[4]

The jurist in the case, none other than Lord Coke, Chief Justice of the King's Bench, found that the Board had a vested financial interest in the case and could not act as factfinder. The principle espoused: NEMO JUDEX IN RE SUA, "no man may be a judge in his own

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[1]Preamble to the Declaration of Independence; United States Constitution, amend. V; amend. VIX.

[2]"I pledge allegiance to the flag of the United States of America . . . with liberty and justice for all." Pledge of Allegiance.

[3] *See* BERNARD SCHWARTZ, THE ROOTS OF FREEDOM: A CONSTITUTIONAL HISTORY OF ENGLAND 121-23, 150, 190-91 (1965); COLIN R. LOVELL, ENGLISH CONSTITUTIONAL AND LEGAL HISTORY, 333-35 (1962) 2 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 195 (7th ed. 1956); JUDGE JOHN PARKER, "THE JUDICIAL OFFICER IN THE UNITED STATES," 20 TENN. L. REV. 703, 705-06 (1949).

[4]Dr. Bonham's Case, 77 Eng. Rep. 646, 8 Coke 114(a)(C.P. 1610).

cause," was fundamental to the early common law.[5] Ironically Lord Coke was removed from office by James I for failing to rule in accordance with James' wishes.[6]

History demonstrates that the other branches of government, Parliament and the King, did not willingly accept the proposition that judges were not subject to their control. Judges were induced to rule in accord with the desires of the King, who would remove them if they did not, or in accordance with Parliament's predispositions, who would decrease or eliminate their salary otherwise.[7]

Finally, in 1688, the Glorious Revolution led to the deposing of King James II and the appointment of judges for periods of good behavior rather than "at the King's pleasure."[8] As a corollary, their salaries were fixed by Parliament.[9]

The British weren't the only people to revolt over the attempts to eliminate the independence of judicial officers.

"We hold these truths to be self evidence; that all people are created equal, that they are endowed by their Creator with certain inalienable rights, that among those are life, liberty, and the pursuit of happiness. That to secure these rights governments are instituted . . . , that whenever any form of government becomes destructive of these ends," destructive of these ends, I repeat, "it is the right of the people to alter or abolish it and institute new government."[10]

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[5]Id. at 648, 8 Coke at 118(b); *see* M. Redish & L. Marshall, "Adjudicatory Independence and the Values of Procedural Due Process," 95 YALE LAW JOURNAL 455, 479 (1986).

[6]WHITE, SIR EDWARD COKE AND THE GRIEVANCES OF THE COMMONWEALTH, 1621-1628, 6-7. (1979). *SEE ALSO* 6 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 509-14 (2d ed. 1924) (James II did the same thing); COLIN R. LOVELL, supra, at note 3.

[7]BERNARD SCHWARTZ, supra, note 3.

[8]1 W. HOLDSWORTH, supra, note 3.

[9]Act of Settlement, 12 & 13 Will.III ch. 2, section 3(1701)(Eng.). Act of 1 George III, 1 George. 3, ch. 23 (1760)(Eng.). In 1907 John Zane wrote, "Since the Glorious Revolution there has never been a removal of a judge by the executive power, nor a single known instance of a corrupt decision." *See*, John Nancy Zane, "The Five Ages of the Bench and Bar of England," in 1 SELECT ESSAYS IN ANGLO AMERICAN LEGAL HISTORY, 625, (1907), quoted in Berman, The Transformation of English Legal Sciences; From Hale to Blackstone, 45 EMORY L.J.. 437, 507 (1996).

[10]Preamble to the Declaration of Independence.

Those words are familiar to us all. We memorized them in grammar school and we can still remember them. But do we remember the words that follow?

In the following words, the patriots declared George III a tyrant! The accusation was not a hollow one. The authors of the Declaration, many of them lawyers, did not rest on hollow, emotive accusations. They supported their harsh accusation with facts:

"Let facts be submitted to a candid world, "they said.[11] Today we would say , "Here's the proof. You judge the accusation for yourself." Then the authors carefully, meticulously charted the long list, twenty-seven paragraphs of the transgressions, the tyrannous acts of the King.

Prominently placed, in the Top Ten, in paragraphs seven and eight, was this declaration:

"He has obstructed the administration of justice . . . , He has made judges dependent on his will alone for the tenure of their offices, and the amount and payment of their salaries."[12]

I submit that it would do us good to memorize that. I submit that it is important, no, it is crucial, that those who hold or desire the title of judge, justice, your honor, that every single person who desires to don the robe, aptly described as both "an emancipating and humbling act,"that those who undertake to judge must be constantly mindful of the fact that paramount among the acts that led to the American Revolution, and ultimately, to the establishment of an independent United States of America were the efforts by the other branches of government to undermine the independence of the judiciary.

That we must remember, if we desire to meet the challenge of equal justice under the law; that we must never forget.

It comes as no surprise then that the requirement of an independent judiciary was integrated soundly into the Constitution and into the jurisprudence of the new nation.[13] Chief Justice John Marshall declared, that, "I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an

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[11] Id.

[12] Declaration of Independence.

[13] U.S. Constitution, Art III, Marbury v. Madison, 5 U.S. 137 (1803).

ungrateful and sinning people was an ignorant, a corrupt, or a dependent Judiciary."[14]

Hamilton in the Federalist Papers "feared complacence to the branch which controls the judicial officer."[15] He expressed concern that the judicial officer would not "hazard the displeasure of those who controlled."[16]

Remove the formal, poetic language of the old English tongue, and the message remains the same. Those who undertake to resolve disputes between citizens, corporations, or government cannot answer to any one; cannot allow control, real or imagined, to influence their decisions; cannot allow the public to believe or even perceive that the decision maker owes allegiance to one side or the other.

Though ancient, judicial independence is not obsolete. It is as necessary, as essential today as it was when Dr. Bonham was imprisoned by the Cambridge University Censors. This theme is nowhere more obvious than in the very Acts which gave rise to many of your positions.

The federal and model state administrative procedures acts, half a century old this year, were largely prompted by concerns for uniformity in administrative procedures.[17] Central to those acts, and to their adoption, were the concerns that procedural guarantees be adequately enforced and the belief that enforcement would help ensure an accurate, fair decision.[18] I suggest to you that a myriad of procedural guarantees: notice, hearing, counsel, witness exam is rendered completely meaningless if the adjudicator of those rights is robbed of

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[14]John Marshall's speech to the Virginia Convention during the debate on the Constitution is quoted by Judge John Parker at 20 TENN. L. REV. 706 (1949), supra note 3, but is unfortunately not cited.

[15]The Federalist No. 78, at 503-509 (A. Hamilton)(E. Earle ed. 1937).

[16]Id.

[17]*See generally* Tenn. Code Ann. Sections 4-5-101 et seq.; 5 U.S.C.§ 551 et seq.

[18]*See*, ROBINSON, GELLHORN AND BRUFF, THE ADMINISTRATIVE PROCESS, 4TH ED. 36-40 (1993); W. GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDING 43 (1941). "The problem is to develop methods which give assurances that matters will receive full and fair administrative consideration, so that the determinations when made will not be "arbitrary," but will reflect wise and informed deliberation" quoted in GELLHORN, ADMINISTRATIVE LAW (7th ed. 1979) at 10-11.

judicial independence or devoid of judicial courage.[19] Procedural safeguards are irrelevant if the adjudicator bases findings on factors other than the evidence or if the adjudicator is an integral part of the party on the other side of the case.[20]

Moreover, the concern is not only in those rare situations in which independence is in reality compromised, it is in those situations in which it appears to be compromised as well. Justice is as it is perceived. We must not only do justice, we must be perceived as doing it. We must satisfy justice and we must satisfy the appearance of justice. As Judge John Parker said: "It is of supreme importance, not only that justice be done, but that the litigants before the court and the public generally understand that it is being done . . . ."[21]

And so we have journeyed through history, quoted the Declaration of Independence, remembered great patriots, great writers, great judges, maybe felt a twinge or two of patriotism. Is this anything more? Is it more than a patriotic journey down memory lane, more than an exercise in waving the flag?

You bet it is. I began by telling you that a dependent judiciary is the greatest threat to equal justice under the law. It is more, ladies and gentlemen, it is a great threat to our entire system of justice, and I suggest, to our democracy.

But there is still more. I've talked about this subject with state court judges, about how judges must not bow to political pressure, to the untested will of the people. We remember all too many times when the people were wrong: slavery, debtors' prisons, segregation, gender discrimination. We are aware that while the public demands equal protection of the laws, their demands are silent, or stifled at best, for those whom the public scorns. And we know that at one time or another the public has scorned minorities, working women, Jews, the disabled, farmers. We know that almost all of us have at one time or another been the object of the public's scorn.

And so I have encouraged those judges and the advocates that stand before them as I encourage you this morning to be courageous

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[19] M. REDISH & L. MARSHALL, supra note 5, at 491-95.

[20] Id.

[21] Judge John Parker, *supra* note 3, at 20 TENN. L. REV. 706.

and relentless in defense of judicial independence.

The courage and perseverance demanded of you, of those of you who sit in the state and federal administrative tribunals is greater than those who judge elsewhere. Federal judges are protected by life tenure, and while our brothers and sisters on the state bench do not have that luxury, they are often insulated from real decision making by juries. That is a buffer that each of you is without.

You hear the case, you determine the facts, you apply the law, you render the decision. You have no guarantee of continued employment; you have no partners on the bench. As a result, you make more decisions, see more people, touch more lives. In short, you have more opportunity, and I suggest, more obligation to demonstrate judicial courage and judicial independence in action.

Secondly, your many decisions affect a wide variety of issues, many of which form the core of those values that prompted the revolution: the right to life, liberty, and the pursuit of happiness. Your decisions impact labor, housing, employment, human rights, transportation, mental health, the environment, the core of every person's existence. There is no more essential place for the exercise of judicial courage, for the demonstration of judicial independence than in the administrative tribunals of this country where issues at the heart of the values we hold most dear are determined. There is no more essential person to demonstrate that courage, to exercise that independence than you and you and you.

Thirdly, and most unfortunately, as a result of the usual nexus between you and parties who routinely appear before you, you are unfairly perceived as the least likely decision maker to exercise judicial independence. Your necessary entanglement with those who appear in cases you decide leads to a natural inference that independence will be sacrificed in favor of protecting most usually, the government's interest, or government coffers.

That perception, though unwarranted, must be recognized first, and then eliminated. "In a government of laws," said Justice Brandeis, "government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. If

government becomes a law breaker,, it breeds contempt for law, it invites everyman to become a law unto himself; It invites anarchy."[22]

You must be the example of law fairly, equally, independently, courageously applied. The determination of the facts and the application of the law, is your exclusive province. No one and nothing should be allowed to influence that determination.

You must do justice, of course, but you must do more than that. You must create, perpetuate, a perception of justice being done. As you personify courage and independence, you plant the seeds for public confidence and public trust in our system of law and you become a torchbearer, an ambassador for that which motivated most of us to enter this profession-- the fulfillment of America's promise of equal justice under the law.

[22] Olmstead v. United States, 277 U.S. 438, 485 (1928).