

SPEECHES

INTRODUCTORY REMARKS

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[T]he judge must be assured unequivocally that his legal decision, no matter how unpopular, will not threaten his term of office and that the only indignity he may suffer for error is reversal. In short, he must be certain that disagreeable views will not lead to personal punishment. . . . [P]rovisions protecting judicial tenure were 'not created for the benefit of the judges, but for the benefit of the judged.'¹

"Politicians on Judges: Fair Criticism or Intimidation" was a program produced by the Committee on Lectures and Continuing Education of the Association of the Bar of the City of New York and held on October 7, 1996, before a large gathering at the Association.²

This program was conceived in the midst of the maelstrom involving judicial independence dominating the news, particularly in light of the 1996 Presidential election. The program dealt with a subject that has pervaded American history and culture, right down to the commitment hearing of Kris Kringle in the 1947 movie, "Miracle on Thirty-Fourth Street."³ The initial plan was to bring two of our finest

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¹ Irving R. Kaufman, *Chilling Judicial Independence*, 88 *Yale L.J.* 681, 690 (1979) (quoting Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 *U. Chi. L. Rev.* 665, 698 (1969)).

² The members of the Committee principally involved in planning the program were Professor Carole Shapiro of Touro Law School, Laura Effel, Deborah Rosenthal, and myself, along with assistance from Tim Rountree of the Civil Rights Committee (Eric Freedman, Chair).

³ In the movie "Miracle on 34th Street" (Twentieth Century Fox, 1947), William Frawley, then playing the cigar-chomping political boss, speaks to Judge Harper, who is presiding over the commitment hearing of Kris Kringle, who claims to be Santa Claus.

orators and thinkers on the subject, Governor Mario Cuomo⁴ and Professor Stephen Bright, to the Association of the Bar, in an attempt to define the problem and design solutions, together with a panel of experts with differing perspectives. The intention was to move the debate forward, away from the tired statements that have dominated the discourse, statements such as "Judicial independence is important," or "Everyone has the right to criticize judges."

This is not to say that there are no outright calls to curtail judicial independence. Some are willing to go on record in support of restricting judicial independence, such as Alabama Governor Fob James, Tennessee Governor Don Sundquist, and former Judge Robert Bork.⁵ In addition, Texas Congressman Tom DeLay, the House majority whip, has been advancing the power of impeachment to keep the power of the judiciary "in check."⁶ Politicians in Tennessee recently raised the possibility of impeaching U.S. District Judge John Nixon due to his perceived bias against the death penalty.⁷

Frawley is worried about the political fallout to the judge (apparently a Democrat) if he rules against Kris Kringle. Harper says, in protest, "I'm an honest man and no one will hold it against me for doing my duty the way that I see it." He adds later: "I'm a responsible judge. I have taken an oath. How can I seriously rule that there is a Santa Claus?"

The boss is more practical. He states:

I don't care what you do with him, [the] Old Whiskerpuss. But if you rule that there is no Santa Claus, you better start looking for the chicken farm right now. You are going to be an awful unpopular fellow. It will be all over the papers. Kids will read it and not hang up their stockings. What happens to all the toys that are supposed to be in the stockings? Nobody buys them. So the toy manufacturers will have to lay off a lot of their employees. Union employees. And now you will have CIO and AF of L against you, and they are going to say it in votes. And what about the department stores, Christmas cardmakers, the candy companies, and the Salvation Army? They have a Santa Claus on every corner and take in a fortune. Why, we won't even be able to put you in the primaries.

And if you do rule against him, remember this. This, you can count on: getting only two votes, your own and the District Attorney's out there.

The judge pipes up, getting the message: "[And] the District Attorney is a Republican."

⁴ Governor Cuomo appointed numerous judges during his three terms as Governor of the State of New York, including all judges of the New York Court of Appeals as of October 1996.

⁵ See 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, 309-10 (1997).

⁶ See Representative Tom DeLay, *Letter to the Editor, Impeachment Is a Valid Answer to a Judiciary Run Amok*, N.Y. Times, Apr. 6, 1997, § 4, at 18 (advocating impeachment of "judges who consistently ignore their constitutional role, violate their oath of office and breach the separation of powers").

⁷ See Woody Baird, *Impeach Judge Nixon, Rally Demands, Com. Appeal* (Memphis, Tenn.), Jan. 20, 1997, at B1, available in 1997 WL 7339509; Sam Kennedy, *Ed Bryant Absolutely Right to Question Judicial Power*, Nashville Banner, Jan. 31, 1997, at A11, available

Although conceding the importance of judicial criticism, Governor Cuomo draws the line where politicians with the power to intimidate attempt to control judicial decisionmaking. He notes that many of those who excoriate, mock, ridicule, burn in effigy, and otherwise attack judges do not know the facts of the cases and are exaggerating the number of criminals freed on so-called technicalities. Governor Cuomo believes it is the role of the bar associations and individual lawyers to insure that the whole truth gets told.

To help separate politics from judging, Governor Cuomo argues that judges should be chosen without regard to politics in the first place, and by appointment rather than election. Electing judges infects the entire judicial system with politics and weakens the pool of potential judges; picking judges for political reasons may cause excellent jurists to be overlooked just because they belong to the wrong party.

Professor Stephen Bright seconds the call for appointment rather than election of judges in order to insulate them from political pressure. Because of such pressure, judges often recognize that when they uphold the Bill of Rights (frequently derided as a bunch of technicalities) in a controversial case, they may be committing political suicide. Judges subjected to political pressure that affects their impartiality in a particular case should be disqualified.

Professor Bright's speech is peppered with examples of judges who have been subjected to intense political pressure: from former Tennessee Supreme Court Justice Penny White, who lost a recall election because of her supposed softness on the death penalty, to James Robertson, who was voted off the Mississippi Supreme Court for the same reason, and to District Judge Harold Baer, who some felt had reversed his own evidence suppression decision due to public criticism.

Attorneys should step forward to defend judges under attack, Bright urges, and correct distortions about decisions, put each decision in the context of the judge's entire career, and explain the difference between the roles of the judiciary and the other branches of government.

Jeanine Pirro, the District Attorney of Westchester County, herself a former judge, draws the line of proper criticism at calls by politicians for a judge's impeachment or resignation. Short of that, she finds criticism of a judge's decisions to be an important antidote to bad decisionmaking, leading in some cases to legislative reversal of

in 1997 WL 7332417; Alisa LaPolt, Senator Seeks to Bounce Judge 'Opposed to Death Sentence,' Nashville Banner, Feb. 10, 1997, at A1, available in 1997 WL 7332863.

such decisions. She notes that with respect to low-bail decisions, prosecutors are forced to criticize them because they cannot seek reversal or review of such decisions. Judges who do not have the spine to stand up to criticism are not suited to be judges.

Professor Susan Herman responds to Ms. Pirro by pointing out that we cannot expect from every judge the resoluteness necessary to stand up to criticism. Some judges, even life-tenured federal judges, are already looking over their shoulders, perhaps tempering their decisions to avoid political fallout. The values that judicial independence sought to protect, namely the protection of minorities, dissenters, and the politically powerless, have been forgotten.

Bob Herbert draws on his experience as a reporter for a tabloid newspaper to explain what drives newspapers to report stories attacking judges. He notes that when the politicians criticize the judges, the press is the conduit, and it is the responsibility of the press to resist exploitation of the facts.