University of Richmond Law Review

Volume 38 | Issue 3 Article 9

3-1-2004

Preserving the Legacy: A Tribute to Chief Justice Harry L. Carrico, One Who Exalted Judicial Independence

Penny J. White

SYMPOSIUM ARTICLES

PRESERVING THE LEGACY: A TRIBUTE TO CHIEF JUSTICE HARRY L. CARRICO, ONE WHO EXALTED JUDICIAL INDEPENDENCE

The Honorable Penny J. White *

PART ONE: WORDS HONORING CHIEF JUSTICE CARRICO[1]

It is a great honor to be among those addressing today's topic in tribute to Chief Justice Harry L. Carrico. It is an honor because of the reverence and respect with which I and countless others hold Chief Justice Carrico and the principle of judicial independence, both of which we celebrate today.

Between 1996 and 2001, I spoke on the topic of judicial independence more than fifty times, in dozens of states, before lawyers, judges, and citizens. I decried what I characterized as the "attack" on the independence of the judiciary, citing the Judge

---

* Associate Professor of Law, University of Tennessee College of Law. B.S., 1978, East Tennessee State University; J.D., 1981, University of Tennessee; LL.M., 1987, Georgetown University. Professor White is a former trial and appellate judge, and former Tennessee Supreme Court justice.

1. The first part of this article is a speech given on March 21, 2003, at the University of Richmond School of Law at a Symposium on Judicial Independence, held in commemoration of Chief Justice Harry L. Carrico on the occasion of his retirement from the Supreme Court of Virginia, after more than three decades of distinguished service. I am especially indebted to Chief Justice Carrico and Justice Donald Lemons of the Supreme Court of Virginia for inviting me to participate in the Symposium and to my colleagues at the University of Tennessee College of Law who provided an engaging, lively debate (as usual) of my planned comments. A special debt of gratitude is owed to Professor Otis Stephens for his counsel.

Harold Baer impeachment rhetoric,[2] the United States Congress's actions and inaction on countless judicial nominees, and my own retention nightmare[3] quite often as examples. I wrote articles that proclaimed that an America without judicial independence was one in which we would not want to live, for it would be one without equal opportunity, without respect for constitutional freedoms, and without equal justice under the law.[4]

In an effort to educate the citizenry about the role of judges and how that role differed from the role of members of the legislative and executive branches, I co-opted the explanation given by Justice Felix Frankfurter that "[c]ourts are not representative bodies . . . [and] are not designed to be a good reflex of a democratic society. . . . Their essential quality is detachment, founded on independence."[5] I added my own opinion that, before a court can mete out equal justice, the court must be impartial; and that essential to impartiality is independence. The Constitution and the laws of this country, and of the individual states, establish rights for individuals that remain despite the current desire of the majority. Judges must give meaning to those rights, but they may be unable to do so if they are enslaved to and controlled by the majority.[6]

I encouraged judges to exercise independence by reminding them of the significance with which the framers viewed an independent judiciary. I quoted John Marshall in attendance at the Virginia Constitutional Convention who proclaimed so eloquently:

---

2. Judge Harold Baer, Jr.'s decision on January 22, 1996, to suppress physical evidence of eighty pounds of cocaine and heroin, *United States v. Bayless*, 913 F. Supp. 232, 234 (S.D.N.Y. 1996), *vacated* 921 F. Supp. 211, 212 (S.D.N.Y. 1996), prompted more than 200 members of Congress to sign a letter written to President Clinton asking for the resignation of Judge Baer. The controversy that ensued sparked discussion on the topic of judicial independence. *See* Judge Harold Baer, Jr., Interview: *A Unique Perspective on Judicial Independence*, 25 HOFSTRA L. REV. 799 (1997); Jon O. Newman, *The Judge Baer Controversy*, 80 JUDICATURE 156 (1997).

3. *See, e.g.*, Colloquium, *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?*, 31 COLUM. HUM. RTS. L. REV. 123, 137–41 (1999) (discussing White's retention controversy).

4. *See, e.g.*, Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URB. L.J. 1053 (2002) [hereinafter *Judging Judges*]; Penny J. White, *An America Without Judicial Independence*, 80 JUDICATURE 174 (1997); Penny J. White, *If Justice Is for All, Who Are Its Constituents?*, 64 TENN. L. REV. 259 (1997); Penny J. White, *It's a Wonderful Life, or Is It? America Without Judicial Independence*, 27 U. MEM. L. REV. 1 (1996).

5. Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

6. *See Judging Judges, supra* note 4, at 1056–57.

"I have always thought, from my earliest youth . . . that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary."[7] I reminded judges of other great Virginians, like James Madison who characterized "independent tribunals of justice" as "an impenetrable bulwark against every assumption of power [by] the Legislative or Executive" branches.[8] And I read them *The Federalist No. 78*, in which Alexander Hamilton wrote:

> In a monarchy [judicial independence] is an excellent barrier to the despotism of the prince: In a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright and impartial administration of the laws.[9]

Often I left the judges, whose jobs I envied and whose characters I trusted, with a challenge, not my words, but the words of another judge, who said that, "in dangerous times . . . [i]t . . . becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude."[10] The current attack on the independence of the judiciary, I often said, made these dangerous times indeed.

As much as I envisioned judges as courageous soldiers hoisting the scales of justice with impeccable balance—"nice, clear and true," in the words of the Supreme Court[11]—I came to envision the attack on the independence of the judiciary as a swinging pendulum, back and forth, with the principle under attack, at risk, or secure. Perhaps had I begun my own tutorial in judicial independence after the tragedy of September 11, rather than a pendulum I would have envisioned a color-coded escalating scale, with yellow, orange, and red indicating the degree of alert.

---

7. John Marshall, Address to the Virginia State Convention of 1829–1830, *in* 2 PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–1830, at 619 (1971).

8. 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1834) (remarks of James Madison, June 8, 1789).

9. THE FEDERALIST NO. 78, at 522 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

10. United States v. Bollman, 24 F. Cas. 1189, 1192 (C.C.D.C. 1807) (No. 14,622) (Cranch, C.J.).

11. Tumey v. Ohio, 273 U.S. 510, 532 (1927) (stating that "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance *nice, clear and true* between the State and the accused, denies the latter due process of law" (emphasis added)).

This symbol of the pendulum came as a result of my own education efforts. The proximity of my personal experience to the then onslaught of attacks on the independence of the judiciary made the attack seem, to me, catastrophic. Through research, and the objectivity that is gained by time and distance, I came to realize that throughout our history the judiciary has been tested, assailed, and attacked, and that each time it has withstood the challenge and remained that separate, independent guardian calmly balancing the scales nice, clear, and true. Through this educational process, I found solace and was comforted in my belief that the pendulum would soon rest again, at least for a while, with judicial independence secure.

At least three times during those five years, I spoke in Virginia to judges and bar associations. While they welcomed my message on those occasions, each time they assured me that the distasteful plight suffered by many judges in states where judges were elected or retained by the electorate would not befall them. They were not intertwined with partisan politics; they did not have to finance campaigns; they were not challenged to respond to special interest groups; nor did they fear that some group would mischaracterize them in the media just before review and retention. I was told repeatedly and consistently by Virginia judges, and judges from the other ten states which neither elect nor retain their judges by popular vote, that their selection and retention methods insulated them from these distasteful political attacks.[12] In Virginia, the legislature, which conducted the review and retention process, was more informed about the proper role of judges; they understood the separation of powers, the importance of judicial independence. They would not succumb to politicizing the judiciary. In Virginia, and these other states, the pendulum was perpetually at rest.

Today, we celebrate the life work of a product of that lauded Virginia system, a judge who not only exercised judicial independence, but exalted it; and as we honor him and the principle that he embodied, it is altogether appropriate to assess my pendulum. Is it at rest, indicating that judicial independence in the

12. *See* Alex B. Long, *An Historical Perspective on Judicial Selection Methods in Virginia and West Virginia*, 18 J.L. & POL. 691, 702–11 (2002) (discussing the judicial selection methods of other states).

states is a secure principle, not under attack or at risk? Or is it swinging wildly, indicating an elevated or high state of alert?

In state after state, the selection of judges is being hijacked by money interests, partisan politics, and special interest agendas that have no place in our system of government.[13] Here are some examples of what is accurately described as bare-knuckle, back-room judicial politics, from newspapers and news magazines in the last year:

> Editorials that pose these questions to citizens:
>
> > *Do you want a court that will stack the deck against small businesses*?;
> >
> > *What about one that will pad the wallets of plaintiff's attorneys*?;
> >
> > *Do you want a judge who is a drug dealer's dream*?;
>
> Articles, written by medical doctors, soliciting donations so that *we can keep courts that support our medical profession by enforcing strict limits on pain and suffering jury awards*;[14]
>
> And advertisements for candidates who promise to *ban most abortions and protect a citizen's right to carry a gun*.[15]

Justice, it seems, may be blind; but make no mistake, justice is not cheap. Years ago when first I became a student of threats to the independence of the judiciary, I read that the U.S. Chamber of Commerce had begun a campaign to capitalize on America's favorite pastime—lawyer bashing. Since then, the Chamber has graduated from attacking the bar to attempting to buy the bench, pledging this year to raise $40 million to help elect what the Chamber considers "business-friendly judges," rated by the

---

13. Editorial, *Sleazemongers*, COLUMBUS DISPATCH, Nov. 1, 2002, at 14A. The article speaks of "sleazemongers" running advertisements in the races for the Supreme Court of Ohio: Citizens for an Independent Court and Consumers for a Fair Court sponsored advertisements targeting incumbent judges, and the editorial argues that the goal of these groups is "a court that will stack the deck against businesses and that pads the wallets of plaintiffs' attorneys who grow rich off fat contingency fees." *Id. See also* Kara Baker, Comment, *Is Justice for Sale in Ohio? An Examination of Ohio Judicial Elections and Suggestions for Reform Focusing on the 2000 Race for the Ohio Supreme Court*, 35 AKRON L. REV. 159, 159–68 (2001).

14. *See* David Barnhizer, *"On The Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 393–94 (2001) (describing the incentive for doctors to make campaign contributions to trial-level judges).

15. *See id.* at 388–89, 397–98 (discussing the impact of the abortion debate on judicial elections and the way judicial candidates send messages to voters indicating their positions on certain controversial issues).

Chamber's business friendly report card.[16] Translated, that means how many times the judge ruled in favor of or against a business in lawsuits. Simplified, that means to ace the Chamber's test you rule for business, the facts and the law notwithstanding.

The business of electing judges has become a financial arms race with a fallout every bit as disastrous to society as a military arms race. It is a financial arms race to elect judges in which only very heavy hitters are able to compete.

A state-wide industry involved in a major lawsuit headed to the state supreme court, raised almost $300,000, ran a candidate against an incumbent, flew the candidate to appearances in the industry jet, and won—both at the polls on election day and in the supreme court on appeal when the lower court's judgment against the industry was reversed, 4-3, with the deciding vote cast by the new justice.[17] And in the nature of a Louisiana lagniappe, that little something extra, the court authorized an investigation of plaintiffs' counsel, a law school legal clinic,[18] and ultimately altered the rule that governs their ability to litigate cases in the state courts.[19] So successful was this effort that it is being used as a model for piggyback campaigns between chambers of commerce and select industries in other states.[20]

In another state, a trial judge and his supporters decided to pad his war chest and retire campaign debt by selling sponsorships to his induction ceremony.[21] That, of course, is the ceremony at which the judge swears to uphold the constitution. For a few thousand dollars, the sponsors will have their names listed on the invitation as sponsors of the ceremony—or of the judge?

---

16. *See* Shawn Zeller, *Tort Reform's Massive War Chest*, 35 NAT'L J. 1008 (2003) (disclosing expenditures on lobbying by the Chamber's Institute for Legal Reform of over $22 million in 2002, and a budget of $40 million for 2003); Peter H. Stone, *The Blitz to Elect Business-Friendly Judges*, 34 NAT'L J. 480 (2002).

17. Sheila Kaplan & Zoe Davidson, *The Buying of the Bench*, 266 NATION 11, 14 (1998) (discussing Louisiana for Business and Industry's (LABI) sponsorship of Louisiana Supreme Court candidate Chet Taylor).

18. *Id.* at 15.

19. *See* Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J.L. & POL'Y 33, 69 (2000) (stating that the chief justice of the Louisiana Supreme Court placed restrictions on Louisiana law clinics that prevented the Tulane clinic from representing community groups in certain situations).

20. Kaplan & Davidson, *supra* note 17, at 15.

21. *Id.* at 14.

It is not just judicial elections and the related financial atrocities that suggest that the symbolic pendulum is neither at rest, nor secure. A week ago, the American Bar Association's ("ABA") Commission on the 21st Century Judiciary released a draft report for the National Colloquium on the 21st Century Judiciary.[22] The headline for an article concerning the draft was a fair summary of the report: *Commission Warns That State Court Systems Are at Risk*.[23] The elaboration was no more subtle: "state courts are on the brink of a crisis" because of the "escalating partisan battle[s]" being waged for their control.[24] State courts must be inoculated not only from the toxic effects of money, but also from political partisanship and special interests.

This unhealthy nexus between judging and politics is evident in op-eds that fault Democratic judges for violent crimes, but credit Republican courts as responsible for falling crime rates because the judges' Republican ideologies cause them to get criminals off the street and into jails.[25]

Playing partisan politics with the judiciary is a favorite sport of the other branches. Regardless of the outcome, the public loses when judges feel pressure to rule based on so-called ideology, rather than the facts or the law. Recent examples include subjecting judges to demeaning, personal inquiries under the guise of reviewing their fitness for the bench, questioning a judge's adherence to rarely enforced state morality laws, and investigating judges whose rulings have advocated fairness for lesbian parents.[26]

---

22. AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY (2003), *at* http://www.law.uc.edu/current/jud031106/justjeop.pdf (last visited Jan. 22, 2004) [hereinafter JUSTICE IN JEOPARDY]; JUSTICE AT STAKE CAMPAIGN, ABA COLLOQUIUM ON THE 21ST CENTURY JUDICIARY: COMMISSION WARNS THAT STATE COURT SYSTEMS ARE AT RISK, RECOMMENDS SINGLE TERM FOR STATE JUDGES, *at* http://www.justiceatstake.org/ (last visited Jan. 22, 2004).

23. JUSTICE AT STAKE CAMPAIGN, *supra* note 22.

24. *Id.*

25. *See* Pete Slover, *All-GOP Criminal Appeals Court Faces Stiff Test; Focus on Fairness in Death-Penalty Cases Puts Races in Spotlight*, DALLAS MORNING NEWS, Oct. 15, 2000, at 41A (commenting on the public perception that a Republican court is biased toward the prosecution).

26. *See* Douglas W. Kmiec, *Judicial Selection and the Pursuit of Justice: The Unsettled Relationship Between Law and Morality*, 39 CATH. U. L. REV. 1, 13–18 (1989) (discussing the questions asked to judicial nominees during the Reagan administration). *But see* William G. Ross, *The Supreme Court Appointment Process: A Search for a Synthesis*, 57 ALB. L. REV. 993, 1004–14 (1994) (approving generally of questioning judicial nominees on their political views).

Those who apply an ideological test for judges make a faulty assumption that all judges can be placed on an ideology-based continuum ranging from the most conservative to most liberal, based on the judges' personal beliefs and philosophies, and that the placement will accurately predict the judges' rulings. The assumption is false in almost every regard, including the assumption that judges judge based on personal opinions. As judges know, their personal opinions are not relevant to what is required by the law or the evidence. A judge cannot reinterpret the law in favor of his or her own private opinions or prejudices.

While a legislative or executive office holder may be swayed—in fact, arguably should be swayed by public opinion—the outcome of a judicial decision cannot depend on its popularity or even its acceptance. It is common for courts to be pressured to behave less like courts, to act less independently, to be more responsive to the immediate needs of the majority. But nothing could be more antithetical to the role of the courts. Resisting the pressure to please the majority is the greatest strength, not the weakness of the judiciary.

When political pressure, be it partisan or special interest group initiated, is brought to bear on a judge in order to secure a certain judicial ruling, justice has been denied. More importantly, the people have lost. Those who would tinker with judicial independence may gain a momentary political victory, but they will also cause a great and lasting loss to our system of justice and to the rule of law.

In many states, special interest groups hide under names like Citizens for Independent Courts and Citizens for Fair and Independent Justices.[27] The former is a group of labor unions and trial lawyers, the latter an organization of insurance companies and big businesses.[28] Another, the United Seniors Association, is actually a group of supporters of pharmaceutical companies.[29] While all are entitled to organize and express their preferences, why they assume such community-conscious titles is a bit confusing. The confusion clears when research discloses that, in addition to

27. Kaplan & Davidson, *supra* note 17, at 16.

28. *Id.*

29. PUBLIC CITIZEN'S CONGRESS WATCH, UNITED SENIORS ASSOCIATION: HIRED GUNS FOR PHRMA AND OTHER CORPORATE INTERESTS, July 16, 2002, *available at* http://www.citizen.org/documents/UnitedSeniorsAssociationreport.pdf (last visited Jan. 22, 2004).

at best ambiguous names, these groups often refuse to register as Political Action Committees ("PACs"), decline to report their expenditures, and do not disclose their donors.[30]

Recently, special interest groups have become more demanding in their expectations of judges and candidates for judicial office. They demand answers to substantive questions regarding so-called judicial philosophy. After last summer's decision in *Republican Party of Minnesota v. White*,[31] the groups have become very precise in their expectations: Demand to know the judge or candidate's position on the issues that interest you; Hold the judiciary's feet to the fire; If a judge "decline[s] to answer . . . by hiding behind the political skirts of the Code of Judicial Conduct" then hold the judge accountable.[32] Accountability, in their jargon, means removal from office.

Not only has the *White* decision removed the barrier between judicial office holders and publicly declared viewpoints, it has further blurred the fundamental distinction between judicial office and other elected offices.[33] Judges are now free—in fact, I would suggest many now feel forced—to announce their views on disputed legal and political issues because "'[i]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.'"[34] This assertion ignores the crucial differences in the roles of judges and the role of others selected via a democratic process. It turns Justice Frankfurter's simplistic explanation of the role of judging[35] on its head; it all but breaks the pendulum from its stem.

In response to *White*, special interest groups can and will be more demanding. Judges who refuse to announce their views will

30. David S. Karp, *Taxing Issues: Reexamining the Regulation of Issue Advocacy by Tax-Exempt Organizations Through the Internal Revenue Code*, 77 N.Y.U. L. REV. 1805, 1806–09 (2002) (discussing the "stealth-PACs" and Congress's response of requiring registration with the IRS and disclosure of donors).

31. 536 U.S. 765 (2002).

32. Sid Salter, *Ask Candidates in Judicial Races Hard Questions*, CLARION-LEADER, July 17, 2002, at 7A.

33. *White*, 536 U.S. at 797 (Stevens, J., dissenting).

34. *Id.* at 788 (quoting Renne v. Geary, 501 U.S. 312, 349 (1991)).

35. Dennis v. United States, 341 U.S. 494, 525 (Frankfurter, J., concurring) ("History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.").

be targeted for removal or defeat; and quite naturally, to those who blend the judiciary with politics, announcement will be expected to indicate commitment. Judges who have announced their views will feel pressured to rule in accordance with those views and to consider their personal views in addition to, or perhaps instead of, the law and the facts. Judicial independence will thus be threatened not only by outside political forces, but by judges who abdicate their responsibilities as judges and impose their personal viewpoints or values.

Since *White*, other seemingly impenetrable barriers between judging and "just politics" have crumbled as well. A federal circuit court has upheld an invalidation of a judicial ethics rule that disallowed judges from soliciting money and endorsements.[36] State court judges in Georgia and presumably throughout the Eleventh Circuit may now raise money and seek endorsements, just like other politicians.[37] Similarly, another federal court has paved the way for judges to participate in political activities, invalidating an ethics rule that prohibited judges from engaging in partisan politics.[38]

Both decisions exalt, as did the Supreme Court's *White* majority, the judge's First Amendment rights over his or her constitutional duties.[39] In the words of one commentator, the decisions make judges no more than politicians who wear black robes.[40] Judicial decisions will be seen as political, no different from a vote by a legislator; the integrity of the judiciary will be denigrated and the public's faith in and respect for the courts will be undermined. And as for my pendulum, I fear it will finally break.

---

36. Weaver v. Bonner, 309 F.3d 1312, 1319–23 (11th Cir. 2002).

37. *See id.* at 1320–21 (interpreting *White* as suggesting the same standard for judicial, legislative, and executive elections).

38. Spargo v. N.Y. State Comm'n on Judicial Conduct, 244 F. Supp. 2d 72, 90 (N.D. N.Y. 2003).

39. *See Weaver*, 309 F.3d at 1320 ("For fear of violating these broad prohibitions, candidates will too often remain silent even when they have a good faith belief that what they would otherwise say is truthful. This dramatic chilling effect cannot be justified by Georgia's interest in maintaining judicial impartiality and electoral integrity."); *see also Spargo*, 244 F. Supp. 2d at 90 ("[E]ven in the face of any tradition, a restriction on the core right to make political speech must be narrowly tailored to meet a compelling state interest.").

40. Paul L. Friedman, *Taking the High Road: Civility, Judicial Independence, and the Rule of Law*, 58 N.Y.U. ANN. SURV. AM. L. 187, 189 (2001).

It was great Virginians who devised the blueprint for an ideal democracy: one with three separate and independent branches of government; one where the politics of governing and the neutrality of judging remained separate; one where judges were insulated from partisanship, special interests, and majority whim. It was another great Virginian, Chief Justice Harry L. Carrico, who once wrote in praise of Chief Justice John Marshall that "[h]e took a federal judiciary, which politicians had sought to make a subservient handmaiden of the other branches of government, and gave it the freedom and independence vitally essential to its existence."[41] Justice Carrico said that while James Madison gave the Constitution a body and George Mason gave it a heart, Justice Marshall gave it a soul.[42]

I can think of no greater disservice to the legacy of Chief Justice Harry Carrico, to the brilliant creation of Marshall and Madison and Hamilton, to the soul of the Constitution, than for the vastly important state courts in this country to become just another political branch of government. Every politician has a choice—to attempt to politicize the judiciary or to honor the importance of the separate and distinct role of judges in our system of government. And every judge has a choice—to exercise his or her First Amendment rights, to further obscure the vast differences between the role of judges and the role of other government actors, or to forsake personal freedom for a greater liberty, a lasting legacy in America and in Virginia of independent, equal justice under law, a land where the pendulum symbolizing an independent judiciary swings to and fro now and again but swings steady, secure, and balances the scales of justice nice, clear, and true.

41. Harry L. Carrico, *The Seventeenth Annual Kenneth J. Hodson Lecture: George Mason, John Marshall, and the Constitution*, 121 MIL. L. REV. 1, 15 (1988).

42. *Id.* at 5.