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FOREWORD: JUDICIAL INDEPENDENCE

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Because I'm a little concerned about whether you will find the topic of judicial independence very interesting, I thought back to one of my favorite authors, Mark Twain—Samuel Clemens. He went to Europe and wrote letters back to the bumpkins in America about what civilized life in Europe was like. Those letters were collected in a delightful book entitled, *Innocents Abroad.* One letter addressed what it was like to attend a Wagner concert. He started out his essay by saying, you know, "Wagner's music is not as bad as it sounds."

Similarly, I think I can assure you that the topic of judicial independence is not as boring as it sounds. The reason I can say that is because I have traveled all over the world on behalf of the American Judiciary to talk about judicial independence. I've been to developing countries, like Rwanda; Arab countries like the United Arab Emirates and Qatar; and modern well-developed countries like Canada and Russia. Everywhere I go, I find admiration and envy for the judicial independence that we have in America.

Those countries may not like our government, they may not like our president, they may not like our policies, but they all like and admire our judicial independence. And they want to know how we achieved it.

It's quite an interesting story—how we developed judicial independence. Of course, there are many chapters still to be written in this story, and you young law students will be writing some of those chapters. At the very end of this lecture, I have several suggestions I would like you to consider.

But first I want to define judicial independence. Then, I want to discuss our history and how we obtained judicial independence, because it turns out to be a very rare thing. I want to talk about some of the threats to judicial independence that we are facing today. Finally, I will discuss some things you can do to help preserve this almost unique asset we have in America.

So first, what is judicial independence?

When I go abroad people say, ah, it must be wonderful, you're a judge, you can do anything you want. You can order the president to do this or that. You can order people to come and go and they come and go.

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You are really independent, and you have all this fabulous power. Nothing could be further from the truth.

From an institutional point of view we have almost no independence. We can't create our own budget. We can't fund ourselves, only Congress can do that. We can't appoint our own members, only the President with the consent of the Senate can do that—(this speech addresses the federal system, but much of what I say applies to the states as well). We can't remove our members. Only Congress can do that by impeachment. We can't even establish our own jurisdiction. Congress could eliminate all federal courts tomorrow under the Constitution—save only the Supreme Court. And Congress can limit the jurisdiction of what we can hear, and what we can decide at their will. Congress even can impose jurisdictional restrictions on the Supreme Court.

That doesn't sound like the judiciary is very independent.

And we can't even enforce our decrees when we issue an order because we have no army to ensure compliance. So institutionally, we lack independence and we are quite weak.

But what protects the judiciary is that the other branches are also weak in other ways. Our strength comes not from independence but rather from the co-dependency that each branch has upon the other branches of government. The judicial branch is the only branch that can definitively interpret the laws and resolve cases and controversies. The judicial branch can enforce constitutional limits on the other two branches and, of course, upon itself as well. Those are powerful tools.

So when people say that we have an independent judiciary, I say, no. The judicial branch is co-dependent on the other branches, but happily the other branches are co-dependent upon the judicial branch as well.

A better way to look at independence is not institutionally, but rather as independence in our decision-making process.

When we make judicial decisions, we make them free of anybody else interfering with our decision-making process, subject of course to our need to obey and be bound by the Constitution first, and the constitutional laws of the land.

In twenty-two years as a judge, no one has ever called me ex parte and tried to persuade me how to decide a case. I have never had a government official tell me what to do, or even suggest it. I have never had an offer of a bribe or intimation of a bribe. I have never had a politician, a legislator, or a president call me and say, this is the way we want you to decide the case. And that fact alone makes us nearly unique among the world's judiciaries.

When I went to another large and well-developed country, I asked the President of the bar of their major city about the independence of their judiciary. I asked, if you took their significant cases (putting aside the routine fender benders), what percentage of those cases were decided solely on the merits, and what percentage were, instead, decided or influenced by bribery or government interference?

You know what he told me?

He said that maybe ten percent of such cases are decided strictly on the merits, and about ninety percent are decided because the government has called the judge and told him how to decide the case or there was ex parte pressure or bribery involved.

Once that cancer sets into a country, it is almost impossible to excise it.

In America, if you get into a legal dispute, there is a place to go where nobody is going to be bribing or threatening or imposing ex parte influence or persuasion on the decision-making. That place is called the courts.

So I would define judicial independence as a judiciary that decides cases under the rules that are presented to it, under the evidence that is presented to it, where all the litigants have an equal and open opportunity to address the merits. Judicial independence really boils down to independence from outside influences in making judicial decisions. It may not be as grandiose or sexy as some of my envious friends in foreign countries imagine, but it is every bit as important and unique as they understand it to be.

Now, how did this judicial independence come about?

Many countries have similar constitutional guarantees of judicial independence, but it doesn't always play out in practice the way it has in America.

So let me talk a little bit about the history of our country, because how judicial independence came about is really interesting. Let's go back to the Declaration of Independence, July 4, 1776. It lists 25 reasons why we were going to break off from Great Britain. And of those 25 reasons, two explicitly talk about an independent judiciary. Isn't that interesting? Approximately one-tenth of the grievances that lead to our independence had to do with King George's interference with the independence of the judiciary.

One of those grievances complained that King George was exercising influence over our judges by threatening to fire them or by reducing their salaries. And the second complained that King George wouldn't let us set up our own judiciary.

Thus, an independent judiciary is on our birth certificate. It is part of who we are and why we became a separate country.

Next, let's turn to the Constitution. It addresses judicial independence in Article III. And it says: All judicial power is vested in the Courts. Then it defines judicial power to say: Judicial power is the right to resolve all cases arising under the Constitution, the statutes, or the treaties.

Wow. Any case, any dispute involving the Constitution, statutes, or treaties, is vested in the judicial branch.

When I was in Malaysia I learned that about twenty years ago they had a similar provision in their constitution that all judicial power was vested in the Courts. But about twenty years ago Malaysia took that out of their Constitution. There is an effort now in Malaysia to try to restore the earlier provision back into their constitution.

With a specific nod to King George, we put another provision in our Constitution that said federal judges have life tenure and judges' pay can't be diminished during their lifetime.

But it took a lot more than these constitutional provisions to establish judicial independence in America. It took some very wise decisions by some very wise judges to slowly take a step forward on independence, and then maybe half a step back, and then a step sideways, and then two steps forward, and then a step back.

The route to judicial independence had to be earned. It wasn't just given to us full blown.

You all know the case of *Marbury v. Madison*, which was the case where Chief Justice Marshall declared that judges have the power to declare statutes unconstitutional.

We all remember the principle of that case. But you may not know how remarkable that principle was at the time. It may seem normal now. But it was shocking at the time because we were founded as a democracy. And the Constitution says all power comes from the people. There is undeniable tension between ultimate power residing in the people and their elected representatives and the power of the courts to strike down laws passed by those representations.

The people, through their elected representatives, can pass a law—that is the very embodiment of democracy. But the courts can set that law aside if it violates the Constitution. That was not a self-evident proposition, although now we have come to appreciate it as the embodiment of a "constitutional" democracy.

How did the other branches of government allow Chief Justice Marshall to come up with that rule that the courts can strike down legislation that is unconstitutional? The Constitution does not explicitly permit that action.

Well, what had happened was there was a sharply contested election between Jefferson and the incumbent President, John Adams. President Adams was running for re-election against Jefferson and Jefferson beat him.

But, before Jefferson could take office, John Adams tried to appoint his loyalist cronies to government positions wherever he could.

And one of the people he wanted to appoint to a magistrate judicial position was Marbury. So a judicial commission was issued for Marbury to become a judge, the Senate approved it, and Adams signed it.

But before he could deliver the commission to Marbury (which was required before it could become effective), Adam's term ended, and Jefferson became President. Jefferson said, I'm not going to deliver that commission to Marbury. So, Marbury sued.

But here's the twist. Marbury brought his suit directly in the Supreme Court. He didn't sue in the lower courts and let it work its way up on appeal. He sought the Supreme Court's direct original jurisdiction and asked the Supreme Court to issue a mandamus to Jefferson's Secretary of State, Madison, to force him to deliver the commission.

Everybody was scared to death about that case, because they knew that if the Supreme Court ordered Madison to deliver the mandamus to get Marbury seated as a judge, Jefferson wouldn't obey it. And it would provoke a terrific conflict. You can't have an independent judiciary if the executive branch won't enforce judicial decrees?

So Chief Justice Marshall did an amazing thing. He said, yes, Marbury should get his commission. But Marbury is seeking Supreme Court original jurisdiction to issue a mandamus forcing Madison to seat him. And that original jurisdiction to issue writs of mandamus comes only from a statute recently passed by the new Congress giving the Supreme Court original mandamus jurisdiction.

The Supreme Court then found that jurisdictional statute to be unconstitutional. The Constitution lists a couple of specific areas where the Supreme Court has original jurisdiction. But all of the rest of the cases have to come up to the Supreme Court through appellate jurisdiction. There are only a couple categories of cases listed in the Constitution that can be filed in the first instance in the Supreme Court. And a mandamus action is not one of them.

The Court ruled that when Congress tried to give the Supreme Court additional power to issue a mandamus as a matter of original jurisdiction, it exceeded the Supreme Court's constitutional authority and hence that statute was unconstitutional. And because the Supreme Court could not give Mr. Marbury the mandamus he wanted, they threw his claim out of court.

Ah, Jefferson was happy. The Supreme Court was not going to force him to seat Marbury as a judge. Congress was happy because to Congress this looked like a modest, self-effacing Supreme Court decision rejecting additional judicial authority that Congress tried to give to it. In this early jockeying for power, that seemed to satisfy the new two branches.

The other branches of government, therefore, accepted the decision, and yet we now understand that it announced, for the first time, the most powerful weapon that the judiciary has—the power to strike down laws that are unconstitutional.

I can talk about a lot of other cases that contributed to our current understanding of judicial independence, but the point I make is that judicial independence in our country wasn't just birthed fully clothed the day our country was created. It was slowly developed, step-by-step, by very astute judges.

I was next going to talk about the New Deal cases. There are some interesting stories there, but I don't have time. I'm going to skip that. I'm going to just jump forward to *Bush v. Gore*.

One of the things that *Marbury v. Madison* announced was the doctrine called political question abstention. That is, if a case presents essentially a political rather than a legal issue, the Court is not going to get involved. A political fight is kind of like punching a tar baby. If the courts weigh in on political fights, that will get mired in a morass.

Besides that, if the courts get involved in a political fight, the public is going to see the courts as political and partisan. And then the courts lose their indispensible asset of being viewed as neutral, objective, and above the fray.

So the Court announced in *Marbury* that political disputes between Adams and Jefferson were beyond the wisdom and jurisdiction of the Court. And the Court has followed the doctrine of political question abstention almost uniformly since then.

Twice we had contested presidential elections that were thrown into the Senate for resolution. One involved Rutherford B. Hayes and one involved the Jefferson/Adams election. And in both cases it was Congress that decided which delegates to seat, which electoral college votes to count, which ones not to count, which states to count, which ones to disallow.

So when *Bush v. Gore* came along I was very surprised that the Court took jurisdiction. I had predicted that it wouldn't.

Now, I have nothing to say about the outcome of the case—no comment on whether I thought it was a good outcome or a bad outcome or whether the merits were rightly or wrongly decided. I'm speaking only

about the question of jurisdiction, whether the case should have been taken at all by the Court. In my opinion, the "political question" doctrine strongly counseled that judges stay out of basic political fights. Those fights should be resolved ultimately by Congress.

I think my judge colleagues will mostly agree that the judiciary has paid a heavy price for *Bush v. Gore*. It has resulted in a loss of public confidence that the judiciary is politically neutral.

This loss of public confidence in the apolitical nature of the courts is exacerbated by the fact that, with two exceptions, the Republican justices, that is the justices that were appointed by a Republican president, supported Bush. All the justices appointed by the Democrats supported Gore.

If the public ever really comes to believe that the judicial branch is just another political branch of government, all is lost, because we have no armies, we have no budget, we have no constituents. Our authority ultimately rests on our reputation of neutrality and integrity.

Now, let me now speak about some of the current events that threaten to undermine judicial independence.

One of the threats to judicial independence goes to our competence. You see, the country will not continue to support judicial independence if they don't believe judges are competent. Why should it? I mean, if judges as a whole are not competent, of course the other branches would want oversight over us.

So we have to prove with every case, every day, that we're competent. And that is getting to be increasingly difficult, because the laws are getting increasingly complex. And the resources available to the judiciary are becoming increasingly scant.

Let me talk about how complex the laws are getting. Think of the last time you ate a hamburger at McDonald's. That may have been yesterday. How many separate laws do you think had to be complied with from the time that hamburger was born as a baby calf in Wyoming to the time you ate it?

Somebody with way too much time on their hands actually calculated that. And they counted, as a separate law, every statutory provision that had a different citation to it. So if there was a big statute that had 20 sections and 10 subsections, they would count each of those subsections that would apply as a separate statutory obligation.

How many different statutory obligations had to be satisfied? A hundred? Five hundred? The answer is 72,000; 72,000 ways that a federal judge could be involved in a judicial challenge to the making of a hamburger for your eating pleasure. The first ninety days I was a judge I had labor cases, tax cases, discrimination cases, environmental cases,

coal cases, capital punishment cases, bankruptcy, an assassination attempt on the President, and dozens and dozens of other issues. How could I possibly master all of those things?

And, unfortunately, judicial resources are dwindling. They're dwindling in the salaries paid to judges. They're dwindling in the resources that support us, research, and so forth. What do you think the percentage of the U.S. budget is that is allocated to the entire judicial branch? Of course, the judiciary does not aspire to thirty-three percent of the budget even though the judiciary is one of the three coequal branches of government. I mean, we would be happy with ten percent. Seems like a modest enough proposal. We don't even come close to ten percent.

Okay, I'm going to set my sights really low. I'll take one percent of the federal budget for our coequal branch of the government. We don't even get that. We get two-tenths of one percent of the U.S. budget to fund the entire judicial branch. That's less than is spent to fund a mid-sized administrative agency. It's less than it costs to build one aircraft carrier or three submarines. So the judicial budget is very tight.

That goes all the way from our support staff and our resources, to our salaries. I took a two-thirds pay cut to become a judge. And since then my judicial salary has fallen way below the inflation index.

In the last two years we've had two of our best active circuit judges on the Tenth Circuit leave for more lucrative private engagements. It's becoming a real problem.

And the funding problem is a hundred times worse in the states. I am not at all claiming sympathy for the federal judiciary, because any state court judge would say, my goodness, it is so much worse at the state level.

But just to describe our workload. We are now deciding, on the Court of Appeals, three times as many cases per judge per year as the Court of Appeals judges had to decide in 1960.

If you asked a judge in 1960, are you overworked? They would say, oh, man, am I overworked. And then if you said, we're going to fire two of your colleagues and you have to do the work of three judges. They would say, there is no way that is possible. Yet today each federal appellate judge decides three times as many cases as a single judge decided in 1960 on a yearly basis. Today I decide about 500 cases a year. Think of what a case involves, up to 125 pages of briefs, thousands of pages of record, precedent that has to be read and understood. And I have to decide about two of those every single day.

Another threat we face in the judiciary to independence goes to ethics. We have rules about ethics, what you can and can't do. I sat for many years on the national Ethics Advisory Committee. And I now sit on the National Appeals Committee for Ethical Changes. We do a good job

of enforcing judicial ethics. But some in Congress think they can do better.

And so there is periodically a bill introduced into Congress to establish an inspector general's office for oversight of the courts. Well, that would be disastrous to the concept of judicial independence because of the intimidation Congress could exert by such oversight over our daily decisions. If someone thinks we are being "activist"—whatever that means—they could start an investigation. And so, we have to convince Congress that we're doing a good job of policing ourselves. And that's hard to do, because much of our policing is done below the radar level.

We do occasionally recommend that a judge be impeached by Congress. But 99% of the time we can handle these matters more effectively under the radar. We must, somehow, convince the American public that we are serious about our own internal policing of compliance with judicial ethics rules.

Finally, let me suggest a few things that you can do to help preserve and advance judicial independence.

One thing you can do is to get involved with the Institute for the Advancement of the American Legal System. It is one of the premiere institutes in America devoted to the independence of the judiciary and the betterment of the Courts. It's located just across the street, and my dear friend, Rebecca Love Kourlis, a former State Supreme Court Justice, runs it. They are doing things all over the country to ensure the independence of judges, integrity, competence, resources—all of those things that I said you have to have to be independent.

You ought to find out about that institute. You ought to go over there and see if you can volunteer your time. I know they have a bunch of researchers, and I bet they could use more.

The second thing you can do is to be our constituency, because judges don't have constituencies. We're not elected. We don't have anybody to come to our defense. When we're accused of a bad decision or being an activist judge, often, at least when I know something about the decision under attack, the criticism is misinformed. You see, the political branches of government look at the world very differently from the way a judge looks at the world. The political branches look at the world largely by the end results. Did this decision advance abortion or did it advance pro-life? Did it advance the environment, or did it advance corporations? Did it advance the tenant or did it advance the landlord? That's what they look at. The political branches say, well, the judge was pro-tenant, pro-landlord, pro this, pro that, or whatever, based on the end result of the decision.

That's not the way judges look at things. Judges tend to focus on process and let the end result wind up wherever it may. Judges ask, what

are the rules? What does the statute say? What does the Constitution say? What is the precedent? What is the evidence? What is our standard of proof? Measure those things together. Once you get the ingredients together, the soup takes care of itself. I can't tell you how many times I tell my clerks, after we have gone through that ingredients analysis, that I may not personally like the end result of my own decision. But whether I personally like or dislike a result is not the criteria by which I decide cases.

I never issued a ruling because I'm pro this or pro that. Why? Because a judge cannot rule on the basis of the end result achieved without sacrificing neutrality and fairness and those are higher values in the judicial world.

We need people like you to spread the word that judging is different than the way the other two branches of government operate. The judiciary is not a result-oriented branch. It is a process-oriented branch. And the process is to ensure fair and objective trials—nothing more and nothing less.

If a decision is being criticized politically, we need you to review that case and then publicize your own legal analysis of the decision. Get involved and explain how judges work and how the law works. If the case is wrong, we deserve to be criticized. If it's right, tell people about the process that lead to the decision.

We had a case that Judge Henry, our recent Chief Judge, wrote years ago involving a prisoner in state prison that wanted estrogen treatment. She had gotten a transsexual operation and was now a transvestite woman, although she had started out life as a male. She wanted hormone treatments to support her new femininity. She sued the prison asking for hormone treatments. The district judge granted summary judgment for the prison without converting it to a summary judgment and without giving her a chance to put on evidence. Judge Henry looked at that and said, you can't grant a summary judgment without telling both sides that you're going to convert the matter to summary judgment and without giving the parties a chance to put on evidence. So he reversed summary judgment for the prison and sent it back for evidence so that both sides could put on their evidence and have their day in court.

What happened? There was a storm of criticism. Three or four congressmen threatened to introduce a Bill of Impeachment against Judge Henry as an activist judge because he was allegedly supporting transgender rights at the cost of taxpayers' money. And it wasn't until some law professors and some law students and some lawyers spoke up and said that every law professor in the country would have agreed with Judge Henry. It was a process case. Judge Henry had not decided that a prisoner had a right to estrogen treatment in jail; he had only decided that the plaintiff/prisoner had a right to her day in court to argue her case. The

politicians in both the executive and legislative branches do not think much about process. And you have to educate the public about that.

Well, very quickly, other things you can do. You can advocate for adequate funding for judges. And leave the federal judges out of it, because we are, by most standards, well paid, and we have life tenure. State judges really need money. They are woefully underfunded. Get active in urging adequate funding for the state judiciary.

Another thing you can do is file a complaint if you think a judge is acting unethically. You know, an ethics complaint does not require standing. It's the only court-like proceeding I know of that doesn't require standing. You don't need to be a lawyer in the case. You don't need to be a party in the case.

If you think a judge is acting unethically, the judge is biased, the judge belongs to biased clubs, the judge has been intemperate on the bench, the judge has acted improperly off the bench, the judge is arrogant, the judge is not listening, whatever, file a complaint and let us deal with it. We can only resolve the problem when complaints come in. We need to keep our own house clean and private complaints of judicial misconduct help us to spot problems so we can correct them internally.

And then the final thing for you to consider is that when you reach the ripe old age of mid-forties or early fifties, some of you should consider throwing your hat in the ring for a judicial career.

It is one of the most wonderful jobs I can imagine. But I don't think you should do it early in your careers, because you need a lot of experience first. And you need the strength of character that comes from years of battling in the mine fields in order to insist on judicial independence.

See, you see, hopefully, the topic of judicial independence is not as boring as it sounds.