# Annual Convention Luncheon:
## Judicial Independence

*Carlos T. Bea, Danny J. Boggs, Timothy B. Dyk, Patricia M. Wald; Moderator: Dennis G. Jacobs*

**Dean Reuter:** Welcome to our National Lawyers Convention Luncheon. It's my great pleasure to welcome you here today. You, that esteemed group described by the *Washington Post*—and I want to get this right—as the "pinstriped tribe of conservative legal minds called the Federalist Society." Now why is it every time I quote the *Washington Post*, you laugh?

Anyhow, it is my great pleasure to introduce this panel and its moderator. Internally at the Federalist Society, we've been referring to this as the "bunch of judges" panel. Of course we refer to them only very respectfully as "a bunch of judges."

Now, many of you probably know that we have conference calls in advance of these panels to get everything right and discuss the logistics. And sometimes disagreements can arise. But I'm happy to report that when I had the call for this panel, there were no disagreements about the order of the speakers or anything that anyone would propose to say. In fact, the only points of disagreement were how many gavels should be provided and how many federal marshals would be on hand. I'm now beginning to hope that this has not becoming the "contempt of court" introduction.

Anyhow, what better topic to discuss here today at our luncheon than judicial independence, after the recent *Wall Street Journal* exchange between U.S. Supreme Court Justice Sandra Day O'Connor and Circuit Court Judge Bill Pryor? And what better group of panelists could we have assembled to speak about the issue than federal appellate court judges, current and former? These are people that live, eat, drink, and sleep judicial independence on a daily basis. In fact, here at the Convention we have some 20 federal appellate court judges participating, many in today's audience. When you stop and think about it, 20 judges, that's a fair percentage of our entire active federal appellate bench that we've presented at this year's convention. And of course, the other night at dinner we were just a couple votes shy of being able to grant *cert*. It really is remarkable when I reflect on the personalities and organizations that are represented by the participants in our convention; 20 federal appellate court judges, two Supreme Court justices, state judges, and law school professors from the very best law schools in the country—Yale, Harvard, Chicago, Northwestern, Georgetown, Northwestern, Berkeley, Duke, Colombia, Northwestern, Pepperdine, and Texas—three law school deans and public policy officials, a sitting governor and three state AGs, a couple of former U.S. attorneys general, the current and two former U.S. solicitors general, and of course the Vice President. Roaming the halls and on stages, we've also seen quite a few U.S. senators, congressmen, and former congressmen, several Cabinet secretaries, the Head of Domestic Policy, journalists and commentators, and importantly representatives from Human Rights Watch, the ACLU, the Center for American Progress, People for the American Way, and the ABA. (That wasn't one of my laugh lines.) These last few are very welcome to join us here in our discussions, and they really do help underscore the spirit of debate that is so integral to the Society.

The moderator for our next panel is truly a remarkable, likable man. Judge Dennis Jacobs is the Chief Judge of the Court of Appeals for the Second Circuit. He's been a judge on that circuit since 1992, leaving a partnership in a major private firm to assume his position on the bench. He's a regular participant in Federalist Society events. I've never seen him perturbed or with anything but a big smile on his face and a ring of laughter nearly always in his voice. Given that demeanor, I'm keenly interested to learn just how deep his concerns about judicial independence could possibly run. We're very pleased to have him with us here today. Please join me in welcoming Judge Jacobs.

**Dennis G. Jacobs:** The first thing I want to say is what a privilege it was for me to be here in the room last night listening to the Vice President. For me, that was sort of a lucky accident. I just saw a very long snaking line outside, and I got on the end of it, and when I got to the front I thought that I was going to be able to buy a PlayStation. But the event was much more rewarding than even that.

As a moderator of a panel on judicial independence, I suppose I should talk up the

importance of this topic and justify the time that we will spend exploring it. This discussion will be provocative and absorbing. The subject is important. But the threshold question for me is really whether judicial independence is a great issue in terms of the size of the threat to judges. Is judicial independence so precarious nowadays that it's a legitimate preoccupation? And if it's secure, what fuels this issue is a major controversy?

One essential preliminary to the discussion: this topic will be discussed chiefly though not altogether in the context of federal judges. The subject sprawls when it's expanded so that each of the states is in play; and the panelists and your moderator have all been on the federal side. So we'll focus on what we know. As to independence, I suppose I should ask if I should be worried. Under Article III, I enjoy enormous insulation from reprisal. My salary is secure, and if I'm impeached, I won't make less than I do now. I hold a position of distinction and moderate power, recently diminished by my becoming Chief Judge. And if I am so inclined, I can arrange to be lionized.

Federal judges who focus on criticism or threats of impeachment may be susceptible to being characterized, possibly mischaracterized, as a bit overwrought. On the other hand, there are assaults on judicial independence that need to be decried. But when one talks about independence, it's important to ask, independence from what? From Congress? The Executive? From critics? From humiliation? From gross disrespect? From threats of impeachment? From imputations of partisanship? And, independence to do what? Presumably, our jobs.

Finally, as we talk about the subject, we should not forget that the empowerment of judges is at the same time an empowerment of the legal profession and the legal community. The bar has its own interests, and it would be naïve to think that the bar is the only major player in our economy that is not self-interested and working to expand its influence. So, when the bar rears up to defend judicial independence, often for judges who exercise or overextend their sweeping powers, we cannot know who is moved to defend judges out of neutral sense of public interest, who is making room for doctrines that they approve and that judges promote. And who in that group is aggrandizing the power of the legal profession generally to operate and promote its agenda without the kind of bare-knuckled criticism that prevails everywhere else in our culture?

To discuss these subjects and many others, we have, as Dean has pointed out, a very distinguished panel. We're going to hear very briefly from each of the four speakers, so that you can get acquainted with their views, and then I'll pose a bunch of questions.

Our first speaker is Danny Boggs of the Sixth Circuit Court of Appeals. He is a Kentuckian who attended Harvard and the University of Chicago Law School. He returned to Kentucky after school and was legal counsel to the governor, among a number of other distinguished positions in state government. He came to Washington and was assistant to the Solicitor General of the United States, and other jobs. And then, after an interlude in private practice, he returned to serve in the White House Office of Policy Development and Special Assistant to the President. In 1986 he was appointed to the Sixth Circuit. In 2003 he became Chief Judge.

Patricia Wald was educated in my circuit with a law degree from Yale and a clerkship on the Second Circuit. She's had a varied career and practiced in the Justice Department, in the neighborhood legal services, in the Center for Law and Social Policy. She was appointed to the D.C. Circuit in 1979, became chief judge of that court in 1986, retired in 1991, and since then has been intensely active in the ALI, and (very recently) as a judge of the International Criminal Tribunal for the former Yugoslavia.

Carlos Bea grew up in Los Angeles. He has a BA and a law degree from Stanford. He worked in a firm in San Francisco, had his own firm for 15 years, until the Governor appointed him to the San Francisco Superior Court. In 2003, he was appointed to the Court of Appeals for the Ninth Circuit, where he now serves.

Timothy Dyk is a circuit judge on the Federal Circuit. He took office in 2000. A graduate of Harvard Law school, he was a law clerk to Justice Reed, Justice Burton, and Chief Justice Warren. He served as special assistant to assistant attorney general Louis Oberdorfer in 1963 to 1964. I'm happy to say that I sat with Judge Oberdorfer on my court this past Tuesday. And Judge Dyk has been adjunct professor at a number of distinguished law schools.

We will begin with Judge Boggs.

**Danny Boggs:** Thank you, Judge Jacobs. I've been askedto give my take on judicial independence very briefly, so I will rattle through this. First, I think that there are two aspects of judicial independence, inner and outer. Inner is what we do as judges. Outer is what people may do or may try to do to us.

Discussions of judicial independence largely and most frequently focus on the second, but I think the first is really the more important to start with. One of the things I did in my checkered career was to go to Moscow on several occasions and teach Russian judges. Especially in the early days, when the USSR was still in existence, they spoke about "telephone justice," meaning the party boss would call the judge up and tell them how to rule. We heard a great deal about this. Finally, a very cynical defense attorney who'd managed to stay active under the Communists said, "Listen, these guys are talking about telephone justice. That's only for the stupid ones; the smart ones don't need to be called." I take from that that, whether carrots or sticks are being used, if you internally think that you know how this case is *supposed* to come out, then you are not independent.

To take another example, Professor Mark Tushnet, a man of great stature in the academy, had a law review article a number of years ago, explaining how would act as a judge. He said, "Well, I would decide what decision in this case is most likely to advance the cause of socialism, and having decided that, I would then write an opinion in the grand style." Now to me, that's not judicial independence. No one has a gun to his head, but he's not getting his ruling from impartial principles; rather, from an overarching appeal to personalities or principles other than those of the law. So, to me, the internal is most important.

With regards to the outer part--what can be done to us? Well, we've seen what's happened in other countries. Blessedly, we've been almost but not entirely free of force. There was a group we had in our court once litigating under the title of "By any Means Necessary." If they had actually meant it, that would have been a threat to judicial independence.

Then, there is money and compensation. Hamilton obviously focused a great deal on those two. Rampant and uncompensated for inflation at some point could become a threat to judicial independence. I don't think that has, but it could. And the third is obviously the threat of dismissal in some way. Frankly, that threat in the past has been so weak that I don't think any of us are intimidated by it—although, as my wife continues to tell me, "Your tenure, Love, is not for life; it's during good behavior."

Now, there are many other things said and done about judges that may be bad ideas—but bad public policy ideas that are not threats to independence. Nor is criticism a threat. I take my text from Churchill, who at one point said that, "I do not resent criticism, even when occasionally, for the sake of emphasis, it parts company with reality." I think that's what judges have to do. The phrase "independence" may be a little off-putting to people. In my part of the country, if you say, "Zeke, he's real independent," that does not mean he's impartial. It means he's willful and headstrong. That is not what independence is about. Independence is not an end in itself. It is a means to impartial adjudication.

Hamilton, in a part of *Federalist* 78 not frequently quoted, says, "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents." I take from that that we are not independent to exercise an arbitrary discretion. We are independent to be impartial arbiters.

Dennis asked me to be provocative. I will just throw out one more thing. I'll put it on the table as heretical. We say that judges should never be impeached for their decisions, and obviously in the ordinary run of things that is true. But let me just ask the question at least. A judge who behaved as Judge Tushnet would have, or a judge who avowedly always ruled for the litigant with a lighter skin, or a judge who would permit an execution for treason on the testimony of one witness in the face of the clear constitutional command that there must be two witnesses, would that be worthy of impeachment? I don't think that we have any judges that go that far, but I think sometimes it is well to posit the outer limit case to show why simply wrong decisions are not actionable by positing the heretical notion that it is possible that there could be actions that would be impeachable.

Thank you.

**Patricia Wald:** When I first got this invitation, I felt a little bit like Eleanor Clift on the *McLaughlin Group*. But I see it's not that way. On the contrary,

I'm surrounded by former colleagues.

I feel that the threat of lack of independence is not, quite frankly, on the individual level. The Founding Fathers gave us life tenure on good behavior and no diminishment of salary. Like Judge Boggs, I've been abroad, and it isn't just telephone justice in a lot of countries. In Bulgaria, they shut off all the electricity in the court building when they don't like the decision. There are variations on this theme from which we have also thankfully not suffered in the States. But I think it's interesting to look at this issue historically because, actually, as Alexander Hamilton recognized in the more familiar part of the *Federalist*, the Judiciary is probably "the least dangerous" branch in terms of its power. It has not the power of the purse, nor of the police. In the very beginning of our country Congress made a few attempts at perhaps unwise impeachments, but that died out. It's been a long time since there's been any serious threat of impeachment. Article I says that Congress defines the inferior tribunals and, I think, under Article III can make the regulations and exceptions to appellate jurisdiction of the Supreme Court. Those are big powers. I think it is Professor Guy in Indiana who has written a book recounting historically how there has come to be a kind of mutual restraint—which I hope can continue—between Congress and the courts. In other words, there is a tacit understanding that they simply are not going to use those kinds of powers, even when they get mad at the courts for particulars things they have done.

I do think some of the *ad hominem* attacks on judges have gotten particularly nasty in the last several years, but that may be a mark of the general polarization of parties and the political debate we have had. Judges have taken some of the brunt. It's something that I think we ought to keep our eyes on. We should try to keep the discourse civil. It's fine to criticize judges for their reasoning or for their decisions when there is disagreement. But when criticism turns particularly nasty and derogates into name calling, it is just possible, as Professor Guy pointed out in his book, that if enough of mud is slung around, some of it might actually stick. So, I think it behooves us all, whatever side of the issues we are on, to try to keep the discourse civil.

I do agree with Judge Boggs; internal independence is terribly important among judges. The Constitution makes the appointment of judges inevitably somewhat of a political process—nominated by the Executive, confirmed by the Senate—all sorts of people get in there and put their two cents in for their own particular reasons. But once the judge is on the court, he really has to be very careful, very conscientious—I think most are—in looking inward as to whether, when a decision comes up, he is at all I'm worried about its effect upon the people who appointed him or the people whom he tends to ideologically align with. Decisions ought to be something that comes out of looking at the law, such as it is, or consequences of the law as best one can account for them?

There is some very interesting research which shows that "the independence of the judge may be not so much a concern about the political ramifications upon the judge's original party of appointment as peer pressure. There's a growing amount of it demonstrating that if three judges from a like background sit together, they're very much more apt to render a decision which is very strong in terms of a particular viewpoint. If you have one judge from another point of view, it's apt to break that up. Even if they come out with the same basic majority decision, it's apt to be in different terms. It's not apt to be as strong. It's apt to reflect more difference of opinion. Here again, that may have some implications for the kind of prolonged periods in which, in some courts, the same judges sit for a very long time.

The last point I want to make is that there is a difference between independence—(admittedly an ambiguous term)—of individual judges and independence of the Judiciary as an institution. Some of the considerations are different. Of course, under Article I, Congress has the right to create these inferior tribunals and to define their jurisdiction. But from what we can tell from the debate at the time, the notion was that the federal courts would serve as kind of umpire to make sure that the other two branches did not overstep their particular bounds.

Perhaps we have different opinions on this matter, but at least some of us are concerned when both the Executive and the Congress seek to take from the courts powers they have had traditionally which affect the rights of individuals. I know this is a controversial subject, but the recent examples I am thinking of are the removal of *habeas corpus*—I think that's the word in the Military Tribunal Act—and any other type of proceeding in which certain things

could be issued in favor of the format that laid down in it. We also have other doctrines, some of them imposed by the courts themselves, like state secrets, which obviously we need to a degree, but have been interpreted to in effect remove judicial review in some cases—such as the wiretapping surveillance program. That decision has gone the other way but some other decisions have not, so that the courts have in effect lost their role entirely. That's something I think we judges and others should keep their eye on, to make sure that the courts don't get marginalized or stripped of what I think is their true role in the constitutional structure.

**Carlos Bea:** I was very glad to hear Judge Wald say that we're not here to defend particular attacks on judges, being from the Ninth Circuit, as I am. The term in the discussion is judicial independence, and I propose we step back and take a look at it from two different angles. The one we've been talking about up to now is the independence of the Judiciary from outside pressure.

But the electorate has been telling us, I think, over the last few years that there's another type of judicial independence they are interested in, which is perhaps independence *from* the Judiciary in certain matters, such as same-sex marriage. Overreaching courts have spawned this criticism, and, as we know from the recent exchanges in the *Wall Street Journal*, Justice O'Connor has taken the view that this poses a grave threat to judicial independence.

She has cited three sources which I'd like to discuss briefly. One is the state ballot measures, the most unusual of which was Jail for Judges, which would have stripped immunity not only of judges but of jurors in grand jury proceedings in South Dakota. That went down to a 90-10 defeat, showing the good sense of the people of South Dakota. The next one was the Colorado initiative, which limited judges' terms and applied the limitation retroactively, which also went down in defeat. The third was what I thought was a rather modest proposal in Oregon to have appellate court judges have districts for elections, on retention elections. This is not a revolutionary idea to us in California, since we've had that since 1905, but that also went down to defeat. So, it doesn't look like the ballot is going to be a big threat to independence of the Judiciary, at least this year. Congressional action also has not been particularly successful. The Inspector General bill of Congressman Sensenbrenner was not acted on. Also, the Pledge of Allegiance jurisdiction stripping wasn't acted on.

So, what it really boils down to, I think, is that Justice O'Connor is a bit touchy about public criticism of the Court's decisions. And she's picked up an ally, Nan Aron, president of the Alliance for Justice, which I'm not sure was expected or not, who writes in the *Wall Street Journal* letter column a few days ago: "Judicial independence is under attack not because judges are busy creating the right. Rather, it is under attack because the Right's messaging machine espouses facile rhetoric so often that activists are now responding with the overreaching measures which Justice O'Connor correctly decries."

So, what grave threat is left? The Alabama jurists who took that strong position on placement of the Ten Commandments in the courthouse have not even survived the Republican primary and are no longer in office. Personal threats—well, I don't want to minimize what happened in Chicago a few years ago, but we don't seem to have the personal threats we did in the days of desegregation—and the kind of person who really intends to do us ill will act this way: there was an item in the *Fort Worth Star-Telegram* recently about a lady who had sent some home-baked cookies with rat poison to the members of the Supreme Court and the chiefs of staff of the Army, Navy, and Air Force, with a letter saying, "This is meant to kill you, this is poison," tacked on top of it. I don't know whether she benefits or not under the sentencing guidelines that allow downwards departures for early acknowledgment of responsibility, but she got 15 years.

Now, the jurisdiction stripping question is front and center. First of all, I would note that this really isn't something new. Jurisdiction stripping has been around since about 1820, when some people tried to get rid of Section 25 of the Federal Judiciary Act of 1789. That went through certain mutations in the Reconstruction Era. It was not always a conservative construct. Remember the Norris LaGuardia Act which stripped the federal courts of injunction power in labor disputes and in Yellow Dog contracts? We have a series of jurisdictional stripping statutes of recent vintage which are not all that controversial in the Antiterrorism and Effective Death Penalty Act of 1996. One deals with second and successive *habeas*

petitions. The Immigration Act has one regarding removal orders for prior convicts. The one that Judge Wald indicates is going to be the subject of some discussion: whether limitations of review of *habeas corpus* is a suspension or not under Article I, Section 9.

But I'm going to talk a little bit about what I consider to be a real threat to judicial independence, which doesn't have to do with the federal judiciary; it has to do with State-contested elections. First, a disclaimer: I was appointed a judge, and within eight days was told by the county clerk that I was in a contested election. I didn't have much time to do anything bad or good, but I knew I was in an election. And I was sitting in the City and County of San Francisco, appointed by a Republican governor, registered Republican, a Catholic, white and married—and it was not a same-sex marriage. So my election was less an election than a miracle. I won 59-41.

But there are two types of elections. The retention election is used throughout the country, and it says yes or no as to a sitting judge on an appellate court. I don't have anything particularly bad to say about that. It's very rare that one has to spend a lot of money in defending a retention election. They're usually not successful, although they were in California in getting out three Supreme Court justices in 1986. I think that's a valid exercise of democratic consensus, whereas the contested elections where one or more candidates run for trial or appellate seats have gotten totally out of hand. My election cost me $100,000, and that's peanuts these days. The average price of the appellate positions in Michigan, according to a study by an organization which always draws a laugh here, the ABA, is between $431,000 and $500,000. In Texas, the price of election has gone from $300,000 up to somewhere around $5 million.

These increases have two effects. One, the judge who gets the money to run the election gets it mostly from attorneys, and sees those attorneys the next day in court. Second, I've observed judges looking over their shoulder before making decisions because of an upcoming election. It's happened in San Francisco with some frequency. And then there is what I call the bureaucratic and administrative nuisance. It's a subtle limitation on independence. To give you an example, the recent Advisory Opinion No. 67 of the Judicial Council, which requires judges to make disclosures as to which seminars they go to. You must make disclosures, for instance, when you go to FREE. That's the Foundation for Research on Economic and Environmental Issues in Montana. And you must make one if you go to a George Mason seminar. But you don't have to make one if you go to the seminar by the judicial division of the ABA. That distinction supposes that FREE and George Mason are tainted by ideology, while the ABA is not.

Overall, I think that the grave threat that Justice O'Connor was talking about does not exist, at least not at the level of the threat to independence which exists at the state level because of contested elections.

**Timothy Dyk:** Thank you. I agree that the problem at the state level is a significant one. I'm going to confine my remarks, however, to federal independence and look at this a little bit historically. It's a lot easier to address this subject historically since the passions have cooled, though addressing it in the present is obviously important also.

It strikes me that there are two kinds of threats to judicial independence. One is the kind of threat that results in a case or controversy. In that category the Judiciary has the keys to its own prison. It is able to adjudicate whether the threat to its independence is consistent with the Constitution, with the Compensation Clause, with the Life Tenure Clause, or with Article III itself. Perhaps with some exception, most people seem to agree that the Judiciary can be the final word on those issues. We have court cases considering issues of judicial compensation, of jurisdiction stripping, and of the elimination of judgeships, as happened in the 1802 Judiciary Act, as well as cases involving congressional efforts to change the result in particular cases that have been adjudicated by the courts to confer inappropriate duties on the Judiciary, such as advisory opinions. In these areas, the cases come to the courts; the courts can resolve them. And the Supreme Court is accepted by most people to be the ultimate arbiter of the question.

I don't see those issues as presenting quite the same threat to the Judiciary as the kinds of issues that cannot come before the Judiciary, those with regard to which we have to rely on the good will of the Executive, the Congress, and the support of the bar and the public. The quintessential example of this,

of course, is the FDR court-packing plan. Adding Justices to the Supreme Court is not something that results, I would assume, in a case or controversy that can be adjudicated by the courts. The courts had to rely on the U.S. Senate to support it and prevent the court-packing plan from being enacted. Another example would be the refusal of the executive branch to enforce judicial decisions. There's not much the judges can do about that, and there are historical examples—of course, President Jackson's famous remark about *Worcester v. Georgia* that, "Chief Justice Marshall has made his decision; now let him enforce it." There are modern examples too. In the Eisenhower administration there were decrees in desegregation cases that the Administration simply did not do anything about in the *University of Alabama* or one or two other instances; ultimately forced by public opinion, as in the paratrooper intervention in Little Rock. That's a matter of some concern.

Restricting the resources of the Judiciary would be a matter of serious concern that the Judiciary itself can't deal with, or refusing to provide physical security for judges, which we see as an issue in foreign jurisdictions occasionally. Those are things that the Judiciary itself can't do anything about. The questioning at confirmation hearings of judges, where there are efforts to get judges to promise to rule in particular ways in future decision-making—there's not much other than refusing to answer the question that the judges can do in the course of those hearings.

So, there are hundreds of pages of Hart and Wechler that can come before the Judiciary where the thrust to judicial independence can be resolved by the Judiciary itself, but the more serious problems are the instances in which the Judiciary can't do anything to protect itself and has to rely on other parts of the government and the bar and the public to protect it.