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The Article III Judiciary in Its Third Century

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ARTICLES

THE ARTICLE III JUDICIARY IN ITS THIRD CENTURY

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Tonight we celebrate the memory of one of the great American jurists of this century, Robert A. Ainsworth, Jr. In this bicentennial year of our Constitution, it seems most appropriate that we honor the memory of Judge Ainsworth by reflecting on that part of the Constitution to which he exhibited so much devotion—article III, the judicial article.

I choose this topic, quite frankly, for another reason. Quite, unexpectedly, I find that the baton so ably carried by Judge Ainsworth has now been passed to, among others, myself. Upon taking

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the judicial oath,[1] I assumed, as do all federal judges throughout the country, direct responsibility for the future of the judiciary as it enters its third century. Consequently, this occasion is a particularly appropriate one for me to share with you my assessment—and concern—for its future.

The Constitution of the United States, as a basic plan of government, can be formally amended only through the painstaking amendment process of article V. Yet, the constitutional institutions of government, including the article III judiciary, can undergo substantial transformations without our ever changing a single letter of the document. A confluence of political and economic events can, over time, cause significant change in these basic institutions of government. Unless these forces are carefully monitored and carefully checked, they can destroy the essential institutional characteristics contemplated by the Constitution.

In my view, the article III judiciary has been, and is presently being, buffeted by many forces which threaten to alter drastically its essential constitutional character. Today, I would like to identify several of these forces and suggest, at least in tentative fashion, how we might check their impact on the essential characteristics of the article III judiciary.

I

The judicial article of the Constitution is brief and to the point. It establishes a Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish."[2] It provides in its first section that the judges "shall hold their Offices during good Behaviour" and protects their compensation against diminution "during their Continuance in Office."[3] The second section sets forth the subject matter jurisdiction of the federal courts, pointedly limiting it to "[c]ases" and "[c]ontroversies."[4]

Although the word is never mentioned in article III, one concern pervades the structure it sets up—independence. In his classic work, *The Supreme Court in the American System of Government*, Justice Robert H. Jackson described the unique historical

1. *See* 28 U.S.C. § 453 (1982).
2. U.S. CONST. art. III, § 1.
3. *Id.*
4. U.S. CONST. art. III, § 2, cl. 1.

roots of the Supreme Court.[5] His description is applicable as well to the lower federal courts. Unlike most of the tribunals of Europe, which evolved as subordinate to the king, the American judiciary is a unit of government, not a subordinate of the government.[6] Indeed, its judges are not, either in the technical sense or in the broader popular conception, employees of the government. Rather, they are, in their own right, constitutional officers of government. Moreover, judicial officers are protected by their tenure and guaranteed compensation from the whim and retribution of transitory political forces. However, the independence created by article III was not intended to make each federal judge a law unto himself. The power of the federal judge is carefully limited by the requirement that it be exercised only in "[c]ases" and "[c]ontroversies."[7] It is limited further by the doctrines of stare decisis and precedent.[8] It is circumscribed by the power of Congress to limit the jurisdiction of the courts.

Yet, despite these very real limitations, the independence established by this article is an important guardian of the integrity of our constitutionalism. Judicial independence is more than freedom from harassment and direct interference from the political branches. It is meant to protect, indeed to nurture, a certain independence of mind and spirit. The Constitution's judicial article is designed to encourage the judge to look beyond the passion and prejudice of the moment. This sort of intellectual activity—taking the long view of things—presupposes that the judge will perform the judicial function in a certain intellectual climate. We expect

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5. R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 9-10 (1955).

6. *Id.* Jackson exlained:

> The Supreme Court of the United States was created in a different manner from most high courts. In Europe, most judiciaries evolved as subordinates to the King, who delegated to them some of his functions. For example, while the English judges have developed a remarkably independent status, they still retain the formal status of Crown servants. But here, the Supreme Court and the other branches of the Federal Government came into existence at the same time and by the same act of creation. "We the People of the United States" deemed an independent Court equally as essential as a Congress or an Executive, especially, I suppose, to "establish Justice, insure domestic Tranquility," and to "secure the Blessings of Liberty to ourselves and to our Posterity." *Id.*

7. U.S. CONST. art. III, § 2, cl. 1.

8. *See generally* Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should be Applied*, 31 A.B.A. J. 501, 502-03 (1945); Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1 (1983). I have written on the application of this rule in constitutional cases in K. RIPPLE, CONSTITUTIONAL LITIGATION § 13-3, at 494-499 (1984).

our judges to approach their work with a freshness of mind and with ample time for study and reflection.

Finally, judicial independence means personal responsibility and personal accountability. Judicial decisions are decisions of specific individuals who have been chosen for this responsibility through a constitutionally mandated process. The people want to know that decisions that affect not only the parties, but also countless others, have been made by a person who has been subjected to the special scrutiny of the appointment process and who has accepted the discipline that accompanies judicial office. The late Professor Bernard Ward, speaking to a group of federal judges, put it this way:

> The Third Article has caused the buck to stop with you. The Third Article has caused you to be, in effect, the conscience of the nation, and there is no withdrawing from that. That is our Constitutional scheme.
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> . . . .
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> . . .The responsibility is enormous. But it is not going to go away. It's there because you are assigned as a prisoner of the Third Article. It is as simple as that.[9]

Independence, the constitutional hallmark of the article III judiciary, ultimately manifests itself in the decisions of the courts. However, as a practical matter, it is a long road from the cold words of the Constitution to the qualities of mind and spirit which produce those decisions. To endure, the judicial independence contemplated by the Constitution must be institutionally nurtured. Consequently, over the two centuries of the Republic's existence, a very distinct tradition of institutional dedication and discipline has developed within the article III judiciary. That tradition was designed to set the judiciary apart, not as a Brahmin class of autocratic rulers, but rather, as Chief Justice Rehnquist has expressed it, as "keepers of the covenant"[10]—the constant and consistent guardians of American constitutionalism. That tradition has become the institutional embodiment of the constitutional hallmark of independence.

This American judicial tradition, the living embodiment of the

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9. Ward, *The Federal Judges: Indispensable Teachers*, 61 TEX. L. REV. 43, 45-46 (1982).

10. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698 (1976).

constitutional attribute of independence, manifests itself in many ways. Two of its most important manifestations, were identified particularly effectively by Chief Justice Warren on the day he retired—continuity and collegiality.[11]

Continuity goes to the essence of the American judiciary as an institution. As I have pointed out on another occasion,[12] the judiciary is the only branch of government which can reach back into our nation's history and keep us in touch with our enduring values. The constitutional guarantee of life tenure was designed primarily to protect the judge from political retribution. However, at least to the present time, life tenure has also set a standard of commitment. With rare exceptions, one accepted the Federal Commission only if one planned to make the judiciary one's life work. It was well understood, and accepted, that becoming a federal judge involved a lifelong commitment to the judicial way of life with its special restrictions and its special responsibilities.

This lifetime commitment brought with it another important by-product. It produced on each bench, over time, a variety of historical and ideological perspectives. The constant dialogue among judges in the intimacy of the conference room, where rational discourse is found far more often than rhetoric, allows the courts to

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11. Addressing himself principally to the President of the United States, who had just delivered a short congratulatory statement on behalf of the bar, the Chief Justice said:

> I might point out to you, because you might not have looked into the matter, that it is a continuing body as evidenced by the fact that if any American at any time in the history of the Court—180 years—had come to this Court he would have found one of seven men on the Court, the last of whom, of course, is our senior Justice, Mr. Justice Black. Because at any time an American might come here he would find one of seven men on the Bench in itself shows how continuing this body is and how it is that the Court develops consistently the eternal principles of our Constitution in solving the problems of the day.
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> . . . .
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> We do not always agree. I hope the Court will never agree on all things. If it ever agrees on all things, I am sure that its virility will have been sapped because it is composed of nine independent men who have no one to be responsible to except their own consciences.
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> It is not likely ever, with human nature as it is, for nine men to agree always on the most important and controversial things of life. If it ever comes to pass, I would say that the Court will have lost its strength and will no longer be a real force in the affairs of our country. . . .
>
> . . . In the last analysis, the fact we have often disagreed is not of great importance. The important thing is that every man will have given his best thought and consideration to the great problems that have confronted us.

395 U.S. VII, X-XI (1969).

12. Ripple, *On Becoming A Judge*, 34 FED. B. NEWS & J. 380 (1987).

steer a more or less steady course and avoid the extremism which has ensnarled many other jurisprudential systems.

Collegiality is always difficult to define, whether the context be the medical service of a hospital, a law school faculty, or a court. It is not simply physical proximity. It is certainly not unanimity of viewpoint. It begins with respect for differing viewpoints and respectful dialogue. It means accepting that one can always learn. Collegiality in the judiciary requires the judge to listen openly to a colleague who has walked a very different road to the same tribunal. It requires the judge with academic roots to respect his colleague who emerged from the practicing bar or from the political scene. It requires as well that respect be reciprocated. Collegiality requires time—time for discourse, time for collective reflection, time to work together, and time to support each other's growth in perspective.

II

These institutional manifestations of judicial independence—continuity and collegiality—must be institutionally nurtured. In our time, however, they have been subjected to severe stress. I would like to discuss several of those stress points with you today.

1. FLUX IN MEMBERSHIP

Our federal courts have been going through a period of significant flux in membership. Faced with the rising number of filings, Congress has increased significantly the number of judgeships in both the district courts and the courts of appeals. While the entire impact of these new judgeships on the capacity of the federal courts to handle their caseload will take some more time to measure, the impact on collegiality of the infusion of a great number of new judges in a rather short period of time has been significant. In a collegial body, the addition of a single member does much more than add (or substitute) a new vote. It alters all the relationships among the body's members, and the court's "collegial chemistry" produces a different amalgam of views and personalities than it did previously. It takes a while for the new collegial chemistry and all of its working relationships to stabilize. Most of the courts of appeals and many district courts have experienced this collegial "destabilization" several times in the last several years.

This destabilization has not been aided by the cumulative glare of publicity that inevitably accompanies so many appointments. Courts of appeals are designed to be places of reflection where the quest for principle through rational analysis and thoughtful dialogue is the order of the day. Unfortunately, in the conventional wisdom of our time, the judicial process is perceived by many as far more political. The appointment and confirmation processes often leave a very undesirable afterglow on the new judge that impedes his or her integration into the work of the court.

Unfortunately, the glare of publicity that inevitably accompanies the appointment process is often accompanied by another glare quite alien to the judicial function. As vacancies have occurred on our nation's highest tribunal, another spotlight has been turned on the courts of appeals. Political interest groups have openly supported specific circuit judges; carefully-nuanced judicial work has been reduced for public consumption to the equivalent of "box scores." The "target judge" and his or her colleagues must cope with this significant distortion of their daily work. In short, the transformation of the work of the courts of appeals into the equivalent of the New Hampshire primary for Supreme Court vacancies has not made the task of achieving collegial stability in the courts of appeals less difficult.

The stress caused by this flux in membership and the accompanying glare of publicity has been contained not only through the sensitivity of the vast majority of new judges to the problem, but also through the very strenuous efforts of many of the more senior judges to facilitate the assimilation of new colleagues into the institution. Often such efforts place significant demands on the time, and perhaps the emotions, of judges who already have borne the heat of the day in the judicial vineyard. Yet, few among the new arrivals will forget the gracious welcoming note of a senior colleague, the valued word of advice, the assistance with the details of administration and the respect for the new, fresh opinion that occasionally challenges the conventional wisdom of the conference room.

2. WORKLOAD AND BUREAUCRACY

A more objectively ascertainable stress point in the collegial fabric of the judiciary is its significant workload. Responsible members of the bench and bar have expressed different and, to

some degree, conflicting views on the causes and extent of the workload increase.[13] I do not propose today to enter that debate, but rather to focus on the reality that, whatever its cause and whatever its extent, the increased workload of the courts of appeals has produced over the past several decades a significant increase in the number of nonjudicial support personnel who serve the federal judiciary. This situation requires us to examine whether, in an effort to deal with a caseload which has increased both in numbers and in complexity, we unconsciously have sacrificed any of the personal responsibility and accountability necessary for judicial independence. The process of judging is a very personal one. Its essence is personal responsibility. Justice Brandeis has been quoted as having said that "[t]he reason the public thinks so much of the Justices of the Supreme Court is that they . . . do their own work."[14] The public expects the judicial decision to be the product of a person who has been chosen by the President, approved by the Senate, and who, far from remaining anonymous, must sign his or her work.

Over the past years, several of my colleagues on the federal appellate bench have warned of the danger of our slipping, unconsciously toward "institutionalized judging," where the judicial workproduct and, more importantly, the judicial decision, are produced not by the judge but by the judge and staff.[15] These careful, reflective contributions to the literature of judicial administration emphasize various aspects of this problem of bureaucratization. Here, I shall limit my discussion to what I believe are the fundamental distinctions that must be made.

At the outset, the many kinds of support personnel which

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13. For instance, in an address before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents on February 15, 1987, Justice Scalia noted the significant increase in the number of federal causes of action:

> The fact is that over the past quarter-century our society has considered more and more matters appropriate for national control. And there seems to be no substantial possibility of a reversal in that trend. Unless some structural changes are made, therefore, it is unrealistic not to expect substantial alteration in the nature of the federal courts.

Scalia, *An Address by Justice Antonin Scalia, United States Supreme Court, reprinted in* 34 FED. B. NEWS & J. 252, 253 (1987).

14. C. WYZANSKI, WHEREAS—A JUDGE'S PREMISES 61 (1965).

15. *See, e.g.*, R. POSNER, FEDERAL COURTS 102, 119 (1985); McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777 (1981); Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME LAW. 648 (1980).

serve the court must be distinguished. Administrative personnel who shoulder the arduous task of taming the flow of cases through the decision-making processes of the court pose, in my view, little direct threat to judicial independence. Indeed, by manning the dikes each day and preparing the cases for submission to the judicial officer, they relieve the judicial officer of needless distractions from the decision-making function. Indeed, I do not believe that we have yet fully appreciated what a valuable ally our own administrative personnel can be in our efforts to maintain judicial independence. An administrative staff that appreciates the pressures associated with the judicial role and that is dedicated to a mission of the judiciary can be a tremendous asset not only in managing the day-to-day case flow, but in producing new and innovative solutions to the administrative bottlenecks and tangles which inevitably develop. Moreover, these staff members can become very effective channels of communication between the bench and the practicing bar, a relationship which, as I shall point out later, needs a good deal of attention.

If we are to maximize the potential of our administrative personnel to preserve the independence of the judicial function, increased communication between judicial officers and administrative personnel is a necessity. We can hardly expect support in our quest to preserve judicial independence if we do not communicate adequately our needs to those who support us.

In one area, the different responsibilities and resultant different perspectives between judges and administrative staff inevitably produce at least an indirect threat to judicial independence. Administrative personnel accountable for case flow tend to become preoccupied with statistical evidence of the judicial system's health. This emphasis on the quantitative assessment of the judicial function can place an artificial and highly inappropriate pressure on the thoughtful jurist who, like Justice Brandeis, believes "in taking pains" and understands that "the corollary of taking pains [is] taking time."[16] Administrative personnel can never appreciate fully the tremendous pressure that the judge feels to get it right every time.[17] Sometimes, the administrative personnel's emphasis on quantitative assessment of judicial performance can also

16. Frankfurter, *Mr. Justice Brandeis*, 55 HARV. L. REV. 181, 183 (1941).

17. *See generally* Letter from the Honorable Harry A. Blackmun to the Honorable Roman L. Hruska, Chairman, Commission on Revision of the Federal Court Appellate System (May 30, 1975), *reprinted at* 67 F.R.D. 404 (1975).

have a significant negative effect on collegiality. Judges are only human and "looking good in the stats" can become a significant countervailing force to appreciating the need of one's colleague for additional time to consider a matter. On the other hand, administrative personnel can, over time, give the judge a very realistic estimate as to how his personal decision-making process compares with that of his colleagues. As Judge Becker of the Third Circuit, Judge Higginbotham of the Fifth Circuit, and Mr. William K. Slate, II, a distinguished judicial administrator, recently wrote:

> [Q]uantitative analysis, when done properly, is only the starting point for proper analysis of judicial administration. The process of measuring judicial performance may well commence with numbers, but numbers should be the beginning, not the end of the inquiry. We should be measuring quality, difficult as that may be. We cannot forget that lawsuits are highly individualized and the exercise of judgment is not easily systematized. To miss this is to lose touch with the very soul of the judicial enterprise.[18]

Legally-trained support personnel who assist the judge in working on the merits of the cases pose different problems. Much has been written about the danger that an increase in the number of law clerks poses to judicial independence.[19] Unquestionably, law clerks pose special management problems for the judge who is anxious to preserve his judicial independence and who accepts as a "given" his personal responsibility and accountability. The pressure of the caseload and the constant need to reconcile quality and speed in the decision-making process no doubt create many temptations toward over-delegation. On the other hand, the countervailing reality is that, to give quality time to those judicial matters which demand it, judges need law clerks. Each judge must determine how best to use law clerks and still retain control over the judicial function. However, in selecting law clerks, the judges and the law schools who recommend candidates must be increasingly sensitive to the preservation of the delicate balance between permissible assistance and impermissible delegation. Furthermore, the person selected for a law clerkship must be sensitive to the limitations on his or her own role and share the judge's commitment to personal decision-making and personal accountability. We have al-

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18. Becker, Higginbotham & Slate, *Why the Numbers Don't Add Up*, A.B.A. J., Oct. 1, 1987, at 83, 85.

19. *See, e.g.*, Kester, *The Law Clerk Explosion*, LITIGATION, Spring 1983, at 20.

ways required intelligence and academic accomplishment from our clerks. Today, because of our increased concern for the proper allocation of the judicial function, we must also demand maturity, humility, loyalty, and decency. The law clerk must be the judge's ally—not his adversary—in the judicial attempt to preserve the essential qualities of judicial independence.

Staff attorney assistance, that is, assistance by lawyers who are organized in a central staff and work for the entire court, presents special cause for concern. This concern arises because of the difficulty which the men and women who serve in these positions often encounter in maintaining a close working relationship with the responsible judicial officer, rather than because of any lack of professional ability or sensitivity for the judicial process on their part.[20] In my view, it is beyond dispute that these lawyers perform a very valuable professional service for the court. They develop expertise in many of the more technical areas of federal practice and often become particularly astute in analyzing factually complex cases. The challenge is to make use of this valuable assistance while retaining judicial control of the decision-making function by avoiding "school solutions" to recurring problems. Once again, the burden, it seems to me, is on the judicial officer. The initiative for control and supervision must come from the person with constitutional responsibility for the workproduct.

The specter of "bureaucratization" of the federal judicial process is a threat. However, that threat has not become a reality. Moreover, it need not become a reality if judges continue to live by the discipline articulated so bluntly by Justice Brandeis.[21]

3. THE ECONOMICS OF JUDGING

Both the continuity and the collegiality of the federal judiciary are threatened significantly by the present compensation benefits scheme made available to article III judges by the political branches. No one in public office—and certainly not a member of the federal judiciary—has a right (or ought to have an expectation) to become rich through public service. However, we must realize that the commitment to the federal judiciary is constitutionally

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20. For a partial description of staff attorney functions, see J. CECIL & D. STIENSTRA, DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS (1985).

21. *See* note 14 and accompanying text.

designed to be a long-term commitment. It is also meant to be a job demanding total concentration and total dedication to the judicial work of the Nation. A federal judge should not become wealthy; but he or she should not have to worry about the price of a can of tuna fish, or whether he or she can fulfill, with reasonable ease, the basic obligations of life—educating one's children, providing for catastrophic illness, or caring for an aging spouse.

This problem is becoming especially acute as the Nation turns to younger men and women to make such a lifetime commitment to judicial work. The lure of the corner office in a law firm may well become a great temptation for many and, rather than remaining a lifetime commitment, appointment to the federal bench may evolve into a prestigious mid-career stepping stone.[22] Such a syndrome would introduce an instability in the membership of the judiciary which would seriously affect its continuity. It would also seriously affect the relationship of the bench and the bar. The judge whose career ambition is not necessarily to be remembered as a great judge, but rather to some day have an office down the hall from the advocate before him, may well deal with that advocate in a somewhat different way. Both the efficiency of judicial administration and the level of discipline among members of the bar will suffer.

The present inequities in judicial compensation benefits have already had a significant impact on the collegial function. It is indeed disheartening, especially for a new judge, when one joins one's colleagues for the little time we are able to spend together in thoughtful conversation only to have the focus turn quickly not to the matters of law and jurisprudence we ought to discuss, but rather to questions of economic survival.

There is one last aspect of this issue which, in my view, is often overlooked. A failure of the political branches to deal with the issue of judicial compensation will create a significant barrier to the entry of many capable young men and women into the judiciary. The last two decades have seen great advances in equality of opportunity in the legal profession. Today, members of racial and ethnic minority groups and women have found that they can choose the legal profession with confidence that equality of opportunity is a reality. In the next few years, these members of the

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22. *See generally* Goldman, *The Age of Judges: Reagan's Second-Term Appointees*, A.B.A. J. Oct. 1, 1987, at 94, 96-97.

profession will arrive in great numbers at that level of experience that will make them serious candidates for appointment to the federal bench. For the minority lawyer who, through hard work and, in all likelihood, the accumulation of much personal debt, has been able to break the hellish circle of poverty, enthusiasm for making a commitment to the Nation's judiciary will indeed be dampened if the price is recommitting one's family to the financial insecurity from which it has just emerged.

There will always be lawyers who want to be federal judges, but will they be the right lawyers? We certainly do not want the federal judiciary populated by lawyers who could not compete successfully for responsible positions in the private bar. Nor do we want the judiciary to become the domain of an American equivalent of the "landed class." In short, if our judiciary is to reflect the diversity of our own bar, and the diversity of the American people, we must ensure that the constitutional scheme is not artificially skewed by our lack of attention to economic considerations.

III

From the foregoing discussion, it is readily apparent that a good deal of what must be done to ensure the vitality of the federal judiciary can be done by the federal judiciary itself. Federal judges can do a good deal about the assimilation of new judges; we can do a good deal about curtailing any future undisciplined growth of a federal judicial bureaucracy. In other areas, such as structural changes in federal jurisdiction (suggested by Justice Scalia)[23] or judicial compensation, we must look to the political branches. However, neither the political branches nor the judiciary can preserve the essential constitutional characteristics of article III, either acting alone or together. Such an effort will also require the active participation of the practicing and the academic bars.

A great tradition exists in the American practicing bar of support for the independence of the judiciary. Solutions to promote better caseload management, the smooth handling of litigation, and the selection and retention of dedicated jurists can have their intellectual birth not only within the judiciary, but also from the men and women who daily practice in the courts and come to un-

23. *See* Scalia, *supra* note 13, at 254.

derstand, in a unique way, the problems of the judiciary.

One of the most important functions of the bar is to ensure that the American people fully appreciate the importance of judicial independence to the American constitutional order. Now, perhaps more than ever, the public needs to be reassured that law is indeed different from politics and that the function of the judiciary is to decide disputes ranging from simple matters between private litigants to great issues of constitutional law in a rational, dispassionate fashion. Some would suggest that the great transformations[24] occurring in private practice today have given the practicing bar enough to worry about on the home front and that it has little time to devote to the problems of the courts. However, one does not need to be on the bench long to realize that a devoted segment of the bar is still committed to the improvement of the administration of justice and is supportive of the efforts of the judiciary to preserve its institutional vitality.

The academic bar has, of course, a unique role to play in the intellectual life of our profession. Consequently, it has a unique and somewhat adversarial—although constructive—role to play in the safeguarding of judicial independence. It is in a unique position to collect and analyze data bearing on the question; it is in a unique position to propose constructive solutions; it is in a unique position to caution against practices which, in the long term, may contribute to the erosion of judicial independence.

In his lecture at Indiana University Law School, the Chief Justice stressed a theme which recurs throughout his writing:

> I like to think of the profession of law as a multi-legged stool—one leg is the practicing bar, another leg is the judiciary, another leg is the academic lawyers, another leg the government lawyers. No leg of the stool can support the profession by itself, and each leg is heavily interdependent on the others.[25]

We all need to talk to each other more frequently. Already, the law schools are recognizing the need to make more of a contribution in this area. Hopefully, the labors of Judge Ainsworth will serve as an inspiration for Loyola to become a significant contributor to this

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24. These transformations are succinctly summarized in Rehnquist, *The State of the Legal Profession*, N.Y. ST. B.J., Oct. 1987, at 18. (Law School Dedication Speech, Indiana University, September 12, 1986). However, the Chief Justice does not suggest in this lecture that the bar is not meeting its public responsibilities.

25. *See* Rehnquist, *supra* note 24, at 61.

national dialogue.

CONCLUSION

Today we have dealt with judicial independence, a major constitutional issue, not in theoretical but in pragmatic terms. Judge Ainsworth taught us the value of that approach. According to him, American constitutionalism is hammered out not only in the appellate opinions of federal and state court judges, but also in the way we treat the institutions of government on a daily basis. He understood that a lack of sensitivity to the political, economic, and social forces which daily buffet these institutions could be as effective an instrument of change as a constitutional amendment. We honor his memory most effectively when we protect the institution he loved so dearly: the article III judiciary.