

On Judicial Independence Under Pressure*

Procter Hug, Jr.

First, I would like to give my personal welcome to all of you to my home state and city, Reno, Nevada. It is a pleasure to have you here at this annual conference. The timing of the conference, of course, in these days following the terrorist strike in New York and Washington, D.C., made it difficult for those planning the conference and for those of you who traveled here with air traffic restricted the way it is. I am pleased to see the turnout and commend those of you that had to travel here from some distance.

Our President has emphasized the importance of restoring confidence in our air traffic and the importance of our nation in continuing its normal operations. Otherwise, we would be doing the very thing the terrorists would hope, that is, to create disruption of the functioning of our daily activities. Thus, I want to congratulate the American Judges Association for proceeding with this conference despite the difficulties presented by the terrorist attack.

When Judge Jim VanWinkle asked me to speak at the opening of your conference, I didn't realize that it would be billed as the Honorable Tom C. Clark Lecture. You know he was truly a great judge and a wonderful man. He left the bench so that his son, Ramsey Clark, could serve as U.S. Attorney General without conflicts. But when he stepped down he did some great things for judicial education. It was at his insistence that the Federal Judicial Center was created for federal judges and the National Judicial College, that is now here in Reno, was established for the continuing education of state judges. I remember participating in the groundbreaking ceremonies with Justice Clark for the National Judicial College building, which you will be visiting.

With so many visiting judges here it

reminds me of a story that I really just can't resist telling. It involves a northern judge who was sent down to a small southern community. It was quite hot, and it was a small courthouse with no air conditioning, so that all of the windows and doors were open for ventilation purposes. The lawyers seemed to be going on interminably, and the judge was getting rather exasperated. And he said, finally, "Let's get to the point. I don't want to hear any more about this. I just want to get to the point. Let's get this trial finished and your final arguments finished. And what are all these flies that are buzzing around my head?"

And the lawyer said, "Well, your Honor, down here we call them 'circle flies.'"

"Well why would you call them circle flies?" the judge asked.

"Well, your Honor, it's because they're known to circle around the rear end of a horse," the lawyer replied.

The judge shot back, "Counsel, I hope that you're not intimating that there is any resemblance in this Court to the rear end of a horse."

"Oh, no, Your Honor," replied the lawyer, "but it sure is hard to fool them circle flies!"

Well, now on to judicial independence. Although we recognize the importance of our independent judiciary in this country, it takes only a visit to a foreign country that is seeking to establish a democracy such as ours to emphasize that importance. So often the judiciary in these countries is answerable to an executive branch, thus, susceptible to controlled decisions or removal of the judge. High-handed actions by a powerful leader or local officials frequently determine the outcomes of cases. Without an independent judiciary there is no mechanism to serve as a brake to forestall such actions. When we meet with foreign judges in their

countries, judicial independence such as we have here in the United States is the hardest to understand and yet the aspect that the judges most admire in our judicial system. Judges who visit our country, through such programs as we have at the National Judicial College, are struck by that quality of independence that we have in this nation.

Although our legal system is the envy of much of the world, we hear much criticism in our own country of lawyers and judges. But we should take real pride in the contribution of judges and lawyers to the formation of our country. Of the 55 delegates to amend the Articles of Confederation, which we now call the Constitutional Convention, 60% were lawyers or judges. Throughout the succeeding years, lawyers and judges have guided the continuing development of our system of government. I stress *continuing* development because it is not something like climbing a hill when we can say, "Ah-hah! We have achieved the objective." It is more like adjusting a system of governance to the changing times, indeed, in this era it is *very* rapidly changing times, with the breathtaking advances in science and technology and our dependence on a global economy.

We as lawyers and judges have to take pride in the part the legal profession has played in the development of our nation. Lawyers and judges have caused citizens and institutions to face up to themselves, to consider important social changes when other institutions are not willing to do so. It has frequently been in the face of vigorous opposition and antagonism by those who have had a vested interest in the status quo. That's why lawyers, as a class, can be unpopular because they are frequently working for unpopular, though much needed, changes in society.

* Judge Procter Hug, Jr., presented the Tom C. Clark lecture at the annual education conference of the American Judges Association

on October 1, 2001 in Reno, Nevada. We reprint his remarks here.

As a result of the efforts of lawyers and judges, segregated schools are a thing of the past; the ballot box has been freed of racial and property-based exclusions; standards of treatment and care in prisons and mental institutions have been established where inhumane conditions have existed; exclusion of students from universities on the basis of race has been eliminated; and expanded opportunities for employment have been opened up for women and minorities. This highlights just a few of the social changes in which lawyers and judges have been at the forefront.

There are judges who have had truly heroic roles in some of these changes in the social order. Look to some of the federal judges in the South during the Civil Rights movement. Judge John Godbold, the former chief judge of the Eleventh Circuit, pointed this out in a recent law review article.* There are Frank Johnson and Richard Rives of Alabama, and Elbert Tuttle of Georgia, just to name a few. At a time of great difficulty in the history of our country, judges of the South stood up and recognized the rights of all our people. Some of them faced extreme criticism and ostracism in their communities. They and their families endured threats and lived under the protection of guards. The home of Judge Johnson's mother was bombed. Judge Rives' local newspaper demanded that he not be buried in Alabama soil; and the gravestone of his only son was painted red and garbage was heaped on it. Judge Rives loved his church, where he had been a lay official, where his daughter was married and his son was buried from. He left it for another when it posted ushers at the door to bar a few black citizens of the faith who wished to enter. In 1933, Alabama Circuit Judge James Horton set aside a guilty verdict in the second, famous Scottsboro trial. That involved a charge against a young African-American for raping white women. He did so with the sure expectation that it would cost him his seat at the next election. It did. These judges refused to duck their responsibility. They upheld the law and enforced the Constitution. The best

description that I know of them is expressed in the words of Maxwell Anderson's play, *Valley Forge*: "There are some men who lift the level of the age in which they live, so that all men stand on higher ground." And, indeed, the term *men* as used there includes both genders—men and women—because it is true of both.

We federal judges with life tenure have a great advantage in maintaining judicial independence. It's not as difficult for us as it is for state judges. Most of you as state judges have to face election in regular terms. Thus, an unpopular decision can not only lead to ostracism and criticism in a community, but can end a judicial career. Powerful politicians or interest groups can raise large sums of money to defeat a judge who has rendered a decision that is con-



trary to those interests. In such instances, it takes more courage to render the right, but unpopular decision.

The long-term respect for the judiciary is vital to maintaining judicial independence. That respect is built in many small ways, as well as through the high-profile decisions. Those of you who are trial judges have frequent contact with the general public, whether as parties, witnesses, jurors, or persons involved in traffic offenses. The impression that you make on a daily basis as to fairness and civility is more important than the abstract opinions of we who are appellate judges.

The steps that you are taking to

improve the methods of operation and dealing with the public are very important, including alternate dispute resolution, drug courts, mental health courts, different ways of handling domestic violence, and other innovations you are discussing at this conference. Outreach into the community through schools, talks at service clubs, and, indeed, with the media are important in enhancing the reputation of the judiciary and, in turn, in maintaining judicial independence.

With the terrorist threat that has now become evident in our society since September 11, the role of the judiciary will be exceptionally important. Additional security from such terrorist attacks is clearly required, but our constitutional civil liberties must also be protected. It is a delicate balance to be struck, and the judiciary will play a vital role in doing so. Our President has warned against bigotry toward those that are of Mideast descent or of the Muslim religion. It is up to us, as judges, to guard against such bigotry.

We have not always done that well in times of crisis. A prime example is the internment of Japanese-Americans during World War II, which was approved by the Supreme Court in the *Korematsu* decision. Initially, there was a curfew set up for Japanese-Americans, which was a precursor to the internment program. A young Japanese-American intentionally did not comply with that curfew, believing it was a violation of his constitutional rights. He was convicted of the crime. And what was astounding—the government in those restricted travel times had no way to send him to prison in Arizona—so he hitchhiked to prison and there spent two years incarcerated. Eventually, our court reviewed his case and directed the issuance of a writ of coram nobis, which overturned that conviction. The government did not seek certiorari, so we have the unusual circumstance at our Ninth Circuit Court of Appeals of reversing the Supreme Court (which makes me a little happy given the fact that we've been reversed so much by the Supreme Court).**

Today, we have two significant issues

* John C. Godbold, "Lawyer" — *A Title of Honor*, 29 CUMB. L. REV. 301, 309 (1998-1999). This paragraph in the text is based on Judge Godbold's excellent article.

** *Editor's Note*: The case to which Judge Hug refers is *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). In it, Gordon

Hirabayashi obtained a writ of coram nobis vacating his 1942 conviction for violating a military curfew that required persons of Japanese ancestry, whether citizens or not, to remain within their residences from 8:00 p.m. until 6:00 a.m. The Ninth Circuit based its decision in part on the suppression back in

bearing on our civil liberties. The first is the terrorist threat where there will be pressure to loosen protections on civil liberties. The second is the exponential increase in technology that can easily invade privacy in ways that we never dreamed of. There is currently a case in Tampa, Florida, where there was a scan of faces at the Super Bowl and a use by law enforcement to link that scan to wanted criminals. So, if you sneaked off to the Super Bowl, you've been found out!

Recently, the Supreme Court decided a case that held that it was an unlawful search to calibrate the heat emanating from a roof of a building to detect marijuana-growing activity within. This indicates there will be some brakes put on the utilization of this newly invasive technology of various sorts. Then, we have the

rental car company monitoring the speed of drivers of their cars by satellite, with the driver's consent buried somewhere in the small print of the contract, which I know you all read, just as I do, before you rent a car. It will be important for us in the judiciary to determine whether technology or the law will define the contours of civil liberty.

Ours is an important calling to be able to serve in an independent judiciary that is so vital to our democracy. Each of us in our various types of judgeships have the important responsibility to maintain the respect of the public for the manner in which we perform our duties. Hopefully, we will be exhibiting fairness, impartiality, understanding, courage in our decisions, and an awareness that the people have entrusted us to do this important judicial

function to the very best of our abilities. It is in that way that the independence of the judiciary can best be maintained.



Procter Hug, Jr., is a senior judge on the United States Court of Appeals for the Ninth Circuit. At the time he took senior status on January 1, 2002, he had served on the Ninth Circuit for 24 years, which ranked third among the longest-serving active circuit judges in the nation. Hug served as chief judge of the Ninth Circuit from 1996 to 2000. A 1958 graduate of Stanford Law School, he was appointed to the Ninth Circuit in 1977 by President Carter. Judge Hug's chambers are in Reno, Nevada.

1942 and 1943 of portions of a military report and other intelligence materials that might have supported the view that mass actions against people of Japanese ancestry were unnecessary for military purposes and racially motivated. The United States Supreme Court had affirmed Hirabayashi's curfew conviction in 1943 in *Hirabayashi v. United States*, 320 U.S. 81 (1943). A year later, in *Korematsu v. United States*, 323 U.S. 214 (1944), the Court upheld the forced exclusion of citizens of Japanese ancestry from the West Coast on grounds of military emergency. In its

1987 decision vacating Hirabayashi's conviction, the Ninth Circuit found that the United States Supreme Court would not have ruled as it did in *Hirabayashi* and *Korematsu* had it been advised of the full record as it had been developed in succeeding decades by archival historians. The United States did not seek review of the Ninth Circuit's decision by the United States Supreme Court. As of 1987, according to the Ninth Circuit's opinion, Hirabayashi, an American citizen who had been born in Seattle, Washington, in 1918, was a professor emeritus of sociol-