Supreme Court of the United States

Remarks of the Chief Justice

Federal Judges Association Board of Directors Meeting
May 5, 2003

Thank you Judge Jolly. I thought I would speak today about two topics that are of great concern to federal judges around the country. The first, of course, is the perennial topic of judicial pay. The second is the issue of Congressional concern about sentencing in the federal courts of the federal judiciary.

One of the critical challenges of American government is to preserve the legitimate independence of the judicial function while recognizing the role Congress must play in determining how the judiciary functions. Article III of the Constitution grants to Article III judges two significant protections of their independence: they have tenure during good behavior, and their compensation may not be diminished during their term of office. But federal judges are heavily dependent upon Congress for virtually every other aspect of their being -- including when and whether to increase judicial compensation.

Last December I met with President Bush to discuss the need for an increase in judges' pay. The President subsequently issued a statement urging Congress to authorize a pay increase for federal judges. On January 7, 2003, the National Commission on the Public Service, chaired by Paul Volcker, issued its report, "Urgent Business for America - Revitalizing the Federal Government for the 21st Century." Among its recommendations is that "Congress should grant an immediate and significant increase in judicial, executive and legislative salaries" and that "[i]ts first priority in doing so should be an immediate and substantial increase in judicial salaries." At the March meeting of the Judicial Conference, the Attorney General spoke in favor of increasing judges' pay, as did Senators Hatch and Leahy.

Whether this means that the stars are aligned for Congress to pass a bill to increase our pay, I cannot say. But I can say that we are closer than we have been for several years, and I am still hopeful that we may get something through during this Congress. The progress we have made is in large part due to the efforts of many federal judges, including the members and leadership of the Federal Judges Association. I particularly want to note the hard work of Deanell Tacha and Richard Arnold, the Chair and Vice-Chair of the Judicial Branch Committee of the Judicial Conference, Judge John Walker, who has helped pave the way for the President's support, and Judge Robert Katzmann, who worked very closely with the Volcker Commission.

The second topic I would like to address is the recent efforts by some in Congress to look into downward departures in sentencing by federal judges, in particular our colleague Judge James Rosenbaum. We can all recognize that Congress has a legitimate interest in obtaining

information which will assist in the legislative process. But the efforts to obtain information may not threaten judicial independence or the established principle that a judge's judicial acts cannot serve as a basis for his removal from office.

It is well settled that not only the definition of what acts shall be criminal, but the prescription of what sentence or range of sentences shall be imposed on those found guilty of such acts, is a legislative function - in the federal system, it is for Congress. Congress has recently indicated rather strongly, by the Feeney Amendment, that it believes there have been too many downward departures from the Sentencing Guidelines. It has taken steps to reduce that number. Such a decision is for Congress, just as the enactment of the Sentencing Guidelines nearly twenty years ago was.

The new law also provides for the collection of information about sentencing practices employed by federal judges throughout the country. This, too, is a legitimate sphere of congressional inquiry, in aid of its legislative authority. But one portion of the law provides for the collection of such information on an individualized judge-by-judge basis. This, it seems to me, is more troubling. For side-by-side with the broad authority of Congress to legislate and gather information in this area is the principle that federal judges may not be removed from office for their judicial acts.

This principle is not set forth in the Constitution, which does grant federal judges tenure during good behavior and protection against diminution in salary. But the principle was established just about two centuries ago in the trial of Justice Samuel Chase of the Supreme Court by the Senate. Chase was one of those people who are intelligent and learned, but seriously lacking in judicial temperament. He showed marked partiality in at least one trial over which he presided, and regularly gave grand juries partisan federalist charges on current events.

For this the House of Representatives, at President Thomas Jefferson's instigation, impeached him, and he was tried before the Senate in 1805. That body heard fifty witnesses over a course of ten full days. The Jeffersonian Republicans had more than a two-thirds majority in the body, and if they had voted as a block Chase would have been convicted and removed from office. Happily, they did not vote as a block; the article on which the House managers obtained the most votes to convict was the one dealing with his charges to the grand jury; there the vote to convict was nineteen to fifteen, a simple majority but short of the requisite two-thirds vote needed to convict.

The significance of the outcome of the Chase trial cannot be overstated -- Chase's narrow escape from conviction in the Senate exemplified how close the development of an independent judiciary came to being stultified. Although the Republicans had expounded grandiose theories about impeachment being a method by which the judiciary could be brought into line with prevailing political views, the case against Chase was tried on a basis of specific allegations of judicial misconduct. Nearly every act charged against him had been performed in the discharge of his judicial office. His behavior during the Callender trial was a good deal worse than most historians seem to realize, and the refusal of six of the Republican Senators to vote to convict even on this count surely cannot have been intended to condone Chase's acts. Instead it represented a judgement that impeachment should not be used to remove a judge for conduct in the exercise of his judicial duties. The political precedent set by Chase's acquittal has governed that day to this: a judge's judicial acts may not serve as a basis for impeachment.

In the years since the Chase trial, eleven federal judges have been impeached. Of those, three were acquitted, two resigned rather than face trial, and six were convicted. One conviction -- that of Judge West H. Humphreys in 1862 -- was by default since he had accepted appointment as a Confederate judge in Tennessee. The other five convictions were for offenses involving financial improprieties, income tax evasion, and perjury -- misconduct far removed from judicial acts.

But the principle that a judge may not be impeached for judicial acts does not mean that Congress cannot change the rules under which judges operate. Congress establishes the rules to be applied in sentencing; that is a legislative function. Judges apply those rules to individual cases; that is a judicial function. There can be no doubt that collecting information about how the sentencing guidelines, including downward departures, are applied in practice could aid Congress in making decisions about whether to legislate on these issues. There can also be no doubt that the subject matter of the questions, and whether they target the judicial decisions of individual federal judges, could amount to an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties. We must hope that these inquiries are designed to obtain information in aid of the congressional legislative function, and will not trench upon judicial independence.

Thank you.

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