The Independence of Judges

Hon. Milton Hirsch
Judge, 11th Judicial Circuit of Florida

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Sir Isaac Newton said of his accomplishments in the fields of science and mathematics that he stood on the shoulders of giants. In preparation for today's address I read almost every previous Chester Bedell Foundation lecture. Those lectures were given by an attorney general of the United States, by chief judges of federal courts of appeals, by U.S. ambassadors, and by members of the British peerage, among others. As I stand before you today, I am keenly aware that I stand on the shoulders of giants. I am grateful to them, and I am grateful to you.

In a letter to Thomas Jefferson dated May 6, 1816, John Adams considered the qualifications for a judge:

> Our judicial oracle, Sir Edward Coke, thought that none were fit for ... magistrates but sad men; and who were these sad men? They were aged men, who had been tossed and buffeted in the vicissitudes of life, forced upon profound reflection by grief and disappointments.

Speaking as one of those sad and aged men whom Lord Coke was describing, I would like to share with you some thoughts on the subject of judicial independence – a subject to which I attribute some of my age, and much of my sadness.

There is a widespread mis-impression among lawyers and judges that judicial independence is something America has traditionally valued and exalted. That is not true, and for the most part has never been true. The American Revolution had no sooner concluded than Americans began complaining about the independence of judges. In the absence of any other law, American judges were continuing to apply the English common law. Newly-independent Americans, however, thought that they should be subject to law enacted by popular will, not by the dead hand of a tradition that had just become foreign.

It was, and is even today, routine for English trial judges, in giving jury instructions, to marshal and comment on the evidence. Beginning as early as the time of Jefferson's election to the presidency in 1800, however, and continuing throughout the 19th century, many states, particularly in the south and west, enacted statutory or constitutional provisions barring trial judges from instructing or commenting on the facts. Francis Wharton, one of the great legal treatise-writers of the American 19th century, attributed this to the vices of excessive independence – partisanship and political meddling on the part of the judiciary.

In truth the provisions of Article III of the U.S. Constitution that establish a genuinely independent federal judiciary are at odds with the historical as well as the contemporary treatment of judges in American state courts. There is, of course, an argument to be made that no degree of structural independence will embolden a cowardly or unprincipled judge to enter a legally correct but sure-to-be abhorred ruling, and that no lack of structural independence will restrain a forthright and principled judge from entering such a ruling. And perhaps this is true; but it is equally true that any judge, however forthright, however principled, will feel less reluctant to enter the unpopular ruling if he knows he will not suffer a loss of position, of income,

of security, as a consequence of that ruling. On the bench as elsewhere, a price is often exacted from the brave man that the coward never pays.

Which brings me to a little story to which I would like to devote the rest of my time and remarks.

On the evening of May 17, 1954, the leadership of the NAACP in its national office in New York City, as well as others who had been involved in the litigation struggle for integration of schools, wandered over to a modest apartment at 952 Fifth Avenue in Manhattan. This was not by prior arrangement. No plans had been made, no party invitations sent. There was just something undeniably, irresistibly appropriate about celebrating the glorious victory that was *Brown v. Board of Education* at what was referred to, only half in jest, as the "home in exile" of Judge and Mrs. Julius Waties Waring.

Julius Waties Waring was an eighth-generation son of Charleston, South Carolina. Waring went to private school in Charleston, attended the College of Charleston, and commenced the practice of law in Charleston. He married the daughter of an old Charleston family, and became an active member of such exclusive clubs as the Charleston Light Dragoons. After building up a substantial private practice, he served as city attorney of Charleston. He was, in short, the living embodiment of all that was static, unchanging, and eternal in Charleston, South Carolina. In 1941, at age 61, he was made a United States district judge. Any why not? It would have been impossible to imagine a man more perfectly chosen, more perfectly qualified, more perfectly inclined, to keep things just the way they were.

A judge probably should not be a revolutionary, and certainly Judge Waring did not take the bench intending to start a revolution. But as Shakespeare's Falstaff put it, "Rebellion lay in his way, and he found it."

Rebellion first came calling in the unlikely form of George Elmore. Elmore was a Black man from Columbia, South Carolina, and he had the peculiar notion that he ought to be able to vote.

In 1947, voting in South Carolina was a stacked deck. South Carolina was as much a one-party state in those days as Cuba is these days. Until 1944, the activities of the Democratic Party of South Carolina, and particularly its primary elections, were regulated by state statute. In that year, however, in an effort to avoid the effects of two then-recent Supreme Court rulings, the governor of South Carolina called the legislature into special session to remove from the statute books all laws and references to the Democratic Party and its election procedures. The purpose of this maneuver was to enable the White power structure to characterize the Democratic Party as a private club, and its primaries as private-sector activities, and thus to insulate it from federal action requiring that Blacks be permitted to participate.

Adjectives and adverbs are grossly insufficient tools to describe the proclamation by which the governor of South Carolina called the legislature into special session. I quote from the crowning passages of the proclamation itself:

> History has taught us that we must keep our white Democratic primaries pure and unadulterated so that we might protect the welfare and homes of all the people of our State.

. . .

> After these statutes are repealed, in my opinion, we will have done everything within our power to guarantee white supremacy in our primaries of our State insofar as legislation is concerned. Should this prove inadequate, we South Carolinians will use the necessary methods to retain white supremacy in our primaries and to safeguard the homes and happiness of our people.
>
> White supremacy will be maintained in our primaries.

The legislature promptly acted to repeal all statutes bearing upon the conduct of primary elections. That done, the Democratic Party of South Carolina took the position that it was a private entity like a country club, and that federal law had nothing to say about whether the existing members of a country club should or should not admit prospective members to the club.

But Judge Waring had something to say. Some of what he said was:

> I am of the opinion that the present Democratic Party in South Carolina is acting for and on behalf of the people of South Carolina; and that the primary held by it is the only practical place where one can express a choice in selecting federal and other officials. Racial distinctions cannot exist in the machinery that selects the officers and lawmakers of the United States; and all citizens of this State and Country are entitled to cast a free and untrammeled ballot in our elections, and if the only material and realistic elections are clothed with the name "primary," they are equally entitled to vote there.

In his proclamation to the legislature, the governor had promised that if the ploy of removing all laws relating to party politics from the statute books were to "prove inadequate, we South Carolinians" – by which, of course, he meant *White* South Carolinians -- "will use the necessary methods to retain White supremacy in our primaries." In light of Judge Waring's ruling, South Carolina's White power structure moved to make good on the governor's promise. Party by-laws were altered to require that any Black would-be party member was obliged to take an oath swearing, among other things, that he "believe[d] in and w[ould] support the social and educational separation of the races" and that he "believe[d] in the principles of states' rights and [was] opposed to" the enactment of the then-proposed federal Fair Employment Practices law.

On the eve of the primary elections – on July 20, 1948 – Judge Waring issued another order addressing South Carolina's Democratic Party county chairmen. He told them that they were to register qualified Black voters just as they registered qualified White voters, and that if they did not do that, he would hold them in contempt of court and punish them with fine or

imprisonment. He would sit in his courtroom all day on primary day, he said, and make good his threat at once.

It strains the creative afflatus to imagine it: a United States district judge sitting alone in an empty courtroom from early morning till late at night, watching seconds turn into minutes and minutes turn into hours, standing guard to see if anyone would dare defy the Constitution of the United States. But Judge Waring's vigil was uneventful. On primary day, some thirty thousand Black Charlestonians voted – an increase over the prior election cycle of . . . some thirty thousand.

The reaction in Charleston, and throughout South Carolina, was one of the most profound outrage. Waites Waring was expelled from the clubs to which he had belonged throughout his adulthood. Lifelong friends refused to speak to him. Store clerks refused to wait upon his wife. *Time Magazine* profiled him as "the man they love to hate." The Warings had to change their phone to an unlisted number because of the deluge of obscene and minatory calls. A flaming cross was planted on their lawn. One evening three gunshots were fired at their house, and a large lump of concrete was hurled through the front window, barely missing both the judge and his wife; another block of concrete struck their front door. In response, a newspaper in nearby Marlboro County editorialized: "We see by the [Charleston] papers that somebody ... hurled a few chunks of concrete through a window and door at the residence of federal Judge J. Waties Waring. Unfortunately, the judge was not hit."

In what strikes us today as an almost comical pastiche of the racism of the times and the insularity of the place, the South Carolina legislature passed a joint resolution, "To appropriate necessary funds to purchase two one-way tickets for federal Judge J. Waites Waring and his socialite wife to any point of their choice provided they never return to the state of South Carolina." The resolution also appropriated funds to rename the mule barn at Clemson College after the Warings. It strikes us as almost comical today; but it was anything but comical to Judge and Mrs. Waring.

There are many forms of danger and suffering that man is well-constituted to confront. Faced with the horrors of war, natural disaster, even torture, some human beings have reacted with courage and constancy. But no man is constituted to endure excommunication. To be shunned by friends and neighbors, reviled by the community, assured by everyone you meet, speak to, or hear of, that you are wrong, all wrong, wrong the way only a sick, crazy man can be wrong, is more than anyone can withstand.

But the greatest challenge to, and need for, Judge Waring's judicial independence was yet to come. Only a month after the night attack on the judge's home, the NAACP filed a lawsuit in his courtroom challenging the segregation of public schools in Clarendon County, South Carolina.

Clarendon County was poor farm country. The public schools that it conducted for its White children were scarcely ideal. But the public schools open to its Black children were scarcely describable. The Black schools were simply wooden shacks, without running water, without indoor toilet facilities, without educational amenities of any kind.

For decades, the head of litigation for the NAACP Fund was the great Thurgood Marshall. He had fought segregation and race-prejudice in state and federal courts all across the land for virtually all of his adult life. *Briggs v. Elliott* – the challenge to the practices in

Clarendon County, South Carolina – was a Rubicon for him. The disparity between the treatment of Black children and White children was so obvious and so appalling that he could easily obtain a judgment ordering equal, or at least improved, facilities for the Black schools. And armed with that judgment he could move from county to county, then from state to state, demanding schools that, although still separate, would be truly, or at least nearly, equal. It would be an unprecedented blessing for generations of Black schoolchildren in the South. But it would be an abandonment of what Marshall had fought for all his life – the repeal of the hated "separate but equal" doctrine of *Plessy v. Ferguson*.

In his initial complaint before Judge Waring, Marshall hedged. He pleaded in such a way as to make it less than entirely clear whether he was seeking equal but segregated facilities, or equal because integrated facilities. But Thurgood Marshall was not the only one who had reached a point of no return. Judge Waring told Marshall that he was dismissing the complaint without prejudice, to afford Marshall an opportunity to re-plead for the express purpose of challenging the constitutionality of segregated public schools. It was the little-remembered Waites Waring who made it clear to the legendary Thurgood Marshall that the time had come to challenge "separate but equal" once and for all. *Briggs v. Elliott* – not *Brown v. Topeka Board of Education* or any of the other cases that, like *Briggs*, would later be joined with *Brown* for argument before the United States Supreme Court, but *Briggs v. Elliott* – would be ground zero in the final battle between a federal constitution that promised equal justice under law and a state government that swore White supremacy forever.

Because the superceding complaint challenged the constitutionality of state law, the case would be heard by a three-judge panel. Judge John J. Parker, chief judge of the Fourth Circuit court of appeals, would preside. Along with Judge Waring, Judge George Bell Timmerman would make up the court. The trial lasted two days, after which the three judges discussed the matter in chambers. "[B]ut [there was] hardly much discussion," remembered Judge Waring. "Judge Timmerman is a rigid segregationist. ... Judge Parker is an extremely able judge who knows the law, [but] ... [h]e just set his feet on *Plessy v. Ferguson* and said, 'We can't overrule'"it. Three weeks after the *Briggs* trial concluded, Judge Parker's opinion for himself and Judge Timmerman was released.

Judge Waring's 20-page dissent was his last important opinion, nearly his last work, as a judge. As Judge Waring saw it, the purpose of the Fourteenth Amendment, particularly when taken together with the two other post-Civil War amendments, "was to wipe out completely the institution of slavery and to declare that all citizens in this country should be considered as free, equal, and entitled to all the provisions of citizenship." The *Briggs* trial made clear,

> that segregation in education can never produce equality and that it is an evil that must be eradicated. This case presents the matter clearly for adjudication and I am of the opinion that all of the legal guideposts, expert testimony, common sense and reason point unerringly to the conclusion that the system of segregation in education adopted and practiced in the State of South Carolina must go and must go now.

And then, in double-size font and bold highlighting, appear these words: Segregation is *per se* inequality.

Before the Supreme Court, *Briggs v. Elliott* was initially listed first among the four cases – one from Delaware, one from Virginia, and of course the *Brown* case from Kansas – addressing segregated schools in the state systems. At the eleventh hour, however, Justice Frankfurter suggested that *Brown* be listed first to avoid any suggestion that the Court was singling out the Southern states for criticism. Thus the most famous judicial decision in modern American history is remembered as the *Brown* case and not as the *Briggs* case. Chief Justice Warren, appropriately eager to provide critics with the densest target at which to aim their arrows, included in his opinion for the Court none of the particulars of *Briggs*, and none of the language used in Judge Waring's dissent. Even the Supreme Court's famous conclusion that segregated facilities are inherently unequal came with no citation or reference to Waring's opinion in *Briggs*.

Judge and Mrs. Waring moved out of South Carolina, spending the last 17 years of his life in self-imposed exile in New York City. Upon his death in1968 his body was returned to Charleston to be buried. Fewer than a dozen White people attended the graveside service at Magnolia Cemetery on the northern outskirts of Charleston. But on hand were more than 200 Blacks who had formed a motorcade from St. Matthew's Baptist Church, where the NAACP conducted a memorial service.

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These remarks are intended to concern the subject of judicial independence. They are not intended to glorify a particular judge, or even to serve as a biography of him. They could not do so. In truth I know very little about Julius Waites Waring the man. As a judicial scholar and opinion-writer he was good, competent, workmanlike; but no one would speak of him in the company of Holmes, or Cardozo, or Robert Jackson. He created a scandal by divorcing his first wife, and the allegations that he treated her shabbily during and after their marriage cannot be dismissed out of hand. No doubt he had other human failings; humans do.

None of which matters for present purposes. My intent was to illustrate the difficulty of judicial independence, the triumph of judicial independence, and the importance of judicial independence; and to illustrate them, not through the words, but rather through the deeds, of one singularly independent judge. Still, it would be wrong not to give Judge Waring the last word.

On January 26, 1942, while America was entering into war, Waites Waring was sworn in as a United States district judge. His investiture speech was brief and, at the time, must have seemed unremarkable even to him. Certainly he did not foresee that in a matter of a few years he would remake his own life, his own state, and, to a considerable degree, his own country. Certainly he could not foresee that more than three-quarters of a century later, an unimportant little judge from Miami, Florida, would quote his words as defining judicial independence.

And yet there is an inexplicable prescience to his remarks, a perfect foreshadowing of the battle, the pain, and the victory that lay ahead. And so I close with the words with which he closed:

> This court is one of the things that we are fighting for now. This

court and all the other courts, because a free court is a court where a judge is at liberty to express his views and exercise his own discretion ... without any coercion or pressure from anyone. That is liberty, and that is what America stands for.