



REMARKS AT THE INVESTITURE OF S. KYLE DUNCAN

Jay S. Bybee

I AM HONORED TO BE HERE on this important occasion. I am especially pleased to be here because it will allow me to correct a grave wrong.

In the Spring of 1996, I was Associate Professor of Law at the Louisiana State University Law Center in Baton Rouge. That semester I taught Constitutional Law II. In the class was a prize student, Kyle Duncan. I knew that Kyle would do well because I had taught Kyle in Civil Procedure, and he had earned the highest grade in my class. In Constitutional Law II, I announced at the outset that the grades would depend almost exclusively on the final exam. I say “almost exclusively,” because I reserved the right to add as many as two points to the final grade for outstanding class participation. I also told the class that participation did not depend on how much one spoke in class, but on how much one added to class discussion and understanding.

Kyle was – I think, quite clearly – the outstanding discussant in the class. He was reserved in his comments, but when he spoke up, it was well worth listening to. In my mind, I assumed that I would award Kyle the additional points. After I graded the exams, I had one exam that was

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head and shoulders above the others. Not surprisingly, it turned out to be Kyle's exam. But as I looked over the curve, I realized that if I awarded Kyle the grade he had earned on the exam *and* the two points for participation, it would skew the curve so badly that I would not have room to recognize other students who had performed well. I didn't award Kyle the points for class participation. That unfortunate decision has followed me for more than twenty years.

So today, I have a letter for Kyle that reads as follows:

To Whom It May Concern:

This is to certify that Stuart Kyle Duncan actually earned an additional two points in Constitutional Law II in Spring 1996 at the Paul M. Hebert Law Center at Louisiana State University.

I regret any inconvenience to the Registrar. The error is mine alone.

Sincerely,
Jay S. Bybee

Confession is good for the soul. Kyle, I am very sorry. I really hope this didn't ruin your career. True story.



We are met today in an "investiture." An investiture is an unusual ceremony in America, one typically reserved for academic or religious ceremonies. For reasons that I would like to explain briefly, it is the appropriate name for why we are here.

We can be forgiven if we think of an investiture as having something to do with investing (in the financial sense). In fact, an investiture has everything to do with investing, but little to do with finance. The critical subtext of "investiture" is "vest," not "invest." An investiture is, literally, a cloaking, an enrobing. Investiture derives from the Latin *vestire* (or the Spanish *vestir* – to dress). It has more in common with a coronation than an inauguration, although – owing to the peculiar nature of American government – it is a limited coronation.

The idea of an investiture follows directly from the U.S. Constitution. As you know, the Constitution creates the government of the United States, and separates the powers of that government into three. Each of

Remarks at the Investiture of S. Kyle Duncan

the first three articles of the Constitution creates and names a branch of government and, in nearly identical language, *vests* authority in that branch. Thus, Article I provides that “All legislative Powers herein granted shall be *vested* in a Congress of the United States, which shall consist of a Senate and House of Representatives.” Article II provides that “the executive Power shall be *vested* in a President of the United States of America.” And Article III reads: “The judicial Power of the United States, shall be *vested* in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”

An investiture is the mechanism by which judges of the United States are formally vested with judicial power under Article III. Following today’s remarks, Kyle will do two things, one legal, one ceremonial. First, he will take the oath of office. Second, he will assume the robe of his new judicial office.

The oath is a peculiar legal device. It is astonishing to me that by placing one’s hand on a sacred book and repeating a number of words, we can change a person’s legal status. Once Kyle takes the oath he will be something he wasn’t before – a judge of the United States, one endowed with its judicial power who cannot be deprived of his office except by an act of Congress.

That is the nature of an oath. We all make important promises in our life – We promise our mother that we will come straight home after school and practice the piano; we promise our sister that we will not eat the chocolate chip cookies she baked for her party; we promise to our children that we will attend their next soccer game. We promise the boss that we will work hard. We promise our spouse to love her forever.

There are some promises that are so important that they must be witnessed by another. A promise so witnessed is an oath. At common law, an oath was always assumed to be made before God, but to be valid before the law, the oath had to be made in the presence of the king or his representative. You see, you can’t lie to God, and you don’t dare lie to the king. (A knight who swore an oath in the presence of the king, made the king his witness to the promise. The knight who violated his oath forfeited his honor, and likely his lands.) We solemnize our oath with a phrase such as “as God is my witness” or “so help me God.” It is the language of surety, an invocation of God’s help in fulfilling our oath.

Jay S. Bybee

Next comes the ceremonial part. The enrobing – literally the vesting or dressing – is symbolic of the judicial power of the United States. It is a tradition borrowed from our British forebears, whose jurists represented the King’s Bench. But unlike the English, we adopted the simplest of robes and abandoned the pretense of the powdered wig. Although our judicial robes may feel anti-democratic, in another sense, the sameness and simplicity of our robes is a democracy of dress. It is a constant reminder that within the federal judiciary – whether we are women or men, rich or poor, Democrats or Republicans – we represent justice and mercy in a neutral, unadorned front.

Kyle, I am so proud of you and all you have accomplished. God bless you and your family; God bless your court; and God bless America. Thank you very much.

