

## THE IMPORTANCE OF AN INDEPENDENT JUDICIARY

By John C. Evans

The Declaration of Independence was addressed to the world, but it focused on the acts of a single man, King George III. And, of all of the grievances detailed in the Declaration of Independence, none was greater than the total independence of Colonial judges upon King George:

He has made Judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.

The concept of judicial independence, that judges should decide cases faithful to the law, without “fear of favor” and free from political or external pressures, remains one of the fundamental cornerstones of our political and legal systems, both federal and state. I can’t overemphasize the important role that a truly independent judiciary plays in providing the necessary check on the power of the other branches of our government. The law must protect everyone, whether it’s the detainees at Guantanamo who, under a law passed by Congress and signed by the President, were being held in prison indefinitely without charges or the parties in *Bush v. Gore*. Think about it, a bare majority of the United States Supreme Court pronounced unconstitutional the Florida Supreme Court’s order to manually recount previously uncounted ballots to determine the voters’ intent. While the political pundits complained, the American public accepted the result and swore in its new President. I suggest to you that in most other countries of the world, this action would have incited rioting. Our society’s confidence that the judiciary is indeed independent is the only thing that keeps us from taking our disputes out of the courtroom and into the streets.

### **History of Article III Judge Selection**

Our Constitution provides that judges of the supreme and inferior courts would hold office during good behavior (generally thought of as life) and receive compensation that cannot be reduced during their continuance in office. Appointed by the President and approved by the Senate, they have the indirect approval of the majority but are entrusted with protecting even the minority from the actions of same majority that placed them in office.

### **History of Pennsylvania's System for Choosing Judges**

For much of Pennsylvania's history, judges were initially elected to the bench in partisan elections, and then they were re-elected in the same fashion – in partisan elections. They attained public office by the grace of politics and they stayed in office by the grace of politics.

The 1968 Pennsylvania Constitutional Convention changed that process. Debate centered upon whether a commission should recommend candidates for the Governor to appoint. By referendum vote, the Pennsylvania Constitution now provides that judges of the appellate courts and the common pleas courts, upon winning the election, would not be required to go through partisan contest when the time came to seek retention.

Retention gives each judge the opportunity to stand before voters on his or her record. This method keeps judges out of the political fray while, at the same time, holding them accountable to voters based on their overall records and performance in office. In other words, voters were to look at a judge's merit on his or her total performance and not on any single issue.

## Attacks on the Judiciary

In a civilized society, one would not think that the cornerstone principles of the Declaration of Independence would be subject to challenge. They were however challenged in some unique ways and very recently. These attacks were perfectly legal, *albeit*, in my opinion, unwise.

The first form of attack is intimidation. In South Dakota, an organization which professes to have chapters in all 50 states obtained nearly 50,000 signatures to place a referendum on an upcoming ballot that, if passed, would strip judges of judicial immunity and submit them to the jurisdiction of a special grand jury and court. This special grand jury and court could impose civil and criminal penalties for such things as the “willful rendering of an unlawful or void judgment or order.” Furthermore, judges would be taxed a percentage of their salaries to create the fund out of which the operating expenses of that special grand jury would be drawn. ([www.jail4judges.org](http://www.jail4judges.org)) While this may sound eccentric and has little chance of passing, 50,000 signatures in the state of South Dakota represents about 10% of total registered voters is a force to be reckoned with.

Reaction to the Terri Schiavo case was explosive. There was talk of “judicial murder” and “judicial tyranny.” Judges are described in the media as “arrogant,” “running amok” and “out of control.” One Congressman raised the possibility of . . . impeachment and another of reducing funding of the judicial branch. Pat Robertson proclaimed that federal judges are more of a threat to the nation than Al Qaeda and the terrorists who attacked the World Trade Center. Judges should not be immune from fair criticism. However, criticism is one thing.

Intimidation is another. Imagine sitting, hearing a death penalty case. Justice Penny White of the Tennessee Supreme Court was defeated in a retention election. When her opponents assailed her for having joined in a decision which remanded a death penalty case for a new sentencing hearing. After the election, the governor of Tennessee reportedly said, “Should a judge look over his shoulder in making decisions about whether they’re going to be thrown out of office? I hope so.”

Well-funded interest groups at both ends of the political-social-religious spectra have entered the picture. These special interests are not seeking to get the best judge. They are seeking to get the best judge for their particular interest. One need only look at the U.S. Supreme Court nominating process. Senators probe shamelessly into how a candidate judge win rule on a case before the case is presented.

The second form of attack is unfair criticism. The consequences of unfair criticism of judges impacts the public’s trust and confidence in our courts. Support for an independent judiciary depends on the perception that judges are impartial and non-partisan, and that they engage in principled decision-making. Respect for our legal system and, in turn, respect for the rule of law is jeopardized when political, civic and religious leaders describe judges as “out of control,” “running amok,” and committing “judicial tyranny.”

## **The Pay Raise Vote**

Two Pennsylvanian Supreme Court Judges came under furious attack by a series of interest groups voicing their dismay against legislators over pay raises approved by the general assembly in July of 2005. With no legislators on the ballot, Justice Sandra Newman and Justice Russell Nigro became the targets of voter anger. Justice Newman salvaged 54% approval to keep her seat. Justice Nigro was not so lucky, as 51% of Pennsylvanians voted “no” on his retention. Neither Justice Newman nor Justice Nigro was criticized about the way in which they discharged their office. Both are considered wise jurists. However, the events of the infamous pay raise gave special interest groups the chance to come in and tell you of nothing but the pay raise. Neither was a sponsor of the bill authorizing the “unvouchered reimbursement of expenses,” but both were tarred with a blanket of distrust. To the special interest groups, it was their greatest victory. I recently gave a similar talk to a small group and afterwards we had a brief question and answer session where I asked attendees about the judicial election. Their answer was clear, “Get them out.” I said, “Let me tell you who else is running.” They didn’t care! It didn’t matter to them. But it should. We all should be suspicious of people we think are dishonest. However the special interest groups are far more interested in getting people into office who support their political agenda than they are in making sure that you understand the facts.

In the last decade, special interests of all political stripes have made a cottage industry out of dumping millions of dollars into state high court races nationwide to elect their judges in contested elections. What is startling is that these interest groups weren’t so much

concerned with installing a particular judge as they were with running a campaign of anger against the judiciary generally.

West Virginia Supreme Court. It's going to get worse U.S. Supreme Court.

### **CONCLUSION**

The independence of the judiciary is not for the benefit of the judges, but rather for us, the CITIZENS who are the intended beneficiaries of fair and impartial administration of justice.

Judges today are under unprecedented political pressure to conform their decisions to the will of the people rather than the rule of law. The foremost reason we declared our independence in 1776 preserve judicial independence.