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An Independent Judiciary: The Role of Chief Justice Cappy

*Hon. Joseph A. Del Sole**

with

*William S. Stickman IV***

In June of 1978, Governor Milton J. Shapp filled vacancies on the Court of Common Pleas of Allegheny County. Ralph J. Cappy and I were two of the appointees. Little did I realize that this event would be the beginning of a lifelong friendship.

When asked to contribute an article to this issue of *Duquesne Law Review*, as originally conceived, I envisioned more of a roast than a retrospective. I would have enjoyed poking some good-natured fun at Ralph, knowing that he gave as good as he got. His passing has saddened many of us, and it is with a deep sense of personal loss that I offer this tribute to my dear friend.

Chief Justice Cappy's commitment to Judicial Independence demonstrated a true understanding of American history and attempts to undermine this, "the weakest of the three departments of power,"¹ branch of government. Beginning with the Jeffersonian Republicans' impeachment of United States Supreme Court Justice Samuel Chase, a Federalist appointee,² to recent attacks on judges for rulings in a myriad number of cases, such as that involving Mrs. Terri Schiavo and the Supreme Court's 2005 decision in *Kelo v. City of New London*,³ we have witnessed attempts to influence judicial decision-making.

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1. THE FEDERALIST No. 78 (Alexander Hamilton).

2. The Supreme Court Historical Society, Samuel Chase, 1796-1811, www.supremecourthistory.org/history/supremecourthistory_history_assoc_007chase.htm (last visited July 18, 2009). Justice Chase was acquitted by the United States Senate in 1803 and returned to duty on the Court. *Id.* He is the only Justice of the United States Supreme Court to have been impeached. *Id.*

3. 545 U.S. 469 (2005). In response to the Supreme Court's decision regarding the exercise of eminent domain, a movement arose among people dissatisfied with the ruling to have eminent domain declared on the home of Justice David Souter, the author of the majority opinion.

Judicial Independence does not mean judges are unaccountable for their conduct. Rather, it is freedom from outside influence in arriving at a decision. It is more accurately described as an Independent Judiciary.

With this philosophy in mind, when Ralph Cappy became Chief Justice in January of 2003, he was committed to protecting and preserving an independent judiciary. Almost immediately after taking office, Chief Justice Cappy began exploring the possibility of creating an independent commission dedicated to furthering the goals of judicial independence.⁴ While the idea of such a commission stemmed primarily from his long-held dedication to the principles of independence, it was made all the more timely, and relevant, by the growing “nationwide pattern of attacks on the courts and judicial rulings.”⁵

Chief Justice Cappy knew that judicial independence is comprised of two separate, yet related, categories—decisional independence and institutional independence.⁶ Decisional independence “allows fair and impartial judges to decide cases pursuant to the rule of law and the Constitution of the United States and the Commonwealth of Pennsylvania without ‘fear or favor’ unaffected by personal interest or bias or threats of pressure from any source.”⁷ Institutional Independence, on the other hand:

[R]ecognizes the judiciary as a separate and co-equal branch of government charged with administering justice pursuant to the rule of Law and the Constitutions of the United States and the Commonwealth of Pennsylvania working as a constitutional partner with the Executive and Legislative branches and authorized to govern and manage its internal operations without undue interference from other branches.⁸

In October of 2005, his idea became reality when the Supreme Court officially created the Pennsylvania Commission on Judicial Independence.⁹ The Commission is charged with the principal goals of “fostering a better understanding of the courts in a de-

4. Pennsylvania Unified Judicial System, The Judicial Independence Commission, <http://www.aopc.org/T/BoardsCommittees/IndependenceCommission.htm> (last visited July 18, 2009).

5. *Id.*

6. Pennsylvania Commission on Judicial Independence Mission Statement (on file with author).

7. *Id.*

8. *Id.*

9. *See supra* note 4.

mocracy and countering unfair attacks on the judiciary.”¹⁰ The Commission has eleven members, including state and federal judges, attorneys, and academics.¹¹ The Commission’s members are each appointed by the Supreme Court.¹² Chief Justice Cappy demonstrated his commitment to the Commission’s success by appointing as its first co-chairs two distinguished and well-respected jurists, Chief Justice Emeritus John P. Flaherty and Superior Court President Judge Emeritus Stephen J. McEwen, Jr.¹³

In addition to monitoring the threats upon judicial independence and attacks on the courts and jurists—both within the Commonwealth and nationwide—the Commission undertakes proactive measures to “raise public awareness of the importance of a strong, independent judiciary in a free society.”¹⁴ One of the methods the Commission uses to raise the public’s awareness is through cooperation with organizations dedicated to education about the role of the Courts and the teaching of civics in general. For example, the Commission has cooperated with the Pennsylvania Coalition for Representative Democracy (PennCORD) in its mission “to revitalize the teaching of civics from kindergarten to twelfth grade and informing young people about democracy and the American form of government.”¹⁵ In addition, the Commission, through its members, has prepared educational materials about the Judicial System in Pennsylvania on topics such as the reasons underlying judicial retention elections.¹⁶

The Commission fills an important role in educating the public about the function of the judiciary and the importance of sustaining its independence as a key element to maintaining not only its integrity, but the integrity of our constitutional democracy. Further, it gives a voice to the branch of government that has never had the bully pulpit of the “political” branches from which to advocate for its interest—or even to explain its decisions. This role is

10. *Id.*

11. *Id.*

12. *Id.*

13. *Pay Raise Case Brings Boosters into the Open*, 29 PA. L. WKLY 40 (2006).

14. *See supra* note 4.

15. Press Release, Pennsylvania Commission on Judicial Independence, Resolution from the Pennsylvania Commission on Judicial Independence Resolution [*sic*] (Dec. 8, 2006) (on file with author).

16. PAVoteSmart, Frequently Asked Questions About Pennsylvania Courts, <http://www.pavotesmart.com/faqs.asp> (last visited July 18, 2009) (providing, *inter alia*, a link to William W. Scranton et al., Statement of Delegates to the 1968 Constitutional Convention: Why We Re-elect Judges by Retention, <http://www.pavotesmart.com/StatementofDelegatesToThe1968ConstitutionalConvention-final.pdf> (last visited July 18, 2009)).

increasingly important now that, frequently, members of the “political” branches are using their positions to attack both individual judges and the judiciary as a whole. By working to prospectively provide the public with information about how the judiciary works, and by responding to unfair attacks on judges and the Courts, the Commission on Judicial Independence serves as a bulwark against the weakening of an independent judiciary.

On September 17, 2007, the Commission set out a Strategic Plan and Action Agenda to chart its future course.¹⁷ There, the Commission defined four long-term goals:

- 1) The independence of judicial decision-making will be protected to preserve the rule of law and ensure the fair, impartial, and efficient delivery of justice.
- 2) The Judicial Branch is, and will remain, a separate, independent, accountable, and co-equal branch in order to fulfill its purpose, which is to preserve the rule of law, uphold constitutional rights, and ensure fair and impartial courts.
- 3) The Judicial Branch will maintain the highest standards of accountability for use of its resources, adherence to statutory and constitutional mandates, and its overall performance.
- 4) The Judicial Branch will inform, gather input from, and involve the public and its constituencies.¹⁸

With each of these goals, the Commission outlined specific strategic actions to achieve them. The Pennsylvania Commission on Judicial Independence promises to serve as a lasting tribute and memorial to Chief Justice Cappy and his personal and professional commitment to the principles of judicial independence.

In addition to working in his administrative capacity to protect the independence of the Courts, Chief Justice Cappy was an active and ardent advocate for judicial independence and a vocal critic of the unfair and often politically motivated attacks on the Courts. This advocacy is illustrated in the address he delivered to the

17. Pennsylvania Commission on Judicial Independence Strategic Plan & Action Agenda (Sept. 17, 2007) (on file with author).

18. *Id.*

Pennsylvania Bar Association's Fortieth Annual Conference of County Bar Leaders on March 2, 2006.

There, he called attention to the fact that "the independent judiciary in this country is under attack. I am not only talking about attacks on individual judges. In some instances, entire courts are targets."¹⁹ He explained that the modern age of mass communication has heightened these attacks; "Using new modes of mass communication available through blogs and the internet, critics can reach vast audiences and whip up emotional outcries when unpopular rulings come down on hot-button issues."²⁰

His speech outlined specific instances of attacks on the judiciary throughout the nation, such as the "Jail-4-Judges" movement in South Dakota—the frequent attempts to curb the authority of the federal courts by, *inter alia*, reducing the size of the Supreme Court, reducing funding for the courts, and stripping the courts of jurisdiction over controversial topics.²¹ He also referenced a series of instances where individual jurists were unfairly singled out for attack by well-funded special interest groups and subsequently voted out of office.²² He pointed out that "judicial elections, which once were low-key contests, now are becoming cauldrons of invective and mudslinging."²³

In his speech, he challenged the audience to ask themselves, "What is it that you can do as judges, bar leaders[, and] leaders in the profession to insure that your judiciary remains independent[?] To insure that decisions rendered are based solely in the rule of law as unaffected by personal bias or interest and uninfluenced by outside pressure of any kind[?]"²⁴ The Chief concluded by warning that, "without a free and independent judiciary, one that is transparent and accountable, but free to make decisions based on the law, we will lose this precious society as we all know it today."²⁵

In a November 2006 letter to the editor, Chief Justice Cappy reflected upon the defeat of several ballot measures in our sister states designed to curtail the independence and authority of the

19. Ralph J. Cappy, Chief Justice, Pennsylvania Supreme Court, Address at the Pennsylvania Bar Association 40th Annual Conference of Bar Leaders (Mar. 2, 2006).

20. *Id.*

21. *Id.*

22. *Id.* Chief Justice Cappy specifically referenced attacks on appellate judges in West Virginia, Idaho, Tennessee, and California. *Id.*

23. *Id.*

24. Cappy, *supra* note 19.

25. *Id.*

judicial branch.²⁶ He wrote, "I am grateful to say that these ballot initiatives failed. But the threat to Democracy that they represent remains very much alive."²⁷ He observed, "It is vitally important that the courts everywhere in America remain accountable yet strong and independent, as they have for more than 200 years, and that judges remain free to make decisions based on the rule of law, and that alone, uninfluenced by any form of outside pressure."²⁸

Finally, he wrote of judicial independence in the December 29, 2006 Philadelphia Bar Association supplement to the Philadelphia Business Journal.²⁹ The article expressed his faith in the judicial system:

It is thirty-eight years since I finished law school and entered the legal profession, and after all that time I am still a believer. I believe the American system of justice is the best that humankind has ever devised. And I am more convinced than ever that the freedom we enjoy as American depends, above all, on our courts.³⁰

He pointed out threats to courts and judges and explained that the current attacks upon judicial independence have wide ranging implications upon the system of justice as a whole. He stated, "What concerns me most about this trend is that many people in our society do not seem to recognize its sinister implications. It is not only judges who are under threat. It is all of us. It is Democracy itself that is threatened."³¹ He concluded by explaining threats on judicial independence also threaten the underpinning of the American economic system and wrote:

[A] stable court system is essential to a stable business community and to the health and stability of our economy and our free enterprise system. Business leaders must be able to look

26. Ralph J. Cappy, Op-Ed., *Where Courts Were Under Threat, Pa. Voters Made Sound Choices*, THE LEGAL INTELLIGENCER (Phila.), Nov. 15, 2006, at 2. The ballot measures included a South Dakota proposal that would have permitted lawsuits and indictments against judges for their rulings, an Oregon measure to replace statewide judicial elections with politically-carved district elections, and a Colorado measure that would have essentially swept all sitting judges from office by the imposition of term limits. *Id.*

27. *Id.*

28. *Id.*

29. Ralph J. Cappy, Op-Ed., PHILA. BUS. J., Dec. 26, 2006, at 1 (Philadelphia Bar Association Supplement) (on file with author).

30. *Id.*

31. *Id.*

to the courts for prompt, sound and fair rulings. They must have confidence that the judges who hear their cases are professional, well qualified and impartial, and that those judges will decide cases based on rule of law, unaffected by bias or any outside pressure.

Think of what a stable court system means. In contract disputes, partnership breakups, corporate dissolutions, unfair trade practices and countless other matters, business leaders look to the courts for resolutions. They depend on the court to be *dependable*.³²

No discussion of Chief Justice Cappy's commitment to judicial independence would be complete without consideration of what was perhaps the most contentious issue surrounding his tenure—the 2005 pay raise. His position on the controversy had always been that changing the process of providing for judicial compensation in the Commonwealth went hand-in-hand with the principles of an independent judiciary.

In support of the raises, he argued that “we cannot hope to have judicial salaries that compete with the private sector.”³³ However, “we must have salaries high enough to attract and retain outstanding people as judges.”³⁴ Under his plan to peg Pennsylvania judicial salaries to the pay of federal judges, state politics would be completely eliminated from the equation of judicial compensation and the judiciary would not be required to go hat-in-hand to the legislature to seek increases in compensation.³⁵ As an aside, a similar plan in New York, proposed by Chief Judge Judith S. Kaye aroused similar controversy and is currently in litigation.³⁶ To his disappointment, “the idea of linking state judicial salaries to the federal structure was to take politics out of pay raises and yet has been perceived as politics as usual.”³⁷ Unfortunately, because of his conviction that the necessary principle of judicial independ-

32. *Id.* (emphasis in original).

33. Tom Barnes, *Pa. Chief Justice Cappy, 64, to retire early at end of year*, PITTSBURGH POST-GAZETTE, Sept. 12, 2007, available at <http://www.post-gazette.com/pg/07255/816733-85.stm>.

34. *Id.*

35. Cappy, *supra* note 19.

36. Anemona Hartocollis, *New York's Top Judge Sues Over Judicial Pay*, N.Y. TIMES, Apr. 11, 2008 (corrected Apr. 16, 2008), available at <http://www.nytimes.com/2008/04/11/nyregion/11judges.html> (last visited July 18, 2009). It is significant that Judge Kaye also argues that judicial pay is tied into the principle of judicial independence. *Id.*

37. Cappy, *supra* note 19.

ence would be furthered by adequately compensating judges and, moreover, removing the calculation of their compensation from the political system, Chief Justice Cappy became a target of attack both by special interest groups and members of the "political" branches of government.

However, in working with the executive and legislative branches to secure a method of judicial compensation removed from the political process that has governed judicial salaries, he was being true to both an independent judiciary and the historical concept of removing financial retribution from the decisional equation.³⁸ It is also important to note that the vast majority of criticism of the pay bill did not suggest that the judge's salary component was unwarranted or unjustified. Rather, it was directed at the process of the bill's passage and its immediate application to members of the other branches.

With the passing of Chief Justice Ralph J. Cappy, the Commonwealth of Pennsylvania lost a good and faithful servant. With the passing of Chief Justice Ralph J. Cappy, the judiciary lost one of its finest champions. With the passing of Chief Justice Ralph J. Cappy, many of us lost a dear and true friend. He is missed.

38. The necessity of protecting judicial compensation as a component of an independent judiciary is long-recognized and enshrined in the constitutions of both the United States and the Commonwealth of Pennsylvania. Article 5, Section 16(a) of the Pennsylvania Constitution states:

Justices, judges and justices of the peace shall be compensated by the Commonwealth as provided by law. Their compensation shall not be diminished during their terms of office, unless by law applying generally to all salaried officers of the Commonwealth.

Likewise, Article III, Section 1 of the United States Constitution states, in relevant part: The Judges both of the supreme and inferior Courts, shall hold their offices during good behavior and shall, at stated times, receive for their service, a compensation, which shall not be diminished during their continuance in office.