

Some Thoughts on Judicial Independence

by Bernard J. DiMuro, 2002–2003 VSB President*

I would like to discuss briefly the importance of the judiciary as the third branch of Virginia's government. As any first-year law student can tell you, the role of the judiciary is to interpret the law and to apply the facts to the law fairly, consistently and without undue control or influence from any outside source, including the other two branches of government. The mechanism by which this lofty goal is accomplished is, of course, "judicial independence." At first blush, the concept seems easy enough, but defining judicial independence has proven difficult. Does it mean that the judiciary is totally independent from any form of review or accountability? Certainly this is not true. So, the question becomes where to draw the line between judicial independence and judicial accountability. Perhaps it is time to re-examine some of the basic principles involved.

The tension is most often felt between the judiciary, which interprets the law, and the legislature, which makes the law. In Virginia, an added component to the tension exists because the General Assembly has the constitutional duty to appoint and re-appoint our judges. Both branches of government feel strongly about their respective roles and their duty to the maintenance of the rule of law and to the public. Yet, by constitutional dictate the line between each branch's area of responsibility is not clear. Inevitably they "bump up" against each other, and each branch feels, at times, that the other is invading its province with respect to maintaining the rule of law. The result is often misunderstanding and frustration. However, I do not believe that either branch is intentionally encroaching on the other's areas of responsibility. Rather, it is because the line is fuzzy that we must, on occasion, examine the respective roles of the two branches.

I have found that the Federalist Papers provide the clearest discussion of the issue. The overriding precept of the Federalist Papers is that all three branches of government should be separate but connected. Unfortunately, Madison and company are not as clear on where to draw the line between the branches to provide for that separation and connectivity.

The Historical Foundation for Judicial Independence

The historical development of judicial independence illustrates why the founding fathers were insistent that judicial independence be protected—and how they structured that protection.



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Every American knows that the founding fathers "balanced" the power of the government among the legislative, executive and judicial branches. Their intent was that no branch could monopolize the functions of government. What is less frequently recognized is that the "balance" they created is dynamic and not necessarily equal. In Federalist Paper Number 47, James Madison declares that although the Constitution provides for the powers to be "separate and distinct," it does not intend for the three branches to relinquish all control over the acts of the others. This intermixture of the branches of government provides certain obstacles and countermeasures needed for each branch to maintain its own independence, while still being held accountable for its actions.

In Federalist Paper No. 48, Madison again declares that "unless these departments be so far connected and blended as to give to each a constitutional control over the other, the degree of separation . . . essential to a free government, can never in practice be duly maintained." To some this sounds like double-speak. What does it mean to be separate but connected or separate but blended? That is, without the designed intermixing, the branches cannot be independent. It is this concept of separate but connected that creates the dynamic tension between the judiciary, the legislature and the executive branches. Ultimately, the constitutional and political questions are, which branch has the final word on the definition or interpretation of the law, and should each of the branches influence or attempt to control the other in the creation, application or interpretation of law?

How it is Structured

While the founding fathers assigned the constitutional role of upholding the rule of law to the judiciary, they also provided a mechanism by which this constitutional role would be performed. That mechanism is what we call judicial independence, and it is a mechanism that, by design, includes both a system of accountability and a requirement to decide cases independent of external control or influences.

But this begs the question, from what types of inquiries is this mechanism independent? And for what types of actions is it con-

continued on page 6

continued from page 4

trolled or accountable? We must recognize a distinction here because if the judiciary were accountable for all actions, then there is no area where it is independent. Yet if it is completely independent, there is neither control nor accountability. Therefore, defining the proper balance between independence and accountability is the root of this debate.

Judicial Independence Defined

To decide what constitutes a proper balance, we need an applicable and flexible definition of judicial independence. I say “applicable definition” because there is no one definition: The issues surrounding judicial independence are confusing.

I define judicial independence as the ability of a judge to make decisions based on the facts and the law without undue external influence, pressure or control. If judicial decisions were made by mere application of law to facts, then there would be no debate about undue influences or interference in judicial decision making. But legislation is not clear-cut and the application of laws requires varying degrees of interpretation, depending on how the legislation is written. When judges interpret the law, the legislature and the public are rightly concerned that judges are applying the rule of law correctly, fairly and consistently without any personal bias or any reference to the political agendas of the legislature that appointed them—or that will or will not re-appoint them.

There is an unavoidable political dimension inherent in any process of selecting judges and justices—whether it is through public election or, as in Virginia, legislative appointment. Judicial compensation and budgets are determined by the legislature. Creation and preservation of the courts themselves are decided by the legislature. For Virginia’s judges and justices to be truly free from all institutional restrictions under our system of government, we would have to amend the Virginia constitution drastically. The political dimension to selecting and funding judges, however, does not negate our ability or duty to ensure judicial independence.

This is not to say that judges should not be held accountable, but Virginia judges are held accountable under a state system that mirrors the clear hierarchy of accountability that the founding fathers created for the federal judiciary. The courts are accountable to the rule of law, to the people and to the legislature. The first line of accountability is built into the judicial system: It is accountable to the rule of law through judicial precedent and a hierarchy of judicial review. The trial court applies the law to the facts. If a judge has erred in his or her application or interpretation of the law, according to the judicial precedent or the views of a higher court, the decision is reviewed judicially. There are two levels of accountability to ensure that the rule of law is upheld without interference by the legislature. Another layer of accountability to the rule of law is the Virginia Code of Judicial Conduct that prohibits judges from being swayed by personal self-interest, beliefs or undue external influences.

The legislature, which has some degree of control over the judiciary, should not exercise undue control or influence over judicial decisions. Examples of such impermissible influence include

threats to job security or compensation, threats of public scandal, shame or politics.

There is no escaping the fact that the appointment and re-appointment process is political. But a judge’s record of judicial decisions is not equivalent to a legislator’s voting record. A judicial appointment should be based on a judge’s legal intellect, integrity and track record of faithfully upholding the rule of law. The founding fathers did not say that judges and their decisions could not be criticized or questioned. But we must scrutinize how that criticism is manifest.

We Should Continue Our Discussion of Judicial Independence

I believe that the role of the judiciary as the third branch of government and the concept of judicial independence should continue to be discussed and debated. Judicial independence does not mean that judges should not be held accountable. Let us make sure that they are held accountable for the right things and that they are free from undue external influences in their decision-making processes. We have a duty as attorneys to educate others on the concept of judicial independence on behalf of the judiciary who cannot and should not advocate for themselves. Judicial independence is vital to the protection of our liberties and our system of government.

Judicial independence is not just a goal. It is a mechanism chosen by the founders to ensure that the rule of law is followed. Judicial independence is valuable only insofar as it safeguards the rule of law, to which all judges are accountable.

Just as our governmental system incorporates and relies on checks and balances, the judiciary’s “independence” is not threatened by accountability, and should continue to be balanced with accountability of the right type. The message should include our fervent support for accountability that promotes and protects independent judicial decision-making. The Virginia constitution makes this clear by creating institutional review of the courts’ decisions, while providing for a distinct and separate judiciary. We, as attorneys, must ensure that the public and the other branches of government understand that we hold our judges accountable to the rule of law. Virginia, like the rest of the nation, has a body of common law that sets precedence for how laws are interpreted and applied. There is a tiered judicial system that provides for judicial review of case decisions. There is a code of conduct for judges that holds judges accountable for certain conduct.

Our judiciary’s commitment to preserving its own independence, balanced with accountability, has been demonstrated very recently. In response to a General Assembly request in 2000, the Supreme Court of Virginia’s judicial council studied and recommended criteria for evaluating judges. This year, Virginia instituted the evaluation system in a pilot program, pending funding under the General Appropriations Act, with full implementation to occur by January 2004. The program, crafted through the cooperative

continued on page 20

continued from page 6

efforts of legislators and our own judiciary, is an example of how we as a profession and how we as a Commonwealth are remaining true to the spirit of our Constitution—separate but connected.

Judicial independence is alive and well in the Commonwealth and will remain so because of institutional and personal constraints that provide our judiciary with protection from undue external control and with an internal system of accountability. While the Virginia General Assembly has both the constitutional *duty* to appoint our judges and the *right* to argue against the judiciary's decisions, neither this *duty* nor this *right* extends to exercising control or influence over those decisions. We must continue to

educate the public and our colleagues in the other branches of government that judicial independence means that certain types of controls and influences over judges are not permissible under the doctrine of separate but connected, and this includes criticism solely because one disagrees with a judge's interpretation of the rule of law.

Finally, I want to highlight the volunteer activities of two distinguished members of the Virginia judiciary.

**I am indebted to the assistance of my colleague, Jane-Scott Cantus, in the preparation of this article.*

Judge Thomas S. Shadrick



What began as his daughter's project for her undergraduate thesis has become a successful mission for Judge Thomas S. Shadrick and the Virginia Beach Bar Association. Sponsored by the VBBA and directed by Judge Shadrick, a mentoring program for all third grade students at a local elementary school is now in its fourth year.

The mentors are lawyers, judges, police officers, sheriff's deputies, former school teachers and other concerned citizens whom Judge Shadrick helped to recruit. These volunteers visit their assigned students every week, taking them out of class for an hour of one-on-one attention. Mentors assist their students with their weakest skills.

Studies have shown that children who are behind academically by the end of the third grade tend to remain behind throughout their school career.

"We are here to give them an adult who can broaden their horizons and set an example of what can be done with practice and hard work," said Judge Shadrick, who is a mentor.

Seatack Elementary School is one of eight elementary schools in the Virginia Beach area that does not meet SOL standards. "Seatack is expected to earn the state's second highest accreditation rating for 2002–2003," Judge Shadrick said.

"We do not want these kids to be let down," he said. "Some of them already have too much of that in their lives."

Thanks to the dedication of Judge Shadrick and other program volunteers, Seatack Elementary School is expected to earn the state's second highest accreditation rating for 2002–2003.

Judge B. Waugh Crigler



U.S. Magistrate Judge B. Waugh Crigler, of the Western District of Virginia, has worked diligently and tirelessly to ensure the highest standards of professionalism in the practice of law in the Commonwealth throughout his legal career. Having served as a faculty member of the State Bar's Mandatory Course on Professionalism, Judge Crigler

currently serves as vice chair of the Standing Committee on Professionalism.

Since 2000, Judge Crigler has spearheaded an effort on behalf of the Professionalism Committee and the Section on the Education of Lawyers to develop and present a Professionalism for Law Students Program that, for the last two years, has been offered annually in all of the state's seven accredited law schools. The program's goal is to present the bar's aspirations of professionalism to the students early in their legal training, during the first year of law school. It combines lectures with student interaction through small group discussions of hypothetical questions. The faculty is comprised of the best and brightest judges and lawyers in Virginia. The board of governors of the VSB Education Section, which includes the deans of Virginia's seven law schools, and the state bar's Standing Committee on Professionalism—that has overseen the Professionalism Course since its inception in 1988—have collaborated to model the program on the state bar's mandatory course

Judge Crigler continues to give his time and energy to this program to recruit, train and inspire volunteer lawyers and judges to insure the continued success of the program, and to work in partnership with the law school deans to make the program most effective and meaningful to each school's students.