

Judicial Independence and the Rule of Law

by Phillip V. Anderson, 2005–2006 VSB President



“A courtroom is a quiet place, where it doesn’t matter how much money you have, whether you are popular or not, where the weak can take on the strong, where we park whatever political differences we have at the common door. The people want a judge who doesn’t look over their shoulder, who looks them in the eye, gives them a fair hearing and a fair day in court.”

Senator Lindsey O. Graham of South Carolina made these observations to the American Bar Association House of Delegates in August 2005 while he participated in a panel discussion on judicial independence. Senator Graham articulated his vision of what we as a freedom-loving people expect from our judiciary, and how independence is the lifeblood of that vision. He, along with other panelists — U.S. Supreme Court Justice Stephen G. Breyer and former U.S. Solicitor General Theodore B. Olson — voiced concerns about what appears to be a lack of appreciation for the fundamental concepts of separation of powers and an independent judiciary.

Judicial independence is what Americans expect, Senator Graham noted, and is absolutely crucial to our system of government. “Voting is not a democracy,” he said. “Saddam Hussein got 100 percent of the vote. A democracy is the rule of law supported by the participation of the public. The key to a democracy is if you lose the election, you don’t lose your life, your house, your business, your rights — because the law won’t let that happen.” The rule of law distinguishes our form of government from the rest of the world, and the guardians of this rule of law are an independent judiciary free from intimidation, undue influence and reprisal.

A natural tension between notions of judicial independence and judicial accountability has been with us since 1803, when Chief Justice John Marshall first established the right of the U.S. Supreme Court to pass on the constitutionality of an act of Congress. The tension has continued, with perhaps the most notable example being President Franklin D. Roosevelt’s proposal to enlarge the size of the Supreme Court to insure favorable treatment for his economic recovery legislation.

Recently, the tension has heightened, with unwarranted or uninformed criticism of judicial decisions, calls for impeachment of judges, and virulent personal attacks on judges for decisions that do not adhere to a particular political or philosophical agenda. Whether merely reflective of a culture in which all forms of discourse have become less urbane, the attacks show a declining appreciation for the importance of an independent judiciary.

Dear Fellow Members of the Bar:

In November 2004, Legal Services of Northern Virginia (LSNV) initiated a fundraising phonathon. The event was a great success, resulting in the participation of over four hundred attorneys, thirty-five callers and seventy-six thousand dollars raised in support of LSNV. This year, LSNV will be conducting its second annual phonathon, “Calling for Justice,” in April, concluding on Law Day, May 1.

For the past four years the Greater Richmond Bar Foundation (GRBF) and the Central Virginia Legal Aid Society (CVLAS) sponsored a phonathon campaign. Some of the past volunteer telephone solicitors included the Governor, two former Governors, bar presidents and scores of attorneys. Last year during Law Week, over fifty lawyers made calls that raised more than thirty-nine thousand dollars. This year, the GRBF and CVLAS will conduct a 2006 phonathon during Law Week, May 1–5.

Please help make these worthy events a success.

Sincerely,

A handwritten signature in black ink, appearing to read "Phillip V. Anderson". The signature is written in a cursive style with a horizontal line extending to the right.

Phillip V. Anderson
President

P R E S I D E N T ' S M E S S A G E

Not all of the challenges are overt. They also come in subtle forms, such as inadequate funding of the judicial branch, partisanship in the selection and confirmation process, and threats of impeachment or failure to reappoint. These influences gradually erode the dignity of and respect for our republic's most honored and important institutions.

Judicial independence cannot flourish without nurture. The responsibility for that nurture, by necessity, rests with an informed and engaged bar. In a recent address to the American Academy of Appellate Lawyers, U.S. Justice Sandra Day O'Connor stated: "There is no natural constituency for judicial independence except for a vibrant responsible lawyer class. We can't trust the courts to protect themselves." No element of our society should have a better appreciation for the importance of an independent judiciary than lawyers. While we pay lip service to the importance of an independent judiciary, are we as vigilant as we should be? Do we recognize subtle and even well-intentioned efforts that undermine the independence of our judiciary? Are we engaged in responding to those challenges in a positive and reasoned way?

Traditionally, lawyers have been very involved in the political fabric of our nation; however, this is less the case now. Fewer lawyers serve in our state legislature. Lawyers have become so focused on the business of law that they have neglected the more time-consuming and less lucrative responsibilities of political and community involvement. Our complacency may be explainable, but nonetheless fatal.

Senator Graham concluded his remarks with an expression of a fear that should be foremost in all of our minds: "We are trying to spread the rule of law in faraway places with strange-sounding names, but my biggest fear is that we take it for granted here."

The fear is real. Without the protection of an independent judiciary, the rule of law is at risk. Support for judicial independence separate and apart from its importance to the rule of law risks being lost in a cry for "accountability." The question for each of us is what will carry the day — judicial independence, or accountability?

Unless we as lawyers heed the call to become more involved and be prepared to clearly articulate the connection between independence and the rule of law, accountability may indeed carry the day and call into question the legitimacy of and respect for these institutions. The time for our action is now.

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Virginia State Bar,
Virginia Lawyer Magazine
707 E. Main Street, Suite 1500, Richmond, VA 23219-2800

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