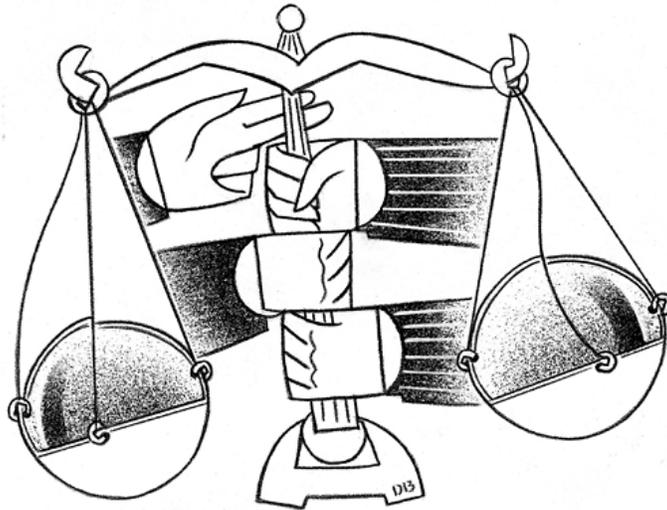


**“Hey, Judge, Can I Talk To You?”**  
The Need for Judicial Independence  
in Municipal Courts

by

**Brian S. Holman**  
Presiding Judge  
Lewisville Municipal Court



Presentation given November 8, 2007 at the  
Texas Municipal League, TCCA Affiliate Meeting  
Dallas, Texas

The topic of judicial independence has received much attention recently with high profile events like the *Terry Schiavo* case from Florida and the ongoing events in places like Pakistan<sup>1</sup>, Venezuela<sup>2</sup> and Ecuador.<sup>3</sup> It is a topic that most often surfaces when partisanship politics and factional divisiveness over contentious issues is on the rise. It is however, nothing new. From the beginning of our existence as a nation, there have been attempts to pressure the judicial branch to rule in one way or another. The doctrine of separation of powers is the cornerstone of our federal and state constitutions and it explicitly acknowledges the need for a strong and independent judiciary so as to protect and promote the rule of law. My comments today will focus, in part, on some of the influences that affect the third branch of government and how those influences can, if not checked, have a pernicious effect of an independent judiciary. I will also apply those same principles to municipal courts and discuss how municipal governments can balance the competing principles of judicial independence, required by our Constitution, with the need and desire for judicial accountability, sought by municipal officials.

Both the Federal<sup>4</sup> and Texas<sup>5</sup> constitutions call for separate branches of government. The Legislative Branch – the elected senators and representatives – create the laws. The Executive Branch – Presidents, Governors, and other executive officers, including peace officers - are elected or appointed to enforce the laws and provide executive authority. And the Judicial branch – the Courts – resolves disputes between citizens or between citizens and the government. More often than not, it is the authority of the Court that stands between the individual and the power of the sovereign. The concept of “separation of powers” is part of the basic structure of both the U.S. and Texas Constitutions, but there is a difference between the doctrine of separation of powers and judicial independence. While most municipal and county governments do not strictly follow the structure of three separate but co-equal branches of government, the constitutional mandate of judicial independence nevertheless applies to municipal courts.

The requirement of an independent judiciary is clearly set forth in the preamble to the Texas Code of Judicial Conduct. It reads, “Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us.” While there is often the temptation for judges and municipal officials to feel a certain ownership of the municipal court, it is a state trial court nonetheless and, like all courts, is governed by the rule of law established by and for the people of the State of Texas.

“Judicial independence is the freedom we give judges to act as principled decision makers. The independence is intended to allow judges to consider the facts and the law of each case with an open mind and unbiased judgment. When truly independent, judges are not influenced by personal interests or relationships, the identity or status of the parties to a case, or external or economics pressures.”<sup>6</sup>

“A truly independent judiciary is one that issues decisions and makes judgments which are respected and enforced by the legislative and executive branches; that receives an adequate appropriation of funds from Congress [to function properly]; and that is not compromised by politically inspired attempts to undermine its impartiality.... Judicial independence includes the independence of an individual judge as well as that of the judiciary as a [separate] branch of government. Individual independence (otherwise known as decisional independence) is both substantive, in that it allows judges to perform the judicial function subject to no authority but the law, and personal, in the sense that it guarantees judges job tenure, [and provides] adequate compensation and security.”<sup>7</sup>

A judge's impartiality and his or her ability to interpret and apply the law fairly are integral to the proper administration of justice. Canon 2 of the Texas Code of Judicial conduct states that a “judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” It also states that a judge “shall not allow any relationship to influence judicial conduct or judgment” and it prohibits a judge from lending “the prestige of judicial office to advance the private interests of the judge or others” or from conveying or permitting others to convey “the impression that they are in a special position to influence the judge.” A judge’s impartiality is called into question whenever political pressure is brought to bear on a judge in order to ensure a particular outcome in a case. In the words of Supreme Court Justice Anthony M. Kennedy, "The law makes a promise--neutrality. If the promise gets broken, the law as we know it ceases to exist. All that's left is the dictate of a tyrant, or perhaps a mob."<sup>8</sup>

Public critique of judicial decisions has always been part of democratic society and is an essential component of self-government. We must be able to disagree with our government, including our judiciary, without fear of official oppression or retaliation. But no one is well-served when special interests seek to promote narrow partisan agendas through unwarranted, inappropriate criticism of judges. As stated by Tennessee Supreme Court Justice Adolpho A.

Birch, Jr., "Judicial independence is the judge's right to do the right thing or, believing it to be the right thing, to do the wrong thing."<sup>9</sup>

Attacks on judicial independence seem to be cyclical in nature and usually correspond to increased periods of extreme or exaggerated political partisanship and intense public debate of socially divisive issues like flag burning, abortion rights, same-sex marriage and prayer in school. A recent example of this type of extreme partisanship occurred in the case of Terry Schiavo. You may recall that the *Schiavo* case involved the decision of a Florida judge to discontinue life support for a woman who was determined to be in a constant vegetative state. It was a contentious debate and resulted in state and federal lawmakers intervening through the legislative process to affect the outcome of the case. The numerous and extraordinarily intense attacks on the judges involved in the case led many in the legal community to decry the tactics of these prominent national leaders. In particular, Robert J. Grey Jr., past-president of the American Bar Association, issued a statement in March of 2005 during the *Schiavo* trial, which powerfully speaks to the concerns of all of those who believe in the preservation of the rule of law. He said:

*Regardless of how one feels about the specific circumstances of this situation, the role of the judiciary in it is clear and straightforward. The federal and state judges who have been assigned this case have been charged with weighing the facts of the case and the remedies set forth in the law, responsibilities they have carried out valiantly and with great dignity and sensitivity to the anguish that all of the participants in this case have endured.*

*While it is appropriate for commentators, policymakers and the broader public to debate the societal challenges and dilemmas brought to light by Terri Schiavo's case, there is no need for personal attacks on the judges in this case. They are not killers as some have called them, nor are they activists bent on pushing an ideological agenda. They are simply dedicated public servants called on to serve as impartial arbiters in a very difficult case. Instead of maligning them for applying existing law to the case at hand, even though it may not reflect the current will of Congress, we should praise them for dispensing even-handed justice and upholding the independence of the judiciary even under the most difficult circumstances. These judges deserve our respect, not our scorn.<sup>10</sup>*

There are five major principles of judicial independence and fair and impartial courts: Decisional Independence, Institutional Independence, Competent Judges, Adequate Resources and Accountability.

1. **Decisional independence** permits disinterested and impartial judges to make decisions based on the merits of the case and in accordance with the applicable law and governing constitutions unaffected by the pressures exerted from internal or external sources. It allows a judge to make rulings that may not be popular but that should be made nonetheless. Once again, as Justice Birch said, "... [it] is the judge's right to do the right thing or, believing it to be the right thing, to do the wrong thing."<sup>11</sup>

2. **Institutional independence** acknowledges the judiciary as a separate and co-equal branch of government charged with administering justice pursuant to the rule of law, and authorized to manage its own internal operations without unwarranted interference from the other branches of government. Recognition of the court's authority and consistent enforcement of its orders by the other branches is critical to ensuring the continued viability of the court.<sup>12</sup>

3. Fair and impartial courts require **competent judges** who have been selected for their merit, who are sensitive to the diversity of their community, and who maintain their competency through continuing legal education and professional growth. In Texas, municipal judges must attend annual educational seminars or face possible removal from office by the State Commission on Judicial Conduct.

4. A competent and independent judiciary must have **adequate resources** to perform the duties and responsibilities of the office. This includes a budget that provides for adequate facilities and equipment, appropriate security to ensure the safety of all court personnel (judges, clerks, etc.) and just compensation for judges. Sufficient funding of court operations demonstrates the government's commitment to judicial autonomy and the rule of law.

5. With judicial independence comes judicial **accountability**. The system must include a judicial code of ethics and an impartial disciplinary system that allows for a range of sanctions up to and including the removal of errant judges. The system must also provide a means for citizens to lodge complaints against judges for illegal or unethical conduct. In establishing judicial accountability however, the process should be designed to address ethical lapses or violations and should not be a surrogate for the appellate process or a means to remove a judge for unpopular decisions. Appropriate judicial accountability must also provide a transparent system that allows for public and media access to court proceedings and legal decisions.

Up to this point, the principles of which I have spoken relate generally to all courts, whether they are federal, state, county or municipal. In fact, one could argue that because municipal judges are, for the most part<sup>13</sup>, appointed officers, they do not suffer from and are not affected by the same kinds of pressures as elected judges. Because they do not run for office, they are unaffected by rancorous partisan politics. Nor do they deal with the divisive and controversial issues of our day such as school prayer, capital punishment and abortion rights. Consequently, they are insulated from the public outcry in those very divisive cases. In fact, some local and state government officials give the impression that they look upon municipal courts as merely a convenient and reliable stream of revenue for the city rather than an essential part of local government. This unfortunate attitude, while not pervasive, undermines the basic principles of fairness and justice that citizens expect and deserve.

One of the most common intrusions into the independence of the court is the imposition of quotas or the evaluation of court efficiency based on certain revenue goals. Section 720.002 of the Texas Transportation Code prohibits the use of citation or income quotas to "evaluate, promote, compensate or discipline [a] ... municipal judge."<sup>14</sup> In fact, the creation or use of such a plan is grounds for removal of the city official or representative that promulgates or sponsors it.

Another common form of interference with judicial independence occurs when elected or appointed officials take a personal interest in ongoing, unadjudicated cases. A call from the mayor or a council member to the judge to inquire about a particular, ongoing case is inappropriate and could subject both the judge and the official to disciplinary penalties and sanctions for the ethical lapse. However, contact with the city attorney is permissible.

More subtle, but perhaps equally intrusive, interference occurs when city leaders attempt to influence the outcome of a case by dealing directly with court support personnel rather than the judge. This can happen when the official inquires into the status of a case in an informal setting such as the grocery store, a church activity or a local restaurant. Such inquiries, often made with good intentions, can give the impression of improper political pressure on the court and must be avoided if judicial independence is to be preserved. Unofficial contact with court personnel, while not *per se* improper, gives the appearance of impropriety and thus is equally prohibited.

It is certainly proper for a city council to discuss the judicial philosophy of a judge and to evaluate his or her performance based on such criteria as judicial temperament and demeanor, management style as it relates to court operations, timely disposition of cases, and professional competence. But when the performance evaluation turns on the results of a particular case or series of cases, or when the criteria for evaluation is based on matters extraneous to the operations of the court, judicial independence is affected and institutional integrity is compromised.

Is it important to your community that the municipal court be free from improper influences of local politics? Why should a city leader or official concern himself with whether the municipal court is feeling undue pressure to rule a certain way in a particular case? How does it affect the quality of life in your community if special interest groups exercise unwarranted influence on your municipal court? Is your local community strengthened or weakened by increased judicial independence?

It is a common axiom among municipal court personnel that the average person develops his or her general sense of the fairness, effectiveness and impartiality of the “court system” as the result of contact with a municipal court. The average person who comes to municipal court is not a felon or serious misdemeanant, but rather someone who, either by intent, negligence or just bad luck, has run afoul of a traffic law or municipal ordinance. He was speeding because he was late to work (or because he likes to speed). She allowed her inspection certificate to expire. She thought she could make the yellow light. Or, he was not paying attention and rear-ended the woman in front of him. For whatever reason, each is issued a ticket and they show up in municipal court. It is that experience, much more than watching television shows like “*Boston Legal*” or “*L.A. Law*” or even “*Perry Mason*”, that forms their notion of what a court is or ought to be. How they were treated and the respect, or lack thereof, which they were shown will likely be what shapes their opinion of the court system as a whole. As a general rule, the only court you and your neighbors are ever likely to go into is a municipal court. Having a properly functioning court that is sufficiently independent to follow the rule of law rather than what is politically expedient will instill confidence in the community and trust in its leaders. Judicial independence is not just good politics; it is good governance.

**Some questions to ponder:**

- How does the reputation of the municipal court (fair/unbiased or slanted towards the prosecution/ticket mill) affect the community as a whole?
- When contact is made with the municipal court by a city official, what is the underlying motivation? (to affect the outcome of a case or simply to obtain information?)
- Is it ever appropriate to discuss fine revenues and/or collection practices of the court? If so, what is the motivation and purpose of the inquiry?
- Are rulings of the court publicly criticized and if so, in what forum?
- What are some of the positive effects of judicial independence for your community?

## Appendix A

Following are examples of the impact of an independent judiciary on American life and the law.

**Brown v. Board of Education** (1954) which established the principle that “Separate schools are not equal,” but rather “are inherently unequal.” Prior to *Brown*, African-American citizens had no redress through the elected branches of government to protect their constitutional rights. So they were forced to resort to the courts to provide them with the relief the Constitution demanded.

**Baker v. Carr** (1962) established the principle of “one person, one vote” and that the votes of each citizen-electors must be weighted equally. This voting rights case struck down Tennessee’s practice of creating districts to favor rural, and therefore mostly white, districts over urban, mostly black, districts. The State argued that the drawing of voting districts was a political, not a judicial, action that was beyond the jurisdiction of the Courts to review. The courts rejected this argument and ruled that any attempt to dilute the votes of law abiding citizens when drawing electoral districts violated their constitutional rights.

**Gideon v. Wainwright** (1963) was the seminal case that required legal representation for indigent defendants without charge. The court ruled that if the State seeks to deprive a person of life or liberty (i.e., jail time) the State must ensure that the process is fair and that a fair trial could not take place without at least affording a defendant the opportunity to be represented by a lawyer.

**U.S. v. Nixon** (1974) showed that even the President of the United States is not above the law. When President Nixon refused to turn over audio tapes of Oval Office conversations, the Court ruled that under certain circumstances, even executive privilege cannot shield the President from improper conduct. This case illustrates the need for a check on the excesses of government officials. Equally noteworthy was the President’s subsequent decision to voluntarily comply with the Court’s order which demonstrated his respect for the rule of law.

**Texas v. Johnson** (1989) reinforced the principle that symbolic speech, even offensive speech, such as flag burning, is protected by the First Amendment. Political protests are protected even when a majority of citizens finds the conduct offensive or abhorrent. Because the Constitution was designed to protect the free expression of ideas, any law designed to criminalize such expression was unconstitutional.

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<sup>1</sup> “*Pakistani court reinstates top judge*”. CNN.Com/World, retrieved on November 8, 2007, from <http://www.cnn.com/2007/WORLD/asiapcf/07/20/pakistan.chaudhry/index.html>

<sup>2</sup> “*Judicial Independence Threatened In Venezuela: The Removal Of Venezuelan Judges And The Complications Of Rule Of Law Reform*”. Georgetown Journal of International Law, Spring 2006 by Castaldi, Lauren, retrieved at [http://findarticles.com/p/articles/mi\\_qa4140/is\\_200604/ai\\_n17172986/pg\\_16](http://findarticles.com/p/articles/mi_qa4140/is_200604/ai_n17172986/pg_16).

<sup>3</sup> “*Ecuador: Removal of Judges Undermines Judicial Independence*”. Human rights Watch, retrieved on November 8, 2007 from <http://hrw.org/english/docs/2007/05/11/ecuado15909.htm>.

<sup>4</sup> Articles I, II & III, U.S. Constitution.

<sup>5</sup> Article 2, Section 1, Texas Constitution.

<sup>6</sup> Brennan Center For Justice Resources: Questions and Answers about Judicial Independence.; [http://www.brennancenter.org/resources/resources\\_jiqanda.html.2001](http://www.brennancenter.org/resources/resources_jiqanda.html.2001).

<sup>7</sup> Excerpt from: An Independent Judiciary: Report of the Commission on Separation of Powers and Judicial Independence. Chicago: American Bar Association, 1997 (pp. ii-iii)

<sup>8</sup> Excerpt from: Honorable Anthony M. Kennedy. Address to American Bar Association symposium, *Bulwarks of the Republic: Judicial Independence and Accountability in the American System of Justice*, held December 4-5, 1998, Philadelphia, Pennsylvania.

<sup>9</sup> Quoting *Justice at Stake*, retrieved at <http://www.justiceatstake.org/contentViewer.asp?breadCrumb=2>.

<sup>10</sup> Statement of Robert J. Grey, Jr., President, American Bar Association, March 25, 2005, retrieved on November 8, 2008, from <http://www.abanet.org/media/statementsletters/sttjudiciary.html>.

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<sup>11</sup> *Idem.*

<sup>12</sup> The principle of institutional independence is not universally applicable to municipal courts because there is no express separation of powers in the majority city charters in Texas. Nevertheless, judges at the local level must be free to exercise their professional discretion and to make principled decisions without improper political, economic and social pressures (whether internal or external) that are intended to affect the court's ability to adjudicate cases.

<sup>13</sup> El Paso and Lubbock elect their municipal judges.

<sup>14</sup> §720.002(e), Trans. Code. "A violation of this section by an elected official is misconduct and a ground for removal from office. A violation of this section by a person who is not an elected official is a ground for removal from the person's position."