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Commentary **Judges**

The Birth of Judicial Independence in New York

Henry Greenberg, vice president of the New York County Lawyers Association and past president of the New York State Bar Association, describes the origins of judicial independence in New York, which predated the Declaration of Independence in 1776, and inspired the founding fathers.

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In anticipation of America's upcoming 250th anniversary, Chief Justice John Roberts' *2025 Year-End Report* recounts the historic development of the Declaration of Independence and Constitution and the role of the federal judiciary. The Constitution, he notes, safeguards the independence of federal judges "to ensure their ability to serve as a counter-majoritarian check on the political branches." The Chief Justice exhorts judges to "continue to decide the cases before [them] according to [their] oath, doing equal right to the poor and to the rich, and performing all of [their] duties faithfully and impartially under the Constitution and laws of the United States."

The Chief Justice is exactly right about this: An independent and impartial judiciary is essential to the rule of law. Many of our most cherished rights were secured in courtrooms, because

courageous judges applied the law without fear or favor, even when subjected to intense criticism and outright hostility.

America's establishment of an independent judiciary was a novel innovation in the history of government systems. The Constitution's most unique feature is arguably the creation of the federal judiciary as a separate branch of the national government, with judges who enjoy lifetime tenure and salaries that cannot be diminished while in office.

The Founding Fathers rejected the Royal tradition that tended to interfere with courts. For much of British history, kings controlled judicial salaries and dismissed judges whose rulings displeased them. Henry VII boasted that he ruled England with his laws and his laws with his judges. The Founders would have none of it. As Chief Justice Roberts points out, one of the 27 grievances against King George in the Declaration of Independence was that he "obstructed the Administration of Justice…[and] made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries."

Judicial independence was the product of political theory and practical experience. John Adams' *Thoughts on Government* (1776) and Alexander Hamilton's Federalist 78 (1788) laid the intellectual foundation. And original states and colonial antecedents set important examples by rebelling against the corruption of British courts.

One such colony was New York. More than a decade before America declared independence, New York's bench and bar bravely stood together against the Crown's attempt to control judges in *Forsey v. Cunningham*—a case that shook the colony, reverberated across the Atlantic seaboard, and left a legacy that lives on today.

'Forsey v. Cunningham'

The case arose from a waterfront fight between two New York merchants: Thomas Forsey and Wadell Cunningham. Forsey owed a debt of £150 to certain creditors; and Cunningham sought to collect on that debt. On July 28, 1763, in an apparent premeditated attack, Cunningham "accosted Forsey in the street, drew a concealed sword, and did beat Thrust Stab wound and evilly treat him badly that he remained incapacitated for eighty-two days."

Cunningham was politically connected with friends across the Atlantic Ocean. When Forsey's life hung in the balance, the King's representative in London informed New York's acting Governor, Cadwallader Colden, that if Cunningham was convicted of murder or manslaughter, his execution should be stayed. But this scenario did not come to pass because Forsey survived the attack.

After Forsey recovered, Cunningham was found guilty of criminal assault and fined £30 by a court with criminal jurisdiction known as a Court of Oyer and Terminer (to hear and decide). But this did

not put an end to the matter because Forsey brought a civil action for damages in the Supreme Court of the Judicature, alleging violent assault, battery and wounding.

Lawsuits initiated in Supreme Court were tried with a jury. According to traditional procedures, an appeal could be taken to the Governor and his Council (an advisory body that performed certain legislative and judicial functions) but only to review irregular court proceedings or errors of law. This did not include an examination of the facts or passing judgment on a jury's verdict—a practice that protected colonists' right to trial by jury of their peers.

Forsey and Cunningham were represented by some of the most eminent lawyers in the colony, such as James Duane, William Livingston, John Morin Scott, and William Smith Jr. Two of Cunnigham's lawyers (Duane and Livingston) are in the pantheon of Founding Fathers; and, in the 1760s, Livingston, Scott and Smith were collectively referred to as the "Triumvirate," owing to their legal skills, political activism, and articles in newspapers and journals. Originally, the lawsuit seemed so mundane that the Triumvirate's members represented opposing parties—Scott for Forsey, and Livingston and Smith for Cunningham.

The trial was held in New York City on Oct. 25, 1764, before Chief Justice Daniel Horsmanden and Associate Justices David Jones, William Smith, and Robert Livingston. Neither party challenged the composition of the jury; nor did Supreme Court exclude any evidence offered by the parties. The trial lasted about ten hours.

The jury delivered its verdict the next day, finding in favor of Forsey and awarding £1,500.22 in damages. Claiming the award excessive (the equivalent of roughly $359,224 today), Cunningham requested Supreme Court grant leave to appeal to Acting Governor Colden and his Council. However, Cunnigham objected only to the size of the jury's verdict. Because no appeal could be taken from a jury's decision under British law, Chief Justice Horsmanden rejected Cunningham's unusual request.

Cunningham was determined to break tradition and appealed directly to Colden. He did so without legal representation, however. All his lawyers had withdrawn from the case, believing that their client's attempt to appeal posed a dangerous threat to jury trials.

Colden was a staunch defender of Royal prerogative. He also disliked lawyers, finding them "insolent" and "petulant" and a dangerous enemy to good government in the colony. His opinion of judges was no better. In the recent past, he prevailed in a dispute with the Assembly (New York's representative governing body) over judges' tenure. In 1761, the home authorities sided with Colden and directed the governors of all the British American colonies to require that judges serve at the Crown's pleasure.

Colden's dim view of the bench and bar was shared by other high ranking British officials. Thomas Gage, the commander in chief of British forces in America, wrote the King from his headquarters in New York City that "the lawyers are the Source from whence the clamors have flowed in every Province. In this Province [New York] nothing public is transacted without them, and it is to be wished that even the bench was free from blame."

Given Colden's politics and biases, he naturally disagreed with Chief Justice Horsmanden's opinion that a Governor and his Council lacked jurisdiction to entertain an appeal from a jury's damage award. Ever the loyal servant of the Crown, Colden saw Cunningham's appeal as an opportunity to limit the power of juries and thereby increase his control over New York's legal system.

Seeking legal allies, Colden requested an opinion from New York Attorney General John Tabor Kempe. However, the Attorney General chastised Colden, reminding him that juries are the judges of facts and that an appeal was only available to review an error of law. Unfazed, Colden ordered the Justices to appear before the Council and explain their conduct, produce the record, and stay the judgment.

When the Council convened, Chief Justice Horsmanden stood firm and defended the denial of Cunningham's appeal. He declared that an appeal would disturb "the Ancient, and wholesome Laws of the Land," undermine the right to a jury trial, and create a procedure "repugnant to the Laws both of England and this Colony."

The other Justices concurred. Justice Smith stated that judges were "limited in their proceedings by the course of practice, in three of the great courts of law at Westminster, and no appeal from any verdict, taken in either of those courts, was ever known to have been allowed or entered there." Likewise, Justices Livingston and Jones each opined that an appeal could not be taken in the circumstances presented.

Over Colden's dissent, the Council agreed with the Justices and the Attorney General and denied the appeal. This drew Colden's fury. He denounced the Justices for their "Indecency, Want of respect to the King's Authority and unwarrantable Freedoms," and declared that he would forward his objections to the King's ministers.

Astounded by Colden's behavior, the Council refused to allow him to carry the case directly to the Crown. But this did not stop Colden from writing frantic letters to the British Secretary of State and Board of Trade in London, urging the removal of the Justices.

Colden's stance unleashed a firestorm of criticism by the New York bar, which, almost to a man, rejected the idea that a jury's award of damages could be overturned on appeal. Lawyers in

Philadelphia and New Jersey supported the position taken by their New York brethren.

Perhaps the most vocal critic was Cunningham's former lawyer, William Livingston (who later made history as a revolutionary Governor of New Jersey, delegate to the Constitutional Convention that commissioned the Declaration of Independence, and signer of the Constitution).In a series of newspaper articles published from February through August 1765, Livingston warned that Colden's "scandalous abuse of the King's name and authority" would subvert colonists' right to have their cases decided by a jury of their peers. This right, he wrote, was "sacred, matured by ages, founded as it were upon a rock." He urged Americans to "oppose arbitrary rule in every shape by every lawful method in our power. Never let us sit supine and indolent while our precious privileges are abridged."

Such commentary struck a chord with the public. Emotions then ran high with rumors swirling of an impending Stamp Act—a wildly unpopular measure that imposed taxes on all legal and business documents, licenses, cards, dice, and published materials in the American colonies. Colden's attempt to curtail jury rights added fuel to the fire. It was seen as another tyrannical encroachment of colonists' rights. As one New Yorker put it, "I do not remember any Subject that has so much engaged the public Attention—People in general think their all at Stake."

Even Colden's friends abandoned him. John Watts, Jr., a prominent lawyer and member of the Council, wrote that Colden's position was "so unconstitutional that not one lawyer . . . would draw the writ of appeal," and that Colden's position would "entirely destroy the use of juries & Court too." Watt added that "the old body was dislik'd enough, but now [the people] would prefer Beezlbub himself, to him."

Despite (or perhaps because of) such criticism, Colden persisted. He warned English authorities that the New York bar comprised a "faction" that was a once "formidable and dangerous to good Government" and a major threat to the "Powers of the Crown." Cunningham, with Colden's support, petitioned the King for a hearing.

So, the case moved to London and, for a moment, it appeared as if the King's Privy Council supported Colden's position. With the Crown's apparent backing, Colden ordered Chief Justice Horsmanden, to stay the judgment, produce the record to the Council, and appoint counsel. But once again Chief Justice Horsmanden defied Colden, seeing no legal means by which an appeal could properly be taken.

Colden's war against the judiciary came to a close in November 1765, when the English Attorney General and Solicitor General essentially rejected Colden's position and agreed with Supreme Court's interpretation of the law. New York's General Assembly added a coda, declaring that the attempt to appeal a jury verdict was "illegal, an attack upon the right of the subject, and a most

dangerous and mischievous innovation, tending to encourage litigiousness and delay, promote perjury, prevent justice, subject the people to arbitrary, prevent justice, subject the people to arbitrary power, and ruin the colony." A mob of New Yorkers later attempted to seize Fort George, the colonial seat of power at Manhattan's southern tip where Colden was staying; carried an effigy of Colden hung from moveable gallows; and broke into his coach house to seize his coach and burned it on Bowling Green.

'Forsey's' Legacy

Forsey established the principle that a properly tried fact by a jury could not be retried on appeal. A dozen years after the case was closed, Colden's negative example further served as a motivation for the framers' of New York's First Constitution (1777) to establish trial by jury as a fundamental right in both criminal and civil cases. In fact, the committee which drafted that charter included two of Cunningham's former lawyers (Duane and Scott). In 1791, the right to a jury trial was extended to federal criminal and civil cases by the ratification of the Sixth and Seventh Amendments to the U.S. Constitution.

Another legacy of *Forsey* is the model it provides for responding to attacks on judges. Judicial independence, as we now understand it, was not born fully-formed in the 18th Century. Nor did it result from a single court decision. Courageous judges developed judicial independence slowly, case-by-case, with the unwavering support of the legal profession. *Forsey* is one such case—the first and most consequential in New York legal history—where bench and bar quashed a politician's attempt to subvert a fundamental right through intimidation.

Forsey teaches that attacks on the judiciary cannot be left unanswered. They threaten the fair and orderly process of resolving legal disputes. But it is not judges who can provide the necessary defense, given the restrictions of judicial ethics codes. That duty lies heavily upon the legal profession.

Indeed, whenever the independence of the judiciary is threatened, lawyers must be the first to rise in protest and display the greatest courage. The traditions of the profession, the exclusive franchise on the practice of law, and the examples of past great leaders, demand nothing less. Lawyers cannot stand mute and allow the justice system to be subjugated to the political process or influenced by the passions and prejudices of the moment. Just as eternal vigilance is the price of liberty, the bar's defense of an independent judiciary is the price of the rule of law.

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