

## **Judicial Retention: Time to Put Away Brooms and Restore Balance**

By: Andrew Barbin

To hear Clean Sweep advocates tell it, all we have to do to improve justice in Pennsylvania is take out a broom and make a clean sweep of all judges up for retention. The history of the Clean Sweep movement resembles that of the French Revolution, which began in honor and ended in a Reign of Terror. It is time to put away the brooms and inflammatory rhetoric and return a sense of balance to discussions the judiciary and its place in the political process.

I have no quarrel with those who objected to the high handed Legislature or to the initial Clean Sweep movement to “educate” the legislature as to the reason representatives are elected for two year terms. It is a particular genius of our system of government that the legislature is designed to be most directly responsive to the people, and the judiciary is designed to be the most insulated. It is essential to their function that the judiciary be insulated from the tyranny of the ever shifting, momentary emotions of the masses, so that the law can develop, and be enforced, without violent mood swings.

The Federal Supreme Court, Circuit Appeals Court and District Court judges are appointed for life, subject only to impeachment. Federal Magistrate Judges served ten year appointments, subject to reappointment. No direct election is involved. On the state level in Pennsylvania, we have a similar system which allows for direct initial election (rather than appointment) and then a yes/no retention decision every ten years thereafter, until a mandatory retirement age is reached.

In reviewing the Clean Sweep web site, one would find a complete list of all Pennsylvania Judges who are up for retention and a list of essentially redundant reasons why they should *all* be thrown out. While the origins of the Clean Sweep movement lay in popular outrage over the pay raise issue, the vast majority of those targeted had no say whatsoever in that matter; and the one who did, voted *against* the decision they attack.

Revolutionary power is intoxicating, and it is far from uncommon for those who taste it to lose perspective. In my opinion, Clean Sweep has adopted the disastrous attitude of the Reign of Terror and Robespierre’s adage “kill them all, and let God sort them out.”

Central to the “Top Ten Reasons” they list to turn these jurists out of their positions is the Supreme Court decision which (correctly) held that while the legislature was free to return the pay raise that they arrogantly awarded themselves; our constitution (wisely) did not allow the Legislature to do so as to the Judiciary. If the Legislature had that power, they could use such power over purse strings to coerce the Judiciary. Our forbearers wisely guarded against that risk.

It was certainly impolitic and incendiary for then Chief Justice Cappy to argue that the judiciary “deserved the raise,” and there are certainly good reasons to reject his “private sector pays better” and we “need to pay more to have the best judges” rationale.

Frankly, I doubt if any judge currently serving does so because their pay is more, or less than they would get in private practice. It is a difficult job, with awesome responsibilities, and requires, foremost, the patience of Job. If money drove *any* of them, they would already be elsewhere. While family needs might lead one to leave, from time to time, money does not drive our judicial system; liberal or conservative, Republican or Democrat. In my experience, they are *all* there because they believe in the role of the judiciary, and they are driven to preserve it.

The Clean Sweep criticism of the decision is unfair in general; but particularly so, as to the 66 judges up for retention who did not make the comments, and did not rule in favor of its legality. Each should be judged on their own merit, and not a perceived error by others.

Clean Sweep also argues for “Term Limits.” While there may be wisdom in term limits as to legislators, who may accumulate power and arrogance from incumbency which may insulate them from their constituents and undermine the *representative* function they are intended to serve; the same is not true of judges. Judicial experience breeds necessary perspective and wisdom, and tenure ensures independence. Term limits for judges is an idea whose time never was, and never should be.

Clean Sweep argues that *all* the judges should not be retained because *some* will reach mandatory retirement before the end of their “terms.” Mandatory retirement is designed to ensure that a judge does not overstay his or her capacity for the demands of the job. Many “retired” judges in good health remain as “Senior Judges” by annual reappointment and provide invaluable service for many years after such “retirement.” Retention is a ten year cycle which recurs until retirement. There is no rational reason why the approach of mandatory retirement should preclude retention. I was taught as a runner to run through the line, and not to it. Judges who have run the race and fought the fight to preserve justice in Pennsylvania should not be punished because they seek to run through the line. They should be honored for their dedication.

Retention is designed as a safety valve to allow the electorate to remove a particular judge if the full record over the past ten years or a particular scandalous incident demonstrates a good reason why that person should not be retained. It is intended as a scalpel to surgically remove any cancerous growths on the judiciary. Clean Sweep asks the public to treat it as a guillotine and “to let God sort them out.” The response should be to say no to Clean Sweep, rather than no to the Judges up for retention.

Our system, as designed, works. I served five years as a Judicial Administrative Clerk in the Superior Court for a judicial member of the Judicial Inquiry and Review Board. I participated in the approval of wiretaps for investigation of judges and in the drafting of numerous decisions relating to discipline of judges accused of misconduct. Bad judges were weeded out, and the rest serve with honor and distinction. Judge Joyce, who alone warranted rejection in this retention cycle, saved us all the trouble by withdrawing from the retention process. While the system is not perfect, and has been modified from time to time to meet specific concerns; it works.

Clean Sweep has drawn a bull's eye on Supreme Court Justice Thomas G. Saylor, despite his vote against the pay raise decision they place at the center of their alleged justifications. Justice Saylor has been an honorable and conscientious public servant for 34 years. On a Supreme Court dominated by lawyers from Pittsburgh and Philadelphia, he is a vital voice for the midstate and the unique values we cherish. I do not hesitate to urge his retention.

I do not agree with the politics or judicial philosophies of each of the intermediate Court Judges up for retention from the Superior Court and the Commonwealth Court. Some, like Judge Melvin, have values similar to the judges we have traditionally elected and retained here; others more typically reflect the experience and values of our urban centers to the west and east. Nonetheless, having watched them all closely as a practicing litigator and appellate court advocate over the past ten years, *none* have done *anything* which would warrant their rejection for retention. Indeed, Clean Sweep has made little or no effort to identify any reasons as to any *individually*; rather all are simply swept up in their revolutionary intoxication.

Locally, only Judge Edward E. Guido stands for retention. He is universally respected by the local legal community, and there is not the slightest reason for his rejection for retention. He served honorably as a public defender, a prosecutor and a judge; and has demonstrated the type of balance which we have come to expect of our local judges.

Clean Sweep's myopic focus ignores the depth and breadth of judicial responsibilities. To judge any justice or judge by a single case (regardless of your view of that case) is to judge the power of an ocean by the frailty of its foam. When you go to the polls this November, leave your broom behind and judge as you would want to be judged, each on his or her own merits.