

**Remarks of Andrew F. Susko, President,
Pennsylvania Bar Association to the
Wilkes-Barre Law and Library Association
October 12, 2007
*ERIE v. THOMPINS CASE***

I am very pleased to be here and stand before you proud to be the president of our nearly 30,000 member Pennsylvania Bar Association. We celebrate here today the 10th anniversary of the placement of the historical marker and specifically the marker commemorating the case of *Erie v. Thompkins*. The details of the U.S. Supreme Court's decision need not be recounted at length. More important is that we pause here today to reflect collectively on the ultimate decision made by our United States Supreme Court; a decision to follow the United States Constitution and apply the common law of the state, the law of Pennsylvania, and not to apply general federal common law.

Recognizing and following the rule of law is a fundamental underpinning of our justice system. Acceptance of the rule of law separates the civilized society from the uncivilized one. The rule of law is the first casualty when a government is overthrown or when a country is embroiled in civil war. Our Courts and our justice system in the United States and here in Pennsylvania are at the center of protecting and defending the rule of law.

I want to speak today for a few minutes about the vital importance of the rule of law and judicial independence. Judicial independence is a frequently invoked term that requires more precise definition. Judicial independence is not independence from the rule of law, but rather independence of Judges to follow the rule of law. Our ideal is "fair and impartial courts" and, specifically, an environment in which an individual judge can decide a case fairly and impartially based on the facts and the law presented in a particular case. This concept is a hallmark of our

justice system and one that we, as lawyers, all agree to protect and vigilantly guard when we take our oaths of office.

To illustrate the critical importance of an independent judiciary, I want to share a story with you that was related to me by a retired Justice of the Polish Supreme Court, Teresa Romer. I first met her honor, Justice Romer, at a PBA Labor Law Section Dinner in Philadelphia when she, and other judges from Poland, were our guests of honor. Justice Romer first became a trial court judge in Poland in the late 1950's. Poland has a proud history of fierce independence. Even though it fell under Soviet Union Communist domination, as a vestige of its independence, judges were not required to become members of the Communist party. Although most judges did, Judge Romer never joined the Communist party.

Most of you will recall the marches in the streets of Warsaw in 1981 led by the charismatic labor leader Lech Walesa. The world stood transfixed during this politically-charged, intense moment in history when hundreds of thousands of Polish citizens stopped working and took to the streets. While the world waited, the legal question of whether there could be a "Solidarity Union" and whether that union would have the right to strike in Communist Poland was assigned to Judge Teresa Romer, then a trial court judge. Now, there was no doubt how the Communist party wanted the case decided, but Judge Romer held fast to her independence and integrity and, despite great personal risk, she ruled that workers had the legal right to unionize and had the right to strike. The rest, as they say, is history. Why do I share this story with you today?

Because every person here today, every lawyer, every judge, every person in this room, has a stake in ensuring that our justice system remains independent, stable and free. At risk are the courts' protection of those rights that we hold most dear; rights that can only be fully

protected when our judges are truly independent to follow the rule of law and to reach the right decision. Our judges need to be free to decide cases fairly and impartially; they must be able to make decisions free from political interference or pressure, free from public outcry or coercion, and free from financial consequence or intimidation.

The *Erie v. Tompkins* case that we celebrate here today was a clear victory for the rule of law. The application of state law, in the context of federal court diversity of citizenship jurisdiction, was an acknowledgement of the fundamental underpinning of legal rights that our US Constitution recognized- that, in this context, the state's legal standard was paramount. The U.S. Supreme Court, in rejecting the application of general federal common law, reversed its previous decision in *Swift v. Tyson*, and stated in *Erie*:

Thus, the [*Swift v. Tyson* application of federal general common law] rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state We merely declare that in applying the doctrine, this court and lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.

Respecting the common law of the state and applying the provisions of the U.S. Constitution reserving state's rights at common law, heralds *Erie v. Tompkins* as a major victory for the rule of law.

In closing I want to address one final subject. Preserving and protecting the rule of law are implicated by the upcoming judicial retention elections. On November 6th, voters will go to the polls and consider the “merit retention” of qualified judges. This is a most important election; seven state-wide appellate level judges and sixty Common Pleas Court trial judges are

up for merit retention. Merit retention election, as you know, involves a “yes/no” vote, and follows a judge having served a term of office for ten years. The yes/no vote is non-partisan; merit retention election is expected when the judge has demonstrated, by his or her conduct on the court, that they are qualified and that their record reflects service merits retention.

The Pennsylvania Bar Association’s Judicial Evaluation Commission (JEC) has rated each of the seven statewide Appellate Judges “Recommended for Retention.” The JEC is a bipartisan group of 18, including lawyers and non-lawyers, who evaluate judges up for merit retention. That evaluation includes a thorough review of the jurist’s legal opinions and interviews of practicing lawyers who have appeared before the judge in question. In addition, the PBA had adopted standards that we believe constitute the primary considerations for determining the qualifications of candidates for judicial office. These standards include writing reasoned opinions, adherence to the rule of law, good judicial temperament, timely decisions, judicial integrity and the like.

You are all opinion leaders and voters need to know their Judges. The PBA has established a Web site at www.PAVoteSmart.com and urges voters to learn about their judicial candidates. In addition to the seven state-wide candidates who have been rated as “recommended for retention” by the PBA’s Judicial Evaluation Commission, the JEC, there are also links to local county bar association’s Web sites where county bar processes are in place for evaluation of trial court judges.

The citizens of this commonwealth have a significant investment in judges who have served a ten year term. Those judges have effectively given up their law practice to serve on the bench. Tax payers’ dollars have been invested in their training and education and the learning of their position. Inform yourself about these judges; and, call on other voters to visit the PBA Web

site and consider the recommendations of the Judicial Evaluation Commission. It is only through a strong and independent judiciary that the legal profession and rule of law can thrive. Making sure that experienced and qualified judges, seeking retention, are retained in office is essential to maintaining the stability and independence of our judiciary in Pennsylvania and vital to preserving the rule of law.

Thank you very much!