

TESTIMONY OF EDWIN W. KELLY
IN OPPOSITION TO
HOUSE RESOLUTION 7
FEBRUARY 22, 2011

Mr. Chairman and members of the Committee, I appreciate the opportunity to appear before you today to speak in opposition to HR 7.

I am here with great respect and reverence for the role this Committee and this legislature are being asked to assume in what I believe is probably the most serious action this body can be asked to take. And I am mindful that this hearing today is not about whether Marital Master Phil Cross should be impeached but, rather, whether this Committee should essentially advise the House of Representatives to authorize a full investigation.

I feel certain that some of you may believe that this is only a small step to take and that there is virtually no harm in at least investigating the facts raised by the Resolution. However, Mr. Chairman, members of the Committee, if you will indulge me, I want you to know that it is my strongly held belief that the action you are being asked to take today, would have consequences every bit as momentous as the potential result, an impeachment hearing. The resolution before you today involves one marital master, but, if it moves forward, the long-term impact has the potential to undermine our justice system and I believe, violate basic Constitutional principles that are at the core of our democracy, principles that all of us, judges and legislators, have pledged to uphold.

In our state and national history, the awesome power of the House to impeach and the Senate to convict a public official of an impeachable offense has been used exceedingly sparingly. In fact, since 1790 it has been used only twice in New Hampshire. With that in mind, and because of the significant constitutional implications of this action, I urge each of you not only to exercise great restraint but also ask you to adopt, formally as a Committee, and personally in each of your own minds and hearts, a standard by which you make this decision.

It seems to me that for a public official, especially one appointed by the Governor and Council and sworn to uphold our constitutions to be

impeached, the standard for the commencement of an investigation ought to demand, at the very least, that each of you find that the allegations contained in House Resolution 7, if assumed to be true and if proven:

- Would more likely than not result in sufficient facts to form the basis of an Impeachment vote; and**
- That those allegations are not meant to subvert the judicial process established by the constitution and laws of the state.**

In other words, before voting in favor of a full investigation, I believe this Committee should make a conscious finding that the allegations in this Resolution would, if proven, constitute impeachable offenses and that this rarely used action is not designed to take the place of the right of our citizens, when they disagree with a judge's order, to have their appeals heard by the Supreme Court as our constitution provides.

I respectfully suggest that if you believe that the allegations, as set forth in this Resolution, are simply complaints about the process that was utilized in the context of matters properly before the courts or that the allegations are essentially based on a disagreement or dissatisfaction with a decision a master, a judge or the Supreme Court made, then to forward this case for further investigation would be a great injustice.

More importantly, however, it would threaten the constitutional admonishment that the legislative, executive and judicial branches, "...be kept as separate from and independent of each other as the nature of a free government will admit or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity." Those words, of course, are taken from the Separation of Powers provision of our NH Constitution, found at Part 1, Article 37th, and have been in full force and effect since its adoption in 1784.

Mr. Chairman, I must say that I had a very difficult time determining the specifics of the allegations from a reading of the Resolution, however, one thing is very clear and that is that each of the four allegations is related to a decision the master made in the exercise of his judicial discretion within the context of cases that were properly before him. I have no intention, nor would it be appropriate for me to introduce the facts behind any of these allegations, however, I do want

to take just a very few moments to review each of the allegations with you because I think it is critical that you consider a different perspective on those allegations than what is presented by the proponents.

Allegation #1 alleges what amounts to a disagreement with the order of 2 courts, involving a marital master and two judges, that David Johnson was in contempt of court. Our judicial process and both the New Hampshire and United States constitutions already provide for a complete review of this decision.

Mr. Johnson had available to him the ability to Petition the superior court for a review of the Order detaining him for civil contempt of court. In fact, Mr. Johnson, through his lawyer, did file such a petition which was rejected by the superior court. Further exercising his constitutional rights of appeal he also filed an appeal with the N.H. Supreme Court on 4 other rulings made in his case and in each one, the order of the Master was affirmed. Said differently, 3 different unrelated bodies of judicial officers considered the matter before them and ruled independently against Mr. Johnson.

My point is this. Mr. Johnson has made full use of the protections guaranteed him by our constitutions and now he is asking that this body find that those very same orders affirmed by a superior court judge and the 5 members of the N.H. Supreme court are evidence of malpractice and maladministration and should result in his impeachment. This would amount to his 4th bite at the apple.

The second allegation of the Resolution alleges the master somehow, himself, defrauded the court by making alterations in documents submitted to the court. The first question the Committee ought to be asking itself is how it is possible for a court to defraud itself? Every day in every court in the land, judges review proposed agreements that are signed and submitted by parties. However, no such document can become a court order unless the judge reviews and approves it. If a judge is not in agreement with it then the document must be made to conform to the judgment of the court. In short, it is the judge's job to change the terms of documents submitted to the court if the court does not agree with the terms of the documents. And, again, it is the right of the parties to appeal the decision to change the proposal if they disagree.

The third paragraph alleges the Master held a hearing for a purpose other than that for which it was noticed. I feel compelled to point out that there is absolutely no specificity to this allegation nor was there specificity to Allegation #2. How on earth this Committee or Master Cross or anyone else can be expected to even begin to respond to an allegation like this is beyond me. This master has conducted literally thousands of hearings and issued thousands of orders in his time on the bench. This allegation doesn't even bear a litigant's name much less a timeframe. To put the problem of lack of specificity in perspective, as near as we can estimate, Master Cross has been assigned to more than 6,000 cases in his 6 years as a marital master. This resolution speaks to 4 instances in those thousands of cases.

At some point, it would seem to me that very basic issues of due process, fairness and justice would require enough specificity in this Resolution so this Committee knows what it is being asked to investigate and this Marital Master knows what he is being asked to defend against. I would ask each of you as public officials of this state what your reaction might be if someone sought to launch an investigation that might lead to your impeachment and ultimate removal from office with an allegation as undefined and nonspecific as this one.

Finally, paragraph 4 of the Resolution again alleges without any specificity about case name, time frame or details of the allegation that the master did not allow some unnamed party or parties to present evidence.

It is the function of every judge and master to decide what evidence should be allowed to be considered in the courtroom. The fact that you bring a case in a court does not mean that you have the unfettered right to say whatever you want to say. In our system it is the function of every trial judge to determine what is relevant, what is material, and what is reliable evidence using their professional experience as well as a body of case law handed down through the years as guides in those decisions. If a party disagrees with the ruling of a judge or master the recourse provided by our laws and constitution is to appeal the decision to the Supreme Court. Indeed, that was one of the issues raised in Mr. Johnson's appeal to the Supreme Court that I mentioned earlier and rejected by the Supreme Court. However, I have no idea, and I don't

think you can either, if this allegation relates to Mr. Johnson or someone else.

Please just pause and consider this...if you decide to launch a full investigation in this case based on these allegations, is it your intention that every litigant around the state who is unhappy with a decision of a judge or master will be entitled to come to this body to seek and receive a full investigation of the judge or master who made that decision? Where would you draw the line? Keep in mind that every year more than 220,000 cases are filed in our courts and believe me not every criminal defendant who is convicted and sentenced is pleased with every decision, not every injured person who is found not to be eligible for compensation is happy and not every parent who believes their children need more child support than the court ordered is pleased.

Consider also, that in every case there are at least two parties. In the cases raised as the basis for this Resolution, I daresay, the parties on the other side of these cases may not see the facts quite as presented here. For every act of bias against a party that is alleged, there will be a party that says the master found the facts correctly , for every argument that evidence was kept out unfairly there will be a party who says the evidence was properly excluded. Is the legislature to become a 400 member appellate court in these cases? Is this how the framers of our constitution expected our system of government to work? The same framers who wrote so clearly about the separation of powers and the need, in our democracy, for an independent judiciary?

Mr. Chairman and members of the Committee, I am grateful for your attention and want to raise just one final, but very significant, point. Last session a Bill of Address on these issues against this Marital Master was presented to this House. It was fully investigated by a joint committee of the house and senate and this House of Representatives rejected the Bill by a vote of 170-127. That was not even one year ago.

Under our constitution, a Bill of Address may be appropriate in cases where there, "...shall not be a cause which is a sufficient ground for impeachment." In other words, an impeachment proceeding requires even higher standards than the process for Bills of Address. If the House did not believe these very same facts rose to the level of a Bill of

Address, I respectfully ask how this Committee can justify moving forward with these same facts as part of an Impeachment process?

And, maybe more importantly, where does this end? Can the newly constituted membership of the next biennial session of this House bring the same facts forward again?

I conclude where I began, and that is with a plea that you consider this first step in this process carefully, deliberately and with restraint and that you consider the implications not only for the proponents of this Resolution and for Master Cross but, even more importantly, for our constitutional form of government.