

*Inter Alia***Judicial Independence—and Accountability**

By Tony F. Soltani

Editor's note: The following article is in response to retired N.H. Supreme Court Associate Justice William F. Batchelder's article updating the history of judicial independence in New Hampshire, which appeared in the June issue of the New Hampshire Bar Journal.

I LIKE JUDGE Batchelder. I admire his modesty and decency as a person. I respect his intellect and diligence as a judge, or, as he would put it, a state worker. But this is not why I agree with his views on judicial independence. It is not Judge Batchelder's stature that persuades me, but his crisp reasoning. The three branches of government in New Hampshire are "co-equal." The state constitution, unlike its federal counterpart, has so proclaimed. Neither the legislature nor the judiciary could address the governor and her council out of office. Nor can the executive branch dissolve the legislature. It goes without saying that neither the executive nor the legislature should be empowered to remove duly appointed judicial officers without cause. This is pure logic and common sense. One would be hard-pressed to find much resistance to this basic notion that follows from the concept of "co-equality."

Independence is an inherent constituent of being "co-equal." However, independence should not translate into arrogance, irresponsibility, isolation or unresponsiveness. Each branch of the government must ultimately remain answerable to the people. It is sometimes difficult in positions of power to remember our fallibility. It is often too easy to dismiss criticism as ignorant or unfounded. It is much too tantalizing to underestimate the intellect of the public and the electorate.

Current state of affairs

Presently, the judicial branch is headed by the Supreme Court. The court manages the judiciary, promulgates rules and performs the functions of the highest court in the state. The members of the bench are guided by the canons of judicial conduct which have been adopted by the supreme court. These canons have a very specific scope. Clearly, a judge cannot be

disciplined for having rendered an erroneous decision. Nor could they be suspended or removed for a variety of other acts that could be just cause for the termination of ordinary employees. Judges are not susceptible to removal without cause. Judges occupy their office until the age of 70 during good behavior. The appointment of judges in New Hampshire is, for the most part, a political process. The governor nominates and the council confirms. Similarly, the process of promotion within the judicial branch is purely a political process. Again the governor nominates to a higher judicial post and the council confirms. There is no minimum requirement other than membership in the Bar. Nominees to the trial courts need not have ever tried a case in their careers; just as nominees to the appellate court need not have ever argued an appellate case. Once an appointee has been confirmed, the internal process of the judicial branch remains, for the most part, political. The method of assignment to various courts for the qualified judicial officers is matters of discretion. There are, again, no quantifiable guidelines, standards or requirements.

A confirmed special justice, qualified to sit anywhere in the state, may be called to preside over one or two sessions per month while another special justice may be assigned to a full-time post when available. These machinations remain a mystery to the public, and to most of the Bar. The counsel and the clients, most of the time, do not know who will be presiding over their case until they actually walk into the courtroom.

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Judges are humans

It is within our nature as human beings to respond to incentives—positive and negative. Sometimes this disposition has been denigrated as beastly, primitive or even selfish. Nevertheless, our history is conclusively demonstrative of the true



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nature of our being to be attracted to what we perceive as good or desirable and to avoid what we believe to be bad or harmful. Judges are no exception; they respond to positive and negative incentives. They are merely humans, although, for the most part, honest, decent, hardworking and God-fearing humans, they are humans nevertheless. They should neither deny nor apologize for their fallibility and human tendencies.

Under the present system, the judicial branch is only exposed to positive, but not negative incentives. Many if not all judges, like most other humans, are ambitious. They want to excel and obtain higher office. This is not to speak ill of them but to recognize their ambition. The possibilities are limitless. After all, former associate justice of the New Hampshire Supreme Court is now a United States Supreme Court justice. Ambition is also an altogether admirable quality. On the other hand, negative incentives, or reinforcement, is nearly non-existent. Once appointed, a judge is practically immune from those standards that apply to other "employees." They cannot be "demoted." A judge's pay cannot be docked for being tardy. A judge cannot be suspended for not finishing his or her work on time.

The low watermark of judicial conduct is that which is prohibited by the canons. The high point is the "voluntary want" to excel and in twain lies the vast latitude of discretion. One can occupy the seat without crossing the prohibited line until the 70th birthday. In the military, it is called "gold-bricking." In police service, it is called doing another day toward one's twenty."

Judges are similarly not subject to election. They do not have to face the voters at the ballot box. Thus, the judicial branch is once removed from their bosses, or the electorate. It is beyond the reach of the citizenry to impose positive or negative incentives. There is also the shroud of mystery that cloaks much of the judges' work. They come and go through different doors, they deliberate in secret, they confer privately, and they are disciplined in non-public proceedings.

The contrast

The New Hampshire voter gets a chance to throw the "bums out" of the legislative or executive branch every other year. An elected official may lose his or her seat without cause if the voters disapprove of his or her performance. This is in addition to the impeachment process that is the equivalent of removal for cause as applied to judges. The executive and the legislature deliberate openly. Neither is separated from the citizen through different entrances; nor are there any metal detectors outside the governor's office. The attendance record of all elected officials is a matter of public record. The governor's daily schedule and her attendance are available for all to see. The legislators and the governor's councilors are practically volunteers. This includes

the senate president and the speaker of the house. The governor is paid a full-time salary which is rather modest by national standards. A first-year judicial appointee is paid over \$90,000 per year.

The executive and legislature may be confronted openly and criticized. They make a point of mingling with the voters and answering the media. The politician takes heat up close and in person, in the mail, and on the telephone. They are expected to get out of the kitchen if they can't stand the heat. Judicial officers are not confronted. Not the judges, but their honor is addressed in very polite terms and requests are made in the form of prayers.

The good, the bad, and the ugly

The third branch must remain independent and indeed insulated from public clamor if it is to fulfill its constitutional mission. It should not be subject to the whim of the electorate. The function of the judiciary is worlds apart from that of the executive or the legislature. The judicial branch works in the realm of principle, while the elected officials set policy. Judges should not be punished for upholding unpopular constitutional mandates. Election of judges is not only a bad idea, but would undermine the purity of the system.

At the same time, judges must be accountable, responsive and not isolated. In order to carry out their function, the judge is granted immense power. Power has been known to corrupt. The grant of power must be maintained under scrutiny, if the judiciary is to remain impartial; and more importantly retain its perception of impartiality. In sharp contrast to our custom, the inability to deny "raises" and to "demote" and finally the shroud of secrecy frustrate the average citizen.

The only way to vent the frustration is to speak. To speak loud, and clear, in terms that turn heads and on the biggest soapbox that one can find. The judicial branch has to grow a thick skin in return for the insulation that it has earned. The citizen must be allowed to speak his or her piece in the most compelling terms that please him or her. More importantly the citizen is to be *heard* by the judiciary.

Our judges have done well over the years. But anecdotes, similar to that given by Judge Batchelder, repeat themselves everyday to this day and beyond. Most lawyers, including myself have heard a judge say words to the effect of "I don't care what the statute says" or "here I write the law." Some but not nearly all of the criticism that is leveled is well founded and worthy of consideration.

The courts are not being administered to meet their customers' needs. I look around at 8:30 a.m. in some courts and try to calculate the hourly rate of all those present. I try to tally the cost directly to the taxpayers and indirectly to the economy. It is simply enormous! To top it off, if one dares to assert the right to trial, he or she is promptly doomed to the bottom of the docket. It will often be two,

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three or perhaps four hours before the trial begins. Meanwhile, the client and the lawyer must remain in the courthouse. In some jurisdictions, we incarcerate the lawyers along with the accused for daring to ask for a trial. After the wait, the accused faces a judge who is by then tired, probably hungry with a million other thoughts in mind. Win, lose or draw, the client walks away with the worst perception of our system.

Suffice it to say an elected official would not dare waste in this manner. When I chaired a planning board, we often had several public hearings scheduled to be heard during the same session. Had I required all the applicants, lawyers and surveyors to appear at the same time, I would have promptly lost my chairmanship. At the next election, even my wife would vote for my opponent as she should. I do not know of a single agency of the state government that operates in the manner of these courts.

It is also customary to reward good employees, through promotion, and merit raises. Judges are immune to this American custom. Often clients ask me if a particular judge is always late, rude or inattentive. I say yes. The next question is predictable: "How come he/she can get away with it?" I do not know the answer. As an active member of the system, I remain completely in the dark about how the members of the judiciary are evaluated. Does anyone even keep track of the hours worked or the timeliness of the work performed? If there is a mechanism in place the public should be told. The perception, in this instance is just as important as the underlying fact.

These criticisms are aimed at the administration of justice. Unfortunately, more often than not, they are appropriate. But the substance of the judicial decisions are also subject to attack by the public, the litigants and the media. We should listen to all of them. First, some decisions are simply erroneous, so the critic is correct. Second, we often do not do a very good job in explaining the decisions. There is usually no logic or reasoning presented in support of the decisions. The words, "granted," "denied," or "guilty" are far too often our only insight into the workings of the judge's mind. Third, legitimate differing interpretations based on ideological differences are an inherent part of our system. The New Hampshire Supreme Court does not

apply the same rules of construction as the Warren Court did. The debate will rage until one side convinces the other. This is the way our system works. Fourth and last, there is always erroneous criticism. Such bad criticism must be aired; and if truly bad it will fall on deaf ears. The criticism leveled against Justice Johnson in the Grafton County jury instruction case did not go very far, although it used strong language and appeared in the state's largest newspaper. Superior Court Judge William Johnson is presently the senior associate justice of the Supreme Court.

Any suggestions?

I don't pretend to know the whole truth, but the judiciary could improve. There are different aspects of its functions that may be subjected to change:

Selection. The process to select judges should be designed to establish tangible or quantifiable standards. Some states have developed nominating commissions; yet others have selection committees. I do not advocate additional layers of bureaucracy. However, as a newspaper article put it, the exclusive factor in becoming a judge should not be one's proximity to the governor. I do propose that anything, including a judicial "lottery" would be an improvement over a system of no standards, no qualifications and no factors other than proximity to the governor. If nothing else, change—any change—would improve the public perception of the judicial branch. A judge who won appointment through a lottery would probably be better perceived than one who got the appointment for being the friend of a politician.

Retention. There is no magical advantage to a term of office expiring at age 70. There is no cosmic advantage to the 30-year tenure as opposed to 40 or perhaps ten. It is an arbitrary line drawn in the sand. The original theory is that the judge would be insulated until retirement. But, as earlier demonstrated, the positive incentives remain in place, and the insulation factor which once assured "life" tenure is no longer present. I argue that a shorter tenure is probably more appropriate for our times. I have sympathetically heard complaints about hearing the same story over and over again, only with new faces on the witness stand. Judges do get bored with the monotony and sometimes they burn out. On the other hand, there is much to be said for judicial experience. A

judge acquires invaluable experience on the bench that is beneficial to litigants and the efficiency of the system.

There is a balance to be struck between having heard it all and having not heard anything. I do not pretend to know the magic number. But I do assert that a shorter term of office with the possibility of reappointment is probably better than the present system. Although not a great fan of the Missouri plan, I would submit that even that plan would be an improvement over the present system. Under the Missouri plan, an originally appointed judge faces re-election on a yes-no ballot without an opponent.

The merit system. I recently received a questionnaire used by the Probate Court to evaluate its judges. It had developed no less than 30 tangible, clearly ascertainable and desirable qualities in a judge. This can be expanded and implemented on a regular basis throughout the system. The judicial appointees should also be subject to reviews on criteria that are generally applicable to employees in government service, such as diligence, timeliness, attendance, and initiative. All raises, promotions, and other incentives (such as paid travel) should be directed correlated to the merit reviews. Additionally, these reviews are to be made available to the reappointing authority.

Turn on the lights. The era when mystery earned respect has long passed. We now, as an educated society, value enlightenment, reason, knowledge and diligence.

In the ancient navies, the captain and his executive officers were inval-

able. Their ability to read the stars and use the sextant appeared divine to the crew. It was only the select few crewmembers, after years of loyal service, who would be allowed to learn about navigation. It remained a mystery for others who often attributed supernatural qualities to those able to navigate.

In the 1990s, the public has long learned the secrets of the legal sextant. The people are able to comprehend and understand the law. The judiciary may no longer maintain respect through an aura of mysticism, but by openness, explanations and public access. If the judiciary is to navigate the good ship New Hampshire through the troubled waters of the next century, it must maintain the confidence of its crew by sharing and diffusing knowledge. Maintaining the shroud of mystery is probably the single most serious threat to the stability and the legitimacy of the judicial branch. The more the public knows, the merrier.

Bad ideas will wither away if allowed to see the light of public scrutiny. On the contrary, they fester into dangerous infections if allowed to remain in the dark.

Tony F. Soltani, a sole practitioner in Epsom, is an at-large member of the NHBA Board of Governors. The views expressed here are not necessarily those of the New Hampshire Bar Association, its Board of Governors, or staff. Responses and other letters to Morning Mail are invited. Send submissions to Bar News Editor, NHBA, 112 Pleasant Street, Concord, NH 03301. The Bar News editorial policy appears on page 5.

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