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Please Be Careful With The Constitution: A Call for the Preservation of Judicial Independence

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The courts were now brought under popular control and the judges chosen by the legislature without any tenure. And the legislature, now free of any restraint, proceeded to exercise judicial power rather freely in such matters as granting divorces, granting new trials, quieting title to land, partitioning real estate, and miscellaneous acts relating to minor children, mentally incompetent persons, and estates of deceased persons.

A view of the future if the various constitutional amendments to "reform" the judiciary now pending before the New Hampshire legislature are adopted? No. This is Richard F. Upton's description of New Hampshire government under the first Constitution adopted in Exeter, New Hampshire on January 5, 1776 by the Fifth Provincial Congress of New Hampshire.[1] As he explained: "[t]here was no Bill of Rights nor any checks and balances; these were not thought necessary so long as the legislature, which held all powers of government, was directly responsible to the people who by frequent elections could correct any errors."

The intent and structure of the Constitution of 1784, adopted five years before the federal constitution, reflect the experience of the citizens of New Hampshire under the earlier constitution which had reposed all power in the "Supreme Legislature." Part I of the 1784 Constitution contains a Bill of Rights, guaranteeing individual liberties to the people and Article 35, which affirms the principle of judicial independence deemed "essential to the preservation of the rights of every individual, his life, liberty, property and character," was deliberately included in the Bill of Rights. Article 35 makes explicit that lifetime tenure and "honorable salaries" for the justices of the Supreme Court were chosen by the people as the means for ensuring the protection of individual rights:

> It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit. It is therefore not only the best policy, *but for the security of the people*, that the judges of the supreme judicial court should hold their offices so long as they behave well...and that they should have honorable salaries, ascertained and established by standing laws. (emphasis supplied).

Article 73, also adopted in 1784, extends the same guarantee of lifetime tenure to the judges of the Superior Court and to such lower courts "as the legislature may establish." The Constitution of 1784, adopted out of dissatisfaction by the people with the concentration of all power in the Legislature, established tenure for the judiciary during good behavior[2] to foster judicial independence.[3] The delegates to the constitutional

conventions that led to the 1784 Constitution believed that protection from arbitrary removal would ensure not only that judges could rule free from political influences, but also that the most qualified individuals would seek hold judicial office[4], the same arguments later made forcefully by Alexander Hamilton in *Federalist No. 78.*

Alexander Hamilton recognized in *Federalist No. 78*, as did the framers in the Constitution of 1784, that judicial independence achieved through lifetime tenure and "honorable salaries" was not intended to benefit the members of the judiciary, but to safeguard the rights guaranteed to the citizens by the Constitution:

> That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable to the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.

Articles 35 and 73 of this early Constitution have remained virtually unchanged for over two hundred years[5] , but it is these provisions which must be amended if the legislative proposals for the imposition of term and/or periodic retention evaluations are to be implemented. The experiment of 1776 with a "Supreme Legislature" suggests that the people should proceed with caution before remedying a perceived arrogation of power by the judicial branch by transferring it to a legislature that is subject to the changing will of given majority at each election.

Article 37 of the 1784 Constitution, which requires the three branches of government to "be kept as separate from, and independent of, each other, as the nature of a free government will admit..., " is also contained within the Bill of Rights, reflecting the belief of the people that the separation of power, and the institutional independence of the judiciary subject to the system of constitutional checks and balances[6] , was equally essential to the preservation of individual liberty. This was made clear in an address before the 1781 constitutional convention where it was explained to the delegates that without separation of powers, "the great barrier against oppression would be at once destroyed: the laws would be made to bend to the will of that power which sought to execute them with the most unbridled rapacity."[7]

The Constitution of 1784 was soon tested. In *Merrill v. Sherburne, 1 N.H. 199 (1818),* the Court declared unconstitutional an act of the Legislature granting Merrill a new trial after a final judgment of the Probate Court in favor of the defendants had been affirmed. When Merrill sought to re-file his case, the defendants moved to quash the proceedings on the ground that the act of the legislature granting Merrill a new trial exceeded the legislature's powers under the Constitution of 1784.

The Court immediately recognized that the decision it had to make involved "[a] question of no small magnitude":

> [t]he motion contains a charge, that encroachments have been made upon constitutional rights; and though in form the measures of a branch of the government towards a few individuals only are arraigned, yet in substance, these measures affect the interest of all, as the rule of construction adopted today, may become precedent tomorrow, and be adduced to vindicate, or oppose, similar conduct towards every member of society.

Relying on both *Federalist No. 78* and Part I, Article 8[8] of the Constitution of 1784, the Court acknowledged that the Constitution was a fundamental law, created by the people "as an expression of their will," and that the

members of the Legislature were bound by their oaths of office and the terms of the Constitution itself [9] from enacting legislation contrary to the intention of the people as expressed in the Constitution. Quoting from *Federalist No. 78,* the Court stated:

Nor does this conclusion by any means presuppose a superiority of the judicial to the legislative power. It only presupposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people, declared in the constitution, the judges ought to be governed by the latter, rather than the former.

In this brief, but eloquent opinion, the New Hampshire Supreme Court affirmed that the separation of the judicial power from the executive and legislative powers was essential to safeguard the rights of individuals from the will of the elected majority, or as Montesquieu observed, "[i]ndeed there is no liberty, if the power of judging be not separated from the legislative and executive powers."[10]

Those who seek to impose limits on the "power of judging" argue that in recent, politically charged decisions, the Court has gone beyond the long-acknowledged "province of the judicial department to say what the law is," *Marbury v. Madison, 505 U.S. 137 (1803)*, and is, in fact, legislating. Decisional independence — the ability of an individual judge to make decisions, whether popular or not, without being influenced by political and/or financial pressure — is characterized, and then condemned by critics of the judiciary as "judicial activism." Institutional independence, the separation of the judicial branch from the legislative and executive, is similarly disparaged as "the arrogance of the judiciary."

Efforts to make individual judges more easily swayed by the turbulent winds of public opinion through term limits, elections, or retention evaluations by the executive or legislative branches ignore the constitutional mandate that lifetime tenure is, under the terms of the current state constitution, "not only the best policy," but necessary "for the security of the rights of the people."[11] The framers of New Hampshire's Constitution of 1784 clearly recognized that judges whose tenure was dependent upon the whims of the King or those who controlled the Legislature could not be expected to protect the rights of those who lacked political power or access.

Efforts to limit or restrain the judicial power of the state that is constitutionally vested in the "supreme court, a trial court of general jurisdiction known as the superior court, and such lower courts as the legislature may establish" through undue legislative interference with the administration of the court system or severe financial limitations threaten not only the institutional independence of the judiciary, but the right of every citizen, under Part I, Article 14 of the Constitution, "to obtain right and justice freely...promptly, and without delay."[12] The institutional independence of the judiciary requires that the court be allowed to carry out its constitutional "power of expounding and applying [the laws] to each particular case" without excessive legislative interference over the manner in, or the conditions under which justice is administered, for "[i]f the legislative and judicial powers be united, the maker of the law would be the interpreter thereof and might make it speak what language best pleased him, to the total abolition of justice."[13]

Judicial decisions protecting individual rights are not always decisions that are popular with the Legislature or the Governor or even large segments of the population.[14] But those who seek to change the Constitution to make it easier to remove judges who issue unpopular decisions — or even to remove unpopular judges — in response to pressure from politicians, the

media, and even the public for "judicial reform" should understand the consequences of hasty and injudicious action for, as Hamilton stated so eloquently in *Federalist No. 78*:

> [t]his independence of judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humours, which the arts of designing men, or the influences of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minority party in the community.[15]

An argument against the enactment of judicial reforms that appeared in *The Keene Sentinel* in March of this year used the controversial *Claremont* decision as an example of how public reaction can change with "better information" and "more deliberate reflection." Whether or not one agrees with its conclusion, the editorial demonstrated the relevance of Hamilton's observations on the importance of judicial independence in a democratic society:

Think of it this way. The Supreme Court's *Claremont* school-funding decision caused an explosion of rancor in Concord when it was issued in 1997.

But now, more than three years later, a large majority of New Hampshire's citizens and politicians recognize the decision's wisdom and fairness.

Yet, what would have happened if a system of judicial term limits or a radical review process had been in place before that case was decided?

Maybe the justices would have followed their constitutional convictions. Yet, it is equally likely that they would have found a way to overlook the state's school-funding inequities, to avoid the possibility that they might end up pensionless and out of a job.[16]

Of particular concern is what has been described by members of the legislature and some of the outspoken media as the public's desire for "judicial reform." Several legislative leaders have been quoted as saying that "judicial reform" will be undertaken by legislative action regardless of any input from the Bench and the Bar, thus indicating that the lawmakers have pre-judged issues without a full understanding of the full consequences of their actions in the name of "judicial reform." Were a judge not be willing to listen to both sides of a controversy, he or she would be the subject of harsh and appropriate criticism. The citizens of the State of New Hampshire should expect no less from the legislative branch.

There is no greater danger to the freedoms of citizens of the "Live Free or Die" state than the prospect that the independence of the judiciary be compromised by well-intentioned, but ill-considered action:

> He has obstructed the Administration of Justice by refusing to assent to laws for establishing judicial powers...He has made judges dependent on his Will alone, for the Tenure of their offices..."[17]

Thus reads one of the grievances against the King of England contained in the Declaration of Independence that led to the confrontation between the American Colonies and their government, setting the stage for the American Revolution and the resulting "great experiment" in democracy. It was this experience of our forefathers that prompted them to include a provision in

the federal constitution guaranteeing that there would be three independent co-equal branches of government, that the members of the judiciary be appointed for life and that their salaries not be reduced, all to ensure that independence.

It was thus recognized by the Framers that essential to the functioning of a democratic system of government is an independent judiciary, one that is free from outside influence and interference. As John Adams put it so eloquently in 1776:

> The judges themselves should always be persons) of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness and attention;....Their minds should not be distracted with jarring interests; **they should not be dependent upon any (person) or body of (persons),**[18]

One of the ways that judicial independence can be severely compromised is a system where the tenure of a judge is dependent upon the judgment of others, whether they are representatives of the legislative or executive branch, a combination of the two, or another body altogether. It has been suggested that this would constitute a method by which the public would be assured that judges are held "accountable." While that sentiment may be legitimate, consideration must be given to the other side of the coin, that is, the pressure that would inevitably result in a judge bowing to the popular opinion of the moment.

A judge is called upon on a daily basis to decide cases on the basis of facts established by the evidence and the law, regardless of how popular or unpopular the decision may be to others. At times, he or she is called upon to decide cases involving the other branches of government. The judge must exercise independent judgment, subject to no outside influences, independent and as fair and as impartial "as the lot of humanity permits." Decisions of a court of law must not be based upon public or media opinion, any sort of political pressure, or the fear that one's position might be lost. In the event the judge's opinions are made subject to review and his or her tenure affected by that review, it would be naive to think that decisions made were not influenced by the prospect that the judge's entire future may be jeopardized. As one commentator put it — "Once you know there is a crocodile in your bathtub, it's pretty hard to ignore it."

It is the judge's obligation to protect every individual's rights, regardless of whether that individual is potent or powerless, rich or poor, popular or unpopular, and regardless of their personal beliefs, ethnic background, or the pigmentation of their skin. The American democracy is not governed solely by majority rule, and certainly not by some politically powerful group or agenda-motivated media. One of the fundamental goals of the state and federal constitutions is to protect the minority from the government and the tyranny of the majority. Judges are required by their oaths not to be to be persuaded by the "howling of the mob."

As examples of how the independence of the judiciary has moved our country forward beyond the then current state of public opinion, the civil rights of all citizens were advanced by rulings of federal judges, appointed to life-time tenure, prohibiting the continuance of racially segregated schools and guaranteeing voters' rights. Were those federal judges in the 1950's subject to review and renewal procedures, is there not a substantial likelihood that segregated schools would persist in the South and black citizens would continue to have their votes uncounted at the ballot box? Would judges so "accountable" to the whims and whimsies of others of others been as likely to strike down poll taxes, literacy tests and lynching, to protect citizens from warrantless searches and seizures and from coerced confessions to crimes?

The case is made by the opinions attributed to members of the legislature and other public and political figures that the decision of the New Hampshire Supreme Court in *Sirrell v. State of New Hampshire*, No. 2001-063 decided May 3, 2001, the case involving the constitutionality of the state-wide property tax, was politically motivated, an illegitimate leap of logic unjustified on any rational basis. Had the justices been subject to review by the other branches of government, the decision could be legitimately questioned as to whether it was prompted not by the objective analysis of the law and the facts supported by the evidence, but by the motive to gain approval in the eyes of those performing the evaluation, so as not to risk legislative or executive reprisal.

In the light of these so-called "judicial reforms" (no one has been calling them court improvements, just reforms), who is to protect the interests of those who have no power in the legislature? Who will be left to protect the governed against the government? Who will protect the unprotected?

It is axiomatic that there will continue to be tension between the three independent branches of government, a healthy situation for the democratic form of government. But when one or another branch of government seeks to dominate over another, and is successful in that effort, the system will simply fail.

Take the case that came up in our neighboring state of Vermont. A judge whose term was coming up for renewal by the state legislature was opposed by an attorney member of that body for no other reason that the judge's spouse had prosecuted the attorney before Vermont's equivalent of the Professional Conduct Committee. As a result, the State came within several votes of not renewing the term of a highly respected and competent judge. To cite an example from another State, an appellate judge was not renewed for no other reason than she had participated in an unpopular decision involving the imposition of the death penalty.

The framers of the New Hampshire constitution conscientiously guaranteed judges life-time (to age 70) tenure and did not provide for their removal whenever they made a decision with which the legislature or executive disagreed. To suggest that a judge's office should be limited because a decision is somehow not acceptable to a vocal non-prevailing party or the "howling mob" does a grave disservice to the principle of an independent judiciary and, even more significantly, misleads the public as to the role judges play in a constitutional democracy.

It has been said that court reform is not for the short-winded; it takes a considerable amount of time and effort to effect meaningful court reform if that reform is to represent court improvement. Before any change to the state constitution is undertaken, there should be a full understanding of the consequences of any constitutional amendment affecting the tenure and terms of office of judges.

Not all of the proposed judicial reforms are "dangerous innovations," but those proponents of judicial reforms that require amendment of the Constitution of 1784 that has withstood, remarkably, the inherent "jealousies" that arise between the legislative and judicial branches "as to the exercise of their respective powers"[19] for more than two centuries, should proceed with caution lest they cause the "serious oppressions of the minority party in the community" that the Constitution of 1784's Bill of Rights was intended to protect.

ENDNOTES

1. The Constitution of 1776, which was not ratified by the

people, was, by its terms, only intended by the Fifth Provincial Congress "to continue during the present unhappy and unnatural contest with Great Britain." In his unpublished article, "The Constitution of 1776 From The Viewpoint of the Legislature," Upton describes the eight year regime under the Constitution of 1776 as "the high water mark of unchecked popular government and of faith in the infallibility of popular majorities."

2. "Good Behavior" was "a term of art under English law, and it meant life tenure. It stood in stark contrast to tenure at the pleasure of the Crown and freed judges of the threat of removal, except for disgraceful conduct — which explicitly did not extend to the substance of their opinions." Joseph, "Judicial Imperfection and Judicial Independence," ABA *Litigation*, Vol. 23, No. 4 (Summer 1997).

3. *Grinnell v. State of New Hampshire*, 121 N.H. 823, 825 (1981).

4. J. Colby, *Manual of the Constitution of the State of New Hampshire* 107.

5. Article 35 was amended once in 1792 to provide for age limitations as provided by the Constitution

6. James Madison, in *Federalist No. 47,* cited the New Hampshire Constitution of 1784 as properly recognizing "the impossibility and inexpediency" of the complete independence of the three branches, and described the system of checks and balances, including the appointment of members of the judiciary by the executive branch and the legislature's role in the impeachment of judges; *see also, Merrill v. Sherburne*, 1 N.H. 1999 (1818) ("[a]ll of the judiciary were made dependent on the executive for appointments and on the legislature and the executive for the erection of courts, the apportionment of jurisdiction, for compensation and for removal by address.").

7. *Grinnell, supra*, 121 N.H. at 827, citing J. Colby, *Manual of the Constitution of New Hampshire* 102 (1902); *see also*, Douglas, "Judicial Review and the Separation of Powers Under The New Hampshire Constitutions of 1776 and 1784," 18 *N.H.B.J.* 250, 264 (1976).

8. Part I, Article 8 of the 1784 Constitution provided: "All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore should be open, accessible, accountable and responsive."

9. Part II, Article 5 of the 1784 Constitution granted to the

Legislature "full power and authority...to make, ordain, and establish, all manners of wholesome, reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties, or without, so as the same be not repugnant or contrary to this constitution..."

10. Montesquieu, "De L'Esprit des Lois" (1748).

11. Part I, Article 35 of the Constitution of 1784.

12. *See, e.g.,* Recommendations 6 and 7 of "The Report of the Task Force On The Role of the Legislature in Setting the Power and Jurisdiction of the Courts," reprinted from *Uncertain Justice: Politics In America's Courts* (The Century Foundation, Inc. 2000).

13. 9 Provincial Papers 878-9, cited in *Ashuelot R.R. Co. V. Elliot*, 58 N.H. 451 (1878).

14. *See*, Lynn, "Judicial Rule-Making and The Separation of Powers: The Need for Constitutional Reform," N.H.B.J, Vol. 42, No. 1 at 61 (March 2001) ("The price of judicial independence is that courts are fundamentally undemocratic institutions. This is surely a price worth paying in order to insure that the courts will be there to protect the constitutional rights of *all* persons, including particularly minorities and others who may be out of favor with the political winds of the moment.")

16. "Misguided Judicial 'Reforms' Could Cause Bigger Problems," The Keene Sentinel (March 29, 2001).

17. A Declaration by the Representatives of the United States in Congress Assembled, July 4, 1776.

18. John Adams, Thoughts on Government, April 1776, Papers 4:86-93.

19. *Merrill v. Sherburne*, 1 N.H. 199 (1818)

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