

## **NH Supreme Court Unaccountable to the People**

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### **Part 1**

"The 'balance of powers' is supposed to allow any of the three branches to block an unconstitutional order from another — otherwise we would only need one branch of government: the courts. You seem...to consider the judges as the ultimate arbiters of all Constitutional questions: a very dangerous doctrine indeed and one which would place us under the despotism of an oligarchy." — Thomas Jefferson

Once again, the New Hampshire legislature finds itself confronting the state's Supreme Court. The most recent display of arrogance by the court is seen as a desperate attempt to further distance the court from any semblance of accountability.

Legislators who have been attempting to bring this run amuck court system to bay have merely had to sit back and watch as the court continues to swirl down a black hole of head spinning pomposity and self-importance.

The list of abuses goes all the way back to the Fairbanks case where a District Court Judge, while simultaneously acting in private practice as a lawyer, absconded with client money. Complaints and evidence were kept secret from the public. It has continued through the conflict of interest exhibited in the Supreme Court Justice Thayer divorce case, the flawed recusal policy that came to light in that investigation, the existence of secret trial dockets, the inappropriate lobbying by Associate Justices in the aftermath of the Chief Justice's impeachment trial, etc., etc.

The chief justice has stated that, although the legislature is charged with appropriating money for the operation of the court, it could only set the bottom line. He claims the authority to spend it however he wants. Purportedly in the interest of saving \$250,000, Superior Court Chief Judge Walter Murphy has suspended jury trials for five of the next fifteen months -- ignoring the Bill of Rights of both the federal constitution which guarantees a "speedy and public" trial and the state constitution which guarantees a trial "promptly and without delay". The court has also overlooked the old admonishment that "justice delayed is justice denied".

Since the legislature did, in fact, increase the appropriation to the courts in the last budget rather than decrease it, it has decided to continue with a performance audit which had commenced before the start of last year's impeachment proceedings. The audit had been suspended as a courtesy during that dark blight on our history.

The supreme court has now rejected the right of the legislature to audit the administrative workings of the court system. An October 11, 2001 letter from Chief Justice Brock misuses the separation of powers language of Article 37, Part I of the state constitution in an effort to escape public oversight of the court system which he administers.

But with a separation of powers goes a right of the people, through their elected representatives, to exercise prudent checks and balances. The state constitution, again in Part I, the Bill of Rights, establishes the Accountability of Magistrates and Officers in Article 8. In Part II of that constitution, which is the Form of Government, Article 73 states that the judiciary shall "hold their offices during good behavior". How can the legislature determine accountability or "good behavior" without the check of an administrative performance audit?

Next week's column will take a closer look at the legislature's attempt to audit the court and the court's refusal to permit it.

## **Part 2**

"The candid citizen must confess that, if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."  
— A. Lincoln,  
First Inaugural Address (Mar. 4, 1861).

In order to fulfill its obligation to perform constitutional checks and balances on other branches of government, the New Hampshire legislature notified the NH Supreme Court that it would resume its legislative performance review of the Supreme Court's administrative procedures.

The performance review began before the court and the legislature became embroiled in the impeachment proceedings of last year. Due to the sensitivity of those proceedings, the review was suspended so as to not give the appearance of bias during the hearings. The constitution requires in at least two instances that the people, through their legislature, needed to keep the other branches accountable and determine the "good behavior" of judges who are appointed for life.

Because we have no judicial term limits, there is a general misconception among the public that judges here are appointed for life. That is NOT the case. Judges are appointed for as long as they exercise "good behavior." The founders of our Constitution certainly didn't intend for us to just appoint judges for life and forget them and let them go and do anything they want and be totally unaccountable.

The form of "term limits" we have in our Constitution is the restriction that they can remain judges as long as they "behave well" and what constitutes "good behavior" is subject to the interpretation of the people at any time. Their terms would then be "limited" by impeachment or address by the legislature. Other states can simply wait and either not elect them or appoint them again if they encounter "bad behavior."

It is important to stress that a performance audit would not be a wide ranging one. The audit is narrowly tailored to answer the following question: Do current court management practices and the management practices of the Administrative Office of the Court promote efficient and effective operations? The legislature has clearly stated that the audit does not intend, nor would the legislature permit, "an inquiry into the process by which the court reaches substantive decisions on cases". But establishing policy and ensuring that the taxing power is conducted wisely is "a core function of the legislature".

But the New Hampshire Supreme Court has again gone into a "circle the wagons" mode. They have sent a letter to the legislature that they object to a performance audit and will agree only to a fiscal audit. Anyone who has ever been in business knows that a full audit considers more than mere numbers. It considers the administrative procedures from which those numbers result. An administrative "performance audit" is just such an audit.

The legislature will meet with the court to discuss the court's concerns. Failing to agree with those concerns, the committee will proceed. It will be interesting if the Legislative Budget auditors knock on the door of the Supreme Court only to be turned away -- while the cameras roll.