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## ***Bad Precedent:***

*Inquiry Concerning Judge  
Prompts an Inquiry about Civil Liberty  
and Judicial Independence*

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# Bad Precedent:

## *Inquiry Concerning Judge Prompts an Inquiry About Civil Liberty and Judicial Independence*<sup>1</sup>

### I. Introduction

In a development widely underappreciated by the local media, the Utah Supreme Court recently handed down an opinion with major ramifications for civil liberty and judicial independence in the State of Utah.

Styled as *In re Inquiry Concerning Judge Joseph W. Anderson*,<sup>2</sup> the justices' opinion ordered that Judge Joseph W. Anderson be removed from the bench for the Utah Third District Juvenile Court. An appendix to this article includes key excerpts from the four-justice majority opinion and the partial dissent of Associate Chief Justice Matthew B. Durrant.

### II. Factual Background

Judge Joseph Anderson was appointed to the Third Judicial District bench in 1995 to hear child abuse and welfare cases.<sup>3</sup> He was retained by the voters in the general election of 1998.<sup>4</sup>

According to Judge Anderson, his ordeal began when he started to take issue with the way juvenile court proceedings were conducted in Utah.<sup>5</sup> He maintains that his objection, in a nutshell, was that the juvenile courts were acting as a rubber stamp for the Attorney General's Office and the Guardian ad Litem Office.<sup>6</sup> (The Attorney General's Office prosecutes parents for neglect. The guardian ad litem attorney is assigned to protect the child's interests during child-welfare proceedings. Critics of the current system believe there is too much tacit cooperation, particularly in situations where prosecution of the parents may impose a practical harm upon the children.)<sup>7</sup><sup>8</sup>

Judge Anderson claims to have challenged the arguments, documentation, and general preparation of the government attorneys appearing before him.<sup>9</sup> He says he felt that the formalities of his court should have more closely resembled the rigors of other non-juvenile courts, in order to ensure proper dispositions.<sup>10</sup> For a variety of reasons, including in some instances extenuating circumstances, poor case management, and a philosophical objection to rushed proceedings and improper interference with judicial prerogatives, Judge Anderson began running afoul of mandatory statutory deadlines which applied to the progression of his child-welfare cases.<sup>11</sup>

Judge Anderson alleges the friction intensified when he continued to insist upon more documentation for government legal positions and more deliberate progression of cases.<sup>12</sup> From 1999 to 2000, the Offices of the Attorney General and the Guardian ad Litem allegedly bridled under the Judge's authority, and on occasion made successful complaint to the Utah Court of Appeals.<sup>13</sup> (As one might expect, Attorney General and Director of the Guardian ad Litem inherently and vehemently disagree with Judge Anderson's characterization of their motivations for complaining about him. Fortunately, the analysis in this article does not, and need not, resolve the factual question about whether Judge Anderson's opponents were motivated by personal or political animus.)

In June of 2000, the Director of the Office of the Guardian ad Litem submitted a request for an investigation of Judge Anderson to the Judicial Conduct Commission (a tribunal of appointees consisting of assorted judges, legislators, attorneys, and citizens), alleging a pattern of tardy hearings and judicial decisions.<sup>14</sup> The Office of the Attorney General allegedly provided support for the Director's efforts.<sup>15</sup> The Commission's investigation began in the fall of 2000, and it commenced a formal proceeding on December 8, 2000.<sup>16</sup>

During the period of investigation, which stretched from the fall of 2000 to January 23, 2004, Judge Anderson recused himself from hearing cases argued by the Office of the Guardian ad Litem and the Office of the Attorney General.<sup>17</sup> He did so because he felt that the heads of these two offices were attempting to have him removed from the bench, and therefore his impartiality could be reasonably questioned<sup>18</sup> during the progression<sup>19</sup> of the Judicial Conduct Commission investigation (and, later, during Judge Anderson's federal lawsuit).<sup>20</sup>

The Offices of the Guardian ad Litem and Attorney General apparently agreed with Judge Anderson's rationale for recusal. They filed recusal motions whenever the Judge did not remove himself on his own motion.<sup>21</sup> However, the Presiding Judge of the Third District Juvenile Court attempted to put an end to the series of recusals by denying a motion to disqualify Judge Anderson.<sup>22</sup> The Presiding Judge found that there was no proof of actual bias.<sup>23</sup> The Utah Court of Appeals overturned this ruling of the Presiding Judge,<sup>24</sup> further intensifying the swirling currents of acrimony.

In late 2001, after a year and a half of accusations and investigation, and with no end in sight, Judge Anderson decided he needed to enlist the oversight of a federal court.<sup>25</sup> He filed a civil complaint in the federal District of Utah, naming the Judicial Conduct Commission and the Office of the Guardian ad Litem.<sup>26</sup>

Judge Anderson's federal complaint alleged that he had personally observed a pattern of deficient representation and inappropriate conduct committed by the Office of the Guardian ad Litem in connection with cases held before him.<sup>27</sup> He additionally alleged that the Offices of the Guardian ad Litem and the Attorney General were cooperating to preserve a cozy status quo in the legal community by seeking to intimidate him from performing his judicial role, and when that proved unsuccessful, to remove their jurisprudential opponent from the Utah bench.<sup>28</sup> The Judge further represented that only neutral federal intervention could stop a defective, biased Utah Judicial Conduct Commission from facilitating a violation of individual civil rights protected under the federal and state constitutions.<sup>29</sup>

Despite the ongoing federal lawsuit, the Judicial Conduct Commission ultimately concluded its proceedings. The Commission proposed that a public reprimand be issued to Judge Anderson for eleven alleged instances of tardy case management.<sup>30</sup> Judge Anderson appealed the Commission's decision to the Utah Supreme Court.

By a 4-1 vote, the Utah Supreme Court made the extraordinarily unusual decision to disregard the Commission's recommended sanction in order to impose an even harsher penalty.<sup>31</sup> Relying upon its own original factual findings, rather than on the issues or facts taken on appeal from the Commission, the Court removed Judge Anderson from his office to punish him for filing a federal

complaint containing negative statements about individuals in the Offices of the Guardian ad Litem and the Attorney General.<sup>32</sup>

### III. Reasoning of the Utah Supreme Court

The Utah Supreme Court did not render a unanimous decision. An examination of the majority holding and the dissent is presented below.

#### A. *Legal Reasoning of the Majority*

In an unsigned opinion, four justices determined that Judge Anderson should be removed instead of publicly reprimanded.<sup>33</sup>

The justices conceded that the statutory deadlines allegedly violated by Judge Anderson were, in all likelihood, unduly onerous, unconstitutional, and void, and his tardiness alone would not justify removal from office.<sup>34</sup> (Judges do not, of course, typically get removed from office for being too ponderous.)

The majority identified and invoked the Court's implied authority to initiate original findings of fact and law and consider matters beyond the scope of the Judicial Commission's jurisdiction.<sup>35</sup>

Judge Anderson was to be removed from the bench, said the majority, on account of the claims he had chosen to assert in his federal civil-rights lawsuit.<sup>36</sup> The justices reasoned that the federal complaint constituted an inherent "improper expression of bias," which would require permanent and automatic recusal of the judge in any future Juvenile-Court case involving an attorney from the Office of the Guardian ad Litem or the Office of the Attorney General.<sup>37</sup>

The majority felt that the Judge Anderson's federal complaint had "brought a judicial office into [irreparable] disrepute" by causing "public discussion," "exposure," and "wide[] report[ing]" of his concerns about the alleged systemic deficiencies of the Offices of the Guardian ad Litem and Attorney General, including conspiracy.<sup>38</sup>

#### B. *Legal Reasoning of the Dissent*

Associate Chief Justice Durrant, dissenting in part, succinctly set forth his objection:

Rather than merely considering the aggravating or mitigating effect of Judge Anderson's public accusations, my colleagues now rely upon those accusations as the principal justification for his removal. Thus, we remove Judge Anderson today for conduct that played no role in the Commission proceeding and that had no bearing upon the sanction recommended by the Commission. This I believe we are not empowered to do.<sup>39</sup>

Justice Durrant concluded that "if a complaint is filed with the Commission . . . and the Commission issues a sanction order based upon that complaint, then and only then are we [on the Utah Supreme Court] empowered to address those charges."<sup>40</sup>

In Justice Durrant's view, Anderson's federal complaint was not properly before the Utah Supreme Court, so discussion about it was unripe.<sup>41</sup>

### IV. Analysis

The problems posed by the *Inquiry* opinion are simple, but profound and numerous.

The difficulties discussed in this article have nothing to do with the propriety of Judge Anderson's removal per se. Instead, the paradoxes identified herein have arisen because of the Utah Supreme Court's failure to define the limits of its own holding, or to provide a coherent predictive rationale in support of the disposition it ultimately reached.

Some of the basic practical incongruities resulting from the majority position are briefly explored below.

*A. When can Judges, Government Officials, and Private Employees be Terminated for Making Impolite Comments in Litigation Filings?*

The Utah Supreme Court held that "Judge Anderson's decision to add allegations [in his federal lawsuit complaint] about the attorneys who initiated or supported complaints about him with the Judicial Conduct Commission . . . . was an expression of bias"<sup>42</sup> which justified removal, notwithstanding the First Amendment of the United States Constitution.<sup>43</sup>

To fend off Judge Anderson's First Amendment argument, the majority cited *In re McCully*<sup>44</sup>.<sup>45</sup> *McCully* upheld a Judicial Conduct Commission reprimand order issued against a juvenile court judge who had, in her official capacity, inappropriately signed a sworn affidavit for a litigant containing the judge's opinions and conclusions on an ultimate issue under pending review in a separate district-court judicial proceeding.

*McCully*, in turn, rested its First Amendment analysis upon *In re Charge of Judicial Misconduct*,<sup>46</sup> (criticizing a judge for holding a news conference and commenting on a case pending before him); *Furey v. Commission on Judicial Performance*,<sup>47</sup> (disciplining a judge for writing a letter to another judge who was replacing him on a case from which he had been disqualified, telling the succeeding judge that the defendant had lied); *Gubler v. Commission on Judicial Performance*,<sup>48</sup> (disciplining a judge for writing a note to a court commissioner regarding the outcome of a case from which the judge had previously been disqualified); and *Roberts v. Commission on Judicial Performance*,<sup>49</sup> (sanctioning the trial judge for telephoning the presiding judge to discuss a ruling with which the trial judge disagreed, before time for rehearing had expired).

*McCully* and the cases it relied upon are factually inapposite to the *Inquiry* situation. These previous cases all dealt with First Amendment speech which constituted inherent, simultaneous, coterminous misuse of the trappings of the judicial office, designed in some way to inflict direct and material prejudice to the rights of a third party. Judge Anderson, in contrast, was making defensive remarks about his accusers, in a legal complaint about himself, in connection with a lawsuit he was constitutionally entitled to file, against a backdrop of precautionary judicial self-recusals he had proactively taken to protect the integrity of his Court.

As it currently reads, *Inquiry* allows judges, and perhaps even other government officials, to be removed from their official positions on the basis of comments those individuals chose to make in their own filings for non-frivolous court cases (i.e., "non-frivolous" in the technical, legal sense of the term). *Inquiry* thereby opens the door to *de facto* outside regulation and censorship of litigants and their attorneys. How far can all of this go? The Utah Supreme Court does not tell us.

The Utah Supreme Court offered very few cases of any kind to support its remarkable opinion, and no factually-analogous citations, notwithstanding the voluminous pre-existent precedent created by two hundred years of prior judicial removals throughout the United States. The Court did not even

attempt to reconcile its *Inquiry* holding with United States Supreme Court precedent, which seems generally sympathetic to individuals who have chosen to employ a variety of private and official means to criticize the official actions of government officials which were committed while those officials were working in a different branch of government.<sup>50</sup>

Although it is generally understood that a judge surrenders some First Amendment prerogatives in order to function within the judicial office, a judge does not shed all of his or her First Amendment rights at the courthouse door. The officials who filed and abetted the disciplinary complaint against Judge Anderson were acting pursuant to their official capacities. Judge Anderson's criticism of their complaint and their actions surrounding the filing was, therefore, a criticism of official acts committed by those government officials.<sup>51</sup> It is unreasonable to hold that Judge Anderson completely surrendered his First Amendment rights and judicial prerogatives to speak out in defense against other government officials who had taken steps to discredit him professionally. The Attorney General and the Director were effectively attempting to prevent him from fulfilling his official responsibilities in the manner he envisioned.

*Inquiry* engenders vast potential for political chicanery, facilitates the suppression of core First Amendment activity, and allows state courts to clog access to the federal courts. *Inquiry* lends itself to a political impression, fair or unfair, that the Utah judiciary is vindictive or secretive, and that Utah judges prefer to hide dirty laundry from federal courts and the general public. The *Inquiry* decision will probably give rise to a wide array of other unfortunate and unintended consequences. The entire situation is troubling, unfortunate, and unconstitutional.

#### *B. What Other Patterns or Expressions of "Bias" Merit Removal of a Judge?*

*Inquiry* allows judges to be removed for "bias," but the opinion does not indicate what classifications or levels of bias are sufficient for such a drastic sanction.

Suppose that Judge Anderson had written, or commented on some occasion, that his experience had led him to "find, without exception, that the Offices of the Attorney General and Guardian ad Litem are composed of individuals who care for the public good, and who always comport themselves with the highest standards of ethical conduct and legal scholarship." Does that judicial remark constitute an unforgivable expression of bias by the judge *in favor* of the government? Accused parents, who frequently complain against child welfare official and the perceived leanings<sup>52</sup> of the Utah Bar, and who assuredly feel upset when judges express such pro-government sentiments in court, would no doubt prefer recusal.

Along the same vein, how does the *Inquiry* rationale apply outside the child welfare context? For example, if a judge decries minimum sentencing guidelines for criminals, should that judge be disqualified from future sentencing hearings because of a pronounced bias against prosecutors? If a judge repeatedly berates government tax collectors for being over-aggressive, or tells law-enforcement officers that their warrant applicants are shoddy, should that judge be removed?

Should Utah Supreme Court Chief Justice Christine M. Durham recuse herself from all sex discrimination cases, in light of her widely-aired remarks about the under-representation of women in the Utah Bar and in other professional circles? Should the Utah Supreme Court recuse itself from constitutional questions about Legislative authority, or firearms in the courtroom, given the

long history of professional acrimony between the judicial and legislative branches of government? When, if ever, does a pattern of jurisprudential friction transition into an undue “bias” against an entire branch of government, requiring systemic recusal?

Disqualification is required if the judge demonstrates "a personal<sup>53</sup> bias as distinguished from a judicial one, arising out of the judge's background and association and not from the judge's view of the law."<sup>54</sup> The problem with removing Judge Anderson on the basis of “bias” is that his conflict with the government attorneys sprang out of a dispute about his alleged failure to properly adhere to required statutory guidelines, which he challenged on philosophical and legal grounds, and not on account of his background or association.<sup>55</sup> His “bias,” if any, would seem to be judicial rather than personal, stemming as it did from his view of the applicable law and his resultant official actions (or inactions) on the bench.

*Inquiry* seems to say that Judge Russell Bench of the Judicial Conduct Commission has an unfettered right to recuse himself, but Judge Joseph Anderson of the Third Judicial District does not.<sup>56</sup> *Inquiry* also says that Judge Anderson “is not entitled to a tribunal of his choosing,”<sup>57</sup> but then empowers the Offices of the Guardian ad Litem and Attorney General with the de facto ability to disqualify any judge they consider to be routinely unsympathetic or philosophically recalcitrant.

Utah has long recognized that conflict-of-interest for government agencies must necessarily be radically different than the conflict rules for private parties:

The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.<sup>58</sup>

The sheer scope and volume of government-related legal activity compels this approach to disqualification for public legal professionals. Such a consideration is especially overriding for juvenile courts, because otherwise an alleged conflict with the juvenile-court judge could be instigated or exploited by any government attorney seeking a potent method to undermine judicial independence.

A government attorney should not be able to force a judicial removal or recusal on a theory of judicial *personal* bias vis-à-vis a government attorney or official who happens to be appearing or acting in an *official* capacity. Rather, such a government attorney should be required to show that the judge has 1) a *personal* bias against a government attorney or official who is appearing before the judge in a *personal* capacity, or 2) an openly stated, categorical, and comprehensive bias against an entire governmental agency, of such a compelling and sweeping nature that the judge has *knowingly, completely, and explicitly* precluded *any* possibility that he or she will comply with the clear applicable dictates of governing law.

Thus, for example, if Attorney General Mark Shurtleff was defending against a State action brought to terminate Mark Shurtleff’s parental custody of his *own* children, he would have a legitimate ground for asserting that Judge Anderson’s apparent *personal* animus towards Mark Shurtleff required recusal. Or, as another example, if Judge Anderson had declared that he would *never* rule in favor of the Guardian ad Litem’s Office in *any* case brought before him, because the

Director had engaged in a crooked conspiracy against him, and he was incapable of honoring *any* request whatsoever from *any* attorney under her supervision, there would be a more solid ground for saying that Judge Anderson was incapable of ever fulfilling the demands of his position vis-à-vis the Guardian ad Litem's Office.

“Bias” is often in the eye of the political beholder. “Bias” sometimes serves as a pejorative description for the judge who happens to be placing a check against an over-zealous prosecutor or other official exercising executive power. The Utah Supreme Court's opinion should have addressed the difficult practical implications of this reality, regardless of whether Judge Anderson erred in his particular case.

Professional rancor frequently erupts between the Utah judiciary and the Utah State legislature, and everyone readily understands that this is a natural consequence of constitutional government. In truth, analogous professional animus between the judicial branch and the *executive* branch is equally predictable, inevitable, and healthy from a constitutional standpoint. A certain amount of friction is merely an indication that the wheels of our democratic republic are continuing to roll forward.

### *C. How Should a Judge Combat Systemic Misconduct by the Government?*

Suppose, as a hypothetical, that Judge Anderson discovered a bona-fide pattern of discrimination by the Attorney General and Director of the Guardian ad Litem Office against African-American parents in Utah. Specifically, assume he noticed an Antebellum-style conspiracy designed to remove African-American children from their parents, even in circumstances where similarly-situated white children would not be removed. (This is not beyond the realm of possibility, for Native-Americans have been victims of similar conspiracies in the past.<sup>59</sup> And American law, particularly antitrust law and criminal law, sanction the notion that conspiracies for economic gain are a bona fide phenomenon worthy of precautionary measures and punishments.<sup>60</sup>)

Assume further that when the Judge tried to obstruct this conspiratorial effort in his courtroom, the Director filed a retaliatory complaint against him with the Judicial Commission. After commencement of the investigation, the Judge discovered that the Commission was loaded with close personal friends of the Director, and that an effort was underway to complete execution of the misconduct in the Judge's former case(s) while the Judge was recused. Under *Inquiry* precedent, how will this hypothetical situation be resolved?

Presumably, if the judge chose to speak out about the conspiracy in public, or challenge it in a federal lawsuit, his remarks would constitute an inappropriate expression of bias against the government attorneys appearing before him.<sup>61</sup> He would have a perpetual obligation to recuse himself from a large proportion of his cases, and would be forced to accept the “consequences” of his decision by accepting removal from the bench. This would apparently be the result even if the judge's remarks and lawsuit were eventually demonstrated to be correct.

A second option to this hypothetical scenario might involve filing a complaint in federal court, while taking pains to omit material facts about the conspiracy. However, such a lawsuit would probably look nonsensical on its face, assuming the suit could even name the defendants at all.

After filing such a cryptic complaint, the Judge would become subject to sanction or removal for filing a “frivolous” lawsuit.<sup>62</sup>

The third alternative, doing nothing at all, would also be unacceptable. Acquiescence to a systemic violation of a constitutional right would constitute a dereliction of duty, in violation of the judge’s oath to uphold the constitutions of Utah and the United States.<sup>63</sup> A judge caught casting a blind eye to such egregious conduct would be subject to removal, and deservedly so.

As the aforementioned analysis demonstrates, the Utah Supreme Court’s *Inquiry* decision has painted independent-minded judges into a corner. The Utah Supreme Court does not explain how a judge can properly blow the whistle on government officials that the judge suspects of committing systemic civil rights violations. The Court’s failure to identify a safe harbor for this purpose has compromised Utah’s system of justice in general and the interests of Utah’s parents in particular.

#### *D. How Can a Judge Mount a Meaningful Defense against Unfair Accusations?*

The Utah Supreme Court blamed Judge Anderson for creating his own quandary:

By attributing blame and improper motives to the attorneys of the Office of the Guardian ad Litem and the Attorney General, as well as very specifically to the Director of the Office of the Guardian ad Litem, Judge Anderson has created, principally of his own making, a quagmire from which he cannot extract himself, while simultaneously bringing disrepute on himself as a judge and on the judiciary as a whole.<sup>64</sup>

Upon closer examination, however, the Court’s pronouncement quickly unravels.

The principle cause of the “quagmire” could just as easily be attributed to the Director of the Office of the Guardian ad Litem, who chose to file a career-threatening complaint against a juvenile-court judge she disliked, notwithstanding the availability of the normal appeals process.<sup>65</sup> The Director surely knew that Judge Anderson handled a large number of cases involving the Director’s own Office, yet she insisted upon the Judge’s recusal at every turn.<sup>66</sup> One could just as easily posit that the Director, a person in a sensitive governmental position, has a commensurate duty not to disrupt the juvenile court system in such a dramatic fashion.

Judge Anderson’s choice to recuse himself fueled charges that he was hopelessly “ineffective.” Yet if the Judge had refused to recuse himself during the conflict, notwithstanding the demands of his political enemies, he would surely have been deemed incompetent or corrupt. And if he had recused himself but refused to offer an explanation, the other judges would have bitterly accused him of employing a bald subterfuge to obtain unwarranted extra vacation time or golfing opportunities at the expense of his colleagues.<sup>67</sup>

Once accused, Judge Anderson was apparently obligated to simply absorb body blows from his opponents without offering a defense. The *Inquiry* opinion decried his decision to “attribute[e] blame and improper motives to the attorneys of the Office of the Guardian ad Litem and the Attorney General,” even though the Judge actually believed that his very public accusers were improperly seeking his removal for illegitimate reasons.<sup>68</sup> The rationale of the opinion implicitly rejected the notion that any non-judicial public official might be blameworthy on some current or future occasion, or that judicial criticism might be appropriate in some instances. The possibility

that Anderson's underlying substantive accusation had some merit should have been entertained, if only to facilitate a brief justification or explanation to convincingly dispense with Anderson's allegations involving the alleged pattern of misconduct and conspiracy.

Judges must be permitted to confront their accusers in proceedings held before legally-convened tribunals of appropriate jurisdiction. Judges must be allowed to aggressively assert defensive theories until such time as those theories have been properly considered and conclusively accepted or rejected. It is unreasonable to require a judge, or anyone else, to make statements against their own interest or to admit to wrongdoing while they are still in the process of disputing whether any wrongdoing actually occurred.<sup>69</sup> Judges need to be confident about the merits of their own wisdom, for they would never have agreed to assume their offices without a healthy dose of pre-existing self-confidence.

Public confidence in the judicial system is not enhanced when judges are gagged, bound, and hung up as punching bags for their detractors to abuse. When the field of public discourse is abandoned to the exclusive control of malcontents, especially malcontents beholden to well-heeled special-interests groups, public deception and confusion is often the end result.

#### *F. How Much Weight Should Be Allotted to an Expressed Voter Preference for a Particular Judicial Philosophy?*

Judges should not have the power to directly remove their own fellow judges from office, except in clear-cut instances where a crime or precise pre-defined breach of ethics has occurred. The current arrangement creates an inherent conflict-of-interest, denies judges the protections of fair warning and lenity, and engenders an unhealthy vertical and horizontal doctrinal conformity throughout the Utah court system.

Some advocates of family autonomy see parallels between the removal of Judge Anderson in Utah and the recent removal of Chief Justice Roy Moore from the Alabama Supreme Court.<sup>70</sup>

By way of reminder, Judge Roy Moore was a circuit-court judge in Alabama who became famous when he defiantly posted a wooden plaque of the Ten Commandments in his courtroom.<sup>71</sup> Alabama voters subsequently elected Moore to be Chief Justice of the Alabama Supreme Court when he promised to enshrine the Ten Commandments within the realm of the high court.<sup>72</sup> When Moore unapologetically (but nonviolently) followed through on his prominently-advertised campaign promise and pushed the envelope of First Amendment jurisprudence, an unelected judicial conduct committee removed him from office on the basis of his unrepentant attitude.<sup>73</sup> The removal of Moore occurred despite a proven willingness on the part of the other Alabama justices to simply override Moore's controversial decision(s) (i.e. vote out a successful order to remove the Ten Commandments monument, over Moore's lone dissent).<sup>74</sup>

Critics say that the Judge Anderson episode has become Utah's version of Alabama's Chief Justice Moore controversy.<sup>75</sup> Judge Anderson won his retention election in 1998. In the absence of action by the Utah Legislature, these critics contend, voters should be allowed to decide if Judge Anderson served as a gallant protector of family liberty or as an unacceptable embarrassment to the Utah court system. Until elections or impeachment occurred, other judges could have contained the alleged excesses of Moore and Anderson by simply overriding them on appeal or

reconsideration. Judges can usually contain a rogue judge simply by collectively issuing orders, writs, and opinions which vacate inappropriate activities or mandate completion of an activity which has improperly been left undone or uncorrected.

Critics of Utah's juvenile court system point to the infamous Parker Jensen incident in 2003,<sup>76</sup> the suspicious October 23, 2003, death of Casey Barrow while in Utah foster care,<sup>77</sup> mistakes involving the family of Connie Roska,<sup>78</sup> and other alleged problems with Utah's child welfare system during the late nineties. They point out that approximately forty bills were introduced in the 2004 Utah Legislature to address alleged dysfunctional behavior by child-welfare professionals. These incidents, the critics maintain, demonstrate that Judge Anderson's concerns about Utah's juvenile court system were not only reasonable, but in step with the views of many other elected officials.

Fairly or unfairly, the Guardian ad Litem Director's successful effort to remove Judge Anderson from the bench is seen by many as a legal coup, a maneuver which side-stepped voters and legislators and undermined public confidence in the judiciary. Instead of creating an atmosphere of even-handed, mature deliberation, which would have strengthened public confidence in Utah's system of justice,<sup>79</sup> the Utah Supreme Court responded by handing down an extraordinary opinion which only served to add considerable fuel to an already rampant conspiracy-theory fire.

Off the record, some judges have also expressed similar concerns about judicial independence.<sup>80</sup> Some judges are very upset about the *Inquiry* opinion, and feel the holding will chill necessary expression (both personal and official).<sup>81</sup> These judges say they are afraid to confront judicial colleagues and government officials, for fear of suffering the ostracism and removal Judge Anderson experienced.<sup>82</sup> They believe other sitting judges have similar views, but for the similar reasons will refrain from speaking out.<sup>83</sup>

In short, Utah's three-pronged system of judicial removal (legislative impeachment, voter retention elections, and Utah Supreme Court removal) operates to produce strange and unhealthy cross-incentives, which run contrary at times to necessary judicial independence and expressed voter sentiment. *Inquiry* notes the existence of the milieu, but makes the situation worse by failing to meaningfully clarify any of the relationships, rationalize the system, or resolve the apparently conflicting priorities.<sup>84</sup> In this case, the Utah Supreme Court should have deferred the question of Judge Anderson's removal to the Utah Legislature and to Utah voters.<sup>85</sup>

Permitting judges to overrule one another is quite different than allowing judges to remove each other from the bench. Judicial independence means more than independence of the judiciary vis-à-vis the legislative and executive branches of government and special interest groups. True judicial independence also requires the independence of each judge's office and professional capacity vis-à-vis all other judges (regardless of whether the judge, or the judge's adversaries on the bench, happen to be state or federal, trial or appellate).

In fact, independence from other judges is the most critical component of judicial independence. Judges interact with each other much more frequently than they interact with other sources of outside influence. Each judge must be able to candidly express his or her view regarding the law and the proper administration of justice, even (or perhaps especially) when that view may irritate, anger, or even embarrass fellow jurists. A judge must at times virtually defy his or her colleagues

on a topic of conscience, and at minimum ought to be positioned to dispel any remote<sup>86</sup> possibility or perception of judicial conspiracy, conformity, or complacency.

## **V. Conclusion**

*Inquiry* is a landmark decision which will exert a very negative effect upon the legal, political, and civic landscape of Utah.

Unfortunately, the Utah Supreme Court created precedent in the *Inquiry* opinion without limiting its application, citing apposite supporting legal precedent, or providing a coherent, predictive legal doctrine to guide future analysis. The Court did not offer a suggestion for what Judge Anderson should have done, or what the best practice would have been.

Even if a concerted effort is made, it will probably take years to undo the profound damage done by the *Inquiry* decision. The Legislature may need to render assistance to the Judiciary in this regard. If possible, the precedent should be swiftly abrogated or overturned in its entirety.

## APPENDIX

### Excerpts from Majority Opinion:

¶68 In filing a civil action in the federal courts against the Judicial Conduct Commission and others, Judge Anderson exercised his [federal First Amendment] right to petition for redress of grievances. However, as a judge, he has other burdens.

¶70 . . . Judge Anderson's decision to add allegations about the attorneys who initiated or supported complaints about him with the Judicial Conduct Commission is a concern. While Judge Anderson is free to sue whomever he wishes, as are all citizens, he is also subject to the consequences . . . . [Judge Anderson] believed that the attorneys from the Office of the Guardian ad Litem and the Attorney General were engaged in some sort of conspiracy to wrongfully remove him from his position as a public official. Saying so was an expression of bias, and prevented Judge Anderson from ethically hearing cases involving those attorneys.

¶71 Judge Anderson's decision to address in a public forum his beliefs about the integrity and professionalism of attorneys who appear before him carries with it certain consequences. . . . We therefore find no merit in his claim that asserting his constitutional rights has somehow resulted in his discipline. Even if [“his constitutional rights has somehow resulted in his discipline”] . . . he has not been prevented from asserting his rights, but rather only from avoiding the inevitable consequences of his choice[.]

¶75 The Judicial Conduct Commission has proposed a public reprimand be issued to Judge Anderson for his failure to timely hear and decide the eleven matters cited in the order issued by the Commission. . . . Ordinarily, [the Utah Supreme Court] would not propose a sanction more drastic than that ordered by the Commission in a case involving specific, discrete failures to conduct court business in keeping with legal requirements. However, Judge Anderson's case does not involve only those discrete events identified by the Judicial Conduct Commission.

¶84 In this case, Judge Anderson created a circumstance where he allowed his non-judicial activities, namely his federal action against the Director of the Office of the Guardian ad Litem, to take priority over his judicial duty to hear child welfare cases. He did so by treating the Director, the attorneys in her office, and the attorneys of the Attorney General's office with considerable disrespect, creating a continuing situation where his impartiality might reasonably be, and was, repeatedly questioned.

¶86 . . . Judge Anderson's disastrous choices regarding retaliation against lawyers from the Office of the Guardian ad Litem, including its Director, and the office of the Attorney General, has unquestionably "brought a judicial office into disrepute." Judge Anderson has promoted the public discussion of his dispute with the attorneys he accuses of attempting to improperly remove him from office. His actions have been widely reported. The activities of this court, as a result of the referral from the Judicial Conduct Commission, have brought more exposure of the dispute. . . .

¶88 . . . . The purpose of judicial discipline is . . . most importantly . . . [to] protect[] the integrity of the judicial system in the interests of the people it serves, the people of Utah.

¶90 . . . We see no alternative but to remove Judge Anderson from his office as a juvenile court judge. Any sanction short of removal will neither correct the damage done to the judiciary nor restore Judge Anderson to the proper level of function and dignity that his office requires.

### Excerpts from the Dissenting Opinion of Associate Chief Justice Durrant:

¶93 I disagree . . . that [the Utah Supreme Court] is empowered to remove Judge Anderson from office for conduct that was neither considered by the Judicial Conduct Commission nor a basis for the Commission's recommended sanction.

¶94 . . . Judge Anderson is not being removed because he made decisions in an untimely manner, but rather because he made public accusations against the offices of attorneys who frequently appear before him, thereby rendering himself disqualified from hearing the bulk of the cases a juvenile court judge must hear.

¶95 . . . Rather than merely considering the aggravating or mitigating effect of Judge Anderson's public accusations, my colleagues now rely upon those accusations as the principal justification for his removal. Thus, we remove Judge Anderson today for conduct that played no role in the Commission proceeding and that had no bearing upon the sanction recommended by the Commission. This I believe we are not empowered to do.

¶96 As the court of last resort in this state, we are privileged with vast power. Attendant to that power, however, is an obligation to carefully police ourselves in its exercise. We have only that authority the constitution grants us, and we must be rigorous in limiting ourselves to the bounds set by that document.

¶98 . . . [T]he authority conferred upon [the Utah Supreme Court] . . . to take additional evidence authorizes us to impose a sanction based on that evidence. . . . provided the additional evidence serves to support or undermine the charges filed with the Commission. . . . [O]ur license to take additional evidence [does not] qualify[y] as a basis upon which we may remove Judge Anderson in this case, given that such additional evidence concerned conduct that was neither considered nor relied upon by the Commission in its proceedings.

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<sup>1</sup> Daniel E. Witte, Esq., has clerked for a United States Federal Circuit Court judge and worked for a former Utah Supreme Court justice, the Staff Counsel's Offices for the United States Seventh and Tenth Circuit Courts of Appeal, a U.S. District Attorney's Office, and a nationally-prominent law firm in the litigation department. He has also performed pro-bono work to promote parental liberty and assist parent litigants defending their family autonomy.

<sup>2</sup> 82 P.3d 1134 (Utah 2004)(per curiam)(hereinafter "*Inquiry*"). The opinion is set forth in full at <http://www.utcourts.gov/opinions/supopin/inrein012304.htm>. Since the opinion is rendered with paragraph numbers, which are more precise than page designation, references in this article will refer to paragraph numbers rather than page numbers.

<sup>3</sup> *Inquiry* at ¶22.

<sup>4</sup> *Id.*

<sup>5</sup> Interview with Joseph W. Anderson, Judge, Third District Juvenile Court, State of Utah (Jan. 15, 2004)(hereinafter "*Interview*").

<sup>6</sup> *Id.*

<sup>7</sup> In the interest of full disclosure, the author is one such critic. He has noted that "judges face a strong political backlash unless they handle parental rights cases to the satisfaction of entrenched interests." Daniel E. Witte, Comment, *People v.*

The author also wrote:

Many courts have heavy dockets; they cannot allocate the court time and resources needed to identify and meet the individual needs of children in a manner comparable to the service provided by even the marginally involved parent. Additionally, the lack of resources combined with a fear of being second-guessed compels most judges to passively capitulate to state agency demands. [] Without procedural protections arising from the common law policy of deference to parental rights, parents and children with modest means are quite vulnerable to unnecessary and/or harmful state intervention. Until there is a public outcry, judges tend to tolerate questionable evidentiary, [] due process, [] and enforcement [] practices [] against questionably large numbers of vulnerable people [] when state agencies assert that it is necessary to protect a child and prevent chilling their intervention.

To summarize, original intent analysis yields a policy of broad deference to parental rights. [] As demonstrated above by cases concerning parental rights in the education context, there is ample reason for courts to scrutinize not only the interplay between the interest of parent and child, but also the interplay between state and child/parent interests.

Due to inherent organizational design, state agencies have powerful incentives to make managerial decisions for children that are not in the child's best interest. Courts are unlikely to consistently check this organizational bias, because the pressures associated with heavy dockets combined with the professional risk of being second-guessed eliminates much of the incentive for judges to fill such a role. Protections afforded by presumptions favoring parental decisions cannot be adequately replicated with substitutes. The original American approach towards parental rights is sound policy in our modern era.

[]Even judges face political pressures. Judge Phoebe Greenbaum of New York City noted that "[i]t is any judge's worst nightmare to be involved in a case in which a child dies." . . . . [Other commentators have noted that] [t]hose who evaluate homes for abuse "get no public recognition when [they say a home is fine] and they help mend a broken home . . . . But when a child is killed or injured, they are the first to be second-guessed and blamed." . . . .

It is safer for a judge's professional career to favor state agency intervention over family autonomy or unity. The probability of being criticized for doing too little is less than the probability of being criticized for intervening too much, even when the harm inflicted by either type of misjudgment is of the same potential magnitude.

*Id.* at 232-34, 232 n.184 (citations and footnotes omitted, and footnote appended).

To be crystal clear, this current article takes no position about whether the aforementioned dynamic of systemic bias was implicated in Judges Anderson's specific situation, notwithstanding the observations the author made in a previous article about the American system of justice generally.

This current article explicitly takes no position concerning whether 1) Anderson identified a bona fide pattern of bias in his Court or in other Utah courts, 2) Anderson encountered a conspiracy against him because of his attempt to combat alleged or posited bias in Utah Juvenile Courts, 3) Anderson could or should have complied with every statutory deadline which ostensibly applied to him, 4) the Utah Supreme Court or any other state or federal tribunal was acting on an improper motive or incentive when resolving the matters before them concerning Anderson and his alleged conduct, 5) Anderson should have filed his federal lawsuit or fashioned his federal complaint as he did, 6) Anderson properly handled his disciplinary proceeding, 7) Anderson should have been impeached, 8) Anderson's tardiness constituted a removable offense, 9) Anderson actually acted in an impartial manner, or 10) any other question this article does not purport to squarely discuss.

The author specifically acknowledges that the sitting justices of the Utah Supreme Court are accomplished, intelligent individuals. Nothing in this article is meant to suggest otherwise. The author explicitly encourages the public to act respectfully towards the court system and towards judges and other government officials when they are performing official acts, and to seek necessary judicial reform through appropriate avenues of legal, academic, and political activity.

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This article merely questions the wisdom of the legal rationale which was offered by the Utah Supreme Court as the official reason for their removal of Judge Anderson from office, by assuming, *arguendo*, that the facts were as the Court officially found them to be in its opinion. This article takes issue only with the legal holding of one court in one case, and even as to that one case, does so only in a scholarly sense rather than a personal one. This article is reliably read only for what it literally says about the entire factual and legal morass which led to the *Inquiry* opinion, not for any of the many insinuations which various readers might otherwise be understandably tempted to impute into it on account of their own creative extrapolations.

Nonetheless, the author openly continues to believe that a right to a trial by jury should be honored in the context of any proceeding relating to parental neglect, custodial termination, or abrogations of parental liberty which are outside of the intra-parent setting. Juries would ensure that three important principles are upheld. First, parents would be restored to full procedural due process before an impartial fact finder, and thereby enjoy the same basic protection afforded to criminal defendants (loss of custody is, practically speaking, an effective punishment which is harsher and more traumatic than many of the sentences imposed for felony crimes). Second, the public, the litigants, and jurists like Judge Anderson would have much greater confidence in the system for administering justice, because the appearance of systemic bias would be largely alleviated by the involvement of an independent-minded jury. Third, a jury would bring to bear the practical life-experience of the community relative to child-raising, which would help round out the perspective of government attorneys and caseworkers who might be young, of privileged background, of a majority demographic group, and/or without any older children of their own.

Juries have no perpetual professional agenda to protect. Juries cannot get into perpetual spats or alliances with legal professionals. Although juries are an imperfect device for ensuring justice, no better method has yet been devised by political scientists or legal practitioners.

<sup>8</sup> *Interview*.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Cf. id.; Inquiry* at ¶23.

<sup>12</sup> *Cf. Interview*.

<sup>13</sup> *Inquiry* at ¶¶23-25; *Interview*.

<sup>14</sup> *Inquiry* at ¶26.

<sup>15</sup> *Id.* at ¶28; *Interview*.

<sup>16</sup> *Inquiry* at ¶27.

<sup>17</sup> *Id.* at ¶¶28-30, 38.

<sup>18</sup> It could be argued that one might “reasonably question” the impartiality of any judge towards any attorney or entity who has initiated a complaint against the judge, regardless of whether 1) the complaint had merit, 2) the judge decided to recuse himself or herself, 3) the judge offered a statement noting the obvious truth about the perception of bias against a complainant on account of the complaint itself, or 4) the judge was gracious and entirely proper in responding to the complaint. The Utah Supreme Court did not note or resolve this difficulty anywhere in its opinion.

<sup>19</sup> Judge Anderson does not believe, and says he did not mean to indicate, that the reason for his recusal would survive beyond the termination of his disciplinary proceedings and the federal lawsuit, or that he harbored an actual and bona fide animus against any attorney or agency which would prevent him from judiciously resolving the matters involving the minors or families arising before him in his court. *Interview*.

He says his position was that he did not want to appear as if he was trying to chill the aggressive testimony or tactics being employed by his political enemies against him in the relevant litigation and disciplinary proceedings. He did not want to look as though he was holding out the specter of retaliation in his own Court against his unsolicited personal opponents during the period when they were contemporaneously engaged in their own official government activities and personal professional

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careers before the juvenile courts. Judge Anderson says he made it abundantly clear that he would be willing to assume a full caseload after the disciplinary proceedings and personal litigation had been resolved. *Id.*; *cf. Inquiry* at ¶30.

It would also seem that Judge Anderson had power to reconsider his own decision to recuse, even assuming, *arguendo*, that his initial recusal order or findings were communicated in language which was unduly broad or confusing. The Utah Supreme Court tacitly suggested, without any citation, that a recusal decision is somehow beyond the reach of reconsideration or reversal, whether achieved by subsequent motion in the same case or a decision in a subsequent, independent case. *Inquiry* at ¶30. Such a precedent is impractical, doctrinally unsound, and inconsistent with the approach used by courts for decisions resolving other types of administrative issues.

The Utah Supreme Court did not discuss, let alone address, any of these finer distinctions. The Court did not discuss the consequential impact of these distinctions upon the range of potential remedies or sanctions available in connection of Judge Anderson, which would have fallen short of his removal. The Court did not justify its implicit assumption that Judge Anderson was so biased that he could not be rehabilitated as a judge, or provide any useful yardstick for evaluating the viability of future judges.

In truth, the Attorney General and the Director of the Guardian ad Litem Office always had a strong perpetual safeguard against any undue bias by Judge Anderson: the opportunity to appeal Judge Anderson's decisions. If Judge Anderson did harbor an actual bias which resulted in improper judicial action, the victimized government lawyer would only need to appeal the decision, and obtain a reversal. The appellate courts have provided an adequate and effective check against rogue trial judges for hundreds of years, and there is no reason to think that Utah appellate judges would be incapable of fulfilling their responsibilities in this instance.

<sup>20</sup> *Inquiry* at ¶28.

<sup>21</sup> *Id.* at ¶¶35, 37.

<sup>22</sup> Judge Anderson's decision to state a reason for his recusal seems to have taken into the account the fact that the other judges would naturally be expected to resent the shift of caseload caused by Anderson's decision to recuse himself. If he had failed to offer an explanation, other judges or their proxies might have sought discipline, or obtained a reversal of Anderson's decision on appeal, on the theory that he was merely employing a bald subterfuge to avoid work for himself. Therefore, Judge Anderson was open to criticism both for stating a justification and for not stating one. The Utah Supreme Court did not address this problem, or explain how Judge Anderson (or any future judge facing a complaint) should have resolved it.

<sup>23</sup> *Inquiry* at ¶36.

<sup>24</sup> *Id.* at ¶37.

<sup>25</sup> *Id.* at ¶31; *Interview*.

<sup>26</sup> *Inquiry* at ¶31.

<sup>27</sup> *Id.* at ¶¶32-33.

<sup>28</sup> *Id.* at ¶¶31-33; *Interview*.

<sup>29</sup> *Inquiry* at ¶¶31-33.

<sup>30</sup> *Id.* at ¶75.

<sup>31</sup> *Id.* at ¶¶6, 75, 90-91, 94-95, 98.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at ¶¶6, 75, 90-91, 94-95, 98.

<sup>34</sup> *Id.* at ¶¶22, 63-64, 64 n.16.

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<sup>35</sup> *Id.* at ¶12 (“the scope of exposure of the [Utah Supreme Court] is naturally greater than that of the Judicial Conduct Commission when considering the impact of alleged judicial misconduct”).

<sup>36</sup> *E.g. id.* at ¶75 (“Judge Anderson's case does not involve only those discrete events identified by the Judicial Conduct Commission”).

<sup>37</sup> *Id.* at ¶¶70, 84.

<sup>38</sup> *Id.* at ¶¶86, 90.

<sup>39</sup> *Id.* at ¶95.

<sup>40</sup> *Id.* at ¶99.

<sup>41</sup> Associate Chief Justice Durrant, did, however, indicate that he agreed with the majority’s view that Judge Anderson had acted improperly in certain respects, and that Judge Anderson had thereby prejudiced the administration of justice. But Durrant did not indicate the scope or severity of the prejudice caused, nor did he indicate whether he would have voted to remove Anderson from office had the question of removal been properly brought before the Utah Supreme Court.

Of course, even assuming, arguendo, that Anderson would likely have been removed even if Durrant’s dissent had been heeded, there is no excuse for not following proper procedure. An assertion that the Court’s committed mere harmless error with its jurisdictional error would be tantamount to an assertion that Anderson did not need procedural due process because he was, after all, guilty anyway. We simply cannot know what outcome would have resulted if Durrant had persuaded the majority of the Court to follow proper procedure. Additional evidence might have come to light, a different sanction might have resulted, or Anderson’s case could have outlasted the tenure of his political adversaries (rendering the alleged intractable bias entirely moot). Furthermore, public confidence in the justice system is normally bolstered when compliance with reasonable procedure occurs.

<sup>42</sup> Quite apart from the First Amendment question, the identification of “bias” by the Utah Supreme Court is misguided and overreaching. Judge Anderson expressed a jurisprudential philosophy about proper procedural protection of parental liberty, not a personal bias toward a specific party appearing before him. The minors, their families, and (sometimes) the State of Utah are the parties in juvenile courts, and it is their interests which are at stake. The Guardian ad Litem and the Office of the Attorney General are not parties, but only (at least in theory) advocates for such.

The Utah Supreme Court’s theory of “bias” tacitly presupposes that Judge Anderson would *deliberately* deny minors adequate protection, and knowingly turn a blind eye to dangerous parents and compelling interests of the State, merely to settle scores in petty personal conflicts he might have with government attorneys appearing (usually vicariously) before him in an *official* capacity. Only a monstrous man, utterly unworthy to be called a human being, would be willing to intentionally exploit and endanger innocent children in such a fashion. The Utah Supreme Court referenced no credible evidence to support its grave insinuation that Judge Anderson is capable of committing acts reflecting such an extraordinary degree of villainy and malicious indifference.

<sup>43</sup> *Inquiry* at ¶70.

<sup>44</sup> 942 P.2d 327, 333 (Utah 1997).

<sup>45</sup> *Inquiry* at ¶70 n.17.

<sup>46</sup> 47 F.3d 399, 400 (10th Cir. 1995).

<sup>47</sup> 743 P.2d 919, 928 (Cal. 1987).

<sup>48</sup> 688 P.2d 551, 568 (Cal. 1984).

<sup>49</sup> 661 P.2d 1064, 1068-69 (Cal. 1983).

<sup>50</sup> *See, e.g., BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002)(holding that the right to petition is one of the most precious liberties safeguarded by the Bill of Rights, and that a lawsuit by a private litigant is thereby protected unless the lawsuit 1) is found to be so objectively baseless that no reasonable litigant could realistically expect success on the merits,

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and 2) the demonstrated subjective motivation of the litigant is shown to conceal an attempt to use the lawsuit in an inherently unlawful way or to achieve an inherently unlawful end (e.g. as an anticompetitive weapon, in violation of antitrust law)); *Garrison v. Louisiana*, 379 U.S. 64 (1964) (holding that the Constitution limits state power to impose sanctions for criticism of the official conduct of public officials, in criminal cases as in civil cases, to false statements concerning official conduct made with proven knowledge of their falsity or with reckless disregard of whether they were false or not, and that a District Attorney's accusations concerning judges' official conduct did not become private defamation merely because the accusations also reflected upon the judges' private characters). The Utah Supreme Court should have drawn upon such cases to provide some affirmative guidance, or, in the alternative, explicitly distinguished Anderson's case on its facts or on the unique characteristics of Utah law.

<sup>51</sup> To reiterate, recusal for the duration of the lawsuit is different than indefinite recusal. Temporary susceptibility to having one's impartiality questioned during a lawsuit is not the same as permanent disability extending beyond the resolution of a lawsuit or hearing. Avoiding the appearance of partiality is not the same as admitting that one harbors a bona fide personal animus which would render one unable to complete his or her work on a temporarily or permanent basis. Personal anger at one or more government officials is not the same as an inability to treat an entire governmental office or branch of government fairly. Personal animus towards an attorney appearing in their official government capacity does not automatically constitute a willingness to prejudice the interests of the vulnerable private minor party being represented by that attorney.

<sup>52</sup> Many attorneys and parents believe that Utah Bar officials and publications advocated positions which are adverse to parental liberty.

To take one example, the April 2004 *Utah Bar Journal* tacitly responded to Utah 2003-04 child-welfare controversy by publishing two articles. To the consternation of some attorneys who favor family autonomy, no articles authored by parental-liberty advocates were included in the issue to provide readers with a balanced overview as to either of the two topics. Although such articles are generally understood to constitute individual opinions rather than official Utah Bar positions, some speculated that the Utah Bar was intentionally "stacking the deck" with anti-family offerings.

One article, authored by Martha Pierce of the Office of the Guardian ad Litem, enthusiastically advocated changes to Utah's appellate procedures which would have the effect of severely prejudicing Utah's parents. Specifically, Pierce advocated 1) cutting terminated parents' deadline for filing appeals to only fifteen days, even in situations where parents obtained new attorneys or where the petition on appeal would have to be prepared before the trial-court transcript could be made available; 2) creating a de facto presumption against any time extensions for terminated parents seeking reversal, and disallowing any extension exceeding ten days, 3) forcing parents seeking reversal of parental termination to set forth their concerns in a standardized template "Petition on Appeal" instead of a conventional appellate brief; and 4) allowing the appellate court to decide whether terminated parents would be allowed to file a brief at all, and to act without allowing and brief to be filed. Martha Pierce, *Making Appeals More Child Friendly*, 17 UTAH BAR JOURNAL No. 3, April 2004, at 21-22, 22 n.8. Pierce avoided any discussion of *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), the controlling United States Supreme Court opinion which recognizes the compelling procedural rights of parents, or of *In re J.P.*, 648 P.2d 1364 (Utah 1982), Utah's landmark decision governing the same topic. Pierce also misled casual readers by describing the recommendations of Utah's Court Improvement Project as "parent-friendly," *id.* at 21, when in fact parents are severely disadvantaged by such changes and have fiercely contested such arrangements in other states, *id.* at 22 n.8 (briefly citing to three Iowa cases in which parents challenged the restrictions on constitutional grounds).

A second article, authored by the Needs of Children Committee of the Young Lawyer Division, encouraged all Utah attorneys to report their clients to Utah officials in any situation where the clients' children seem to show "[d]epression, anxiety, withdrawal, isolation, excessive sleepiness, boredom, misbehavior, . . . agitation, hyperactivity, an overly great need for attention or a need to please, . . . needing to go to the bathroom too much, . . . [or] appear[ing] unkempt or [with] . . . insufficient clothing." Needs of Children Committee of the Young Lawyer Division, *Attorneys and the Child Abuse Reporting Statute*, 17 UTAH BAR JOURNAL No. 3, April 2004, 23, at 23-27. No mention was made of any of the practical drawbacks associated with unsubstantiated accusations or over-aggressive reporting. No article was offered by a "Needs of Parents Committee" or a "Needs of Parent and Child Family Autonomy Committee."

<sup>53</sup> Personal animus towards an attorney appearing in their official government capacity does not automatically constitute a willingness to prejudice the interests of the vulnerable private minor party being represented by that attorney.

<sup>54</sup> *Cf. City of Cleveland v. Krupanski*, 619 F.2d 576, 578 (6th Cir. 1980)(articulating the standard of recusal for federal judges).

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<sup>55</sup> *Inquiry* at ¶¶23, 26; *Interview*.

<sup>56</sup> *Inquiry* at ¶¶72, 91.

<sup>57</sup> *Id.* at ¶74.

<sup>58</sup> Utah Supreme Court Rule of Professional Practice 1.11, Comment.

<sup>59</sup> *See generally, e.g.*, Manuel P. Guerrero, *Indian Child Welfare Act of 1978: A Response to the Threat to Indian Culture Caused by Foster and Adoptive Placements of Indian Children*, 7 AM. INDIAN L. REV. 51 (1979); *In re Lelah-puc-ka-chee*, 98 F. 429 (N.D. Iowa 1899), and *Peters v. Malin*, 111 F. 244 (N.D. Iowa 1901) (federal judge condemns coordinated effort of Iowa state officials designed to deprive Native American parents of parental liberty and custody, and awards damages to mother against state official).

<sup>60</sup> *See, e.g.*, 15 U.S.C. §§ 1 - 12 (2001).

<sup>61</sup> The ability to express concern about a problem, and garner attention relative to it, is the first and essential step to obtaining any kind of public or governmental solution to it. Perhaps that is one reason why protection of expression (speech), petition, and conscience (religious exercise) were included in the First Amendment of the United States Constitution.

<sup>62</sup> *See, e.g.*, Utah Supreme Court Rule of Professional Practice 3.1.

<sup>63</sup> *See, e.g.*, U.C.A. 76-8-201 (Official misconduct -- Unauthorized acts or failure of duty).

<sup>64</sup> *Inquiry* at ¶40.

<sup>65</sup> *Id.* at ¶26.

<sup>66</sup> *Id.* at ¶¶35, 37.

<sup>67</sup> Indeed, despite Anderson's recorded explanation for recusal, and an apparent reluctance to explicitly state that Anderson's recusal was improper, the Utah Supreme Court nonetheless insinuated that Anderson was lazy: "[F]or more than half of his current six-year term of office, he has not done the job he was appointed and retained to do. In the interim, he has continued to enjoy the emoluments of office[.]" *Id.* at ¶89. But the Court's assertion begs the question of whether Anderson took the lazy course, or the more difficult and courageous one, and whether voters retained him to acquiesce to government attorneys, or stand up against them.

Voters do, for example, sometimes prefer divided government, where one political party is elected to the executive branch and a different party to the legislative branch, in hopes that moderate political governance will be the ultimate result.

<sup>68</sup> *Id.* at ¶40; *Interview*.

<sup>69</sup> Judge Anderson has acknowledged he could have handled some aspects of his predicament and deportment more adroitly, but he maintains that his missteps did not rise to the level of a removable offense. *Id.* at ¶82; *Interview*. Thus, even if one subscribes to a theory for removal relying upon "incurable attitude" grounds, application of the theory to Anderson seems shaky at best.

<sup>70</sup> *Cf. Moore: 'I've kept my oath'*, Jan. 8, 2004, <http://www.cnn.com/2003/US/South/08/25/moore.bio/> (CNN biography of Chief Justice Moore)(hereinafter *Biography*).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Cf. id.*

<sup>74</sup> *Cf. id.*

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<sup>75</sup> This article does not take a position as to whether Chief Justice Moore should have been *impeached*, whether the Ten Commandments should have been posted by Moore, whether Moore’s interpretation of the Establishment Clause was correct, whether Moore comported himself properly during his tenure in any office or during proceedings before any disciplinary tribunal, or any similar substantive question. And, to reiterate, this article is about the official rationale offered by the Utah Supreme Court for the official *manner* and *justification* of Judge Anderson’s removal – not about the *ultimate propriety* of Anderson’s conduct, the *ultimate accuracy* of his allegations levied against other public officials, or the *personal motives* of any judge or public official.

<sup>76</sup> See generally Matt Canham, *Judge dismisses remaining charges against Parker Jensen's parents*, SALT LAKE TRIBUNE, October 25, 2003, at <http://www.sltrib.com/2003/Oct/10252003/utah/105177.asp>.

<sup>77</sup> See generally Jacob Santini, *A mother holds on tight*, SALT LAKE TRIBUNE, March 29, 2004, at <http://www.sltrib.com/2004/Mar/03292004/utah/152199.asp>.

<sup>78</sup> See generally Jill Atwood, *Woman Allowed to Seek Damages from DCFS*, KSL TV, April 5, 2004, at <http://tv.ksl.com/index.php>; *Roska v. Sneddon*, Case No. 1:99CV112DAK (D. Utah Mar. 26, 2004), at <http://www.utd.uscourts.gov/opinions/199cv0011200000154.pdf>.

<sup>79</sup> The Utah Supreme Court argued that removing Judge Anderson was necessary in order to preserve the public’s confidence in Utah’s judiciary. *Inquiry* at ¶41 (“his actions . . . thereby diminishing the overall effectiveness and reputation of the judiciary”); *id.* at ¶76 (“bring the judicial office into disrepute, meaning conduct that has ‘the effect of lowering public esteem for a particular judicial office and thus tend[s] to lower public esteem for the entire judiciary so as to reduce its effectiveness.’”); *id.* at ¶80 (“preservation of public esteem for judicial office”); *id.* at ¶86 (“Judge Anderson's disastrous choices . . . has unquestionably ‘brought a judicial office into disrepute’”); *id.* at ¶89 (“for more than half of his current six-year term of office, he has not done the job he was . . . retained to do”); *id.* at ¶91 (“this behavior by Judge Anderson . . . brings a judicial office into disrepute”).

But the Court’s rationale is problematic for at least three reasons.

First, the public had an opportunity to express its confidence, or lack thereof, when it voted upon Judge Anderson in his 1998 retention election, and would have had a future opportunity to vote upon him. It is unclear why the Utah Supreme Court needed to step in to speak for the public when the public already had an ample opportunity to speak for itself.

Second, the Utah Legislature had a closer nexus to the pulse of the public sentiment than the Utah Supreme Court. The Legislature was better positioned to gauge public confidence in the judiciary and to determine whether Judge Anderson needed to be removed on the basis of a political justification.

Third, it is unclear which “public” the Utah Supreme Court was concerned about reassuring. Although it seems likely (although by no means certain) that most prosecutors, social workers, public educators, and lawyers in Utah were unhappy with Judge Anderson, *cf.* at ¶81 (“nearly unanimous opinion of the judges of the Third District Juvenile Court”)(emphasis added), it is not clear that the sentiments or political views of such insiders are shared by a majority of the general public, Utah parents, juvenile court defense attorneys, or the current and former victims of Utah’s child welfare system. The author has heard a fair number of citizens bitterly exclaim, fairly or unfairly, that it is the *Utah Supreme Court* that has lowered their confidence in the court system by *removing* Judge Anderson.

To recap, then, the Utah Supreme Court utilized the *Inquiry* decision to interpose itself into a political question. The Court purported to speak for the “public,” without defining the relevant population, favored the position of certain segments of the general public over the opinions of other segments, foreclosed the mechanisms which genuinely measure public segment, and made a factual representation about the public’s perception without offering even one public opinion poll as supporting evidence. The Court exercised political will instead of legal judgment.

<sup>80</sup> Interview with John Doe #1, Judge, State of Utah (Feb. 2, 2004)(hereinafter *Publius*); Interview with John Doe #2, Judge Emeritus, State of Utah ((Jan. 15, 2004)(hereinafter *Doe #2*).

<sup>81</sup> *Publius*; *Doe #2*.

<sup>82</sup> *Publius*; *Doe #2*.

<sup>83</sup> *Publius*; *Doe #2*.

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<sup>84</sup> See *Inquiry* at ¶8.

<sup>85</sup> Judge Anderson is either a courageous whistleblower, or a buffoon who might be unable to competently navigate through the political contours of his office. But this determination is itself an inherently political question, best resolved by a body which is accountable to voters as a representative and overtly political entity. Additionally, since the Utah Supreme Court had a vested interest in presenting the judicial branch of government in the best possible light, in order to maintain the highest level of public confidence and thereby maximize the influence of the judicial branch in the public arena, the Utah Supreme Court was saddled with an obvious *political* (as opposed to *legal*) conflict-of-interest in relation to Judge Anderson's case.

The Legislature, on the other hand, could have weighed Judge Anderson's troubling allegations about Utah's juvenile court system without being tainted with the obvious appearance of protecting a political self-interest in dismissing his troubling allegations about the realities of the Utah juvenile court system. The Legislature could have acted as an arms-length finder-of-fact in determining whether the Utah court system had its own house in order, whether Judge Anderson was fit for office, and whether additional legislative action or investigation was needed.

By miscasting a predominantly political question as an ethical and legal matter, the Utah Supreme Court inappropriately usurped the role of the Legislature and unwisely created a precedent which undermined judicial independence.

<sup>86</sup> The Utah Supreme Court majority stated there was "no merit" to the concern that problems might be caused by the "cloud of restraint" upon the Court itself because of its vulnerability to the disciplinary power of the very Judicial Conduct Commission the Court was attempting to review for error. *Inquiry* at ¶¶58-59. This was so, according to the Court, because "[w]e are much more constrained by our individual and collective belief that the rule of law and the fair and impartial application of the law to facts are vastly more important than the individual or collective careers of any of us." *Id.* of ¶60. Such an assertion flies in the face of history's lessons about human nature and the basic assumptions underpinning American constitutional government.

Court majorities have rendered many decisions which have come to be condemned as unprincipled, selfish, or offensive to basic notions of human fairness and decency. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896)(upholding racial segregation); *Hirabayashi v. United States*, 320 U.S. 81 (1943)(upholding internment of Japanese-Americans on the basis of racial class rather than individualized suspicion); *State v. Garber*, 419 P.2d 896 (Kan. 1966), *cert denied*, 389 U.S. 51 (1967)(allowing state education officials to commit cultural genocide against the Mennonites, simply because the educators wanted to obtain more tax revenue by using the Mennonite children to bolster local school enrollment figures, using compulsory education practices belatedly curtailed by *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). In addition, courts have tended to shamefully shy away from situations where they should have intervened – including open and obvious persecution of Native Americans, Mormons, African-Americans, and many other demographic minorities, even when members of those communities submitted reasonable and valid petitions to the courts for enforcement of their constitutional rights.

Although there are exceptions, some of whom may well be currently sitting on the Utah Supreme Court, and certainly including the judges for whom the author has clerked, the cold truth is that a large proportion of high public officials in America have attained their positions by consistently making their own career wellbeing the foremost consideration in their decision-making processes. Successful politicians and judicial nominees are typically people who strategically pick-and-choose their initiatives to curry maximum favor, and deliberately leave the toughest and most bruising battles for "the fair and impartial application of the law" to be carried out by others. Most justices on most courts (though certainly not all) tend to have a track record of work and writing is decidedly arcane and technocratic. In contrast critical progress on most weighty causes or innovations of any kind has tended to be achieved by efforts which are initially lonely, controversial, or divisive. Many jurists are selected because of what they have *not* said or done, or for who they know, or for what they have done for influential friends, and not because of their decision to take a principled and controversial stand on some noble issue prior to nomination. Cf. *Memorandum of Scalia, J.*, No. 03-475, p.5 (March 18, 2004), at <http://a257.g.akamaitech.net/7/257/2422/18mar20041000/www.supremecourtus.gov/opinions/03pdf/03-475.pdf> ("Many justices have reached this Court precisely because they were friends of the incumbent President or other senior officials.").

Indeed, the American system assumes that civic leaders will, at least occasionally, act out of self-interest rather than public virtue. Politicians and jurists will not always be angels, and our society does not systematically rely upon their own word that they will be. But public support, which is essential to a successful public career, and properly-constructed checks and balances, which are designed to pit selfish opportunists against each other, are thought to be sufficient to curtail the most egregious excesses of ambitious civic leaders and jurists.

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The Utah Supreme Court was also incorrect when it claimed that curtailment of Utah Supreme Court judicial independence would require a “majority of the Judicial Conduct Commission and the majority of this court . . . to . . . act in selfish disregard for the truth.” *Inquiry* at ¶59. In actuality, all that would actually be required would be three Utah Supreme Court justices acting on a fear that they *might* face retribution by a majority of the Judicial Conduct Commission at some time in the future. As to judicial independence, perception is reality, and the perception need not be accurate to exert a potent chilling effect.

Of course, discussion of this hypothetical is not meant to imply that such a dynamic was actually present in the consideration of Judge Anderson’s case, or a significant factor in any other Utah Supreme Court decision rendered by any current or recently-retired justice of the Utah Supreme Court. And the observation that judges have human frailties like the rest of us is not meant to derogate any court or the law, it is offered only to refute the Utah Supreme Court’s implicit suggestion that the public should forgo structural governmental remedies in favor of assurances that that justices and their successors will behave more altruistically than other, more typical mortals. Such notions have wreaked havoc wherever they have been adopted.