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The Judge Joseph Anderson Case:

A Setback for Judicial Independence in Utah

Authored by: By Publius*

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By Publius[1]

Americans are fighting and dying abroad in Iraq in an attempt to bring the people of that tortured nation the blessings of democracy. A crucial element in the success of this effort is an independent judiciary. Unless judges are able to make decisions "without fear or favor" in some reasonable approximation of the Anglo-American ideal, all forms of constitutional guarantees of individual rights to the people of Iraq will be worthless and all the sacrifices made by American and coalition troops will have been in vain.

The tragic case of juvenile court judge Joseph Anderson gives reason to ask whether as we seek to bring an independent judiciary to a people for whom this must seem an alien notion, we may be in serious jeopardy of losing a significant part of this cornerstone of democratic government here at home.

Such a risk arises not from some kind of nefarious plot by radical schemers bent on overthrowing the government or a conspiracy by corrupt politicians seeking to subvert the justice system for their own private purposes. Nor does it arise from attempts by the other two branches of state government to usurp the proper functions of the courts, the traditional challenges to an independent judiciary. Rather, it arises from public inattention or indifference to the threat posed by the process that has been put in place in Utah over the past twenty years to discipline judges and the enormous and unchecked power that has been bestowed on the five justices of the Utah Supreme Court to remove their fellow judges from office. By virtue of the top court's demonstrated use of this power in its decision to remove Judge Anderson, juvenile court judges, and to a lesser extent all trial court judges, can now with considerable justification be said to serve "at the pleasure" of a majority of the five members of Utah's highest appellate court.

Further, given the vindication and support provided to the state Office of the Guardian ad Litem by this decision, guardians can now exercise a form of pressure over judges to an extent never contemplated or intended by the creation of this office. In a very real sense they can function as unofficial supervisors of juvenile court judges to see that their behavior measures up to institutional norms and regnant judicial philosophy. Judges who give offense to these attorney-officers may find themselves disqualified from hearing child welfare cases and risk removal from office. Indeed in light of this decision, and the media spotlight given to the guardian in the Parker Jensen case, parents may have good reason to believe their interests will be better served by pleading their cases before this state official rather than the judge assigned to the case.

All Utah citizens who are concerned with the ability of judges to render justice without fear for the loss of their jobs, if they incur the displeasure of guardians and prosecutors, should be alarmed by the implications of this decision. The under-whelming media attention this case has received should be real cause for concern for those who care about the preservation of a critical element of good government in a free society.

The Elusive Transgression That Cost a Judge His Job

For nearly three years Judge Anderson engaged in single combat against institutional adversaries of overwhelming power and resources in an effort to save his job and reputation. This he was required to do entirely at his own expense and without support from his own bench or any of the natural allies within the legal profession that would be expected to come to his aid. Because he was alleged to have engaged in judicial misconduct, under the law he was not entitled to the assistance of legal counsel at public expense.

On Friday January 23, 2004 his long and lonely three year struggle came to an end when the Utah Supreme Court entered its order removing him from office "immediately." The former judge was thus deprived of all income and benefits summarily without any form of severance pay or period of time within which to secure other employment. No other public employee would be subject to such harsh treatment. Now unemployed and without financial resources, the cashiered former judge must depend on the willingness of legal counsel to aid him pro bono in any further legal proceedings.

To be thus rendered a pariah within his own profession, and suffer the disgrace of being "fired" from his job for the first time in state history, as one newspaper account had it, his transgression must have been grievous indeed. The Judicial Conduct Commission recommended a public reprimand but the Supreme Court elected instead to impose the ultimate penalty of removal. So what did he do to deserve such an ignominious end?

The average person or lawyer unfamiliar with the details of the case will find the answer to this question frustratingly elusive. The sparse news accounts of his demise focus on the judge's tardiness in rendering decisions in child welfare cases as the reason for his summary removal. Yet the 25-page decision by the top court says he was removed not for tardiness or inattention to statutory time schedules, but for a self inflicted "disqualification" brought on by his efforts to defend against allegations in a complaint filed against him by the guardian ad litem in the Judicial Conduct Commission. In the words of the Court's written order it was "a series of tragic personal decisions over a period of years" which "prevented him from performing the duties of juvenile court judge" that brought about his removal. From the reasoning in the Court's order it is apparent that by the time Judge Anderson appeared before the justices to plead his case there was no acceptable way for him to remove this disqualification. In the court's words he had "created a quagmire from which he cannot now extract himself."

Yet the nagging question remains: Why could not this unfortunate situation have been dealt with in some other way? Other options existed such as a strong reprimand as recommended by the Conduct Commission or a probationary period to see if the errant judge exhibited any actual bias in his rulings or behavior and could demonstrate his ability to render decisions in accordance with the strict statutory standards in Utah child welfare law, presumably the reason for the complaint in the first place. The court bypassed these choices in favor of removal as the only way to appropriately deal with the situation mentioning that the interest of the public always took priority in it deliberations over the interests of the individual judge and the image and institutional norms of the judiciary. Given the reasoning used by the court for its decision, the application of these priorities is open to question and particularly the priority need to demonstrate to the legislature the capacity of the judicial branch to deal sternly with its own members.

The Triumph of the Guardian ad Litem

Former Judge Anderson's case is unique. There is nothing like it in Utah history. An attorney-guardian required by law to appear before juvenile court judges in child welfare cases has succeeded in removing a judge from the bench due in large part to aggravation with the judge's professional work style and personal idiosyncrasies.

The former juvenile court judge did not engage in unlawful behavior or become addicted to drugs as with the case of former Judge Ray Harding, Jr., who resigned in the face of certain removal action after his criminal conviction. Nor did he incur the wrath of a particular group of litigants who organized to bring about his defeat at the polls in a retention election as was the case with former Judge David Young. Judge Anderson received high marks from attorneys appearing before him and from most accounts was proper and polite in running his courtroom. Even the district judge appointed as a special master by the Supreme Court referred to him as a good judge. The Presiding Juvenile Court Judge of Judge Anderson's district tried to give him a

chance to prove himself and cure the disqualification brought on by the Judicial Conduct Commission proceedings by allowing him to assume a normal calendar with his share of child welfare cases, unless and until there was a showing of actual bias. However, the Utah Court of Appeals, agreeing with the objections of the guardian, and the prosecutors from the Attorney General's office who work closely with the guardian in child welfare cases, reversed the Presiding Judge and held Judge Anderson to be totally disqualified from hearing all child welfare cases pending the outcome of the disciplinary proceedings against him.

Given such circumstances, it is difficult to see what any juvenile court judge in such a predicament could do to restore himself to the good graces of his accusers and critics except to make no effort at self defense and humbly plea bargain for his job. By the time the case reached the Supreme Court from the Conduct Commission for final action, little remained of the initial complaint against the judge by the guardian except the claim of failure to make timely decisions in eleven cases. But as the lone dissent in the Supreme Court order points out, the judge was not being removed from office for this reason, but for reasons completely unrelated to the original allegations lodged against him in the Judicial Conduct Commission. He was being removed because of the "unique complications" of the case created by the personal strategic choices the judge made in an effort to defend himself by filing a federal lawsuit.

In a nutshell, it was what Judge Anderson said in his federal complaint that did him in because these allegations created an appearance of bias which disqualified him from hearing cases in which the guardian was a participant. Since the guardian is mandated by state statute to appear in virtually all child welfare cases, this effectively barred the judge from hearing those cases which make up the bulk of a juvenile court judge's workload. Of course without such allegations much of the judge's federal complaint would have been lacking in substance and would have appeared frivolous.

The Utah high court summarily rejected the possibility of merit in Judge's Anderson's federal filing indicating that while his decision to file the federal lawsuit did not bear on his disqualification, that he could in the court's words "sue anybody he wishes," the allegations he made in his federal complaint questioning the motives of the guardian ad litem and others within the system did bear on his disqualification —and in fact created it. Given such reasoning, the conclusion seems inescapable that once former Judge Anderson elected to bring suit in federal court challenging the process and composition of the Utah Judicial Conduct Commission, and sought a neutral forum for the hearing of his case, his fate was sealed. It was only a matter of time until, as the court's opinion states, these personal choices produced their "inevitable consequences."

Ghosts of the Past Return to Threaten Judicial Independence

At the time Utah entered the union in 1896, its constitution contained an interesting and unique feature with regard to the administration of the judiciary not found in other states. The judicial article of the 1896 Utah constitution establishing the judicial power of Utah courts contained an express clause providing that the Utah Supreme Court would have "appellate jurisdiction only" and that supervision of all inferior courts was vested in the district courts of the state.

Historians may debate the reasons for this unusual arrangement, but it no doubt had much to do with the suffering Utah residents had experienced at the hands of federally appointed judges during pre-statehood days and particularly federal appointees to the highest territorial court. Many judges during these early years, and even well into the next century, at times displayed an undisguised animus towards the Church of Jesus Christ of Latter-Day Saints and the religious culture of the state. No doubt in an effort to protect against a continuation of this type of bias and to insure that judges would be accountable to the voters at the local

level, the powers of the Utah Supreme Court were sharply restricted to hearing and ruling on appeals with no authority to discipline trial court judges or to direct the internal affairs of the judiciary.

This unique feature of the Utah judicial system remained in effect until 1984 and is the reason why the internal management of the judiciary in Utah and the voting majority on the Judicial Council remained in the hands of trial court judges until 1985, the year following the adoption of the new judicial article by the electorate. Indeed the head of the Judicial Council until that time was not the Chief Justice of the Supreme Court as it is today, but the "Chief Judge" of the district courts. The Chief Justice merely sat as one of seven members with no greater vote or formal powers than any other member of the council. However, with this change in the judicial article the Chief Justice became the formal head of the Judicial Council and the Supreme Court was given plenary authority to discipline and remove judges. Further, the Judicial Conduct Commission was given constitutional status. To those responsible for drafting the 1896 Utah constitution this kind of top heavy power arrangement would have represented a completely unacceptable threat to judicial independence.

The 1984 constitutional amendment sought to put to rest public complaints about the way judges were selected and retained in office and tried to guarantee that Utah courts would never again suffer from the kind of interference with judicial independence that had occurred so many times in the past, especially in the organization and management of the juvenile courts. The elimination of the corrupting influence of the partisan political process associated with contested elections was a major selling feature of this article, as was the claim that by giving the judicial branch the power and resources to manage its own affairs it would be less dependent on the other two branches for its internal management needs.

Finally, as we look back at relevant historical contributions leading up to the Anderson case, the 1994 Child Welfare Act must not go unnoticed. It is unlikely former Judge Anderson would have been removed from office at all had it not been for the inflexible deadlines of this Act and its other provisions that seek to micromanage the outcome of child welfare cases. It was these features of the 1994 Act which provided the basis for the guardian's complaint to the Judicial Conduct Commission. Also, the independent "Office of the Guardian ad Litem" is a creature of this Act. Its attorneys are answerable, if at all, not to trial judges who have traditionally appointed them, but to the Judicial Council headed by the Chief Justice of the Supreme Court. No doubt in response to the angry claims of parental rights groups, the 2004 Utah legislature has attempted to correct this imbalance in the child welfare system by creating the "Office of Child Welfare Parental Defense" within the Department of Administrative Services to be independent of both the Division of Child and Family Services and the Judicial Council. How effective this legislation will be in offsetting the huge advantage state guardians and prosecutors have had over parents in child welfare cases remains to be seen.

Should Utah Citizens Take Comfort or Alarm at the "Message" of the Anderson Case?

It is important for the judicial system in Utah to operate in a manner to inspire public confidence. Public perception that judges are impartial and make decisions as free of bias as possible is a vital part of justifying such confidence. Judges must avoid the appearance of bias and if they do or say anything that creates the appearance of bias then procedures must be available to disqualify them from hearing cases in which this may be a problem or to remove them when actual bias is shown tainting the ability of the judge to perform the duties of the judicial office.

But it is equally important to public confidence, especially in child welfare cases, for parents in particular and the public in general, to have confidence that judges are not being unduly influenced or pressured in their

decisions. If prosecutors and guardians possess the unchecked ability to initiate disciplinary proceedings against a judge which the judge cannot defend without the risk of disqualification from hearing an entire category of cases, thereby risking removal from office, such pressure is real and serious. It means others have an effective whip hand over the judge and all that transpires in the courtroom and perceptions that the judge is merely a "rubber stamp" for the Division of Child and Family Services may come to have a basis in fact. Further, there is no question that judges must be held accountable for rendering timely decisions. But tardiness or laxness in doing so can be dealt with in a number of ways short of removal unless and until such behavior becomes chronic and willful.

Judicial independence was not a doctrine invented to provide judges with job security or to protect the public image of the judiciary and prevent institutional embarrassment. It was intended to preserve the ability of judges to do justice in individual cases on the basis of the law and the facts free from outside pressure or influences. The new threat to judicial independence posed by the Anderson removal decision is serious because over ninety percent of all citizens experience justice (or the lack of it) at the hands of trial judges, not appellate court judges. But it is appellate court judges which have the final say and they dominate and control to a great extent the tone and culture of the judicial branch of government and the policies which guide it.

This new threat is not as obvious as with the historic external threats to judicial independence associated with contested elections, partisan or non-partisan, and attempts by the other branches to "control" the decision making process of the judiciary. Yet even if more subtle, it is every bit if not more dangerous than past threats precisely because it is internal to the judicial branch and less open to public scrutiny. The job security of all judges is now under the control of a handful of appellate court judges to whom the press and the public give great deference and who now have at their command the resources of a administrative bureaucracy which never existed a quarter of a century ago. This unchecked power over the livelihood of individual judges as demonstrated in the Anderson case enables a handful of appellate judges to secure the conformity of their fellow judges to a degree that has never before existed in the Utah court system. Such power may even be wielded to secure conformity to views and philosophies that go well beyond the traditional duty of appellate courts to insure that trial judges adhere to the law and established constitutional principles in the way they decide individual cases.

In sum, the major blow to judicial independence represented by Anderson case is twofold:

First, the likelihood that trial court judges will now come to care more about not offending certain persons than they do about upholding their oath of office; and

Second, the likelihood that the historic tyranny of appellate court judges with special agendas experienced by Utah in its early days may come again to visit the state and its trial court judges in a new form.

Is there a Single Step That Might Help?

Yes, perhaps. While not a complete answer to a systemic problem, there is a relatively simple legislative step that might prevent this kind of case from recurring. This would be to amend the judicial conduct commission statutes by adding two steps as a jurisdictional prerequisite to the commencement of any action by state guardians or prosecutors. Specifically, to require that any such complaints against judges by guardians and/or prosecutors contain:

(1) a description of the number and nature of the appeals taken in individual cases and a showing of why the appeals process has not and will not cure the problem with the offending judge; and

(2) a record of the results of specific efforts undertaken within the judicial branch administrative structure to

cure the problem before filing with the Judicial Conduct Commission, including but not limited to: redress of grievances against an individual judge before the Presiding Judge and the Board of Judges of the district of which the judge is a member, and the Judicial Council itself which is the body charged with supervising the internal affairs of the judiciary.

This second requirement is particularly important with respect to complaints filed by the head of the Office of the Guardian ad Litem as in the Anderson case because this office is lodged within the judicial branch of government itself and it is the Judicial Council which is the nominal supervisor of this office. Such attorney-officers ought not be at liberty to file complaints against judges for disciplinary action unless and until certain basic steps are taken internally to cure the problem.

The foregoing modest proposal is based upon the assumption that most complaints against judges will continue to go through the Judicial Conduct Commission first before reaching the Supreme Court. However, in light of the legislative expansion of the power of the Supreme Court in 2003 to act on its own initiative without waiting first to go through the Judicial Conduct Commission, this may no longer be a safe assumption. All the same, such a legislative step could have three salutary benefits. First, it would allow matters of legal interpretation, procedure and a judge's work style to be dealt with first internally and allow judges an opportunity to defend themselves before their peers. Second, it would avoid litigation and media attention generating the risk of the appearance of bias which the court found to be the root problem in the Anderson case. Three, it would curb the appetite of guardians and prosecutors from attempting to exercise undue pressure over judge's decisions by means of the threat of unwarranted disciplinary actions.

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[2] His petition for rehearing was denied on February 20, 2004.

