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Book Review

*This issue is dedicated
to the memory of*
Ernest A. Hoidal



Judicial Independence: A Cornerstone of Democracy Which Must be Defended¹

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“There is no liberty, if the power of judging be not separated from the legislative and executive powers.”

– Montesquieu, *Spirit of Laws* (1752)

“All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary.”

– Andrew Jackson

Earlier this summer, I received a phone call from the Honorable Richard Bevan, Chief Justice of the Idaho Supreme Court. The Chief Justice asked if I would be willing to serve on a Committee that was being established in response to several pieces of legislation advanced during the 2022 legislative session relating to the Idaho Judicial Council and the process for filling judicial vacancies in district and appellate courts. The Committee would consist of three representatives of each of Idaho's three branches of government, and I would be one of the representatives

of the judiciary. Considering how, in my view, the selection of judges is fundamental to the independence of the judiciary, I was honored to be considered and readily accepted the request.

As I began preparing for the Committee's meetings, I found that the subject of judicial independence and its foundational prerequisite to our functioning democracy has been often written about, including on several occasions in this forum. In 2002, Idaho State Bar President Fred Hoopes wrote, “An independent judiciary protects each person's individual liberties and prevents a tyranny of the majority.”²

In 2005, Idaho State Bar President (now Federal Magistrate Judge for the District of Idaho) Debora Kristensen (Grasham) stated, “Judicial independence is the principle that judges should reach legal decisions free from outside pressures, strictly according to the law, and without fear of reprisal. It is the cornerstone of our democracy and ensures that constitutional liberties are protected even in the face of adverse public sentiment.”³

In 2007, Bar President Tom Banducci echoed these messages stating, “[O]ur judiciary must be free to exercise their constitutional obligation to decide cases fairly

and impartially. If this freedom is threatened, so that judges might ‘look over their shoulder’ before making an unpopular decision, then the checks and balances built into our democratic system aren't working properly.”⁴

More recently, in 2015, former Dean of the University of Idaho College of Law, Don Burnett, wrote about judicial independence, stating that the framers of the United States Constitution entrusted the task “of maintaining the dispersion of power and preserving the enumeration of rights [contained in the Constitution]—to an independent and impartial judiciary.”⁵ Dean Burnett went on to state that “[t]he independence of the judges is predicated upon their impartiality and their adherence to the rule of law” and that these precepts “are the anchors that enable [judges], in the memorable words of Justice Hugo Black, to ‘stand against any winds that blow.’”⁶

The independence of the judiciary is at its most vulnerable during the process of selecting judges. Again, in the words of Mr. Hoopes, “Politically motivated pressures are calculated to influence a judge from acting impartially. They undermine the public's support, understand-

ing and confidence in the judicial system. The time when judicial independence is most vulnerable is during the selection process.⁷⁷

While Mr. Hoopes was writing about the election of judges, the statement is also true with respect to the appointment of judges.

Idaho law governing the appointment of Judges

During the 2022 legislative session, three bills were introduced that presented significant changes to the way district and appellate judges are selected and appoint-

tion for profit under the United States or the State of Idaho.

Upon a vacancy on the bench, the Council solicits applications and then seeks input on the candidates from all members of the Bar through a survey. The Council receives the comments and survey results, conducts interviews of the candidates, and then submits two to four names to the Governor. The Governor selects the new judge or justice from this list of candidates. This process has functioned well for several decades and produces a high caliber of judges—indeed, Idaho has been nationally recognized for the excellence of its judicial system.



During the 2022 legislative session, three bills were introduced that presented significant changes to the way district and appellate judges are selected and appointed to the bench.⁸

ed to the bench.⁸ Under Idaho law, the selection of judges generally occurs through nonpartisan elections. However, when a vacancy occurs during the judge's term, the Governor appoints the new judge or justice (not including magistrate judges). The appointment process begins with an initial selection of qualified candidates who are vetted and nominated by the Idaho Judicial Council.

Judicial Council membership includes representatives of the bench, bar, and public. The Idaho State Bar, with the consent of the Senate, selects three attorney members (one judge and two attorneys). The Governor appoints three non-attorney members from the general public, also with the consent of the Senate. The Chief Justice serves as an ex officio member of the Council. To provide further balance to the Council, the appointments are made with consideration of area of representation; no more than half of the members can be from one political party and no member can hold another office or posi-

2022 legislation to change the Judicial Council and the appointment of Judges

The three bills advanced in the Legislature varied, but all of them sought to substantially change the process for selecting Judicial Council members and filling judicial vacancies. Focusing on House Bill 782—the one that ultimately passed the House and the Senate—the Judicial Council members would increase from seven to 11 members and add a magistrate judge to the roster of members. The Idaho State Bar would no longer appoint any Council members but would recommend to the Governor three attorneys from four different practice areas (civil defense, civil plaintiff, criminal defense, and criminal prosecution). The Governor would appoint one lawyer from each of these areas.

The Governor would still appoint the members of the public, thereby giving the Governor the authority to approve all Council members. The legislation de-

creased the terms of Council members from six years to four, made public the Council's rankings and the ratings of judicial candidates, and allowed the written comments submitted to the Judicial Council to be provided the candidate, if requested. Additionally, the legislation authorized the Governor to reject an entire slate of candidates submitted by the Judicial Council. The bill included a salary increase for judges, such that if the bill did not pass and become law, Idaho judges would not receive a pay raise.

The bill met opposition with many raising concerns, such as: how the limitations on practice areas for Judicial Council members would disqualify potential attorney applicants; how the modifications to the judicial selection process would create significant additional delays; how the disclosure of confidential comments would significantly chill important input about applicants and could dissuade individuals from applying; how the disclosure of Bar survey rankings could leave the Governor open for negative comments, depending on judicial selection made, and could impinge upon the Governor's discretion for judicial selections; and how the bill vests too much authority in the executive branch.⁹

In light of these concerns, and others, recommendations were made to have the issues looked at in more detail.¹⁰

HB 782 ultimately passed both the House and the Senate. However, the Governor vetoed the bill, stating that, "There were components of H782 I supported but I think it is in Idaho's best interest to spend more time properly vetting these changes with all relevant stakeholders. Our starting point must be filtered through the lens of what will help us recruit and retain top quality judges for Idaho."¹¹

The Governor encouraged the judicial and legislative branches "to collaborate and identify areas of compromise that will increase the transparency, preserve impartiality, and improve judicial recruitment."¹²

Judicial selection committee and consensus proposal

With this charge, the Judicial Selection Committee, made up of three representatives from each of the three branches of government, undertook the process of reviewing the history of the propos-

als to change the Idaho Judicial Council. The Committee members debated and engaged in difficult discussions about whether changes were needed to the existing judicial selection process, the perceptions and misperceptions about the Judicial Council and Idaho judges, and possible compromises to protect the current system and the role of the judiciary—particularly in light of potential new legislation during the 2023 session. Ultimately, the Committee was able to reach consensus on new draft legislation.

Under the proposed draft, the number of Judicial Council members would be increased from seven to nine, adding a magistrate judge and an additional member of the public to the Council. Rather than the Idaho State Bar selecting the attorney members (including the district judge member), the proposal would have Idaho Supreme Court select the judicial members. The Idaho State Bar would still select the two attorney members, after soliciting feedback regarding the applicants, but the members would be approved by the Governor and subject to Senate approval. The attorney members would not be limited to a particular practice area, but no two attorney members could be from the same practice area at any one time. The terms of the members would be reduced from six to four years.

One marked change is that the Governor would not be able to reject a slate of candidates submitted by the Judicial Council. Instead, the Governor could request three additional names to be submitted for consideration (in addition to the initial set of names), whereby the Judicial Council would solicit for additional applicants. As to the disclosure of information, either to the public or to the applicant, the Judicial Council would draft a summary report to provide to the Governor identifying the factors considered for each submitted applicant. The summary report would be considered a public record, as would the Judicial Council's rating and tabulated scores from attorney surveys—just as the information is disclosed for judicial elections. The applicant would not receive the actual comments received about a candidate, but instead the Judicial Council would prepare a summary of the comments to protect the confidentiality of the commentors.

Next steps

As with any compromise, the proposed draft legislation is not perfect, but it achieves a measure of balance in both the selection of members of the Judicial Council and the selection of Idaho judges. We will have to wait and see what happens in the Legislature this next session, but considering the debates and discussions over our state's judicial selection process—including comments suggesting that some might consider eliminating the Judicial Council and the appointment of judges all together, in favor of a strict mandatory election for all judicial positions—this issue is far from over.

The judiciary is by its nature unable to defend itself and its role as the third branch of government. That obligation, therefore, falls to the people, and even more so to attorneys— as officers of the court and members of the Bar—to defend against efforts to undermine the judiciary's independence.

As aptly stated by Mr. Hoopes, “Our American democracy promises us that when any of us appears before the law, our cause will be heard only on its merits. Our system of liberty under law assures us that the law will be fairly applied by an independent judge governed only by the rule of law. It further promises us that we will be treated without regard to our wealth or social status or capacity to influence. Our founders insisted that judicial impartiality and independence be a prerequisite to American democracy.”¹³

In that vein, may we all work to serve as an anchor to assist our judiciary “stand against any winds that blow...”



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Endnotes

1. The title of this article is excerpted from a paper from the American College of Trial Lawyers – *Judi-*

cial Independence: A Cornerstone of Democracy Which Must Be Defended, American College of Trial Lawyers (Sept. 2006) https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/actl_judicial_independence_a_cornerstone_of_democracy.pdf?sfvrsn=4. I highly recommend it, as well as the sequel article, *The Need to Promote and Defend Fair and Impartial Courts*, American College of Trial Lawyers (Mar. 2019), <https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/need-to-promote-fair-and-impartial-courts.pdf?sfvrsn=4>.

2. D. Frederick Hoopes, *President's Message*, Advocate, Vol. 45, No. 9 at 8 (Aug. 2002); also Idaho State Bar Resolution 2003-01 (emphasizing the importance of judicial independence in connection with establishing a process for judicial candidate surveys in contested elections and stating that “[a]n independent judiciary is essential if judges are to remain free to make difficult or unpopular decisions based on the law and not on the weight of public opinion[.]”).

3. Debora K. Kristensen (Grasham), *President's Message*, Advocate, Vol. 48, No. 6 at 4 (June 2005).

4. Thomas A. Banducci, *President's Message: Judicial Elections, Judicial Independence, Judicial Surveys*, Advocate Vol. 50, No. 2 at 6 (Feb. 2007).

5. Don Burnett, *Civic Education, the Rule of Law and the Judiciary: “A Republic if You Can Keep It.”* Advocate, Vol. 58, No. 2 at 26 (Feb. 2015).

6. *Id.* (citing *Chambers v. Florida*, 309 U.S. 227, 241 (1940) (unanimous opinion authored by Justice Black)).

7. Frederick D. Hoopes, *President's Message*, Advocate Vol. 45, No. 9 at 8 (Aug. 2002).

8. 2022 House Bill 600, 2022 Senate Bill 1382, 2022 House Bill 782.

9. See, e.g., Idaho Capital Sun, Commentary (Jim Jones), *Idaho Has an Exemplary Process for Picking Judges, Why Fix it?* (Mar. 18, 2022) <https://idahocapitalsun.com/2022/03/18/idaho-has-an-exemplary-process-for-picking-judges-why-fix-it/>; Betsy Z. Russell, Idaho Press, *Legislature vs. Courts, Lawmakers Consider Changes to Judicial Council Judge Selection Process* (Mar. 14, 2022). https://www.idahopress.com/news/local/legislature-vs-courts-lawmakers-consider-changes-to-judicial-council-judge-selection-process/article_cd50b344-cbfd-5b3b-8b3a-69effb4171ab.html;

Betsy Z. Russell Idaho Press, *Letter from Former Chief Justices on Judicial Council Bill* (Mar. 17, 2022) https://www.idahopress.com/letter-from-former-chief-justices-on-judicial-council-bill/pdf_d58119ac-0d9e-5927-b1dd-ccb7f7b63eb2.html;

Betsy Z. Russell, Idaho Press, *Legislature v. Courts, Part 2, Late In Session House Panel Will Consider Major Changes To Idaho Judicial Council* (Mar. 17, 2022) https://www.idahopress.com/eyeonboise/legislature-vs-courts-part-2-late-in-session-house-panel-will-consider-major-changes-to/article_7fb7ae26-b450-5d54-a897-7fe3afb01c40.html.

10. See *id.*

11. Governor Little Veto Letter (Mar. 2022) <https://legislature.idaho.gov/wp-content/uploads/session-info/2022/legislation/H0782-VetoLtr.pdf>.

12. *Id.*

13. D. Frederick Hoopes, *President's Message*, Advocate, Vol 46, No. 4 (Apr. 2003).