Judicial Independence and Judicial Accountability: How Judicial Evaluations Can Support and Enhance Both

Clifford E. Haines
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I. INTRODUCTION

Events related to the conduct of the judiciary in Pennsylvania over the past twelve months have put in stark relief the issues that surround concepts of judicial independence and judicial accountability.

Two judges in Luzerne County in the northeastern corner of the state stand accused of abusing their judicial office for financial gain.¹ In and of itself, an accusation that a judge has been cor-

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¹ United States v. Conahan, No. 3:09-CR-028, slip op. at 2 (M.D. Pa. Jan. 26, 2009). The events in Luzerne County first came to light when it was announced that the Judges were entering provisional guilty pleas to federal charges of Theft of Honesty Services and had agreed to a prison sentence. When it came time for the Court to accept those pleas it
rupted by money is unfortunately neither unique nor stunning. Whether it is the temptations that accompany power, the fact that judges are underpaid compared to their counterparts practicing law, drugs, alcohol, gambling, or flat out dishonesty, judges all too often violate their oath of office and become corrupt. What make the accusations against the Luzerne County judges raise such serious questions about the independence of the judiciary are the facts of the case. It is not simply that judges took money. As accused, the judges are alleged to have committed juvenile offenders to a private juvenile detention center in return for money from the owner of the facility.\(^2\) In some instances the “crimes” the juveniles committed were nothing more than innocent pranks. In one instance a young girl who had never been in trouble before and who was a “stellar” student, had mocked an assistant principal in her high school. Her crime consisted of creating a spoof MySpace page which said at the bottom it was a joke. Her offense got her a three month sentence to imprisonment.\(^3\)

The distortion of their judicial duty and judicial authority as charged in the federal indictment is so disturbing that it almost defies one’s ability to comprehend how someone could be so corrupt. Because our judicial system in Pennsylvania has given judges so much autonomy by way of judicial independence and because there is a public expectation that people who aspire to be judges are honorable men and women, we instinctively assume the events which occurred in Luzerne County could not happen.

Of course criminal conduct of any kind rarely has a direct relationship to judicial independence. The complete freedom associated with judicial independence can lead to opportunities that sometimes invite misconduct, but there is little discussion of a link between independence and criminal activity. It nonetheless seems obvious that the unchecked freedom coupled with enormous power that judges have seem all too often to be at the heart of a variety of levels of judicial abuse. While we expect our judiciary to be responsible, in truth it not always is.

Concomitant with judicial freedom is judicial accountability. The accountability standards applicable to judges are generally

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the ethical guidelines and disciplinary rules we establish for judges. Because of a judge's autonomy and power, however, those guidelines may not be enough. We need to find a way to ensure judicial accountability without taking away the important aspects of judicial independence. This article explores the grant of independence and the value of judicial performance evaluations in balancing independence and accountability.

II. THE REACHES OF JUDICIAL INDEPENDENCE

Judicial independence is often identified as "institutional independence" and "decisional independence." 4

There is no precise definition of judicial independence. Some efforts to formulate a definition have focused on some theoretical analysis of the terms, while others have emphasized practical aspects of the role of judges individually as well as the function of the judiciary as a whole. The effort to define independence is universal and in some countries the ability of judges to command independence is paramount to the rule of the law. 5

A. Institutional Independence

Institutional independence is used generally to describe the relationship between the judicial branch of government and the executive and legislative branches of government. 6 The enactment of laws, rules, and regulations, by either the legislature or the executive, is, by virtue of the independence of the judiciary, subject to the analysis of those pronouncements by our courts. This principal, established in Marbury v. Madison, 7 has been the hallmark of judicial independence in the United States since 1803. The support for this definition of an independent judiciary, although rounded in constitutional interpretation, rests largely on the willingness of society to acknowledge the importance of a court system free from influence. Without that moral authority there is no way to truly enforce independence. The practical aspect of institutional independence does not, of course, make every judge an in-

dependent agent. In order for court systems to operate in an efficient and productive manner there has to be some organizational structure and authority, a hierarchy of judicial control exercised over things courts do. In order for courts to work properly, someone has to decide which judge is going to handle a particular matter. Someone has to decide who is assigned to the criminal cases, civil cases, juvenile cases, and the orphan’s court. If, within a particular judicial district or jurisdictional area, one judge handles all of these functions, someone still has to determine how cases are going to be scheduled and who turns the heat and lights on in the courtroom.

Article V of the Pennsylvania Constitution has created a system where each county or judicial district elects a president judge who oversees the operation of the judicial system and handles all of these ministerial responsibilities. The job of a president judge ensures that someone will make the decisions; this makes the system work. The assignment of even the most mundane task has to be made by someone. That means that a president judge cannot win a popularity contest because he or she has to decide who gets the hardest job and the worst assignments. Even the assignment of a particular judge to a particular courtroom requires judicial involvement. However, the assignment of a particular case to a particular judge may profoundly affect the outcome, and the person making this decision would be expected to make it free from the influence of anyone out of their immediate control.

Whether making assignment decisions falls under the term judicial independence or not, it has been tied to that concept and is an example of how far we have taken the concept. Independence being tantamount to freedom, judges have not only jealously guarded their freedom, they are sometimes inclined to extend it as far as possible. As will be suggested later, the relationship between independence and power has lead to questions about the fair reach of autonomy and the legitimate expense of judicial independence.

B. Decisional Independence

Decisional independence is the autonomy an individual judge has in his or her decision making process. A judge’s rulings have to

be fair and balanced. The ability of a judge to decide his or her case without political or public pressure is at the heart of the fairness we seek in our justice system. It is arguable that decisional independence is far more important than institutional independence. It is, after all, the daily rulings handed down by our courts that most impact the everyday lives of the public. Not only should a judge be free of influence from others, it is particularly repugnant to our system that financial pressures or influence play any part in a judge's decisions. Not only must judges refrain from accepting money, but they must also take care that they are not influenced by gifts, favors, or political contributions. The increased role of politics in the election and appointment of judges has made the influence of money a central concern regarding judicial independence.

The importance of what judges do and how they do it make independence and responsibility the most important traits in those who become judges; furthermore, these traits influences how judges perform their job once they take the bench. In fact, we have put so much emphasis on the independence of the judiciary that it has become a core value to judges and lawyers alike.

At the same time, while judicial independence is staunchly supported by the legal establishment, the public's perception of the judiciary as independent, particularly today, is tenuous at best. Periodic challenges arise which are both troubling and surprising. In 1996 President William Clinton, a Yale-trained lawyer, publicly threatened to call for the resignation of a federal judge in New York because the judge had ruled inadmissible certain evidence in a drug case. While the White House later tried to modify the President's statements, the disrespect for judicial independence was palpable.10 More recently a group of citizens in North Dakota led an initiative which would allow for public punishment of judges whose decisions were unpopular. Under their proposal—called J.A.I.L. any judge who handed down a decision not to their liking would be subject to indictment and prosecution.11

Fortunately the voters of North Dakota soundly defeated the proposal but there still were substantial numbers of citizens who

thought it was a good idea. Both of these events evidence the lack of trust many have in the judiciary and the way it handles its independence.

III. THE LEGAL PROFESSION HAS LONG PLAYED THE PREDOMINANT ROLE IN ADVOCATING JUDICIAL INDEPENDENCE

Lawyers everywhere have long been the champions of judicial independence. That effort is almost always in response to harsh and intemperate rhetoric by others. It is sometimes a reflective reaction, but when judges are subjected to criticism there is a fear that judicial independence is threatened. No one likes public criticism, and without the ability to respond judges invariably look to the legal community for a defense. There is, however, a distinction between criticism of a judge because of a particular ruling and a threat to retaliate against the judge over that ruling. Threats of reprisals against judicial decisions are seen as troublesome interferences to the ability of a judge to decide cases independently. That does not, of course, mean that every criticism of a judge is unwarranted or improper.

An example of how dangerous this kind of challenge is to judicial independence occurred in a 2007 Pennsylvania retention election cycle. Judges in Pennsylvania and other states, after their initial election, undergo some sort of retention election to remain on the bench. Instead of standing for election on a partisan ballot, a judge undergoes a form of referendum election. The judge's retention on the bench for each ten-year term after the first is determined by a simple yes-or-no vote in response to the question, "Should Judge X be retained?" The judge's name appears without reference to political party and is placed on the ballot in a place conspicuously different than all of the contested races.

In the 2007 election, several vocal citizens' groups initiated a campaign to have the voters of Pennsylvania reject the retention election of over 60 trial court judges around the state and one justice of the state Supreme Court. The campaign was predicated on a ruling upholding a judicial pay raise after the General Assembly revoked a bill increasing the pay of both legislators and

12. See id.
14. PA. CONST. art. V.
judges. The Supreme Court, while supporting the revocation of the legislative raise, ruled that their own pay raise could not be changed because of a Constitutional prohibition to lowering judicial salary. The ruling generated a great deal of anger that in turn led to a movement to retaliate against all judges up for retention. The retaliation came in the form of a state wide effort to defeat every judge in the Commonwealth who was running for retention that year. The effort to defeat those judges took no account of the merits of the individual’s performance during his or her previous tenure or the fact that none of the targeted judges had anything to do with either passing the pay raise or the decision to rule it could not be revoked as to them. It was an attack on the judiciary as a symbol of dissatisfaction with the whole idea of a pay raise generally. The Pennsylvania Bar Association almost immediately took up the cause of the judges who were constrained by judicial rules of conduct from defending themselves. A counter campaign was launched asking voters to consider the merits of the judge not the merits of the pay raise decision. Fortunately the voters responded positively and rejected this assault of the judiciary and all of the judges who were subject to retention won their elections. The success of that campaign was viewed as a statement in favor of judicial independence by both the judges and the lawyers.

But there is a disquieting aspect to the bar's role in promoting judicial independence. While defending the judiciary from unwarranted attacks promotes better relationships between the bench and the bar in these situations, there is little effort to actively promote judicial accountability. It is the perception among lawyers that judges are too sensitive to discussions about limits on their autonomy to risk addressing judicial responsibility head on. Too often discussions prompted by concerns that a judge has acted inappropriately are no more than whispered complaints. Lawyers feel that any criticism will be met with retaliation. This all too often leads to an unbalanced discussion about the importance of judicial independence but not about accountability. This reticence to speak up played a part in the unfettered abuse committed by the Luzerne County judges.

Judicial independence has a curious history in Pennsylvania. When Pennsylvania adopted its original Constitution in 1776 there was no separation of powers or branches of government as we

know them today.\textsuperscript{17} Judges were appointed by an executive authority (the concept of a governor had not even taken hold) and they remained under that authority’s control. It was only with the scraping of the 1776 Constitution and adoption of a new Constitution in 1790 that Pennsylvania adopted a form of government which identified a separate branch of government.\textsuperscript{18} Whether the decision to change was a product of the chaos of a poorly crafted government, bad people who previously held office, or the brilliance of the Federal Constitution is hard to say, but clearly the wise founding fathers of the Commonwealth of Pennsylvania were not as intent on an independent judiciary as we are today.

As a result, the grant of the independence that seems so necessary to the fairness of their decisions is something grudging at best. The stock of the judiciary seems to have waxed and waned for the two hundred plus years since those early years of the Republic. Judges generally are like baseball umpires, calling balls and strikes. Invariably, they are perceived to have it wrong by at least one side of any dispute. Today, we see society becoming more and more polarized; there is an even higher level of distrust and dissatisfaction with judges who are even more often perceived to be mistaken. People genuinely believe that judge’s decisions should reflect the public will. Our education system has been unable to adequately educate children about the role of the judicial branch of government or the way it is uniquely distinct from the other two branches. At the same time, little is said by the media or public officials about this unique and distinct role that judges play in the tripartite system of government. As a coequal branch of government, many think all of the same rules apply to the judicial branch that apply to every other branch of government. Judges are thought by most people to be politicians subject to the will of the people like every other public official.

The judiciary itself has not always put its independence in the best light either. For much of the twentieth century Pennsylvania’s courts were seen as the handmaiden of coal, railroads, and steel.\textsuperscript{19} Even today appellate court judges are heard to say how important it is that they get out among the people to understand

\textsuperscript{17} PA. CONST. ch. II (1776).
\textsuperscript{18} PA. CONST. art. II, § 8, art. V, § 2 (1790).
what they believe and feel and too often the judiciary itself has adopted an over inflated concept. In the last appellate court decision touching on judicial independence, the Commonwealth Court of Pennsylvania in Local 810 American Federation of State v. Commonwealth was called upon to review a trial court decision interpreting an order entered by an arbitrator. The dispute was between the trial court in Philadelphia County and the employees of the court. The court employees challenged the pay scale being applied to them compared to the pay scale for other city workers. The trial court ruled, after an arbitrator called for a study of pay disparity, that no such review was permitted because it interfered with the independence of the judicial authority to select, discharge, and supervise court personnel. The Commonwealth Court ruled that the study itself had no bearing on the question of judicial authority and could therefore go forward, but emphasized that it was doing so because the study did not effect the selection, discharge, or supervision of court personnel. But to tie the selection of employees in clerical roles to judicial independence is stretching the expanse of its meaning to a very broad sweep evidencing an inflated view of how independent the judiciary views itself as being.

The events that have been unfolding in Luzerne County seem to demonstrate both the abuse and perversion of judicial authority cloaked in terms of judicial independence. The judges who have been charged there did more than incarcerate children for money. Not only did the judges overreach in their adjudicatory and sentencing authority, they frequently decided cases involving juvenile crimes without either affording or offering them the right to counsel. These judges not only abused their office, they ignored the law.

But the perversion of their decisional prerogatives was accompanied by the abuse of their supervisory authority too. As president judges, which both of them were during the relevant time periods, they ignored principals of fairness in their administrative roles. They created a culture of autocratic authority which permeated the courts and other offices of county government. Relatives and close friends were awarded jobs irrespective of their qua-

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lifications. The judges never met as a group and the assignment of matters to them was decided solely by the President Judge without consultation with the judges themselves. The interest of other branches of government was ignored. The existing county juvenile facility was abruptly closed and children were transferred to the new private jail over the objection of the county commissioners. The balance of power associated with a fair and impartial judiciary was gone. Judicial Independence turned dictatorial.

While the Luzerne County situation is outrageous in the extreme, the chinks in the armor of judicial independence are not only evidenced there. Lawyers seem to confront judges who have lost touch with the role they play in society all the time. Judges forget that it is not only the rulings they hand down that affect litigants, it is the way that is done. All too often judges become imperious and condescending to lawyers and litigants alike. It is a disturbing reality that is often ignore because of the fear on the part of judges that they might be abdicating power and the fear on the part of lawyers and litigants of the expanse of that power. Even when there is no intent to be overreaching, the lack of explanation for decisions is alarming. The holding in *Local 810* itself suggests a misguided notion of the reaches of judicial independence. Matters that require give and take between branches of government fail to be satisfactorily resolved because of the declared independence of the judiciary. In 1987 the Pennsylvania Supreme Court ordered the Commonwealth of Pennsylvania to fully fund the unified court system. When that order was ignored, a writ of mandamus followed. To this day the Commonwealth has failed to comply with that decision. If courts draw unrealistic parameters around their decisions, legislatures ignore the courts and judges do, in fact, misbehave. The call for an independent judiciary becomes hard to justify.

IV. HAS JUDICIAL INDEPENDENCE GONE TOO FAR

Being a judge is not easy. Judges almost always deal with people who are in difficult and unpleasant situations. Lawyers pressure themselves to perform and are pressured to perform by their clients. Litigants and witnesses are frightened, sometimes angry, and often uncertain about courtroom decorum. In instances where the need for tolerance and temperance is greatest, it is the judge that should be the last person to lose composure. That is not always the case.

The job of being a judge can be terribly isolating, particularly if you recognize the need to keep an arms length relationship from those who will appear before you. Isolation is not a preferable state. Most people are social animals. Being a judge can lead to loneliness, frustration, distrust, and depression. In some instances, it’s hard to maintain that arms length relationship. If a judge is from a small town or county where everyone knows everyone, attends the same social functions, sends kids to the same schools, and see one another every day, the people who appear in court are also people you interact with in those other roles.

The actual job of judging is hard. Rarely are matters black and white. Issues are sometimes difficult and often require making decisions about who to believe. The line between right and wrong and truth or fiction, can be as narrow as a razor’s edge. Everything on either side of that narrow line is different shades of gray.

Judges are expected to exercise a kind of power they have never experienced before. We certainly want our judges to be strong and assured. We want them to control situations frequently filled with highly charged emotions—even life and death. We also want them to be compassionate but unyielding to the pressures of money and influence. In short we want them to be independent and act independently without overstepping the boundaries the rest of us set.

Our present systems of electing and appointing judges seems to do little in ferreting out qualities that will assure us judges are capable of demonstrating all these important characteristics. We can articulate what we want a judge to be, but we can’t identify the qualities that will assure the judge will be able to fill those shoes. Most people wouldn’t think of turning the car keys over to a kid who has a history of irresponsible behavior. Most would likely agree that there is little to directly measure the “responsibility” of judicial candidates except the normal vetting that goes on: Do they pay their taxes? Do they hold jobs and perform well in them? Do they contribute to the community? Do they have a
stable personal life? Do they care about the legal system and the administration of justice? But it is also fair to expect men and women to ascend to the bench who will likely be able to fill all the responsibilities we impose on a judge. If we are able to elect or appoint men and women with the traits necessary to make hard decisions and withstand public pressure, we should not have to concern ourselves with how they will use their independence judiciary.

There is little in life that is really analogous to the role of being a judge—even baseball umpires confer with one another before a final ruling. Nor are there people without faults. People are subject to tempers and bad days. There are examples of individuals who seem to be mediocre candidates for judicial office but who prove to be outstanding jurists. People often can grow into the role of being a judge. There are individuals with giant intellects whom we put on the bench only to find them incapable of being decisive, unable to meet deadlines or don’t have the stomach to maintain control over their courtroom. There are well known examples of people who undergo what appear to be radical changes when they become judges. Some seemingly indecisive people become firm and effective. Some people reinvent themselves. Certainly, Dwight Eisenhower did not anticipate that Earl Warren would become the powerful progressive he was as chief justice. Justices Brennan and Souter and to a lesser extent Sandra Day O’Connor and Harry Blackman are recent examples of judges who were perceived to undergo philosophical transformations after they were appointed to the bench.

Like it or not, judges no longer enjoy the protected and reflective life they once did. Not only is the work of a judge demanding, they are expected to solve all matters of social problems. Disputes that once were settled in homes, neighborhoods, families, and churches are now resolved through lawsuits. Judges who seem removed from the everyday life of the litigants are thought to be imperious, out of touch, and ineffective. The truth is that people only want a judge to be independent from the pressures or values coming from the other side. When a judge is truly independent, people can become suspicious.

Every person who interacts with judges has experienced “black robe disease”; the condition affecting some judges who abuse their

power simply because they can. Those judges have little regard for either lawyers or litigants who appear before them. Back robe disease can manifest itself in laziness and the expectation that they don't have to work any more simple because they are a judge. Black robe disease can appear in a courtroom where a judge feels it unnecessary to treat lawyers, witnesses or parties respectfully and revels in belittling others.

The Luzerne County situation emphasizes the point that all of the power, expectations, and demands on judges can go terribly wrong. The situation also points out that both the integrity and independence a judge is really a status that one earns; it is not an entitlement. Like respect, it is something you have to work toward every day. Simply put, we want our judges to earn and maintain their independence by behaving in a responsible way.

Too often we put people on the bench hoping that they will understand the interplay between independence and responsibility without either a measure of their ability to do so or a mechanism to check it. And so a judge becomes misguided, a rogue, or at worst a criminal. And the concept of judicial independence suffers a mortal blow. No longer does the public want independence because its abuse has bred contempt. It is not fair to espouse independence if the people who have been given it can't handle it. It is only logical to expect the contempt and condemnation that undermines the very principal we want society to expect.

Judicial independence often shields this behavior. The bad judge’s independence can protect not just the conduct that leads to criminal or immoral acts, it can lead to conduct that can make life miserable for people without ever becoming actionable. While the reactions of the extremists in North Dakota were misguided, the judiciary is capable of abuse of power that can understandably anger the public.

Given the magnitude of ways that judges can squander their independence, more effort needs to be directed at making sure they are doing the job expected of them. All of us hope we are on the right path but in the absence of meaningful feedback we may never know for sure. The present system in Pennsylvania puts judges on the bench with little in the way of qualifications. While expectations for a judge are high, nothing measures whether those expectations are being met until a judge faces a retention election. At that point, a judge can do an awful lot of damage.
V. EXISTING MECHANISMS TO ADDRESS JUDICIAL CONDUCT ARE CUMBERSOME AND FOCUSED ON DISCIPLINARY MEASURES

When a judge strays from the responsibility expected of him or her, the only present mechanism to address their misconduct is judicial discipline or removal from the bench. Pennsylvania has, by Constitutional Amendment created a Judicial Conduct Board that is charged with the responsibility of disciplining judges who are accused of wrongdoing.29 The system is a reactive one; the Board intervenes upon the filing of a complaint. Pennsylvania does not require its judges to undergo mandatory legal education as it does its lawyers. There is no required ethical training or substantive law updates a judge must attend. What exactly constitutes an actionable complaint against a judge is not clear. There is no place to challenge a judge’s ability to understand or adhere to the law except through appeal. Even then, a judge who is found to have abused his discretion or been wrong on the law is not subject to any remedial process to address a misunderstanding of his role or ignorance of the law. The Luzerne County incidents have exposed weaknesses in the existing judicial disciplinary system. It has come to light that a complaint made to the disciplinary board about the judges involved in the present scandal was not acted on when the Board’s counsel learned that the FBI had opened a federal investigation.30 As a result of this failure to investigate judicial conduct continued unchecked for months and months while federal authorities assembled evidence sufficient to justify criminal charges. Obviously, it does not take the same level of proof to remove, sanction, or suspend a judge whose conduct appears improper while a formal investigation is undertaken.

In an extreme case a judge who misbehaves may be subject to impeachment.31 Impeachment was the mechanism employed to remove Justice Rolf Larsen from the bench after he was accused of a number of improper acts, including forging prescription medications for himself.32 Finally every judge is subject to a retention election after ten years on the bench. There is, however, no standard by which a judge is evaluated nor any guidance given the voter with respect to who should or shouldn’t be retained. Some

County bar associations undertake an evaluation process that they offer to the public but there is little formal publication of the results of those evaluations. The circumstances in which a judge is not successful at winning a retention election are few and far between.

There is legitimate reason that the removal of a judge is cumbersome and difficult. Judges should be immune from removal at the will of the electorate or anyone else simply because of a disagreement over a judge's philosophy or a particular ruling in a particular case. The flipside of overinflating judicial independence is undervaluing its importance. Irrespective of how vigilant the judiciary has been to the demands of judicial independence, criticism of how it is being employed and empowered does not translate into weakening or abandoning it. The 2007 judicial retention elections in Pennsylvania demonstrated the potential impact of a misguided attack on the judiciary. Not only did that effort fail to take into account the individual qualifications of sixty judges throughout the state who deserved to be considered on the merits of their work; it posed a substantial threat to the judicial system. Because judicial elections only occur in odd numbered years, vacancies on the bench would have followed the removal of those judges for at least twelve months unless the governor were able to make interim appointments. To expect the governor to fill over sixty vacancies without taking time to locate and consider qualified candidates would be both unlikely and unreasonable. The loss of that many would have a profound impact on the administration of justice in Pennsylvania.

But too often judicial conduct which should result in some action is unreported or not thought to be serious enough to rise to the level of either formal discipline or removal. Judges can be dilatory in their work habits, intemperate toward litigants, haughty, highhanded, and imperious without triggering the presently existing intervention methods. Even if that conduct might justify defeating a judge at a retention election, to wait six, seven, or eight years to address abuses of judicial power is not acceptable.

Judicial conduct that is unacceptable can also go unreported. Lawyers who are aware of unacceptable behavior are often unwilling to step forward. Although the disciplinary process is intended to be confidential, the present system has no enforcement mechanism for board appointments. The present system calls for the appointment of lawyers, judges, and lay people to the board. Unlike the lawyers and judges there are no ramifications to a lay person who discloses a complaint against an individual judge. Equally
important is the fact that lawyers have little confidence that a judge will not be able to conclude who has complained about them. In rural counties with a small number of lawyers who appear in court and only a few judges, the identity of the person who makes a complaint can be pretty transparent. But even in the absence of transparency or outright disclosure, the perception that exposure will occur invokes widespread silence. Lawyers are like everyone else in this regard. The many stories of grand jury leaks and re-
criminations by criminals against witnesses are enough to intimi-
date a lawyer who sees bad judicial conduct. While there is more than sufficient reason to be concerned that public officials in Luzerne County—the District Attorney and Public Defender in par-
ticular—saw nothing of concern, retaliation against them may have kept them silent in the face of what seems to be obvious abuses.

Discipline should not be the only response to judges who have failed to perform appropriately. Long before a judge's conduct ris-
es to the level of reportable misconduct some mechanism for inter-
vention is needed. Judicial independence can impede that inter-
vention, though, if independence is a shield against any interference from the outside with the actions of a judge. Obviously that is not the intent of independence but it can be a consequence. Judges are human beings who do not want to be scrutinized for every misstep. Although high expectations for the office are war-
ranted, judges suffer from the same foibles the rest of us do. Judges can procrastinate, become distracted, and, at times, behave badly. It is probable that fear of seeming just like the rest of us is sometimes behind resistance to interference.

Most professionals experience some cause and effect between their performance and their success. Even a doctor who treats patients will experience a correlation between what they do and the outcome. Rude and impolite treatment of patients will result in the patient not coming back. Bad medicine leads to bad out-
comes and peer review reprisals or medical malpractice lawsuits. But judges operate below this kind of scrutiny. Lawyers can't de-
cline to appear before a judge with whom they clash. Appeals can't be based on the laziness of a judge or his ineffectiveness in the courtroom. People in the ordinary workplace would not hold a job long if they were dismissive, discourteous, lazy, or unproduc-
tive. Rarely are judges called on the carpet for the routine job per-
formance failures we all see.

It is important to acknowledge that judicial misbehavior is not always the result of intentional or even negligent conduct. Judges
are often unaware that their behavior is received as inappropriate or abusive. Judges may not perceive they are being harsh or rude when they speak or act.

Given the pressures and demands that judges experience, human weaknesses of mankind generally, and our changing society, it is almost unrealistic to think that independence as we have tried to promote it will ever be a stable state. Judges will do things that they ought not do. People will react to judges in ways they ought not react. It may, in reality, be vary hard in our current climate to hold the principal of judicial independence in the same regard it once was. Accountability of judges, in whatever form that concept may take, is constantly pulling against independence. It is time to look at the space between independence and accountability and see if we can fill the void with a productive mechanism for improving the appearance of misdirection that is all too common.

VI. JUDICIAL PERFORMANCE EVALUATIONS SUPPORT JUDICIAL INDEPENDENCE

In fact, there is a middle step that can accommodate the demands of both. If a judge undergoes a balance analysis of his performance on a periodic basis, there is an opportunity to ensure that judges are performing their duties appropriately. Through a judicial performance evaluation, a judge can hear constructive criticism of the job he is doing with the hope that an evaluation will improve his performance.\textsuperscript{33} Eighteen states, the District of Columbia, and Puerto Rico have taken steps which address the problem of accountability by undertaking some form of judicial evaluation process without invoking any threat to independence or the risk of punishment or retaliation.\textsuperscript{34} Each process is slightly different than the other but New Hampshire may have adopted the most progressive and balance system of all.\textsuperscript{35} Under a rule adopted by the States Supreme Court, judges in that state undergo judicial evaluations every three years.\textsuperscript{36} Each judge is subject to evaluation on specific areas of his or her performance in accor-


\textsuperscript{34} University of Denver's Institute for the Advancement of the American Legal System, Judicial Performance Evaluation Programs in the United States, available at http://www.du.edu/legalinstitute/JPE.pdf.

\textsuperscript{35} N.H. Sup. Ct. R. 56 (West, Westlaw through Nov. 2009 amendments).

\textsuperscript{36} N.H. Sup. Ct. R. 56 (IV)(A).
dance with set standards. Judges are reviewed on all aspects of a judge's role. The evaluations are done by litigants, witnesses, jurors, and lawyers. After the evaluations are accumulated they are shared with the individual judge confidentially. The judge is provided with input on areas of deficiencies and problems. Each judge is reevaluated again three years later. If prior deficiencies continue and have not been adequately addressed by the judge then the evaluations may become public documents.\(^{37}\)

The benefits of judicial evaluations should be obvious. First they address the problems of isolation or a lack of self reflection. They allow judge to become aware of perceived weakness without fear of public embarrassment or retaliation. They not only encourage improvement, they promote respect for judicial independence. Even through an evaluation is confidential, if the public is aware of the fact that a judge is subject to this kind of review, they are hard pressed to argue that judges are out of touch or acting on their own without any guidelines. Attacks on the judiciary can be reduced. Judicial evaluations counter the calls for extreme measures to sanction a judge who has rendered an unpopular decision or even made a mistake.

One critical part of a judicial evaluation process is buy-in by the judiciary. Judges must accept that there are limits to independence and those limits are not theirs to set. While an independent judiciary is critical to our democracy, so too are checks and balances. Too often the judiciary, in explaining why their independence is so important, make it sound like they are above everyone else. Whether that is true or not, an argument that they are accountable to a different and amorphous standard doesn't sell well.

In addition, a larger, more diverse, more informed society has created a different landscape than the one that existed a decade or two ago. The public does not attend trials where they get to witness judges and lawyers in action. The press rarely sits through a trial and rarely employs lawyers to observe. People witness a form of vigilante justice on television and in the movies. In some respect, what judges do and don't do is the product of second hand information provided to a transparent society from the least transparent branch of government. At the same time the legal system has become a daily part of the life of society. Not only do people not know their neighbor, even the slightest disagreement ends up in court. Churches, schools, and community organiza-

\(^{37}\) N.H. SUP. CT. R. 56 (IV)(B).
tions are no longer community arbitrators. In fact they are as likely to be litigants as anybody else. Legislatures churn out new laws and the courts keep trying to adapt. Drug courts, treatment courts, community courts, veteran courts, and a whole range of other dispute resolution mechanisms have been put in play. The pressure on the judiciary is extraordinary. The opportunity for reflective thought, calm reasoning, and scholarly analysis has diminished. The result is the invariable outcome of familiarity: contempt. Because we don’t put premium value on the legal system, we don’t hold it in the high regard we once did. So as the public demands more from the courts and they are unable to deliver, people get frustrated by the inability of the justice system to fix everything that is wrong.

Judges cannot be expected to be flawless or to figure out the bounds of independence on their own. Demanding respect to an independent judiciary will not work in a vacuum or without some give and take reflective of where we are as a country today. A judicial evaluation process can provide a buffer to the critics on both sides of the aisle.

Judges are like the legal system itself—resistant to change. Some outspoken judges who do not like interference with their autonomy will reject the notion of judicial evaluations as intrusive, untrustworthy and threatening to their independence. But most judges should embrace the opportunity for healthy feedback and guidance. Good judges have no fear of an evaluation process because they know they are acting responsibly and an evaluation will simply confirm that. Most of us deplored grades when we were in school, except when we got high ones. When we got high marks we were proud, reassured, and motivated. After school, we rejoice in good performance evaluations in the work place or other commendations for a job well done. When those acknowledgments don’t come or the performance evaluation is bad, we try harder. In some instances we recognize we are in the wrong place doing the wrong thing and we move on. But one way or another, we want to know where we stand.

Whether a judicial evaluation process would have prevented the corruption uncovered in Luzerne County is impossible to say. Most people who commit criminal acts work diligently not to get caught. The intent to deceive is the hallmark of corruption. But one would like to think that a corrupt judge subject to wide ranging scrutiny would have difficulty going unnoticed. Ten years a very long time to go without any meaningful evaluation. There is
little to be said to justify rejecting judicial performance evaluations.