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Check Still Needed On Judicial Power

Should Judges Answer Only To Themselves?

By MITCHELL W. PEARLMAN

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No one can question the courage of senior Associate Supreme Court Justice David Borden. He filed the complaint, and made public the events, that led to the Judicial Review Council's sanctioning of former Chief Justice William J. Sullivan for trying to keep from the legislature a court decision limiting public access to judicial records.

He's leading a much-needed overhaul of the judicial branch's rules and policies on transparency - even in the face of intense opposition by some of his colleagues on the bench. But perhaps he showed the most courage when he recently met in a no-questions-barred session with members of the Connecticut Council on Freedom of Information.

The council is an umbrella group representing the state's print, broadcast and cable news media. It advocates for strong open government laws and a vigorous First Amendment. It's been most critical of the culture of secrecy in Connecticut courts and is crusading for a constitutional amendment to assure greater accountability over our judges. So Justice Borden knew he was entering the proverbial lion's den in meeting with them.

The state constitution states that the "powers and jurisdiction" of the courts "shall be defined by law." The Council on Freedom of Information has proposed that this provision be amended by adding the words "and the practices and procedures of the courts, including their openness and accountability to the public, shall be established by statute."

Justice Borden's argument against this constitutional amendment was two-fold. First, he argued that the recent scandal that precipitated the call for such an amendment had nothing to do with the judicial branch's power to make rules governing the courts.

Second, he maintained that such an amendment is unnecessary now since internal reforms are already under way that, if implemented, will provide for far greater transparency than is currently the case.

It was a good argument, articulately presented. But I think it falls short on both

accounts.

It was not just the Sullivan scandal that precipitated the initiative for a constitutional amendment. It was also the protocols that came to light a few years ago, in which a large number of court files and proceedings had been clandestinely closed to the public, and the judicial branch's vigorous attempt to keep some of those records secret - including the identities of the judges who entered sealing and closure orders.

In fact, these are just two of the more publicized examples of what many consider judicial arrogance - or "robe-itis" as it is now called. Other examples include the decision to keep the meetings of the Superior Court Rules Committee closed to the public, the decision not to permit public attendance at the annual convention of judges, and the numerous decisions of judges to prohibit cameras in their courtrooms. One judge even prohibited note-taking by a reporter in her courtroom.

Interestingly enough, each one of these decisions has been, or is in the process of being, changed under Justice Borden's enlightened leadership. But the fact is that no remedial action occurred until the recent scandals unfolded. So why shouldn't we be skeptical that without a change in the one fundamental law that binds the courts - the constitution - these improvements won't be reversed by a judiciary led by someone other than Justice Borden?

The fact is, there is no guarantee without a constitutional amendment.

Why is this so important? In effect, Justice Borden is attempting to establish within the judicial branch, by rule and policy, something akin to our Freedom of Information Act. But alleged violations of these provisions would not be reviewable by, or appealable to, any independent authority, such as the Freedom of Information Commission. Nor would any rule change be subject to legislative approval, as it is in the federal system.

Thus, any newfound transparency would be exclusively at the sufferance of the very judges who, in the future, may decide to close records or proceedings from public scrutiny.

I certainly understand why judges don't want independent oversight of such decisions. No one likes someone else looking over their shoulders and second-guessing them. But in our system of government, that's what "checks and balances" are all about, and the judicial branch shouldn't be immune from such accountability under some self-serving system it designs to cloak itself from that accountability.

Justice Borden made some legitimate points in arguing against amending the constitution. And I agree that the constitution should not be amended without very good reason. But I submit there well might be such reasons in this instance. At the least, the legislature should look closely at the issue, hold public hearings on it, and then decide whether to institute the constitutional processes for amendment, in which the ultimate decision would be left to the people of this state.

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