Bill as Introduced

HB 134 – AS INTRODUCED

2001 SESSION

01-0028
09/10

HOUSE BILL ***134***

AN ACT permitting challenges to judges.

SPONSORS: Rep. Soltani, Merr 10; Rep. Marshall Quandt, Rock 20; Rep. Pepino, Hills 40; Sen. Roberge, Dist 9

COMMITTEE: Judiciary

ANALYSIS

This bill permits each party one challenge to the justice assigned to the case.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

HB 134 – AS INTRODUCED

01-0028
09/10

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand One

AN ACT permitting challenges to judges.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Section; Courts; Superior Court; Challenges. Amend RSA 491 by inserting after section 3-a the following new section:

491:3-b Challenges. Each party to any case before the superior court may request that one justice of the court, or one marital master in a case that may be heard by a marital master, not be assigned to the case. Such request shall be filed with the court, in writing, within 30 days after arraignment in any criminal case, and within 30 days of the return date in any other case. Upon timely filing of such a request, the clerk of the court shall not schedule the case in question with the justice or marital master named in the request.

2 New Section; Courts; District Courts; Challenges. Amend RSA 502-A by inserting after section 6-b the following new section:

502-A:6-c Challenges. Each party to any case before the district court may request that one justice of the court not be assigned to the case. Such request shall be filed with the court, in writing, within 30 days after arraignment in any criminal case, and within 30 days of the return date in any other case. Upon timely filing of such a request, the clerk of the court shall not schedule the case in question with the justice named in the request.

3 Effective Date. This act shall take effect January 1, 2002.

Amendments

Senate Judiciary
January 15, 2002
2002-2181s
09/01

Amendment to HB 134

Amend the bill by replacing all after the enacting clause with the following:

1 New Section; Courts; Superior Court; Challenges. Amend RSA 491 by inserting after section 3-a the following new section:

491:3-b Challenges. Each party to any case before the superior court may request that one justice of the court, or one marital master in a case that may be heard by a marital master, not be assigned to the case if the party making the request has appeared before that justice or marital master in a previous case. Such request shall be filed with the court, in writing, within 30 days after arraignment in any criminal case, and within 30 days of the return date in any other case. Upon timely filing of such a request, the clerk of the court shall not schedule the case in question with the justice or marital master named in the request.

2 New Section; Courts; District Courts; Challenges. Amend RSA 502-A by inserting after section 6-b the following new section:

502-A:6-c Challenges. Each party to any case before the district court may request that one justice of the court not be assigned to the case if the party making the request has appeared before that justice in a previous case. Such request shall be filed with the court, in writing, within 30 days after arraignment in any criminal case, and within 30 days of the return date in any other case. Upon timely filing of such a request, the clerk of the court shall not schedule the case in question with the justice named in the request.

3 Effective Date. This act shall take effect January 1, 2003.

2002-2181s

AMENDED ANALYSIS

This bill permits each party one challenge to the justice assigned to the case, if the party making the challenge has appeared before that justice in a previous case.

Senate Judiciary
January 22, 2002
2002-2249s
09/01

Amendment to HB 134

Amend the title of the bill by replacing it with the following:

AN ACT establishing a pilot program in the superior and district courts of Merrimack county which allows each party in a civil case one challenge to the justice assigned to the case.

Amend the bill by replacing all after the enacting clause with the following:

1 Pilot Program in the Superior and District Courts of Merrimack County to Permit Judicial Challenges by Parties in Civil Cases.

I. A pilot program in the superior and district courts of Merrimack county is established to allow each party in a civil case one challenge to the justice, or marital master, assigned to the case.

II. Under this pilot program, each party to any civil case before the superior court or a district court in Merrimack county may request that one justice of the court, or one marital master in a case that may be heard by a marital master, not be assigned to the case. Such request shall be filed with the court within 30 days of the return date in any civil case. Upon timely filing of such a request, the clerk of the court shall not schedule the case in question with the justice or marital master named in the request.

2 Legislative Oversight Committee.

I. There is established a legislative oversight committee to study and make recommendations on the pilot program, established in section 1 of this act, allowing judicial challenges by parties in civil cases in the superior and district courts of Merrimack county.

II.(a) The members of the legislative oversight committee shall be as follows:

(1) Three members of the senate, appointed by the president of the senate.

(2) Three members of the house of representatives, appointed by the speaker of the house.

(b) Members of the committee shall receive mileage at the legislative rate when attending to the duties of the committee.

III. The legislative oversight committee shall study the pilot program allowing judicial challenges by parties in civil cases in the superior and district courts of Merrimack county.

IV. The members of the legislative oversight committee shall elect a chairperson from among the members. The first meeting of the committee shall be called by the first-named senate member. The first meeting of the committee shall be held prior to October 1, 2003.

V. The legislative oversight committee shall report its findings and any recommendations for proposed legislation, including any recommendations for the continuation and expansion of the pilot program, to the senate president, the speaker of the house of representatives, the senate clerk, the house clerk, the governor, the administrative justice of the district courts, the chief justice of the superior courts, and the state library on or before January 1, 2004.

3 Repeal. Sections 1 and 2 of this act, relative to the pilot program on judicial challenges in the superior and district courts of Merrimack county and the legislative oversight committee, are repealed.

4 Effective Date.

I. Section 3 of this act shall take effect July 1, 2004.

II. The remainder of this act shall take effect July 1, 2002.

2002-2249s

AMENDED ANALYSIS

This bill establishes a pilot program in the superior and district courts of Merrimack county which allows each party in a civil case one challenge to the justice assigned to the case. The bill also establishes a legislative oversight committee on the pilot program.

Committee Minutes

Date: May 22, 2001
Time: 10:30 a.m.
Room: 103 LOB

The Senate Committee on Judiciary held a hearing on the following:

HB 134 permitting challenges to judges.

Members of Committee present: Senator Gordon
Senator Pignatelli
Senator Prescott
Senator Fernald

The Chair, Senator Edward M. Gordon, opened the hearing.

Senator Edward M. Gordon, D. 2: I am going to open the hearing on HB 134, *permitting challenges to judges*.

This is not our usual hearing day, on Tuesday, but in order to accommodate the schedule and the number of bills that are currently in the Senate Judiciary Committee, we had to call an extra day's meeting in order to get our work complete in time for the end of the session.

I see Rep. Soltani is the prime sponsor. I don't see him here today but I do see... Is there any other Representative who is here to speak in favor of the bill?

Rep. Quandt, sorry. My apologies.

Rep. Marshall Quandt, Rock. 20: That's a common mistake, Senator Gordon.

Senator Edward M. Gordon, D. 2: So I will call on you, Representative to give your testimony.

Rep. Marshall Quandt, Rock. 20: Thank you Mr. Chairman, and let me say that 27 years as a probation officer does not qualify me to sit here and talk about pre-empting judges.

However, what qualifies me to be here is Rep. Soltani said, gee Lee, would you like to sign onto this bill? And I said aw sure, I owe you a favor.

He's at a jury trial right now, Mr. Chairman, and I think the issue that he wants presented, and it is one that I have seen over my many years of being in the system, is when judges are challenged for whatever reason to step aside from a case, they are not obligated to do so.

And I think the question before the senate now is, should they be, or should they not be – both on the Superior Court level and on the District Court level.
And that is the issue that has to be resolved. We can talk. Mr. Chairman, I know that you are a practicing attorney. You've been in the system a long time, and I know that the members of your committee are extremely well versed on the issue.

Right now I am upstairs being drawn and quartered on a couple of our own bills before Commerce that have come out of the Senate, so I don't have a lot of time to sit here and try to convince you. I think that at face value I think it is an issue that has to be addressed, it has to be looked at, and hopefully if this isn't the way the Senate would like to go perhaps an amendment that would be in order to make it palatable. I have a feeling that when a judge is asked to recuse himself, and there is adequate information given to do so, then they should.

And that's it, Mr. Chairman.

Senator Edward M. Gordon, D. 2: Thank you for your testimony. Are there any questions for Rep. Quandt?

Thank you. I appreciate your coming.

Rep. Christopher Reid?

Rep. Christopher Reid, Straf. 12: Thank you Mr. Chairman, members of the committee. My name is Chris Reid. I represent Strafford County district 12, which is Dover. I am a member of the House Judiciary Committee and they know that I am opposed to this bill.

At present if you have a judge who you feel like has a conflict in a case, or has a personal animus towards you, you can make a motion to have the judge recuse him or herself. And I understand that there is a saying which is *if you shoot for the king, don't miss.* You don't want to move for recusal and then have the judge not recuse themselves.

I think what this bill is trying to aim at is "problem judges", judges that one group or another feels are a problem in a particular place. And I understand that the motivation behind that...

But I think we are doing, taking a number of steps to try and deal with it. If there are problem judges there, we ought to do something to take care of that problem. And I think the Senate is trying hard to deal with that issue. Senator Gordon has a bill that tries to deal with it, and we're trying to deal with it as well.

The problem that I have with this bill is that it is going to have a number of unintended consequences. You know, in a large Superior Court where there are a number of judges, maybe it makes sense to have one party or the other to be able to say, we don't want this particular judge. We've had problems with him in the past, or that particular judge. But in Coos County there may be only one judge sitting. In another county there may be only two judges sitting and there could be a circumstance where one side or the other is always trying to knock off one of the judges. And I think that a lawyer who has the opportunity to forum shop for their client, is going to take that opportunity. In fact I think that if the lawyer knows that this particular judge is going to possibly be more difficult for them, that they have an obligation to advise their client that they have a free shot at one of the judges, with no cause whatsoever, just because they think that the other judge will be better. So I think that it will be used in that way.

So in a place where there are two judges you are going to have a problem. In a place where there's one judge...

The most important problem that I see with this bill is this; in certain circumstances, like a temporary restraining order, or a motion for an injunction, some kind of circumstance where one party or another needs immediate relief this bill does not create a way – this bill has no exception for that. So let's say we are in a county where there is only one judge sitting that week, or month or whatever, and someone comes in and they really have a problem. I have a problem with, you know, Scott Spradling, and I come in and I say "I want Scott Spradling to stop polluting my land", or to stop beating me up, or to stop lighting fires that might light my property on fire. Well, he has a reason to delay in that kind of case. He doesn't want there to be an immediate injunction, some kind of relief granted. And so this bill will give him an opportunity in that kind of case to grind the wheels of justice to a screeching halt. He can say, I have a right under this bill to have this judge who is sitting right now to recuse themselves without any cause whatsoever, and now the court is stuck. It can't issue that temporary restraining order that is immediate relief. That is the unintended consequence that I think is the biggest problem.

In every case, one side or the other may have a reason for wanting to delay. And it is in just those kinds of cases where this bill doesn't make any kind of exception for it. You've got 30 days after the case is filed to say I want a justice to recuse himself. So if I file a short order of notice and say, I need an injunction to stop this guy from doing something, he can just walk in and say, stop everything. I want a different judge.

I hope you'll consider either amending or voting down this bill. We are working on a number of things that will help to resolve the problems that we are having with judges and I think we ought to go that way rather than this way.

Senator Edward M. Gordon, D. 2: Any questions for Rep. Reid? Senator Fernald.

Senator Mark Fernald, D. 11: I believe we voted on something like this in the Senate last year or the year before, and my understanding of what's behind it is not so much problem judges, but that people who rightly or wrongly feel that a particular judge has a problem with him or her. And they are feeling that if that judge hears their case again, they are not going to have justice served.

Now, that may or may not be accurate, but the feeling was that for people to come away from the justice system thinking, I got a bad deal because I got the wrong judge.

I mean, I knew the moment that judge was assigned I was going to lose, that isn't a good feeling for people to come away with. It is not good for the justice system as a whole if that happens because we are going to have a lot of angry people who talk down the judiciary.

So I feel it is directed at a different problem than what you articulated.

You said something about amendments and I guess my question is, how do we amend this to... would we make it apply only to counties with at least two judges in Superior Court, or at least 3 or ... because I understand what you are saying about the possibility that this sort of law would slow down the administration of justice, particularly in a county with not many judges to choose from.

Rep. Reid: Well even in a county where there are three judges, if you have a situation where criminal defendants are always moving to recuse one judge and the prosecution is almost always moving to recuse another judge, that will have a serious negative effect on the administration of justice in a county that has three judges. So, I understand the motivation and I am not offering an amendment because I think the bill should be found inexpedient to legislate, but what I would ...

In a perfect world it would be great if each side had some kind of a peremptory challenge on judges and there were enough judges there that it would have a negative effect the administration of justice. I agree with you and I agree that there may be circumstances in which there is an inappropriate perception that, you know, that somebody got the wrong judge. But this, with this kind of a solution you may end up having gamesmanship where, you know, the person thinks that only one of the three judges would be good for them. So they move to recuse one, the other side moves to recuse another that they think is a problem, that maybe you might prefer. And you are still in a situation where you think, well you know, if I hadn't gotten this judge, I'd be OK.

Perhaps one way to go about it is to set up procedures that people are more comfortable with, with respect to motions to recuse. But I am just, I am not

disagreeing with you that in a perfect world this might not have a benefit for people's perception that they got a fair shake, but in the real world of New Hampshire where you have many courts that may only have only three judges sitting, and courts that one or two judges sitting, it's other consequences outweigh it, and more importantly the consequences of delay in a case where there is a TRO or some kind of a motion that needs quick justice and somebody comes in and says, boy I can grind the wheels to a halt, just by exercising my right under this statute.

Sorry to be so long winded, Mr. Chairman.

Senator Edward M. Gordon, D. 2: Any other question? Seeing none, thank you.

Rep. Reid: Thank you Mr. Chair.

Senator Edward M. Gordon, D. 2: I see that there are some other Representatives here. Are they here to testify on HB 134? No. Thank you. Judge Nadeau?

Tina Nadeau, Superior Ct. Judge: Thank you Mr. Chairman, members of the committee. It is a pleasure for me to appear and testify today, and I have to tell you that I am going to testify in opposition to HB 134. I know from my prior experience in working with the legislature that there is nothing more important to this body than the effective administration of justice, and that to insure that justice is dispensed impartially and fairly. And I know particularly that that is the goal of this committee.

My fear thought is that this bill will undermine your goals to provide that kind of efficiency in the system, and will undermine the judiciary's goal to implement the measures you pass to ensure efficiency.

I understand from having testified at that House, what the purpose behind the bill is, and the goals of the sponsors, and that is to address perceived prejudice they find exists on the bench. But I think that the adverse effects of this bill on a small state like New Hampshire will be significant. And I think what will end up happening is that the bill will not address that kind of prejudice but will promote forum shopping and judge shopping, which I think will interfere with litigants' ability to get their cases heard promptly.

We also recognize that efficiency is not the only attribute of a good judicial system. We have to buy justice with impartiality and I'd like you to know that in those small number of cases where the perception of partiality may exist, there is already a mechanism for making sure that judges remove themselves from a case. For example, a party can file a motion for recuse if there is a specific conflict. If the judge has a family member in a law firm that is going to be appearing before that judge. If the judge happens to have a financial interest in a company that's being sued. If a judge is very familiar with one of the lawyers that is involved in the case. There are lots of examples where motions are filed and routinely granted.

There are also circumstances where, when a judge sees a file on their desk, before the parties have said anything, they notice from the file that they either know somebody or that they have had some dealings with a particular party in the case and they decide this is not the right case for me to sit on. And there is a reassignment that occurs within the court house at that time.

If a party can set forth some reasonable facts to demonstrate a legitimate risk that fairness and impartiality will be jeopardized, or that there is a reasonably supported *perception* of partiality, then those motions are routinely granted.

The other trait that I want to address is public accessibility. HB 134 would substantially undermine this goal, and I think that you've already worked hard to try to achieve public accessibility. I think it would cripple the efficient, effective scheduling of judge time and it will cost the state precious dollars and judicial resources. And I think it would be disruptive to the everyday life of litigants and that is probably the most important factor.

The bill will allow a lawyer to challenge a judge for *no valid reason* whatsoever. For instance a lawyer might disagree with the sentencing philosophy of a judge or may dislike the judge because he or she demands high standards for performance.

Those are important tensions that must exist between judges and lawyers in any courtroom. So in controlling the courtroom and managing the efficient disposition of cases, judges often have to make decisions the lawyers simply don't like. And in addition it is in the nature of the adversarial system to produce a winner and a loser, so there's always going to be somebody disappointed with the result. Every potential litigant, however is assured

objectivity and principled application of the law. If judges try to please everybody, then we wouldn't be able to apply constitutional principles that we are required to do.

But let me talk more practically about a couple of the consequences. And I think Rep. Reid brought this up and I will give you some details about our specific counties. There are 11 county courthouses. In three of those eleven county courthouses, only one judge presides. In two of the courthouses one judge presides for six months, and two judges preside for six months. In one courthouse 2 judges preside all the time. That means that in over half of the Superior Courts, only one or two judges preside at a time, and I think that in only two out of the eleven courts are there more than three judges that preside at a time. And one of the points that Rep. Reid made is in a perfect world this would be a good bill.

For example, in some urban cities where there may be 200 or 300 judges sitting in a building or a complex, this bill would have no effect whatsoever on the fair application, accessibility of the system because there are available judges all the time in the same place to hear whatever case needs to be heard. And because there would be so many judges to cover the case, it would really prevent the problem of judge shopping that you might have.

So even in a three judge county courthouse, if each side exercises a peremptory, that leaves one judge. And if the sides exercise... for example in a criminal case, you obviously know that there are defense attorneys that like particular judges and there are prosecutors that like particular judges for whatever reason. It is probably likely that if a prosecutor is going to move to recuse one judge, that prosecutor will do so in every case. And you have the same prosecutors in each county and the same defense attorneys in each county. So it may be that the two judges, the ones that defenses don't like and the one that prosecutors don't like, don't hear any criminal cases. That leaves one judge to hear all of the criminal cases, which simply won't work.

One result of the bill as it is drafted right now, might be to force litigants to travel to other counties to have their cases heard. For example, in Caroll County there is one judge there, if both sides move to recuse that judge, it is impossible to move him, because then there are other cases he has to hear. The parties would be forced to go to another county; spend a lot more money; police departments would have to send their officers to another

county to testify; local budgets would be growing bigger and bigger, and I don't think that is something anybody would intend as a result of this bill.

Let me just give you an example. In 1999 the superior court disposed of over 51,000 cases. If this bill were law, then there would be a potential for 102,000 challenges which need have no rational basis, based on this bill.

The problem in the criminal case is compounded by constitutional concerns because defendants have a constitutional right to be tried in a venue in which they were charged, so I don't know whether that means all criminal cases from one county would be transferred to another or whether we would rotate judges on a weekly basis. It's not clear. And I think it would produce a lot more chaos than is intended.

And let me be clear, I think that Senator Fernald pointed out that this is not a knew concept. It is a bill that you addressed already and it is identical to the concept that was introduced and rejected last session. I sincerely hope that my appearing here today to testify on this bill that you've heard before, doesn't give the committee the misimpression that the Superior Court or any other court is against any reasonable and rational and effective judicial reform, because we do not. We simply oppose this bill because we think it will have the adverse effect on litigants and everyday people who use the judicial system, and the citizens of the state. And we oppose it because it will interfere with basic judicial economy and common sense allocation of resources. And I would be happy to answer questions. I have a copy of my testimony of the committee would like.

(See Attachment "A")

Senator Debora B. Pignatelli, D. 13: Thank you Mr. Chairman. Good morning Judge Nadeau. How are you.

Tina Nadeau, Superior Ct. Judge: Good morning, I am fine.

Senator Debora B. Pignatelli, D. 13: I have a question about what someone is to do, let's say they are pro se litigant and they don't know the court system that well but they've been before a particular judge a couple of times and the judge has always ruled against them and there is a perceived problem with that particular judge. And now they are in court again, they are representing themselves. They find they have this one particular judge

again. What is available for this person to do when they move to have this judge recused, the judge refuses to recuse. Is there some kind of a forum that this person can go to? And might we ought to have that rather than allowing what we have now.

Tina Nadeau, Superior Ct. Judge: That is an excellent question because I think it brings to the front a lot of the issues that need to be addressed. Let me answer that a couple of ways.

First of all, it depends on why the pro se litigant wants to remove the judge. If it is because the litigant is disappointed with the orders, that should never be a good reason for removing a judge, because if that were the standard then everybody who is ever disappointed, and everybody is, because nobody gets everything they want – they can't possibly, then everybody would move to have a judge recused.

I firmly believe that the judges that are sitting and the marital masters who are sitting are fair and objective and open. And if a pro se litigant is continually losing we have to look at is it because the position that litigant is taking is not reasonable or is it because there is some bias on the part of the person hearing the case.

If there is a bias, there is a mechanism by complaining to the Judicial Conduct Committee, and that brings up another piece of legislation that you are working on to create an independent judicial counsel which would help with the perception of impartiality. And I know that body works hard to make sure that litigants are having their cases heard by fair and impartial judges. I think it would be a big mistake to allow litigants who are disappointed in the outcome of their case to continue to ask for a new judge.

I have a feeling that depending on what the reasons are, if that pro se litigant went to another judge that the same problem might persist. If we are talking simply about the outcome of what the litigation was. If there is a judge that is simply being unfair because, for the sake of being unfair, then the judicial conduct committee is the forum in which that problem should be addressed. But if the litigant can put in a pleading, you know for example I think we have standards that if the judge knows people involved in the case. If the judge has expressed a view outside the courtroom on this particular case. If the judge has been involved in litigation with any parties in the case or is related to anybody involved in any litigation.

For example, I just had a case a couple of weeks ago in which I am going to be removing myself, even though they haven't in my view met the legal standard. I am concerned about the perception. I practiced law with one of the attorneys when I worked at the Attorney General's Office, ten years ago. We were in different bureaus. We socialized a lot together when we were there. I have seen her maybe once a year for the past...I have seen her maybe once every other year for the past ten years.

So in my view if that were the standard, I wouldn't be able too hear many cases in Strafford County because luckily, we have a small bar and a small bench and people do know each other but, there was a big concern on one party's part. They were worried about their clients. In my view the clients need to feel certain that they are getting a fair shot. So I removed myself. And that happens a lot more often than people realize, because we do it before we even see the parties, and we do it on an informal basis without emotion, and we do it when there are legitimate grounds stated in motions. So I hope that answers your question.

Senator Debora B. Pignatelli, D. 13: It does. I just have one follow up one.

Tina Nadeau, Superior Ct. Judge: Sure.

Senator Debora B. Pignatelli, D. 13: You said that litigants who feel there is a bias or a perceived bias can go to the Judicial Conduct Committee. And is the Judicial Conduct Committee obligated to accept complaints?

Tina Nadeau, Superior Ct. Judge: You know, I am not certain about that question. I think they do. They may review it and investigate it and decide that it is not worth further investigation and then dismiss it. But I don't think they reject any complaints that are filed, but I am not certain about that.

Senator Debora B. Pignatelli, D. 13: Thank you.

Senator Edward M. Gordon, D. 2: Any further questions? Guess not. I have a question.

Tina Nadeau, Superior Ct. Judge: Sure.

Senator Edward M. Gordon, D. 2: To get back to your issue in regard to Carroll County, and there is only one judge there so obviously it would be inefficient, inconvenient to basically have that judge recused and either have the litigants move to another forum or bring another judge into that forum, but what if you, since we do have at this time, dedicated Superior Court judges, what if that judge in that court has a reputation for giving longer sentences for a particular crime than other judges, other Superior Court Judges. There is nothing wrong with that that I can see and, in fact, that is the case. There are judges who do have that reputation for giving longer sentences.

Tina Nadeau, Superior Ct. Judge: Right.

Senator Edward M. Gordon, D. 2: Why would it be fair to subject the defendant in Carroll county, knowing they have no alternative, to a judge in a particular case who is, if they are convicted, is likely to give them a longer sentence than a judge in another county?

Tina Nadeau, Superior Ct. Judge: I think there are two answers to that question. A defendant unfortunately, or fortunately depending on your view, does not have a constitutional right to a particular judge or a particular "hope" for a particular sentence. They have a range of sentences available that the legislature decided was fair. And the legislature put a maximum on every sentence. And so if every judge sentenced to the maximum in every one of those particular cases, it would be in my view fair and reasonable, depending on the circumstances, because that is what the legislature has said Is the maximum sentence available for this particular sentence.

That is one answer. The second answer would be, if you move that judge then wherever that judge is going to go, the same problem is going to occur. And so I don't think this particular bill addresses the concerns that are raised in that scenario. It may be that you need to have a talk with the chief justice, whoever is concerned that this a particular judge with a particular issue, and you know, I know certainly in the past under previous chief justices, there are all kinds of sentencing education programs available that a chief judge can pick for a particular judge to go to. So there are lots of mechanisms to address, maybe not cure, but address a perceived problem that defendants have, but my first answer would be that they are really not entitled to any

particular sentence unless it is more than what the legislature says they can get.

Senator Edward M. Gordon, D. 2: Well if I could just follow up.

Tina Nadeau, Superior Ct. Judge: Sure.

Senator Edward M. Gordon, D. 2: Is it a question of what a defendant's entitled to or is it a question of making sure the public perceives the court as fair?

Tina Nadeau, Superior Ct. Judge: I think there are a lot of people that would say that as long as a judge is issuing a sentence based on the facts in front of him, up to the maximum that the legislature provided, that that's fair. You could probably have someone come in here and ask me another question and that would be, why should the prosecutors have to come before a judge that consistently gives light sentences on a particular defendant. So that in my view is a broader mechanism for judge shopping that really can't be allowed. Unless we have sentencing guidelines, I mean we are human beings and we follow the guidelines that you've given us in the statutes.

I mean, I understand the concern that you raise because, you know, we want the public to understand that everybody is acting in the best way they possibly can to make sure that people are treated fairly.

Senator Edward M. Gordon, D. 2: I don't want to be argumentative, but to get back to the issue...

Tina Nadeau, Superior Ct. Judge: We did this in law school, didn't we?

Senator Edward M. Gordon, D. 2: Right. We did this in law school.

(laughter)

Senator Edward M. Gordon, D. 2: To get back to the issue of light sentences, for example. I guess, and in using the Laconia example as a particular example right now. There is a concern among law enforcement officials that maybe they are not getting a fair shake in front of a particular judge. And the question is, if that's the circumstance, does that serve the

public when you have a group of people who are forced to participate in a court where they don't feel that they are being well served and that there is no public confidence.

Tina Nadeau, Superior Ct. Judge: I think the public is served by knowing that one group of constituents, like law enforcement officers, can't force a judge to make a different decision. I mean I think judges have to be free to exercise the discretion without fear of what political consequences might be, whether it is from a group of police officers or a group of defense attorneys. And that how the public good is served.

Senator Edward M. Gordon, D. 2: Senator Fernald?

Senator Mark Fernald, D. 11: I did, before I ask my question, do want to say that just because the legislature says a particular result is going to happen it isn't necessarily fair.

Tina Nadeau, Superior Ct. Judge: No, that's true. Depends on the facts of the case, but I think that they've at least given us some guidelines of what they think would be rational for a particular type of crime.

Senator Mark Fernald, D. 11: I continue, at least as I recall this whole discussion from two years ago, or maybe it was last year, that the concern was more with people who had been to court on a particular issue. Maybe they had been to district court on an assault or something. And they real feel, and now they are in two years later on DWI. And they are going to feel, no matter what, they got to the same judge, this judge doesn't like me, I am going to get nailed and I guess part of what I am thinking is, why wouldn't we want the system to give this person a different judge so that if they get nailed again, maybe they start to get into their heads, maybe it isn't the system, maybe it's me.

Tina Nadeau, Superior Ct. Judge: Right.

Senator Mark Fernald, D. 11: And I am concerned that the whole system gets undermined when we have these angry people running around saying the system is unfair. I keep getting the same judge. I keep getting nailed. That guy hates me, that girl hates me, whatever. And I can see the problems with this bill as drafted, that the lawyers in particular who are able

to study the patters will go judge shopping and forum shopping. And so I am just wondering if there is a way to amend this to avoid the problems and maybe keep what at least what I thought was at the heart of it.

I will just throw out two ideas for you to consider and maybe the committee as well. One would be to allow a party to challenge only judges that they have appeared before in another case. So that it just isn't anybody going into court, but it is a repeat visitor and had an unhappy experience, for whatever reason with a judge, and really would just prefer to have a different judge hear their case.

The other thing that I would throw in as an idea would be that we would never allow the state to challenge. Because the state can't be unhappy, so to speak. The state is an institution not a person. That I think would cut down a lot on some of the problems.

And maybe the other possible things to consider would be not to allow it in a county with only one judge, or maybe in a county with only two judges, though that would be...

Tina Nadeau, Superior Ct. Judge: Or three judges. I mean, I think, the places where this kind of program has worked there are at least 10 or 15 judges in a building where the clerk isn't going to be working 100 hours a week to try to sort of figure out how to schedule things. If you have, even in a three judge or a four judge courthouse, you have people moving to recuse the judge for whatever reason, whether it is the second time before the judge. That that is going to cause the case to be delayed for at least 6 months. Because the scheduling, the way the scheduling is done.

I think the suggestions that you have made about not allowing the state to challenge would definitely cut down, but if the other concern is public perception, I think you are going to have a big problem there. I agree with you, the state is the state and they represent all the citizens when they go to court in criminal cases. But if your other concern is public perception, then the police officers or the chiefs who believe that they are not getting a fair shake are going to still have that same concern.

Maybe you decide that is not a policy reason that you think should be valued. And I think your other idea was that if it only involved a person that came before that judge before, probably the district court judge who is here

today would be able to answer that better, because that happens to them often. I think that would sort of, that distinction would be meaningless in the district court simply because they see the same people all the time, day in and day out, so it would be pretty much be everybody there anyway.

It would be a problem for the marital cases because a marital case doesn't have one day in court and then it is over. It's open until the kids are 18 or until the property settlement is complete, so I am not sure that that would be manageable with such a small judicial system, but there definitely... those are ways to narrow it down.

Senator Edward M. Gordon, D. 2: Thank you for your testimony.

Tina Nadeau, Superior Ct. Judge: Okay, thank you very much.

Senator Edward M. Gordon, D. 2: Judge Sullivan.

Judge Michael Sullivan: Good morning Mr. Chairman, members of the committee. I am Michael Sullivan, Associate Judge of the Concord District Court and speaking on behalf of the administrative judge, Judge Kelly, who I believe authored a letter to you, delivered to you yesterday, who set forth some of the concerns that he has with the bill.

(See Attachment "B")

I'd like to make a couple of points and not to make the same ones that Judge Nadeau just made, but speak to how the bill would effect the district court. It seems to me that what you are doing is you are making a public policy decision that may have a noble purpose. But the question is, could the noble purpose be mutated or perverted so that people forum shop.

For example, are we looking more convictions? Less convictions? Are we looking for higher sentences, less sentences? Are we looking for more evictions, less evictions? Are we looking for less restraining orders, or more restraining orders. It all depends on your point of view. And I think there are presently, as Judge Nadeau said, mechanisms in place to assure the judges who have an interest in the case should not hear it.

Let me specifically talk, that the bill talks about the return date and arraignment dates. In domestic violence cases, 173 actions, there are no

return dates. There's no arraignments. In the IEA cases, those cases tried at the State Hospital, there is no arraignment, there is no return date.

On the motor vehicle cases, the plea by mail cases, there is no arraignment. So those kind of cases aren't even covered under the bill and how they would apply is unclear to say the least.

The other thing that happens is that many of these cases are tried, within 30 days. Let me give you an example. Domestic violence cases are tried generally within 3 to 4 weeks of their filing. Landlord tenant cases, by statute, have to be tried within ten days of an appearance. So how the thirty day rule would apply to give a litigant an opportunity to challenge a judge.

In all felony cases, probable cause hearings are scheduled either in 21, 10 days or 21 days, from the date of filing. So the thirty days obviously wouldn't run there. Many of our courts in the criminal cases for people that are detained, hear their cases within 30 days. So it seems to me the 30 day time limit is problematic, to say the least.

Our scheduling notices don't indicate what judge is going to hear a particular case, so I don't know how a litigant would know who is going to hear his or her case.

Let me give you another example. Let's say I am assigned to a juvenile case, and at the same time my colleague is assigned to a landlord tenant case. He is challenged. Am I supposed to hear the landlord tenant case or am I supposed to hear the juvenile case? The juvenile cases as you know have to be tried in within 21 or 30 days. Those are the abuse cases, the CHINS cases and the delinquency cases.

Judge Kelly made the point that this could drive up the cost of special judges that would have to come in and hear these cases. I think the cost could be considerable. And Judge Nadeau made the point that this could result in rather than the court manages, the clerks of court managing the courts, but they would have to spend virtually all their day finding judges to sit on these cases.

It's not uncommon where a case could be scheduled and at the last minute a request for good reason to continue the case could be granted, thus the judge would have no cases to hear on a particular date. So I think it could be

somewhat chaotic to say the least. Especially when you are talking about 70 judges, most of which are part time and 39 district courts.

If you have any questions Mr. Chair or members of your committee I will be happy to answer them. I know you've got a rigorous schedule this morning so I don't want to belabor the point.

Senator Edward M. Gordon, D. 2: Thank you. Questions?

Senator Mark Fernald, D. 11: I just want to mention ever so briefly that I think as the bill is drafted, the requirements, the notice within the first 30 days, so other than in those cases you've talked about without arraignments or return dates that the challenge would happen before any judge was assigned. So people aren't doing it after they know who the judge is, unless they really don't want him or her, they would be making a decision up front. And so it wouldn't be happening two days before a hearing or something like that. It would be up front.

Judge Michael Sullivan: It's not uncommon Senator, as you know, that a lot of the district court judges are traveling around. I, for example, am sitting in Laconia not infrequently, so if a litigant has an expectation that a certain judge will hear their case, it may or may not happen. But maybe I missed the point of your question.

Senator Edward M. Gordon, D. 2: I guess the question I have, is there any...the issue here is an issue of someone feeling that a judge might have a prejudice either towards the litigant or either a prejudice towards a particular disposition, and that you might want to have that judge recused. Is there any process in place in the court system, or at least the district court system that you'd be familiar with that addresses those issues today?

Judge Michael Sullivan: Well it seems to me if a judge has a particular reputation, that the form would be to take the concern to the administrative judge. You know we have judicial performance, people have an opportunity anonymously on a questionnaire to tell the administrative judge their feelings, so that he or she can have an idea and can coach a particular judge and send them to some education or try and sensitize them, if there is a perception of bias. That's one mechanism to deal with it. In the bigger courts like Nashua, Manchester, and Concord, where it's not infrequent there are three judges, you can switch cases so as to avoid the appearance of bias.

But in the smaller court locations, which is the lion's share, it becomes more problematic.

Senator Edward M. Gordon, D. 2: Thank you. Thanks for your testimony.

Judge Michael Sullivan: Thank you....

Senator Edward M. Gordon, D. 2: Cecilia de la Rosa? Did you wish to testify?

Cecilia de la Rosa: I just signed to show my support.

Senator Edward M. Gordon, D. 2: Okay. Thank you. And Carl Scheidegg?

Carl Scheidegg: Yes sir. I wonder if you would permit me to delay my testimony until the end. I was hoping that Senator Roberge would be here and I would like to wait for her arrival. I don't know if that is out of order to request.

Senator Edward M. Gordon, D. 2: I think this is the end unless there are other people who want to speak. I'm sorry, there is one more other speaker and I apologize for that. Greg Robbins.

Greg Robins: I am going to be very brief, cause I think it would be pretty redundant. It's Greg Robbins. I am President of the Bar. And Mr. Chairman, members of the committee, I think that from our perception, if this bill is designed to deal with a perception of bias towards a lawyer or a litigant for reasons given by Rep. Reid and others, it is overkill. There are just too many obvious unintended adverse consequences.

If on the other hand, it is designed to deal with bad judges who may have a bias in a particular area, it doesn't solve the problem because no judge or master is going to sit quiet, they are going to be assigned somewhere else hearing the same kind of cases. So we just don't think it solves the problems it is designed to address and it has all kinds of unintended consequences.

Senator Edward M. Gordon, D. 2: Senator Pignatelli.

Senator Debora B. Pignatelli, D. 13: Thank you. I am going to ask you the question that I asked Judge Nadeau before and maybe you know the answer. The Judicial Conduct Committee is the forum where someone would go when they have a complaint about a possible bias or a perceived bias by a judge or a marital master. And what happens when the complaint gets to the Judicial Conduct Committee? Are they obligated to take a look at each case?

Greg Robins: If they meet the criteria for a complaint against a judge, if there is a complaint that they have violated the ethics of judicial ethics; that they have displayed bias in a particular manner. For example, if there is a particular bias towards the complainant, then that may well set out a judicial complaint. If it is, as I said, if it is a disappointed litigant saying the judge ruled against me and it was a bad decision, the forum for that is to take your appeal. That is my understanding of how they handle these cases.

Senator Debora B. Pignatelli, D. 13: Thank you.

Greg Robins: You're welcome.

Senator Edward M. Gordon, D. 2: Thanks for your testimony. I think you are on, Carl. Oh, Rep. Potter. You hadn't checked off that you wanted to...Oh I'm sorry. One minute.

Rep. Frances Potter: I signed in late.

Senator Edward M. Gordon, D. 2: I'm sorry.

Rep. Frances Potter: My apologies for being late. If you haven't already heard, oh excuse me. I am Frances Potter, Concord at large, Merrimack 24. The House Judiciary Committee vote on this was 9-8 and it was very close. And we heard the same concerns. I would just like to propose that judges inevitably differ and that the travel time for everyone, including witnesses and the judge time, and so forth, is very inefficient, if a judge's assignment is challenged. That's what I'm thinking in addition to what has already been said.

Senator Edward M. Gordon, D. 2: Thank you for your testimony.

Now, I think Carl, you are the last one up.

Carl Scheidegg: Thank you, sir.

Senator Edward M. Gordon, D. 2: How long do you think your testimony will be, Carl?

Carl Scheidegg: About a couple minutes. I am getting better at it although it is a challenge.

My opening would be if the Bar is opposed, it is probably a good law, but that's just because I am a pro se and a simple guy. I respect Rep. Soltani and Sen. Roberge, and I'm glad that they sponsored this. Let me see if I can dispel some of the gloom and doom, because what we are hearing is the system will grind to a halt. The world as we know it will come to an end, and we are familiar with that sort of thing.

The present recusal process is OK as written but it doesn't work in practice. Now it does work in the most egregious cases. You won't find people whose... judges coming before their nephews or their in-laws. All of that works. So by and large the recusal process as written does work.

Where it breaks down is especially where pro-se folks are involved. and this is where a lot of this legislation is coming from. There is a rebellion in the ranks. There is something wrong with the court system. And it doesn't work in practice.

When we ask for a recusal for a variety of reasons, it is just ignored. Well, do something about it! Not you. I am saying that you have all these rights. You have the Judicial Conduct Committee, I mean, they'll take care of it. You have the right of appeal. They'll take care of it.

No you don't. The JCC won't do anything about an incident that you claim is bias because that is outlawed in their rules, because it would effect the outcome of a case, and they consider that an alternative route to appeal.

You can't appeal because under the – you can waste a lot of money, believe me, I've done it – and your appeals will be routinely denied. So the system works open loop, and that means that if you take advantage of the recusal

law, especially as a pro se person, it will be ignored. It has been ignored. And you really have no recourse.

It's really not judge shopping. This is a one shot attempt and I think it's good as written. Now suppose, instead of the gloom and doom, we look at a judge or a master that is routinely rejected by litigants. Or routinely rejected by a class of litigants. Wouldn't *that* be interesting? Wouldn't this be an automatic way to expose jurists who have some, at least perceived flaw in their equal handling of cases?

Now I claim this will be rarely used. And I claim lawyers will almost never use this law. The recusal system that we know about where people know people where they are all in the same country club, works fine. Not a problem. But, as a lawyer, and these are all things that I've learned from lawyers, as a lawyer told me, you think I...

Senator Edward M. Gordon, D. 2: Could you just focus in on New Hampshire?

Carl Scheidegg: I am focusing. That is the point of these things. Unless you hear the truth of what is going on, all this gloom and doom as philosophy, the real world is as follows.

The lawyer says I am not going to fall on my sword for your case. I have to go back in front of the same jurist tomorrow. It doesn't matter to me whether I represent the plaintiff or the defendant, I make money either way.

The bottom line was, if you want a decision, go to court. If you want justice, Mr. Scheidegg, go see your local preacher. You have to understand that mind set. They are not going to run in and forum shop. It is only those of us who have a feeling that certain people and certain things are happening in the court system and we'll hone in on that and we'll go, hey wait a minute. We know what's going to happen in this forum. In that sense it will be shopping.

But look at the result you'll get. You'll have certain judges and jurists who will be regularly rejected by the common man. Interesting outcome.

Even pro se litigants wouldn't use it very much. Reason? Because we know that the word is out. We've rejected judge or master so-and-so. The next

guy or gal is probably going to punish us. So it is a self correcting system. Lawyers won't use it and pro se people will use it rarely. And the outcome may very well be to highlight some of the problems.

If the judicial system works, as we were told it should in High School civics, then we all wouldn't be here today, and I mean the universal today of all the work we have been doing this year, crying for judicial reform.

Finally, if we have judges and masters as impartial *as the lot of humanity will allow*. I have heard that saying somewhere before. It must be important, as impartial as the lot of humanity will allow – then this law will be completely unused. But it will be there if we need it.

If it's abused, the legislature can repeal it, or investigate why litigants are unsatisfied with their courts? And that's precisely what the General Court should be doing.

I hope that was brief enough.

Senator Edward M. Gordon, D. 2: It was. Is there any questions for Carl?

Thanks for coming today.

Carl Scheidegg: Thank you, sir.

Senator Edward M. Gordon, D. 2: Anyone else who wishes to testify on HB 134? Seeing no one I am going to declare the hearing closed on HB 134.

The hearing on HB 134 was closed at 11:19 a.m.

This verbatim transcript respectfully submitted by
Jennifer Ruffing, Senate Judiciary Secretary.

Attachment "A"

The State of New Hampshire
Superior Court

Strafford County
P.O. Box 799
Dover, New Hampshire
03821-0799

May 21, 2001

Senator Edward M. Gordon, Chairman
Senate Judiciary Committee
Legislative Building
Room #103
Concord, NH 03301

RE: House Bill 134

Dear Senator Gordon:

Mr. Chairman, honorable committee members, it is a pleasure to appear before you again. My name is Tina Nadeau and I appear on behalf of the Superior court to express our opposition to HB 134.

I know there is nothing more important to the Legislature than to ensure the court dispenses justice impartially, fairly and with compassion. Each member of the court shares that goal. This bill, however, would undermine your efforts to achieve justice and the court's role to provide justice.

I understand the goals of the sponsors in attempting to address perceived prejudice they believe exists on the bench. But the practical adverse effects of this bill on a small state like New Hampshire are substantial. The bill will not address potential prejudice, but rather will encourage judge shopping and destroy the

unique advantages litigants enjoy from a small State like New Hampshire in which lawyers, judges and the Legislature have been able to provide early and expedient access to the courts. Indeed, the Superior Court in New Hampshire has been first in the nation for the efficient disposition of cases.

We recognize that efficiency is not the only attribute of a successful judiciary; justice must be provided with impartiality. But I'd like you to know that in those small number of cases where the perception of partiality may exist, there is already a mechanism for challenging the judge and receiving another judicial assignment. In both the district and Superior Courts, if a party can set forth reasonable facts to demonstrate a legitimate risk that fairness and impartiality will be jeopardized, or that there is a reasonably supported perception of partiality, the trial judge will routinely grant a motion for re-assignment and a new judge will be assigned. The judges themselves recognize conflicts and will often instruct the clerk to assign the case to another judge even where parties have not made a request.

Another valued trait in any judicial system is public accessibility. HB 134 would substantially undermine this goal. It would cause delays in litigation. It would implicate additional fees and expenses. It would cripple the efficient scheduling of judge time and cost the State precious dollars in scarce judicial resources. The result would be extremely disruptive to every day litigants.

Let me talk frankly about the effect of this bill. It will permit lawyers to challenge a judge for no valid reason. For instance, a lawyer may disagree with the sentencing philosophy of the judge or may dislike the judge because he or she demands high standards for performance. These are legitimate and appropriate tensions within any courtroom.

In controlling the courtroom and in managing the efficient disposition of cases, judges must often make decisions lawyers don't like. In addition, it is the nature of an adversarial system to produce a winner and a loser. In such a system, judges must weigh competing interests, analyze the law and produce just results. In such a system, not every litigant is pleased with the result. But every potential litigant is assured of objectivity and principled application of the law. If judges attempted to please everyone, rather than apply constitutional and legal principles to the disputes that come before them, the results would not be just, but rather unfair, unsound and unreasoned.

Aside from the potential negative impact on valued judicial policy, let me describe some of the more practical effects of this bill. In three of the eleven county courthouses only one judge presides. In two of the courthouses one judge presides for six months and two judges preside for six months. In one courthouse two judges preside. That means in over half of our Superior courts, only one or two judges preside at a time. If this bill were to take effect, and parties routinely exercised a challenge, those courthouses would be extremely handicapped. Literally, the

operation of some courts could even be brought to a stand still.

In 1999 the Superior Court disposed of over 51,000 cases. If this bill were law, then there would have been a potential for 102,000 challenges, which need to have no rational basis.

As a result of seeking relief under HB 134, parties may be forced to travel out-of-county to have their case heard by another judge. More significantly, however, parties who haven't even raised a challenge may experience delays in their court hearings that would be required to accommodate the disruption in scheduling caused by those who do challenge a judge. In addition, police departments will have to spend unanticipated revenue for officers to travel out of county to testify.

And imagine the problems that would occur in criminal cases. Generally, the same few public defenders and the same few prosecutors handle the majority of criminal cases in each county. If a prosecutor or public defender exercised their right to challenge one judge, then presumably they would do so in every case. Does that mean all criminal cases from one county would be transferred to another? Or would judges have to rotate on a daily or weekly basis to cover criminal trials in other counties? If so, the application of HB 134 raises substantial constitutional concerns.

The judiciary might have a different position if there were ten or fifteen judges sitting in each county, as there are in states or large urban courts where this practice occurs. But this is New Hampshire. And the Legislature historically has been

reluctant to apply a big state remedy to issues raised in New Hampshire.

As you know, the concept in this bill is not new. It is identical to the concept that was introduced and rejected last session. Personally, I hope my appearing here to testify on this old concept does not give the committee the misimpression that the Superior Court, or any other court, opposes reasonable improvement to the judicial system. Simply, we oppose this bill because of its adverse effects on the timely resolution of disputes. We oppose this bill because it will inconvenience parties and witnesses in everyday cases. We oppose this bill because it will result in additional costs to the citizens of this state. And we oppose this bill because it will interfere with basic judicial economy; specifically, the common sense allocation of resources, and the efficient scheduling of judicial time.

Thank you.

Sincerely,

Tina L. Nadeau
Associate Justice
New Hampshire Superior Court

Attachment B

New Hampshire District Court

Edwin W. Kelly
Administrative Judge

Regional Court Administrators
Pamela B. Neville
James F. O'Neil
Lauren B. Thorn, Esq.
Permanency Planning Coordinator
Kristin A. Lamont, Esq.
Domestic Violence Specialist
Elizabeth Paine, Esq.

May 21, 2001

Senator Edward Gordon, Chair
Senate Judiciary Committee
Legislative Office Building, Room 103
Concord, NH 03301

Re: House Bill 134 An Act Permitting Challenges to Judges

Dear Senator Gordon:

I would like to explain the concerns I have as Administrative Judge of the District Court System about the passage of House Bill 134.

As you know, the District Court processes roughly 200,000 cases a year at 39 court locations around the State. Pursuant to the legislative scheme set forth in RSA 502-A, each court location is served by two justices, a Presiding Justice and a Special Justice. The exceptions to this rule are the three largest courts, Manchester, Nashua and Concord, each of which is served by a full-time Presiding Justice and an Associate Justice, as well as a Special Justice. Of the 39 district court locations, only 10 are full-time. The balance are part-time courts meeting anywhere from one-half day to three and a half days per week. As the system is set up legislatively, the Presiding Justice of each court is expected to handle the vast majority of the court's sessions. In most cases that means the Presiding Justice sits 70% to 90% of the time the court is in session. Since 1987 Special Justices are paid on a per diem basis; i.e., only when they sit.

As I understand this bill, each party before the court is allowed to "strike" or recuse the judge assigned to hear it without cause. The consequence of this bill is that in at least some, and perhaps many cases, both the judges from a particular court will be struck and the District Court System will have to send a judge from some other court to hear the case or have the case transferred to another court location, either of which option will cause delay and expense to the parties and to the State. Although it is certainly possible to move judges from one court to another, indeed we do so

now, the administrative structure this particular bill would require will be extensive. It is not often that I find myself expressing an inability to adequately carry out an innovation; however, this is one of those times.

I apologize for being unable to personally appear before your committee on May 22 to further explain my position. I have, however, asked Judge Michael Sullivan of the Concord District Court to appear on my behalf. I would be happy to speak personally with any committee members or yourself to further answer questions.

Very truly yours,

Edwin W. Kelly
Administrative Judge

EWK:jcb

CC: Members of the Senate Judiciary Committee
Honorable Michael F. Sullivan

HB 134 – permitting challenges to judges

Senate Judiciary Executive Session – 1/16/02

Senators present: Senator Gordon
Senator Pignatelli
Senator Fernald
Senator Roberge

Senator Fernald: Does this allow you to bump out a judge? My interpretation is no, if it is same case, same number, same judge. Someone might see otherwise. You and I have discussed on the record in session the legislative history to show that we intended that if it is the same case, same number, that you don't get to exercise challenge.

Don't know how to write it without just bogging down.

Senator Pignatelli: How do you solve the problem in counties where there is only one judge?

Senator Fernald: No, we haven't solved that problem. Wait for a judge to rotate in or send people to another county.

Senator Pignatelli: This is not as big a problem in some counties as it is in others?

Senator Fernald: Sometimes you just go to a different building. Little more than bit of inconvenience.

Senator Pignatelli: First saying about case, 6 months later before the same judge. What if you feel you didn't get fair treatment the first time, but didn't exercise right to challenge a particular judge?

Senator Fernald: By definition there is an unhappy person in every case that goes before a judge. If it goes back to court shouldn't have ability to ask for another judge. Original bill would have ended up in the same place within 30 days of filing. Original bill as filed would not have given those people going back for another marital hearing the ability to challenge because it is same case.

Senator Pignatelli: Gives attorneys chance to advise clients.

Senator Fernald: Concern with original bill. Attorneys would use routinely. Amendment limits been before a particular judge.

Senator Roberge: You have to have appeared before that judge before.

Senator Pignatelli: First time person might know or have heard of a particular judge and has no challenge.

Senator Gordon: Judge with predisposition – you can't have judge recused for that reason. It is for people, who appear in court over and over again, criminal defendants. Question do we really care if they see the same judge over and over again. Would be fine to say for everybody, but what is going to happen is those people who appear regularly are more likely than not criminals. I don't think it does what original bill was intended to do. I would just as soon see it go.

Senator Roberge: Original intent was if you don't want a particular judge, you should have right of first refusal and not have that judge. Make it an even playing field.

Senator Pignatelli: I was sort of favorable toward that, but I don't know about this.

Senator Roberge: That is how we want it to read. What about a pilot?

Senator Pignatelli: What was the problem?

Senator Roberge: Nothing.

Senator Fernald: Idea of bill was someone with problem with particular judge should be allowed to select. Original bill did that, but opens door to judge shopping by lawyers. Concern will start routinely picking judges. Has nothing to do with original idea. Limit to person who has been before that judge before.

Senator Pignatelli: Any willingness to second time person appears?

Senator Fernald: That is what amendment does.

Senator Pignatelli: For lawyers/

Senator Fernald: Give right to litigant. Lawyers can always exercise for litigant. No way to police this. Clients can, lawyers can't.

Senator Pignatelli: I don't know how to get around this. Support what you want to do. I think you are right that criminal defendants saying they don't want a particular judge.

Senator Fernald: Can only say that if they have already been before that judge once.

Senator Pignatelli: Nashua District court has some judges you might want and not others.

Senator Gordon: Certain judges do mandatory sentence on particular crime every time, other judges may not.

Senator Pignatelli: Doesn't take long for people to figure that out.

Senator Roberge: Will try it again next year.

Senator Pignatelli: Will help you.

Senator Gordon: I like the original idea of doing a pilot in Hillsborough County limiting to civil cases.

Senator Roberge: That would be good. Don't need to do criminal.

Senator Gordon: Only for civil, period.

Senator Roberge: Do sunset? Then we would have some data.

Senator Pignatelli: This would send a message to administrative office of the court.

Senator Gordon: I don't see it being exercised very often. As an attorney, I am not going to exercise. Might exercise in marital matters. Pro se would probably be more likely to exercise.

Senator Pignatelli: Can we have court report back to us?

Howard Zibel: That has been done in the legislature.

Senator Gordon: Legislative committee for oversight?

Howard Zibel: Can only be done if you put it in the legislation that court would file report.

Senator Roberge: Pilot in Hillsborough County?

Senator Gordon: Would be better in only one court closer to Concord.

Senator Roberge: Sunset, two years.

Senator Gordon: Legislative oversight committee to report back. Just to receive a report.

Senator Pignatelli: President, Speaker and Governor review report.

Senator Gordon: Administrative judge report. The House will want a legislative committee to look at it.

Senator Roberge: Have we fixed what we can fix?

Senator Gordon: Want me to do amendment? Will get amendment out to get it on the calendar for the 24th. Will draft amendment. Going back to original idea, limit to civil cases, pilot, sunset, two years. Merrimack County with legislative oversight to report back.

Senator Fernald: You are not worried about judge shopping?

Senator Gordon: Not worried about judge shopping.

Senator Fernald: Are we excluding or including marital cases?

Senator Gordon: Including marital.

Senator Fernald: That is where most chance for judge shopping. Legitimate cases, personal problem, life is unfair.

Senator Gordon: Shouldn't be unfair in the courts.

Senator Fernald: Only way to do that is one judge. I am having tough time with details. I would rather do the amended bill. Defer to sponsor. Not select judge, but reject a judge.

Senator Roberge: Would like to see it go. If you feel legislature should be able to say no.

Senator Gordon: We need to get this out of here today, be prepared to vote against it all together.

Senator Fernald: Not vote against it entirely. With pilot court would have same objections. Administrative burden used by judge shoppers. Not sure pilot does anything.

Senator Gordon: See potential in criminal cases, but not in civil cases.

Senator Fernald: Someone going to draft amendment?

Senator Gordon: Hope to vote.

Senator Fernald: Merrimack County might feel they got the short straw again, not picking on Merrimack.

Senator Pignatelli: Hillsborough feels left out. Have it in Merrimack.

Senator Gordon: Amend to allow for pilot in Merrimack County. Original bill would allow litigants to disqualify a judge. Only in civil matters, pilot be put in place with sunset provision for 2 years, legislative oversight committee be established in order to monitor and report back to legislature on whether or not it should be continued or not.

Senator Gordon: Ought to Pass w/Amendment

Senator Roberge: Seconded.

Vote 4-0.

Senator Gordon to the floor.

Speakers

SENATE JUDICIARY COMMITTEE

Date: 5/22/01 **Time:** 10:30 AM **Public Hearing on:** HB 134

FAVOR	OPPOSED	Name	Representing	SPEAKING?
☐	☑	GREG ROBBINS	N.H. BAR ASSOC.	☑
☐	☒	MICHAEL SULLIVAN	CONC DIST CT	☑
☒	☐	CARL SCHEIDEGG	SELF	☒
☐	☒	Marty VanOot	NHBA	☐
☐	☒	Rep Christopher Reid	Strafford 12	☒
☐	☒	Tina Nadeau	Superior Court	☑
☑	☐	Cecilia de la Rosa		☐
☑	☐	Rep Quant		☑
☑	☐	Rep. Phyllis Woods		☐
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SENATE JUDICIARY COMMITTEE

Date: 5/22/01 **Time:** 10:30 AM **Public Hearing on:** HB 134

FAVOR	OPPOSED	Name	Representing	SPEAKING?
☐	☒	Rep John Parisi		☐
☐	☒	Rep Jim Carlson		☐
✓ ☐	☒	Rep Frances Potter	House Jud. Cmte	1 min ☐
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Testimony

New Hampshire District Court

Edwin W. Kelly
Administrative Judge

Regional Court Administrators
Pamela B. Neville
James F. O'Neil
Lauren B. Thorn, Esq.
Permanency Planning Coordinator
Kristin A. Lamont, Esq.
Domestic Violence Specialist
Elizabeth Paine, Esq.

May 21, 2001

Senator Edward Gordon, Chair
Senate Judiciary Committee
Legislative Office Building, Room 103
Concord, NH 03301

Re: House Bill 134 An Act Permitting Challenges to Judges

Dear Senator Gordon:

I would like to explain the concerns I have as Administrative Judge of the District Court System about the passage of House Bill 134.

As you know, the District Court processes roughly 200,000 cases a year at 39 court locations around the State. Pursuant to the legislative scheme set forth in RSA 502-A, each court location is served by two justices, a Presiding Justice and a Special Justice. The exceptions to this rule are the three largest courts, Manchester, Nashua and Concord, each of which is served by a full-time Presiding Justice and an Associate Justice, as well as a Special Justice. Of the 39 district court locations, only 10 are full-time. The balance are part-time courts meeting anywhere from one-half day to three and a half days per week. As the system is set up legislatively, the Presiding Justice of each court is expected to handle the vast majority of the court's sessions. In most cases that means the Presiding Justice sits 70% to 90% of the time the court is in session. Since 1987 Special Justices are paid on a per diem basis; i.e., only when they sit.

As I understand this bill, each party before the court is allowed to "strike" or recuse the judge assigned to hear it without cause. The consequence of this bill is that in at least some, and perhaps many cases, both the judges from a particular court will be struck and the District Court System will have to send a judge from some other court to hear the case or have the case transferred to another court location, either of which option will cause delay and expense to the parties and to the State. Although it is certainly possible to move judges from one court to another, indeed we do so

PO Box 389, Concord, New Hampshire 03302-0389
(603) 271-6418

now, the administrative structure this particular bill would require will be extensive. It is not often that I find myself expressing an inability to adequately carry out an innovation; however, this is one of those times.

I apologize for being unable to personally appear before your committee on May 22 to further explain my position. I have, however, asked Judge Michael Sullivan of the Concord District Court to appear on my behalf. I would be happy to speak personally with any committee members or yourself to further answer questions.

Very truly yours,

Edwin W. Kelly
Administrative Judge

EWK:jcb

CC: Members of the Senate Judiciary Committee
Honorable Michael F. Sullivan

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Date:

THE COMMITTEE ON **Judiciary**

to which was referred **House Bill 134**

AN ACT **permitting challenges to judges.**

VOTE: **4-0**

Having considered the same, report the same with the following recommendation that the bill be: **REREFERRED TO COMMITTEE.**

Senator Sheila Roberge
For the Committee

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Date:

THE COMMITTEE ON **Judiciary**

to which was referred **House Bill 134**

AN ACT **permitting challenges to judges.**

VOTE: **4-0**

AMENDMENT DOC # 2002-2249s

Having considered the same, report the same with the following recommendation that the bill be: **AS AMENDED OUGHT TO PASS.**

Senator Ned Gordon
For the Committee

|HB134 Docket

Next|Prev|Results List|Main|Bill Status

Bill Title: permitting challenges to judges.

Date	Body	Description
1/3/2001	**H**	Introduced and ref to Judiciary; HJ9, p93
1/3/2001	**H**	Copy to Chairman on 1/3/2001
1/3/2001	**H**	Hearing Jan 10 2:30 RM208,LOB (NOTE ROOM CHANGE)
2/8/2001	**H**	Maj Report OTP for Feb 22 (vote 9-8;Reg)
2/8/2001	**H**	Min Report ITL
2/22/2001	**H**	Passed RC(202-147); HJ20, p300-302 + 309
3/29/2001	**S**	Introduced and Ref. to Judiciary; SJ 7, Pg.90
5/15/2001	**S**	Hearing; May 22, 2001, Room 103, LOB, 10:30 a.m.; SC24
6/6/2001	**S**	Committee Report; Rereferred to Committee, [06/07/01]; SC29
6/7/2001	**S**	Rereferred to Committee, MA, VV; SJ 17, Pg.378-379

Next|Prev|Results List|Main|Bill Status

Docket Abbreviations

|HB134 Docket

Next|Prev|Results List|Main|Bill Status

Bill Title: (New Title) requiring the supreme court to establish a pilot program in the superior and district courts of one county which allows each party in a civil case one challenge to the justice assigned to the case, and changing a budget footnote relative to district and probate court security.

Date	Body	Description
1/3/2001	H	Introduced and ref to Judiciary; HJ9, p93
1/3/2001	H	Copy to Chairman on 1/3/2001
1/3/2001	H	Hearing Jan 10 2:30 RM208,LOB (NOTE ROOM CHANGE)
2/8/2001	H	Maj Report OTP for Feb 22 (vote 9-8;Reg)
2/8/2001	H	Min Report ITL
2/22/2001	H	Passed RC(202-147); HJ20, p300-302 + 309
3/29/2001	S	Introduced and Ref. to Judiciary; SJ 7, Pg.90
5/15/2001	S	Hearing; May 22, 2001, Room 103, LOB, 10:30 a.m.; SC24
6/6/2001	S	Committee Report; Rereferred to Committee, [06/07/01]; SC29
6/7/2001	S	Rereferred to Committee, MA, VV; SJ 17, Pg.378-379
1/22/2002	S	Committee Report; Ought to Pass with Amendment, {2249}, [01/24/02]; SC6, Pg.7-8
1/24/2002	S	Ought to Pass with Amendment, {2249},[Not Voted On]; SJ 3, Pg.41-42
1/24/2002	S	Sen. Pignatelli Moved Laid On Table, Division 10y-14n, MF; SJ 3, Pg.42
1/24/2002	S	Sen. McCarley Moved Laid On Table, MA, VV; SJ 3, Pg.42
1/31/2002	S	Sen. Gordon Moved Remove From Table, MA, VV; SJ 4, Pg.72
1/31/2002	S	Ought to Pass with Amendment {2249}, AF, VV; SJ 4, Pg.72
1/31/2002	S	Sen. Gordon Floor Amendment {2406},(New Title), AA, VV; OT3rdg, MA, VV; SJ 4, Pg.72-73
4/4/2002	H	House Nonconc with Sen Am req Conf Comm, Rep Mock MA VV; HJ32, p1248
4/4/2002	H	(Spkr appts Reps: P Woods, Reid, L Jean, and Wall)
4/25/2002	S	Sen. Gordon Accedes to House Request for Committee of Conference, MA, VV
4/25/2002	S	Pres. Appts.; Senators Gordon, Pignatelli, Roberge
4/25/2002	H	Conf Comm meeting Apr 29 11:00 RM208,LOB
4/29/2002	H	Conferee change: P Woods replaces Reid as 1st-named;
4/30/2002	S	Conference Committee Report; Senate Am + New Am {3724}, Filed;
5/2/2002	S	Conference Committee Report {3724}; Adopted, VV
5/2/2002	H	Conf Comm Report Adopted VV;

Next|Prev|Results List|Main|Bill Status

Docket Abbreviations