Judicial Activism? How About Judicial *Inactivism?*

To the Editor:

Charges of "judicial activism" are commonly heard from public figures of various hues when a court's decision varies from what the public figure thinks is the "right" decision. The judicial activism analysis is almost always in the eye of the beholder. But at least the decision at issue provides some form of evaluation of the evidence and law and sets forth the court's reasoning.

A much more pernicious practice by courts, in my view, is what I call "judicial inactivism." I use this phrase to describe the avoidance by a judge of specific issues raised and argued in a case. I understand the consequence of this silence to be that the avoided issues have been decided on the merits (because they were argued on the merits) and are decided against the party raising them. This, of course, offers the judge a poor man's version of the leave-to-appeal authority of the Supreme Court. It can also superficially serve somewhat the same function as res judicata without the bother of actually deciding anything. And it is difficult to see the logic that supports the determination that the proponent of the ignored issue loses. It seems equally plausible that the proponent should win the issue if the court refuses to address it.

A lawyer faced with the practice of judicial inactivism is in an impossible situation, especially when he or she has solid law and facts supporting a client's case. The lawyer accepts a fee, explains to the client how he or she will argue the matter, and argues the case. The lawyer is then faced with the task of explaining judicial inactivism to the client, and subsequently trying to explain why the client has to part with an additional fee to fund the appeal process.

Is this simply a hypothetical case? Most certainly not. I have argued in at least four cases that the so-called "collective bargaining agreements" and "contracts"—repeatedly referred to by the State Civil Service Commission (CSC) in its rule setting forth its so-called collective bargaining system—are not valid contracts. The courts' opinions failed to even recognize that this issue was raised, much less evaluate the arguments addressing the invalidity of the contracts. In my most recent case challenging the legality of the CSC's system (which went to the Sixth Circuit Court of Appeals—the U.S. District Court relying largely on judicial inactivism on the part of a state circuit court to find res judicata), the CSC, represented by the Michigan Attorney General, admitted that "collective bargaining agreements are not valid contracts." This admission was pointedly called to the attention of the Sixth Circuit, in briefs and oral argument. The court's opinion ignored it.

The CSC's system of "collective bargaining," like any system that claims to be a form of collective bargaining, revolves around the possibility of arriving at valid collective bargaining contracts. The CSC and the attorney general have admitted that the state's system doesn't include that possibility. And thanks to judicial inactivism, the state's lies will continue to mislead state-classified employees and cost these employees millions of dollars for nothing.

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A Belated Acknowledgement

To the Editor:

As theme issue editors for the February 2007 federal practice issue of the *Michigan Bar Journal,* we inadvertently forgot to thank Hon. Victoria Roberts for identifying topics and finding authors. Her assistance was invaluable to us.

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