

Judicial Independence in Crisis (Part 1)



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“We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution.”

—Charles Evans Hughes

“The judicial power ought to be distinct from both the legislative and executive and independent upon both, that so it may be a check upon both, as both should be checks upon that.”

—John Adams

Our founding fathers believed that an independent, fair, and impartial judiciary is essential to our free and democratic society. In the words of Alexander Hamilton, “The complete independence of the courts of justice is peculiarly essential in a limited Constitution.” Our civil liberties and constitutional rights can be preserved only when judges are free to make impartial and sometimes unpopular decisions, without fear of reprisal from the public or politicians. As Justice Robert Jackson stated in the 1943 decision of the United State Supreme Court in *West Virginia State Board of Education v Barnette*:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of the majorities and officials and establish them as legal principles to be applied by the courts. One’s right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Today, there is an ever-increasing concern that the principle of an independent,

fair, and impartial judiciary is being threatened and undermined in both federal and state courts. In fact, Margaret H. Marshall, chief justice of the Supreme Court of Massachusetts, goes so far as to say that our “state courts are in crisis.” She offers three basic reasons for the crisis: “inadequate funding, an inability to provide adequate access for all, and the politicization of state judiciaries.” This column will address the first reason— inadequate funding for the judiciary—which applies to both state and federal courts. Next month’s column will address the other reasons cited by Chief Justice Marshall.

Inadequate funding of resources for the judiciary is magnified in recessionary times. In a speech to the ABA House of Delegates on February 16, 2009, Chief Justice Marshall stated:

...in times of economic stress, people turn in even greater numbers to their state courts for relief.

Consider this: New Hampshire’s Judicial Branch recently announced that it will halt all civil and criminal jury trials for a month to save on per diem payments to jurors... Two rounds of budget cuts in Florida have left 280 court personnel without jobs, and more cuts may be on the way. Utah has dismissed all of its in-

house court reporters. Even the security of our courthouses is at risk.

The State of Michigan, like many other states and the federal government, has significant budgetary problems, and the judicial branch must share the responsibility of addressing these problems with the other branches of government. The judicial budget should not, however, be diminished to the point at which courts do not have the resources to provide efficient, fair, and impartial justice to those in need. As ABA President H. Thomas Wells, Jr. said in his March 2009 President’s Message, “Our ability to maintain courts as an independent branch of government is undermined if they simply do not have the resources they need.”

Judicial independence is also undermined when we do not pay state and federal judges fair compensation. Michigan state court judges have not had any increase in compensation, including cost of living increases, since 2001, and federal court judges have not received a significant increase in compensation since 1992. According to a recent report of the National Center for State Courts, the effect of inadequate judicial compensation is real and impacts the ability to attract and retain the best and the brightest men and women on the bench. Quoting from the editors of the *Chattanooga Times*,

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the American College of Trial Lawyers in a 2007 report on federal judicial compensation concluded as follows:

All Americans, of course, should want our judges to be among the most stable of our nation's lawyers, to be well-trained men and woman of integrity, dedicated to absolute impartiality in upholding the Constitution and the law—with no political or philosophical agenda for “judicial activism.”

And we should pay enough to justify the best.

The State Bar of Michigan has long supported adequate funding for the judicial system, including compensation for judges. Recently, the State Bar, working together with various Michigan judges associations, asked

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Barry Howard, a former state court judge, to appear before the State Officers Compensation Commission (SOCC) to advocate against a decrease in judicial compensation. Fortunately, the SOCC did not recommend, and the state legislature did not vote for, a decrease in judicial compensation. But avoiding a decrease in judicial compensation does not address the erosion of the earning power of judicial compensation for state and federal judges.

The State Bar is continuing its efforts to develop a long-term strategy to assure adequate resources for the judiciary, including fair compensation for judges. To this end, a blue ribbon committee of judges and lawyers has been convened to address these issues. But we need your help and support. Lawyers have a unique understanding of our justice system and the significance of judicial independence. I urge you to speak out for adequate resources for our judicial branch, including fair pay for judges, because adequate judicial resources and fair judicial compensation are keys to maintaining an independent, fair, and impartial judiciary. ■