

Judicial Independence in Crisis (Part 3)



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“Political campaigns are designedly made into emotional orgies which endeavor to distract attention from the real issues...”

—James Harvey Robinson,
The Human Comedy [1937], chapter 9

“Politics has got so expensive that it takes lots of money to even get beat with.”

—Will Rogers

Don't look now, but they are right around the corner. Just when they appeared to have ended, they are ready to begin again, making inordinate demands on our time and money. Lawyers dread them, but judges dread them even more. What are they? They are judicial campaigns, which will soon be gearing up for the 2010 elections. Make no mistake about it, judicial campaigns, especially for the Michigan Supreme Court, are “political.” This leads to the ultimate question: should judges who are supposed to be independent and impartial be involved in political campaigns?

According to Margaret H. Marshall, chief justice of the Supreme Court of Massachusetts, the “politicization of state judiciaries” poses the greatest threat to the independence of the judiciary:

This trio of developments—special interest money, attack ads, the loosening of ethical structures on judicial campaign speech—has transformed the nature of judicial elections. What were once low-key, inexpensive contests for a seat on the judiciary have become multi-million-dollar scorched earth campaigns. When judges have to look over their shoulders before deciding a case—or worse, when they make an implied promise to look over their shoulder before deciding a case—when litigants enter the courtroom hoping their attorney has contrib-

uted enough to a judge's election coffers, we are in trouble, deep trouble... Justice Sandra Day O'Connor had this to say: “While our judiciary has always faced significant attacks, some appropriate and others not, the simple greatest threat to judicial independence is fairly modern and uniquely American. And that is the flood of money coming into our courtrooms by way of increasingly expensive and volatile judicial elections.”

Based on data collected by the Michigan Campaign Finance Network (MCFN), special-interest groups spent \$3.75 million on television advertisements in the 2008 Michigan Supreme Court election, while the candidates spent another \$2.5 million. The total spent on this election was \$7.3 million, resulting in the most expensive Supreme Court election ever, according to MCFN data. A recent MCFN statewide poll, conducted after the 2008 judicial elections, found that most Michigan voters do not believe that judges can be fair and impartial when deciding a case involving a major financial supporter.

Although “there is no evidence to demonstrate that contributing to a judicial campaign increases the contributor's likelihood of success in cases before the court,” a “perception problem nonetheless exists.” See the American Bar Association's 2003 publication, *Justice in Jeopardy*. The public's perception that judges cannot be fair and impartial when deciding a case involving a

major financial supporter undermines confidence in our justice system. An ordinary citizen cannot help but wonder why lawyers and special-interest groups would contribute so much money to the judicial candidates of their choice. As United States Supreme Court Justice John Paul Stevens said at an ABA convention on August 3, 1996:

Persons who undertake the task of administering justice impartially should not be required—indeed, they should not be permitted—to finance campaigns or to curry the favor of voters by making predictions or promises about how they will decide cases before they have heard any evidence or argument.... Moreover, making the retention of judicial office dependent on the popularity of the judge inevitably affects the decisional process in high visibility cases, no matter how competent and how conscientious the judge may be.

There are no easy and quick solutions to the increasing politicization of state judiciaries, but this does not mean that we should ignore the problem. One answer, advocated since the early 1900s, is the abolishment of judicial elections and the establishment of a system of selecting judges based on merit. There are pros and cons to both types of selection systems, and it is unlikely that Michigan, which was the first state to hold judicial elections, will abolish judicial elections.

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Other suggestions include more stringent qualification standards for individuals seeking election to judicial office; codes of conduct for judicial campaigns; campaign finance reform, including public financing; and transparency in advertising, specifically identifying special-interest groups financing advertisements in judicial campaigns. Every potential solution should be considered, as well as variations and combinations of each.

More importantly, lawyers and judges have a responsibility to educate the public about the important role of our courts in our democracy. Judges must not only be

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fair and impartial, they must also be perceived by people to be fair and impartial. Perception can become reality. Lack of public confidence in our judicial system will make it difficult to maintain an independent, fair, and impartial judiciary.

This issue is too important to ignore. The various proposals that have been offered on judicial selection and disqualification deserve serious thought and consideration. Let your voice be heard. Get involved in programs to educate the public on the importance of the judicial branch of government. Justice is not, and should not be, for sale in Michigan or anywhere in the United States of America. Our judicial system, with all of its blemishes, is still the envy of the world, and it is our responsibility to keep it fair, impartial, and independent. ■

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