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Toward Judicial Independence

Judicial independence is a fundamental tenet of our democratic system of government. In 1776 Thomas Jefferson wrote:

> *"The dignity and stability of government in all its branches, the morals of the people and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive and independent from both, that so it may be a check upon both, as both should be checks upon that."*[1]

There is very broad agreement on the need for judicial independence, but there is wide divergence of opinion in Michigan and across the nation as to the best means to achieve this goal.

Questions regarding judicial independence often elicit passionate arguments for or against election of state judges, particularly appellate judges. That debate occurred with great vigor in Michigan during the constitutional convention of 1963, resulting in our present system of judicial elections. Since then, there have been numerous proposals to modify the system. None has succeeded, despite the prominence and influence of some of the proponents.

Michigan is not alone in its reluctance to revisit constitutional choices on judicial selection. In the majority of other states, whether their judges are appointed or elected, it is extremely hard to persuade either legislators or citizens to tinker with the status quo because of the tremendous political forces that tend to align on either side of the issue seeking to gain or to oppose perceived political advantages for various interest groups.

The State Bar of Michigan has been deeply involved in the series of discussions in our state on judicial selection. Over the years the Bar has supported both appointment and election of judges. This is not to suggest that the Bar is fickle. In other very important areas the Bar has shown steadfast consistency on matters of public policy. A few examples: the Bar has always been opposed to legislation that would encroach on judicial independence; it has been stalwart in its support for adequate legal services for the poor; it has lobbied annually for adequate funding for the judicial branch; and it has been unwavering in advocacy for protection of the public from the unauthorized practice of law.

In my opinion, the delicate subject of judicial selection is unique in the continuous consternation caused to the bench, the bar, our legislators, and hapless citizens. Indeed, debates frequently arise between factions that are nominally (albeit temporarily) on the same side of the election/appointment conundrum. For example, even among those who favor the election of judges, there remain serious questions about the means: the length of terms; the need for districts and their composition; "slating" versus "slotting;" campaign finance limits; judicial campaign speech; the incumbent designation; and for the Supreme Court, the question of partisan nomination.

The following is a brief chronology of the bar's consideration of judicial selection issues over the last 30 years:

March 1973: Supported in principle a system of merit selection of all Michigan judges and recommended the formation of a Citizens Committee on Michigan's Judiciary.

September 1973: Approved in principle a proposal to amend the Constitution to provide for (1) appointment of all Michigan judges by the Governor from a list of nominees submitted to him by a nominating commission, and (2) requiring all judges so appointed to run against their record within a specified period following appointment.

September 1974: Defeated a proposal to endorse legislation requiring certain minimum qualifications before an attorney is eligible to become a judicial candidate, including being of the age of majority and having practiced law for a minimum number of years.

April 1978: Adopted a substitute motion endorsing a Constitutional amendment providing for appointment of Supreme Court Justices and Judges of the Court of Appeals advocated by a coalition known as the Michigan Citizens to Take the Courts Out of Partisan Politics.

May 1981: Adopted a proposal to recommend to the Michigan Supreme Court that temporary appointment of judges be limited to those who do not leave office after a defeat in a general or special election.

May 1981: Adopted a proposal that the State Bar endorse a Constitutional Amendment providing for the appointment of Supreme Court Justices, Court of Appeals Judges, and the members of the State Board of Education and the governing boards of Michigan State University, the University of Michigan and Wayne State

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University; and that members of the State Bar of Michigan be urged to assist efforts to place this proposal on the ballot for the 1982 general election; and (2) to permit Lt. Governor James H. Brickley to speak in support thereof.

May 1984: Endorsed an amendment to the Michigan Constitution to replace the present partisan party convention process for nominating candidates for Supreme Court justice by a nonpartisan primary election.

April 1989: Endorsed a requirement that candidates for judicial office must have been licensed to practice law for at least five years, and candidates for the position of hearing officer within the executive branch must have been licensed to practice law at least three years, before they are eligible for appointment or election to office.

September 2001: Adopted a resolution endorsing "a system for the election of judges in all Michigan state courts, which reduces, to the greatest degree possible, the politicization of judicial selection," and urging the Michigan legislature, the Supreme Court, and the State Bar to educate voters on our justice system, and on the background, experience, and qualifications of candidates in judicial elections.

The Representative Assembly considered the election/appointment issue in 2001 in part because judicial campaign speech was a major topic of discussion following the November 2000 election. Many lawyers and commentators asked, "How can respect for the justice system be maintained when voters are bombarded by campaign commercials telling them that judicial candidates are bought and paid-for, and when voters are besieged by bedsheet ballots of judicial candidates about whom they know little or nothing of substance?"

In 2002, State Bar Past-President Dennis Archer, who is now President-Elect of the American Bar Association, brought together a group of lawyers and interest group representatives to figure out how to make the 2002 Michigan Supreme Court campaigns more civil than the 2000 season. I attended the meetings as chair of the State Bar of Michigan's Public Policy Committee. At our first session, former Supreme Court Justice Archer showed clips from campaign commercials of 2000. The overarching theme of these advertisements was that judges distort the law for the benefit of special interests and to the detriment of the public welfare.

After several meetings, Past-President Archer presented those assembled with a proposed pledge to engage in clean campaigns. The pledge was not for signature by judicial candidates; instead it was for representatives

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of the interest groups, many of whom were responsible in one way or another for creating and funding the negative ads we all decried. After negotiations over language, some of the interest groups signed the pledge and others declined. The State Bar of Michigan, which is prohibited from partisan political activity, has had no role in election campaigns. Nevertheless, in the interest of supporting a voluntary "ceasefire," in these perceived attacks on our precious justice system, consistent with the Representative Assembly's September 2001 exhortation to reduce "the politicization of judicial selection," the Bar's Board of Commissioners endorsed the pledge.

We will never know exactly how much the discussions led by Dennis Archer helped to quiet the 2002 judicial campaign season. Some would argue that political realities and a tight gubernatorial campaign were largely responsible for the relative dearth of attacks on Supreme Court candidates. On the other hand, it must be noted that the only 2000-style attack ads during the 2002 judicial campaigns came from a national group that did not attend the Archer meetings or sign the pledge.

The American Bar Association has approached judicial campaign issues in another way. In 2002 the ABA's Standing Committee on Judicial Independence adopted the report of its Commission on Public Financing of Judicial Campaigns, which (not surprisingly) recommends public financing of judicial campaigns, to address the perception that improper influences may result when judicial candidates accept private contributions from those interested in cases those candidates may later decide from the bench. The commission found in its research that the tremendous expenses associated with today's state appellate court campaigns require judges to seek very large contributions from persons and groups who are directly interested in affecting the outcomes of cases. It reasoned that requiring judges, whom Thomas Jefferson believed to be distinct from the political branches of government, to campaign like their legislative and executive branch counterparts, "contributes to the inappropriate politicization of the judiciary."

In Michigan we provide public financing for gubernatorial races, but not for judicial contests. In these lean budget times, it is not likely that a public financing proposal will be met with great enthusiasm by those responsible for allocating our scarce public funds. More importantly, public funding will not stop special interest groups from engaging in protected free speech in the form of damaging attack ads. Interest groups would still be able to run independent expenditure campaigns over which the candidates have no control, or use so-called "issue ads" that do not advocate for or against the election of a specific candidate or slate.

Ideally, we could have a combination of the Archer and ABA approaches. We should continue efforts that rely on the good will of those who believe we must preserve and strengthen public confidence in the justice system, *and* we should provide public funds to relieve our judges of the terrible burden of soliciting others to solicit millions of dollars for their campaigns. Lawyers bear a special responsibility to work toward an appropriate solution, and the evolution of the State Bar's positions on judicial selection should not be seen as equivocation, but rather as evidence of how seriously we are taking that responsibility. ✦

FOOTNOTE

1. Thomas Jefferson to George Wythe, 1776. Papers 1:410.