

Reflections of a Survivor of State Judicial Election Warfare

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REFLECTIONS OF A SURVIVOR OF STATE JUDICIAL ELECTION WARFARE

Following four years on the Michigan Court of Appeals, Justice Young was appointed to the Michigan Supreme Court in 1999 and in 2000 ran for reelection. He prevailed in one of the most difficult campaigns in Michigan judicial history. A graduate of Harvard Law School and Harvard College, Justice Young has served on several advisory groups to the Eastern District of the Michigan Federal Court. He has been active in the Michigan bar, including a term as president of the Michigan Board of Law Examiners. He is also an adjunct professor of law at Wayne State University and has a long and impressive record of public and community service.

Thirty years ago, there was almost no media coverage of state judicial campaigns—and certainly there was no national interest in them. Frankly, there was not much on which to report. Judicial races of that era were largely quiet, decorous affairs where the candidates politely presented their credentials to various civic groups and lawyers. Except in the unusual campaign, the fraction of voters who even bothered to cast a ballot in judicial races generally returned the incumbents to office and then everyone went back to sleep.

However, last fall, Alabama, Michigan, Mississippi, Ohio and several other states were the staging grounds for breathtakingly expensive, brutal and hard fought state supreme court races. Even the venerable *New York Times* and the *Wall Street Journal* deigned to feature stories and editorials on the Michigan and Ohio supreme court races. There was a sense that something new was afoot in judicial races.

My quick internet review of newspaper accounts of last year's state supreme court races across the country reveals: (1) a nearly universal editorial hue and cry over the amount of campaign funds raised and spent by the candidates themselves and by "independent" advocacy campaign groups, and (2) a high-pitched,

sustained whine about the awful tenor of these campaigns. In short, the kind of bare-knuckle judicial campaigns that first debuted in Texas and Alabama a decade ago have now metastasized to a broader array of states.

It would appear, from the various newspaper articles I have reviewed, that there is now universal agreement (at least among those who own and write for the newspapers, and other political cognoscenti) that judicial elections have gotten out of hand and that some other method of judicial selection must be found.

Instead of regaling you with the traumas I recently survived as a successful candidate to retain my seat on the Michigan Supreme Court, I would like to ask and answer a question: Why, after decades of quiescence, have state judicial campaigns become such fractious, expensive (but apparently interesting) political affairs?

The simple answer, I think, is that to one extent or another, enough people now recognize that judicial philosophy matters. And judicial philosophy matters precisely because, for the past 40 or so years, the courts at the state and federal levels have transformed themselves into "auxiliary legislatures." Courts have become a new and previously unmonitored source of social

and political policy making. There has been a belated, but growing public awareness that the courts, not the legislatures, are in control of the important social issues of American life.

This is so much the case that, as my colleague and good friend, Justice Clifford Taylor of the Michigan Supreme Court, suggests: “More public policy is determined on an average Monday in June by the U.S. Supreme Court when it issues its decisions than by the Congress during an entire session.”

What has happened during this period is that the judicial traditionalists—those who, like me, believe that judges are constrained to apply the actual text of the constitution and statutes to particular fact patterns in the cases before them—have been eclipsed by judicial activists who believe that judges should serve as a counter-majoritarian hedge against legislative actions that they believe to be insufficiently “just.”

This debate between judicial activists and judicial traditionalists was framed as follows by the late Chief Justice Walter Schaefer of the Illinois Supreme Court (please note the palpable condescension in his statement):

“If I were to attempt to generalize, as indeed I should not, I should say that most depends upon the judge’s unspoken notion as to the function of his court. If he views the role of the court as a passive one, he will be willing to delegate the responsibility for change, and he will not greatly care whether the delegated authority is exercised or not. If he views the court as an instrument of society designed to reflect in its decisions the morality of the community, he will be more likely to look precedent in the teeth and to measure it against the ideals and the aspirations of his time.”¹

I was not aware that the constitution “delegated” to judges the authority to treat the court as a “change agent” reflecting the “aspirations

of [the] time.” It is also worth noting that Justice Schaefer refers to a judge’s “unspoken” notions rather than the text of our constitution and the structure of government it established as the critical determinant as to whether a judge should be an activist or a traditionalist. Notwithstanding, the Justice correctly points out that this debate among judges is fundamentally one about the role of the judiciary in a constitutional republican form of government.

It is my belief that the national “judicial culture” of the last 40 years has fully embraced judicial activism—a philosophy that is fundamentally elitist and which is unquestionably founded on the belief that we judges, being more intelligent and better educated than the rabble who are elected to our legislatures, are in a superior position to make refined social policy judgments about the critical questions of the day.

Indeed, any cursory review of the most contentious issues of the day reveals that subjects such as abortion, gun control, gay rights, school choice, the expression of religion in public places, assisted suicide, tort reform and many, many others are being decided not in our legislatures, but in our courts.

As we look around today, I think the framers of our constitution would be baffled, if not horrified, to learn that our courts, not our legislatures, were deciding such fundamental policy questions as these on bases that some would suggest are simply contrived constitutional grounds that have no link to the text of our constitution.

And it is worth noting that resort to the courts is one of the cheapest political campaigns one can wage. Instead of having to convince a majority of one’s state legislature, the governor and the public constituencies they represent, a “political litigant” need only convince one trial judge, two judges of the court of appeals, or a majority of justices on the state supreme court. The same is true at the federal level.

This phenomenon represents nothing short of a usurpation of political power by the judiciary and it is a dangerous threat to our constitutional framework that, with limited exceptions specifically enumerated in our Bill of Rights, respects the peoples' right of self governance—to make their laws by the majoritarian political process, namely through the legislature.

I also submit that the judiciary is an institutionally incompetent vehicle for making sound social policy. Because they are specifically designed to create policy, it is entirely desirable that important public and social policy be made by the political branches of government—the executive and legislative branches—rather than the judiciary. The political branches are designed for public debate, discussion and compromise. The judicial branch is not.

When one has a hot political issue, one can gather up like-minded citizens and storm the state capitol. However, one risks that equally dedicated citizens of opposing views will challenge that effort. This is the nature of the majoritarian political process.

In contrast, in the judiciary, the process, though public in name, is private in its essence. The public cannot broadly petition a court to urge it to reach a particular result, and if the public did, the court is obliged to rebuff such importuning. Further, a court must consider issues largely as they are framed by the litigants, who typically do so only in terms that will serve their vested interests, which is to win that particular case.

Finally, the legislature is free to experiment on policy questions—to try one thing and then another to reach a result satisfactory to the public at large. When the legislature makes a mistake in policy, it simply amends the law. When a court makes a mistake in social policy, and does so on constitutional grounds, its error can persist for generations.

However troubled one may be about this trend, we have as a society become its “enablers.” Political activists on the left and right of the political spectrum have been guilty of resorting to the courts as a means of circumventing the majoritarian political process. If you lose in the legislature, “on to the court!” has been the rallying cry and strategy of far too many political activists over the years.

It is the very fact that the activist judicial philosophy I have described has encouraged the expansion of judicial policy making into such a broad range of public issues that has, in turn, spawned a corresponding growth in interest group involvement in judicial campaigns. Now, as never before, it simply matters who wears a black robe if one's goal is to ensure that one can achieve political results in the courts. And people are organizing politically in response to this reality.

I am indebted to Professor Anthony Champagne of the University of Texas for his monograph on interest groups and judicial elections that he prepared for the recent National Center for State Courts summit on improving judicial selection.² Professor Champagne notes the following national trends in judicial races:

- (1) Interest groups have had a long history of involvement in judicial selection.
- (2) In judicial elections interest groups can and do play important roles in assisting candidates to communicate with and mobilize voters.
- (3) Over time, the range of interest groups involved in judicial races has broadened from a small cadre of lawyer and law enforcement groups to embrace those reflecting many different ideological interests.
- (4) More recently, interest groups involved in judicial elections have become interconnected and increasingly national in scope.

(5) The literature on such interest groups recognizes that they have become involved in judicial campaigns in an attempt to influence courts and they do so for three primary reasons:

- such groups believe they need to counterbalance the influence of *other* groups;
- interest groups wish to influence judges to incorporate *their* political views into the law; and
- they wish to hedge their bets in the event they fail to persuade the executive and legislative branches to enact their policy preferences.

Finally, and most importantly for my purposes here, Professor Champagne observes that interest groups today “often draw no distinction between achieving their goals through the courts or the political process.”

It is my belief that the trends of judicial interest group politics that Professor Champagne describes correspond precisely with the judicial branch’s increasing willingness to venture into the political arena and become the arbiter of policy questions that have historically been the province of the majoritarian and political processes.

However, a development of more recent and “incendiary” character has been the emergence of a cadre of judicial traditionalist appointees and candidates who have challenged the hegemony of the judicial activist regime. These traditionalists, like me, are the flinty jurists who believe that they are constitutionally constrained to interpret the laws, not make them. (I can tell you from personal experience that there is no natural interest group “constituency” for judicial traditionalists because traditionalists reject the activist’s view that courts should engage in politics by another name.)

I believe that the arrival of judicial traditionalist appointees and candidates for office has encouraged new interest groups to become involved in judicial elections and also caused established interest groups, such as lawyers, which have traditionally been involved to become anxious to maintain their suzerainty in judicial elections. In many states, this change created a more competitive, intense environment within which judicial candidates had to function.

Michigan has followed the national trends I have just outlined. Last year, we experienced the most expensive judicial campaign in State history, possibly one of the most expensive in the nation’s history.

Let me give you some background on the events which lead to the 2000 judicial extravaganza in Michigan.

The Michigan Supreme Court consists of seven Justices. Although Michigan Justices run statewide on a nonpartisan ballot, they are nominated by political parties. (In as much as voters have very little basis upon which to select among rival Supreme Court candidates, it appears that the theory for this arrangement is that political parties would select a higher caliber of candidates for the Supreme Court than would be selected by the voters in a statewide primary.) By constitutional provision, incumbent candidates enjoy one significant advantage over their challengers: they appear on the ballot designated as a “Justice of the Supreme Court.”

For the past 40 years, the Michigan Supreme Court has been dominated by politically liberal judicial activists. Beginning in 1998, and continuing through 1999, four of its seven justices retired or resigned from the Court. Each was replaced by a judicial traditionalist. These changes shifted the philosophical center of the Court and engendered enormous anxiety among those who had profited from having a

Court traditionally willing, frankly, to legislate. The interest group thrown into deepest agony by these personnel changes was the very powerful and wealthy plaintiff personal injury bar, which is more simply known in Michigan as the “Trial Lawyers.” They, unlike others in society, are investors in litigation because they earn as fees a third of whatever verdicts or settlements they can achieve. As such, the plaintiff’s bar has a continuing and direct pecuniary interest in who becomes or remains a Michigan judge.

Until the late 1990’s, beyond nominating candidates for the Court, the political parties played a relatively modest role in the Supreme Court campaigns. The parties provided only token financial assistance and almost no organizational support to their nominees. Campaigns rarely raised as much as \$200,000 and such funds as were raised were collected almost exclusively from members of the state bar. (In 1994, few businesses or other non-lawyer interest groups made any kind of contributions to judicial campaigns.) It was not contemplated that any Supreme Court candidate would attempt to buy media, and such campaign funds that were expended were used to buy things like lawn signs, bumper stickers and similar campaign paraphernalia.

In keeping with these longstanding traditions, as late as 1994, Justice Elizabeth Weaver, the successful non-incumbent candidate, who was nominated by the Republican Party, beat a field of three male candidates and raised the princely sum of \$187,000. Following that election, it was discovered from campaign finance reports that one of the failed Democratic nominees had raised the unprecedented sum of \$500,000—almost all of it from the Trial Lawyers. You may not find it surprising to learn that that candidate campaigned stating that he favored people over “corporate” interests.

While this 1994 Democrat nominee for the Supreme Court failed in his effort, the nature of the anti-business campaign he waged and the

source of his huge campaign fund caused the business community to reassess its lack of involvement in judicial campaigns.

The Michigan State Chamber and other major business groups began an aggressive education effort to increase that community’s awareness of how the courts affect business climate issues. Various business groups formed and funded “M-Law,” a pro-business “watchdog” organization that purports to evaluate judges’ rulings on business issues, educate the public on judicial topics, and to run issue advocacy ads on radio and television.

More importantly, the business community, with the leadership of the State Chamber, vowed never again to let the Trial Lawyers have a financial advantage in supporting Supreme Court candidates.

The first race in which the business community attempted to become a major player in judicial campaigns was the 1998 race. In 1998, two judicial traditionalists (both Republican nominees, one an incumbent) were on the ballot and opposed by two politically liberal, activist, Democratic nominees. The Democratic nominees were supported by the usual coalitions: the Democratic Party, the Trial Lawyers, and major labor organizations. Both traditionalists, with the financial backing of business groups and the support of law enforcement and social conservative interest groups, won, bringing the Court to a 4–3 liberal activist majority. One of the traditionalist candidates raised more than \$1 million, the other slightly less than \$1 million.

The success of the 1998 effort caused the leaders of the Trial Lawyers to claim that the business community was attempting to “buy” the Court. The irony of this claim was not lost on anyone but the media that gave it credence.

In December, 1998, the unexpected happened. A Justice who had been a Democratic nominee,

resigned from the Court and Governor Engler appointed me. This resulted in a shift of the Court to a 4–3 traditionalist majority—the first in nearly 40 years. In 1999, a Republican nominated Justice regarded as a “swing vote” retired and the Governor appointed Justice Steven Markman. His appointment created a 5–2 traditionalist philosophical majority and spawned abject terror among the Trial Lawyers and their allies.

Under ordinary circumstances, only one Justice, Justice Taylor, would have been on the ballot in 2000 because his term expired in that year. However, because our state constitution requires that every judicial appointee stand for election at the next general election, in 2000 Justice Taylor, Markman and I—all judicial traditionalists—were on the ballot. This arrangement meant that the possibility of defeating two of the three incumbents and replacing them with politically liberal judicial activists could change the philosophical majority of the Court.

The fact that the Court’s philosophical majority hung in the balance energized virtually any political interest group which believed that control of the Court’s majority philosophy was important.

Because of this fact, I knew that I faced a difficult campaign when I accepted my appointment. However, nothing in my most paranoid ravings prepared me for the viciousness of the election. The three incumbents raised slightly more than \$1 million each. One Democrat nominated challenger also raised more than \$1 million and the other two came close. Contrary to the Democratic Party’s consistent assertion that our campaigns were the captives of “big business interests,” in my campaign, there were a total of 4,094 contributors. Of these, 68% of my contributors gave \$100 or less; 27% gave \$1000 or less; and a mere 0.01% of my contributors gave between \$1000 and the maximum contribution allowed by Michigan law.

Apart from the fact that \$1 million became the threshold for a credible Michigan Supreme Court race in 2000, what was even more unprecedented were the huge campaign expenditures made by independent campaigns. Apart from the roughly \$6 million spent by the 6 principal candidates, approximately an additional \$10–12 million of expenditures were made by independent campaigns. In a further break with tradition, both parties spent heavily in independent campaigns in support of their respective Supreme Court nominees. They also invested heavily in get out the vote campaigns that, for the first time, featured the Supreme Court candidates who voters had to seek out on the non-partisan part of the ballot.

The Democratic Party’s effort, financed almost exclusively by the Trial Lawyers, began attack ads on the three incumbent Justices in July, a month before the parties’ nominating conventions. The Republican Party responded in kind with attack ads directed at the Democratic nominees. Other attack ads were sponsored by nonparty independent campaigns. Needless to say, no candidate was legally able to direct these efforts, even when we felt that their ads were “off message” or frankly damaging to our own campaigns.

As far as I can tell, none of this money or extraordinary effort mattered much. There was no detectable change in the percentage of voters who voted in the nonpartisan Supreme Court races. The three incumbents, undoubtedly aided by the incumbency ballot designation, all won handily by at least 10%.

How should we reflect on the conduct of these elections, now that the smoke has cleared? Have last November’s big money, big media, electoral *blitzkriegs* undermined the public appeal, or desirability, of judicial elections?

As someone who was the target of some fairly vicious campaign ads, I can honestly say that I

have a very personal understanding of how ugly and unsettling some of these election tactics can be. But our republic—and our judiciary—is healthy. And its health is sustained whenever the public is treated to a robust discussion of the issues, no matter how unseemly it may appear to elites who purport to be concerned about protecting the public from its own naiveté. While it is certainly true that you cannot cram a lot of deep philosophical issues into a 30 second television ad, it is possible, in a general way in a campaign, to raise the public's consciousness about the difference that judicial philosophy makes. Furthermore, my colleagues and I went to every major newspaper editor in the state and offered to talk about the philosophical issues of our campaign in greater depth. However, what I found interesting and almost invariably true was that few newspaper editors wanted to talk about the substantive issues, rather than tenor of the campaign ads.

There is a legitimate concern about the shocking amount of money involved in judicial campaigns in the state of Michigan and in many of the other states. But I believe that we ought to be very, very chary about tinkering around with reforms because, when you scratch the surface of each, what one typically finds is either an effort to trump First Amendment rights or a covert initiative for incumbency protection. Worst of all, most such reforms are fundamentally

rooted in a total distrust of the public and its ability to make astute political judgments.

But I think this distrust is unwarranted. Even with my limited experience as a candidate in electoral politics, I think I can confidently say that the public understands the issues and what is at stake, even if they are not as articulate as our angst-ridden political pundits. The truth is that people do not usually need to invest a lot of time and attention in judicial races in order to make a decision that serves their interests. In Michigan, people are passionately attached to their right to cast their votes in judicial elections largely because they want to reserve the right to remove a jurist who seems to be fundamentally at odds with how they think a judge ought to be functioning and conducting themselves on the bench. In a self-governing society, this is an important political tool.

Now, I don't know quite how this current controversy concerning judicial selection processes will resolve itself. I simply note that we have electoral mood swings in our polity all the time. I suspect we are on the high end of one swing of the pendulum in judicial elections in terms of their cost and intensity. But I am not fundamentally troubled. Perhaps the elite are troubled, but the public at large is not. And in the final analysis, it is the public's opinion that matters.³

NOTES

1. *Precedent and Policy*, 34 U. Chi. L. Rev. 3, at 23 (1966).

2. *Interest Groups and Judicial Elections* (Dec. 2000) (unpublished monograph on file with the National Center for State Courts).

3. This Report has been adapted from remarks Justice Young delivered on February 28, 2001 at a Manhattan Institute luncheon at the Harvard Club in New York City, and from an April 18, 2001 conference in Washington, D.C. on “State Judicial Elections: Past, Present, and Future,” co-sponsored by the Center for Legal Policy at the Manhattan Institute and the U.S. Chamber Institute for Legal Reform.

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