



ESSAY

PROTECTING AN INDEPENDENT AND QUALIFIED JUDICIARY

BY GEORGE W. SOULE

Recent years have not been kind to judges in many respects. They have been the targets of physical attacks and political hostilities. It is important to measure the impact of these events on the judicial process and recruitment efforts.

The recent killings of a judge and courthouse and law enforcement personnel in Atlanta, and of a judge's family members in Chicago, are the most tragic. While such attacks certainly raise security concerns, fortunately they are rare.

The politicization of the judiciary has been more widespread in recent years. In 2002 the U.S. Supreme Court ruled that broad restrictions on campaign speech by judicial candidates are unconstitutional. As a result, judicial candidates can now be pressed for their opinions on hot-button issues, such as abortion, gay marriage, and the death penalty. Judges who do take positions on issues may disqualify themselves from deciding those issues, or their impartiality may be questioned.

Political parties and special interest groups have turned to judicial elections as battlegrounds in many states. They spend vast sums of money to elect judges friendly to their interests. Business interests often square off against unions and trial lawyers in these races. These groups and others invested over \$10 million in the race for one Illinois Supreme Court seat in 2004.

Some Minnesota legislators are pressing for a county-by-county account of the number of judicial consents for minors seeking abortions without parental consent. Such legislation may make judges who do grant consents targets in elections and/or discourage such orders. Ironically, judges may be vulnerable for doing exactly what the Legislature required them to do when it adopted the judicial bypass procedure.

Financial pressures are also of concern to the judiciary. In what is becoming a bi-annual ritual, the Minnesota court system and its allies must plead with the Legislature and Governor for enough money to operate effectively. Certainly, when public money is scarce, the courts must run a lean operation. But proper staffing is needed to deal effectively with

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the host of cases and problems that the Legislature and society ask modern courts to resolve.

Until recent years, judges' salaries in Minnesota had not kept pace with compensation for other lawyers or the cost of living. District court judges now earn \$118,141 annually, although that number is frozen through 2006 unless the Legislature acts soon. Still, judges make less than some first-year associates in Twin Cities law firms.

These factors may harm the judiciary in two principal ways: They threaten judicial independence and they may deter good lawyers from seeking appointment or election. Minnesota lawyers should be concerned about both possible results.

THREAT TO JUDICIAL INDEPENDENCE

Judicial independence is the principle that judges should reach legal decisions free from outside pressures, strictly according to the law, and without fear of reprisal. If judges are independent and fair and impartial, then justice should be served.

Each of the factors listed above may threaten judicial independence, either in a particular judge or in the Judiciary as an

institution. Threats of violence can jeopardize independent justice in particular cases. Judicial independence is threatened when judges are thinking about how partisans or special interests may be affected by a decision, what campaign contributions can be gained or lost, or how a ruling may sit with the Legislature.

The withholding of adequate funding system-wide or in compensation of judges may have insidious results, and may impair the courts' ability to administer justice.

Judicial independence is not absolute, but must be balanced with accountability. In Minnesota, judicial accountability is achieved on a case-by-case basis through the appeals process. Judges are also accountable for their conduct through enforcement of the Code of Judicial Conduct. Finally, judicial elections make judges broadly accountable to the people they serve.

Accountability can be achieved without impairing judicial independence. Minnesota's system of nonpartisan judicial elections provides a safety valve — a method for voters to replace a judge who has behaved poorly or has not performed adequately. But turning elections into partisan contests with special interests picking sides is a direct threat to judicial independence.

IMPACT ON JUDICIAL SELECTION

Acts of hostility toward judges, further politicization of the judiciary, and under funding of the courts may also diminish their effectiveness in the long term by deterring good lawyers from seeking judicial positions.

While a judge's salary may exceed the compensation of most public lawyers,

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ESSAY

many private practice lawyers must take a pay cut to become a judge. A balance of public and private law backgrounds is good for the bench. Judicial salaries should at least keep pace with inflationary pressures. Individuals may make sacrifices to hold this prestigious, public service position, but good lawyers may not apply if the gap between judicial salaries and private sector opportunities grows.

Good lawyers may also be discouraged from seeking judgeships if the courts do not have sufficient staff to get the work done. Judges should have law clerks, for example, to operate effectively. There must be sufficient funding, funding should be directed to the public service level, and security concerns should be addressed to make judicial positions attractive.

Turning judicial elections into partisan battlegrounds, targeted by special interests with large war chests, may provide the greatest disincentive for prospective judicial candidates. Many lawyers who would be good judges have little political background and are wary of running a high-profile election campaign. They want to focus on being good judges, not politicians. If elections turn out to be highly partisan, expensive battles, many will be scared off.

Any retreat in the merit selection process for judges would also deter good candidates. The Commission on Judicial Selection is established by statute, but its goals could be subverted by a governor who stacks the commission with partisan friends, or ignores its recommendations. The process has been used for 15 years with good results, so a governor would likely pay a political price for a return to partisan selections.

LAWYERS' SPECIAL RESPONSIBILITY

Minnesota lawyers are in a unique position to provide leadership in defending against attacks on judicial independence and in fostering a judicial selection process that will attract the best and the brightest candidates. As day-to-day participants in and observers of the judicial process, lawyers understand the importance of a process unfettered by partisan politics and other pressures and staffed by the best judges. While we each have our own legal agenda, our common special interest is in having such a process. Minnesota lawyers should fulfill our special responsibility by being advocates for an independent and qualified judiciary. □

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Copyright and Related Areas of Intellectual Property
- Professor Daniel J. Gifford |
| June 2
8:30-4:30 | War, National Security, and the Constitution: The Constitution
after September 11
- Professor Michael Stokes Paulsen |
| June 3
8:30-4:30 | Trends in International Estate Planning and Offshore Trusts
- Professor Barbara Hauser |
| June 4
9:00-3:00 | The Latest Word in Regulation of Professional Conduct: Rules,
Statutes and Cases (morning)* and Dealing with Bias in the
Courtroom (afternoon)**
- Professor Maury S. Landsman |
| June 6
8:30-4:30 | War Crimes
- Professor Fred L. Morrison |
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8:30-4:30 | M.B.A. Concepts for Lawyers
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| June 8
8:30-4:30 | Systematic Statutory Interpretation
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| June 9
8:30-4:30 | Campaign Finance Reform
- Professor Guy-Uriel E. Charles |
| June 10
8:30-4:30 | Patents for the Business Lawyer
- Professor Dan L. Burk |

6.5 General credits have been requested for each course, May 31-June 3 & June 6-10.

*3.0 Ethics credits have been requested for June 4 (morning).

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