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Selecting non-partisan, impartial justices by a political process causes an inherent conflict

By Steve Horton

When Elizabeth T. Clement was up for election in 2018, the Michigan Supreme Court justice—having been appointed to the office the prior November by Gov. Rick Snyder—was opposed by many Republicans. There was a move to deny her the nomination at the GOP State Convention by some of the more hard-core activists and then, during the campaign, her name was left off of a mailer that Republican election volunteers were passing out that listed endorsed (or preferred) candidates.

The reason for their displeasure was that Justice Clement had sided with the majority on two high-profile cases.

The 4-3 court decision to allow schools to ban the carrying of guns on school property was one. The pro-gun folks, of course, expected a Republican-appointed justice to nix any restrictions on where a gun can be taken

What really aggravated them, though, was her deciding vote that allowed the Anti-Gerrymandering proposal to appear on the November 2018 ballot; a citizen-led initiative that would turn the legislative redistricting process over to an independent commission,

The GOP officials who filed the lawsuit were counting on the state's highest court to accept their legal argument to that proposal was unconstitutional. Such a favorable ruling would have

skuttled what they expected to happen if the measure did reach the voters, namely that it would pass.

Since controlling how state House and Senate districts are drawn up is how Republicans have maintained their hold on both chambers of the Legislature for the past two decades, this legal maneuver was understandable.

With the court being comprised of four Republican-backed justices pitted against three Democratic Party-nominated justices, they expected a favorite ruling.

But Clement, citing her understanding of the current law on this matter, felt that there was not a valid, legal reason to keep the proposal off the ballot. The decision angered the Republican faithful. Faced with this opposition, she wrote: “I am someone you can count on to be fair and unbiased. I have no agenda other than to follow the law.”

What a quaint notion, a justice viewing ‘the law’ in an objective fashion rather than fashioning it to serve a political purpose.

Part of the problem, as I wrote in a 2018 column on the party’s displeasure with Clement, is that Michigan Supreme Court justices are nominated by political parties, but then appear on the non-partisan section of the General Election ballot.

I assume the reason for having justices run as non-partisan candidates is that they are expected (at least in theory) to be impartial and not tailor the law like a suit of clothes to fit a preferred political or social cause. But then the inherent conflict of having their nomination made by political party and needing the support of partisans (who do have an agenda) stands this ideal on its head.

As things turned out, Justice Clement was re-elected and the state court still has a majority beholden to Republicans. And reapportionment in Michigan will be done by an independent commission.

U.S. Supreme Court justices, who unlike their counterparts in Michigan receive lifetime appointments rather than having to face voters, are also expected to be impartial, unbiased, and not have an agenda. As the third and co-equal branch of our federal government, the high court

was designed to serve as part of the “checks and balances” that the Constitutional founders hoped would diffuse power.

But to get that office, they need to be appointed by the President and confirmed by a majority in the U.S. Senate. As nearly mother’s son or daughter knows all too well, that process is an intensely political one.

“Supreme Court Justice Ruth Bader Ginsburg dies, setting up nomination fight” is how the newspaper headline read. It pretty much sums up the verbal fisticuffs that await over selecting her replacement. Given that passions are already at a high pitch with the Presidential election and many Congressional races, the Senate’s advice-and-consent on the appointment will only add fuel to the fire.

The fact that we routinely refer to Supreme Court justices as liberals or conservatives, or in Michigan note whether they were nominated by the Republicans or Democrats and, as such, expect them to interpret the law and make their rulings accordingly is—at the very least—problematic.

Of equal concern is the chorus of criticism that arises when a justice strays off the reservation and doesn’t perform as politically expected—as if their role is no different than a ward heeler.

I realize that people, even judges, don’t live in a vacuum and are shaped by the forces around them—those influences from their past and what’s now occurring. Truth be told, we all have some sort of agenda—even if it’s stating that ‘the law’ is your guiding star, not partisan expediency.

But there is a reason Lady Justice is blindfolded and holds those scales. True, this image may be more of an ideal than the operating norm; more an aspiration than a reality. Still, it infers an ethical component in rendering judicial judgements that supersedes political allegiance. Or should.

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