

Horton's

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An Independent Judiciary is Essential

By Steve Horton

An independent judiciary is essential—both at the national level, but also to our state. People have to have faith that judges presiding over a courtroom or considering the merits of an appeal or sitting on the Supreme Court are fair, impartial, and even-handed; that facts matter and that they'll reach their decisions by use of logic and rational analysis.

They also have to have faith that special interests, the well-heeled and influential among us, are not tilting the scales of justice in their favor or that they have been given behind-the-scenes access to lobby their cause or that they can sway a decision with threats and intimidation.

In the same vein, they have to believe that judges are not water boys or girls for a political party, allying themselves to the partisans and content to serve their interests. They also have to hope that the men and women elected or appointed to sit on the bench will not pull and twist the law like a piece of warm taffy, with the intent of making it fit a preconceived conclusion that suits those partisans.



Michigan Supreme Court Justice Elizabeth Clement said she was “bullied and intimidated” by outside groups while considering whether or not to allow the redistricting proposal to go on the November ballot as Proposal 2. legal challenge.

We expect much of judges, those men and women manning our city and county courts and those who have gone higher up the ladder to appellate courts and for a select few, the Michigan and U.S. Supreme Courts.

Admittedly, those expectations might at times border on “the ideal.”

In fairness, we should remember that the real world is a nitty gritty place, pushing us (judges included) to be more subjective in our judgments and more accommodating to particular situations. Also, like us, they bring their own unique backgrounds, experiences, viewpoints, and guiding principles to the job and are no more immune than anyone else from the impacts caused by unfolding and oftentimes unexpected events.

Still, a high standard is not unreasonable.

I use those thoughts as a preface to what happened recently to a justice on the Michigan Supreme Court.

A front-page story in The Detroit News detailed comments made to the paper's editorial board by Justice Elizabeth Clement, stating that she had faced "bullying and intimidation" from outside groups while deliberating on whether or not to allow the redistricting proposal on the November ballot.

The outside groups, which she did not name, wanted her to keep it off. The proposal, which is Number 2 on the ballot, would appoint a Citizens Commission to draw up state legislative and congressional districts rather than continuing to have the legislature, or more specifically the political party in control of the legislature at that time, oversee this task.

At present Republicans have majorities in both the Michigan House and Senate—as they did when the districts were re-drawn (as they are every ten years) in 2011 and earlier in 2001. Since that earlier date, the number of seats in the two chambers and the make-up of the state's congressional delegation have tilted decidedly in the Republican's favor.

This despite the fact that the numbers were more evenly divided prior to this shift and, at present, the state voters seem to be evenly split in their preference for Republicans and Democrats.

This shift occurred, according to Democrats and others, due to gerrymandering.

The proposal reached the ballot after enough voters signed petitions requesting the referendum and after it passed muster with the election commission. Republican-oriented interest groups, led by their attorneys, had challenged the proposal when it was being considered by the election commission.

When that effort failed, they took it to court, stating that it would violate the state constitution. The challenge lost in the court of appeals, so they moved onto the state supreme court.

There was some anticipation by some and fears by others that the proposal, despite the grass roots support it had received, would meet its Waterloo at this final legal battle. Afterall, five of the justices had been supported by the Republican Party.

Clement had been appointed to the court by Gov. Rick Snyder to fill a vacancy. She had been his legal counsel. That seat, along with one held by Justice Kurtis Wilder, is up for election this November.

This past August, despite grumblings by some of the delegates, she was nominated at the Republican State Convention—as was Wilder. The grumblings were due to her having supported a ruling that it was OK for a school district to ban the carrying of guns on school property—thus, running afoul with the anti-gun control partisans.

As it turned out in the redistricting case, Justice David Viviano—who also reached this position with Republican support—joined Clement and two others in rejecting the challenge. As The News noted in their story "The state's highest court ruled that the redistricting voter-initiated proposal was allowed on the ballot because it did not significantly alter or abolish the form or structure of our government, making it tantamount to creating a new constitution.

Justice Clement did not make public this effort to pressure her while she was considering the case, but did so after some apparent political retaliation had taken place since the court decision.

As reported in *The News*, "...door hangers distributed by the Michigan Republican Party (in targeted areas) encouraged residents to vote on Nov. 6 and listed every other statewide Republican candidate, including Justice Kurtis Wilder, but omitted Clement's name and photo. Wilder joined the dissent in the redistricting case."

Clement, in her comments to the editorial board, called this action, of leaving an incumbent candidate off the literature, "unprecedented."

Justice Viviano, who no doubt has also displeased many in the party for his vote to allow the redistricting proposal on the November ballot, told *The News* that he was aware of the pressure put on his fellow justice and called it "unusual when applied in judicial cases and a breach of legal protocols."

"Certainly, people are entitled to their own viewpoints on how a case should be decided," Viviano told the newspaper. "But it is inappropriate to direct those views at a member of the court while the case is being decided."

Of course, leaving her name off the literature is a matter of hard-ball politics; a brush-back pitch warning her that "you either play the game the way we want or you'll be taken off the team."

And the game?

Well, it's the expectation that a judge will support certain issues favored by the party and assist in its hold on power and, when doing so, provide legal justification. The expectation that in exchange from the support the party that got them this position, they'll pull and

stretch the warm piece of taffy when necessary.

The news of what's happened to Justice Clement is troubling, but not surprising. In Michigan, as elsewhere, we've been observing this slippery slope, the effort to politicize the courts.

I understand that "all's fair in love and war" and that politics (which has the goal of controlling government) is a combination of both. The partisans "love" their party and their cause and are willing to wage "war" (hopefully in a metaphoric manner) against the opposing side.

While we want and should welcome enthused participation in the political process, ethical rules of engagement need to be observed.

Otherwise, taken too far, we risk "the totalitarianism of utopia," its true believers, so passionate in their ideology, so convinced in the rightness of their cause that they become uncompromising to opposing views and unforgiving towards any deviations.

Aware of this inclination and danger, our forefathers set up three separate branches of government—designed as "checks and balances." An independent judiciary is, of course, one of those branches.

While what happened to Justice Clement is troubling—and a symptom of the politicization of the courts—her response is heartening. It matches the high standard we set for judges, the expectation that they will be fair, impartial, and even-handed; that facts matter and that they'll reach their decisions by use of logic and rational analysis.

"I would hope that people would look at me as an example and have faith in the judicial system that we stand up to it (the bullying and pressure)," she said. "I swore an oath to the people, not to special interests to do their will."

“People expect that we won’t be swayed or intimidated by outside groups,” she added. Ah yes, faith in the judicial system.

As I said, it is essential