Some Thoughts on Judicial Reform and Growing Old

With Love from Grandpa Einhorn

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Dear Irena,

I hope this holiday season has been good, and I want to wish you, Clara, and the kids a healthy and happy 2044.

I suppose this is quaint, writing a letter and all, but I tend to reminisce more at this time of year—particularly now that I have to spew out three numbers when I'm asked my age. Frankly, it's hard to believe I've passed the century mark. I remember attending a lecture during my first year as an attorney that was entitled "How to Live to Be a Hundred." The speaker, a physician, started off by asking, "First of all, who would *want* to be 100?" And after a long pause, he answered, "Those who are 99."

I do wish I knew then that I would live this long. If I had, I might have taken better care of myself. At least I was wise enough not to take my law partners' advice to have myself cryogenically frozen after I finished my presidency of the State Bar in 2014.

You're about to embark on a judicial campaign, and although this makes me very proud, like most things lately it also makes me reflect on the old days. I've always believed that we have a thoughtful and independent judiciary in Michigan. But back in the early part of the twenty-first century, there were many—including lawyers—who believed that our judges promoted partisan agendas, both during campaigns and while on the bench. Some thought judicial campaigns were no different than campaigns for the legislative and executive branches.

To be fair, this perception wasn't really the judges' fault. I knew—more or less everyone in the bar knew—that judicial candidates would have preferred to distance themselves from political parties and the guerilla warfare that has always been an unfortunate part of political campaigns.

The real culprit was found in the Michigan Compiled Laws. Believe it or not, Michigan law used to *require* judicial candidates—including sitting justices—to get approval from a political party before they could appear on the ballot.[1] It's hard to conceive now that, as late as 2014, candidates for our Supreme Court were nominated by political parties. Yet our constitution prohibits the listing of party designations on ballots, both then and now.[2]

Obtaining a party's nomination wasn't a mere formality. Before appearing on the ballot, judicial candidates had to endure the crucible of party conventions. This meant that sitting justices and those trying to obtain their seats had to walk a very tight and very thin rope.

Candidates had to avoid making comments that could suggest they had predecided a case that might come before them. At the same time, they had to show they were on the party's side. They had to listen to party faithful talk about how much they hated the usual targets of partisan ire and how much they admired the party-sanctioned saint-of-the-day. There were endless references to people like former Presidents Jenna Bush and Chelsea Clinton—paragons to some and pariahs to others. Our justices had to smile and thank the party faithful at conventions, only to take to the campaign trail and talk about how they would interpret the law without allegiance to any person or party.

This conflict in the electoral process put candidates for the Supreme Court in an impossible bind. And according to many accounts from justices who went through the ordeal, the process was an odious and unhappy one.

I think all of our justices tried to avoid partisanship. Unfortunately, though, the public kept counting votes. Every time a justice decided a case, commentators would consider the justice's nominating party and conclude that his or her decision was based on what the *party* wanted rather than an impartial view of the law. It didn't matter that these commentators were wrong about our justices. The public perception was toxic.

Poisoning the well of public commentary wasn't the only problem. This overt partisanship detracted from justices' ability to have the kind of debate *they* wanted to have (and many in the public wanted them to

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have). Judges wanted to focus on their qualifications and discuss judicial philosophies—how they approached the common law, statutes, and constitutions. They wanted to have a dialogue about the role of the judiciary in our state government. But the political realities made judges focus on responding to personal attacks and saying just enough—but not too much—to the party faithful.

Now that we've minimized the role of political parties in judicial elections, we know that allowing candidates to focus on qualifications and genuine philosophical differences leads to more meaningful debates. Members of our bar, the public at large, and, more importantly, judicial candidates themselves are now able to make thoughtful contributions to public discourse about the role of the judiciary and the rule of law.

The contrast between today's judicial campaigns and those in the "good old days" (or perhaps not so good) couldn't be more stark. Back then, we were inundated with advertisements using the same gravelly voice-overs and ominous music to level ridiculous accusations against candidates. To make matters worse, many of those ads didn't identify who contributed to them or whose views they really represented. We had personal attacks and insinuations instead of meaningful debate and reason.

It didn't help that Michigan law allowed the governors to fill mid-term judicial vacancies without input from the kind of nonpartisan groups now involved in the nomination process. As you know, we now have a nonpartisan group of 15 individuals who review applications from those seeking appointments, interview candidates, and obtain public input. Based on that information, this group provides the names of five or six people from whom the governor can choose.

We had nothing of the sort back in the early part of the century. The governor would appoint candidates without the aid of nonpartisan input. As a result, many in the public—and, sadly, some lawyers, too—came to believe that justices appointed in this way made decisions based on the politics of the governor who appointed them. We heard the same refrain over and over: Justice X voted in a defendant's favor because she's a Republican or Justice Y voted in a plaintiff's favor because he's a Democrat.

Thankfully, we realized that nonpartisan input in the nomination process could eliminate most of this crass editorializing about the courts. And when we eliminated the perception that the nomination process was political, we also minimized folks' tendency to assume the worst of any judge whose political stripes did not match their own.

It's hard to say what the turning point was in our path to reform but I think a report prepared by the Michigan Judicial Selection Task Force back in 2012 may have started a discussion. By the way, that report is still available. Just use your "old stuff" button on your ZZ-phone and it will appear. I commend it to you for reading.[3]

Once people started examining the task force's recommendations they began to see the wisdom behind the proposed reforms. That led to popular support for reform and, finally, to action by the Michigan legislature that eliminated partisan campaigns and opened the process for independent mid-term nominations.

We also saw changes when the State Court Administrative Office implemented its public satisfaction surveys in 2013.[4] The surveys allowed parties and attorneys to provide direct feedback to those administering justice in our courts. And by publishing the results of these surveys on an annual basis, the State Court Administrative Office provided real data on how our courts were faring. Our courts responded, and continue to respond, to this feedback. And the public perception of the judiciary improved.

Of course, some people continue to make unfounded assumptions about judges. We still see a negative ad or two and, unfortunately, we still sometimes overhear one candidate assassinating another's character. That's as inevitable as people blaming the Lions' failure to reach the Mega Ultra Super Bowl again on biased referees and bad calls. (Back in my day, it was just the Super Bowl.)

Perfection, you see, was never the goal. By getting rid of the most overtly political aspects of the road to the bench, we were able to cut most of the briars from the rose. The perception that the judiciary is a political tool is now far less rampant. Candidates are more able to focus on thoughtful discussions of what it means to be a judge rather than having to respond to personal attacks. Judges are better equipped to address consumers' and litigants' concerns.

During campaigns, candidates for judicial office are no longer forced to shake hands at party conventions while discretely holding their noses. And it's been 20 years since I've seen an advertisement claim that a judicial candidate hates democracy, or the rule of law, or puppies while the theme from *Halloween* plays in the background.

There's a lesson here. And since I'm your grandfather, I'm entitled to point it out (and even if I'm not, I'm going to). In legal reform, as in all things, a few changes can make a big difference, even if they don't make things perfect. The old saying goes, "Never let the perfect be the enemy of the good."

That's enough history for now. Have a good holiday and stay well. I'm off to a meeting with Governor Yzerman. I'll put in a good word for you.

Love,
Grandpa ■

ENDNOTES

1. MCL 168.393.
2. See Const 1963, art VI, § 23.
3. See Michigan Judicial Selection Task Force, *Report and Recommendations*, available at <http://jstf.files.wordpress.com/2012/04/jstf_report.pdf> (accessed November 21, 2013).
4. See State Court Administrative Office, Public Satisfaction Survey, *Courts working smarter for a better Michigan* <http://courts.mi.gov/administration/admin/op/performance/pages/public-satisfaction-survey.aspx> (accessed November 21, 2013).