

Michigan House of Representatives

JUDICIARY COMMITTEE

Committee Hearing On HJR P – Disqualification of Justices

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Testimony Prepared for Submission by:

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Mr. Chairman and Committee members, my name is Richard McLellan and I have been a licensed attorney in Michigan for 40 years. My practice is located in Lansing and I have focused my practice on public policy matters. I have been involved with both legislative matters and matters concerning the Supreme Court throughout that time.

My testimony today will focus on Chairman Meadows' proposed House Joint Resolution P to constitutionally establish the circumstances under which a justice of the supreme court must disqualify himself or herself.

Looking at this issue appears to be timely given the U.S. Supreme Courts very recent decision in *Caperton v Massey*, wherein the Court established a new constitutional "objective standard" under the Due Process Clause requiring recusal of elected Justices in state supreme court races where the justice received the benefit of an excessively large expenditure related to the election.

HJR P both differs from and is similar to the *Caperton* decision in the following ways:

- *Caperton* is a decision based on the existing U.S. Constitution; HJR P is a proposed amendment to the State Constitution.
- *Caperton* is a federal case; HJR P relates to state law.
- Both involve an "objective standard."
- The majority Justices in *Caperton* asserted the case dealt only with "an extraordinary decision where the Constitution requires recusal;" HJR P would apply a multi-page set of new rules in every case in the Michigan Supreme Court.

Role of Judiciary Committee

Historically, the Judiciary Committees of the Legislature have had a unique role because of their special interface with a separate branch of government. The Judiciary Committees not only recommends legislation creating new judicial positions, it must deal with the most sensitive constitutional issues when drafting legislation which may impede the Constitutional powers of the judiciary.

But the Judiciary Committees very rarely has initiated successful amendments to Article VI, the judicial article of the Constitution.

Only in 1968 and 1996 were legislatively-proposed amendments to Article VI adopted by the voters and incorporated in the Constitution. In 1968, a series of changes were made related to filling of vacancies in courts and in 1996 a requirement that a judge have been licensed as an attorney for at least five years was adopted.

There is a good reasons the Legislature rarely tampers with Article VI.

- The judiciary is a separate co-equal branch of government and should generally have stability in its structure and powers.
- Article VI has worked well in giving Michigan an effective system of courts.
- There is a great deal the Legislature can do to affect the courts and the judicial system by statute without resorting to a change in the Constitution.

Accordingly, I would urge caution as you consider whether to recommend HJR P to the full House.

Respect for Separation of Powers

I recognize that there may be political or policy reasons to consider an intervention by the Legislature in a matter that has heretofore been the province of the Supreme Court and its members. But I urge you to consider how the important concept of separation of powers applies to this situation and why your intervention may be ill advised.

The separation of powers principle is embodied in Article 3, § 2 of the Michigan Constitution of 1963:

The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

A Court of Appeals case articulated the basis for the principle:

Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of

power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties. [Quoting Daniels v People, 6 Mich 381, 388 (1859).]

The Legislature does have the power to propose to the People that the separation of powers be modified. HJR P does so in significant ways.

While it establishes a length constitutionally-imposed standard for judicial recusal, it also includes a provision that “the Legislature shall implement this section by law.”

By operation of HJR P, the disqualification rules of the Supreme Court would be transferred from the elected member of the Supreme Court to a combination of standards locked in the Constitution and thereafter subject to legislative actions by the political branches of government.

Role of the Legislature In the Judiciary

The separation of powers doctrine does not mean the Legislature has no role in the Judiciary, it plays a critical, but limited, role as outlined in Appendix A to this testimony.

As expansive as the Legislature's role is, the Constitution also places significant limits in order to assure that "no person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in [the] constitution."

At least these areas are not subject to legislative interference:

- Selection of the Chief Justice.
- Establishment of duties of the Chief Justice.
- Appointment of the Court Administrator, a Constitutional officer.
- Assignment of duties to the Court Administrator.
- Establishment of rules for the "practice and procedure in all courts of this state."
- Appointment, removal and supervision of the Supreme Court staff.
- Determining the divisions and terms of Court of Appeals divisions (as distinguished from their election districts).
- Determining the practice and procedure of the Court of Appeals (as distinguished from determining its jurisdiction).
- Establishing the jurisdiction for the circuit courts when not otherwise provided in the Constitution.
- Establishment of rules for the appointment of members of the Judicial Tenure Commission.

HJR P shifts a substantial aspect of the rules for the highest court in the State to the political branches by making judicial recusal subject to legislative implementation.

Disqualification of Justices

The subject of HJR P, disqualification of Justices, is a legitimate public policy issue. Judicial disqualification is a policy matter of importance to the integrity of our courts. As the U.S. Supreme Court found in *Caperton*, the issue can rise to the level of a federal Constitutional violation.

But I do not believe the Legislature is the proper forum to consider these matters. Absent some broad-based move to restructure our judiciary through revision of Article VI, there is not sufficient reason for the House Judiciary Committee to wade into the disqualification issue.

This is one of the issues the People have entrusted to an elected Supreme Court. As part of the careful balance incorporated in the separation of power principles, the Constitution provides that both the Judicial and Legislative Branches have responsibility to establish and enforce their own rules for the conduct of the branches.

Constitutional Structure of Rule Making

In the Constitution, the People establish two important principles applicable to the discussion today:

For the Legislature:

Each house, except as otherwise provided in this constitution, shall choose its own officers and **determine the rules of its proceedings....** Each house shall be the sole judge of the qualifications, elections and returns of its members....

For the Judicial Branch:

The **supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state....**

It would no more be appropriate for the Legislature to try and usurp the Court's rule making power than it would be for the Court to intrude on the internal rule making powers of the Houses of the Legislature.

HJR P recognizes that the Legislature has no power to set rules for the judiciary other than by way of proposing a constitutional amendment.

With respect to the disqualification issue, the Michigan Supreme Court already has long-standing procedures in place covering judicial ethics and recusal in the form of the Canons of Judicial Ethics and the procedures uniformly followed by the Court since its inception.

The Court has considered this issue and made its decision. It has the power to make changes. The Supreme Court is an elected body and recent changes in the make up of the Court may lead to changes. That is the right of the Court under our Constitution.

HJR P would freeze the rules of the Court in place subject to "implementation" by the Legislature.

The Court itself would be wholly relieved of its present responsibility to establish rules and procedures for recusal.

A Solution Looking for A Problem

As I testified before this Committee in 2007, the disqualification issue largely related to a controversy related attorney Geoffrey Fieger.

At that time, I checked with the Supreme Court and learned the following:

- There have on average been 2 motions to disqualify a justice(s) filed per year over the course of the last 30 years.
- But since April of 2003, when the Fieger motion to disqualify some of the Justices was filed in *Gilbert v Daimler-Chrysler*, Mr. Fieger or his firm has filed 10 such motions, all alleging bias against Fieger by some combination of the "majority of four" on the Court.
- In the same period, there have only been 2 such motions filed by other people.
- So, since the spring of 2003, the count is roughly: Fieger--11, Rest of the World—2.
- Over the course of the last 4 years, if you exclude the Fieger filings, the Court is well below its historical average of 2 disqualification motions per year.

The current Supreme Court disqualification practice, which is the same practice utilized in the United States Supreme Court, has worked since statehood without incident or controversy. These procedures for evaluating claims of bias and prejudice that comply in all respects with the requirements of the Due Process clause of the federal constitution have, in fact, resulted in disqualifications in many cases.

In addition, the Supreme Court has an open file to consider whether to modify its actual procedures and adopt a different set of standards applicable to the disqualification of Justices.

What the Supreme Court cannot change are two important safeguards that are part of the disqualification procedures:

- Appellate review of a Michigan Supreme Court disqualification decision is available from the Supreme Court of the United States. The *Caperton* decision makes this clear.
- The decision of individual Justices is subject to periodic review by "we the people" of Michigan in the form of judicial election. The 2008 election made this clear.

Keep Your Focus On Important Issues Within Your Scope

I urge this Committee to turn its attention to matters that are the primary responsibility of the Judiciary Committee. There is more to be done.

Thank you for your consideration.

Appendix A

Summary of Legislative Powers Relating to the Judiciary

- Establishing courts of limited jurisdiction.
- Prescribing the manner in which Justices of the Supreme Court are nominated.
- Increasing the number of Court of Appeals Judges and designating their districts.
- Providing for the jurisdiction of the Court of Appeals.
- Creating circuit court districts and determining the number of judges.
- Defining the jurisdiction of the circuit courts and other courts.
- Creating and altering probate courts districts.
- Establishing the jurisdiction, powers and duties of the probate court.
- Designating courts of record.
- Recommending removal of a judge “for reasonable cause, which is not sufficient ground for impeachment.”
- Providing for court review of final decisions of administrative officers or agencies.
- The House of Representatives may impeach and the Senate may convict a civil officer, including a judge, for “corrupt conduct in office or for crimes or misdemeanors.”
- Enacting appropriations for funding of the courts.
- Conducting post audits of the courts through the Legislative Auditor General.

This list of constitutional powers does not include the broad range of issues that the Legislature deals with in the normal course of legislating such as enactment and amendment of the Revised Judicature Act (“RJA”), Criminal Code, Probate Code, etc.

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