



MICHIGAN SUPREME COURT

ELIZABETH A. WEAVER
JUSTICE

January 31, 2007

To: Honorable Governor Jennifer M. Granholm
Senate Majority Leader Michael Bishop; Senate Minority Leader Mark Schauer
House Speaker Andy Dillon; House Minority Leader Craig DeRoche
Michigan Senate Members; Michigan House of Representative Members

Re: **I. Why, in this current controversy among justices of the Michigan Supreme Court, it is futile and unwise to make a request for investigation to the Judicial Tenure Commission (JTC) (See pp 2-4); and**

II. Why Justice Weaver's January 24, 2007 proposal and request to the legislature and governor to investigate the controversy is constitutional (See p 5); and

III. Justice Weaver, in her dissents, has already supplied accurate and sufficient information and evidence for the legislature and governor to investigate the current controversy among the Justices of the Michigan Supreme Court (See pp 6-9).

This document will be published on my personally funded website: www.justiceweaver.com.

I. WHY, IN THIS CURRENT CONTROVERSY AMONG JUSTICES OF THE MICHIGAN SUPREME COURT, IT IS FUTILE AND UNWISE TO MAKE A REQUEST FOR INVESTIGATION TO THE JUDICIAL TENURE COMMISSION (JTC)

A referral and request for investigation to the Judicial Tenure Commission (JTC) of this current Michigan Supreme Court controversy among justices will allow the majority of four to investigate themselves.

Further, it will not resolve the controversy but will continue and extend the controversy for the following reasons. (See Michigan Constitution, Article VI, Sec. 30 and Michigan Supreme Court Rules 9.200 *et seq.*)

1. THE JTC OPERATES IN SECRET

The JTC operates under strict rules of confidentiality. Michigan Court Rule (MCR) 9.221 states in part: “[a]ll papers filed with the commission and all proceedings before it are absolutely privileged from disclosure ...” The exceptions to this required secrecy are very narrow.

Therefore, the public would know very little or nothing of what transpires within the JTC and little or nothing of the ultimate result of the investigation.

2. THE JTC HAS ONLY THE POWER TO RECOMMEND TO THE SUPREME COURT AND NO POWER TO END THE CONTROVERSY

- The JTC has no power to make final determination of the controversy.
- The JTC could investigate, dismiss and make no recommendation and the controversy would still continue; or
- the JTC could investigate and make a recommendation to the Supreme Court to “censure, suspend with or without salary, retire or remove” justices, and the controversy would still continue.

3. NEED FOR DISQUALIFICATION OF ALL JUSTICES

Michigan Court Rules 9.204 and 2.003(B) set the standard for disqualification of justices to hear any recommendation of the JTC. A judge is disqualified if his own actions are involved, he has personal knowledge of disputed facts, has more than a de minimus interest that could be affected by the proceeding, or is likely to be a material witness.

Under this standard, each current justice of the Supreme Court would be disqualified from hearing any recommendation of the JTC.

4. IMPOSSIBILITY WOULD BE CREATED

Since all 7 justices would be disqualified from hearing the JTC's recommendation, all would likewise be disqualified from selecting for assignment and authorizing other Michigan judges to sit in their places.

Article VI, section 23 of the Michigan Constitution provides:

The supreme court may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments.

The first problem is that it is unclear how judges disqualified to hear a case could be deemed qualified to select other judges to replace themselves.

The second problem is that the majority of 4 has already stated unequivocally in its opinion in *Adair v Michigan*, 474 Mich 1027, 1040-1041 (2006) that the provisions of Article VI, section 23 do not apply to the Supreme Court and that no judge from a different court can be authorized to perform the duties of a supreme court justice at any time.

Therefore, no one could be empowered to act on any recommendation the JTC might make.

5. JTC COULD NOT BE INDEPENDENT BECAUSE OF INHERENT CONFLICTS OF INTERESTS

There are inherent unacceptable conflicts of interests in the Judicial Tenure Commission's making judgment about justices' conduct in this controversy because:

- The Supreme Court, by a majority of four votes, can make the JTC rules and can change them. It can do so speedily and without notice, as it did when it adopted the "gag order," the so-called "deliberative privilege" order (Administrative Order 2006-08). The Supreme Court, by a majority of four, can also change the rules the JTC must apply during an investigation, such as was done in *In re Haley*, 476 Mich 180, 202-203 (2006) (when the majority of four rewrote how the rules of conduct that govern judges will be applied, and questioned and rejected the application of the "appearance of impropriety" standard in Canon 2 of the Code of Judicial Conduct.)

- The Supreme Court, by a majority of four, approves and can increase or decrease the budget of the JTC, which funds the entire operation of the JTC.
- Seven (7) of the nine (9) members of the JTC are lawyers, five (5) of whom are judges, over whom the Supreme Court exercises supervisory powers. Where a majority of justices of the Supreme Court is the subject of the investigation, one must ask whether judges of inferior Michigan courts and lawyers can be zealous and unbiased in their review of the conduct of those to whom they are responsible.

A referral to the secret chambers of the JTC will do nothing to shed light upon the conduct of the Court, will not allow for a disinterested and unbiased investigation of facts, and will not result in any action being taken. It will be nothing short of a charade, where the Court investigates itself in secret, finding facts and recommending actions that no one will know about, then ultimately throwing up its collective hands in the realization that there is no one left who can decide anything anyway.

6. JTC POWER TO INITIATE INVESTIGATIONS

The JTC has the power to initiate investigations on its own without any request from anyone, and to this point, has not done so. Thus far, the JTC Executive Director, and general counsel, Paul Fisher, has been quoted in the press as stating: “We’d be in uncharted waters.” (See Detroit Free Press, December 22, 2006.) In all likelihood, Mr. Fisher is aware of the limitations of the JTC and perplexed as to what, if anything, it might do if presented with the issue.

II. WHY JUSTICE WEAVER'S JANUARY 24, 2007 PROPOSAL AND REQUEST TO THE LEGISLATURE AND GOVERNOR TO INVESTIGATE THE CURRENT CONTROVERSY AMONG THE SUPREME COURT JUSTICES IS CONSTITUTIONAL

The actions of the legislature and the governor are presumed constitutional until in the last court of jurisdiction (the Michigan Supreme Court or the U.S. Supreme Court) such actions of the legislature are determined unconstitutional.

Chief Justice Taylor has a right to publicly assert his opinion, as quoted in the press, that the proposal is “clearly unconstitutional” for the legislature and/or the governor to investigate this controversy. (See Detroit Free Press, January 25, 2007.) But even the Supreme Court Chief Justice’s stating publicly to the press that something the governor or legislature would do is “unconstitutional” does not make it so. Again, the acts of the legislature and the governor are presumed constitutional.

Further, the Michigan Constitution, Art. VI, Sec. 25 “Removal of judges from office” states:

Sec. 25. For reasonable cause, which is not sufficient ground for impeachment, the governor shall remove any judge on a concurrent resolution of two-thirds of the members elected to and serving in each house of the legislature. The cause for removal shall be stated at length in the resolution.

The power to remove a judge is based on reasonable cause and the “cause for removal shall be stated at length in the resolution” for removal. Just as Senator Sam Ervin’s Watergate Committee investigated the facts to determine whether grounds existed to impeach President Nixon, our legislature has the inherent power to investigate to determine if grounds exist for the exercise of its constitutional duty to remove a justice for reasonable cause. If that inherent power is lacking, the legislature is left, even where good cause for suspicion exists, to do nothing but wait until the complete and well-packaged case for removal lands in its lap.

III. JUSTICE WEAVER IN HER DISSENTS HAS ALREADY SUPPLIED ACCURATE AND SUFFICIENT INFORMATION AND EVIDENCE FOR THE LEGISLATURE AND GOVERNOR TO INVESTIGATE THE CURRENT CONTROVERSY AMONG THE JUSTICES OF THE MICHIGAN SUPREME COURT.

Justice Weaver's dissents contain sufficient and accurate information and evidence revealing the misuse and abuse of power and repeated misconduct of the people's judicial business by the majority of four (4), Chief Justice Taylor, and Justices Corrigan, Young and Markman. The published dissents are available at her personally funded website, www.justiceweaver.com.

The dissents are substantial, truthful, and factual. Any challenges to the truthfulness or accuracy of the information and evidence contained in Justice Weaver's dissents should be part of investigations by the legislature and/or the governor, completely independent of the Michigan Supreme Court. The reputation of and the public trust and confidence in Michigan's judiciary will be best served by insuring that our confidence is not misplaced and that the edifice of equal justice for all is not just a façade.

This is not to any degree a controversy arising out of wounded pride or personal ill will. Any claim that it is, seeks to trivialize a matter of most serious concern and importance to the people of Michigan.

The controversy is about how the majority of four has formed a voting block and how the majority of four has been misusing and abusing its power and conducting the people's judicial business in a disorderly, unprofessional, unfair, evermore secret and unaccountable way. This practice is occurring instead of having seven (7) impartial, independent, and fair justices, exercising judicial restraint and common sense, conducting the people's judicial business in a most open, professional, orderly, just and accountable way. What is needed are seven (7) justices who will strive to "get along," but not "go along to get along."

Justice Weaver in her dissents has already supplied sufficient information and evidence of the majority of four's misconduct of the people's judicial business for the legislature and governor to investigate the current controversy among the Justices of the Michigan Supreme Court, for example as follows:

1. The majority of four has engaged in unjust and unfair conduct, for example by:

- Excluding 3 justices (Justices Cavanagh, Weaver and Kelly) from Court conferences on Court business on November 13 and on November 29, 2006 because they would not go along with the secret "gag rule," adopted by the

majority of four on November 13, 2006. (The content of this “secret gag rule” later became the “gag order,” AO 2006-08, adopted by the majority of four on December 6, 2006.

- Adopting secret rules as internal operating procedures (IOP). On March 1, 2006, the majority of four adopted a secret IOP for disqualification of *justices* that is less stringent than the rule of disqualification for *judges* so that justices are held to a lesser standard than judges.
- Terminating an employee unfairly. Shortly after Justice Corrigan’s election as Chief Justice, at least two employees, loyal to the Supreme Court as an institution, were terminated, immediately told to “get their stuff” and were escorted out of the building by Security.

2. The majority of four has engaged in disorderly conduct, for example by failing to have:

- Timely, accurate, complete minutes and failing to correct, approve, and publish them. For example, the proposed minutes for the March 1, 2006 conference concerning the disqualification of justices file (ADM 2003-26) are still inaccurate, uncorrected, unapproved and, along with Justice Weaver’s dissent to them, are still not available (despite the fact that the conference occurred over ten (10) months ago). Also, there are still no proposed minutes concerning the closing of ADM 2003-26 which occurred during the administrative conference on September 7, 2006 (over four (4) months ago).

3. The majority of four has engaged in unprofessional conduct, for example by making:

- Statements to colleagues and staff in written and oral communications, such as Chief Justice Taylor’s statement in his July 17, 2006 draft concurrence to the order appointing the Kent County Chief Judge of Probate that “in fact, ever the conciliator, I even suggested Justice Weaver use a hunger strike as a vehicle as it seemed to have the potential for everyone to be a winner.”
- Chief Justice Taylor’s statement quoted in the press of personal character attack saying that Justice Weaver is a “sad and angry woman.” (See Lansing State Journal, January 13, 2007.)

4. Most importantly, the majority of four has misused and abused its power by engaging in unconstitutional conduct, for example by:

- Effectively suppressing Justice Weaver’s dissent to the majority’s March 1, 2006 vote to adopt an Internal Operating Procedure (IOP) to govern justice disqualification decisions. Because the majority’s March 1, 2006 vote was a final vote, and not a straw vote, Justice Weaver’s dissent to the adoption of the IOP by the majority of four should have been made publicly available attached to the minutes for the March 1, 2006 administrative conference. However, the March 1, 2006 minutes have never been approved, now over ten (10) months later. Thus, what occurred on March 1, 2006 during the Court’s conduct of the people’s business remains a secret from the public as it has yet, as of this writing, to be made available to the public in the Clerk of the Court’s office.
- By effectively suppressing Justice Weaver’s dissent filed September 28, 2006 to the action taken at the September 7, 2006 conference by the majority of four’s closing of the Justice Disqualification administrative file, ADM 2003-26. There have never been any proposed minutes for recording of the action taken on September 7, 2006, now nearly four (4) months later.
- Adopting the “gag order” (AO 2006-08) which was used by the majority of four on December 6, 2006 to order the suppression of Justice Weaver’s dissent in *Grievance Administrator v Fieger*, Motion for Stay (Docket No. 127547). Fifteen days later (December 21, 2006), they wisely effectively reversed the order.

The “gag order”, Administrative Order 2006-08 (AO 2006-08) unconstitutionally restricts a justice’s ability to perform his duty to the public by barring a justice from “giv[ing] in writing” his “reasons for each decision” and “the reasons for his dissent.” Const 1963, art 6, § 6 says:

Decisions of the Supreme Court, including all decisions on prerogative writs, **shall be in writing** and shall contain a concise statement of the facts and **reasons for each decision** and reasons for each denial of leave to appeal. **When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.** (Emphasis added.)

Simply put, AO 2006-08 is a “gag order,” poorly disguised and characterized by the majority of four as a so-called “judicial deliberative privilege.” The “gag order” is not necessary to protect and promote frank and robust deliberations before the Supreme Court.

As to this Court’s handling of cases and administrative matters the Michigan Constitution, statutes, case law, and court rules do not establish a so-called “judicial deliberative privilege.” The closest thing to a “deliberative

privilege” in Michigan is contained within the Canons of the Code of Judicial Conduct. Canon 3A (6) embodies the so-called “deliberative privilege” in Michigan, applying only to cases and not administrative matters:

A judge should abstain from public comment about a pending or impending proceeding in any court, and should require a similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court or the judge's holdings or actions. [Emphasis added.]

This canon adequately provides confidentiality on pending and impending cases and allows for frank and robust discussion. But this canon only applies to pending and impending cases, not to completed cases, and not to administrative matters of the Court. Further, after a case is decided, a justice is not prohibited from speaking freely about *what* was decided and *how* the case was decided.

The so-called “deliberative privilege” embodied in Canon 3A (6), has been mischaracterized as a “privilege” to protect judges, when in reality, it exists to protect the parties when a case is pending or impending before the Court. This so-called “deliberative privilege” ***does not apply to administrative matters*** before the Court because administrative matters do not concern the rights of individual parties in specific cases before this Court. Thus, when this Court is conducting its administrative duties, there should be no confidentiality or secrecy, except for Court employee matters.

Regrettably, in creating and claiming an all-inclusive and permanent “gag order,” and in characterizing it as a “deliberative privilege,” the majority of four has tried to erect an impenetrable shield around its abuse of power and misconduct.

The majority of four’s adoption of the unconstitutional “gag order,” AO 2006-08, without any notice to all justices, without inclusion on the conference agenda, and without public notice or opportunity for public comment, illustrates the majority of four’s misuse and abuse of power and disorderly, unprofessional and unfair conduct of the people’s judicial business. Further, it illustrates the majority of four’s increasing advancement of a policy of greater secrecy and less accountability—a policy that wrongly casts “a cloak of secrecy around the operations” of the Michigan Supreme Court. (See *Scott v Flowers*, 910 F2d 201, 213 (5th Cir 1990).