

Steven Puiszis Named Editor for DRI Article , “Without Fear or Favor in 2011: A New Decade of Challenges to Judicial Independence and Accountability”

In The News | 6 min read

Mar 1, 2011

In June 2005 DRI’s Judicial Task Force was formed to examine issues and problems facing the judiciary. The Task Force’s mission statement was to research and identify issues that threaten to disrupt the independence of the judiciary. Its groundbreaking 2007 report, *Without Fear or Favor*, identified a number of significant issues that threatened judicial independence.

Since that report was issued, several dramatic developments have triggered new and even greater challenges to judicial independence and accountability. The country spiraled into one of the worst recessions since the 1930s, causing state and local government tax revenues to plunge. As a result, funding for our court systems, already precariously low before the recession, has been further slashed. The added pressure these economic conditions have imposed on our judiciary cannot be understated. They have placed “some court systems on the edge of an abyss,” in the words of Georgia Chief Justice Carol Hunstein. The financial crisis facing many states has triggered budget cuts “so deep they threaten the basic mission of state courts.”Almost half of our state courts are operating under hiring freezes; others have instituted cost-cutting measures such as staff pay cuts, judicial furloughs, elimination of special court programs, and even the reduction of hours courts are open each week. While some of these measures may be unavoidable, “[a]t some point, slashing state court financing jeopardizes something beyond basic fairness, public safety and even the rule of law. It weakens democracy itself.” Continued increases in the number of cases filed in our state courts compounds these problems.

Even before the recession, inadequate court funding was deemed a serious threat by 52 percent of a DRI survey group in 2005. Further investigation revealed that significant numbers of the public had little or no interest in supporting increased court budgets or needed renovations to aging courthouses. The examples outlined below in several sections of this 2011 report provide stark reminders of how precarious judicial independence can be when there is inadequate funding for our courts.

The controversy surrounding judicial elections reached new heights following the Supreme Court's decision in *Citizens United v. Federal Election Commission*, which invalidated limits on union and corporate campaign contributions. While *Citizens United* did not involve judicial elections, the import of the decision was clear: unlimited monetary contributions to judicial campaigns were now fair game. In his dissent, Justice Stevens observed:

The consequences of today's holding will not be limited to the legislative or executive context. The majority of the States select their judges through popular elections. At a time when concerns about the conduct of judicial elections have reached a fever pitch... the Court today unleashes the floodgates of corporate and union general treasury spending in these races.

Justice Stevens' concern has quickly been realized. Campaign contributions in 2010 state supreme court retention elections reached unheard-of heights. The vast sums being contributed to judicial campaigns create the appearance of a judiciary indebted to campaign contributors, who include attorneys and parties likely to appear before the winning candidate.

The explosion of special interest funds in judicial campaigns also brings with it heightened concerns over politicization of the judiciary and the appearance of fairness in the American legal system. The challenges to judicial independence triggered by campaign contributions and the impact that the flow of money into judicial elections has on the perceived fairness of our courts have reached a critical state. These concerns, repeatedly expressed by legal commentators, were vividly acknowledged by the Supreme Court in *Caperton v. A.T. Massey Coal Company*, which outlined a constitutional standard for judicial disqualification based on financial contributions to a judicial campaign. However, *Caperton*'s constitutional standard is admittedly imprecise, and only intended to reach extraordinary cases. Thus, real reform is needed at the state court level to ensure that our legal system is perceived to be fair. If the perception of fairness is ever lost, the public will lose respect for the rule of law, a cornerstone of American democracy.

As "independent" funding swept its way into judicial campaigns, the manner in which the campaigns are run also dramatically changed. Attack ads have become commonplace. One journalist graphically described his state's supreme court campaign in the following terms:

If you only saw the ads, you might think [the] State Supreme Court election pits a partisan pit bull dedicated to Republican causes against a trial lawyer's lapdog whose insider status helped contribute to one of the worst courthouse scandals in state history... the voters had to wade through a lot of mud to get to this [election] week.

Because judges are asked to decide [cases involving sensitive social and political issues](#), they are being subjected to harsh and often unfair criticism with increasing frequency. In controversial cases, the losing side, whether they are labeled Democrats or Republicans, conservative or liberal, typically blame the outcome on “activist judges.” However, judges must be allowed to decide cases based on the facts presented and the applicable law, free from ideological influence, even when their decision will likely be unpopular.

Judicial independence, however, does not mean a lack of accountability. While fair criticism of judicial decisions is to be expected and can be vital to the development of the law, threats, attempts to intimidate or influence judicial decisions are not, but frequently are made under the guise of holding judges accountable. Judicial performance evaluations are being increasingly used in some states as a mechanism to improve the quality of judicial decision making and to establish fair accountability standards. Such evaluations can be used to educate the public on the factors and qualities to consider when evaluating a judge, rather than focusing on the outcome of a specific case. Accordingly, judicial performance evaluations can help to depoliticize the electoral process, and their use should be encouraged.

The Internet has provided a new venue for expressing severe and inappropriate criticism of judicial decisions and individual members of the judiciary. The World Wide Web provides a forum for every critic to speak his mind to an unlimited and potentially like-minded audience. The growing phenomenon of the Internet has also triggered a new threat to judicial security as the prosecution of Web radio talk show host Harold Turner aptly demonstrates. Following the Seventh Circuit Court of Appeals’ decision in *National Rifle Association of America, Inc. v. City of Chicago*, rejecting a Second Amendment challenge to the City of Chicago’s gun control ordinance, Turner expressed his disapproval of the decision. Turner posted several internet messages stating the judges who authored that opinion deserved to be killed. In one of those posts he provided the names, photos, work addresses and phone numbers of the panel that decided the case, writing: “Their blood will replenish the tree of liberty,” and calling the potential murders “a small price to pay to assure freedom for millions.”

This type of rhetoric can often lead others to take action, which in turn creates a need for increased court security. Two events in 2005—the murders of the husband and mother of United States District Court Judge Joan Lefkowitz by a man angered over the dismissal of his legal malpractice case, and a courtroom shooting in Fulton County, Georgia shortly thereafter—highlighted the need for greater security in both our state and federal courts. With increasingly tight budgets, providing adequate security for our judges and other court personnel often comes at the expense of other needed court programs.

The lack of diversity in our judiciary presents another challenge to the perception of our legal system. Unless additional progress is made toward building a more diverse judiciary, the legitimacy of judicial decision making may be questioned by parties who do not share the same cultural or ethnic values as the judges who are hearing their cases.

Budgetary issues are also challenging judicial independence at the federal level. Federal judges haven’t had a salary increase in more than a decade, and have received only sporadic cost of living increases. The goal of an independent federal judiciary through the provision of lifetime tenure is being frustrated by the failure to provide

adequate compensation to judges who frequently handle some of the most challenging and constitutionally important cases in our court systems. When second and third year associates in some of the country's largest law firms are paid more than our federal judges, it is not difficult to understand why more federal judges are leaving the bench for private practice.

All rights reserved. No part of this product may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying and recording, or by any information storage or retrieval system, without the express written permission of DRI unless such copying is expressly permitted by federal copyright law.

Hinshaw & Culbertson LLP is a U.S.-based law firm with offices nationwide. The firm's national reputation spans the insurance industry, the financial services sector, professional services, and other highly regulated industries. Hinshaw provides holistic legal solutions—from litigation and dispute resolution, and business advisory and transactional services, to regulatory compliance—for clients of all sizes. Visit www.hinshawlaw.com for more information and follow @Hinshaw on LinkedIn and X.

Related People



Steven M. Puiszis

Partner

📞 312-704-3243

Related Locations

Chicago

Attachments

24_SPusizis_WithoutFearorFavorin2011_020111