

INSIDE MICHIGAN POLITICS

Inside: Michigan's 2010 Congressional Outlook
They Said It

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CAN'T BUY 'EM LOVE: ENGLER, PERO, AJP TAKE BIG HIT, BUT 2010 COULD SET NEW JUDICIAL SPENDING RECORDS

Despite spending record cash last year to elect conservative judges throughout the country, the American Justice Partnership (AJP) lost its most important race as well as key contests in other jurisdictions.

Democrat **Marilyn Kelly's** election last week as Michigan's new Chief Justice underscores the impact of the AJP's defeats in November.

In 2004, former Michigan Gov. **John Engler** brought the AJP under the aegis of the National Association of Manufacturers (which Engler now heads), recruiting his ex-chief of staff **Dan Pero** to run it.

Engler and Pero had the Michigan model in mind: appoint or elect conservative, pro-business state Supreme Court justices who will put an end to so-called "jackpot justice" at the expense of business and industry.

The AJP has funneled millions of dollars and political support into high court races via its business partners in various states. In Michigan, this means the Michigan Chamber of Commerce, which spent \$1.7 million on television ads this past fall in support of arch-conservative Supreme Court Chief Justice **Clifford Taylor**. Engler launched Taylor's judicial career back to 1993, when the then-governor plucked Taylor out of private practice and made him an appellate judge. Taylor's last campaign, which ended two months ago, turned out to be the most expensive Supreme Court race, per candidate, in Michigan history.

While the 2008 contests in Michigan and elsewhere were certainly expensive and bruising, they produced decidedly mixed results:

- Pero and AJP helped persuade voters to boot justices in Wisconsin and Mississippi and elect a pro-business justice to fill an open seat in Louisiana.

- But voters also ousted a business-friendly chief justice in Mississippi. In Michigan, the befuddled Taylor — a five-time general election loser who has never won an office to which he was not previously appointed — was throttled by little-known Wayne Co. Circuit Judge **Diane Hathaway** by nearly 370,000 votes. That was doubly painful for Pero, since his wife, Colleen, ran Taylor's campaign out of the couple's home on Scenic Lake in rural Woodhull Twp, Shiawassee County, a stone's throw from the manse of Taylor and his wife, Lucille (Engler's former legal counsel), their longtime friends and allies.

The AJP also failed to stop a couple of Democratic nominees from being elected to two open seats on West Virginia's highest court. In Texas, 22 of 26 experienced GOP circuit judges were swept off the bench on a straight-ticket Democratic vote in Harris County.

For decades, Supreme Court races were mostly nickel-and-dime, bottom-of-the-ticket races waged with what Bench & Bar claimed was "dignity," usually in obscurity. Now, thanks in large part to groups like the AJP, they have become multi-million dollar, high profile, no-holds-barred campaigns. If you believe the ads, voters had choices between justices who nodded off on the bench, were soft on terrorists, or helped rapists get off so they could rape again.

Going into last year, Supreme candidates had spent \$165 million between 2000 and 2007, compared with only \$62 million in the previous decade, according to an outfit called Justice at Stake. That doesn't even include third-party spending, much of it undisclosed, by groups such as the Michigan Chamber and the trial lawyer-friendly Michigan Democratic Party.

Justice at Stake, based in the nation's capital, has called the Taylor-Hathaway race the nastiest in a year in which Supreme Court elections were "punctuated by runaway spending, partisan pressure, angry accusations and costly, secretly-funded ads by third-party special interests that often drowned out the candidates."

But AJP President Pero makes no apology for the spending, nor for the aggressive campaigns that AJP and others are running.

"Across the nation, these races have become as important or more important than any other in the state," Pero said. "It ultimately matters who controls your Supreme Court because it is the arbiter of what the law is. It's not the governor. It's not the Legislature. Four people will decide what's law, and that's the majority (on the Supreme Court)."

The AJP began as a demonstration project created by Home Depot co-founder **Bernie Marcus** and former Chrysler executive **Steve Hantler** five years ago amid concerns over lawsuit abuse and huge awards against businesses. NAM president Engler expanded it and brought it under NAM's umbrella, although his organization doesn't provide funds. Pero assisted through the Lansing-based Sterling Corporation.

AJP works with like-minded organizations in various states to advance tort and other legal reforms. Pero says it brings together intellectual capital that exists in Washington and think tanks around the country and helps them coordinate activities.

While AJP focuses mainly on Supreme Court races, it also engages in selected attorney general campaigns, appeals court elections, and a small group of legislative contests. It rarely involves itself in lower court races, which collectively would be cost-prohibitive.

AJP has administrative offices in Washington, but Pero works out of rented space in the Michigan CofC headquarters in downtown Lansing. He says he's "gone platinum" as he toils 40-80 hours a week, trav-

eling the country working with his state-based partners, making presentations, and delving into legislative issues. Pero is also a prolific writer on his blog at www.americancourthouse.com

As Michigan's governor in the 1990s, Engler transformed Michigan's Supreme Court into a model of conservative jurisprudence that almost always came down with decisions to business's liking. He appointed Taylor (1997), **Robert P. Young, Jr.** (1998), and **Stephen J. Markman** (1999) to the bench, and they were all later elected to full terms in their own right. **Maura Corrigan**, elected in 1998 with Engler's backing (earlier, he had appointed her to the state Court of Appeals), was the fourth in the conservative majority.

"The court with Corrigan, Markman, Young and Taylor for a good decade provided sound, consistent, predictable decisions," Pero insists. "A lot of people may not have agreed with those decisions. They would have preferred, perhaps, a court that may have decided differently and taken a more activist role. We say: if you want the law changed, (the Legislature, not the court, should) change the law."

Pero says that AJP is more interested in results than in padding its won-loss record, so it picks its electoral targets carefully. It focusses on court races in states where there is an active business partner (like the Michigan Chamber), where it believes its influence can make a difference, and where the result will affect the direction of the court.

"If the outcome just enhances an overwhelming majority or doesn't really change the playing field in any way, then we would look somewhere else," Pero said.

In 2006, Pero claims AJP racked up a 9-4 record in Supreme Court races. It also helped Michigan Attorney General **Mike Cox** win re-election, and Wisconsin elect its first Republican AG in 16 years. AJP-supported candidates also won four of five Michigan senate contests, helping the GOP maintain its majority despite Democratic Gov. **Jennifer Granholm's** easy re-election win at the top of the ticket.

But AJP faced stronger headwinds this year, with Democratic presidential nominee **Barack Obama's** strong showing nationwide.

Nevertheless, Wisconsin voters tossed out Supreme Court Justice **Louis Butler** and replaced him with AJP-

backed Burnette Co. Circuit Judge **Michael Gableman**. It was the first time an incumbent justice had lost in Wisconsin since 1967.

Gableman ran highly controversial ads that implied Butler was responsible for the release of a rapist who went on to rape another child. AJP's partner, Wisconsin Manufacturers & Commerce, shelled out \$1.3 million on television ads, including ones that labelled Butler "Loophole Louie" for rulings in murder cases.

In Louisiana, AJP helped elect Court of Appeals Judge **Greg Guidry** to an open seat on the state's high court over two candidates who had broad trial lawyer support.

In Mississippi, where Supreme Court justices run in districts, three of the four incumbent justices were shown the door. Chief Justice **Jim Smith** was defeated despite AJP's backing in a campaign where he was charged with being too cozy with business. But AJP, which worked with Mississippians for Economic Progress, takes credit for helping defeat two other justices it considered "activists," in part because of ethical issues.

In Michigan, however, state Democratic Party Chairman **Mark Brewer**, who for years obsessed over taking out Taylor, finally nailed him. Brewer's party ran television ads with an actor portraying Taylor asleep on the bench, based on signed affidavits from two plaintiffs who claimed they personally witnessed it (Pero calls it a flat-out but effective lie). Meanwhile, the Michigan Chamber ads suggested Hathaway was soft on sexual predators.

But Pero claims the insurmountable obstacle for Taylor was Obama, who carried Michigan handily and brought in up to 40,000 volunteers. The decision by Republican presidential nominee **John McCain** to pull out of Michigan a month before the election; a weak GOP U.S. Senate nominee (**Jack Hoogendyk**); and tough Congressional races in the 7th and 9th CDs (where Republican incumbents **Tim Walberg** and **Joe Knollenberg** both lost) also took a toll.

"Normally, what you'll see is that the Supreme Court races get mixed up with all the other stuff that is going on. In this case, this was the primary race," he said. **Mark Brewer** did a very good job of turning what was a non-partisan race into a partisan race in a year where it paid to be affiliated with the Democratic Party, and it certainly paid to be affiliated with Barack Obama."

Pero is resigned to the prospect that Hathaway's victory will fundamentally change the nature of the court, especially on issues that are important to business. Prior to the election, AJP and *Directorship* magazine (a publication for CEOs and company directors) ranked Michigan as having the ninth best legal climate among the states.

The court will still have a 4-3 Republican tilt, but look for that rating to plunge. Justice **Elizabeth (Betty) Weaver** has bitterly attacked her fellow Republican justices for the past several years, ever since she was denied a second term as chief justice in 2001. She has often sided with the court's two minority Democrats.

"We consider Betty Weaver now a liberal, (pro-)trial lawyer, bad judge," says Pero. "She will more than likely be very supportive of increased litigation, more of a return to a jackpot justice/litigation lottery (system) here in Michigan and create more unpredictability that's not good for the Michigan economy nor the Michigan business climate."

Whatever. Republican Weaver gets the last laugh — she provided the crucial margin of support to elect Democrat Kelly to the top post last Thursday.

CAMPAIGN SPENDING: SUPREME COURT RACES

	Total Spending*	# of Major Party Candidates
2008	\$7.0 million	2
2006	2.6 "	4
2004	3.6 "	4
2002	1.9 "	4
2000	16.2 "	6
1998	3.8 "	6
1996	3.4 "	4
1994	1.3 "	4

* Includes disclosed spending by candidate committees and independent committees on public record, as well as estimated undisclosed spending by special interest groups based on documented TV and radio ad buys + direct mail and "doorknockers".

Justice at Stake argues that, regardless of outcomes, the influx of big money from third party groups, whether it is the AJP, the Michigan Chamber or the Democratic Party, should be of concern to citizens depending on a fair and unbiased system of justice. A poll it commissioned showed that three voters out of every four believe campaign contributions influence decisions in the courtroom.

What's worse is that, in the case of third party groups, it's impossible to know who's bankrolling the ads. While the candidates' committees are required to disclose campaign contributions and contributors, there are no similar rules for groups like AJP or the Chamber. And corporations, which can't contribute to candidates in Michigan, are free to pump unlimited money into groups like the AJP.

Or, for that matter, a trial lawyer could contribute huge sums to finance Democratic ads without his or her identity being disclosed. **Rich Robinson** of the Michigan Campaign Finance Network (MCFN) has said many people believe controversial trial lawyer **Geoffrey Fieger**, a longtime Engler- and Taylor-hater, paid for most of the ads attacking Taylor last fall, although there are no public records to confirm or refute that belief. Pero thinks Fieger may have been involved but suspects others, including Kalamazoo multi-millionaire **Jon Stryker** and labor unions, were also contributors.

"The bottom line," says **Charles Hall** of Justice at Stake, "is that Supreme Court elections really have become big business in the last decade, and that has raised questions as to whether the judges who are getting elected are accountable to the law or are accountable to the financial supporters who put them on the bench."

Justice at Stake, born out of those concerns eight years ago, works with partners (including Robinson's MCFN), to educate the public about a wide range of reforms. Among them are **1)** Public financing (used in North Carolina); **2)** Appointive systems (often linked to so-called "retention" elections, where voters can decide after a number of years whether to throw out the incumbents); and **3)** Stronger disclosure laws, especially for third-party groups.

Despite last year's disappointing losses, Pero scoffs at the idea that taking voters out of the equation would lead to better outcomes, although he concedes that the business community is divided. Letting a blue ribbon committee appoint judges, he contends, is like letting lobbyists pick the Legislature.

"You (would) shut out 6,7, or 8 million people from having a voice in who sits in their judiciary because a group of elites think they know better," says Pero. With a retention election, he observes, voters can turn out one judge only to see the replacement be someone with similar views.

Pero argues that reform efforts took off only after conservative justices started getting elected with regularity.

"Are you going to tell me that, with a selection process dominated by the Michigan Bar Association and the Michigan Trial Lawyers Association and maybe a couple of business people elected by no one and accountable to nobody, people appointed by the Speaker, people appointed by (Gov. Jennifer) Granholm, you are going to get a Cliff Taylor, a Bob Young, a Maura Corrigan, a Steve Markman? No, you're not going to get any of those."

Mark Brewer would say that's just peachy with him as well as a majority of the Michigan electorate.

What's ahead: record spending for two seats on Michigan's high bench that will be up for grabs in 2010.

Incumbents Weaver and Young can both run again, if they choose to. Whether either or both decide to retire from the bench (thus creating at least one, maybe a pair of open seats), the importance of the two contests can't be minimized — the GOP has to win them both to maintain control of the court headed into the incendiary reapportionment battles of 2011-12. A single Democratic nominee could finish as the runner-up (all the candidates will run in a pack) and regain control of the court for his or her party. Two Democratic winners would give Dems an insurmountable 5-2 majority, undoing once and for all everything that Engler created a decade ago.

DO REPUBLICANS HAVE A CHANCE TO MAKE GAINS IN MICHIGAN'S U.S. HOUSE DELEGATION IN 2010?

Almost certainly not.

Democrats now hold an 8-7 edge in the state's Washington, D.C., contingent, following breakthrough wins in the 7th and 9th districts in the general election two months ago.

Both districts are marginal; in fact, on paper the 7th is still Republican, and the GOP would not have lost it but for the fact that its incumbent, **Tim Walberg**, was too ideologically conservative in a year when Democrat **Barack Obama** was carrying the enclave by about 7%.

So why shouldn't Republicans be able to win it back two years from now? Or, for that matter, the 9th, which they've held in some form for decades before the November debacle? After all, the GOP has been able to pick up seats in two elections during the past three decades that came just before a decennial census and subsequent reapportionment (see box).

Maybe a **Jim Dunn** (remember him?) or **Mike Rogers** will come along — but don't count on it. In the 9th, the Oakland Co. GOP is broke and dispirited, and for various reasons none of its potentially most attractive candidates, i.e., Sheriff **Mike Bouchard**, Clerk **Ruth Johnson**, or state Senate Majority leader **Mike Bishop**, is likely to take on freshman Democrat **Gary Peters** (D-Bloomfield Hills). In the 7th, the most attractive potential GOP nominee, ex-state Rep. **Mike Nofs** (R-Battle Creek) is concentrating on trying to win what he hopes will be a special election to fill newly-elected U.S. Rep. **Mark Schauer's** vacated state senate seat.

So look for the Republicans to produce token nominees against Schauer and Peters in 2010, and then wait for reapportionment to find out what Michigan's 14 districts (because we'll lose a seat after the 2010 census) will look like. 2012 promises to be a more interesting election than 2010, at least for Congress.

Other districts to keep an eye on? The 11th, where four-term Congressman **Thaddeus McCotter** (R-Livonia) may be a target for Democrats because of his feeble majorities against token Democratic opposition during the past six years, and the strongly Republican 2nd, where incumbent **Pete Hoekstra** (R-Holland) says he won't run for a ninth term.

Following is an up-to-date table broadly summarizing election prospects in all 15 U.S. House enclaves two years from now. In the table, "solid" or "likely" or "lean" refers to the district itself, although in a few cases a particularly strong incumbent enhances his (or her) party's chances of retaining the seat. Term limits can also make a difference. Democrats are in regular type, Republicans in italics.

U.S. HOUSE OF REPRESENTATIVES

SOLID DEM	LIKELY DEM	LEAN DEM	TOSS-UP	LEAN GOP	LIKELY GOP	SOLID GOP
8 Projected Democratic seats						
(6)	(1)	(1)	7 Projected Republican seats			
Conyers Dingell Kildee C.C. Kilpatrick S. Levin Stupak	Peters	Schauer		(1) McCotter	(3) Camp Rogers Upton	(3) Ehlers Hoekstra Miller

PARTISAN BREAKDOWN OF MICHIGAN'S U.S. HOUSE DELEGATION SINCE HISTORIC ELECTION OF 1964

Years	Net Change from		Years	Net Change from	
	Partisan Breakdown	Previous Election		Partisan Breakdown	Previous Election
1965-66	12D/7R	+4D	1989-90	11D/7R	—
1967-68	12R/7D	+5R	1991-92	11D/7R	—
1969-70	12R/7D	—	1993-94@	10D/6R	—
1971-72	12R/7D	—	1995-96	9D/7R	+1R
1973-74	12R/7D*	—	1997-98	10D/6R	+1D
1975-76	12D/7R	+5D	1999-2000	10D/6R	—
1977-78	11D/8R	+1R	2001-02	9D/7R	+1R
1979-80	13D/6R	+2D	2003-04^^	9R/6D	+2R
1981-82	12D/7R	+1R	2005-06	9R/6D	—
1983-84	12D/6R#	-1R	2007-08	9R/6D	—
1985-86	11D/7R	+1R	2009-10	8D/7R	+2D
1987-88	11D/7R	—			

* = It was 12R/7D at the start of the session, but U.S. Rep. **Don Riegle** (D-Flint) changed his party affiliation from Republican to Democrat, and Democrats won two special elections in 1974 in districts that had been Republican. The result was that Dems held a 10-9 edge in the delegation headed into the November 1974 general election, when they picked up another two seats.

= Michigan lost a seat in the House based on 1980 census figures; that seat turned out to belong to Democratic U.S. Rep., **James Blanchard**. However, in 1982, former U.S. Rep **Bob Carr** (D-E. Lansing) knocked off the man who had upset him two years earlier, Republican **Jim Dunn**.

@ = Michigan lost two more seats in the House based on the 1990 census; after reapportionment and the general election, each party lost a seat in the delegation.

^^ = Michigan lost still another seat in the House based on the 2000 census; after a Republican-dominated reapportionment and the subsequent election, the GOP converted a 9-7 deficit in the delegation into a 9-6 majority.

THEY SAID IT

■ "(**Bob**) **Young** is playing politics to protect himself from **Cliff Taylor's** fate. When the truth comes out revealing Young's six years of wasting millions of taxpayer dollars for his own personal and political benefit, voters will do the right thing and oust him in 2010." — Michigan Democratic Party Chairman **Mark Brewer**, demonstrating in a 12/19/08 press release that the Spirit of Christmas would not deter Dems' re-energized efforts to purge the state's Supreme Court of the last remnants of the so-called 'Gang of Four' majority, put in place a

decade ago by then-Gov. **John Engler**. Brewer argued that "Michigan voters are not fooled by ... Young's newfound interest in fiscal responsibility. Young's recent call to finally close the Court's satellite offices — slated to have been closed six years ago when Republicans controlled the court and justices such as Young himself were using those offices — is a political ploy to garner support before his 2010 campaign." Of course, Brewer's attack makes it nearly impossible for the new court, including recently-elected justice **Diane Hathaway**, to rescind the 'Gang of Four's' post-election decision to close the offices. That vote passed by a tenuous 4-3 majority, with outgoing chief justice Taylor as one of the four-vote majority. How could Brewer and the Michigan Democratic Party countenance a decision by Hathaway to reverse last month's action by siding with the three justices (including the panel's two other Dems, who are still members of the court) who voted against closing the offices?

■ "Back in the day, Detroit had the most single-family dwellings of any city in the country, and now we're still the same size — 137,000 (square) miles, which is roughly the size of San Francisco, Boston and the island of Manhattan, inside (our) city limits — as our homes are continually destroyed, either by neglect, abandonment or fires ... Now we're left with vacant land ..." — **Steve Varnas**, a captain in the Detroit Fire Department's arson unit, speaking on National Public Radio (12/27).

■ "Detroit — the very name is a symbol of American might and American loss ... (The city's firefighters) ... fight in neighborhoods they describe as being like 'a mouthful of broken teeth' — a burned-out building here, a collapsed home there. Calling themselves 'urban warriors,' Detroit's firefighters face a landscape that grows more treacherous as the city's vacancy rate climbs. Detroit is shrinking... its population has dropped to less than 900,000 from the two million it was 50 years ago. It's estimated that Detroit has more than 70,000 abandoned homes. The city says one in four homes will be unoccupied (in 2009) if the trend continues. Over time, these abandoned homes can erode into empty, dangerous hells — giant tinderboxes dotting Detroit's neighborhoods. The fire department claims the number of fires is on the increase, though the city stopped publishing the count in 2006. The firefighting force is shrinking, too. Fifty years ago there were 1,900 firefighters. These days there are only about half that. Engine houses have been closed, and there are just 66 companies left... With fewer fire stations, that means more fires per company with longer response times. Though firefighters still come when called, some neighborhoods are growing more and more isolated." — Correspondent **Jacki Lyden**, on NPR's "All Things Considered" (12/27).