

# Judge Feikens sees more active role for judiciary

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Snail darters, Ohio sulfur oxides, discharges of lacemite in Lake Superior, and municipal wastes in Milwaukee are just a few of the complex environmental issues that the federal judiciary has been asked to deal with. In the following interview, Judge John Feikens, soon to be appointed chief Federal District Judge for Detroit, discusses the judiciary's participation in environmental concerns with reporter Frank Corrado. The interview was conducted on April 19 in the judge's chambers in Detroit.

**Q.** Are federal judges being asked to make political determinations? Are they becoming activists in environmental issues?

**A.** We have to realize, as deToqueville pointed out, that every political problem becomes a judicial one. Inevitably, things will get more and more complex, and the legislative process, which is a political process, will have to give way to the judicial process.

**Q.** Why?

**A.** You say to a federal judge, "Congress has given you jurisdiction, here is a problem (like the one we've had with the Detroit sewage treatment system) that has an effect on the nation's entire wastewater program."

"Without the encumbrance of the political process, we want you to balance the issues here." In this case, it was the judge's role, my role, to force the recognition that you have to give decision-making power to one person, the mayor.

This type of judicial involvement has been seen in school district decision, federal prison and environmental cases. Behind all this, you have to realize that the legislature can't solve everything.

**Q.** How did this evolve?

**A.** You have to go back to Marbury vs. Madison where Justice Marshall carved out a tremendous source of power for the judiciary. He ruled that judges could rule on whether political enactments are constitutional.

The judiciary then was expanded to "fill in the gaps" left in the political process by the Constitution.

An example of this is the snail darter case, where you had the Congress authorizing a dam to be built on the river and also enacting legislation to protect an endangered species. Until Congress decides who wins, the courts must act. The Constitution really didn't provide for other than a Supreme Court. The growth of the country mandated something like a federal judge to call the shots.

**Q.** How has this judicial process

worked in the Detroit sewage treatment case?

**A.** Let's look at the conflicts. We have a city that made an initial investment and took title to a plant, which as the area grew up over 75 years, had more and more suburbs tapping into it at a low cost.

Then you had a growing desire on the part of people to clean up. People realized that you just couldn't dump the sewage. The federal controls followed.

Now the question was: How do we pay for this system, which now serves over four million people? Only the feds could fund these massive changes, and so a huge grant program was devised.

Coupled with this was a congressional mandate that standards be met.

But now you had new political strength in the suburbs. And the former leadership group in the city had moved to the suburbs, with a new mayor and council in place who were black. It was a learning process for them.

Detroit, like other cities, is at the point of either decay or renaissance. There are a lot of people who feel this city has turned around and that is because we have a leadership group that is working together. The mayor has established a good working relationship with the business community.

In August of 1977, EPA started its suit against Detroit, saying in essence, "You're years behind in cleaning up, and we're going to ask for some heavy sanctions."

Meanwhile, the suburbs said they wanted to have a majority on the water board. When the case came before me, the first thing I had to do was issue an order putting a lasso around \$400 million in federal funds that might have been lost.

The minute I did that, I was in deep trouble with the out-of-state communities who had a claim on some of that money. Good cooperation between the state and EPA solved this problem.

But for Detroit to finance its share of the cost of upgrading the plants, rates had to go up dramatically. But it became evident that the real problem was the gross inability of the present plant and management to carry out the terms of the 1977 consent decree between EPA and the city.

Because of the problem, EPA filed a show cause motion in August 1978. I then appointed a monitor to help me identify problems in the process.

**Q.** Did you rely on this technical findings in your decision?

**A.** I believe that in a complex situation like this, you've got to have generalists. The value of a judge is that he is a generalist with an ability to balance.

I remember John Kennedy saying that, after the Bay of Pigs, he'd never trust an expert again. I think the Three Mile Island case was an excellent example of this reliance on experts.

Experts are valuable, but they

should not be making the decisions.

**Q.** And your decision was . . .

**A.** To appoint Mayor Young himself as administrator of the Detroit system. By doing this, we were able to put into focus the problems. It was the city's plan, and you had to respect the fact that the chief executive already possessed more powers than any outside expert I could appoint.

For example, I found it took 40 weeks to procure an ordinary set of roller bearings that I could pick up at a hardware store on a Saturday morning. There are some close deadlines coming.

There will be pliantwide test later this summer. I want to see the results of the test before I change any deadlines.

**Q.** Going back to whole question of the judiciary and the legislative process and its problem . . .

**A.** I was active in politics here in Michigan after I left law school at U of M. I ran the Eisenhower committee here in the state in 1951, and I was active for about four years, so I am very much aware of the political process and how it works.

I am aware of the kinds of problems we have in the political arena. In this Detroit case, I could have been the kind of judge who waited for lawyers to come to him and come in with a case.

And I could have told the council, "Live up to the consent decree or pay \$10,000 a day in fines." But that's not the way to solve the problem.

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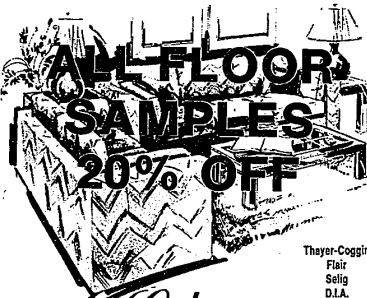
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