

BUTLER TARGETED BY CONSERVATIVES *BUT TOPPLING A SITTING JUSTICE ISN'T EASY*

JEFF MAYERS

Following an expensive and nasty race for Supreme Court in 2007 that set a total spending record of \$5.8 million, insiders already are bracing for an even more expensive and more nasty race next year. And operatives on both sides are already doing the opposition research and mapping the battle plans that are likely to make this officially non-partisan race for the high court perhaps the most partisan ever.

That's because Democratic Governor Jim Doyle's history-setting pick for the Supreme Court—Milwaukee African-American Louis Butler—will be going for a full 10-year term on the state's highest court. If he wins, liberals will continue to hold the edge on Wisconsin's 7-member top court—furthering the power of Doyle and Democrats entering a November 2008 election, which at this writing in July 2007 holds little hope for many Republicans.

If Butler loses, conservatives would have the philosophical edge on the Wisconsin and U.S. Supreme Courts, ensuring protection for school choice and providing a boost to business interests at a time when the conservative's political climate appears to be eroding elsewhere.



The court lined up like this in late July:

Liberal-leaning:

- Chief Justice Shirley Abrahamson, first appointed to the Supreme Court in August 1976 and became chief justice in August 1996. Next up for reelection, 2009.
- Ann Walsh Bradley, elected to the court in 1995 and reelected in 2005 without opposition.

- Louis Butler, appointed by Doyle in August 2004 to replace Diane Sykes, a leading court conservative who was appointed by the Bush administration to the 7th Circuit of the U.S. Court of Appeals.

Swing vote:

- N. Patrick Crooks. Elected to Supreme Court in 1996 with help of Republicans, and reelected in 2006 without opposition after joining liberal-leaners on two controversial liability cases.

Conservative-leaning:

- David Prosser, former GOP Assembly speaker appointed to Supreme Court in

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September 1998, and elected to a full 10-year term in 2001 without opposition.

- Patience Roggensack, elected to the court in 2003.
- Annette Ziegler, elected spring 2007 to replace conservative Jon Wilcox. Officially took office August 1.

If Butler wins, Abrahamson continues leading what many think is an operating majority with Crooks. Butler loses, and conservatives would seem to have a solid four-justice majority.

The stakes are very high.

How else to you explain all the pre-election year activity—even before the swearing-in on August 1 of Wisconsin's latest justice? Ziegler, the Washington County judge who was politically wounded by conflict-of-interest charges in her spring election victory over Madison attorney Linda Clifford, was added to the court in place of conservative Wilcox even though the outcome of a secretive Judicial Commission investigation was unlikely to be announced before her official swearing-in.

Even months before, activists were busy.

- Democrats were busy organizing Butler's campaign and raising money. Butler's campaign through June 30 raised more than \$175,000 and had more than \$155,000 cash on hand.
- Republicans were busy trying to find an opponent. As of late July they hadn't found a willing circuit judge yet, though the name of former Waukesha County District Attorney Paul Bucher, who unsuccessfully ran for attorney general in 2006, kept popping up. If Bucher ended up in the race, Democrats would have the advantage of borrowing Republicans, successful "the-best-candidate-for-the-high-court-is-a-judge" campaign that in many ways doomed Clifford.
- And operatives were mapping plans for special interest-funded "independent" campaigns. Those independent campaigns

that spent an estimated \$3.1 million mostly on Ziegler's side, were seen as pivotal in the 2007 race and perhaps even more pivotal in 2008 because the contestants next year likely won't have the personal wealth that Ziegler and Clifford had to pump into electioneering (their campaigns, with the help of that personal money, spent a combined \$2.7 million, more than doubling the old mark). Some operatives estimate spending for the 2008 race, all told, could reach \$8 million, surpassing the estimated total of \$5.8 million spent on the Ziegler-Clifford affair.

Bye-bye, it seems, to the sleepy, mostly genteel court races of the past. In bygone days, candidates and campaigns didn't get rolling until December before the February primary, and once they did get rolling stuck mostly to resume campaigns, Rotary Club speeches, bar association dinners and newspaper editorial board visits. In fact, some recent incumbents didn't even have an opponent when they won their 10-year term (Bradley, Prosser, Crooks).

Like it or not, some observers say, high stakes, highly negative, general election-like court races are probably here to stay in Wisconsin. Critics say special interests are buying elections. Others say added attention to these races is good in that more and more citizens are becoming aware of the importance of the job and that they have the power to elect top judges.

What's happening in Wisconsin is a national trend.

A group called the Justice at Stake Campaign bemoans special interest influence on court races. A report issued earlier this year by the group and its partners (the Brennan Center for Justice at NYU School of Law and the National Institute for Money in State Politics) concluded this special interest pressure is growing into a "permanent national threat to the fairness and impartiality of America's courts."

"Justice at Stake's report shows how in too many states, judicial elections are becoming

political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the constitution," said former U.S. Supreme Court Justice Sandra Day O'Connor. "I hope that every state that elects judges in partisan elections will consider reforms."

Among the key findings of the report on 2006 races were:

- Of the 10 states that had entirely privately-financed contested Supreme Court campaigns in 2006, five set fundraising records. Candidates in Alabama combined to raise \$13.4 million, overtaking the previous state record by more than a million dollars.
- Median fundraising by candidates for state high courts hit a record high of \$243,910. Five states set aggregate candidate fundraising records for high-court campaigns — Alabama, Kentucky, Georgia, Oregon, and Washington. Wisconsin's Ziegler-Clifford race wasn't included in the study of 2006 races.
- TV ads in 2006 high court campaigns ran in 10 of 11 states with contested elections, compared to four of 18 states in 2000.
- Average television spending per state was \$1.6 million, a new record. An overwhelming majority of independent expenditure television advertising was sponsored by groups on the political right. In 2006, pro-business groups accounted for 90 percent of all independent spending on TV ads in high court races, the report said.
- State Supreme Court elections attracted record sums from business interests, what the report called a reflection of the importance of state courts in setting corporate

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damage payments. Campaign finance analysis showed business gave \$2 for every \$1 donated by lawyers directly to candidates. Donors from the business community gave \$15.3 million to high court candidates—more than twice the \$7.4 million given by attorneys.

- Third-party interest groups pumped at least \$8.5 million more into independent expenditure campaigns to support or oppose their candidates. About \$2.7 million of that was spent in Washington state alone.

But interestingly, the report also found that money and TV ads don't always buy the expected results:

- The candidate with the most on-air support won 67 percent of the time, a modest drop from 85 percent in 2004.
- And, in 2006, the candidate raising more money won 68 percent of the time, down from 85 percent in 2004.

National court-watchers say a major mover in this arena is the U.S. Chamber of Commerce, with ties to the state's big

business lobby, Wisconsin Manufacturers & Commerce (WMC).

According to *Governing* magazine, in 2006 the Chamber, which represents the interests of more than 3 million businesses across the country, reportedly spent \$120 million in the preceding four years, most of it through the Institute for Legal Reform, a tax-free affiliate. *Governing* said that in 2004, the Chamber won every single contest in which it was involved. Figures for 2006 weren't available, but the Chamber can claim a piece of the Ziegler trophy.

The U.S. Chamber Institute for Legal Reform (ILR) calls itself a national campaign, representing the nation's business community,

“with the critical mission of making America's legal system simpler, fairer and faster for everyone.” It was founded by the U.S. Chamber of Commerce in 1998 to address what it calls the “country's litigation explosion.”

That national trend exhibited itself in Wisconsin earlier this year, and court-watchers predict a more robust exhibition next year—especially given a U.S. Supreme Court decision neutering the McCain-Feingold campaign law in a suit brought by Wisconsin Right to Life.

That trend and the Butler race's likely impact on the court majority appear to be lining up for a battle royal of special interests.

Some Democrats lament the attention on this race, saying if Bill Bablitch's seat had been protected properly, and more early support had been there for Clifford, maybe Butler wouldn't have such a big target on his back going into his 2008 run.

Bablitch, the former state Senate majority leader from Stevens Point, left the court in 2003, but the Democratic effort to hold the seat seemed lackluster to some. Republicans organized quickly and solidly behind Roggensack, a Madison-based Court of Appeals judge, and she narrowly defeated western Wisconsin's Ed Brunner with 51 percent of the vote. Later that year, Bablitch reflected:

When Brunner had such a surprisingly good showing in the primary he was just ripe to be picked up and carried through and yet for whatever reason—and they all have little petty reasons—he never got the kind of support that he got. The trial lawyers will rue the day that they did not throw their full support to Ed Brunner because there is going to be issues coming up on punitive damages; there is going to be issues coming up on caps. They didn't like one decision of Ed Brunner, and they didn't do a whole lot to help him out. Why the teachers didn't get far more involved than they did I'll never know that.'

Dems got a break in 2004 when Sykes was tapped by President Bush to go to the federal appeals court. Doyle got his first Supreme Court pick, and made what many insiders con-

sidered a smart pre-reelection pick when he chose Butler.

And then earlier this year, Republicans and business groups got heavily involved in the race for the Wilcox seat.

Early targeted voter contact and positive advertising helped Ziegler to an impressive primary showing, dispatching a third minor candidate from Dane County, and making the Democrats wonder if Clifford had a chance in a race that had been cast as experienced judge versus activist lawyer.

That changed after charges and revelations that Ziegler had presided over cases that involved a West Bend bank on whose board sat her wealthy, investor husband.

And that led to Clifford's first paid advertising—a negative shot using the conflict-of-interest charges; it came in mid-March, with only about two weeks until the April election. Following that came a flurry of negative commercials from outside groups, including the negative counter-punching from WMC. WMC, using tape of Clifford saying “I am not a judge,” declared the Madison attorney had “zero experience putting criminals behind bars.” WMC had torpedoed the attorney general candidacy of Doyle's choice, Dane County Executive Kathleen Falk, in similar fashion and now it, and its conservative allies, were doing the same to another Dane County woman with a liberal reputation.

Editorial boards and Bablitch were outraged. Said Bablitch, who issued a late Clifford endorsement: “It is now apparent that one of the candidates, Judge Ziegler, is not qualified to sit on the state's highest court. Her numerous conflicts of interest—of which she was either ignorant or oblivious—are glaring violations of the judicial code of ethics.

But in the end, it was a Ziegler sweep, with the Washington County judge winning with 58 percent of the vote.

But while Clifford lost the race and WMC notched another election victory, Ziegler's victory was bittersweet, as she had to contend

with a dual set of subsequent conflict-of-interest charges—in the Ethics Board and in the Judicial Commission. She went to her future colleagues asking them to take original jurisdiction. But they declined and she settled the Ethics Board case in May, paying \$17,000 in penalties.

That allowed the Judicial Commission, the arm of the state judiciary that is in charge of disciplining judges, to take over.

Ziegler took the bench on August 1, 2007, while still under investigation by the Judicial Commission for cases she presided over involving West Bend Savings Bank, where her husband was a paid member of the board.

Ziegler said she believes the commission will come up with a satisfactory conclusion and that the investigation isn't affecting her today.

It doesn't really affect today because they'll come to a conclusion and I'll go forward and work hard for the people.

Ziegler said it "feels great" being sworn in.

"I'm ready to get to work for the people of Wisconsin," Ziegler said.

Her election followed a bitter campaign, one she said she hoped people learned something from.

"I hope they learned that a positive campaign is a good one to run, especially in the judiciary," Ziegler said. "Judges need to rise above that and I think the public expects that."

Ziegler and Wilcox, whom she replaces on the court, lamented the nature of the race before the a Wisconsin State Bar Association conference in Milwaukee about a month after Ziegler's win.

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"I've always been for an elected judiciary. That's our constitution," Wilcox said. "I don't know. I'm kind of rethinking that."

"Maybe I'll talk about that when I get off the court a little more, but that is a concern to me," he added.

I think that, as an institution, the Supreme Court is an independent third branch of government, it also is a non-partisan group . . . it also has to retain the people's confidence in how it's acting. And it's tough.

Wilcox pointed to his own "difficult election" 10 years ago. His 1997 campaign was accused of illegally coordinating a get-out-the-vote effort with an organization that supported school choice. The Elections Board eventually reached a settlement with Wilcox's campaign, and he personally paid the \$10,000 to settle it. Wilcox strongly maintains it was not a fine and that he was personally exonerated in the case, claiming people in his campaign lied to him.

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Wilcox's speech was followed by Ziegler, who shared her background, experience, and vision for a "congenial" court.

During a question and answer session, Ziegler also raised concerns about the judicial election process.

While she said she enjoyed much of the campaign, she said it is a "good time to take a look at meaningful campaign finance" reform.

But you're always going to have the fact that people have First Amendment rights, and you're always going to have other parties special interest groups who I think put their hand in motion in campaigns.

So it will be difficult to have any significant control over that. But to give people the opportunity to get their own message out there is an important one and you ought not have to be someone with the financial wherewithal to do that on your own in order to run for public office.

She also expressed dismay at the loss of civility in campaigning for judicial elections.

"It's somewhat of a painful process," Ziegler said. "That isn't what campaigns should be about, especially for a judicial race. A judicial race should rise above it; we should be leaders in that respect."

Despite the conflict-of-interest fallout (dismissed by Republicans as minor, media-ballooned charges) the Ziegler race quickly set the stage for the Butler race, with even Democrats openly worrying about Butler's security on the bench. Republicans, meanwhile, were gleefully mapping battle plans that included Milwaukee Circuit Judge Michael Brennan as Butler's perfect opponent.

Brennan, viewed as a connected, pragmatic conservative from Butler's electoral base, had toyed with running before, when Crooks had mused about passing on a reelection run. His name then emerged as a candidate for Wilcox open seat, but he declined.

And then, after Ziegler's victory, he let it be known that he wouldn't run against Butler, either, sending Republicans on a recruiting mission. Brennan's name later emerged as a top contender for the seat of federal Judge Rudolph Randa, who's moving to senior status. Among those applying in late July were Brennan and two others who declined this past summer to challenge Butler—Timothy Dugan and Ralph Ramirez.

In late July, when it was unclear who would challenge Butler, conservative strategists remained confident a capable candidate would emerge who could beat a justice they view as the most vulnerable in the country. That's in part because the school choice move-

ment and national business interests apparently have Butler and the Wisconsin Supreme Court on its radar screen.

That could mean millions of dollars in out-of-state money for TV advertising, direct mail, robo-calls, and other devices for "independent" campaigns designed to help Butler's opponent. You could see the draft ad scripts now, containing disparaging Butler nicknames such as "Loophole Louie" and "Lead Paint Louie," referring to Butler's reputation among some for anti-law enforcement decisions and his 2005 votes with Crooks and the tentative Abrahamson-led court majority for a decision the business community alleged would make Wisconsin a haven for liability claims and trial lawyers. Said a *Wall Street Journal* at the time, labeling Wisconsin "Alabama North":

In a pair of rulings last month, the court tossed out the state's cap on non-economic damages in medical malpractice cases, and it blessed a theory of lead paint litigation that will soon have every trial lawyer in America descending on the state and posing as a cheesehead.

Despite all of that, Butler supporters were upbeat in late July, and some Republicans were admitting it would be an uphill battle to unseat an incumbent. After all, an incumbent justice hasn't lost in Wisconsin since 1967, when George R. Currie became the first chief justice in Wisconsin history to be knocked off in an election. An official court history owes the loss to the mandatory retirement age then in effect that would have allowed Currie to serve only two years out of his 10-year term, and an unpopular ruling a year earlier saying the state couldn't use its antitrust law to keep the Braves baseball team in Milwaukee. Although Currie did not write the opinion, he joined it, the history noted.

Could the state's first African-American justice be knocked off too? Butler is viewed as vulnerable by campaign and court-watchers on both sides.

Why Butler could lose

Using a composite of strategist and insider opinions, here's a sampling of major reasons Butler could lose:

- Butler is a little-known candidate who may have little appeal beyond southeast Wisconsin, given Diane Sykes' big win over Butler in 2000.
- Butler's record on public safety from his days as assistant state public defender, Milwaukee municipal judge, and Milwaukee circuit judge, as well as on the high court (what critics will call soft on crime), may resonate with average voters concerned about curbing violence.
- Butler's decisions said to loosen liability rules likely will mobilize state and national business interests—and money—against him.
- School choice advocates looking to safeguard Milwaukee's program appear poised to weigh in heavily to defeat the justice and secure a pro-school choice majority.

Why Butler could win

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- Butler is an incumbent who likely will have the personal backing of Governor Jim Doyle and his allies, including organized labor and organized unionized law enforcement.
- Butler's campaign is organized early and raising money early.
- Butler's ethnicity and status as the first African-American on Wisconsin's high court may help spike support in Democrat-dominated Dane County, especially if attacks on him are viewed as racist.
- Democrats in general are engaged on this race because of the stakes.

Bill Bablitch, the political savvy ex-justice who helped guide Crooks to an easy reelection victory, has donated to Butler early. He didn't do the same for Clifford, because, as he says now, he didn't think she could win.

Bablitch calls Butler "highly competent" and hard to beat in part because attacks on him could be viewed as racist. "He has advantages being the first African-American on the court," Bablitch said. "(But) I don't think he has to play the race card."

Bablitch thinks Butler's biggest obstacle is the business community's anger at the liability rulings. "Louie's got that hanging around his neck like an albatross. You've got to talk about it."

Adds Bablitch: "It's not a shoo-in by any means. He's not taking it for granted."

Concludes Bablitch; "I've seen his organization. I like it."

Mark Graul, who led Ziegler's successful campaign, likewise concludes Butler won't be easy to beat. The Republican strategist involved in the 2004 Bush campaign and Mark Green's 2006 governor's campaign, says the candidate that crafts the best message will win.

And Graul thinks that message is public safety. He maintains Butler's record is one "of putting criminals out on the street," so Butler's opponent will have to be strong on that issue.

"You still have to have a winning message," Graul said. "Ziegler won because she had a winning message. That to me ultimately will decide who wins or loses, regardless of the special interests."

But court-watchers expect the special interests to be there amplifying the issues in a way that may make the faint of heart yearn for the bygone days of sleepy court races in Wisconsin.