Republican Party of Minnesota v. White: Should Judges Be More Like Politicians?

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Republican Party of Minnesota v. White

Should Judges Be More Like Politicians?

By Roy A. Schotland

The Supreme Court's decision in Republican Party of Minnesota v. White shows how unrealistic five justices can be about what happens in judicial election campaigns, and also—ironically—about how much judges differ from legislators and others who run for office. This reality was captured concisely by Robert Hirshon, immediate past president of the American Bar Association (ABA) in his statement following the Court's ruling: "This is a bad decision. It will open a Pandora's Box...." The decision will change judicial election campaigns in such a way that the quality of the pool of candidates for the bench will likely diminish, good judges will be less willing to seek reelection, and the public's cynical view that judges are merely "another group of politicians" will gain further impetus. This will directly hurt state courts and indirectly hurt all our courts.

After noting the majority and separate opinions—which, unsurprisingly, raise many questions—this article will predict what litigation lies ahead, then describe the current judicial election environment and prospects for reform.

The White decision is not reducible to the simplistic, misleading proposition that "Notwithstanding ABA policy to the contrary, the law of the land now holds that the First Amendment trumps all other considerations when it comes to judicial elections." Justice Scalia's majority opinion held that Minnesota could not prohibit a candidate for judicial office from "announcing his or her views on disputed legal or political issues." The decision will impact all but one of the thirty-nine states in which at least some judges face elections of some type, because all (except North Carolina) have canons limiting what candidates may say when campaigning for the bench. One limitation, as Justice Scalia wrote, bars judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office."—a prohibition that, as he wrote, "is not challenged here and on which we express no view." As for a third limitation, "[t]he Court's treatment of the ['Commit Clause'] precluding a candidate from making 'statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court' was, unfortunately, not a model of clarity." Justice Stevens, writing for the four dissenting justices, said this:

By obscuring the fundamental distinction between campaigns for the judiciary and the political branches, and by failing to recognize the difference between statements made in articles or opinions and those made on the campaign trail, the Court defies any sensible notion of the judicial office and the importance of impartiality in that context.

Arguably, the most significant point of the majority opinion is that whether or not the Court "obscured" the distinction between judicial and nonjudicial elections, it did not ignore it. It did not adopt what Justice Ginsburg, also writing for the four dissenters, called "the unilocular, 'an election is an election' approach." As an example of that approach, she quoted the dissenting judge below: "When a state opts to hold an election, it must commit itself to a complete election, replete with free speech and association." The majority's opinion reveals that one or more justices are unwilling or at least unready to strike more (or much more) regulation of judicial campaigns: "Justice Ginsburg [attacks] an argument we do not make. [W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office."

Of course, it is difficult to say how many of the five majority justices would strike how much more of the canons, but it is hard to see why their opinion would have included any such limitation if all five agreed with what Justice Kennedy said alone.

Justice Kennedy, who joined the majority and also wrote alone, views judicial elections as like (or not materially different from) nonjudicial elections, and so would strike all limits on candidate speech. But he made two important points about what can be done to meet injudicious conduct in judicial campaigns: States "may adopt recusal standards more rigorous than due process requires, and censure judges who violate..."
Judicial Independence—Free Speech Means Impartiality

By William F. Dressel

With the U.S. Supreme Court’s decision in Republican Party of Minnesota v. White, the war of words expounding legal and philosophical positions has begun. The finest legal minds will analyze and enlighten us on what is meant by “communicating relevant information to voters during a judicial election.” Clearly, judicial candidates are now authorized to engage to some degree in discussion of relevant political issues. Until such a time, when a bright-line standard is established, I would suggest that both sitting judicial officers and candidates address this issue from a practical common sense point of view honoring impartiality.

When a judge is elected to office, it is a voluntary commitment (not in the mental health sense) to conduct one’s personal, public, and professional life in a career that has privileges and limitations not known to other professionals. The discussion about one’s speech or behavior that each judicial officer should have with himself or herself is framed by looking inside oneself for the impartiality, dignity, and independent components that make up judicial integrity. A judge does not need to read or be instructed by a judicial decision or canon to understand the wisdom of this introspection.

Judges, by virtue of their position, are subject to a number of “thou shall and shall nots.” The “shall” relevant to this issue is the faithful and impartial performance of the duties of the office. The “shall not” requires that a judge not make pledges or promises of conduct. From a common sense standpoint, a judge cannot remain independent when promises or statements are made that commit the judge to rule a certain way.

It is not easy to maintain the dignity appropriate to a judicial office in these times. Conducting one’s daily judicial life is not simple. Many judges must participate in elections. The proceedings that lead up to those elections require that judges speak knowingly and firmly about justice. Add to this the growing pressure on judges to be innovative and act as problem solvers, and you have judges engaging in acts or speech that open them up to criticism or questions.

There is not just an outcry, but a demand that judges be full participants in society, which may result in conduct or speech that has the potential to adversely impact the dignity of the court. In that respect, isn’t it interesting how judges and others who refer to us use the generic “the court” whereby judges are referred to not as persons, but as institutions! Yet, there are times that the judge is acting or speaking as an institution. When seeking election, the incumbent tries to blur the distinction between the individual and the legal entity. After the election, it is a common practice for judges to protest statements inconsistent with standards of judicial neutrality and judicial excellence. Indeed, if democracy is to fulfill its promise, they must do so.

Justice Stevens made the same point, adding that even official bodies like the defendant board in this case “may surely advise the electorate that such announcements demonstrate the speaker’s unfitness for judicial office. If the solution to harmful speech must be more speech, so be it.”

Justice O’Connor, also joining the majority and also writing alone, took a familiar and simple approach: We shouldn’t have judicial elections, because of the fundamental tension between judicial independence and elections. But she ignored reality—the difficulty of ending judicial elections. For example, Florida’s voters in 2000 (“yes Virginia, there were other things on the ballot!”) overwhelmingly rejected changing from contestable elections for their trial judges, to the same system of merit-appointment and “retention” elections that they have for their appellate judges (with voters deciding only whether a sitting judge will continue or not). The opposition to the change was led by the women’s and minority bar associations; similarly in 1987, Ohio voters overwhelmingly agreed with the opposition’s key advertisement against change: “Don’t let them take away your vote!”

The surest result of the White decision is (for a change) more litigation, of three types. First, there will be two kinds of lawsuits about the provisions limiting speech, the “Commit Clause” and the “Pledge or Promise Clause.” There will be attacks on the facial constitutionality of each clause, and there will be disputes about whether this or that particular statement violated one or both of those clauses. Second, there will be litigation over whether the seventeen states that have chosen nonpartisan elections for all or some of their judges can preserve the nonpartisanship they prefer. Minnesota, like most or all of these states, bans party endorse-

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ments—and, indeed, the plaintiff who brought the White case was joined by the Republican Party of Minnesota because of this provision. Their attack on it was rejected in the lower courts, and the Supreme Court excluded that issue when it granted certiorari—but now that we have White, surely courts will be asked to revisit this issue. In addition, the nonpartisan states limit judicial candidates from announcing their own party affiliation. Will that limitation stand up? Last, but not least, the thirty-nine states bar judicial candidates from personally soliciting campaign funds; also, most of these states limit the time period for fundraising. Will these limitations survive?

White will figure, perhaps substantially, in the next U.S. Senate confirmation hearing of any nominee for a federal judgeship who is reticent about answering senators' questions regarding his or her views. Justice Ginsburg drew on several of the briefs for, as Justice Scalia put it, "repeated invocation of instances in which nominees to this Court declined to announce [views on disputed legal issues] during Senate confirmation hearings. . . ." Scalia said that the majority "do not assert that candidates for judicial office should be compelled to announce their views. . . ." Stay posted!

Of the nation's 10,000 state judges, most still face elections of some type—contestable partisan or nonpartisan, or retention. That's after a century of major effort by the bar and good government groups for adoption of the "merit" retention system. "Judicial reform is not for the short-winded," as New Jersey's great Chief Justice Arthur T. Vanderbilt taught. But true as it is that during the last generation voters rejected "merit" systems, perhaps we are entering a new era, perhaps recent changes in judicial elections will increase voters' willingness to change these systems. Meanwhile, don't we need to work at reducing the problematic aspects of judicial elections?

Until 1978, judicial elections were as uneventful as playing checkers by mail. That year in Los Angeles County, a number of Jerry Brown-appointed trial judges were defeated. Then in the 1980s in Texas, campaign spending soared. But the biggest change occurred in 2000 when campaign spending set sharply higher records in ten of the twenty states with high court elections, and nationally, high court candidates raised 61 percent more than ever before. Also, outside groups like the Chamber of Commerce spent about sixteen million dollars in just the five liveliest states: Alabama, Illinois, Michigan, Mississippi, and Ohio. The "nastier and noisier" campaigning in 2000 was more like nonjudicial campaigns than ever before.

The states that chose judicial elections did not want them to be like other elections. Their constitutional histories show that elections seemed less problematic than appointments, which seemed elitist and/or mere political patronage. But those states accompanied judicial elections with constitu-
The impact of elections on judicial independence is amplified because so many states have such short terms for judges.

Tional provisions unthinkable for other elective officials—like uniquely long terms. The constitutions of the thirty-nine states in which judges face elections of some type have an array of such provisions, unique to the judiciary, to accommodate the choice of popular selection with the constitutional value of judicial independence. In all thirty-nine states (except Nebraska), judges’ terms are longer than any other elective official’s. In thirty-seven of these states, only judges are subject to both impeachment and special disciplinary process. In thirty-three states, judges are the only elective state officials subject to requirements of training and/or experience (except that in ten of those states, the attorney general is subject to similar requirements). In twenty-three states, only judges are subject to mandatory age retirement. In twenty-one states, only judicial nominations go through nominating commissions; in six states, this applies even to interim appointments. Last, in eighteen states, only judges cannot run for a nonjudicial office without first resigning.

The impact of elections on judicial independence is amplified because so many states have such short terms for judges. Although terms are uniquely long in some states (e.g., fourteen years in New York, twelve years in California), in fifteen states even the high courts have only six-year terms. In twenty-five states, trial judges have six-year terms, and in another nine, only four-year terms. One can’t help but be deeply troubled by what short terms may mean for nonroutine cases at all levels—for example, at the trial level, sentencing and rulings on bail.

Of appellate judges who face elections, 38.5 percent have terms of ten to fifteen years and another 60.6 percent have six- to eight-year terms. Of trial judges who face elections, 13 percent have terms of ten to fifteen years, and another 67.6 percent have six- to eight-year terms. This pattern shows that the choice of elections, “while perhaps a decision of questionable wisdom, does not signify the abandonment of the ideal of an impartial judiciary carrying out its duties fairly and thoroughly.”

Thirty-nine states have recognized that far from fulfilling the historic purpose in allowing for the popular election of judges, any effort to treat judicial elections like other elections wholly undermines the judiciary’s independent role. Their balanced approach to the proper structure for an elected judiciary embodies the understanding that:

The word “representative” connotes one who is not only elected by the people, but who also, at a minimum, acts on behalf of the people. Judges do that in a sense—but not in the ordinary sense…. The judge represents the Law—which often requires him to rule against the People.

Five justices have decided that judicial election campaigns cannot be kept as different as the states want. The Pandora’s Box that Robert Hirshon predicts will be opened by the small minority of judicial candidates who simply want to win, and the dynamics of campaigns will show a race for media coverage and appeals to single-issue groups.

Keeping judicial elections judicious involves not only the First Amendment, but also the due process rights of litigants. Further, as judicial campaigns become more similar to other campaigns, judges will continue to become more like politicians and the public will view them as such. Do we want decisions on the First Amendment (and other constitutional protections) made by people who are more like legislators, or different from that? If judges are more like legislators, won’t that threaten the legitimacy of having courts review the constitutionality of actions by the political branches?

Perhaps more states will end contestable judicial elections altogether. But meanwhile? First, what should candidates do now? Take advantage of what the Missouri Supreme Court ordered in response to White: After noting which of its provisions would no longer be enforced and which would remain in full force and effect, it provided (to finish its less-than-two-page order) as follows: Recusal [which includes disqualification], or other remedial action, may nonetheless be required of any judge in cases that involve an issue about which the judge has announced his or her views as otherwise may be appropriate under the Code of Judicial Conduct.

This is an inspired step. It supports the overwhelming majority of candidates who want to campaign judiciously—they’ll be able to say, “I know what you’d like me to say, but I can’t. I’ve heard the campaign slogans, but we don’t have to. I’ve listened to the opponent’s ideas, but I can’t. I believe that anyone convicted of child abuse should receive the maximum sentence allowed by law,” or “I’m a tenant, not a landlord”), to respond with “My opponent has told you what he thinks you want, but hasn’t told you that he won’t be able to deliver; he’ll be disqualified from the cases you care about.”

The most important step in meeting the challenge was urged in May by Ohio’s Chief Justice Moyer: Lengthen judicial terms to at least eight years. That single step will reduce the problems inherent in judicial elections, and will go far to enlarge and enrich the pool (continued on page 45)
of people willing to seek judgeships, and to encourage them to continue serving. And improving the caliber of those who serve as judges is obviously the goal of all reform of judicial selection.

Notes
1. Chair’s Column, JUDICIAL DIVISION RECORD (Summer 2002), at 2.
2. 122 S. Ct. 2528, 2542 (last day of Term 2002).
3. Id. at 2532.
5. 122 S. Ct. at 2546.
6. 122 S. Ct. at 2550, 2551.
7. 122 S. Ct. at 2550-51 quoting Judge Beam, dissenting, 247 F.3d 834, 897, 903 (8th Cir. 2001). Judge Reinhardt also took the “unilocular” approach, Georcy v. Renne, 911 F.2d 280, 291-96 (9th Cir. 1990) (concurring opinion). For other examples see my Myth, Reality Past and Present, and Judicial Elections, 35 IND. L. REV. 659, 663-65 (2002) (on “An Election is an Election is an Election”: The mantra that passed for analysis in the decisions limiting Canon provisions).
8. 122 S. Ct. at 2539.
9. Id. at 2545.
10. Id. at 2546.
12. In Washington, a judge put out material that included this: “Bearing in mind the nonpartisan position a judge must maintain while on the bench, it may be useful for you to know that Judge Kaiser’s family have been lifelong Democrats. Indeed, Judge Kaiser has doorbelled for Democrats in the past.” Matter of Kaiser, 111 Wash. 2d 275, 759 P.2d 392 (1989) (censuring the judge for that and other statements).
14. 122 S. Ct. at n.11.

Judicial Campaigns
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18. Goldberg, Holman, and Sanchez, supra note 12, at 17.
19. The data were presented at the Summit on Improving Judicial Selection, Chicago, Illinois, December 8-9, 2000. Some of these data can be found in 34 LOY. L.A. L. REV. 1508-12 (2001).
22. An earlier study of fifty-five television judicial campaign commercials, fifty-four of which are in the eighty-five commercial databases used in the Goldberg, Holman, Sanchez study, supra note 12, reaches similar conclusions, although it finds that crime control is slightly more popular as a theme than is tort law. See Anthony Champagne, Television Ads in Judicial Campaigns (Nov. 2001) (presented at the National Center for State Courts Symposium on “Judicial Campaign Conduct and the First Amendment” (Chicago, Ill. Nov. 9-10, 2001)). Data reported hereafter on the numbers of ads in various categories and on the times broadcast are from the Goldberg, Holman, Sanchez study, supra note 12.
24. Id.
25. I am grateful to the Brennan Center, and especially to Craig Holman, for providing me with transcripts of these television ads.
29. Schotland, supra note 1, 22. It was not the first time that a sexual predator ruling was used against a judge in a television commercial. In the 1999 Wisconsin chief justice race, the incumbent chief justice was hit with a television commercial that criticized her dissent in a sexual predator case. That commercial featured the grandmother of a child who had been sexually assaulted and then slain who spoke of the chief justice and her dissent in a 1995 ruling saying, “I’m sure if she could only understand the pain that you go through and to lose a child that way, I’m sure she’d think differently.” Interestingly, had the chief justice’s view prevailed, it would not have affected the man who killed the victim discussed in the commercial. See Joseph D. Kearney and Howard B. Eisenberg, The Print Media and Judicial Elections: Some Case Studies from Wisconsin, 85 MARY. L. REV. 593, 630 (2002).
31. Just one example is the announcement of a formation of a group of secret contributors that will focus on two Ohio Supreme Court races. See Dennis J. Willard and Doug Oplinger, Brennan’s Advocacy Group May Focus Money on the State Supreme Court, ABBON BEACON J., July 30, 2002.

Perspective on Tensions
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independence if pressure is a real or perceived problem. In Wisconsin, the supreme court justices have a ten-year term. All other judges serve for six years. The public would be better served if all judges had ten-year terms.

Despite its flaws, the election system has produced good, competent, and hardworking judges. Still, the system can be improved. For instance, an ethical code should acknowledge the increased number of lawyer couples and families in the legal profession and the advantage they enjoy in campaign fundraising. This fundraising advantage should be removed by permitting candidates to solicit funds, or by public funding of all judicial campaigns. The process must allow candidates to describe their philosophy to the voters while simultaneously supporting judicial concerns over decisonal independence by lengthening terms.

Judges Abroad
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The commitment of willing volunteers and unselfish leaders is essential to bring the prospect of fundamental freedom and judicial independence to these trouble spots. Without promoting the rule of law in this region, there is little hope for the freedom and development necessary to bring to it the tranquility the people there deserve.

So although I will miss the chance to work with CEELI and the judges of Azerbaijan, I hope someday there will be a CEELI presence in places like Israel and Palestine. If given the opportunity to participate in programs there, I would do everything possible to avoid having to write another article about why I was unable to go.