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Perspective

Campaign Speech And the Administration of Justice

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As the effects of the U.S. Supreme Court decision in *Republican Party of Minnesota v. White*[1] take hold, and candidates for judicial office speak more freely, will judges more frequently be disqualified from hearing certain cases because their impartiality has been compromised by things they said on the campaign trail? This simple question implicates complex constitutional concerns that take us back to the founding of our nation. The debate and consequences are not always pretty.

The so-called "announce clause" in the Code of Judicial Conduct[2] prohibited judicial candidates from announcing their views on disputed legal and political issues. In 1990, the American Bar Association recommended deletion of the "announce clause," and most states followed suit. Minnesota and a few others did not. In 2002, the U.S. Supreme Court declared Minnesota's "announce clause" unconstitutional, holding that government cannot preclude core political speech at the heart of the electoral process when candidates communicate their qualifications and views to the voting electorate.

While invalidating the "announce clause," the Court said it was not opining on the code's "pledges or promises" clause, which says a judge shall not, with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

A related code provision, the "disqualification rule," requires a judge to recuse in any case where the judge's impartiality might reasonably be questioned, including where the judge, while a candidate, made a public statement that commits, or appears to commit, the judge with respect to an issue in the proceeding, the controversy

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itself and, in some jurisdictions, the parties or a class of parties. In his concurring opinion in *White*, Justice Anthony Kennedy noted that the states may adopt disqualification standards more rigorous than due process requires and may discipline judges who violate those standards.

Since *White*, federal lawsuits have proliferated, raising grand sounding constitutional arguments against code provisions other than the "announce clause." While every federal court that has addressed the "disqualification rule" has upheld it - Florida, Alaska, North Dakota, Kentucky, Indiana[3] - some have gone beyond *White* to invalidate the "pledges or promises clause" and the bar against judicial candidates personally soliciting contributions.[4] State courts, however, tend to disagree.

In 2003, in *Spargo v. Commission on Judicial Conduct*, a federal district court judge, relying on *White*, declared numerous political activity restrictions in the New York Code to be unconstitutional.[5] Since New York did not have an "announce clause," there should not have been a *White* issue. But the federal court nevertheless nullified restrictions pertaining not to the judge's own campaign for judicial office but to the judge's political involvement in other campaigns. The petitioner in *Spargo,* a sitting judge went to Florida at the expense of a political party after the 2000 presidential election and participated as a partisan in the vote recount. Under the *Younger* abstention doctrine,[6] the federal judge should have deferred to New York state courts on this matter, but he astoundingly declared that the Court of Appeals, New York's highest court, was unable to address the constitutional issues at stake. The Second Circuit later reversed and dismissed.[7] Ironically, while *Spargo* was pending in Second Circuit, the New York Court of Appeals ruled on the constitutionality of provisions the district court had struck.[8]

What is going on here? Some limitations on political activity have been recognized for more than a generation. In the 1973 *Letter Carriers*[9] case, the Supreme Court upheld the Hatch Act limitations on political activity and speech by federal employees. In *Buckley v. Valeo*[10] in 1976, the Supreme Court upheld limitations on campaign contributions.

What is really going on here is not so much a grand constitutional debate as an issue-driven political agenda. Many of the post-*White* federal lawsuits challenging the code have been brought by Right-to-Life organizations, whose goal seems to be to loosen the constraints on judicial candidates so that a more ideologically pure group of candidates would be identified and elected. In Alaska, where a lawsuit challenging the code has been commenced, the judicial council advised judicial candidates not to answer certain issue-driven questionnaires. The Alaska Right to Life organization then sent out a fundraising appeal stating, "Alaska Right to Life is in dire need of PAC funding to accomplish the goals of changing the makeup of the courts by removing bad judges."

What may be a "bad judge" to Alaska Right to Life is probably not what would be a "bad judge" to Alaska abortion rights advocates, but I would be offended by such tactics from either side

of the abortion issue. When Right to Life wins one, they simultaneously open the door to Pro-Choice groups using the same tactics to put their people on the bench. What is good for one side will be good for the other. It just won't be good for public confidence in the integrity or impartiality of the judiciary or the administration of justice.

James Madison warned in The Federalist against the corrupting influence of factions on the American body politic. Today, it seems that much of our national discourse has succumbed to factional influences. Campaigns for executive and legislative office have become staging grounds for pro-life versus pro-choice advocates, pro-gun versus gun-control activists, pro-death-penalty versus anti-death-penalty adherents, and others. We are now at great risk of factionalizing our judiciary as well, with litmus tests and candidate questionnaires whose only purpose is to determine not whether a particular individual has the intellect, temperament and fair-mindedness to be a judge, but whether the individual agrees with the questioner on abortion, firearms the death penalty or God.

These all-or-nothing questions seem not to allow for the possibility that judges can or should render rulings by the book and refrain from using judicial power to impose their social will on the rest of us. Unfortunately, there will always be some judges who may go to an extreme to interpret a law and, for example, find a way to decide a simple trespass case involving an abortion clinic not on whether the defendant improperly came onto the property but on whether the judge is pro-life or pro-choice. But in my experience, even as a judicial disciplinary enforcer, the vast majority of judges try every day to do right by the law and the facts of the case and resist the temptation to use their power to promote their own agendas. Increasingly, however, such judges are under attack, targeted by special interest groups that, under the appealing guise of searching for information before casting a vote, are actually looking to identify and remove the ideologically impure from the bench.

This trend toward factionalizing the judiciary poses a great risk to the real and perceived independence and impartiality of our judiciary.

Why is the appearance as important as the reality of independence and impartiality? Because public confidence in the administration of justice is what keeps people coming back to the courts and what empowers the writ of our law. As the Federalist Alexander Hamilton understood and history has underscored, the judiciary owes its power not to an army to enforce its will and not to the public purse to fund its mandates, but to the integrity of its judgments. It is confidence in that integrity, and in the principle that the litigant will get a fair shake from an impartial magistrate, that keeps us coming to the courts rather than turning to the streets to resolve our disputes. Do we want to tamper with that fragile yet monumentally potent ideal?

Do we really want a judiciary that is elected in the same way as legislators and executives, making promises of future conduct in office, picking up special interest endorsements, hustling for votes? What would be the judicial equivalent of a pledge to "bring home the bacon" - a pledge to rule for

landlords while addressing a real estate group? Do we want to create the impression, and even worse, the reality, of judges beholden to voting blocks? Will we so taint the judiciary by the manner in which we elect them that they cannot be or appear impartial once they get to the bench?

If a campaigning judge is permitted to make promises with respect to cases or controversies, will that judge's impartiality reasonably be questioned should that case or controversy come before him or her on the bench? In my view, depending on the specifics of the particular situation, the answer will increasingly be "yes," and the judge will have to recuse.

For example, I believe under *White* judicial candidates may say, "I have always believed life begins at conception." But I do not believe *White* permits candidates to say, "If an abortion case comes before me, I will rule in favor of the unborn child." Such a statement would likely result in discipline under the "pledges or promises" clause. Yet even if there were no such clause, this pledge-making candidate could not preside over an abortion rights case because, under the disqualification rule, he or she would have made a campaign statement that did or appeared to commit to a party or a result. Substitute "pro-choice" for "right-to-life" in this example, and you get the same awful result.

Other campaign statements may not violate the rules so clearly. If that same candidate were to say, "I am right-to-life, and if an abortion case comes before me, you can count on me to do the right thing," my work as a disciplinary enforcer would be set in motion. Was this a disguised and prohibited "pledge" or "promise"?

If the present trend continues, and federal courts invalidate the "pledges or promises" clause while affirming the disqualification rule, the Right-to-Life groups bringing suit will have created new work for disciplinary enforcers, work we do not want on an issue we would prefer were not there, but work we will be obliged to undertake. We could not let judges off the hook for presiding over cases in which their impartiality might reasonably be questioned. But our factual inquiry would be a complex and delicate balancing act as we try to find the truth without becoming the "thought police." And we would not be alone. Appellate courts would increasingly be forced to rule on claims that a lower court ruling was tainted by the judge's lack of impartiality, owing to pledges or promises made during the judge's campaign.

Ironically, if campaign "pledges or promises" are permitted while disqualification for such statements is mandated, these federal lawsuits may leave special interest groups less than they had when they filed suit. Right to Life may put its adherents on the bench in such a manner as to disqualify them from hearing abortion cases

Right-to-Life groups are not the only partisans in this battle. Too many advocates on both sides of abortion, gun control, the death penalty and other hot-button issues are skewing the judicial campaign debate. Rarely in these debates do we hear any passion for the idea that a judge should rule with integrity on the facts and the law without injecting

personal beliefs into the equation. Yet that is the ultimate ideal.

The increasingly divisive, special-interest and politically driven view of the judiciary cannot be what we want for our system of justice. It would threaten to make the judge an instrument of ideological tyranny instead of a guardian against it.

I deeply believe we have to resist this trend, which brings with it the potential to eviscerate the most distinguishing, liberty-saving feature of our constitutional governance. It cannot be said forcefully enough that there is a compelling, even overriding state interest in the independence, impartiality and integrity of the judiciary. We play with it, and fail to protect it, at our great national peril.

Endnotes:

1. 536 US 765 (2002).

2. In New York, the Code is promulgated at 22 NYCRR 100.

3. *Florida Family Planning Council v. Freeman*, #4:06cv395-RH/WCS, (N.D. Fl, Oct. 10, 2006); *Kansas Judicial Watch v. Stout*, 440 F. Supp.2d 1209 (D. Kan. 2006); *Alaska Right to Life Political Action Comm. v. Feldman*, 380 F. Supp.2d .1080 (D. Alaska 2005); *North Dakota Family Alliance, Inc., v. Bader*, 361 F. Supp2d 1021 (D.N.D. 2005); *Family Trust Foundation, Inc., v. Wolnitzek*, 345 F. Supp.2d 672 (E.D. Ky 2004); *Indiana Right to Life v. Shepard*, #4:04-CV-0071 (N.D. Indiana, Nov. 14, 2006).

4. *Weaver v. Bonner*, 309 F.3d 1312 (11th Circuit 2002); *Indiana Right to Life v. Shepard*, #4:04-CV-0071 (N.D. Indiana, Nov. 14, 2006).

5. 244 F.Supp.2d 72 (N.D.N.Y. 2003).

6. *Younger v. Harris*, 401 US 37 (1971).

7. 351 F.3d 65 (U.S.C.A.2nd).

8. *Raab v. Commission on Judicial Conduct*, 100 NY2d 305 (2003); *Watson v. Commission on Judicial Conduct*, 100 NY2d 290 (2003).

9. *Civil Service Commission v. National Association of Letter Carriers*, 413 US 548 (1973).

10. 424 US 1 (1976).