

Should Judges Be More Like Politicians?

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Judges sometimes are unrealistic. Whatever one's view of the recent Pledge of Allegiance decision, do you remember *Clinton v. Jones*,¹ in which eight justices had no doubt that there were no serious risks in allowing Paula Jones' lawsuit to proceed against a sitting President?²

The Supreme Court's decision about judicial elections³ shows how unrealistic five justices can be about what happens in election campaigns, and also—ironically—about how much judges differ from legislators and others who run for office. Reality was captured concisely by Robert Hirshon, president of the American Bar Association, who said, "This is a bad decision. It will open a Pandora's Box . . ." ⁴ The decision will make a change in judicial election campaigns that will downgrade the pool of candidates for the bench, reduce the willingness of good judges to seek reelection, add to the cynical view that judges are merely "another group of politicians," and thus directly hurt state courts and indirectly hurt all our courts.

After noting the majority and separate opinions (which, unsurprisingly, open many questions), I predict what litigation lies ahead, then describe the judicial election scene and prospects for reform, and last, suggestions to candidates and all judges. The decision is not reducible to the simplistic, misleading proposition that "[n]otwithstanding 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."⁵

Justice Scalia's majority opinion held that Minnesota could not prohibit a candidate for judicial office from "announc[ing] his or her views on disputed legal or political issues."⁶ Although that "announce clause" has been law in only nine states, the decision will impact all but one of the 39 states in which at least some judges face some type of elections, because all states have canons limiting what candidates may say in campaigns.⁷ Another 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."⁸ 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."⁹

Justice Stevens, writing for four dissenters, said this:

By obscuring the fundamental distinction between campaigns for the judiciary and the political branches,

Footnotes

1. 520 U.S. 681 (1997).
2. As the Court put it in reversing the lower court's stay order, "We think the District Court may have given undue weight to the concern that a trial might generate unrelated civil actions that could conceivably hamper the President in conducting the duties of his office. If and when that should occur, the court's discretion would permit it to manage those actions in such fashion (including deferral of trial) that interference with the President's duties would not occur. But no such impingement upon the President's conduct of his office was shown here." *Id.* at 708.
3. Republican Party of Minnesota v. White, 122 S. Ct. 2528 (2002).
4. David G. Savage, *Running Stance*, A.B.A. J., Aug. 2002, at 32.
5. Diarmuid F. O'Scannlain, *Chair's Column*, JUDICIAL DIV. RECORD (ABA), Summer 2002, at 2.
6. 122 S. Ct. at 2542.
7. *Id.* at 2541, n. 13. Justice Scalia erred in excluding Idaho, which at the end of 2001 adopted the "pledge or promise" clause.

Jan Baran overstates, and at once corrects his overstatement, that "[c]andidates cannot be gagged by Canon 5." Jan Witold Baran, *Judicial Candidate Speech After Republican Party of Minnesota v. White*, COURT REVIEW, Spring 2002, at 12. Two sentences later, he rightly notes that only "the version of Canon 5 used by the Minnesota courts" was at issue here, and only one part of Minnesota's canon. *Id.*

Baran misstates how Minnesota had treated the "announce clause." He says that "the clause can be read—and was read by the Minnesota disciplinary committee—to prohibit virtually any commentary about legal or political issues." But Justice Scalia

wrote this:

The Lawyers Board dismissed the complaint [against plaintiff Wersal]; with regard to the charges that his campaign materials violated the announce clause, it expressed doubt whether the clause could constitutionally be enforced. Nonetheless, fearing that further ethical complaints would jeopardize his ability to practice law, Wersal withdrew from the election. In 1998, Wersal ran again for the same office. Early in that race, he sought an advisory opinion from the Lawyers Board with regard to whether it planned to enforce the announce clause. The Lawyers Board responded equivocally, stating that, although it had significant doubts about the constitutionality of the provision, it was unable to answer his question because he had not submitted a list of the announcements he wished to make.

122 S. Ct. at 2531-32.

And as Justice Stevens noted, "no candidate has yet been sanctioned for violating the announce clause." *Id.* at 2547, n.2 (emphasis added). In fact, we cannot find any case in any state (in the last decade or so) involving a finding of violation of the "announce clause," except for *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953 (Ky. 1991), in which the clause was held unconstitutional. For that fact, I am indebted to Cynthia Gray of the American Judicature Society, an outstanding authority on the canons.

But put aside Baran's tiny errors. Never has anyone so well captured the whole matter as he does, saying: "[J]udges must judge. They cannot prejudge." Baran, *supra*, at 13.

8. 122 S. Ct. at 2532.
9. National Center for State Courts, Ad Hoc Committee on Judicial

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.¹⁰

Arguably the most significant point about the majority opinion is that, whether or not they “obscur[ed]” the distinction between judicial and nonjudicial elections, they did not ignore it. They did not adopt what Justice Ginsburg (also writing for four dissenters) called “the unilocular, ‘an election is an election,’ approach.”¹¹ 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.”¹²

The majority’s reply 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] arguments 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.¹³

Of course, one cannot 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, joining the majority but also writing alone, views judicial elections as like (or not materially different from) nonjudicial elections, and so he 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. First, he said that states “may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.”¹⁴ In the most significant step since *White*—a step rich with promise for the overwhelming majority of candidates who want to campaign judiciously—the Missouri Supreme Court has taken up the justice’s invitation, as noted below. Second, Kennedy also encouraged what is often called “more speech to meet speech”:

The legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment Freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence. Indeed, if democracy is to fulfill its promise, they must do so.¹⁵

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.”¹⁶

Justice O’Connor, who also joined the majority and wrote 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 continues or not). The opposition to the change was led by all the women’s and minorities’ 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!”¹⁷

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 surviving provisions that regulate judicial campaign 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 17 states that have chosen nonpartisan elections for all or some of their judges can preserve the nonpartisanship they prefer. Minnesota, like most or all these states, bans party endorsements—indeed, the plaintiff who brought the *White* case was joined by the Republican Party of Minnesota because of that 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

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Election Law, July 12, 2002 memo analyzing the case (on file with the author).

10. 122 S. Ct. at 2546.

11. 122 S. Ct. at 2550, 2551.

12. *Id.* at 2550-51 (quoting Judge Beam, dissenting, 247 F.3d 854, 885, 897 (8th Cir. 2001)). Judge Reinhardt has also taken the “unilocular” approach. See *Geary v. Renne*, 911 F.2d 280, 286, 291-96 (9th Cir. 1990) (concurring opinion). For other examples, see Roy A. Schotland, *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”).

13. 122 S. Ct. at 2539.

14. *Id.* at 2544, 2545.

15. *Id.* at 2545.

16. *Id.* at 2546.

17. For the Florida and Ohio developments, see Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 M.S.U.-D.C.L. L. REV. 849, 886-90.

party affiliation.¹⁸ Will that limitation stand up? Last, all but four of the 39 states bar judicial candidates from personally soliciting campaign funds; most of these states also limit the time period for fund-raising.¹⁹ Will these limitations survive?

One other prediction: *White* will figure, perhaps substantially, in the next U.S. Senate confirmation hearing of any nominee for a federal judgeship who holds back in answering senators' questions. Justice Ginsburg drew upon 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 . . ." ²⁰ Scalia answers that the majority "do [not] assert that candidates for judicial office should be *compelled* to announce their views . . ." ²¹ Stay posted!

Justice O'Connor's call to change the current scene must be realistic about the scene. Of the nation's 10,000 state judges (appellate and general-jurisdiction trial), 87% face elections of some type: 53% of appellate judges face contestable elections, partisan or nonpartisan, and another 34% face retention elec-

tions. Of our trial judges, 77% face contestable elections, only 10% face retention elections. That's after a century of major effort by the bar and good-government groups for adoption of the "merit" retention system. At that rate of change, we need 160 years to end contestable elections for appellate judges and 770 years for trial judges. "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 for the last generation legislators and voters have rejected "merit" systems, perhaps we are entering a new era, perhaps recent changes in judicial elections will increase voters' willingness to change 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 10 of the 20 states with high-court elections; nationally, high-court candidates raised 61% more than ever before. And outside groups like the Chamber of Commerce spent about \$16 million in just the five liveliest states: Alabama, Illinois, Michigan, Mississippi, and Ohio. The campaigning in 2000, "nastier and noisier," was more like nonjudicial campaigns than ever before.²²

The states that chose judicial elections did *not* want them to be like other elections. Elections seemed less problematic than appointments, which seemed elitist or mere political patronage or both. But those states accompanied judicial elections with constitutional provisions unthinkable for other elective officials—like uniquely long terms. The constitutions of the 39 states in which judges face elections 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 39 (except Nebraska), judges' terms are longer than those of any other elective official. In 37 of these states, only judges are subject to both impeachment and special disciplinary process. In 33, only judges are required to have training or experience or both (with the minor

SELECTION AND RETENTION SYSTEMS FOR STATE COURT JUDGES	
APPELLATE COURTS	
Total appellate judges: 1,243	
Total that stand for some form of election: 1,084 (87%)	
Total that stand for contestable election: 659 (53%)	
INITIAL TERM	SUBSEQUENT TERMS
Appointment: 582 (47%)	Appointment: 133 (11%)
Partisan Election: 495 (40%)	Partisan Election: 400 (32%)
Nonpartisan Election: 166 (13%)	Nonpartisan Election: 166 (13%)
	Retention Election: 518 (43%)
GENERAL JURISDICTION TRIAL COURTS	
Total trial judges: 8,489	
Total that stand for some form of election: 7,378 (87%)	
Total that stand for contestable election: 6,650 (77%)	
INITIAL TERM	SUBSEQUENT TERMS
Appointment: 2,061 (24%)	Appointment: 1,013 (12%)
Partisan Election: 3,669 (43%)	Partisan Election: 2,360 (28%)
Nonpartisan Election: 2,759 (33%)	Nonpartisan Election: 2,891 (35%)
	Retention Election: 2,127 (25%)

18. 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, 278, 759 P.2d 392, 394 (1988) (censuring the judge for that and other statements).

19. ABA TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, REPORT, PART 2 (1998), at n. 73 and at 47-49. The former limitation was sustained in the lower courts here and not appealed. 247 F.3d 854, 883-84 (8th Cir. 2001). The latter limitation was stricken in

Zeller v. The Florida Bar, 909 F. Supp. 1518 (N.D. Fla. 1995), severely criticized in the Report, n. 83.

20. 122 S. Ct. at 2539, n. 11.

21. *Id.* (emphasis in original)

22. See Schotland, *Financing Judicial Elections*, *supra* note 17, which was cited by Justice O'Connor for this point. 122 S. Ct. at 2541, 2542. She also cited the important 1998 ABA Report (Part 2) of the Task Force on Lawyers' Political Contributions, which led to the Model Code of Judicial Conduct's 1999 amendments with respect to campaign contributions. For the earlier events, see Report at 13-18.

exception that in ten of those, the attorney general is subject to similar requirements). In 23, only judges are subject to mandatory age retirement. In 21, only judicial nominations go through nominating commissions; in six states, this applies even to interim appointments. Last, in 18 states, only judges cannot run for a nonjudicial office without first resigning.²³

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., 14 years in New York, 12 in California), in 15 states even the high courts have only six-year terms; in 25 states, trial judges have six-year terms and in another nine states, only four years.²⁴ Can one avoid being deeply troubled by what short terms may mean for nonroutine cases at all levels, and at the trial level, for example, for sentencing and rulings on bail?

Of appellate judges who face elections, 38.5% have terms of 10 to 15 years and another 60.6% have six-to-eight-year terms. Of trial judges who face elections, 13% have terms of 10 to 15 years, and another 67.6% 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.”²⁵ The 39 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 others acutely undermines the judiciaries’ independent role under their constitutions. These states’ 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.²⁶

Five justices have decided that judicial election campaigns cannot be kept as different as the states want. The Pandora’s Box that ABA president Hirshon predicts, will be opened by the small minority of judicial candidates who simply want to win—but given the dynamics of campaigns, those few candidates may fuel 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 to open-minded judges. Further, as judicial campaigns become more like other campaigns, more judges will become more like politicians—and more people will so view judges generally. Do we want decisions on, say, the First Amendment (and other constitutional protections) made by people who are more like legislators . . . or different from legislators? 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. 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 their provisions will no longer be enforced and which remain in full force and effect, they provided (to finish their less-than-two-page order) as follows:

Recusal [which there 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.²⁷

That 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 if I go into that then I’ll be unable to sit in just the cases you care about most.” In addition, it enables any candidate whose opponent has stretched the envelope (with some variant of “I’ll hang them all,” or “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, because he’ll be disqualified from the cases you care about.”

The most important single step to meet the challenges inherent in judicial elections was urged in May by Ohio Chief Justice Thomas J. Moyer—lengthen judicial terms to eight or 10 years. That single step will not only reduce the problems inherent in judicial elections but also go far to enlarge and enrich the pool of people willing to seek to serve as judges, and to induce good judges to continue serving. After all, improving the caliber of who serves as judges is the whole goal of all judicial selection reform.



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23. See amicus brief submitted in *White* on behalf of the Conference of Chief Justices, at 6-7.

24. See Roy A. Schotland, *Comment*, 61 LAW & CONTEMP. PROBS. 149,154-55 (1998).

25. *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991).

26. *Chisom v. Roemer*, 501 U.S. 380, 404, 410-11 (1991) (Scalia, J., dissenting) (emphases in original).

27. *In re Enforcement of Rule 2.03, Canon 5.B.(1)(c)* (July 18, 2002). More than half of Missouri’s trial judges run in partisan elections.