

“ANNOUNCEMENT” BY FEDERAL JUDICIAL NOMINEES

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INTRODUCTION

The Supreme Court’s decision in *Republican Party of Minnesota v. White*¹ has understandably caused consternation among the American judiciary and legal profession. The principal concern aroused, apart from the holding itself, is whether restrictions may validly be imposed on judges and judicial candidates on forms of speech other than speeches in judicial election campaigns. Speeches by the candidates in judicial election campaigns was the issue immediately involved in *White* and I will have a few observations regarding that issue. However, my principal inquiry proceeds as follows:

- If judicial candidates in selection systems based on popular elections can be permitted to “announce” their views on pending or impending legal issues, as a matter of Constitutional law it would seem that the same right is enjoyed by judicial candidates in selection systems based on appointment.

- Since judicial candidates in selection systems based on popular elections are permitted to announce their views on pending or impending legal issues, as a practical matter they will often be obliged to do so under pressure of the electoral contests.

- Since judicial candidates in appointive systems will be permitted to state their views on such issues, no legal rules can prevent interested agencies in systems using an appointive process from demanding that candidates provide such statements. For example, the President, prior to sending a nomination to the Senate, could demand from a prospective nominee a statement of views on abortion or affirmative action or the scope of the Eleventh Amendment. Presumably a statement in writing.

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1. 536 U.S. 765 (2002).

• If the President could require such a statement, the Senate Judiciary Committee and the Senate itself would seem equally empowered to do so. The American Bar Association could, although I hope it will not, assert that such a statement is a necessary condition for obtaining a positive review by its Judicial Qualifications Committee.

There is thus some possibility that eliciting such statements will become a norm in the federal judicial appointive process.

Part of my analysis is that elective and appointive systems are not as fundamentally different as the *White* decision appeared to assume.

I. THE HOLDING IN *WHITE*

The question in *Republican Party of Minnesota v. White* was the validity under the First Amendment of a Minnesota rule that a candidate for judicial office could not “announce his or her views on disputed legal or political issues.”² The Court’s decision was stated chiefly through quotations from earlier decisions:

“[D]ebate on the qualifications of candidates” is “at the core of our electoral process and of the First Amendment freedoms *Eu*, 489 U.S., at 222-23 (internal quotation marks omitted). “The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.” *Wood v. Georgia*, 370 U.S. 375, 395 (1962). . . . We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.³

The precedents from which these quotations were taken concerned election to offices other than in the judiciary.⁴ The court said that made no difference; an election is an election and the right of free speech applies equally in all such political processes.⁵

In pronouncing the crucial point that judicial elections are not different from other elections, the Court made much of what it considered to be history.⁶ It noted that restrictions on speech in judicial elections made their appearance only in the twentieth century, whereas

2. *Id.* at 768 (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2002)).

3. *Id.* at 781-82.

4. *See generally* *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989) (concerning members of state and county central committees); *Wood v. Georgia*, 370 U.S. 375 (1962) (concerning a sheriff up for reelection).

5. *See White*, 536 U.S. at 783-84.

6. *See id.* at 785.

selection of judges by popular election went way back to the beginning of the nineteenth century.⁷ The Court said:

By the time of the Civil War, the great majority of States elected their judges. We know of no restrictions upon statements that could be made by judicial candidates (including judges) throughout the 19th and the first quarter of the 20th century. Indeed, judicial elections were generally partisan during this period⁸

The Court cited respectable scholarly and professional authority for these propositions of legal history. So far, so good.

The Court then went on to say:

Thus, not only were judicial candidates (including judges) discussing disputed legal and political issues on the campaign trail, but they were touting party affiliations and angling for party nominations all the while.⁹

The Court's opinion offers no support for this proposition, which poses an issue to which I return below.

In any event, the holding in *White* addresses speech in judicial election campaigns.¹⁰ It does not address other judicial speech. For example, it does not address whether the prohibitions on *ex parte* communication still validly restrain a judge from listening to such communications, or validly prohibit a lawyer from addressing them to a judge outside of permissible forensic settings. It does not address whether a judge may commit reversible error, or incur other consequences, for making intemperate remarks from on or off the bench. It also does not address whether the judge may be subject to recusal on account of statements he has made during an election campaign or in other settings outside of court. The decision does suggest that a judicial candidate may frequent the company of partisan politicians, the Court having referred to this as "angling for party nominations."¹¹

The decision also does not address various collateral issues associated with judicial elections, particularly fund-raising. The lower courts, probably eventually the Supreme Court itself, will have to work through the intersection of the *White* decision, about the First

7. *See id.*

8. *Id.* (citations omitted).

9. *Id.* at 786.

10. *See id.* at 789.

11. *Id.* at 786.

Amendment rights of judges, with *Buckley v. Valeo*,¹² about the First Amendment rights of others.

Nor does the decision address the First Amendment as it might apply to court officers other than judges. If judges have a Constitutional right to tout themselves, the same right would seem to extend to their bailiffs and clerks.

Further out, but perhaps more serious, is application of the concept of free speech to lawyers. Is the rule of confidentiality, requiring a lawyer to maintain secrecy of client intimacies, possibly within the scope of the *White* decision? For example, could a lawyer, on the basis of the First Amendment, defend against a malpractice claim that is predicated on the lawyer's wrongful disclosure of client confidences? In other words, does a lawyer have a constitutional right to disclose a client's secrets? I certainly think not and hope not. However, there have already been cases where lawyers have invoked the right of free speech as a limitation on rules governing their conduct.¹³ Given the decision in *White*, there certainly will be more cases in which lawyers invoke First Amendment arguments.

In all such situations, the rejoinder will be that the state has a proper interest in imposing prior restraints against violation of what traditionally has been regarded as the lawyer's highest duty. A similar state interest—protecting judicial impartiality—was invoked in *White*, but without success.¹⁴ I wager lawyers who try to claim a First Amendment right to blab on a client outside the narrow channels now permitted by the ethics rules will lose.¹⁵ However, it is not easy to state the metric by which a lawyer can be restrained from making utterances about a case where essentially the same utterances would be Constitutionally protected if made by a judge. A whole new field of controversy has been opened in the law governing lawyers.

And of course the logic of the *White* decision has potential application in the law of trade secrets, confidentiality agreements, agreements not to compete, and still other fields.

But to return to speech by judicial candidates.

12. 424 U.S. 1, 39 (1976) (concerning the constitutional issues surrounding the Federal Election Campaign Act of 1971, which restricted the amount of money any one individual could expend towards the campaign of a candidate for government office).

13. See, e.g., *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1058 (1991).

14. See *White*, 536 U.S. at 777.

15. See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. (1999).

II. OLD-STYLE JUDICIAL ELECTIONS

The Court in *White* evidently assumed that in judicial elections, as they were adopted in the nineteenth century, the substantive views of the candidates were routinely vented in the campaigns. The Court also evidently assumed that the venting was done by the candidates themselves. (It should be kept in mind that the Minnesota rule did not prohibit discussion of a judicial candidate's views; the rule prohibited the *candidates* themselves from stating their views.) However, the Court cited no authority for its proposition that "judicial candidates [in nineteenth century elections were] discussing disputed legal and political issues on the campaign trail. . . ."¹⁶ I have not had opportunity to do proper research on these propositions, but I have serious doubts about the accuracy of this general proposition.

In the first place, the term "election" is generic. The *Columbia Encyclopedia*,¹⁷ for example, refers to elections for the office of Pope of the Roman Catholic Church, in which the electors are the college of Cardinals. No election speeches there. It refers also to election of the Emperor of the Holy Roman Empire, in which the electors were a handful of German heads of state. No election speeches there. There are all kinds of corporate and local government elections in which election speeches are, or traditionally were, considered *outré*.

Moreover, in elections for political office through some part of the nineteenth century, there was a strong tradition, though one not universally observed, that candidates should not make speeches about themselves. It was thought unseemly for a candidate to tout himself, the thought perhaps also being that self-serving statements were inherently unreliable. That tradition still had force as late as 1896. William McKinley, the Republican candidate for President in that year, famously campaigned by sitting on the veranda of his Ohio homestead. The famous debates between Senator Douglas and candidate Lincoln are not an exception to the tradition. The debates did not directly address an electorate, because senators in those days were elected by the state legislatures.

The original concept of popular election was that the electorate would gather in an informal convention to select the best person for the job, quite as school boards and corporate boards elect a chairperson. In a typical nineteenth century election, the men (women could not vote)

16. *White*, 536 U.S. at 786.

17. See generally COLUMBIA ENCYCLOPEDIA (Paul Lagasse, ed. 2000).

gathered at the appointed place to exchange gossip, toasts and boasts, and political opinions. Decision was often by consensus, but in any event the candidates generally were supposed to remain modestly at home. These local conventions are the antecedent of the modern national party convention. The tradition that candidates should be reticent has left a modern residue in the norm that the successful candidate for President appears before the convention only after the choice has been made.

The reform, that selection of judges be by popular election, was adopted in this context. The idea was to get selection of judges out of smoke-filled rooms, not that judgeships should necessarily be determined by contested elections. Popular opinion differentiates between judges and other public officials. According to popular opinion, judges are supposed to be apolitical, just as President Bush has said.¹⁸ On that premise, popular election does not equate to election campaign, let alone to campaigns in which the candidates themselves are expected or permitted to speak their views. In most states and communities today, the old tradition holds concerning judicial elections. Judicial candidates are not supposed to campaign, but to win or lose according to reputation. Candidates are selected by various procedures and the selection is then put out for popular ratification. In many rural counties, the nominating committee consists of the local bar, who select a suitable successor for the retiring incumbent.

A serious problem in the modern urbanized context is that judicial candidates are unknown to the electorate, and typically remain that way.¹⁹ Active campaigns for judicial office have been exceptional and the candidates have typically remained more or less unknown. All this may be changing, particularly in election of appellate judges. The "interest groups" are hard at work and many judicial elections are now politicized.²⁰ But that development does not dissipate the public interest in restricting judicial speech in judicial elections. On the contrary, keeping judicial elections more judicial becomes a stronger community interest.

18. See, e.g., JOANNE DOROSHOW & STEPHEN C. HALPERN, CENTER FOR JUSTICE AND DEMOCRACY, *ATTACKING THE BENCH*, at <http://www.centerjd.org/press/opinions/001114.htm> (2000).

19. See, e.g., Delmar Karlen & Joseph M. Miller, *A New Judicial Article for New York*, at http://www.courts.state.ny.us/history/electbook/new_jud_art/pg4.htm (last visited April 21, 2004) (stating that "[j]udicial offices are of such 'low visibility' that people are scarcely aware of them and do not know for whom they are voting...").

20. See RESEARCH AND POLICY COMM., COMM. FOR ECONOMIC DEVELOPMENT, JUSTICE FOR HIRE: IMPROVING JUDICIAL SELECTION 2 (2002), available at http://www.ced.org/docs/report/report_judicial.pdf.

The opinion in *White* made much of the fact that restrictions on judicial speech are a twentieth century invention.²¹ The opinion further suggested that the restrictions were foisted on the public by the American Bar Association.²² However, there is another understanding that takes equal or better account of the historical sequence, which is as follows:

Prior to the twentieth century, candidates for judicial office, even more so than candidates for other offices, did not make campaign speeches. That was and still is the popular norm, consistent with the concept that judges should be apolitical.²³ As the country became more urbanized and impersonal, around the turn of the twentieth century, there was increasing incentive for judicial candidates to campaign. The incentive was especially strong for opponents of incumbents, because incumbents typically tried to be apolitical. The imposition of speech restrictions aimed to confirm the traditional understanding that judgeships were apolitical. Because the restrictions expressed a traditional and widely shared conception of judicial office, they were accepted by the political branches and by the electorate.

On this basis, it is the Supreme Court that has embraced a supposition that judgeships—particularly appellate judgeships—are political like other elective offices. Perhaps the skepticism expressed here about the historical foundation of the Court's opinion will encourage other courts, and the Supreme Court itself, to limit the scope of the *White* decision.

III. ANNOUNCEMENTS BY CANDIDATES FOR APPOINTIVE OFFICE

Nevertheless, *White* makes the right of free political speech available to candidates for appointive judicial office.²⁴ That includes candidates for federal judicial office and particularly candidates for the Supreme Court.

The underlying problem, of course, is that judicial office is political in some undeniable sense. That is true specifically of federal judicial office and particularly the office of Justice of the Supreme Court.

21. See *White*, 536 U.S. at 785 (2002) ("We know of no restrictions upon statements that could be made by judicial candidates (including judges) throughout the 19th and the first quarter of the 20th century.").

22. See *id.* at 786.

23. See, e.g., DOROSHOW & HALPERN, *supra* note 18.

24. See generally *White*, 536 U.S. 765 (finding a free speech right for judicial candidates running for election as well as for appointed judges).

Thus, *Brown v. Board of Education*,²⁵ *Roe v. Wade*²⁶ and the recent decision on “gay rights”²⁷ are political in some sense. The same is true, of course, of *Marbury v. Madison*,²⁸ the *Dred Scott* decision,²⁹ the “Switch in Time” decisions of the Court under Chief Justice Hughes³⁰ and the anti-regulation decisions of the “Old Court” that preceded the so-called switch.³¹ The same is true of many lower court decisions, for example, the acquittal of O.J.³² or the Louima verdicts.³³ More fundamentally, all judicial decisions involve implicitly the exercise of the state’s coercive authority, which is political by definition.

Of course, in some sense judicial decisions are also *not* political, or seek and at least pretend to be such. That was true, perhaps most notably, of *Bush v. Gore*.³⁴ But that is also true of the *Brown* decision and the decisions in *Roe v. Wade* and the gay rights decision. I recall in law school the suggestion by Professor Julius Goebel that the evolution of the common law in the twelfth and thirteenth centuries was not only legal but also political. It has since seemed to me that if judicial decisions in the twelfth century were political in some sense, they must still be so. In the years since my graduation I have had little occasion to think otherwise. One can even find analysts outside the United States that are now willing to concede as much.

Accordingly, to me there is a boring and empty character to debate’s in the academy, the courts and the media over whether a judicial decision and the judicial process are or are not political in some sense. Of course they are. But judicial decisions and the judicial process also are *not* political in some sense. This is true even of decisions that, in the eyes of some observers, are “obviously” political. In my opinion, *Bush v. Gore* was legal and judicial at least in some sense. Whatever else can be said about the issue in that case, it was no solution to accept a further vote canvass in some Florida counties but not others, nor in Florida but

25. 347 U.S. 483 (1954).

26. 410 U.S. 113 (1973).

27. *Lawrence v. Texas*, 539 U.S. 558 (2003).

28. 5 U.S. 137 (1803).

29. 60 U.S. 393 (1856).

30. *See, e.g., W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

31. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

32. *See Phoebe C. Ellsworth, Jury Reform at the End of the Century: Real Agreement, Real Changes*, 32 U. MICH. J.L. REFORM 213, 221 (1998) (noting the effect on verdicts from feelings regarding race).

33. *United States v. Volpe*, 78 F. Supp. 2d 76 (E.D.N.Y. 1999); *United States v. Schwarz*, 283 F.3d 76 (2d Cir. 2002).

34. 531 U.S. 98 (2000).

not other States. By exclusion, finality had to be resolved with the returns that were available.

The problem of differentiation between the political and the judicial is two-fold. On one hand, there are distinctions to be made between decision-making in the judiciary and decision-making in the political branches of Congress and the Executive. On the other hand, the distinctions cannot be drawn clearly and cleanly. Indeed, in my opinion some decisions by the courts dealing with fundamental political issues are justifiable precisely because the issues were so fundamental and therefore so necessarily political. I think *Brown* certainly was in that category, and so also was the steel seizure case in the Korean War,³⁵ and perhaps also the recent gay rights decision in *Lawrence v. Texas*.

In the appointment of a Supreme Court justice, all these definitional, political, and Constitutional concerns are on the table, or at least under the table. So also do they exist, to a lesser degree, in the appointment of other federal judges and the selection of judges in other appointive systems. Every participant in the appointive process—the President and his advisers, the Senators and theirs—thinks about these concerns, and many other people do so as well. And so also does any nominee or candidate who has the background and qualifications to be seriously considered. I have never met an American judge who does not think about politics some of the time.

Heretofore, nominees for judicial office have been able to refuse to answer questions about their views on issues likely to come before the court. Until about a few generations ago, it was generally assumed to be improper to ask a nominee direct questions on such issues. Questions therefore were not asked and refusals or deflections of answers were unnecessary. The confirmation hearings of Thurgood Marshall were almost a charade in this respect. Everyone knew what his views would be, or at least his approach, on certain issues concerning race. Many Senators were concerned that he would be too extreme. But no one asked him. Perhaps that was only because the nomination had been presented by Lyndon Johnson.³⁶

However, in the case of Robert Bork things worked out differently and badly for Bob, who is an admired friend. Bork had indeed "announced" his views on a number of subjects, some in decisions while

35. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

36. See ROBERT A. CARO, *MASTER OF THE SENATE* VOL. 2 xxii (1982).

on the D.C. Circuit and others in less constrained circumstances.³⁷ These announcements were turned against him,³⁸ in respects that I consider unfair. In the case of Justice Thomas, the candidate turned the issue on its head, successfully denouncing as racist questions what then and now could properly be asked of a judicial candidate. Perhaps the after-shocks of the Bork and Thomas hearings were a caution to those interested in the political dimensions of judicial selection. In any event, the Clinton nominees, Justices Ginsburg and Breyer, got through under the old rules.

CONCLUSION

Nominees for federal judicial office now have a right to speak their views on issues likely to come before the Court.³⁹ But they also have a right to refuse to do so.⁴⁰ No doubt many of them refuse, relying on their records as a sufficient basis for evaluating their fitness for office. Most of them probably will be successful in this approach. However, they will no longer be able to say they cannot answer, only that they will not answer.

An approach I might counsel, at least for some nominees, is that there be a refusal, based on the ground that it is improper for a nominee to judicial office to answer such questions, and that the ground be justified by reference to American tradition. This would certainly not be unlawful under the *White* decision, nor would it be unethical.⁴¹

Rather, refusal would simply be on the basis of Constitutional propriety. This is, or is similar to, a normative basis suggested by Justice Rehnquist in his opinion in *Laird v. Tatum*.⁴² The refusal would be on much the same basis as Mr. Greenspan would decline to answer questions addressed to future decisions about the interest rate, or Secretary Powell about his discussions with the Israelis and Palestinians.

37. See, e.g., *Dronenburg v. Zech*, 741 F.2d 1388, 1398 (D.C. Cir. 1984) (expressing his belief that homosexual conduct will almost certainly have negative effects if practiced within the military, regardless of an absence of sociological data on the subject); Joseph R. Tybor, *In the Shadow of Bork, Kennedy Thrives Despite Sketchy Testimony*, CHI. TRIB., Dec. 20, 1987, at C4 (stating that Bork openly condemned Supreme Court decisions "expanding individual rights over the last half-century, including recognition of marital rights, decisions on abortion and some that struck down forms of racial and sexual discrimination").

38. See Susan Milligan, *Pickering Rejection Sets off Nominee War*, BOSTON GLOBE, Mar. 16, 2002, at A1 (noting that Bork's nomination was defeated due to "complaints about his conservative ideology").

39. See *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002).

40. See *id.* at 783 n.11.

41. See *id.* at 788.

42. Compare *Laird v. Tatum*, 409 U.S. 824 (1972), with *White*, 536 U.S. at 783 n.11.

Answering such questions would be profoundly impolitic and therefore improper.

It is sobering, however, to contemplate hearings on a nominee whose views, from and off the bench, were as strongly expressed as those of Justice Scalia. Some might think there would be a contradiction between the tenor of those views and a norm of prudential reserve.