

HUGH JONES LECTURE
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JUDICIAL INDEPENDENCE: IS IT PRESERVED OR IMPAIRED
BY THE ELECTION OF JUDGES?

*Carmen Beauchamp Ciparick**

Thank you so very much Judge Lippman, for that remarkable, but highly exaggerated introduction. For the last year Judge Lippman has had the most unfortunate task of introducing me at various venues. And he never disappoints. I've said it before and I will repeat it here that you have not been introduced if you haven't been introduced by Chief Judge Jonathan Lippman. And thank you to my wonderful colleagues from the Court of Appeals who are all here tonight. You know many changes have occurred at the Court since last year's Hugh Jones lecture. Our beloved Judge Theodore Jones passed away just a year ago.¹ I retired from the court in December.² And we welcomed Judge Jenny Rivera and Judge Sheila Abdus-Salaam to the court earlier this year.³ Welcome ladies. We again have a majority of women on the court. Thank you also to Dean Penny Andrews and Albany Law School for once again hosting this event and special thanks to the Fund for Modern Courts, for being in the forefront of court reform for over six decades, and for contributing to the preservation of judicial

* Carmen Beauchamp Ciparick is the former Senior Associate Judge of the New York State Court of Appeals. She spent 19 years on New York State's highest court, and 34 years on the bench. Carmen was appointed on December 1, 1993 by Governor Mario M. Cuomo. She was re-appointed by Governor Eliot Spitzer in November 2007. She received her JD from St. John's University School of Law and her BA from Hunter College. She is currently Of Counsel at Greenberg Traurig, LLP, where she is co-chair of the national appellate practice group. In 2014, she was appointed by Mayor Bill de Blasio to serve as Chair of the Mayor's Advisory Committee on the Judiciary.

¹ Joel Stashenko & John Caher, Colleagues, Friends Remember Jones As 'Thoughtful,' 'Temperate,' 'Judicious', N.Y.L.J., Nov. 7, 2012, at 1, col. 3.

² Joel Stashenko, An Unassuming Judge Leaves Her Mark on N.Y.'s High Court, N.Y.L.J., Dec. 26, 2012, at 1, col. 3.

³ John Caher, First Department Justice Tapped for Top Bench, N.Y.L.J., Apr. 8, 2013, at 1, col. 3.

independence—my subject today—by its efforts that include merit selection of judges, campaign finance reform, and accountability of judges. And thank you Milton Williams, Jr. and others for your support in our attempt to raise the retirement age of judges. It was not to be—this time. You have asked me to continue the tradition of relevant and important lectures in honor of our esteemed former colleague at the Court of Appeals, the Honorable Judge Hugh Jones. Thank you for this wonderful opportunity to address you.

It is somewhat difficult to follow Chief Judge Judith Kaye, last year's Hugh Jones lecturer, who regaled us with stories of her personal interactions with Judge Jones. I have no such stories as Judge Jones had left the Court before I came on, but I do remember, twenty plus years ago, when I started my quest for a seat on the New York State Court of Appeals, that Judge Hugh Jones, then a retired member of the court, chaired the Commission on Judicial Nomination, before which I appeared three times, and he was always so very kind and supportive of my candidacy. He was familiar with my work as a trial judge, as he had had the opportunity on many occasions to review my decisions on appeal. In preparing for tonight's remarks I had occasion to re-read Judge Jones' *Cogitations on Judicial Decision-Making*,⁴ and I hope that my judicial decision-making spanning over thirty-four years of judicial service, fifteen years as a trial judge, and nineteen as an appellate judge, in some small measure would have met Judge Jones' high standards.

As I indicated earlier my topic for tonight, one that I have been passionate about my whole professional life is "judicial independence." I start with the proposition that when impartial judges are free from external pressures and conflicts so that they can decide cases fairly and impartially, in accord with the applicable facts and the law, they are functioning within a system of judicial independence. But, unfortunately, this is not always the case.

Judges themselves can impair the independence of the judiciary by failing to conform to high standards of conduct. And we, as concerned citizens, should strive to remove the influences on judges that conflict with their using their best judgment in applying the

⁴ See generally Hugh R. Jones, Assoc. Judge, N.Y. State Court of Appeals, Benjamin N. Cardozo Lecture at the Association of the Bar of the City of New York: *Cogitations on Appellate Decision-Making* (Nov. 28, 1979), available at http://www.nycourts.gov/history/legal-history-new-york/documents/History_Jones-Appellate-Decision-Making.pdf (setting out a standard of expectations amongst decision makers).

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law fairly. A judge who worries that a decision on the merits may impede, even end, his or her judicial career is on the brink of acting unethically and losing judicial independence. Seeking judicial office presents similar risks. A judge who suggests to the electorate, or the appointing authority, how he or she will decide cases, on issues that concern the public, impairs judicial independence, not only for that judge, but also for the judiciary in general. And a judge, who makes a decision that is not on the merits, but is intended to cater to a perception of what the public wants, violates his or her oath of office.

I have heard issues raised concerning judicial independence throughout my career. During my early career, judges complained privately about the “meddling” of court administrators and how they interfered with judges’ “independence.”

When the Commission on Judicial Conduct was first established, judges were worried that they would be investigated for making unpopular decisions, and that the Commission would act as an appellate court with disciplinary powers. Judges have complained, and continue to complain, that the Commission impairs their independence, but in many ways the Commission protects and enhances their independence and the independence of the judiciary generally. Significantly, despite the complaining, there has been absolutely no effort to support a case against the Commission from the public record of over 700 determinations of public discipline and 93 reviews by the Court of Appeals.⁵

My disclaimer here is that I was a Commission member for eight years (1985 through 1993), having been appointed by Governor Mario Cuomo.⁶ During this time I participated in decisions to investigate and discipline judges as well as to dismiss many unfounded complaints against judges. From the very beginning, the Commission members received support from a clerk who was totally independent and who did not participate in investigations or

⁵ See N.Y. STATE COMM’N ON JUDICIAL CONDUCT, INDEX OF CASE CITATIONS AND RECORDS OF THE NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT FOR MATTERS IN WHICH PUBLIC DISPOSITIONS HAVE BEEN RENDERED (2014) [hereinafter INDEX OF CASE CITATIONS], available at <http://www.cjc.ny.gov/Determinations/DISCIPLINE.INDEX.2014-01-06.pdf>; “Appealed” Decisions, N.Y. STATE COMM’N ON JUDICIAL CONDUCT, http://www.cjc.ny.gov/appealed_decisions.htm (last revised Dec. 11, 2013).

⁶ Malvina Nathanson, *Retirement Interview with Court of Appeals Judge Carmen Ciparick*, LEAVEWORTHY: NEWSL. N.Y.S.B.A. COMMITTEE ON CTS. OF APP. JURISDICTION (N.Y. State Bar Ass’n), Spring 2013, at 2, 3, available at <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=946>.

presentation of evidence against the judges. The Commission also early on adopted fair rules that have withstood careful scrutiny over the past thirty-eight years.

As a judge of the Court of Appeals for nineteen years (1994 through 2012), I participated in deciding thirty-six cases of judicial discipline that were reviewed by the court.⁷ In all thirty-six, incidentally, the court found judicial misconduct, and in thirty-two of those cases, the court accepted the precise disciplinary sanction determined by the Commission.⁸ In one case, the court remanded for further proceedings, and in three cases, the court modified the penalty imposed.⁹

On previous occasions I have discussed the question of whether judicial accountability is consistent with judicial independence, and if it is, whether the New York State judicial disciplinary system accomplishes the goals as set forth in our state constitution. I have concluded that it does and that in fact judicial independence is enhanced by an effective system of judicial discipline, which we in New York are so very fortunate to enjoy. I refer you to my article in your materials on this subject.¹⁰ Tonight, however, I would like to focus on a subset of this topic as it relates to a specific aspect of preserving the independence of the judiciary: the Commission's role in the enforcement of rules that limit campaign conduct during judicial elections.

We've just gone through what has been, in many parts of the state, highly contested judicial elections including some difficult judicial races that resulted in the loss of some highly regarded and very competent trial and appellate judges.¹¹ The same thing happened last year.¹² But such is the system we have in our state and we are constrained to work within that system to ensure that judicial independence is not impaired in this process. To assist us we have the New York Rules Governing Judicial Conduct, which begin with the premise that "[a]n independent and honorable

⁷ "Appealed" Decisions, *supra* note 5.

⁸ *Id.*

⁹ *Id.*

¹⁰ Carmen Beauchamp Ciparick & Bradley T. King, *Judicial Independence: Is it Impaired or Bolstered by Judicial Accountability?*, 84 ST. JOHN'S L. REV. 1 (2010).

¹¹ See, e.g., N.Y. STATE BD. OF ELECTIONS, NYS BOARD OF ELECTIONS STATE SUPREME COURT ELECTION RETURNS (2013), available at <http://www.elections.ny.gov/NYSBOE/elections/2013/general/2013GeneralElection-JD.pdf> (detailing the judicial election returns for the various judicial districts).

¹² See, e.g., Joel Stashenko, Republican Judges Lose Seats in Democrat-Heavy Election, N.Y.L.J., Nov. 8, 2012, at 1, col. 4.

judiciary is indispensable to justice in our society.”¹³ To that end, rules as they relate to election conduct for all judicial candidates have been promulgated (the rules are included in your materials).¹⁴ Over the years, the Commission on Judicial Conduct has publicly disciplined eleven judges for violations of these rules pertaining to election conduct and at least fifteen others for improper political activity when judges were not running for judicial office.

It is interesting to note that the Supreme Court of the United States has weighed in on our method of selecting judges in New York. Specifically in *New York State Board of Elections v. Lopez Torres*,¹⁵ the Court upheld the constitutionality of our judicial convention process for nominating New York Supreme Court Justices for election,¹⁶ but in a concurring opinion Justice Kennedy wrote: “Even in flawed election systems there emerge brave and honorable judges who exemplify the law’s ideals. But it is unfair to them and to the concept of judicial independence if the State is indifferent to a selection process open to manipulation, criticism, and serious abuse.”¹⁷ New York, I maintain, is not indifferent and has attempted to curtail such abuses.

Former United States Supreme Court Justice Sandra Day O’Connor has also maintained that the election of judges impairs the independence of the judiciary.¹⁸ I agree with Justice O’Connor that there could be a better alternative in the selection of judges than elections. She has urged states to adopt a merit selection system.¹⁹ However, the standard definition of merit selection around the country incorporates a retention election after a year or two of the appointed judge’s term to give the voters an opportunity to say yes or no to a judge who has been appointed under merit selection.²⁰ The retention vote in other states has unfortunately allowed well-financed, special interest groups to defeat good judges

¹³ N.Y. COMP. CODES R. & REGS. tit. 22, § 100.1 (2014); *Matter of Restaino*, 890 N.E.2d 224, 231 (N.Y. 2008).

¹⁴ N.Y. COMP. CODES R. & REGS. tit. 22, § 100.5 (2014).

¹⁵ *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008).

¹⁶ *Id.* at 207–09.

¹⁷ *Id.* at 212–13 (Kennedy, J., concurring).

¹⁸ John Schwartz, *Effort Begun to Abolish the Election of Judges*, N.Y. TIMES, Dec. 24, 2009, at A12 (“A group of judges, political officials and lawyers, led by the retired Supreme Court Justice Sandra Day O’Connor, has begun a campaign to persuade states to choose judges on the basis of merit, rather than their ability to win an election.”).

¹⁹ *See id.*

²⁰ *E.g.*, IOWA CONST. art. V, § 17.

for either their decisions or their beliefs on “hot button” issues.²¹ So that brand of merit selection does not seem ideal either. We in New York partially moved toward a merit selection appointment system for judges of the Court of Appeals in 1977, as a result of a constitutional amendment,²² and without it, I am not sure that some of us, myself included, would have been able to serve on the court, as we could not have afforded the expense of a state-wide election. Certain municipalities also employ a modified merit selection system.²³ So in New York some judgeships are appointed, some elected, and so, as Justice Kennedy said in *Lopez Torres*, “the appropriate practical response is not to reject judicial elections outright but to find ways to use elections to select judges with the highest qualifications.”²⁴

There have been, in other states, politically-motivated attempts to defeat judges in campaigns because of their decisions.²⁵ Efforts have been made to gather support for recall elections in states that have such procedures.²⁶ These crass efforts to replace judges because of disagreement with their views of the law certainly diminish judicial independence and pose a threat to other judges that they could be in peril unless they view the law as the majority of voters do.

As a candidate myself for State Supreme Court Justice, thirty-one years ago, I experienced running for judicial office, in a contested election, appealing to political leaders for their support, seeking funding for my campaign, and garnering support from voters.²⁷ By

²¹ E.g., A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1; see generally James C. Foster, *Rethinking Politics and Judicial Selection During Contentious Times*, 67 ALB. L. REV. 821, 823 (2004) (“Big spending on judicial elections is driven by controversy over specific judicial decisions.”); Lisa Denig, *The Perfect Storm: Why Judicial Selection for Supreme Court Justices Is the Right Remedy for New York State in the Wake of Torres v. Board of Elections*, 34 WESTCHESTER B.J. 21, 31 (2007) (“Retention elections also bring with them a more focused attempt by special interest groups to oust judges that have decided cases in a manner that runs counter to their particular philosophies.”).

²² N.Y. CONST. art. VI, § 2.

²³ See, e.g., Denig, *supra* note 21, at 31 (“Nominating commissions are also used in New York City to fill vacancies on the Family and Criminal Courts.”).

²⁴ N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 212 (2008) (Kennedy, J., concurring).

²⁵ See *supra* note 21 and accompanying text.

²⁶ *Id.*; see also *Recall the Rouges—About the Project*, AM. CIVIL RIGHTS UNION, <http://www.recalltherouges.org/about.html> (last visited Oct. 13, 2014) (advocating recall as a way to reign in state elected officials).

²⁷ Antonio E. Galvão, *Carmen Beauchamp Ciparick*, in THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY 915–16 (Albert M. Rosenblatt ed., 2007).

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contrast, later in my career, I was nominated by the Commission on Judicial Nomination and appointed by Governor Mario Cuomo to the Court of Appeals.²⁸ In my case, the Commission on Judicial Nominations and the Senate and the vetting bar associations asked me challenging questions as they reviewed my qualifications for judicial office, while respecting my reluctance to discuss how I might decide issues that might come before the court.

But many other judicial officers are subject to partisan election and, as long as we select judges by election we must try to control the excesses of political pandering, unfair attacks on decent judges who were trying to apply the law, excesses in raising funds for judicial elections, and having judges unnecessarily involved in politics. New York has found some workable solutions for these ills.

We have all read about extraordinarily large financial contributions in judicial campaigns for the high courts in other states, and the implication is that those contributions were made to further the interests of the donors. Two decades ago, oil interests were donating \$250,000 to individual judicial campaigns for the Texas Supreme Court to elect judges who would view oil interests favorably.²⁹ And just a few years ago, a litigant spent \$3 million on a campaign in West Virginia in a supreme court race to support a candidate whom the litigant viewed as a friendly voice on the West Virginia Supreme Court, that state's highest court.³⁰ The litigant had an \$82 million lower court verdict that he apparently wanted to protect.³¹ Following the election of the litigant's friend, the new judge participated in a decision that gave his friend a one-vote victory in that court.³² Shameful, but we in New York protect our judges from such appearances of bias and outside influence. Our Chief Judge and Chief Administrative Judge, A. Gail Prudenti, have established a rule, Part 151, which restricts the assignment of cases when participating litigants, counsel, or firms have made significant

²⁸ *Id.* at 918.

²⁹ BILLY CORRIHER, CTR. FOR AM. PROGRESS, BIG BUSINESS TAKING OVER STATE SUPREME COURTS: HOW CAMPAIGN CONTRIBUTIONS TO JUDGES TIP THE SCALES AGAINST INDIVIDUALS 10–12 (2012), available at <http://www.americanprogress.org/wp-content/uploads/2012/08/StateCourtsReport.pdf>.

³⁰ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 873 (2009); Meryl Chertoff & Dustin F. Robinson, *Check One and the Accountability Is Done: The Harmful Impact of Straight-Ticket Voting on Judicial Elections*, 75 ALB. L. REV. 1773, 1788–89 (2012).

³¹ *Caperton v. A.T. Massey Coal Co., Inc.*, 679 S.E.2d 223, 265 (W. Va. 2008), *rev'd and remanded*, 556 U.S. 868 (2009) (Albright, J., dissenting) (noting that the county court awarded plaintiff fifty million dollars plus interest and costs).

³² *Caperton*, 556 U.S. at 874–75.

campaign contributions to the assigned judge within the previous two years.³³

As Chief Judge Jonathan Lippman stated in his 2011 *State of the Judiciary* address, “[i]n a State that elects 73% of its judges in partisan elections, these changes will go a long way toward putting New York at the forefront of national efforts to promote public confidence in the independence, fairness and impartiality of the Judiciary.”³⁴

To yet again quote Justice Kennedy,

When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence. The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges. And it may seem difficult to reconcile these aspirations with elections.³⁵

In response, I would say that we in New York are doing just fine in coping with a system that could use improvement.

So how do we safeguard judicial independence in a candidate’s efforts to become a judge? Well, some states separate judicial elections from partisan politics. In those states, judges do not run for office as part of the usual political process, and in running for office, they do not seek the support of political parties.³⁶ In New York, most judges, within the State Unified Court System are elected in a partisan political process of endorsements and nominations by political parties.³⁷ Judicial candidates not only have to raise funds to be successful, as we discussed earlier, but their views on the hot issues of the day may be solicited, just as the

³³ N.Y. COMP. CODES R. & REGS. tit. 22, § 151.1 (2014).

³⁴ Jonathan Lippman, Chief Judge of the State of N.Y., *The State of the Judiciary 2011*, at 14 (Feb. 15, 2011), available at <http://www.courts.state.ny.us/admin/stateofjudiciary/SOJ-2011.pdf>.

³⁵ N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 212 (2008) (Kennedy, J., concurring).

³⁶ See COALITION FOR JUSTICE, AM. BAR ASS’N, *JUDICIAL SELECTION: THE PROCESS OF CHOOSING JUDGES* 6 (2008).

³⁷ See *Lopez Torres*, 552 U.S. at 199–201 (describing the process for electing the judiciary in New York State).

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views of non-judicial candidates are solicited.³⁸ That raises the additional question of whether we want judicial candidates to be taking positions on issues that are likely to come before them.

A substantial number of judges are appointed, and although those judges are shielded somewhat from political pressures, we have only to consider the televised hearings of the Senate Judiciary Committee on appointees nominated by the President of the United States, either for the United States Supreme Court, or other federal courts, to realize how political an appointed selection method can be.³⁹ Whether a candidate for appointment to a city court is being interviewed privately by a screening committee or a nominee to the United States Supreme Court is being questioned under the lights of television cameras by United States Senators, the temptation is to try to get commitments from the candidate as to how he or she might rule on a particular matter or, at least, to try to get some basis to predict whether this will be a judge who is friendly or unfriendly to the party in power. In the federal system, we have seen the political party that is not in power block appointments, on the basis that the applicant has an outlook that is inconsistent with that political party or its base.⁴⁰ To maintain a semblance of judicial independence, it has become fairly standard for applicants for appointment to give noncommittal answers to direct questions about “hot button” issues.

What a judicial candidate in New York may say during a campaign for elective judicial office is also the subject of rules

³⁸ See Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2168, 2194–95 (2006) (“[V]oters who ultimately select and approve judicial nominees, are more likely to demand—and indeed to demand successfully—that judicial nominees speak out on issues.”).

³⁹ See generally Richard Davis, *Supreme Court Nominations and the News Media*, 57 ALB. L. REV. 1061, 1065 (1994) (“Public interest soars when the nominee is controversial. Combined, the three major television networks devoted sixty-six hours to the second round of Clarence Thomas hearings after Anita Hill’s sexual harassment charges surfaced.”).

⁴⁰ See, e.g., Arthur L. Rizer III, *The Filibuster of Judicial Nominations: Constitutional Crisis or Politics as Usual?*, 32 PEPP. L. REV. 847, 883 (2005) (“As radical as it may sound, the simple act of filibustering judicial nominees threatens not only the role of the President in the nomination process, but also the Judiciary’s independence. This political maneuver wanes on the doctrines of presentment and bicameralism, and the very notion of majority rule. The Senate’s obligation to the advice and consent clause has been displaced by politics and a desire to place ideology on the checklist for employment as a federal judge. It appears that the Senate is more concerned with nursing old grudges than with fixing the problem.”); Carl Tobias, *The Federal Appellate Court Appointments Conundrum*, 2005 UTAH L. REV. 743, 747 (2005) (“If the Chief Executive and Senate members disagree, they can behave in a tactical manner to secure advantage and to control how judges are chosen, even using delay strategically.”).

governing judicial conduct, specifically Part 100.5⁴¹ and case law.⁴² The rules apply equally to candidates for town and village justice courts and those seeking the office of judge of the county courts, city courts, district courts, family courts outside the city of New York, or state supreme court. Although the specific campaign rules apply only to elective judicial offices, it is understood that all judges should avoid offering assurances as to how the candidate or applicant will decide matters that are likely to come before them—other than to apply their best talents and knowledge of the law to resolve legal issues that come before them and to be fair, industrious, and attentive.

When a judge campaigns for judicial office—during a term defined as nine months prior to the time he or she will be nominated, or within six months after the election⁴³—there are various limitations on what the candidates may say and do. They may appoint committees of responsible persons to raise funds for them, but they may not solicit funds personally.⁴⁴ They may speak, in person or through ads, but must be careful what they say.⁴⁵ They may address issues, but not to the point of making explicit or implicit promises of how they would rule on issues before them as judges.⁴⁶

By contrast, as voters, we expect candidates who want our votes to give assurances on specific issues, and we routinely consider their campaign platforms and promises in determining who to vote for. Candidates who run for either executive or legislative positions appeal to specific constituencies. That is what political campaigns are all about. It is different for judicial candidates. Judges have no constituencies. If they make any promises, they should be promising to interpret the law in an intelligent, unbiased, and fair manner. That makes most campaigns for judicial office dreadfully boring.

Consider how enticing a candidate for judicial office would be if he or she were to clamor for getting tough on criminals, on abusive landlords, or predator lenders and other unpopular classes of parties or litigants in court. The Commission on Judicial Conduct has in fact disciplined successful judicial candidates for campaign

⁴¹ See N.Y. COMP. CODES R. & REGS. tit. 22, § 100.5 (2014).

⁴² See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002).

⁴³ N.Y. COMP. CODES R. & REGS. tit. 22, § 100.0(Q) (2014).

⁴⁴ N.Y. COMP. CODES R. & REGS. tit. 22, § 100.5(A)(1)(h) (2014).

⁴⁵ *Id.* at § 100.5(A)(2).

⁴⁶ *Id.* at § 100.5(A)(4).

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rhetoric that sounded like promises on issues they would or might address as a judge.⁴⁷

A 2002 decision of the United States Supreme Court is a backdrop for considering disciplinary cases of judges who have impaired the independence, integrity, and impartiality of the judiciary. The Court struck down rules that barred judges and other judicial candidates from discussing issues that might come before them in a judicial capacity.⁴⁸ The message of the Supreme Court in *Republican Party of Minnesota v. White*, at least by the five-judge majority, was that the State of Minnesota may not prohibit candidates from “announcing their views on disputed legal and political issues . . . that are likely to come before the candidate if he is elected judge.”⁴⁹ Such a prohibition in fact had been included in the New York rules, but in recognition of a growing tendency to protect the First Amendment speech of judicial candidates and the right of voters to consider these views, the Office of Court Administration had eliminated that provision a few years earlier.⁵⁰

The rationale of the United States Supreme Court was that the “announce clause” was so broad that it could chill discussions that should be protected under the First Amendment, and if the attempt by Minnesota, and other states that still had the broad rule, was to prevent speech that suggested bias against particular parties in court, the rule should be specific and tailored narrowly to the particular harmful speech that might be barred.⁵¹ The “announce clause” was too broad to bar speech that committed the speaker to render future decisions.⁵² Most certainly, the United States Supreme Court opened the door to making judicial campaigns less boring and much livelier.

Campaign speech where the state policy was to elect judges, said the Supreme Court, deserved the greatest protection because such speech deals with the qualifications of office of judicial candidates and that was one way to express their views to voters.⁵³ The Court

⁴⁷ See *Matter of McGrath*, 2010 WL 597261, at *1, *3 (N.Y. Comm’n on Jud. Conduct Feb. 5, 2010), available at [http://www.scjc.state.ny.us/determinations/M/mcgrath\(2\).pdf](http://www.scjc.state.ny.us/determinations/M/mcgrath(2).pdf) (describing a case in which a candidate for Supreme Court in Rensselaer County was disciplined for making improper pledges and promises to pistol permit holders).

⁴⁸ *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002).

⁴⁹ *Id.* at 768, 771.

⁵⁰ See Marjorie E. Gross, *Updated Rules on Judicial Conduct*, N.Y.L.J., May 14, 1996, at 6, col. 5–6.

⁵¹ See *White*, 536 U.S. at 776–77.

⁵² See *id.*

⁵³ See *id.* at 774 (“The Court of Appeals concluded that the proper test to be applied to

took no position on whether a state that desired to select judges through election could bar judges who made explicit, or implicit, promises or commitments to decide matters a certain way, but the announce clause was too broad because it would bar protected speech as well.⁵⁴

Proponents of the view, expressed by the five-Justice majority of the Supreme Court in the *White* decision, note that states have more discretion in barring speech of candidates for appointment than those who seek elective office.⁵⁵ And at least one of the five Supreme Court Justices—Sandra Day O'Connor—made the explicit point in her concurring opinion that the states have created the problem by choosing judges by election.⁵⁶ Justice O'Connor expressed the view that judicial candidates have the same right as candidates for other public offices to speak—which appears to include making promises on their decisions.⁵⁷

In the aftermath of the *White* decision, numerous challenges in court were brought, and some were successful even beyond addressing issues. In some parts of the country, campaigns for judicial office began to resemble campaigns for other public offices.

The Eleventh Circuit Court of Appeals, in *Weaver v. Bonner*,⁵⁸ in 2002, held that the *White* decision in the United States Supreme Court suggested that the standard for judicial elections should be the same as other elections for public office.⁵⁹ What a frightening prospect that is!

determine the constitutionality of such a restriction is what our cases have called strict scrutiny; the parties do not dispute that this is correct.”).

⁵⁴ See *id.* at 776–77.

⁵⁵ See generally David Schultz, *Minnesota Republican Party v. White and the Future of State Judicial Selection*, 69 ALB. L. REV. 985, 1009 (2006) (“As federal judges, we confess some bias in favor of a system for the appointment of judges. Indeed, there is much to be said for appointing judges instead of electing them, *perhaps the chief reason being the avoidance of potential conflict between the selection process and core constitutional protections.*”) (emphasis added).

⁵⁶ *White*, 536 U.S. at 788 (O'Connor, J., concurring) (“I am concerned that, even aside from what judicial candidates may say while campaigning, the very practice of electing judges undermines this interest.”).

⁵⁷ See *id.* at 788–90 (touching on the desire for impartiality in state court judges while examining the history of the right to campaigning for judicial election and the pressures it places on such a desire—the requisite financial backing for those that are not financially wealthy necessarily comes from campaign fundraising which can leave judicial candidates feeling indebted to donors).

⁵⁸ *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

⁵⁹ *Id.* at 1321 (“[W]e believe that the Supreme Court’s decision in *White* suggests that the standard for judicial elections should be the same as the standard for legislative and executive elections.”).

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We in New York are fortunate to have relatively tame judicial campaigns, and I credit both the Commission on Judicial Conduct for pursuing violations of the rules governing judicial conduct in campaigns and the Court of Appeals for essentially supporting the Commission's efforts. The court system deserves credit as well firstly, for its clear rules on the subject and for its foresight in modifying its rules that appear to be resistant to serious First Amendment challenges and for its efforts to educate candidates.

The New York State Court of Appeals considered three disciplinary cases related to campaign conduct after the *White* decision. As you know, the Court of Appeals reviews Commission determinations on direct appeal, but it is not automatic.⁶⁰ The aggrieved judge must first seek review.⁶¹ All three cases were brought to the court by judges who sought review of disciplinary action taken by the Commission on Judicial Conduct.

The first post-*White* decision, *Matter of Shanley*,⁶² was rendered only a few days after *White*, so the parties had not raised or briefed the constitutional issues.⁶³ The Court of Appeals accepted a Commission determination that publicly admonished a town justice for exaggerating her educational background during her successful campaign for judicial office, but rejected a charge that she improperly made a promise to the electorate by running on a "Law and Order" platform.⁶⁴ The Commission had held that by running as the "Law and Order" candidate, the judge implicitly promised voters that she would have a prosecutorial slant in criminal cases, which made her appear less impartial than she should be.⁶⁵ The Court of Appeals however, declined to treat the slogan as a commitment of conduct in office, despite the argument by Commission counsel that the origin of the term and its use was intended to portray a tough stance against criminals.⁶⁶ I participated in that decision, and in two later decisions.

In *Matter of Watson*,⁶⁷ a successful candidate for city court judge

⁶⁰ N.Y. CONST. art. VI, § 22(a).

⁶¹ *Id.*

⁶² *In re Shanley*, 774 N.E.2d 735 (N.Y. 2002).

⁶³ *White* was decided on June 27, 2002. *Republican Party of Minn. v. White*, 536 U.S. 765, 765 (2002). *Shanley* was decided four days later, on July 1, 2002. *Shanley*, 774 N.E.2d at 735.

⁶⁴ *Shanley*, 774 N.E.2d at 737.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *In re Watson*, 794 N.E.2d 1 (N.Y. 2003).

found the perfect regimen to defeat two part-time city court judges; the two incumbents and the challenger, an assistant district attorney, were vying for a single, full-time city court judgeship.⁶⁸ The challenger ran on a tough-on-crime platform that blamed a recent crime increase on the two incumbent judges, and in calling himself a tough prosecutor, told the electorate to “put a real prosecutor on the bench.”⁶⁹ He told the Commission that he believed outside criminals discussed among themselves that the judges were soft on crime, and, hence, the city was targeted for crime.⁷⁰ He promised voters that he, as a judge, would make the city an unattractive place for criminals.⁷¹ An important issue raised was whether implicit assurances would violate the rule against “mak[ing] pledges or promises of [future] conduct[.]”⁷² As a result of court challenges in other states, our rule barring a candidate from announcing views on issues that were likely to come before the court was no longer in effect.

The “pledges or promises” rule has recently been sharpened to prohibit “pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office; [and] . . . commitments that are inconsistent with the impartial performance of the adjudicative duties.”⁷³

But back to our prosecutor who ran for city court judge and blamed the crime rates on the incumbent judges—the Commission decided that he should be removed. The Commission observed that “to allow respondent to retain his judgeship would be to reward him for intentional misconduct and might encourage other judicial candidates, knowing that they may reap the fruits of their misconduct, to ignore the rules applicable to judicial elections.”⁷⁴

The case was reviewed on the judge’s request. The Court of Appeals rejected the judge’s defense that he had never promised to rule a certain way in criminal cases.⁷⁵ But the court reduced the Commission’s sanction from removal to censure.⁷⁶ The court

⁶⁸ *Id.* at 2.

⁶⁹ *Id.* at 2–3.

⁷⁰ *See id.* at 3.

⁷¹ *Id.*

⁷² *Id.* at 4 (quoting N.Y. COMP. CODES R. & REGS. tit. 22, § 100.5(A)(4)(d)(i) (2014)).

⁷³ N.Y. COMP. CODES R. & REGS. tit. 22, § 100.5(A)(4)(d)(i–ii).

⁷⁴ *Matter of Watson*, 2002 WL 31954076, at *6 (N.Y. Comm’n on Jud. Conduct Dec. 26, 2002), available at <http://www.cjc.ny.gov/Determinations/W/Watson.William.2002.12.26.pdf>.

⁷⁵ *Watson*, 794 N.E.2d at 4–5.

⁷⁶ *Id.* at 8.

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warned that in the future similar conduct could warrant removal, thereby clearly issuing a warning to all candidates for elective judicial office not to use the same campaign style in the future.⁷⁷

The constitutional issue, emanating from the Supreme Court's *White* decision was briefed and argued by counsel. The Court of Appeals held that the prohibitions and their application withstand constitutional scrutiny and serve important "[s]tate[] interest[s] in preventing party bias and the appearance of party bias, as well as furthering open-mindedness . . . in the state judiciary."⁷⁸ In response to the defense that the judge never carried out his campaign rhetoric in practice after he became a judge, the court observed that even un-kept promises "damage the judicial system because the newly elected judge will have created a perception that will be difficult to dispel in the public mind."⁷⁹

In another case, *Matter of Raab*,⁸⁰ a candidate for supreme court had engaged in prohibited political activity, including making a substantial contribution to the political party that endorsed him, participating in a political meeting in which candidates for non-judicial office were interviewed by the political party representatives, and participating in a phone bank soliciting support for another candidate.⁸¹ All of these acts were in clear violation of the rules governing judicial conduct and apply to candidates for judicial positions even before they become judges.⁸²

The judge challenged the Commission's determination of censure on the grounds that the "rules [were] not sufficiently narrow in scope to serve a compelling state objective and therefore do not withstand strict scrutiny analysis."⁸³ The court disagreed with the judge's position, finding the independence of the judiciary an important state objective.⁸⁴ The court explained that the \$10,000 contribution the judge made following his endorsement as a candidate could appear to be the "buy[ing]" of a judicial nomination.⁸⁵

The court stated: "Needless to say, the State's interest in ensuring

⁷⁷ *Id.*

⁷⁸ *Id.* at 6.

⁷⁹ *Id.* at 7.

⁸⁰ *In re Raab*, 793 N.E.2d 1287 (N.Y. 2003).

⁸¹ *Id.* at 1288–89.

⁸² *Id.* at 1292–93.

⁸³ *Id.* at 1290.

⁸⁴ *Id.*

⁸⁵ *Id.* at 1292.

that judgeships are not—and do not appear to be—‘for sale’ is beyond compelling. The public would justifiably lose confidence in the court system were it otherwise and, without public confidence, the judicial branch could not function.”⁸⁶

So, preserving judicial independence begins in the selection process, and candidates for judicial office and appointing authorities, should respect the important standards that serve to maintain an impartial and independent judiciary. It is also important for the Commission to enforce the rules that apply to judicial campaigns, and help educate candidates on the rules and the important reasons for them. The court system through the Advisory Committee on Judicial Ethics also educates candidates for judicial office by providing a relatively quick response for any ethical issues raised.

To summarize, as to campaigns for judicial office and judges’ political activity in general, the Commission, the Court of Appeals, and the court system have all educated judges and non-judge candidates for elective office to be attentive to the applicable rules. Over the past thirty eight years, judges who were found to have violated the Rules of Judicial Conduct have been disciplined, and other judges have learned from this history. The quality of the judiciary has improved. The Commission, with the court’s support, has changed unseemly behavior both on and off the bench.

Our disciplinary system is not perfect; no system is. But conditions are greatly improved and most judges know from the work of the Commission that the rules are supported by law and it behooves the judiciary to be sensitive to their ethical obligations.

Our goal is to preserve the independence of the judiciary. By all means, our system requires the Court of Appeals to be a vigilant check on the Commission to make sure that its powers are carried out fairly and resolutely. We have much to be proud of in our court system and in our judicial disciplinary system established over thirty five years ago.

In conclusion, an independent judiciary, a critical part of our democracy, safeguards basic guarantees and freedoms under our federal and state constitutions. The other branches of government may implement popular programs, but only the judiciary can be depended upon to guarantee our rights. A judge is obliged to apply the law evenhandedly in making decisions, which is why the

⁸⁶ *Id.*

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judiciary must be independent and, to the extent possible, free of pressures that are in conflict with the duty to render unbiased decisions. The Court of Appeals, the Commission on Judicial Conduct, and the court system generally have striven to make this a reality. With their contributions we have succeeded in achieving a system, although not perfect, that nonetheless maintains as much judicial independence as we can have in an elective system.

On a personal note, I worked for the court system for almost forty four years. In my opinion, our judiciary is the finest in the land, our court system the shining star in the constellation of court systems. I am blessed to have sat on the Court of Appeals with such legal luminaries as former Chief Judge Judith Kaye, Associate Judges Dick Simons, Vito Titone, Joseph Bellacosa, George Bundy Smith, Howard Levine, Dick Wesley, Al Rosenblatt, Victoria Graffeo, Susan Read, Robert Smith, Gene Pigott, Ted Jones, and our beloved Chief Judge Jonathan Lippman. Special kudos to the one who preceded me—Chief Judge Sol Wachtler. Thank you for making the trip to Albany to attend this special event. And as to those that follow me, Jenny Rivera and Sheila Abdus-Salaam, you will soon come to appreciate what it means to follow in the footsteps of the great Judge Hugh Jones whom we honor here tonight and to be part of this wonderful Court of Appeals family.

Thank you so much for your attention tonight. Again thank you to the Fund for Modern Courts, to its Chair, Milt Williams, Jr., and Executive Director Dennis Hawkins, and to Albany Law School and its phenomenal Dean Penny Andrews. Thank you to family, friends, faculty, students, colleagues, and members of my new Greenberg Traurig family for being here tonight. Enjoy your evening.