

## A PERIPATETIC VIEW OF JUDICIAL FREE SPEECH

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From 1974 to 1990, I was Counsel to the New York Republican State Committee. Then, from 1990 on, I represented, among others, people like Steve Forbes, Ross Perot and Tom Golisano, primarily involving election law issues. So I am fairly familiar with the process by which candidates get on the ballot, run their campaigns and, if necessary, do their recounts. That I did for thirty years as a practicing lawyer.

One of the things I also did was to represent judges in their campaigns, and I had the opportunity to handle some First Amendment cases: protecting the political speech rights of individuals and the right to spend money on behalf of political parties. I am privileged and honored to have been a town judge for two years in the Town of Berne, and this has been my third year as a New York State Supreme Court Judge in the Albany area.

First, a disclaimer—I have a case pending against me before the Commission on Judicial Conduct and there is a related proceeding involving me in the Supreme Court of Westchester County. Anything I say today—either directly or in response to any questions—is not intended in any way to reflect upon my personal circumstances or the issues in my case, or to criticize or praise anybody who is associated with those issues. That does not mean we cannot talk about many things in this presentation, but I would like to avoid having to apologize for anything that I might say as it may impact those cases.

By the way, I wanted to pass on that the Honorable Richard (Dick) Wesley, who we did not hear from this morning, is a beacon in the world of legal thinking and is a man of great legal scholarship. He is also a man of great personality, so if you ever have a chance to hear him or see him, make sure you do that.

Getting down to the issue of the First Amendment rights of judges and judicial candidates, I would like just to focus on judicial

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candidates. It is a hot topic now, after the Supreme Court, two years ago, in *Republican Party of Minnesota v. White*,<sup>1</sup> basically set aside as unconstitutional a provision in the Minnesota Judicial Conduct Code which prohibited judicial candidates from announcing their position in connection with a judicial campaign.<sup>2</sup> It is my recollection from reading it that the case arose because a gentleman wanted to run for the Supreme Court in the State of Minnesota. In order to do that, he wanted to raise certain issues. So, he sought a declaratory judgment to raise these issues, which seemed to be prohibited from campaign discussion under the Minnesota Code of Judicial Conduct by which he was bound. He feared that he might get disbarred without a judicial declaration that he has a First Amendment right to speak and address these issues. I believe that is how the case arose and eventually went to the Supreme Court. The Supreme Court, by a five to four vote, for the first time re-charted the direction of judicial free speech. The Supreme Court issued a fairly broad, although somewhat cloudy, decision that there will be a greater recognition of First Amendment rights for judicial candidates.

There is a Georgia case coming out of the U.S. Court of Appeals for the Eleventh Circuit, *Weaver v. Bonner*,<sup>3</sup> that extends broader, in my opinion, than the Minnesota case, where the court basically said that if you are a candidate for judicial office, you come onto the political playing field in the same function and role as any other candidate, such as a governor, a mayor, a legislator, or any other similar office.<sup>4</sup> You have the same opportunities as a judicial candidate as any other candidate to exercise all of your First Amendment rights and privileges in the course of your campaign.

Now, what I would like to do is shift from the national focus and bring the debate to New York. I would like to suggest that if you are going to be a candidate for judicial office, or if you are going to be active in a campaign supporting someone else, that you familiarize yourself with three things: the rules governing judicial conduct, the statutes that underlie those rules, and the cases that I am about to describe for you. I suggest this because going into a judicial race without knowing these circumstances could lead to

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<sup>1</sup> 536 U.S. 765 (2002).

<sup>2</sup> *Id.* at 788.

<sup>3</sup> 309 F.3d 1312 (11th Cir. 2002).

<sup>4</sup> “[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.” *Id.* at 1321.

some embarrassment.

Let me start with the following thought. The First Amendment gives everyone what we call a right of free speech. Well, interestingly, speech is nothing without a corresponding right to hear. That is, free speech without an audience of voters who are willing to listen is not worth much. My suggestion to you is that you and I, as voters, have a right to hear what it is that a judicial candidate thinks is important. As we know since the third grade, our government is divided into three equal branches. The first is the executive branch, which has full license to come and address you—and I believe we have in five days a presidential election—and, as we know, the President appoints all the federal judges. We know from listening to John Kerry that he is going to have a litmus test on certain issues with regard to the appointees that he puts on the federal bench. The President is the one who makes the judicial appointments. You and I, as voters, have an opportunity to hear what the presidential candidates want to say, and particularly what they want to say about their standards for judicial appointments.

Interestingly, this same year, we have a candidate who is seeking re-election to the U. S. Senate, Chuck Schumer from New York. As we know, federal judicial appointments are confirmed in the United States Senate, part of the second, or legislative branch of government. So now, we are able to hear from Chuck Schumer over a six-year period about his standards for the confirmation process of judges. We have the opportunity as voters to hear Senator Schumer tell us what his standards are for the confirmation of presidential appointees to the bench. So, you and I, as voters, are entrusted with the ability to judge for ourselves what the Senate candidates are saying. This is free speech. We are then entitled to make our own decisions and vote for them or not.

But, that is not the case when it comes to the judicial branch—the third branch of government. We as voters do not have the right to hear what a judicial candidate wants to say about why he or she wants to be a judge and what they would do if they were elected. We get the candidate's name, rank, and serial number, and maybe a photograph of them with their dog, or whatever or whoever they pose with, and that is the end of it. What I propose is for you to think about that—I am not advocating this as necessarily a personal belief—but I would like you to think about it because it seems as though this is an area where we as voters can embrace the issue of the First Amendment and judicial campaigns.

Let me jump aside for one second. Right here, in Albany County,

we have a fascinating three-way race for District Attorney where one of the issues is the repeal of the Rockefeller Drug Laws.<sup>5</sup> That is a legislative function, interestingly enough, but it is an issue in the election of a law enforcement official. It seems to me as though it is an interesting corollary to what a judge may or may not want to address. Why wouldn't a candidate for judicial office be able to comment upon what his thoughts are as to the status of the Rockefeller Drug Laws, which are being discussed in the community? Why wouldn't a candidate of learning and scholarship and presumed wisdom in the community be able to talk about it in the course of a campaign? A judge has about as much ability to affect the success of that legislation as a District Attorney, and it seems to me as though it would be a subject that a judicial candidate may want to discuss. While neither a District Attorney nor a Judge can pass an amendment to existing legislation, an open discussion by candidates may better inform the public about the issues.

We do have a benchmark for judicial free speech in New York, however, which is fairly compelling. In New York State there is an ability to restrict judicial speech in campaigns and the State does it through a Commission on Judicial Conduct ("the Commission"). By the way, when I talk about the Commission, and perhaps it is not apparent, I do not intend any criticism of any Commission member. There are eleven members of the Commission and the members are appointed by the Governor, Chief Judge, and the leaders of the Legislature.<sup>6</sup> The Commission is run by a staff of individuals who carry out the prosecutions that I am describing. Most states have a similar administrative body which is usually overseen by the highest court in the state.

The benchmark, or case, I would like to talk about took place in Lockport, N.Y. in 1999, and involved a gentleman by the name of William Watson, whom I do not believe I have ever met.<sup>7</sup> Mr. Watson was an assistant district attorney who resigned from that office to run in a primary election for Lockport City Judge against two incumbent judges. He was apparently a young man not long out of law school—and serves as an example of why I suggest that you first read the statutes, read the rules and read the cases—

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<sup>5</sup> See Brian Nearing, *Soares Survives DA Battle; Outsider Victorious Despite Paul Clyne's Backing of GOP Challenger Roger Cusick*, TIMES-UNION, Nov. 3, 2004, at A13 (discussing the impact of the Rockefeller Drug Laws in the District Attorney race).

<sup>6</sup> N.Y. CONST. art. VI, § 22(b)(1).

<sup>7</sup> *In re Watson*, 794 N.E.2d 1 (N.Y. 2003).

because Watson thought it was a good idea, in sum, to say that it is time to, “put a real prosecutor on the bench.”<sup>8</sup> He went through the campaign basically blaming the incumbent judges for a crime wave that had hit Lockport due to drug dealers coming in from Buffalo, Niagara Falls and Rochester, creating havoc in that community. And, interestingly enough, he won on the Republican line, he won on the Democratic line, he won on everything except the Liberal line. So, needless to say, he was exercising what I am sure he thought were First Amendment free speech rights.

There was a charge, however, lodged against him with the Commission on Judicial Conduct and Judge Watson came in and explained his circumstances. By the time the Commission was done with its hearing and administrative process, upon his own admission, Watson said, and I’m paraphrasing, “you know [a little late in the day it turns out] I did err, and I made a mistake and exercised poor judgment, and I clearly violated the Rules in the Code of Judicial Conduct.” In the intervening time, the *Republican Party of Minnesota v White* case came down, which is the Supreme Court case that I mentioned earlier. That case seemed to change the Commission’s direction. When the *Watson* case went to the New York Court of Appeals, the Court did indeed find that he had violated the appropriate sections in the judicial canons, but further decided that a censure, rather than removal from office was appropriate.

What I would like to propose to you is that apparently the voters in Lockport, in the course of that campaign, heard something that they wanted to hear or expected to hear and were persuaded by it and voted Mr. Watson into office. So, we come back to the issue of, on the one hand, saying the courts are not a representative body, but as we heard earlier, the judicial structure and system is responsive to the body politic, and here was a case where the body politic said, “well, perhaps we do want a little bit more law and order in our community” and they voted him in.

There is also a case decided by the New York Court of Appeals, In re *Shanley*,<sup>9</sup> that seems to have changed the Commission’s focus. In *Shanley*, a winning candidate for a town court judgeship said: “I am a law and order candidate,” and the Commission said: “No, you cannot say that.”<sup>10</sup> The candidate took it to the Court of Appeals. The Court disagreed with the Commission’s findings and concluded

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<sup>8</sup> *Id.* at 2.

<sup>9</sup> 774 N.E.2d 735 (N.Y. 2002).

<sup>10</sup> *Id.* at 736.

“that simply using the phrase ‘law and order’ in judicial campaign literature does not amount to misconduct.”<sup>11</sup>

So, I find that one should reflect upon free speech issues especially because you are going to be lawyers. As I indicated to you earlier, the First Amendment means you and I, as voters, have a concurrent right to hear. It seems that the ability to hear is a necessity of effective free speech, and the denial of a right to speak equates to a denial of the listener’s right to hear. Voters have the right to make intelligent choices and they cannot make those choices without the knowledge they can glean from the free speech of the candidates they vote for whether executive, legislative or judicial. The right to vote is the most sacred right possessed by an American citizen and it should be government’s obligation to ensure a knowledgeable, informed electorate.

The ultimate resolution of these free speech issues remains to be seen. But for now, what were the consequences of these violations of judicial free speech? The fact is that Judge Watson is still on the bench and the Court of Appeals said, interestingly, that as a judge, he has apparently been doing a good job. Judge Shanley also remained on the bench.

You know, in my experience, under our restrictive and rather obtuse rules, it is much harder to become a judge than to do a good job once you are actually on the bench. Perhaps more judicial freedom of speech will result in more good judges being elected to the bench.

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<sup>11</sup> *Id.*