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Ethical Issues in Judicial Campaigns Third Annual Symposium on Legal Malpractice & Professional Responsibility: Symposium Presentations.

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ETHICAL ISSUES IN JUDICIAL CAMPAIGNS*

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I have gotten away from the lecture format over the past number of years in judicial education, so what I propose doing today is having some participation here as we go along and asking some questions every now and then to maybe keep everybody awake. What I would like to start out with is this question: Have any of you ever heard of a fellow by the name of Kenesaw Mountain Landis?

Kenesaw Mountain Landis was a United States District Judge, who was appointed to the bench by Teddy Roosevelt in 1905. By 1920, he was making the handsome sum of $7500 a year, which was pretty good money for a federal judge at that time. In 1919, Landis began to supplement his income as commissioner of baseball. He was called in to clean up the sport after the mess caused by the 1919 Chicago White Sox. If you have ever seen the movie *Eight Men Out* or *Field of Dreams*, then you are familiar with Shoeless Joe Jackson. Jackson and seven other people conspired to fix and to throw the 1919 World Series when they lost to the Cincinnati Reds. The owners brought in Landis because he had instant credibility. After all, he was a United States District Judge. And, he attacked the scandal with a vengeance. He was throwing out these bums and several others, too, while he was at it.

As commissioner of baseball, Landis made $42,500 a year. The problem was that he was a United States District Judge appointed for life, but he was never at work because he was busy cleaning up baseball. Members of Congress, law professors, and lawyers began

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calling upon Landis to make a choice between his two jobs, and in about 1923 he did choose. He chose to be commissioner of baseball until he died in the 1940s. But, it became obvious that there needed to be some written rules for judges.

Under the leadership of Chief Justice William Taft and with the aid of Dean Pound of Harvard Law School, the American Bar Association (ABA) Canons of Judicial Ethics were promulgated in 1924. They included what I call the Landis Memorial Canons. One of the canons provided that a judge shall not lend the time of judicial office to advance the private interests of the judge or others. Of course, that is exactly what Landis was doing.

Another canon provided that a judge's judicial duty takes precedence over all of the judge's additional activities. Landis was never on the bench and so that applied back to him. Yet another canon stated that a judge shall not be director, manager, general partner, or involved in any business entity except for certain limited exceptions. That is essentially the way that the Code of Judicial Conduct began. And that is the current code that we have today, with some revisions.

The code pretty much stayed in effect without significant attack until about the past twenty years. Since that time, it has been under attack regularly. Different provisions of the code have been stricken down. For example, one former rule said that a judge shall not demean the judicial office. That was too vague and it was struck down. Now, what happens is that you have the typical action-reaction format. You have the Code of Conduct being written and then revised. Judges become less and less accountable, of course, but there is something more fundamental than that. There are many reasons why judges should be held to a different standard or a higher standard than other public officials, and it has to do with what judges do. What is it that we do? We sit in judgment and we pass judgment on other people. And in the Sermon on the Mount, right after "Judge not, that ye be not judged," Jesus says, "Why do you see the speck that is in your brother's eye when you have a log in your own?" You have to have your house in order when you start sitting in judgment on people. Here is another good reason: What do people call us? I'm not talking about behind our backs, but what do they call us to our face? Your Honor–the Honorable Judge Keasler. It is not too much to ask that if we are called that, we live up to it. Another thing is, who

promulgates the codes in the individual states? Is it the legislature? No. Who is it? The courts, the supreme courts of the individual states. What has happened is that the ABA will pass something that tends to be adopted by every state in the Union, plus the federal courts, and the administrative law judges. Everybody has some version of the Model Code of Judicial Conduct. Most of the codes are based on either the 1972 version, or on the 1990 code. What tends to happen is that when the ABA does something, it spreads out to the entire judiciary.

The judiciary is constantly trying to protect itself from becoming just like every other politician. With that in mind, let us go to a case that was decided within the past two years by the Supreme Court of the United States. On June 27, 2002, the Supreme Court of the United States handed down its opinion in *Republican Party of Minnesota v. White*.[1] Minnesota had a provision based on the 1972 code, with Minnesota adopting the provision in 1974. The provision read: "[A] candidate for judicial office including an incumbent judge shall not announce his or her views on disputed legal or political issues."[2] In 1993, the United States Court of Appeals for the Seventh Circuit handed down an opinion in *Buckley v. Illinois Judicial Inquiry Board*.[3] The panel was a very good panel consisting of Judge Posner, Judge Bauer, and Judge Paul Roney from the Eleventh Circuit. What the Seventh Circuit did was strike down as overbroad the Illinois version of the pledges and promises clause.[4] Most states have some provision stating that a judge shall not make pledges or promises of conduct in office other than the faithful discharge of one's duties. In *Buckley*, the judicial candidate had made a statement while he was running for the Illinois Supreme Court and while he was a sitting judge on the Intermediate Court of Appeals. The candidate said he had "never written an opinion reversing a rape conviction."[5] Do you think that is a pledge or a promise? It certainly could be inferred from that statement that he is not going to reverse one once he gets to

1. 536 U.S. 765 (2002).
2. Republican Party of Minn. v. White, 536 U.S. 765, 768 (2002).
3. Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224 (7th Cir. 1993).
4. *Id.* at 228-30.
5. *Id.* at 225.

the supreme court. The Seventh Circuit struck down the provision as being too inclusive and as a chill on free speech.[6]

In *White*, the Minnesota Supreme Court had interpreted the provision about announcing views on disputed legal or political issues. The Minnesota courts had said the provision did not prevent a candidate from stating his or her views on legal questions, but prevented the candidate from publicly making known how he or she would decide disputed issues.

Prior to *White*, the Supreme Court had accepted that rationale. In fact, Justice Ginsburg in her dissenting opinion pointedly makes the statement that the Supreme Court had always in the past deferred to the interpretation of the top court in the state regarding state law.[7] But, in *White*, what the Supreme Court did is say "no" and proclaim that the First Amendment trumps state law and that a judicial candidate has the right of free speech.[8] Basically, *White* says that elected judges do not give up their First Amendment rights when they run for judicial office.[9] Underlying all of the opinions—the majority opinion and, more specifically, Justice Kennedy's concurring opinion—was the general theme that if you are going to have an election of judges, free speech is pretty much absolute. In effect, candidates can say just about anything if states opt to elect judges. What the Supreme Court said is, "We do not like the election of judges, but if you're going to have them, you're going to have all the trash that goes with elections."[10] Easy for them to say!

Do you really think that as a result of *Minnesota v. White* the Texas legislature is going to go out and change the way we select judges? If you do, I have some swamp land that I would like to sell you. Of course they are not, because a good many of those in the legislature want judges to be just like them. This leads to many terrible problems.

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6. *See id.* at 231 (indicating that the Illinois rule was "so sweeping that only complete silence would comply" with the rule).

7. *White*, 536 U.S. at 807 (Ginsburg, J., dissenting).

8. *Id.* at 774.

9. *Id.* at 781-82.

10. *See id.* at 788 (stating that "if the State chooses to tap the energy and legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles," regardless of the effects on campaigns).

The Supreme Court says that they do not reach the issue of pledges or promises. But they cite *Buckley* several times in the opinion very favorably. *White* was a five to four split decision. Justice Scalia wrote a majority opinion, in which Justice Rehnquist and Justice Thomas joined, in conjunction with two concurring opinions by Justices Kennedy and O'Connor.

I think this is one of the most irresponsible and most arrogant opinions of the Supreme Court because they say: "You need to be like us." What the dissent, so ably written by Justice Ruth Bader Ginsburg, says is that it does not have to be all or nothing. Judges are fundamentally different from legislators in that their constituency is the law and is not individuals.[11] What is wrong with restricting speech when you are talking about ethical behavior and the appearance of impartiality? The dissent referenced Justice Scalia's appearance before the Senate Confirmation Committee or Judiciary Committee, where he said he refused to answer questions on an ethical basis.[12] The dissent reasoned that if Justice Scalia can refuse to answer questions, why can't a state judge? Justice Scalia responded, he was not "compelled" to answer.[13]

What the Supreme Court said is that elections and free speech go hand-in-hand. I thought I would share with you a role play exercise that judges do at the National Judicial College. This situation takes place at a candidate forum. Picture a typical Republican/Democratic forum where a group of voters is gathered and you have a moderator that says, "Good evening friends and welcome to the Candidate's Forum. My name is Paul Hack and I will be your moderator tonight. We have a large number of candidates so let's get started. In the race for district judge, we have Judge P.S. Doff, the incumbent, and the challenger, Attorney Sue Quickly. They each have ninety seconds to tell you a little about themselves. We will first hear from Judge Doff." Judge Doff gets up and says, "Thank you, Mr. Hack. Friends, my name is P.S. Doff and I have been judge on the district court since 1980. I served as district attorney for ten years, where I tried over 300 contested jury trials. I have worked hard for this community and for the cause of

11. *See id.* at 803-04 (Ginsburg, J., dissenting) (discussing the differences between elected judges and their elected counterparts in the legislature).

12. *White*, 536 U.S. at 818 n.4 (Ginsburg, J., dissenting).

13. *Id.*

justice. Now, I find myself challenged by this little lady. Ask yourself this: If you or one of your loved ones had a case in court where your liberty or property was at stake, would you want your case heard by a veteran respected trial judge or by my lady friend here who is backed and paid for by a bunch of flannel-mouthed plaintiff's lawyers? This is a district court race, not an ambulance chase. Vote for Judge P.S. Doff, your man in the court house."

Then the moderator says, "Ms. Quickly, your response." Ms. Quickly responds, "Thank you, Paul. Friends, I'm Sue Quickly and I am the qualified candidate for the district court. When I'm elected, I intend to be tough on crime. I will institute a new policy abolishing plea bargains. No dope dealers, perverts, burglars, thieves, or drunk drivers should expect to get probation in my court. I'm sick and tired, and I know that you are sick and tired, of criminals being coddled and babied by senile, whiskey-soaked, liberal judges. If you elect me, I will put a stop to this foolishness. I have been endorsed by the Mother's Against Drunk Driving, the Right to Life Coalition, the Police Association, the Board of Realtors, and the Christian Coalition's Executive Committee. I am also endorsed by the incumbent's colleague, Judge Berry Stern. On the other hand, the only endorsements the incumbent has are those of the criminals. Vote for Sue Quickly, a vote for law and order, a vote for sobriety, and a vote for life."

Do you see any ethical problems in this scenario? Well, it is loaded with them and, of course, it violates the pledges or promises provision. But the way things stand now, the Texas Supreme Court has adapted our code to answer some of the issues raised in *Minnesota v. White*. It reformulated our version of the announce clause about making public statements on political and legal issues into two other clauses. One deals with pledges and promises[14] and the other covers only comments about pending proceedings before the court, that either the judge is on or the judge is running for, that might indicate the judge's possible ruling.[15]

The problem is, would that cover "I have never reversed a rape case?" Maybe. But it is probably not a literal violation of the pledge or promise prohibition. Now, you will be able to talk about

14. TEX. CODE JUD. CONDUCT, Canon 5(1)(i), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon 1998).

15. TEX. CODE JUD. CONDUCT, Canon 3(B)(10).

all kinds of things that may later come before you. The code now warns that judges should be aware that you might be able to say these things under the code, but you risk motions to recuse.

So, what can be done? It is more or less the law of the jungle and it has been in Texas for really some time, even before *Republican Party of Minnesota v. White.* The former head of the Commission on Judicial Conduct was a guy named Bob Flowers. Bob was kind of like everybody's grandfather. I often referred to him as like the Mafia, in a good sense, if there is one, because he could come and just lay his hand on a judge's shoulder and whisper in the judge's ear and the judge would resign. I do not know what Bob said to them, but Bob got rid of some bad apples that way. The remarkable thing about Bob was the fact that he had a very small office. The Commission on Judicial Conduct has, in comparison with New York, Illinois, California, and Florida, a tiny office—a very few lawyers, a small staff, and an executive director. But what Bob Flowers did was prioritize what he was going to go after. Bob just more or less left judicial elections alone. He said, "If I went after elections, that was all I would do." Margaret Reeves, his successor, did a little, but I think she got overwhelmed by it after a while. And so it remains the law of the jungle just as it was before.

The best example I can think of was in the 1980s when Renee Haas from Corpus Christi ran against Raul Gonzalez. It was unbelievable. A television ad showed Renee Haas in a robe because she had been a district judge. The ad said, "Judge Renee Haas is a no nonsense judge. She was not afraid to send people to die for their crimes. On the other hand, Judge Raul Gonzalez favors the rights of defendants as opposed to innocent victims." One small problem with the ad—Haas was running for the Supreme Court of Texas and they do not hear criminal cases. The way Haas justified the ad was that Gonzalez favors the rights of defendant insurance companies over those of plaintiffs. Was anything done to her? No. When Raul had an ad with an ambulance screeching around a corner saying, "This is a supreme court race not an ambulance chase," I thought to myself, "Does that promote confidence in the judiciary?" In Arkansas, a judge had published a cartoon painting his opponent as a snake in the grass with a briefcase that said "Lawyer Lowry" on it. You know, it is just amazing what people do.

What can be done? In Columbus, Ohio, they had really nasty judicial elections. One election for the supreme court was particu-

larly bad. So people, as they do here, wrung their hands and said, "What's got to be done?" Well, they did something about it. Members of the bar went to community leaders, bankers, the Chamber of Commerce, the mayor, and the newspapers. The community leaders said to all of the media outlets there that something needs to be done; and they formed an ad hoc committee. The committee contacted the people running for judicial office and said, "We want you to submit to certain guidelines that we have. The committee also wants you to submit your campaign advertising. We want you to agree to be bound by what we do as far as campaign advertising is concerned because we are going to police it." Virtually all of the candidates signed on to it. Otherwise it would go out over the media that they refused to do so. If one of the candidates was aggrieved by unfair publicity, the committee would meet immediately—not tomorrow, not at the end of the election, but immediately. The committee would review it, and if they found it was unfair or improper, they would call the offending candidate in and say, "You have to retract it." If there was not a retraction, it would go out over the media what a lousy bum the person was. Well, the program cleaned up elections.

They did the same thing in Buffalo, New York, but the bar association was involved there. The bar association involvement is a potential problem because it may be considered state action. But if the bar does not get involved and it is just the public censuring speech, that is fine. There are few other scattered instances of this happening.

The difficulty is getting people inspired enough to take action. People in the neighborhood really just do not care much about judicial elections. The best proof of that is judicial campaign fund-raising. Fund-raising is a problem. Do you realize Texas is the only state in the Union that allows a judge to personally solicit campaign funds? No other state does this. Other states require that fund-raising be done through a committee. But those systems are hypocritical because the judge still signs off on finance reports. The judge still knows exactly who is contributing.

I think most judges, and I feel confident of this, are honorable, good people that are going to rule on the merits of a case—but the appearance is terrible. The 1988 Texas Supreme Court race between Justice Phillips and Ted Robertson is the best example I can think of. Millions of dollars flowed into Ted Robertson's coffers

from the trial lawyers. On the other hand, millions flowed into Tom Phillips's campaign from the large law firms, the insurance PACs, and the medical PACs. Following the race, the American Judicature Society interviewed the contributors on both sides. The responses were remarkable. When asked if the contributions were trying to buy the court, they answered, "No, not us. We just want good government, but those thieves over there, they're trying to buy the court." Money flows into supreme court races because they deal with money and property.

On the other hand, in Court of Criminal Appeals races we are doing good to get our expenses paid while traveling around the state. After all, we are just dealing with people's lives, not money and property.

I have all kinds of solutions that I do not think anybody will accept. My solution to this is to do fundraising through a committee, but you had better be real careful who you appoint as your campaign treasurer or the head of your campaign committee, because that person will swear to the validity of campaign reports. The judge would be kept blind to contributions. However, the judge would be ultimately responsible for reports if there were any fraud. You would need to choose your campaign treasurer carefully under those circumstances. But I am afraid my plan would be met with great resistance, most regrettably from the bar. My experience is that, generally, people want you to know who has contributed to you. It is too bad because, ideally, you would contribute just because the person is good and honorable. But, we live in the real world.

The very least we can do is have a committee, because people point to Texas as having the worst possible system of selecting judges, with the possible exception of Louisiana. That places us in great company. There is a certain amount of healthy tension between judicial independence and accountability, but we have accountability with a vengeance. We are accountable to the voters.

Judicial appointment is not a panacea by any stretch of the imagination either. If any of you have ever been before somebody really overbearing that has life tenure, you understand. The late Tom Gee, formerly of the Fifth Circuit, and I were having a conversation about life tenure when I first started teaching judicial ethics. There is a difference between federal appellate judges and federal district judges. I was a trial judge for a number of years before

moving to the appellate bench. As an appellate judge you use an entirely different set of skills. Generally, judges on the appellate bench are a little bit more reflective than judges on the trial bench. Tom Gee was talking about federal district judges, and he said, "You know, if there's anything mean or petty or small about an individual, that job will bring it out." He said something snaps in their minds after they've been on the bench a few years. They begin to think, "Everybody is standing up for me," and then they are just not the same afterwards.

I have a friend named Larry Gist who is a judge down in Beaumont. Judge Gist has some wonderful stories. When he first took the bench he went into Judge Joe Fisher's court in Beaumont and was really impressed at the way he opened court. Everybody jumped when the bailiff said, "All rise, oyez, oyez, oyez, the Honorable, the United States District Court for the Eastern District of Texas is now in session. The Honorable Joe Fisher presiding. God save the United States and this Honorable Court." And Judge Gist said, "Hey, that's good." So he told his bailiff, "I want you to go over to Judge Fisher's court and take notes on the way he opens his court. I want to do something just like that." The bailiff went and did as he was told. Finally, it came time for Judge Gist to actually take the bench. He had been elected and was going on the bench right after the first of the year. When Judge Gist came into the courtroom, the bailiff said, "All rise, oyez, oyez, oyez, the Honorable, the Criminal District Court of Jefferson County is now in session. The Honorable Larry Gist presiding. God save the State of Texas from this Court." That is what happens when you get too pompous.

So life tenure is not necessarily the answer. I do not think that would ever happen in Texas anyway. The Missouri plan has a lot of good things in it. But when you think about it, there is nothing I know of that is a higher character reference than for the people you know to choose you to sit in judgment of them. I really think that elections in the rural areas, where people know each other, are as good as any method of judicial selection. However, the problems arise when the voting pool becomes larger and larger because a lot of people really do not know who they are voting for. Most people do not even know the Court of Criminal Appeals exists, much less who is on it. Yet, they vote for a third of it every two years. A lot of it is name familiarity. Cathy Cochran, who is

on our Court now, ran with her married name about six or eight years ago. Cathy Herasimchuk came in dead last, but she won as Cathy Cochran. Now, she did not all of a sudden get smart in that eight year period, she just had an electable name. And that is really too bad. We have lost some very good judges because of that.

I do not know what the answer is, but if we are going to have the election of judges, we really do need to do some things to clean it up. But, after *White*, it appears that we are not going to get any help from the Supreme Court of the United States.

One of my old judge friends used to say, "We'll all be better off when preachers stop judging and judges stop preaching." And I will do my part right now. Thank you all very much.