

# Judicial Candidate Speech After *Republican Party of Minnesota v. White*

Jan Witold Baran

The people want to elect judges. Notwithstanding a typical Washington lawyer's view of the judiciary enshrined in Article III of the Constitution, the citizens of 39 states insist that judges should be subject to electoral accountability and not be given lifetime appointments by the government elites. For that reason, 53% of state appellate judges must run in contested elections for an initial term on the bench (out of 1,243 judges). Likewise, 66% of state trial court judges (8,489) must first run in contested elections. Eight-seven percent of all state appellate and trial judges face some type of election for subsequent terms.<sup>1</sup> This insistence on elections creates a tension that Professor Stephen Gillers calls the "on the one hand, on the other hand" dilemma.<sup>2</sup> On the one hand, we expect that judges not make extrajudicial or prejudicial comments about the law, particularly controversial legal principles, while on the other hand voters want information in order to cast an informed vote. Likewise, there is a constitutional dilemma. The due process rights of litigants must be preserved, but the First Amendment rights of candidates and their supporters must be honored. The Supreme Court of the United States in *Republican Party of Minnesota v. White*,<sup>3</sup> has weighed in in favor of First Amendment rights. Candidates cannot be gagged by Canon 5.

The *Minnesota* case brought the dilemmas into focus, but not

in the best of circumstances. First, the version of Canon 5 used by the Minnesota courts was the broadest and most unreasonable. Minnesota used the 1972 version of the model code, which has long been abandoned by the ABA. The contested clause prohibited any candidate for election to judicial office to "announce his or her views on disputed legal or political issues." The clause can be read—and was read by the Minnesota disciplinary committee—to prohibit virtually any commentary about legal or political issues.<sup>4</sup> This resulted in what Professor Gillers described as the "rule of silence." In order to avoid any possible claim of a violation of Canon 5, a candidate limited herself to discussing only safe topics such as one's credentials (she graduated from the state law school, law review, Order of the Coif, but probably without mention of any law review articles authored by the candidate), or innocuous statements such as, "I promise to uphold the rule of law," although that statement can become controversial if stated in the context of a discussion of a subject such as abortion.

We are familiar with the oft-repeated observations of Judge Richard Posner in *Buckley v. Illinois Judicial Inquiry Board*,<sup>5</sup> in which he noted that every issue is potentially subject to litigation that may come before an elected judge. Similarly, the "rule of silence" was impractical because it gave voters no valuable

## Footnotes

1. See chart on page 10 of this issue of COURT REVIEW. See also Roy A. Schotland, *Introduction: Personal Views*, 34 LOY. L.A. L. REV. 1361, 1365 (2001).
2. See Stephen Gillers, *If Elected, I Promise [\_\_\_\_\_]* — *What Should Judicial Candidates Be Allowed to Say?*, 35 IND. L. REV. 725, 725 (2002).
3. 122 S.Ct. 2528 (2002).
4. Professor Schotland suggests that the Minnesota announce clause was not broadly interpreted by the Minnesota disciplinary committee to prohibit commentary about legal or political issues. Roy A. Schotland, *Should Judges Be More Like Politicians?*, COURT REVIEW, Spring 2002, at 8 n.7. Schotland correctly quotes from the majority opinion and Justice Stevens's dissent regarding the history of the board's treatment of plaintiff Wersal and the lack of sanctions for violations of the clause, respectively.

Schotland does not mention, however, that the Court also made this statement: "There are, however, some limitations that the Minnesota Supreme Court has placed upon the scope of the announce clause that are not (to put it politely) immediately apparent from the text." 122 S. Ct. at 2532. Indeed, the Court concluded with respect to both the state court and lawyers board actions that "these limitations upon the text of the announce clause are not all that they appear to be." *Id.* at 2533. The Court noted that at oral argument Minnesota stated that it could sanction

a candidate for critical statements of past judicial decisions even if Wersal was not so sanctioned. *Id.* The Court found: "In any event, it is clear that the announce clause prohibits a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions—and in the latter context as well, if he expresses the view that he is not bound by stare decisis." *Id.* at 2534.

What the opinion "politely" did not elaborate is the practice of Minnesota to speak out of both sides of its mouth. The lawyers board may not have sanctioned Wersal for some statements but it interpreted the announce clause broadly, not at all, or, as Schotland notes from the Court's opinion, "equivocally." The effect is to make the announce clause as broad as described by the Court. Candidates, who are most likely to debate issues, are challengers and practicing attorneys. The reason why there are so few enforcement cases under the announce clause is the in terrorem effect of broad or ambiguous interpretations. Candidates, including Wersal, succumb to the "rule of silence" rather than risk complaints and the resulting damage to their careers. It is precisely this Dickensian type of gamesmanship by disciplinary committees that may result in additional First Amendment court decisions striking down "pledges and promises" provisions.

5. 997 F.2d 224, 229 (7th Cir. 1993).

information and actually distorted the sources and flow of information, not from the candidates and their campaigns, but from others, so-called third-party independent speakers, or in the modern vernacular of campaign finance reform, the “special interests.” Perhaps the reason the issue of the “announce” clause became so prominent—and perhaps even the reason the Supreme Court took the *Minnesota* case—is that judicial elections have become more like all other elections. In more and more states, the courts (especially supreme courts) have become lightning rods for dissatisfied constituencies. As a result of public policy issues being resolved in courts rather than in legislatures, the bench is increasingly viewed as a political participant. One need not claim that any particular judicial decision is wrong or not within the province of a court. Assuming that the courts are performing their proper roles, they nonetheless are making big policy decisions that are creating large numbers of dissatisfied citizens who are responding by mobilizing in the elections. The consequences are many. First, it means that judges, particularly statewide elected judges, must raise more and more money. Second, in those states with partisan elections, the political parties see judicial elections as part of an overall political agenda. This has made races for the bench in some states merely a part of the overall partisan electoral warfare.

In addition, independent interest groups have waded into the breach. Business organizations, trial lawyers, organized labor, and others increasingly sponsor advertising in connection with judicial elections. In this escalating environment, the question is, what can the candidates themselves say about their own campaigns when more and more other voices are commenting on the race? Some have suggested that the rule of silence could silence everyone.<sup>6</sup> Yet the *Minnesota* case answered an important question: If candidates cannot be restricted in what they say based on due process concerns, then similar due process concerns would not justify restrictions on what third parties might say. The Court’s decision striking down the announce clause certainly seems to bolster the view that the speech of third parties cannot be restricted.

Now that Minnesota’s “rule of silence” has been struck down, where can a line be drawn? What are the implications for restricting candidate statements? What is the future of judicial campaigns?

First, perhaps a new approach to the announce clause is possible. Professor Gillers once proposed a revision to the Canon 5 announce clause. His proposed rule is as follows: “A candidate for judicial office may state his or her general views on legal issues, but must make it clear that these views are tentative and subject to arguments of counsel and deliberation.”<sup>7</sup>

The proposed Gillers rule has the advantage of permitting candidates to speak, but also reinforces to the voters the fact that judges must judge. They cannot prejudge. At the same time the proposed revised rule does not silence candidates. It

allows candidates to exercise their prerogative to state their views about legal issues, but requires them to express a commonsense caveat. A rule that requires a candidate to say something, of course, may have its own First Amendment deficiencies.

Regardless of whether the announce clause can or should be modified, there still remains in Canon 5 the provision that prohibits candidates from making “pledges or promises.” The *Minnesota* case did not challenge that clause and there is much sympathy for the concept of banning promises. Nevertheless, the clause presents problems of its own. First, there is the issue of vagueness. What constitutes a pledge or promise? In Texas, a judge was issued a public warning because his campaign literature stated: “I’m very tough on crimes where there are victims who have been physically harmed . . . . I have no feelings for the criminal.”<sup>8</sup> The Texas Commission on Judicial Conduct considered these statements as a pledge “not to show leniency toward violent criminals.”<sup>9</sup> But is it a pledge? Was the judge pledging or was he announcing his view on the legal issue of whether there should be tough sentencing of violent criminals?

In New York, a civil court judge was censured for violating the pledges or promises clause because his “campaign literature gave the unmistakable impression that he would favor tenants over landlords in housing matters.”<sup>10</sup> The candidate (who won) created the “unmistakable impression” by pointing out that he was a tenant while his opponent was a landlord, and by using testimonials from tenants who complimented his handling of cases as a housing judge. At what point did the candidate step over the line? Was it when he accurately described himself as a tenant and his opponent as a landlord, when he stated that he was a housing judge, or when he introduced the testimonials? Will housing judges who rent apartments in New York not be allowed to share this information with the public because it would create the “unmistakable impression” that they are pro-tenant?

The vagueness of the “pledges and promises” clause could be compounded by uneven or sweeping enforcement. If judicial commissions apply the pledges and promises clause as broadly as the Minnesota commission interpreted its announce clause, it will suffer a similar constitutional fate. At oral argument in *Minnesota*, Justice O’Connor cynically guessed that the announce clause was being used to “maintain incumbent judges.” In the short term, the state supreme courts will have to grapple with defining the remainder of Canon 5 to give can-

**The proposed Gillers rule has the advantage of permitting candidates to speak, but also reinforces to the voters the fact that judges must judge. They cannot prejudge.**

6. See Deborah Goldberg & Mark Kozlowski, *Constitutional Issues in Disclosure of Interest Group Activities*, 35 IND. L. REV. 755, 765-766 (2002); but see Jan Baran, *Compelled Disclosure of Independent Political Speech and Constitutional Limitations*, 35 IND. L. REV. 769 (2002).

7. See Gillers, *supra* note 2, at 733.

8. Bruce Hight, *Judge Violated Conduct Code, Panel Decides*, AUSTIN-AMERICAN STATESMAN, Jan. 31, 2001.

9. *Id.*

10. NEW YORK LAW JOURNAL, Oct. 17, 1997.

didates sufficient clarity while acknowledging that candidates have a constitutional right to discuss political and legal issues. That will be a daunting task.

At the same time, candidates must grapple with their new “freedom.” It is one thing to have freedom of speech. What to say is something else. In an election campaign, a candidate will be asked, “What is your position on X?” In the past the candidate could say, “I cannot comment on that topic because it is a legal or political issue.” While a candidate no longer can point to Canon 5 for justification, she can still make a similar response. Judicial candidates can adopt the time-honored practice of other politicians by evading direct answers. Unlike most other politicians, judicial candidates will have a good political reason to evade answers. The public has different expectations of judicial candidates. They want their judges to be fair, evenhanded, and unprejudiced. Judicial candidates should capitalize on that expectation whenever possible. Therefore, when asked, “What is your position on X?,” a candidate, even after *Minnesota*, should consider stating (even if she has already opined in past opinions or articles), “I don’t think it is appropriate for a judge [or prospective judge] to make statements on this issue. It may come before the court when I will hear and consider all the arguments.” This type of response at times may not be possible, or may require further explanation with some “neutral” comment about “issue X.” However, free speech is not compulsory speech and voters expect something from a judge that is not expected of a governor or congressman—fewer press releases and more decorum.

As for questions from or advertising “attacks” by third-party organizations, the candidate will have to exercise even more restraint. Experience suggests that candidates in such circumstances benefit from backlash and sympathy. Supporting

groups tend to respond to such advertising in defense of the candidate. The American Bar Association, for example, is encouraging the creation of civic groups for exactly such purposes.<sup>11</sup>

Finally, there is a clear solution to the dilemmas created by judicial elections. Justice O’Connor devoted her concurring opinion to the history of judicial elections. In adopting elections, she noted that “the State has voluntarily taken on the risks to judicial bias.”<sup>12</sup> Implicitly, she was suggesting that elections be replaced with judicial selections. In light of historical public insistence on elections, merit selection is a difficult proposition, but not one to abandon.

In sum, the *Minnesota* case creates the opportunity for more debate. The quantity of additional debate will increasingly depend on the candidates. The “rule of silence” has been struck down, but there still may be occasions where silence will be golden—and prudent politics.



*Jan Witold Baran is a partner in the Washington, D.C., law firm of Wiley Rein & Fielding LLP, where he heads the Election Law and Government Ethics group. He served on President Bush’s Commission on Federal Ethics Law Reform in 1989 and more recently on the American Bar Association’s Commission on Public Financing of Judicial Campaigns. Baran is past chair of the ABA’s Standing Committee on Election Law and is currently Special Advisor to the ABA’s Standing Committee on Judicial Independence. He authored an amicus brief filed with the Supreme Court in Republican Party of Minnesota v. White on behalf of the Chamber of Commerce of the United States.*

11. Recommendation of the ABA Standing Committees on Judicial Independence and Election Law, at <http://www.abanet.org/>

leadership/recommendations02/113.pdf (Aug. 2002).  
12. 122 S. Ct. at 2544.

## **COURT REVIEW** **AUTHOR SUBMISSIONS WELCOME**

*Court Review* invites the submission of original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to working judges. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of articles, essays, or book reviews for *Court Review* are set forth in detail on page 25 of the Summer 2001 issue. For more information, contact Court Review’s editor, Judge Steve Leben, at (913) 715-3822 or by e-mail: [sleben@ix.netcom.com](mailto:sleben@ix.netcom.com).