The Unconstitutionality of Electing State Judges

Monroe H. Freedman,
Professor of Law,
Hofstra University Law School

Abstract:
There is reason to believe that a majority of five justices can be persuaded to hold that the practice or electing judges, and, particularly, of re-electing judges, violates the Due Process Clause of the Constitution.

Rezumat:
Există motive să credem că majoritatea de cinci judecători ai Curții Supreme poate fi convinsă pentru a considera că practica de alegere, și, în special, de realegere a judecătorilor, încalcă Clauza procesului echitabil din Constituție.

Keywords: election, judges

In *Republican Party of Minnesota v. White*[95] the Supreme Court held that a candidate in a judicial election has a First Amendment right to announce his or her views on disputed legal or political issues. Accordingly, the Court struck down the "announce" clause of the ABA Model Code of Judicial Conduct (1972), which had forbidden a judicial candidate to announce such views.[96] The majority opinion was written by Justice Scalia, joined by Rehnquist, O'Connor, Kennedy, and Thomas. The dissenters were Stevens, Souter, Ginsburg, and Breyer.

Even more important than the holding in *Republican Party of Minnesota* regarding the announce clause, however, is the opinion expressed in strong and extensive dicta by a majority of the Court,

stating that due process is violated whenever a judge who is subject to reelection decides a controversial case. That conclusion was expressed by Justice Ginsburg, writing for the four dissenting Justices, and by Justice O'Connor, who parted from the majority to write a separate opinion addressing that issue.

Beginning in 1927, in *Tumey v. Ohio*[97], the Supreme Court recognized in an opinion by Chief Justice Taft that due

[95] 2536 U.S. 765, 122 S.Ct. 2528 (2002).

[96] "(1) A candidate, including an incumbent judge, for a judicial office ... (b) should not ... announce his views on disputed legal or political issues...." ABA Model Code of Judicial Conduct, Canon 7B(1)(b) (1972).

[97] 273 U.S. 510, 3 47 S.Ct. 437 (1927). See also *In re Murchison*, 349 U.S. 133 (1955); *Commonwealth Coatings v. Continental Casualty Co.*, 393 U.S. 145 (1968); *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80 (1972);

Negative campaigning against sitting judges by single-interest political-action organizations is a relatively recent phenomenon.

process is denied if there is a "*possible* temptation to the *average* ... judge ... which *might* lead him not to hold the balance nice, clear, and true...."[98] *Tumey* was a misdemeanor prosecution in which the judge received $12 as his share of the $100 penalty assessed against the defendant. In vacating the conviction for violating due process, the Court held that unless the judge's interest is so "remote, trifling, or insignificant," as to be de minimis, the judge must be disqualified.[99]

Based on the *Tumey* line of authority, Justice Ginsburg concluded that a litigant is deprived of due process when the judge who hears his case has a "direct, personal, substantial and pecuniary" interest in ruling against him[100]; that the judge's interest is sufficiently "direct" if the judge knows that her "tenure in office depend[s] on certain outcomes;"[101] and that due process does not require a showing that the judge is biased in fact as a result of her self-interest. Rather, the Court's due process decisions have "always endeavored to prevent even the probability of unfairness."[102] Ginsburg's remarks are applicable to any judge who "may be voted off the bench and thereby lose her salary and emoluments" if her decision displeases the voters.[103]

In her separate opinion, Justice O'Connor agreed that judges who are subject to reelection "cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects,"[104] giving them "at least some personal stake in the outcome of every publicized case."[105] O'Connor approvingly cited the observation of a state supreme court judge who said that ignoring the political consequences of controversial cases is like "ignoring a crocodile in your bathtub."[106] She also relied on studies showing that judges who face elections are far more likely to override jury sentences of life without parole and impose the death penalty.[107]

O'Connor's opinion then went further, to challenge "judicial elections generally,"[108] regardless of whether a particular case might be affected by the judge's concern about reelection. Referring to the

[98] 273 U.S. at 532, 47 S.Ct. at 444 (emphasis added).

[99] *Id*. at 531-5 532 and 444. In *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80 (1972), the Court vacated a traffic conviction on due process grounds. There, the mayor who acted as judge received no share in the petitioner's fines of $100, but such fines were a substantial part of the village's revenues. Under state law, petitioner could have had a trial de novo before a judge, but the Supreme Court held that due process entitled him to a "neutral and detached judge in the first instance." 409 U.S. at 62, 93 S.Ct. at 84.

[100] Quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. at 824.

[101] Citing *Ward v. Monroeville*, 409 U.S. 57, 60.

[102] Quoting *In re Murchison*, 349 U.S. 133, 136.

[103] 536 U.S. at 816, 122 S.Ct. at 2556.

[104] *Id*. at 789, 2543.

[105] *Id*. at 788-789, 2543.

[106] Eule, Crocodiles in the Bathtup: State Courts, Voter Initiatives and the Threat of Electoral Reprisal, 65 U. Colo. L. Rev. 733, 739 (1994).

[107] Bright and Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U.L. Rev. 759, 793-794 (1995). See also Ronald J. Tabak, Why an Independent Appointing Authority is Necessary to Choose Counsel for Indigent People in Capital Punishment Cases, 31 Hofstra L. Rev. 1105, 1106-1108 (2003).

[108] *Id*. at 788, 2542.

state's claim of a compelling interest in "an actual *and perceived* ... impartial judiciary," she noted that "the very practice of electing judges undermines this interest."[109] That is, even when judges succeed in overcoming their concern with voters' displeasure, the public's confidence in the judiciary could be undermined "simply by the possibility" that judges would be unable to do so.[110]

In addition, O'Connor noted the pernicious effects of campaign fund-raising in judicial elections.[111] Not surprisingly, lawyers and litigants who appear in court are among the major contributors to judges' campaigns[112], and "relying on campaign donations may leave judges feeling indebted to certain parties or interest groups."[113]

When lawyers and litigants appear to be buying influence with campaign contributions, the appearance of partiality goes beyond the highly publicized case, tainting any case in which money may have passed to a judge's campaign by a litigant or lawyer in a case.[114] Thus, O'Connor's ultimate due process challenge is to the entire system of judicial election of judges, in cases of both major and minor public interest.

The five Justices in *Republican Party of Minnesota* who condemned judicial retention elections on due process grounds wereechoing the view expressed by Alexander Hamilton in THE FEDERALIST No. 78.[115] Hamilton explained that fidelity to the Constitution and laws, and to the rights of individuals is "indispensable" in the courts of justice."[116] He cautioned, however, that indispensable fidelity cannot be expected from judges who hold their offices subject to reelection.[117] Regardless of who might exercise the power of retention, Hamilton wrote, the judges' fear of displeasing that authority would be "fatal to their necessary independence."[118] Specifically, if the power of retention were to reside in the people, or to persons chosen by them for that purpose, "there would be too great a

[109] *Id*. (Emphasis added).

[110] Id.

[111] *Id*. at 7 17 89-790, *citing* Schotland, *Financing judicial Elections, 2000: Change and Challenge*, 2001 L. Rev. Mich. State U. Detroit College of law 849, 866 (reporting that in 2000, the 13 candidates in a partisan election for five seates on the Alabama Supreme court spent an average of $1,092,076 on their campaigns); American Bar Association, *Report and Recommendaitons of the Task Force on Lawyers' Political Contributions*, Pt. 2 (July, 1998)(reporting that in 1995, one candidate for the Pennsylvania Supreme court raised $1,848,142 in campaign funds, and that in 1986, $2,700,000 was spent on the race for Chief Justice of the Ohio Supreme Court).

[112] *Id*. at 790, *citing* Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 Cath. U.L. Rev. 361 (2001); Thomas, National L.J., March 16, 1998, p. A8, col. 1; Greenberg Quinlan Rosner Research, Inc., and American Viewpoint, National Public Opin. Survey Frequency Questionnaire 4 (2001) (http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf) (indicating that 76 percent of registered voters believe that campaign contributions influence judicial decisions).

[113] *Id*.

[114] *Id*.

[115] Hamilton wrote: That inflexible and uniform adherence to the rights of the constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices [subject to reelection]. Periodical appointments, however regulated, or by whomsoever made, would in some way or other be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be anunwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity [rather than assuring] that nothing would be consulted but the constitution and the laws. Alexander Hamilton, James Madison, John Jay, THE FEDERALIST, No. 78, p. 417 (ed., J.R. Pole) (2005).

[116] *Id*.

[117] *Id*.

[118] *Id*.

disposition to consult popularity" rather than assuring that "nothing would be consulted but the constitution and the laws."[119]

Hamilton's concerns were illustrated by the case of Tennessee Supreme Court Justice Penny White. In 1996, her retention was defeated by a campaign that relied upon her vote against the death penalty in a case in which she (and four other justices) had affirmed the defendant's conviction. That outcome was "twisted in inflammatory mass mailings,"[120] which denounced Justice White as wanting to "free more and more criminals and laugh at their victims."[121] After Justice White's loss, Tennessee Governor Don Sundquist asked, "Should a judge look over his shoulder about whether they're [*sic*] going to be thrown out of office?"[122] He answered his own question, "I hope so."[123] Justice Ginsburg referred to THE FEDERALIST Nos. 78[124] and 79[125] in her opinion (although not to the passage quoted above). That may be the reason that Justice Scalia made the point that popular election of judges has coexisted with the Fourteenth Amendment since its adoption.[126] However, that would not seem to be an adequate response in view of *Brown v. Board of Education of Topeka*[127] (invalidating *de jure* school segregation under the Equal Protection Clause of the Fourteenth Amendment) and, particularly, *Bolling v. Sharpe*[128] (reaching the same result under the Due Process Clause of the Fifth Amendment). Moreover, the Supreme Court held in 1991 that if a trial judge is not impartial, there is a "structural defect" in the trial, and reversal is required without consideration of the harmless error doctrine.[129] Indeed, because the right to an impartial tribunal is essential to fundamental fairness, it is one of those "extraordinary" rights that cannot be waived.[130]

In addition, a significant part of Justice O'Connor's concern is the advent of fund-raising in judicial elections in exorbitant amounts, reaching into millions of dollars.[131] As Ohio Supreme Court Justice Paul Pfeifer has said, "I never felt so much like a hooker down by thebus station as I did in a judicial election."[132]

Multi-million dollar fund-raising profoundly undermines judicial independence and impartiality. In the millennia-old epigram, "Gifts are like hooks"[133] – or, in modern parlance, gifts

---

[119] *Id*.

[120] Weiss, Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights, 81 N.Y.U. L. Rev. 1101, 1104 (2006).

[121] Id., citing Bright, Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?, 72 N.Y.U. L. Rev. 308 app. A at 332 (reprinting mass mailing).

[122] *Id*., *citing* Wade, *White's Defeat Poses Legal Dilemma: How Is a Replacement Justice Picked?*, Com. Appeal (Memphis, Tenn.), Aug. 3, 1996, at A1.

[123] *Id*.

[124] 536 U.S. 765, 803, 804.

[125] *Id*. at 817.

[126] *Id*. at 783.

[127] 347 U.S. 483 (1954).

[128] 74 S.Ct. 693 (1954).

[129] *Arizona v. Fulminante*, 111 S.Ct. 1246, 1265 (1991).

[130] *United States v. Fay*, 300 F.3d 345, 350-351 (2d Cir., 1962).

[131] 536 U.S. at 789-790, *citing* Schotland, *Financing judicial Elections, 2000: Change and Challenge*, 2001 L. Rev. Mich. State U. Detroit College of law 849, 866 (reporting that in 2000, the 13 candidates in a partisan election for five seates on the Alabama Supreme court spent an average of $1,092,076 on their campaigns); American Bar Association, *Report and Recommendaitons of the Task Force on Lawyers' Political Contributions*, Pt. 2 (July, 1998) (reporting that in 1995, one candidate for the Pennsylvania Supreme court raised $1,848,142 in campaign funds, and that in 1986, $2,700,000 was spent on the race for Chief Justice of the Ohio Supreme Court).

[132] Adam Liptak and Janet Roberts, Campaign Cash Mirrors a High Court's Rulings, The N.Y. Times, Oct. 1, 2006.

[133] Attributed to Marcus Valerius Martialis (40 AD - 103 AD).

are chits or counters. Moreover, fund-raising for judicial office did not exist in 1789 or in 1868. Thus, the factual premise for a due process attack on elected judges is significantly different from the circumstances at the time of the adoption of either the Fifth or the Fourteenth Amendment.

Furthermore, negative campaigning against sitting judges by single-interest political-action organizations is a relatively recent phenomenon. This is illustrated in Utah, where judges have been voted off the bench in retention elections after vociferous opposition by such disparate groups as the Gun Owners of Utah,[134] the National Organization of Women,[135] and the Gay and Lesbian Utah Democrats,[136] and by a coalition group organized by the pastor of the First Baptist Church of Tooele and calling itself Utahns for Judicial Reform.[137]

One tactic of these groups (and even of contending judicial candidates themselves) is to focus on a sensationalized or distorted version of the underlying facts of a case, while ignoring controlling legal issues, and then, in effect, to identify the judge with the criminal and/or the crime. This is illustrated by former Judge Penny White's case, discussed above, where Judge White was characterized as wanting to "free more and more criminals and laugh at their victims."[138] In that case, Judge White had not voted to free the appellant, who had been sentenced to death. Rather, she had concurred in a majority opinion affirming the conviction and remanding the case for re-sentencing.

Since *Republican Party of Minnesota* was decided, Rehnquist and O'Connor have been replaced on the Court by Chief Justice Roberts and Justice Alito. If either of them adopts Justice O'Connor's views, there would still be a majority in favor of invalidating judicial elections on due process grounds. Moreover, it appears that Justice Kennedy could be persuaded to adopt that position. It is true that he did not refer to due process in the *Republican Party of Minnesota v. White*, but there he joined an opinion based on the First Amendment, which made it unnecessary to reach the Due Process Clause.

However, Justice Kennedy has demonstrated a particularly strong concern with the appearance of impartiality. For example, he joined the majority opinion in *Liljeberg v. Health Services Acquisition Corp.*,[139] in which the Court quoted from an opinion by Justice Frankfurter. Explaining why he was recusing himself from a case, Frankfurter said: "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact."[140]

In that case, Justice Frankfurter did not base his recusal on the Due Process Clause, but on what "[t]he judicial process demands."[141] However, Justice Kennedy, in his concurrence in *Liteky v. U.S.*,[142] relied on cases involving due process in explaining that "In matters of ethics, appearance and reality often converge as

[134] *The Salt Lake Tribune* (Nov. 8, 2006).

[135] *Id.* (Oct. 27, 2002).

[136] *Id.*

[137] *Id.* The group is concerned with what it views as leniency with sex offenders and drunk drivers. Regarding criticism that a judge had been unduly lenient in a case of sex abuse of a twelve-yearold girl, the Deputy Tooele County Attorney wrote a lengthy letter defending the judge's sentence.

[138] Id., citing Bright, Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?, 72 N.Y.U. L. Rev. 308 app. A at 332 (reprinting mass mailing).

[139] 486 U.S. 847 (1988).

[140] *Id.* at 869, quoting Public Utilities Comm'n of D.C. v. Pollak, 343 U.S. 451, 466-467, 72 S.Ct. 813, 822-823 (1952) (Frankfurter, J., in chambers).

[141] 343 U.S. at 466, 72 S.Ct. At 822.

[142] 510 U.S. 540 (1994).

one,"[143] and in referring to the importance of "the appearance of fairness and neutrality."[144]

Thereafter, in *Caperton v. A.T. Massey Coal Co., Inc.*,[145] Kennedy explained for the Court that "the Due Process Clause has been implemented by objective standards that do not require proof of actual bias."[146] He added that the Court elaborated its concern with conflicts resulting from financial incentives in *Ward v. Monroeville*,[147] where, "unlike in Tumey, the mayor received no money; instead the fines the mayor assessed went to the town's general fisc."[148] The principle requiring reversal on due process grounds, he said, "turned on the 'possible temptation' the mayor might face" because of his executive responsibilities of village finances.[149] Kennedy added that the Court had reiterated in yet another case that "the [judge's] financial stake need not be as direct or positive as it appeared to be in Tumey."[150]

There is reason to believe, therefore, that a majority of five justices can be persuaded to hold that the practice of electing judges, and, particularly, of re-electing judges, violates the Due Process Clause of the Constitution.

Nota redacției: Articolul a fost publicat inițial în *Georgetown Journal of Legal Ethics, Vol. 26, Issue 1*, Revista Forumul Judecătorilor primind permisiunea autorului și a revistei americane în vederea republicării exclusive a studiului în România.

[143] *Id*. at 565, citing Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13-14, 99 L.Ed. 11 (1954) ("[J]ustice must satisfy the appearance of justice").

[144] Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S.Ct. 1610, 1613, 64 L.Ed.2d 182 (1980) (noting the importance of "preserv[ing] both the appearance and reality of fairness," which "'generat[es] the feeling, so important to a popular government, that justice has been done' ") (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341

U.S. 123, 172, 71 S.Ct. 624, 649, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring).

[145] 129 S.Ct. 2252 (2009).

[146] *Id*. at 2263, citing inter alia Tumey v. Ohio, 273 U.S. 510, 532 (1927). At the oral argument in Caperton, "When Massey's counsel argued ... that Due Process cannot rest on appearances, Justice Kennedy replied: 'But our whole system is designed to ensure confidence in our judgments.... And it ... seems to me litigants have an entitlement to that under the Due Process Clause.'" Caperton Transcript, quoted in James Sample, Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality, 66 NYU Annual Survey of American Law 727, 770 (2011).

[147] 409 U.S. 57 (1972).

[148] Caperton at 2260.

[149] *Id*.

[150] *Id*., citing Gibson v. Berryhill, 411 U.S. 564, 579 (1973).