



PROFESSIONAL RESPONSIBILITY

REPUBLICAN PARTY, ET AL. V. KELLY, ET AL.

U.S. SUPREME COURT DOCKET NO. 01-521

BY EDWARD J. CLEARY

A decade ago, I had the honor of arguing a 1st Amendment case before the United States Supreme Court.¹ The day before the ten-year anniversary of that argument, I found that I would be returning to the Supreme Court in another 1st Amendment case, this time as a named respondent.²

I had been Director for six months when I was sued in February of 1998 by the Republican Party of Minnesota and others; Lawyers Board Chair Chuck Lundberg had been appointed only a few weeks before he was sued in the same matter. The litigation involves Canon 5 of the Code of Judicial Conduct. Four years after the lawsuit was commenced, what remains of the challenge to provisions governing judicial elections will be heard in the highest court in the land.

CHRONOLOGY

Under Article 6, Section 7 of the Minnesota Constitution, all judicial offices for the state of Minnesota are subject to popular election. For over half a century, judicial code provisions have governed contests for judicial office in Minnesota. In recent years, a number of code provisions have come under attack in several states. These attacks involve a number of issues relating to the campaign conduct of a candidate for judicial office. The Office of Lawyers Professional Responsibility enforces the Code of Judicial Conduct for lawyers seeking judicial office; the Board on Judicial Standards enforces the Code for judges seeking reelection. In February of 1998, an advisory opinion was requested from this office asking whether we would enforce Canon 5 as it related to a proposed judicial campaign. The inquiring lawyer was told that Canon 5A(1)(d) and 5B(1)(a), which forbid judicial candidates from attending or speaking at political organization gatherings, and Canon 5A(1)(d), which forbids judicial candidates from seeking, accepting or using political endorsements, would be fully enforced. The office, however, took a different position as it regarded Section 5A(3)(d)(i) which forbids a candidate from "announc(ing) his views on disputed legal or political issues" (the "announce clause"). After researching the issue, our office came to the conclusion, as I noted in the advisory

opinion, that we had "significant doubts as to whether or not this provision would survive a facial challenge to its constitutionality under the 1st Amendment to the United States Constitution."³ The Board later unanimously supported us in this decision. Together, we made it clear that we would not enforce this clause "unless and until it is ultimately held constitutional in this proceeding." (It should be noted that the complaint had been filed under 42 U.S.C. § 1983, which provides for attorney's fees to the prevailing party.)

In response to the advisory opinion, the Republican Party of Minnesota, along with others, filed a motion for a preliminary injunction in United States District Court for the District of Minnesota, in February of 1998. The plaintiffs asserted five separate claims. In the first count, the plaintiffs alleged that Canon 5 was unconstitutional to the extent it prohibited judicial candidates from attending and speaking at political party gatherings. The second count involved a challenge to the above-cited announce clause. The third count challenged the ban on judicial candidates identifying their political party while the fourth count challenged the ban on seeking, accepting or using political party endorsements. Finally, in the fifth count, the plaintiffs challenged the ban on judicial candidates personally soliciting campaign contributions.

In March of 1998, Judge Michael J. Davis denied the motion for the preliminary injunction but noted that "those cases holding the 'announce' rule unconstitutionally overbroad are more persuasive. Thus, plaintiffs have established the likelihood of success on the merits" as to that issue. As to the remaining counts, Judge Davis found the code provisions challenged to be "narrowly tailored to serve the compelling state interest of maintaining the independence and impartiality of the judiciary."⁴

In October of 1998, the 8th Circuit affirmed Judge Davis' dismissal of the motion by a vote of 2-1.⁵ In September of 1999, Judge Davis, pursuant to a motion for summary judgment, dismissed the action in its entirety. In so doing, the court acknowledged "that in ruling on plaintiffs' motions for a preliminary injunction, it initially

ruled that plaintiffs have shown a likelihood of success on the merits of its claim that the announce clause is unconstitutional as written. However, upon closer examination of the applicable case law, the court is convinced that the announce clause is constitutional when narrowly construed." The court then went on to narrow the language of the announce clause to "only prohibiting discussion of a judicial candidate's predisposition to issues likely to come before the court," thus serving the state's compelling interests in "maintaining the actual and apparent integrity and independence of its judiciary, while not unnecessarily curtailing protected speech."⁶

In April 2001, the 8th Circuit affirmed Judge Davis' dismissal, again by a 2-1 vote.⁷ In June 2001, the plaintiffs' petition for rehearing *en banc* before the 8th Circuit was denied, with two dissents.⁸ In September of 2001, a petition for a writ of certiorari was filed with the United States Supreme Court by the Republican Party of Minnesota and others. An *amicus curiae* brief seeking review was submitted by the Republican National Committee as well.

SUPREME COURT REVIEW

Three questions were presented to the United States Supreme Court. In December of 2001, one of those three questions was accepted for review. The Court agreed to consider whether or not the provision that prohibited a candidate for elective judicial office from "announcing his or her views on disputed legal or political issues" was unconstitutional. This is the clause that we believed to be constitutionally suspect and have refused to enforce unless and until it is ultimately found constitutional; it is also the clause that Judge

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Davis initially believed would likely be found unconstitutionally overbroad.

The Court refused to consider "whether the severe burdens imposed by various provisions" of the code "unconstitutionally impinge on the right of political parties to endorse candidates for elective judicial office." Further, the Court refused to consider whether the provision of the code that "forbids a candidate for elective judicial office from attending or speaking at any political party gathering — while permitting such a candidate to attend or speak at gatherings of all other organizations — unconstitutionally impinges" on the 1st and 14th amendments to the Constitution.

In accepting the first question presented by petitioner and in denying questions two and three, the Court sent a message. At least four members of the Court, the number required to grant a petition for a writ of certiorari, appear to have at least some doubt about the announce clause and/or Judge Davis' narrowing interpretation. At the same time, however, at least six justices declined to hear the other challenges to Canon 5 presented by the parties.

Consequently, four years after the initial lawsuit was filed, four out of the five counts have been dismissed and are a dead issue. These include challenges to the ban on attendance and speaking at political party gatherings; the ban on judicial candidates identifying their political party; the ban on judicial candidates and their committees seeking, accepting, or using political party endorsements; and the ban on judicial candidates personally soliciting campaign contributions. The nonpartisan nature of Minnesota's judicial elections remains intact.

THE REMAINING ISSUE

It is, perhaps, reassuring for most of us that Minnesota will remain a nonpartisan state as it pertains to judicial elections. Why should judicial elections remain nonpartisan? As a number of professors have pointed out, there are significant differences between judges and legislators. While legislative candidates are asked to make specific commitments as to what they will do when in office, judicial candidates are generally not asked, and if asked, should not make any commitments. Legislative candidates often

show a preference for friends and allies while in office, demonstrating partiality towards issues they have been lobbied on; judges hold impartiality as their highest calling. Legislators meet with constituents, publicly or privately, to consider their concerns about official matters; judicial officers observe *ex parte* rules in avoiding contact and discussions with parties and others who have business with them or seek favor in some way. There are other distinctions and concerns. At least one observer has made the valid point that due process and the right to a fair trial are endangered by a judicial candidate's willingness and ability to acknowledge beforehand how he or she will rule on a given issue. Given some of the constitutionally suspect legislation emanating from Congress recently, perhaps we should be expecting more from our lawyer-legislators rather than reducing our expectations of judicial officers.

The United States Supreme Court will be deciding whether Judge Davis' narrowing interpretation of the announce clause and the 8th Circuit's affirmation of that narrowing withstand constitutional scrutiny, or not.



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The Court may agree with Judge Davis' interpretation or rule that Judge Davis was unsuccessful, possibly on the grounds that the narrowing resulted in a "rewriting" of the language found in the announce clause, which is constitutionally prohibited. If the Court upholds Judge Davis' interpretation that the clause applies only to "discussion of a candidate's predisposition on issues likely to come before the candidate if elected" then, barring any action by the Minnesota Supreme Court, this will remain the standard for future judicial elections in the state of Minnesota. If the Court strikes down Judge Davis' decision and finds his narrowing interpretation invalid, presumably the Minnesota Supreme Court will replace the language with the language from the ABA Model Code (1990) which prohibits only "statements that commit or appear to commit the candidate with respect to cases or controversies likely to come before the court."

CONCLUSION

While the standard for permissible judicial campaign speech may change, the framework for judicial elections will not. Judicial elections will remain nonpartisan in the state of Minnesota and the prohibition on judicial candidates attending and speaking at political party gatherings; identifying their political party; seeking, accepting, or using political party endorsements; or soliciting campaign contributions, will remain in effect. It took four years of litigation, with the able assistance of the Minnesota Attorney General's Office, but the hard work and effort of all those involved, resulting in the refusal of the United States Supreme Court to hear an appeal on those issues, ensures that much. □

NOTES

1 R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), argued Dec. 4, 1991.

2 Republican Party, et al. v. Kelly, et al., No. 01-521, cert. granted on Question 1, Dec. 3, 2001.

3 Advisory opinion letter dated February 24, 1998.

4 Opinion and order of Judge Davis dated March 9, 1998, 966 F.Supp. 875 (D. Minn. 1998).

5 Per curiam decision dated October 28, 1998, 163 F.3d 602 (8th Cir. 1998).

6 Opinion and order of Judge Davis dated September 13, 1999, 63 F.Supp. 2d 967 (D. Minn. 1999).

7 Opinion and order of the Court of Appeals dated April 30, 2001, 247 F3d 854 (8th Cir. 2001).

8 Order of the Court of Appeals dated June 26, 2001.

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