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A FEW THOUGHTS ON THE IMPORTANCE OF AN INDEPENDENT JUDICIARY

Robert E. Hirshon*

Nothing is more important to our nation than an independent judiciary, for judicial independence goes to the very core of our democracy. In fact, if you want to measure the level of freedom in any country, the first thing to be determined is whether that nation's judges are truly independent, not just from other branches of government, but from all influences of power, because ultimately a free society depends upon a judiciary that is loyal only to the law.

An independent judiciary is not a given. It is like a delicate flower that requires constant nurturing. Recently, however, our state courts received a shock that may threaten their bloom. The United States Supreme Court ruling in *Republican Party v. White*,¹ which declared the "announce clause" unconstitutional, is the culprit. This decision is likely to create a judiciary that over time will become less independent and more beholden to individuals. At a minimum, the Supreme Court's opinion will open the door to the same cynical election process for state judges that has infected the electoral processes for our two other branches of government.

Why does this cynicism exist? Why is it at an all-time high? In part the answer is because Americans are convinced that special interest groups have far too much power over the legislative and executive branches. Voter apathy and the demand for campaign finance reform are two manifestations of this new reality. To date, the judiciary has escaped the perception that judges are influenced in their decisionmaking by special interests. But how much campaign money will need to be spent,

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1. ___ U.S. ___, 122 S. Ct. 2528 (2002).

how many issue-advocacy ads will need to be aired, how much negative advertising by judicial candidates will need to be created before the public changes its mind? As Benjamin Cardozo himself once pointed out, “[t]he great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.”² And once the public changes its perception of how justice is determined, will the judiciary ever get its credibility back? Our profession’s own recent history suggests that it will not.

On June 27, 1977, the United States Supreme Court decided *Bates v. State Bar of Arizona*.³ Balancing society’s interests in the free flow of commercial speech against the need to regulate the legal profession, the majority of a deeply divided Court rejected the Arizona Bar’s argument that advertising would ultimately erode true professionalism and diminish the legal profession’s reputation in the community. The last twenty-five years have proved that majority wrong. And Chief Justice Burger’s premonition that the Court’s decision would ultimately rebound both against the profession and the general public unfortunately has turned out to be accurate—too accurate.

Quite simply, the majority in *Bates* failed to acknowledge human nature. Lawyers quickly determined that the Supreme Court had created a crack in the heretofore solid armor of professionalism. They learned that they could advertise just like any other trade, and in the process they found out what Madison Avenue already knew: Some approaches sell while others do not. Thus legal advertising became slicker in its packaging as lawyers exuberantly pushed the envelope beyond what many Americans considered good taste.

The American Bar Association and many state and local bar associations did what they could to prevent misleading advertisements and to temper the more distasteful ads, but the die was cast. Advertising helps the bottom line and the bottom line became what it was all about. After all, in *Bates*, the Supreme Court had labeled our profession a trade. And a trade is really a business. “If you’re injured, it must be somebody else’s fault,” became more than just a slogan, it became *our*

2. Benjamin N. Cardozo, *The Nature of the Judicial Process* 168 (Yale U. Press 1921).

3. 433 U.S. 350 (1977).

profession's scarlet letter. Is there any wonder why the legal profession is one of the least respected by the public?

Fast forward exactly twenty-five years to June 27, 2002. The Supreme Court was again asked to engage in a delicate balance involving freedom of speech when the *White* case required the justices to weigh the First Amendment against the professional regulation of judges. Another deeply divided majority determined that freedom of speech trumped judicial regulation and again, the Supreme Court opened Pandora's Box. And as with Pandora's Box, the escape of all the horrors has yet to be cataloged.

In *White* the Supreme Court unequivocally stated that the "announce clause," which prevents a candidate seeking judicial office from announcing his or her views on disputed legal or political issues, is unconstitutional. As a result of this ruling, our judicial elections may soon look a lot more like our executive and legislative races. Judicial candidates will now understand what they have to do to unseat judges who have made unpopular rulings: highlight those decisions and make it clear that they disagree. It will begin subtly at first, but ultimately candidates for judicial office will run on abortion planks, tort-reform planks, consumer planks, business planks. The list will expand and the money will flow.

Protectively wrapped in the *White* ruling, judicial candidates will challenge each other to be more forthcoming about their positions on controversial legal issues under the guise of providing voters with the information that they need. Candidates will cite the Supreme Court as having already discredited the concept that restraint is appropriate. Special-interest donors will be able to precisely target their financial contributions, and special-interest money will ultimately define the results of judicial elections. Justice will be for sale and the states will enter a brave new world. At least one member of the Supreme Court seems to think that the states brought this reality upon themselves by continuing to elect judges, so I guess the states should expect to be punished for making that mistake. But the Supreme Court must be careful, for it too may be affected by the new dynamic it has unleashed.

The majority and concurring justices apparently believe that they will be immune to *White's* effects because their

opinions were limited to judicial campaigns. They may be hard pressed, however, to maintain this limitation. Indeed, the Supreme Court most surely will have to determine, if it hasn't already, that the "announce clause" is unconstitutional not only in those states that elect their judges but also in those states that appoint them. And if this is true, why should there be a distinction between state judges and federal judges? And if there is no distinction, the Senate confirmation process will soon demand answers to questions that many federal judges, including those on the Supreme Court, have been able to deflect by pointing out that they should not make statements that commit or appear to commit them to particular positions that could have a bearing on cases, controversies, or issues that are likely to come before them.

Justice Ginsburg was right. The *White* majority's bold assertion that her dissenting opinion greatly exaggerated the difference between judicial and legislative elections is absolutely wrong. Everything in our proud history demonstrates that the judiciary is different from the political branches of government. The founders knew that independent judges are a nation's most precious commodity. We must continue to treat them as such.