Judicial Politics *Redux*

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On February 20, 2003, Judge David N. Hurd of the U.S. District Court for the Northern District of New York took the decision in *Republican Party of Minnesota v. White*[1] one step further by ruling that New York judges and judicial candidates could not be sanctioned for "enthusiastically participating in all aspects of the political process," including endorsing and raising money for other candidates.[2]

In *Spargo v. New York State Commission on Judicial Conduct*,[3] Thomas J. Spargo, now a state trial court judge, argued that the state judicial code, which is based on the ABA Model Code of Judicial Conduct, infringed upon his free speech, association, and equal protection rights under the First and Fourteenth Amendments.[4] Judge Hurd agreed that the code unconstitutionally violated Spargo's free speech and association rights, but—like Justice Stevens's dissent in *White*—gave short shrift to his equal protection claims.

The Underlying Case

Before his "foray into elective politics," Spargo was an election law attorney in Albany County, New York.[5] In the fall of 1999, he campaigned for the position of town justice in East Berne, New York. Spargo, who is a Republican, successfully ran for the state trial court in 2001 after being endorsed by the local Democratic, Independence, and Conservative parties.[6] The judicial commission filed charges against Judge Spargo in January 2002, almost immediately after he was sworn in as a state supreme court justice, for violating three provisions of the N.Y. Code of Judicial Conduct during his 1999 campaign for town justice:

- A judge shall uphold the integrity and independence of the judiciary (§ 100.1);
- A judge shall avoid impropriety and the appearance of impropriety in all of [his or her] activities (§ 100.2); and
- A judge or candidate for judicial office shall refrain from inappropriate political activity (§ 100.5).[7]

Specifically, the commission said that Spargo had given away nearly $2,000 in "freebies" during his election campaign for town judge, including coupons for free coffee, donuts, and gasoline; cider and donuts for the first fifty residents who hauled their refuse to the town dump; and free pizzas for teachers and other town employees.[8] He also purchased rounds of drinks at a local bar after louding proclaiming his candidacy.

The judicial commission also accused Spargo of presiding over cases without disclosing to defense attorneys that he had represented the campaign of the district attorney, and that the campaign still owed $10,000 in legal fees.[9] He also was the keynote speaker at an annual fundraiser for the Monroe County Conservative Party and received national attention by "participating in a loud and obstructive demonstration against the [Gore-Bush] recount process outside the offices of the Miami-Dade County Board of Elections."[10]

Finally, the commission in a supplemental charge said that Spargo, during his successful campaign for the state supreme court, paid $5,000 in fees to a consulting firm although the principal of the firm had "volunteered her services, did not expect to be paid, and did not request payment."[11] The principal, who served as a delegate to the judicial nominating convention, nominated Spargo as the Democratic Party's candidate for supreme court justice, allegedly on the same day as the $5,000 payment.

Such activities would have been regarded as "politics as usual" for most candidates, except those running for judicial office. In a sweeping decision, Judge Hurd concluded that if *White* allows judges to campaign for themselves, then it must permit all kinds of political activities, no matter how distasteful: "If New York, like thirty-eight other states, persists in electing at least some of its judges, then it will have to live with the consequences."[12]

The *Spargo* decision addresses the four major areas discussed below although most of the discussion focuses on the First Amendment:

Abstention

Despite a " 'strong federal policy' " against interference with pending state cases, Judge Hurd said that federal court involvement was necessary to assure that Spargo's constitutional issues would be raised, at least in some forum.[13] Pointing out the state's failure thus far to "undertake [any] analysis of a constitutional challenge" to the judicial code, Judge Hurt said that "it is fallacious to argue that . . . plaintiffs necessarily have an opportunity to be heard in state proceedings, when in the history of state court proceedings, no such claim has ever been heard."[14]

Equal Protection

Echoing Justice Stevens's dissent in *White*, Judge Hurd found that "judicial candidates and candidates for other public office are not similarly situated" and thus the "restrictions placed upon judges and judicial candidates do not deny them equal protection of the laws."[15]

Section 1983

In response to the defense's call for dismissal of Spargo's claims under § 1983 of the Civil Rights Act of 1871 because the Eleventh Amendment provides immunity to the defendants, Judge Hurd noted that declaratory and prospective injunctive relief would be available remedies to the plaintiff. Therefore, he added, Spargo's § 1983 claims need not be dismissed.[16]

Free Speech for the Judiciary

The *Spargo* decision addresses First Amendment rights for sitting judges and candidates in terms of prior restraint, the need for judicial independence, range of allowable political activities, tradition, and vagueness of language.

All of the litigants, including the judicial commission, agreed that the contested provisions of the state judicial code constituted prior restraint. The basic issue became whether "this prior contraint on political activity is constitutionally permissible."[17] Quoting *White*, Judge Hurd noted that "such a prior restraint is permissible only if narrowly tailored to serve a compelling state interest,"[18] and that the defendants were responsible for "demonstrating that the interest is compelling and . . . narrowly tailored."[19]

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Both Judge Spargo and the judicial commission, according to Judge Hurd, accepted the "articulated purpose of judicial independence" as a compelling state interest but neither side was willing or able to define the term. Accordingly, Judge Hurd looked to *Black's Law Dictionary* and to the preamble to the judicial code to define "judicial independence" as "the ability of judges to make their decisions free of control or influence of other persons or entities."[20]

Thus, the crux of the case became whether the judicial code's ban on "inappropriate political activity" protects "the ability of judges to make decisions free of control" in the narrowest possible sense. And, it is precisely at this point, according to the *Spargo* decision, where the defendants' arguments crumbled. Judge Hurd delineated a laundry list of banned political activities under the judicial code, including participating in political campaigns, endorsing candidates, giving speeches, or attending political functions.[21] Moreover, judicial candidates are called upon to encourage their families to "adhere to the same standards of political conduct in support of the candidate as apply to the candidate."[22] The code is silent on what happens when the judicial candidate is also the parent of a rebellious adolescent.

But the defendants failed to draw a nexus between avoiding the delineated political conduct and an independent judiciary. Furthermore, as *White* points out, judicial candidates do not appear de novo without having had some political experiences themselves.[23] "A wholesale prohibition on participating in political activity ignores the fact that judicial candidate[s] must at one time participate in politics or would not find [themselves] in the position of a candidate." [24]

Is Recusal the Answer?

But in the long run, according to Judge Hurd, the easiest way to preserve an independent judiciary requires no legislative action or judicial codes. "If a judge were influenced, or biased, against or for a party to a proceeding, for poltical reasons or otherwise, the proper consequence would be recusal."[25]

The defendants argued that the "long-established tradition of prohibiting certain conduct, such as political activity by judges and judicial candidates" creates a "supposition that the prohibition is constitutional." [26] Nonsense, according to Judge Hurd, who wrote that "this assertion is more than misleading; it is inaccurate." [27]

Finally, Judge Hurd demolished the lack of specificity in section 100.1 in what could be labeled the "let them eat cake" argument. The commission's ability to exercise complete discretion to determine what conduct "upholds the integrity of and independence of the judiciary" led to its characterization of Candidate Spargo's distribution of donuts as "unseemly."[28] In contrast, serving coffee and cake at a reception where the candidate is introduced would meet with the commission's approval. "How would anyone know," according to Judge Hurd, "that handing out donuts would constitute a failure to uphold the integrity and independence of the judiciary while serving cake would not?"[29]

Mixed Reactions to Spargo

As in the earlier *White* decision, reactions to *Spargo* could best be characterized as mixed. Lorraine Power Tharp, the president of the New York State Bar Association, was quoted in the *New York Times* as saying that "this is going to open up the doors to so many of the campaign abuses that have been documented around the country . . . the public loses its trust and confidence in the judiciary. Judicial campaigns should be conducted with dignity and integrity."[30] But others like Monroe H. Freedman, a law professor at Hofstra University, disagreed. "The idea that if we make believe judges were appointed by certain presidents or governors or elected in certain ways, no one will have a political bone in their body, is not correct," he told the *New York Times*. "It isn't so and there is no reason not to say so."[31]

Meanwhile, ABA President Alfred P. Carlton Jr. pointed to the ABA's continuing efforts "to protect the judiciary from improper political influences and the campaign finance issues that flow from judicial elections while still preserving the First Amendment rights of judges." Work has been underway since last June, he added, on possible revisions to the Model Code on Judicial Conduct to ensure "an impartial judiciary, free to rule on the law, and unencumbered by political demands."

The New York judicial commission has announced plans to appeal the district court opinion.

Endnotes

1. 122 S. Ct. 2528 (2002).
2. *See* Spargo v. New York Comm'n on Judicial Conduct, 1:02-CV-1320, 2003 U.S. Dist. LEXIS 2364 (N.D.N.Y. Feb. 20, 2003); Adam Liptak, *Judges and Politics Mix: U.S. Ruling Breaks Down a Wall*, N.Y. TIMES, Feb. 22, 2003, at B1.
3. *Spargo*, 2003 U.S. Dist. LEXIS 2364, at *1.
4. *Id.* at *3.
5. *Id.* at *1.
6. *Id.*
7. N.Y. STATE CT. R. & REG., tit. 22, §§ 100.1 to 100.5.
8. *Spargo*, 2003 U.S. Dist. LEXIS 2364, at *16–*17.
9. *Id.* at *18.
10. *Id.* at *19–*20.
11. *Id.* at *21–*22.
12. Liptak, *supra* note 2.
13. *Spargo*, 2003 U.S. Dist. LEXIS 2364, at *25 (quoting Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423,431 (1982)).
14. *Id.* at *35.
15. Id at *36–*37.
16. *Id.* at *37.
17. *Id.* at *38.
18. *Id.* (quoting *White*, 122 S. Ct. at 2534).
19. *Id.*
20. *Id.* at *41 (citing BLACK'S LAW DICTIONARY 774 (7th ed. 1999)).
21. *Id.* at *42.
22. *Id.*
23. *White*, 122 S. Ct. at 2535.
24. *Spargo*, 2003 U.S. Dist. LEXIS 2364, at *44 (citing *White*, 122 S. Ct. at 2536–37).
25. *Id.*
26. *Id.* at *45 (quoting *White*, 122 S. Ct. at 2540).
27. *Id.*
28. *Id.*
29. *Id.*
30. Liptak, *supra* note 2; *see also* James C. McKinley Jr., *U.S. Ruling Allows New York Judges to Take Part in Politics*, N.Y. TIMES, Feb. 21, 2003.
31. Liptak, *supra* note 2.