

**As Pennsylvania Goes, So Goes the Nation:
A Case Study of a Supreme Court Election in the Post-White Era**

Pennsylvanians for Modern Courts

August 2004

Pennsylvania's 2003 judicial elections have provided important lessons for observers of judicial elections in other states. Unlike most states, Pennsylvania elects judges in odd years, so it is off cycle from the other big states for judicial elections such as Ohio, Texas and Minnesota. But, Pennsylvania tends to trend with, and often set the trend for, the other states when it comes to issues surrounding funding and campaign conduct. The 2003 elections in Pennsylvania did not disappoint in these two arenas, and from the looks of the 2004 judicial election cycles, Pennsylvania's experience will be repeated throughout the nation this fall.

During the summer of 2002, the United States Supreme Court issued its decision in Minnesota v. White, 536 U.S. 765 (2002), holding that Minnesota's judicial canons limiting judicial candidates' ability to offer opinions on issues that could come before the courts constituted impermissible restrictions of the candidates' First Amendment rights. Many states, Pennsylvania included, had judicial canons strikingly similar to the canons rejected by the Court in White. Judges, candidates, scholars, policy makers and court watchers predicted that the decision would fundamentally alter the way judicial election campaigns were conducted.

The decision was issued in the middle of a judicial election year for many states. Generally, the decision came after the primary season was concluded, but before the general elections were held. Because of the timing, many states did not have time to react to the decision in advance of the elections, and the 2002 elections did not provide a full opportunity for observation and analysis of the impact of the White decision.

There were no judicial elections in Pennsylvania in 2002. By the time the 2003 election season began, however, the Pennsylvania Supreme Court, in response to White, had revised the canons governing candidate speech. Although candidates now would be permitted to "announce" their views on disputed legal or political issues, they would be prohibited from making statements that "commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." (Code of Judicial Conduct, Canon 7 (B)(1)(c)). The new canons were issued just before the start of the 2003 judicial campaign season. Therefore, the 2003 Pennsylvania elections afforded an entire election cycle conducted under the new rules and provided a good opportunity to study elections in the post-White era.

In 2003, Pennsylvania elected a state Supreme Court justice and three Superior Court judges in statewide partisan election contests as well as numerous local trial judges. As expected, candidates were presented with many opportunities to share their views on hot button issues, such as abortion, the death penalty and tort reform. They were presented with surveys and questionnaires from groups across the ideological spectrum, clearly seeking to support or oppose candidates based on their answers to very direct questions. Candidate debates and forums were held, where pointed questions were asked about the candidates' opinions and judicial philosophies. What follows is a case study of the 2003 Pennsylvania Supreme Court election and a likely preview of what other states will experience during the 2004 judicial election cycle.

SHOW ME THE MONEY

The 2003 Pennsylvania Supreme Court race was the most expensive judicial election during the 2002-2003 judicial cycle. (The Institute on Money in State Politics, May 19, 2004). "State judicial elections across the country cost \$29 million dollars in 2002, as 112 candidates competed in 33 states that election cycle. But no single seat in that cycle involved more money than the seat won by Justice Max Baer in Pennsylvania last year." (The Institute on Money in State Politics, May 19, 2004).

Contributions to the two candidates for the vacant Supreme Court seat topped \$3.34 million. Democratic candidate, and ultimate winner, Max Baer raised \$400,000 more than his Republican opponent Joan Orié Melvin. The more than 3,500 contributors to the candidates included individuals, political parties, businesses, unions and political action committees. Over 1,000 lawyers and law firms contributed, amounting to 43% of the total capital raised in the election, a drastic increase from their contribution of 10% of total funding in the 2001 judicial elections and a higher percentage of giving than in other states. (The Institute on Money in State Politics, May 19, 2004). These numbers, staggering as they are, represent only the tip of the iceberg, since third party expenditures that are not direct contributions to the candidates, including those made by special interest groups, could not be captured under existing reporting regulations.

The 2004 judicial races throughout the nation are mirroring Pennsylvania in terms of money. Unprecedented amounts are being contributed to candidates, as the cost of seats on the states' courts rises exponentially. In Ohio, there are predictions that the upcoming elections may cost thirty million dollars. (*Secret Money Harms Judiciary*, Cincinnati Post, Keith Ashmus, January 21, 2004). Similar predictions are being made about Alabama's elections, where at least 2.7 million dollars were spent by eight candidates in the Republican primary for the Supreme Court this summer. (William C. Singleton III, *The High Price of Justice*, Birmingham Post-Herald, June 16, 2004). Moreover, third party special interest expenditures are increasing as well, as organizations are staking out battle ground states and districts and pouring money into judicial races.

TO SPEAK OR NOT TO SPEAK

During the 2003 Pennsylvania judicial campaigns, many candidates embraced the new freedom to speak about disputed issues, but others chose to adhere to the old canons and refrain from announcing views on issues that could come before the courts. This question, to speak or not, itself became the focus of debates and campaign trail rhetoric as various media sources portrayed candidates' struggles with the new rules of judicial campaigns.

The most dramatic difference in candidates was between the two candidates for the Supreme Court seat, Republican Joan Orié Melvin and Democrat Max Baer. Baer chose to speak out, embracing the opportunity to share his views with the voters: "Talking about your views lets voters align with candidates with whom they share 'a

vision of life.” (Emily Heller, *Electing Judges; The New Freedom*, The National Law Journal, Oct. 20, 2003). Baer explained that he agreed with the Supreme Court that judicial elections should be meaningful: “gagging candidates violated their free speech rights.” (Id). By contrast, Melvin adhered to the old canons, explaining that she believed sharing her views might later require her to recuse in a case: “Judges who state their views on matters that might come before them, should then have to recuse themselves if those matters come before them.” (Peter L. DeCoursey, *Judicial Candidate Opts for Silence*, The Patriot-News, October 12, 2003). Baer disagreed, but did state that every time he would take a position, he would also explain that his opinion would not dictate how he would decide a future case. (Heller, *Electing Judges*).

In a televised debate between Baer and Melvin, the candidates argued this issue head on. Baer argued:

Judges have opinions, you wouldn't want a judge on the bench who didn't have opinions, who didn't have sufficient life experiences, hadn't thought about things enough, didn't care passionately about society enough to have opinions. And where Joan and I differ is that I'm willing to tell you mine, because I don't think an ignorant voter, I don't think an ill-informed voter is a good thing. I think you have a right to know what I feel, what I believe in, who I am. And so I tell you, with the caveat that I still am going to do my job as a judge.

(Televised Debate Between Max Baer and Joan Orie Melvin, October 30, 2003). Melvin responded:

A judge's personal beliefs are totally irrelevant when you apply the rule of law in any judicial decision making process. Members of the public need to believe that they have an even playing field. When you are going out speaking on the issues, the public believes there is a predisposition that this judge will rule consistently with what their personal beliefs are. Impartiality of the courts is a fundamental prerequisite to a fair hearing, and that can be deemed compromised by appearances alone. So it is not a question of Max stepping out and saying I will apply it and I won't use my personal beliefs. It's the appearance and the due process rights of litigants.

(Televised Debate Between Max Baer and Joan Orie Melvin). Melvin further explained:

Max and I have differing opinions on offering what our own personal opinions are. I have not stated my personal opinions, whether it be in public, whether it be in private. . . . I have stated that I have a different view of Minnesota v. White. They did not mandate that we speak out on the issues in granting us First

Amendment rights, and I feel that it erodes the public's trust and confidence in the courts.

(Televised Debate Between Max Baer and Joan Orié Melvin).

Citing a newspaper article as his source, Baer countered that Melvin was in fact stating her views about certain issues, including capping damages awards in medical malpractice awards, to private groups. (Televised Debate Between Max Baer and Joan Orié Melvin). Fred Anton of the Pennsylvania Manufacturers' Association told a reporter that Melvin had met with his group and publicly stated her support for tort reform measures. (DeCoursey, *Judicial Candidate Opts for Silence*). Similar allegations were made about Melvin's communication of her position on abortion. (Jill Porter, *Court Race: Clear Choice*, The Philadelphia Daily News, October 30, 2003). The issue of whether Melvin spoke or not was never definitely resolved.

While no polls were taken of voters on the question of how candidate speech affected their choices at the ballot box, it is likely that each candidate gained some votes and lost some others because of their decisions to speak out or not. Some candidates for the lower courts tried to walk a middle ground between the positions staked out by Baer and Melvin. While not directly speaking out, such candidates made their religious affiliations clear and claimed their opinions and beliefs were in concert with the tenets of their religion. Significantly, the Baer-Melvin debate is not unique. Candidates throughout Pennsylvania and the nation are struggling with the meaning of White and the new canons as they try to define for themselves how speaking out will impact their ability to serve on the bench – as well as how it will affect their election prospects.

In Montana, for example, the debate between Baer and Melvin is being replayed by two candidates for the Supreme Court, sitting Justice James Nelson and his challenger Rep. Cindy Younkin. Justice Nelson explains that despite the rule changes, he does not believe that sharing his views is ethical. He also claims that speaking out affects the court's impartiality. His challenger counters that voters need information about the candidates. In a race for a second open seat, District Judge Ed McLean believes it is proper to criticize past decisions but will not comment on issues that could come before the court. His opponent, Brian Morris, said he will speak out only where he feels he can do so without affecting his ability to act as a judge. (Bob Anez, *Judicial Candidates Remain Split; Expressing Personal Opinions Still Tough*, Independent Record, March 13, 2004).

CANDIDATE SURVEYS

Special interest groups in Pennsylvania were very active surveying candidates in 2003. While some simply requested that candidates identify their work experience, civic affiliations and relevant experience, others, emboldened by the new judicial canons, asked probing questions seeking clear pronouncements of candidates' positions on controversial issues that often are the subject of litigation in the state courts. A sampling of these questions follows:

- Do you support the rights of LGBT (lesbian, gay, bisexual, transgendered) people to the following: a. marriage? b. protection from discrimination in employment, housing and access to public accommodations? (Outfront! Liberty City Lesbian and Gay Democratic Club).
- What is your philosophy regarding state aid to religious schools? What is your philosophy regarding separation of church and state? What are your thoughts regarding tuition vouchers? Please discuss your thoughts regarding the privatization of public schools and public school services. (The Pennsylvania State Education Association Political Action Committee for Education).
- Do you support the death penalty? Do you support restricting abortion rights in Pennsylvania? If so, which restrictions do you support? Do you believe that your personal beliefs and political ideology influence how you interpret the Constitution? (Calkins Newspapers, a chain of four daily newspapers in Pennsylvania).
- Do you believe a parent's sexual orientation should be a determining or influencing factor in custody decisions? Do you support the 2002 decision in In re Adoption of R.B.F. and R.C.F.? Should same sex couples be allowed to marry? (Pennsylvania Gay and Lesbian Alliance).

We have not obtained the answers submitted to these surveys nor lists of which candidates responded to which surveys. We do know, however, that many of these groups used the candidates' responses, or lack thereof, in making endorsements and expressing support for the candidates. The National Abortion and Reproductive Rights Action League of Pennsylvania, for example, first cited the White decision and then asked: "What thoughts and/or opinions do you wish to share with NARAL-PA on reproductive rights both as to adults and to juveniles?" The group used the questionnaire to endorse 18 judicial candidates in the May primary. The list of endorsed candidates included Baer, whose answer to the survey accompanied his picture in the endorsement: "I am pro-choice and proud of it." (Carrie Budoff, *PA Court Candidates Speak with New Political Candor*, Philadelphia Inquirer, October 1, 2003).

Media reports from across the nation echo Pennsylvania's 2003 experience. The Christian Coalition of Georgia submitted surveys to statewide judicial candidates seeking their positions on abortion, school prayer and homosexual conduct. The Christian Coalition distributed the results of the survey as a voter guide; and the results are available on the organization's website. The Georgia Committee for Ethical Judicial Campaigns requested that candidates sign a pledge stating their intent to conduct their campaigns ethically and refrain from announcing views on issues likely to come before the court. (Steven H. Pollak, *Christian Coalition Tests Judicial Candidates*, Fulton County Daily Report, May 14, 2004). Other groups also submitted questionnaires to the

candidates: “Georgia right to Life, which opposes abortion, wants to know whether candidates believe there is a provision in the Georgia Constitution that protects a right to abortion; the Cobb County Healthcare Professionals Political Action Committee asks if candidates have ever sued a physician and seeks their views on tort reform; and the Stonewall Bar Association, a group of gay, lesbian, transgendered and bisexual lawyers asks whether candidates would discriminate against employees based on sexual orientation or gender identity.” (Jonathan Ringel, *Christian Coalition Tests Judicial Candidates*, Fulton County Daily Report, June 7, 2004). While some candidates answered some questionnaires, others refused.¹

PMC expects to see more organizations submit increasingly detailed surveys as the post-White era continues. As groups become more sophisticated about their questions and their use of survey results, candidates likely will feel greater pressure to respond. It is unknown how a candidate’s answers to such surveys would later affect his or her ability to rule in future cases and whether such answers could form the basis for recusal motions. This will be an interesting and critical area to monitor in the coming years.

CONCLUSION

In her concurring opinion in White, Justice O'Connor neatly identified the true source of the tensions that produced the case:

Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan. In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.

White, 536 U.S. at 792 (O'Connor, J., concurring). The Court, however, found that this tension could not be resolved by making special speech rules for judicial elections:

¹ In Alabama, the League of Christian Voters submitted a proposed questionnaire to the Judicial Inquiry Commission to determine whether it could be presented to Supreme Court candidates. The survey included questions about the definition of marriage and their positions on abortion. (Kyle Wingfield, *Alabama Christian Group to Ask Judicial Candidates About Faith*, Times Daily, February 12, 2004). It appears that the Commission declined to issue an advisory opinion, and we have been unable to ascertain whether the survey was distributed and, if so, how the candidates responded.

“[O]pposition [to judicial elections] may be well taken (it certainly had the support of the Founders of the Federal Government), but the First Amendment does not permit it to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about.” White, 536 U.S. at 787-88. The White decision means, then, that if a state unwisely chooses elections as its method of judicial selection, the elections must be real elections, not watered down or sanitized versions of political elections.

This is precisely what we observed in Pennsylvania in 2003. Candidate surveys, debates and sound bites have absolutely no place in the process of judicial selection. But it's what we have now, and it's likely to intensify. Campaigns are getting uglier as judicial candidates' associations, decisions and, now, expressed beliefs are bandied about and attacked.

PMC and the Justice At Stake Campaign, a national coalition of organizations dedicated to protecting the independence of the judiciary, opposed the decision in White because of the anticipated effect the ability to speak out would have on a judge's ability to remain impartial and to be perceived as acting impartially. To have judges and judicial candidates across the nation echo these concerns, while validating our arguments, is disturbing. If judges themselves are concerned that speaking out in some way binds them to a position, how can litigants ever be certain that they are coming before an impartial tribunal? Some might argue that the knowledge of a judge's prior statements on the campaign trail could, in fact, provide valuable information to litigants and even form the basis for a recusal motion. At this juncture, this is speculative but it does raise the dangerous prospect of inconsistent rulings by judges who have differing views of the import and impact of their own campaign speech. This is most troubling, because litigants should be able to come to court secure in the knowledge that the judge will rule impartially and independently. Preparing for litigation should not have to mean a thorough research effort into the campaign speech of the presiding judge. Sadly, it may come to that.

Clearly, each state using judicial elections will face growing pains during the early post-White elections. It is not clear how or when the questions will be put to rest. We predict that as Pennsylvania goes, so goes the nation.