IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2000 Term

FILED
March 31, 2000
DEBORAH L. McHENRY, CLERK
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OF WEST VIRGINIA

No. 27458

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DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel. GEORGE E. CARENBAUER,
Petitioner,

v.

HONORABLE KEN HECHLER, Secretary of State of West Virginia,
and the HONORABLE WARREN R. McGRAW,
Justice of the Supreme Court of Appeals of West Virginia,
Respondents,

Writ of Mandamus

WRIT GRANTED AS MOULDED

Submitted: March 17, 2000
Filed: March 31, 2000

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ACTING CHIEF JUSTICE SCOTT delivered the Opinion of the Court.

CHIEF JUSTICE MAYNARD, JUSTICE DAVIS, and JUSTICE McGRAW, deeming themselves disqualified, did not participate in the decision in this case.

JUDGE FRANK E. JOLLIFFE, JUDGE FRED L. FOX, II, and JUDGE THOMAS H. KEADLE sitting by temporary assignment.

JUSTICE STARCHER dissents and reserves the right to file a dissenting Opinion.

JUDGE JOLLIFFE concurs and reserves the right to file a concurring Opinion.

SYLLABUS BY THE COURT

1. "A writ of mandamus will not issue unless three elements coexist–(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syl. Pt. 2, State ex rel. Kucera v. City of Wheeling, 153 W.Va. 538, 170 S.E.2d 367 (1969).

2. "The public policies in protecting fundamental rights, preserving electoral integrity, and promoting both political and judicial economy have prompted a practical approach in assessing whether an election case is appropriate for mandamus relief. . . . It is only when a writ of mandamus has been invoked to preserve the right to vote or to run for political office that this Court has eased the requirements for strict compliance for the writ's preconditions, especially those relating to the availability of another remedy." Syl. Pt. 3, in part, State ex rel. Sowards v. County Comm'n, 196 W.Va. 739, 474 S.E.2d 919 (1996).

3. "Because there is an important public policy interest in determining the qualifications of candidates in advance of an election, this Court does not hold an election mandamus proceeding to the same degree of procedural rigor as an ordinary mandamus case." Syl. Pt. 2, State ex rel. Bromelow v. Daniel, 163 W.Va. 532, 258 S.E.2d 119 (1979).

4. "'The eligibility of a candidate for an elective office may be determined in a proceeding in mandamus and, upon a determination therein that a candidate is ineligible to be elected to or to hold the office for which he seeks nomination or election, a writ of mandamus will issue directing the board of ballot commissioners to strike or omit such candidate's name from the primary or general election ballot.' Syl. pt. 1, State ex rel. Summerfield v. Maxwell, 148 W.Va. 535, 135 S.E.2d 741 (1964)." Syl. Pt. 1, State ex rel. Haught v. Donnahoe, 174 W.Va. 27, 321 S.E.2d 677 (1984).

5. "The West Virginia Constitution confers a fundamental right to run for public office, which the State cannot restrict unless the restriction is necessary to accomplish a legitimate and compelling governmental interest." Syl. Pt. 2, State ex rel. Billings v. City of Point Pleasant, 194 W.Va. 301, 460 S.E.2d 436 (1995).

6. The West Virginia Constitution confers on the West Virginia Supreme Court of Appeals, both expressly and by necessary implication, the power to protect the integrity of the judicial branch of government and the duty to regulate the political activities of all judicial officers.

7. No person who is serving a term as a justice of the Supreme Court of Appeals of this state shall be eligible to file as a candidate to seek nomination or election to another term on said Court which begins prior to the expiration of the term then being served.

Scott, Justice:

Relator George E. Carenbauer[1] seeks a writ of mandamus to have Respondent, the Honorable Warren R. McGraw, declared ineligible as a candidate for election to a separate twelve-year term on this Court.[2] As grounds for the extraordinary relief sought, Relator asserts that Justice McGraw fails to qualify as an eligible candidate for office due to his status as an incumbent currently fulfilling an unexpired term to which he was elected. Additionally, Relator contends that Justice McGraw's actions first, as the author of a recent opinion[3] declaring Speaker of the House of Delegates Robert S. Kiss ineligible for appointment to this Court under the emoluments clause of this state's constitution, and now, in seeking the position which Speaker Kiss was denied,[4] have both undermined the integrity of this judicial institution and cast upon it a pernicious cloak of aspersion. Following an exhaustive examination of constitutional principles combined with an equally thorough review of judicial decisions concerning the penumbral issues presented by the petition, we conclude that while the constitution does not expressly proscribe an incumbent justice whose term has yet to be fulfilled from seeking election to a separate seat on this Court, the intent underlying the

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[1]Relator maintains that he has filed this action "entirely on his own behalf as a citizen, taxpayer and Democrat, independent of any other personal, commercial, or professional associations he may have." Relator cites his party status as a basis for seeking relief herein, given the possibility that Governor Cecil H. Underwood, a Republican, would have the task of appointing a justice to fill the remainder of the unexpired term which Justice McGraw currently holds. See W.Va. Code § 3-10-3 (1999) (setting forth procedures for filling judicial vacancies).

[2]Justice McGraw is currently serving the remainder of a term on the West Virginia Supreme Court of Appeals to which he was elected as a result of the resignation of Justice Thomas E. McHugh in 1998. The term to which Justice McGraw has been elected ends on December 31, 2004.

[3]See State ex rel. Rist v. Underwood, __ W.Va. __, 524 S.E.2d 179 (1999).

[4]While we fully appreciate the gravity of the ethical concerns Relator has raised that arise from Justice McGraw's involvement in the proceedings which resulted in the nullification of Speaker Kiss' appointment to this body, we do not rely on such grounds to resolve this matter.

enactment of article VIII of our state constitution, which sets forth the requirements for selection to this Court, as well as the entire structure of the judicial branch of government; the social compact of this state's citizenry as expressed through the adoption of both the Constitution and the Judicial Reorganization Act of 1974; and the state's compelling interest in maintaining the integrity of the judiciary, as well as its equally-compelling interest in securing an independent judiciary removed from the entanglements of politics, all combine to require this Court to conclude that Justice McGraw cannot seek to enhance his term-length through these means. Accordingly, we grant the writ of mandamus as moulded.[5]

I. Factual Background

The precipitating fact that spawned this petition was the filing of a certificate of candidacy by Justice McGraw via the U.S. Postal system on January 29, 2000. See W.Va. Code 3-5-7 (1999). Were it not for the fact that Justice McGraw is currently filling the remainder of an unexpired term,[6] which runs until December 31, 2004, the filing would not have been momentous. Due to the unprecedented nature of this filing, the press immediately began publishing commentary[7] on the issue of whether a supreme court justice could seek election to another term of court while still occupying an unexpired term on that

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[5]Due to the exigent circumstances presented by the impending primary election and the attendant need to have Justice McGraw's name removed from the official ballots, ballot cards, ballot labels, and voting machines, this Court granted a writ of mandamus, as moulded, by order dated March 23, 2000. The order cursorily identified the basis for the relief granted, indicating that an opinion was to follow which would fully explain the Court's reasoning.

[6]See supra note 2.

[7]We reference the aspect of press coverage not as support for the decision reached in this case, but as commentary on the state of calumny that has beset this institution since Justice McGraw filed his pre-candidacy statement.

same body. When Justice McGraw permitted the deadline for withdrawing his candidacy[8] to pass, Relator avers that he was prompted to file a request for extraordinary relief by virtue of Justice McGraw's failure to withdraw his name from the list of Democratic candidates seeking election to this Court. This Court granted the rule to show cause for the purpose of determining whether Justice McGraw's candidacy is in violation of the West Virginia Constitution or the general laws of this state.

II. Standard of Review

Typically, this Court considers whether to issue a writ of mandamus against the following three-pronged standard:

> A writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

Syl. Pt. 2, State ex rel. Kucera v. City of Wheeling, 153 W.Va. 538, 170 S.E.2d 367 (1969). Where challenges to the electoral process are involved, however, this Court has recognized the need to relax the stringent requirements for issuing writs of mandamus:

> The public policies in protecting fundamental rights, preserving electoral integrity, and promoting both political and judicial economy have prompted a practical approach in assessing whether an election case is appropriate for mandamus relief. . . . It is only when a writ of mandamus has been invoked to preserve the right to vote or to run for political office

[8]Pursuant to the provisions of West Virginia Code § 3-5-11(a) (1999), Justice McGraw could have withdrawn his certificate of candidacy until February 15, 2000. After such time, no candidate is permitted to remove his/her name from the ballot. See id.

> that this Court has eased the requirements for strict compliance for the writ's preconditions, especially those relating to the availability of another remedy.

Syl. Pt. 3, in part, State ex rel. Sowards v. County Comm'n, 196 W.Va. 739, 474 S.E.2d 919 (1996); accord Syl. Pt. 2, State ex rel. Bromelow v. Daniel, 163 W.Va. 532, 258 S.E.2d 119 (1979) ("Because there is an important public policy interest in determining the qualifications of candidates in advance of an election, this Court does not hold an election mandamus proceeding to the same degree of procedural rigor as an ordinary mandamus case.")

While we countenanced easing the standard for issuing extraordinary relief in the context of "preserving" the right to run for political office in Sowards, the issues raised in this case, although aimed at prohibiting a candidacy, suggest similar exigencies which require immediate, rather than deferred, resolution. Moreover, as we explained in Bromelow, "[t]he principal purpose of the liberalized election mandamus proceeding is to provide an expeditious pre-election hearing to resolve eligibility of candidates, so that voters can exercise their fundamental rights as to all eligible candidates." Id. at 536, 258 S.E.2d at 122; see also State ex rel. Maloney v. McCartney, 159 W.Va. 513, 527, 223 S.E.2d 607, 616 (1976) (stating that "intelligent and meaningful exercise of the franchise requires some method of averting a void or voidable election" and recognizing that "some form of proceeding must be available by which interested parties may challenge in advance of a primary or general election the eligibility of questionable candidates in order to assure that elections will not become a mockery. . . ."). That mandamus is the agreed-upon procedural mechanism for resolving questions of a candidate's eligibility is well-established:

> "The eligibility of a candidate for an elective office may be determined in a proceeding in mandamus and, upon a determination therein that a candidate is ineligible to be elected to or to hold the office for which he seeks nomination or election, a writ of mandamus will issue directing the board of ballot commissioners to strike or omit such candidate's name from the primary or general election ballot." Syl. pt. 1, State ex rel. Summerfield v. Maxwell, 148 W.Va. 535, 135 S.E.2d 741 (1964).

Syl. Pt. 1, State ex rel. Haught v. Donnahoe, 174 W.Va. 27, 321 S.E.2d 677 (1984). Against these principles, we examine Relator's request for a writ of mandamus.

III. Discussion

As an initial matter, we feel constrained to observe that not once in the 137 years since this state's formation has any individual adopted a course of action such as that pursued here by Justice McGraw. No one has previously attempted to "switch seats" while already occupying a position on this Court, the highest tribunal in this state. The absence of precedent for this audacious conduct is not limited to this state's jurisprudence, but similarly is lacking throughout the other fifty states, save one. Were it not for the thwarted aspirations of one other judge, we would be completely bereft of authority against which to examine Justice McGraw's novel approach to term extension.[9]

We are not unmindful of the fact that a differing viewpoint exists with regard to the authority of this Court to prohibit Justice McGraw from seeking another term on this judicial body based on the fact

[9]As one astute legislator commented, Justice McGraw is seeking to renegotiate his contract before the expiration of the contractual term.

that our state constitution does not expressly proscribe such a candidacy. In anticipation of such reproach, we respond that this Court is obligated by its role as the arbiter of constitutional issues, as well as its duty to uphold the confidence reposed in the judiciary by this state's citizenry, to resolve the issue of Justice McGraw's candidacy. Concomitant to the sustained confidence of the public in the judiciary is the correlative responsibility that integrity must be the cynosure of all judicial endeavors, both actual and perceived. So crucial is the state's interest in maintaining the integrity of its judicial system that regulations or restrictions which temporally affect an officeholder's access to the ballot have been found to withstand constitutional challenge on this ground alone. Clements v. Fashing, 457 U.S. 957 (1982). This recognized state interest in upholding the integrity of the judicial system, and the inherent and express power of this Court to control the political activities of all judicial officers, thus serve as both the predicate core of our decision and as the authority for the ruling itself.

A. Constitutional and Statutory Provisions

We look first to the governing constitutional language found in article VIII, section seven to determine whether the legislative framers anticipated and addressed the situation with which we are confronted. The only language that addresses the issue of judicial candidacy states as follows:

> No justice, judge or magistrate shall hold any other office, or accept any appointment or public trust, under this or any other government; nor shall he become a candidate for any elective public office or nomination thereto, except a judicial office; and the violation of any of these provisions shall vacate his judicial office.

While some advocates might contend, at first glance, that the constitutional language does in fact authorize the candidacies of incumbent judges, upon scrutiny it becomes clear that this proviso was not adopted with

the concerns in mind presented by Justice McGraw's filing. It does not pertain to the question of his right to run for this particular judicial office as a term-enhancement maneuver.[10]

The language of article VIII, section seven, which permits a justice to become a candidate for judicial office without vacating his/her judicial seat is aimed at two interrelated concerns: preserving the separation of powers amongst the three branches of government and preventing judicial entanglements with politics. The insertion of this constitutional language through the Judicial Reorganization Amendment of 1974 is directed at "bar[ring] [judges] from continuing in office after they become candidates for any nonjudicial public offices." Robert M. Bastress, The West Virginia Constitution at p.213 (1995). These provisions were "designed to prevent both obstructive conflicts and judicial entanglements with politics." Id. The Montana Supreme Court, in discussing the purpose of its constitutional language on this subject,[11] stated: "The constitutional prohibition against judges seeking nonjudicial offices while still holding judicial office is but part of a general constitutional scheme declaring directly or indirectly the rights of office holders in all branches of government to seek other office while still holding office." Committee for an Effective Judiciary v. State, 679 P.2d 1223, 1228 (Mont. 1984). In upholding the constitutional language that permits a judge not to forfeit office if he/she files for a judicial position, the Montana Supreme Court opined:

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[10]While Relator stated that he did not seek to force Justice McGraw to vacate his current seat on this Court under the terms of article VIII, section 7, the vacancy proviso is not implicated as it affects only judges who seek nonjudicial office.

[11]Article VII, § 10 of the Montana Constitution, adopted in 1972, states that "[a]ny holder of a judicial position forfeits that position by either filing for an elective office rather than a judicial position or absenting himself from the state for more than sixty (60) consecutive days." Committee for an Effective Judiciary v. State, 679 P.2d 1223, 1224 (Mont. 1984).

> [T]he [Montana constitutional] delegates perceived a public benefit in opening up the judicial election process to judges who desired to move from lower courts to the district court and from district court to the supreme court, or from a justice on the supreme court to a chief justice on the supreme court. . . . To say that a judge forfeits his office if he files for a non-judicial office is but another way of saying that a sitting judge can file for **other** judicial office without forfeiting his office.

Id. at 1228-29 (emphasis supplied).

Undergirding the constitutional prohibition against seeking nonjudicial elective office is the correlative objective of both removing and insulating judges from the political realm. While the reasons for separating the judiciary from politics are many and varied, there can be no question that the goal of removing politics and its attendant imbroglios from the judicial process is necessary to the proper functioning of our judicial system. See, e.g., Philyaw v. Gatson, 195 W.Va. 474, 478, 466 S.E.2d 133, 137 (1995) (discussing consequences of judge defeated in bid for nonjudicial office returning to bench post-election); J. Clark Kelso, A Report on the Independence of the Judiciary, 66 S.Cal.L.Rev. 2209, 2210 (1993) ("In order to perform its dispute-resolving and law-declaring functions, the judiciary must also be largely independent of, and insulated from, the people and the political process. It is only through this independence--an independence that promotes impartial decision making--that judicial action will earn the respect of the people.") (emphasis supplied). It is not surprising then that the Code of Judicial Conduct includes a complementary restriction on "inappropriate political activity" which requires judges to "resign from judicial office upon becoming a candidate for a non-judicial office." W.Va. Code of Judicial Conduct,

Canon 5A(2). In discussing the Washington corollary to Canon 5,[12] often referred to as a "resign-to-run" requirement, the Washington Supreme Court stated that this canon "seeks to prevent embroiling the court in political controversy and allowing a judge to trade on the prestige and dignity of the judicial office." In re Disciplinary Proceeding Against Niemi, 820 P.2d 41, 46 (Wash. 1991) (citing J. Shaman, S. Lubet & J. Alfini, Judicial Conduct and Ethics § 11.19 at 357 (1990) and E. Thode, Reporter's Notes to Code of Judicial Conduct 97 (1973)); see also Morial v. Judiciary Comm'n, 565 F.2d 295, 305 (5th Cir. 1977), cert. denied, 435 U.S. 1013 (1978) (articulating rationale for requiring resignation of judges seeking election to nonjudicial office in terms of "protect[ing] the state's interest in judicial integrity without sacrificing the equally important interests in robust campaigns for elective office in the executive or legislative branches of government").

Having thus concluded that the language of article VIII, section seven is directed at forcing judges to vacate their office if they intend to run for nonjudicial office and to similarly uphold the separation of powers by proscribing judicial officers from becoming candidates for either of the two remaining branches of government while still holding office, we next address whether the language at issue authorizes

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[12]Canon 7(A)(3) of the Washington Code of Judicial Conduct provides that;

> Judges shall resign their office when they become candidates either in a party primary or in a general election for a nonjudicial office, except that they may continue to hold their judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if they are otherwise permitted by law to do so.

In re Disciplinary Proceeding Against Niemi, 820 P.2d 41, 45 (Wash. 1991).

an incumbent justice to seek a separate seat on the court before his term has expired. The answer to this query cannot be reached by simply concluding that, because the office sought by Justice McGraw is a judicial office, he is permitted by the terms of article VIII, section seven to seek judicial office while still holding and fulfilling an unexpired judicial seat. While the dissent employs contorted logic in rewriting the language of article VIII, section seven to state in positive terms that "a sitting justice may 'become a candidate for any elective . . . judicial office,'"[13] such reformulation is shallow and jurisprudentially indefensible. It neither withstands constitutional analysis nor does it answer the query before the Court. The words of Justice Story still ring true: "How easily men satisfy themselves that the Constitution is exactly what they wish it to be." Alpheus T. Mason & Donald G. Stephenson, Jr., American Constitutional Law 38 (10th ed. 1993). If the course of action undertaken by Justice McGraw was not contemplated by either the framers of our state constitution or the drafters of the Judicial Reorganization Act of 1974, and we seriously doubt that it was,[14] then we cannot summarily conclude that such action is sanctioned under this constitutional provision. It is more reasonable to find that this behavior is simply outside the express terms of our social compact. As we recognized in Randolph County Board of Education v. Adams, 196 W.Va. 9, 467 S.E.2d 150 (1995), "[w]hen the Constitution is silent on a particular issue, the solution cannot be found in a methodology that requires us to assume or divine the framers' intent on an issue which most likely was never considered." Id. at 22, 467 S.E.2d at 163.

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[13]This language is included by the dissent in the order issued by this Court on March 23, 2000.

[14]We have found no authority, and similarly been cited to none by the parties hereto, that demonstrates any historical contemplation was given to the issue of whether an incumbent on this Court whose term has not expired could seek election to another seat on this Court.

Finding no explicit constitutional authority for Justice McGraw's candidacy[15] and rejecting summarily the dissenter's contention that the absence of express constitutional prohibition conversely warrants approval of such candidacy, we must determine whether any statutes bear on the issue of Justice McGraw's eligibility to be a candidate for another seat on this Court. The only statutory provision which addresses the critical element of eligibility for office is West Virginia Code § 3-5-7. That statute, which applies to all candidacies, requires the filing of a certificate of candidacy announcement by "[a]ny person who is **eligible** and seeks to hold an office or political party position to be filled by election in any primary or general election." Id. (emphasis supplied). As part of the candidacy announcement, the individual is required to make a sworn statement that he/she "is a candidate for the office in good faith." W.Va. Code § 3-5-7(b)(8). Other than emphasizing the obvious--that an individual seeking political office must be eligible to hold the office he/she seeks--the language of this general election statute does not assist us with our present inquiry.

B. Analogous Precedent

Despite multitudinous research efforts, only one factually similar decision was unearthed that involved a judicial officer who sought to enhance his term length while still fulfilling a term to which he

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[15]Given our conclusion that no constitutional language addresses the right of an incumbent justice to seek election mid-term to another term on this Court, we do not find applicable the authority which requires that "[i]n the event of ambiguity a constitutional amendment will receive every reasonable construction in favor of eligibility for office . . . ." Syl. Pt. 3, in part, State ex rel. Maloney v. McCartney, 159 W.Va. 513, 223 S.E.2d 607, appeal dismissed sub nom. Moore v. McCartney, 425 U.S. 946 (1976).

had been elected. In Hurowitz v. Board of Elections, 426 N.E.2d. 746 (N.Y. 1981), a sitting civil court judge, who had served less than half of the ten-year term to which he had been elected, filed as a candidate for another ten-year seat on the same judicial body. Like Justice McGraw, Judge Hurowitz asserted his right to seek a separate judicial seat on the same court based on the language of New York's corollary to article VIII, section 7 of our state constitution. Citing the language of article VI, section 20 of the New York Constitution, which provided that "a Judge may not 'be eligible to be a candidate for any public office other than judicial office . . . unless he resigns his judicial office,'" Judge Hurowitz argued that the quoted constitutional language "not only permits members of the judiciary to retain their positions while they pursue vacancies on other courts, but also sanctions sitting Judges whose terms have not yet expired to be candidates for identical positions on the same court." 426 N.E.2d at 747. In rejecting Judge Hurowitz's postulate, the New York court examined the entirety of the language of article VI in which the subject constitutional language was located to determine the underlying general intent of the article.

> "When the whole sixth (or judiciary) article of the Constitution is considered, certain purposes are clearly indicated. It was proposed to provide for the State a general and complete and continuous judicial system, and to create, or recognize and continue, all the judicial officers needed therefor . . . . It was designed that the general and * * * the exclusive mode of filling these offices * * * should be by election by the people, and not by appointment."

426 N.E.2d at 747 (quoting People ex rel. Jackson v. Potter, 47 N.Y. 375, 379-80 (N.Y. Sup. Ct. 1872)). In light of the historical underpinnings of the judiciary article, the court in Hurowitz concluded that

> article VI was designed to assure a structured judiciary elected on a regular basis without fragmentation of terms. To accept this candidate's interpretation of section 20 would defeat the over-all purposes of article VI. Such activities could fragment terms and create interim vacancies on

> a regular basis, thereby infringing upon the people's right to a "complete and continuous judicial system".

426 N.E.2d at 748 (quoting Potter, 47 N.Y. at 379).

Besides its concerns over fragmentation and the consequent disruption to the judicial process, the court in Hurowitz considered the logical consequences of the judge's candidacy on the selection of judges:

> [T]he nature of the Judge's candidacy could have the effect of aborting the election process. By seeking another position on the same court where he currently sits, he not only allows himself multiple chances to be re-elected, but also assures that when he is elected to the other position on the same court, a vacancy will occur. Such a vacancy creates an additional occasion for political involvement. Moreover, should this type of conduct become the norm, it would be possible that all positions would be appointive upon the resignations and shiftings of the other Judges; only at the next general election would the people be given a chance to vote, the effect of which may well be to merely approve the appointment. Although we do not find that this is currently the practice, the likelihood of such a result portends abuse of the elective system. Even viewed in its most favorable light, this conduct has the potential for "mischief" which this court cannot condone.

426 N.E.2d at 748. Long before the Hurowitz decision, the New York Supreme Court was forced to consider, in its Potter decision of 1872, the effects necessarily wreaked upon the electoral process when judicial appointments are required due to politically-motivated vacancies.[16]

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[16]When a supreme court justice resigned from the bench on the eve of the general election and an appointment resulted due to the vacancy created, the New York Supreme Court had to determine whether the term of the appointed justice was a 12-year term or whether the appointment ended on December 31st of that very same year due to the selection of a justice at the general election. Potter, 1872 WL 9733 at pp. 1-2.

> "If a vacancy in a term . . . may defeat the electors of their privilege to choose an incumbent . . . , so a resignation . . . during the running of the term will have the same effect. More than that too, the appointee of the Governor, . . . may . . . resign his office, and then a vacancy again occurs, to be again filled by appointment for a like fractional term. . . . **And this succession of appointment and resignation, and resignation and appointment, may be kept up as long as the judicial and executive servants of the people may be willing to act in it. Thus would the electors be permanently defeated in the exercise of their constitutional privilege of choice**. It needs not to name all the evils which would thus result. It is sufficient to say, that it would work an entire perversion of the spirit and general intent of the judiciary article[.]"

Potter, 1872 WL 9733 at p.3 (emphasis supplied).

The potential for public backlash to this type of candidacy was fully appreciated by the court in Hurowitz: "Not without significance in this connection is the risk of the appearance of impropriety that may be perceived by the public in a Judge's injection of himself into the political process **for the sole purpose of extending his tenure**." 426 N.E.2d at 748 (emphasis supplied). Such injection into the political process, according to the court in Hurowitz, was contrary to the intent of the constitutional framers to "minimize the involvement of the judiciary in the political process and the possible influences such exposure might bring with it." Id. With this sentiment, we heartily agree.

C. Fundamental Right to Candidacy

Despite the compelling nature of the rationale employed by the Hurowitz court in forcing Judge Hurowitz to withdraw his name from the ballot, we must proceed to examine whether Justice McGraw has a fundamental right to candidacy which prevents this Court from similarly foreclosing his

candidacy. Beginning with this Court's decision in State ex rel. Brewer v. Taft, 151 W.Va. 113, 150 S.E.2d 592 (1966), overruled on other grounds, Marra v. Zink, 163 W.Va. 400, 256 S.E.2d 581 (1979), we have recognized that the "'right to become a candidate for election to public office is a valuable and fundamental right.'" Id. at 121, 150 S.E.2d at 597 (quoting 29 C.J.S. Elections § 130 at 377); accord Marra v. Zink, 163 W.Va. 400, 403, 256 S.E.2d 581, 584 (1979); State ex rel. Piccirillo v. City of Follansbee, 160 W.Va. 329, 333-34, 233 S.E.2d 419, 423 (1977).[17] In syllabus point two of State ex

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[17]The United States Supreme Court has adopted a different approach to the issue of whether there is a fundamental right to be a candidate for public office. In Clements v. Fashing, 457 U.S. 957 (1982), the Court stated that "[f]ar from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'" Id. at 963. Explaining further, the Court stated:

> Decision in this area of constitutional adjudication is a matter of degree, and involves a consideration of the facts and circumstances behind the law, the interests the State seeks to protect by placing restrictions on candidacy, and the nature of the interests of those who may be burdened by the restrictions.

Id.; see also In re Advisory from Governor, 633 A.2d 664, 669 (R.I. 1993) ("To the extent that . . . [a prior state] decision . . . identified candidacy for public office as a fundamental right, those beliefs must be revisited in light of Clements v. Fashing.")

While states generally have broad power to determine issues pertinent to the electoral process, any such requirements imposed by states cannot violate the Equal Protection Clause. See Bullock v. Carter, 405 U.S. 134, 141 (1972). Rejecting the traditional strict scrutiny form of analysis applied to equal protection issues, the Supreme Court ruled in Clements that classifications affecting an individual's ability to seek elective office survive constitutional scrutiny provided they are "drawn in such a manner as to bear some rational relationship to a legitimate state end." 457 U.S. at 963.

In its recent decision concerning the constitutionality of state-imposed term limits on Congressional representatives, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995), the United States Supreme Court noted that the Texas constitutional ["resign-to-run"] provision, which it upheld in Clements, was "a permissible attempt to regulate state officeholders"and referenced its exhortation in Clements that "[a]ppellees are elected state officeholders who contest restrictions on partisan political activity." 514 U.S. at 835 n.48 (emphasis in original). Historically, the Supreme Court has upheld electoral restrictions affecting both public officeholders and various classifications of civil servants. Thornton, 514 U.S. at 835

(continued...)

rel. Billings v. City of Point Pleasant, 194 W.Va. 301, 460 S.E.2d 436 (1995), we held that "[t]he West Virginia Constitution confers a fundamental right to run for public office, which the State cannot restrict unless the restriction is necessary to accomplish a legitimate and compelling governmental interest."

D. Additional Qualification

Before proceeding to analyze whether there is a legitimate and compelling state interest that would justify prohibiting Justice McGraw's candidacy, we must digress to consider Justice McGraw's contention that what Relator seeks is to impose an additional qualification for the office of supreme court justice. The quintessence of Justice McGraw's defense to the relief sought by Relator is that any ruling which prohibits his candidacy amounts to the imposition of a constitutionally-prohibited qualification for this Court.[18] Justice McGraw argues that Relator erroneously seeks to use his incumbency as a justice serving an unexpired term as a roadblock to candidacy.

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[17](...continued)
n.48; Clements, 457 U.S. at 972; 457 U.S. at 974 n.1 (Stevens, J., concurring in part and concurring in judgment) ("The fact that appellees hold state office is sufficient to justify a restriction on their ability to run for other office that is not imposed on the public generally."); see United States Civil Serv. Comm'n v. National Ass'n of Letter Carrriers, 413 U.S. 548 (1973) (upholding provisions that required dismissal of civil servants who became political candidates), superceded by statute as stated in Bauers v. Cornett, 865 F.2d 1517 (8th Cir. 1989); accord United Public Workers v. Mitchell, 330 U.S. 75 (1947) (upholding Hatch Act provisions which prohibited civil service employees from seeking election to public office); see also Joyner v. Mofford, 706 F.2d 1523, 1528 (9th Cir. 1983) (observing, in upholding Arizona resign-to-run statute, that "burden on candidacy . . . is indirect and attributable to a desire to regulate state officeholders and not to impose additional qualifications to serving in Congress"), cert. denied, 464 U.S. 1002 (1983).

[18]See W.Va. Const. art. VIII, § 7 (setting forth two qualifications for supreme court justices--admission to practice law for ten years prior to election).

We do not take issue with Justice McGraw's assertion that this Court cannot impose qualifications for the office of supreme court justice in addition to those enumerated in article VIII, section 7. See supra note 18. It is axiomatic that the qualifications necessary to seek office as a supreme court justice are those which are prescribed by the constitution. See W.Va. Const. art. VIII, § 7. While understandable in terms of advocacy, Justice McGraw's attempt to "dress" his incumbency in qualification clothing does not withstand scrutiny. What Relator seeks is not the insertion of an additional qualification for office, but instead a limitation on when a sitting supreme court justice is eligible to seek reelection to this body. Far from being a distinction of semantical significance only, the foundation for imposing a restriction on eligibility for seeking judicial office is well entrenched in this state's jurisprudence.

In State ex rel. Haught v. Donnahoe, 174 W.Va. 27, 321 S.E.2d 677 (1984), this Court was presented with the issue of a judicial candidate's eligibility for circuit court through a petition seeking a writ of mandamus. At issue was an interpretation of the language of article VIII, section 7, which requires that to be elected to circuit court judge, an individual must "ha[ve] been admitted to practice law for at least five years prior to his election." W.Va. Const. art. VIII, § 7. The specific issue presented was whether the five-year law practice requirement entailed that such practice had to have been performed within the confines of this state. The judicial candidate whose candidacy was being challenged had practiced law only in the State of California. 174 W.Va. at 29-30, 321 S.E.2d at 679-80. After first determining that an ambiguity was presented by the language at issue, this Court proceeded to analyze the reasons for requiring judicial candidates to have practiced before the respective bar of the state in which they sought office. "[R]ecogniz[ing] that the regulation of the practice of law and the judiciary is traditionally and inherently

intraterritorial," we concluded that there were valid reasons for requiring that the constitutionally-imposed period of law practice had to have been performed in this state. Id. at 32-34, 321 S.E.2d at 682-84.

After interpreting the law-practice requirement as encompassing a non-existent, but necessary element of in-state practice, the Court proceeded to consider whether its interpretation could withstand equal protection analysis. Recognizing that this court-created restriction upon eligibility could only satisfy the constitutional protections inherent to the fundamental right to become a candidate for public office if it served a compelling state interest, we reasoned:

> As previously noted, similar experi[]ent[i]al requirements for judges are common. The purpose for such requirements is unquestionably clear. They are intended to insure not only that judges are competent in the law, but that they are reasonably familiar with the law of the jurisdiction to which they are elected. While it may be axiomatic that judges are elected to interpret and uphold the law, due process demands a high level of jurisdictional competence and integrity in that endeavor. Requirements or restrictions affecting eligibility for judicial office that reasonably strive to meet such valid public purposes do not impose impermissible barriers to such offices. Furthermore, a state's particular interest in maintaining the integrity of its judicial system can support restrictions which could not survive constitutional scrutiny if applied to other types of offices. Clements v. Fashing, 457 U.S. 957, 968, 102 S.Ct. 2836, 2846, 73 L.Ed.2d 508, 519 (1982).
>
> Therefore, we hold that the requirement contained in West Virginia Constitution art. VIII, § 7, that candidates for the office of circuit judge must have been admitted to the practice of law in the State for five years prior to their election advances the State's compelling interest in securing and maintaining a judiciary well qualified in the law of the jurisdiction.

174 W.Va. at 34, 321 S.E.2d at 684.

In State ex rel. Summerfield v. Maxwell, 148 W.Va. 535, 135 S.E.2d 741 (1964), the case in which we first determined that issues of a candidate's eligibility could be resolved through

mandamus, this Court was asked to resolve whether a non-lawyer was eligible for the office of prosecuting attorney in the absence of a specific constitutional or statutory provision requiring county prosecutors to be lawyers licensed to practice in this state. Before concluding that the non-attorney was not eligible for election to the position of county prosecutor, this Court considered both the law of other states and the strong policy grounds in support of such a ruling. Id. at 543-51, 135 S.E.2d at 747-51. Of critical import to the Court's decision in Maxwell was the inherent power of the judiciary to regulate the practice of law. See id. at 550, 135 S.E.2d at 750 (citing In re Eary, 134 W.Va. 204, 58 S.E.2d 647 (1950)) (holding that Supreme Court has inherent power to grant or refuse the right to practice law).[19]

Just as this the Court has the inherent power to regulate the practice of law so too does it have the inherent power to regulate the judiciary. See W.Va. Const. art. VIII, § 8 (setting forth "inherent rule-making power" of supreme court of appeals). In examining whether a judicial employee was subject to the "resign-to-run" requirement of article VIII, section 7 of our state constitution, this Court began its analysis in Philyaw v. Gatson, 195 W.Va. 474, 466 S.E.2d 133 (1995), with an examination of the constitutional framework of article VIII.

> West Virginia Constitution article VIII is devoted entirely to the powers and function of the judicial branch of government. Since the powers and functions, and indeed the entire structure, of the judicial branch are unique and unlike any other department of government, the rules regulating those powers and functions must, of necessity, be adapted to recognize those differences. The very soul of the judicial branch of

[19]See also W.Va. Code § 30-2-1(1998) (granting Supreme Court power to grant or deny applicant's license to practice law).

> government is that on a systemic basis, the judiciary must maintain both actual and perceived impartiality:
>
> > It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community.... After securing wisdom and impartiality in their judgments, it is of great importance that the courts should be free from reproach or the suspicion of unfairness.
>
> See Forest Coal Co. v. Doolittle, 54 W.Va. 210, 227, 46 S.E. 238, 245 (1903) (emphasis omitted) (quoting with approval Oakley v. Aspinwall, 3 N.Y. 547, 552 (1850).

Gatson, 195 W.Va. at 477, 466 S.E.2d at 136 (emphasis supplied). Continuing in this vein, we observed:

> Justice Frankfurter, dissenting in Baker v. Carr, may have said it best, "[t]he Court's authority--possessed of neither the purse nor the sword--ultimately rests on sustained public confidence in its moral sanction." Baker v. Carr, 369 U.S. 186, 267, 82 S.Ct. 691, 737-38, 7 L.Ed.2d 663 (1962). This moral sanction, which is the underpinning of the public confidence in our judicial system is at the heart of West Virginia Constitution article VIII, section 7 . . . .

195 W.Va. at 477, 466 S.E.2d at 136 (emphasis supplied).

As an aid to resolving the issue of whether judicial employees are subject to the constraints of the "resign-to-run" provision of article VIII, section 7 in Gatson, this Court examined how the duties of judicial employees are necessarily intertwined with the judicial objectives of assuring "independence, impartiality, and public confidence in the court system." 195 W.Va. at 478, 466 S.E.2d at 137. Discussing the inevitable encroachment on "the integrity of the judicial system" that would result from permitting judicial employees to continue in office while seeking non-judicial office, we identified as "legitimate public objectives": "[e]nsuring the impartiality of court employees, protecting the integrity and appearance of

impartiality of court offices, and preserving the division of powers set out in West Virginia Constitution article V, section 1." Id. at 478, 466 S.E.2d at 137.

Continuing with the issue of whether prohibition of an incumbent justice's attempt to seek election mid-term amounts to the imposition of an additional qualification, we find useful the discussion in Gatson concerning whether the "resign-to-run" requirement amounted to an unconstitutional qualification for candidates seeking office. We explained in Gatson why Marra, a decision in which this Court found that a municipal charter provision had wrongly imposed an additional qualification of one year of residency in contravention of the constitutionally-provided qualifications for non-judicial office,[20] was not determinative of the issue before the Court:

> We believe that the circuit court's reliance on Marra is misplaced since the resign-to-run rule does not impose an additional qualification on a candidate. The employer did not alter the qualifications necessary to run for office, but rather established requirements for retaining employment. The claimant's employment was conditioned upon a reasonable restriction, which because of the unique nature of the employment would not be imposed on employees in the private sector. This extension of the resign-to-run requirement to judicial employees is designed as a prophylactic measure to protect the entire judicial branch. This rule is a legitimate and independent condition of claimant's continued employment with the Judiciary. We hold the restriction on judicial employees requiring their resignation upon becoming a candidate for a non-judicial office is reasonable.

195 W.Va. at 478-79, 466 S.E.2d at 137-38 (emphasis in original omitted and emphasis supplied).

[20]See W.Va. Const. art. IV, § 4.

Like the circuit court in Gatson, Justice McGraw has wrongly relied on Marra as controlling of the outcome of this case. Contrary to the position advanced by Justice McGraw, no additional qualification for office will be imposed by restricting when a sitting supreme court justice, whose term has not expired, may seek a new term on this Court. The fundamental qualifications required to seek a seat on this Court[21] are not affected by prohibiting Justice McGraw from seeking a second seat on this judicial body at this juncture in his currently unfulfilled term. What this Court is being forced to do, solely in response to the unprecedented candidacy undertaken by Justice McGraw, is to impose a restriction which affects eligibility for election to this body, not the qualifications for holding a seat on this tribunal. See Anderson v. Celebrezze, 460 U.S. 780, 788 & n.9 (1983) (recognizing that while regulations affecting elections necessarily have some effect on right to vote, "[n]evertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions" and noting "[w]e have also upheld restrictions on candidates eligibility that serve legitimate state goals . . . unrelated to First Amendment values") (citing Clements, 457 U.S. 957).

While Justice McGraw vociferously contends that a prohibition of his candidacy necessarily conflicts with and violates either his right to be a candidate or the electorate's right to vote for the candidate of their choice, what he fails to acknowledge is that "[n]either the right to candidacy nor franchise, however, are immune from regulation." Sowards, 196 W.Va. at 747, 474 S.E.2d at 927. The regulation of the electoral process has its genesis in the irrefutable need to impose "order, rather than chaos" in the

[21]See supra note 18.

democratic process. Storer v. Brown, 415 U.S. 724, 730 (1974). Arising from this state interest in "preserving the integrity and reliability of . . . the electoral process" is the corresponding "authority to prescribe reasonable rules for the conduct of elections, reasonable procedures by which candidates may qualify to run for office, and the manner in which they will be elected." Sowards, 196 W.Va. at 747, 474 S.E.2d at 927.

In upholding a Texas constitutional provision which prohibited judges from eligibility for legislative office "during the term for which he is elected or appointed"[22] on equal protection grounds, the United States Supreme Court relied on the state's interest in maintaining the integrity of the judicial system. Clements, 457 U.S. at 960. The judge affected by this provision was a justice of the peace, who was in the midst of serving a four-year term. Analyzing the burden[23] placed on the judge who sought to hold legislative office, the Court reasoned:

> Section 19 merely prohibits officeholders from cutting short their current term of office in order to serve in the legislature. In Texas, the term of office for a Justice of the Peace is four years, while legislative elections are held every two years. Therefore, § 19 simply requires [Judge] Baca to complete his 4-year term as Justice of the Peace before he may be eligible for the legislature. At most, therefore, Baca must wait two years--one election cycle--before he may run as a candidate for the legislature.

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[22]The Court in Clements also upheld a separate constitutional provision which required resignation of a wide range of state and county officeholders if they became a candidate for state or federal office "other than the office then held." 457 U.S. at 960 (quoting Tex. Const. art. XVI, § 65).

[23]Rejecting traditional equal protection analysis which requires strict scrutiny to uphold classifications, the Court determined "that this sort of insignificant interference with access to the ballot need only rest on a rational predicate in order to survive a challenge under the Equal Protection Clause." 457 U.S. at 968.

. . . .

> In establishing a maximum "waiting period" of two years for candidacy by a Justice of the Peace for the legislature, § 19 places a de minimus burden on the political aspirations of a current officeholder. Section 19 discriminates neither on the basis of political affiliation nor on any factor not related to a candidate's qualifications to hold political office. . . . In this case, § 19 burdens only a candidate who has successfully been elected to one office, but whose political ambitions lead him to pursue a seat in the Texas Legislature.

457 U.S. at 966-67 (citation omitted and footnote omitted). The Court emphatically stated: "A 'waiting period' is hardly a significant barrier to candidacy." Id. at 967.[24]

The Court in Clements had no difficulty in identifying the rational predicate for section 19:

> That provision furthers Texas' interests in maintaining the integrity of the State's Justices of the Peace. By prohibiting candidacy for the legislature until completion of one's term of office, § 19 seeks to ensure that a Justice of the Peace will neither abuse his position nor neglect his duties because of his aspirations for higher office. The demands of a political campaign may tempt a Justice of the Peace to devote less than his full time and energies to the responsibilities of his office. A campaigning Justice of the Peace might be tempted to render decisions and take actions that might serve more to further his political ambitions than the responsibilities of his office. The State's interests are especially important with regard to judicial officers. It is a serious accusation to charge a judicial officer with making a politically motivated decision. By contrast, it is to be expected that a legislator will vote with due regard to the views of his constituents.
>
> Texas has a legitimate interest in discouraging its Justices of the Peace from vacating their current terms of office. By requiring Justices of the Peace to complete their current terms of office, the State has eliminated one incentive to vacate one's office prior to the expiration of the

[24]The Court's determination that a "waiting period" was not a significant burden does not appear to have been prompted by the relatively short two-year period involved as the Court simultaneously referred to its decision in Chimento v. Stark, 414 U.S. 802 (1973), in which it upheld a seven-year durational residency requirement for candidacy in New Hampshire. Clements, 457 U.S. at 967-68.

> term. The State may act to avoid the difficulties that accompany interim elections and appointments.

457 U.S. at 968 (footnote omitted and emphasis supplied).[25] As articulated by our nation's highest Court, the burdens placed upon the judiciary which result from political activities necessitated by the election and reelection process serve to undergird the necessity for our ruling that campaigns by judicial officers be kept to a minimum.

Counsel for Justice McGraw suggests repeatedly in his brief that if this Court rules in any fashion which defeats his candidacy, such ruling can be motivated only by political, non-legal bias of the members of this Court. Such assertions, besides being inaccurate, are both insulting and grossly unprofessional. The West Virginia Constitution confers on the West Virginia Supreme Court of Appeals, both expressly and by necessary implication, the power to protect the integrity of the judicial branch of government and the duty to regulate the political activities of all judicial officers.

E. Compelling State Interest

Against both state and federal precedent, we examine whether this state has a compelling interest which permits it to grant the relief requested by Relator based on Justice McGraw's status as a current officeholder of this Court. Both Relator and this Court have identified multiple bases for concluding that the state has a compelling interest in prohibiting an incumbent justice whose term has not expired from

[25] Included in its rationale was the comment that "[t]he State's particular interest in maintaining the integrity of the judicial system could support § 19, even if such a restriction could not survive constitutional scrutiny with regard to any other officeholder." Clements, 457 U.S. at 968 n.5.

seeking election to another term on this body. In addition to maintaining the integrity of the judiciary, the state also has a valid interest in assuring the public an independent and impartial judiciary, minimizing the involvement of the judiciary in the political process, upholding the constitutionally-delegated method of selecting supreme court justices, and ensuring that the judiciary can sustain the critical and unique element of collegiality necessary to the decision-making process of this Court. Collectively, these legitimate state interests combined with the judiciary's inherent power to regulate itself, compel the conclusion that no person who is serving a term as a justice of the Supreme Court of Appeals of this state shall be eligible to file as a candidate to seek nomination or election to another term on said Court which begins prior to the expiration of the term then being served.

Addressing these legitimate state interests individually, we first consider the primary interest at stake here--upholding the integrity of the judiciary. It is beyond dispute, based on the pronouncements in Clements, that regulations or restrictions affecting candidacy in the form of ballot access can withstand constitutional scrutiny when those ballot limitations are established for the purpose of maintaining the integrity of the judiciary. 457 U.S. at 460. This Court previously adopted the rationale employed in Clements when we interpreted the constitutional requirement concerning the qualifications necessary for eligibility to seek judicial office as a circuit court judge in Donnahoe. See 174 W.Va. at 33-34, 321 S.E.2d at 684. It is equally beyond dispute that the action of Justice McGraw in seeking to "switch seats" mid-term has impugned the character of this judicial body. Similarly above discussion is the importance of preserving the integrity of the judicial system. See W.Va. Code of Judicial Conduct, Canon 1. As one wise jurist has expounded, "The need to preserve judicial integrity is more than just a matter of judges

satisfying themselves that the environment in which they work is sufficiently free of interference to enable them to administer the law honorably and efficiently. Litigants and our citizenry in general must also be satisfied." Hobson v. Hansen, 265 F.Supp. 902, 931 (D. D.C. 1967) (Wright, J., dissenting). When an individual seeks so obviously to advance his personal interests through such an unorthodox and previously uncharted method of term-enhancement, it cannot be gainsaid that public sentiment would quickly conclude that this action is not deserving of a justice sitting on this court of last resort.

The state's interests in assuring the independence and impartiality of the judiciary and minimizing the involvement of the judiciary in the political process go hand in hand. It is axiomatic that a judiciary can properly function only when it acts independent of all extraneous influences or interests, whether political or otherwise. Critical to understanding the imperative that the judiciary be separated from politics, other than as may be required for the purpose of elections, is an appreciation of the dangers presented by commingling politics with the judiciary. The Hurowitz court instinctively recognized the inimical effects that unnecessary exposure to the political process would have on the judiciary. See 426 N.E.2d at 748. Judges have to guard against the public perception that involvement in the political process subjects them to the influences of those who help secure their elections. Here, as in other instances of judicial conduct, it is not only the accuracy of an allegation of impropriety that warrants concern, but, significantly, it is even the mere appearance of impropriety that has the capability of signaling disastrous results for the judiciary as an institution. As recognized by the Supreme Court of Washington in Niemi, "[p]ublic confidence is undermined when the 'citizenry conclude[s], even erroneously, that cases [are] decided on the basis of favoritism or prejudice rather than according to law and fact.'" 820 P.2d at 844

(quoting J. Shaman et al., Judicial Conduct and Ethics § 10.03 at 275). Consequently, the judicial system must be ever vigilant with regard to the public's perception of the improper infusion of politics within its courts.

Perhaps the most obvious and compelling reason why Justice McGraw's candidacy should not be permitted arises from the effects that a mid-term candidacy has on the court system as a whole. As fully-explored by the New York courts in both Hurowitz and Potter, the electoral method of judge selection is abrogated by requiring, perhaps ad infinitum, that judges be placed on a court via the appointment process when contrived judicial vacancies occur. See Hurowitz, 426 N.E.2d at 748, Potter, 1872 WL 9733 at p.3. The evils that could be attempted through such "forced" judicial vacancies are easily perceived. Notwithstanding the patent circumvention of the electoral process, the disruption to the operations of this Court would be catastrophic were we to permit Justice McGraw, and consequently every present and future sitting justice desirous of following suit, to jump into the election fray, irrespective of when the term being filled by that individual expires.[26]

Finally, we would be less than forthright if we did not acknowledge the effects this candidacy has had on the ability of this Court to conduct its constitutionally-required duties with the element

[26]Were this Court to sanction Justice McGraw's candidacy, we would be setting in place a mechanism that would allow judicial seats to be continually up for grabs by those already sitting on this body, whether for the sole purpose of term-enhancement or as a means of defeating the reelection of a particular justice. Whatever the objective, no one can seriously doubt the folly inherent to the establishment of such a "revolving-door" method of justice selection. Where would it end? We fear that the end result would be the utter and complete demise of the public's confidence in its judicial system.

of collegiality necessary to properly effect judicial decision-making. While the process of judicial decisions implies disagreement, it also implies that the parties to such decisions must approach dispassionately the business of dispute resolution without personal animosity and with a healthy respect for honest differences of opinion. Unfortunately, this candidacy has brought with it an unhealthy pall of partisanship.[27] The author of this opinion has experienced first-hand that the loss of collegiality can only serve to promote disharmony and impede rational discourse.

We do not conclude that Justice McGraw is ineligible to be a candidate based on lack of qualifications. See W.Va. Const. art. VIII, § 7. Instead, his ineligibility arises from the State's compelling and permissible interest in regulating the political activities of its judicial officeholders. See Clements, 457 U.S. at 968; Donnahoe, 174 W.Va. at 33-34, 321 S.E.2d at 684; see also Joyner v. Mofford, 706 F.2d 1523, 1531 (9th Cir.), cert. denied, 464 U.S. 1002 (1983) (rejecting argument that fourth qualification for office was being imposed by Arizona "resign-to- run" provision "because it does not prevent an elected state officeholder from running for federal office" and justifying this "indirect burden on potential candidates for Congress" as permissible regulation of state officeholders); Signorelli v. Evans, 637 F.2d 853, 859 (2d Cir. 1980) (upholding law requiring state judges to resign from judiciary before seeking federal Congressional office as permissible regulation of judiciary and suggesting that unconstitutional additional qualification is obviated where regulation "is designed to deal with a subject within traditional state

[27]This was further evidenced by the lengthy colloquy engaged in by the dissenter prior to the oral argument of this case. That discourse made clear that, regardless of the substance of this opinion, the dissenter refuses to believe that the majority has not wrongly based its ruling on perceived political leanings.

authority").[28] Given our explicit and implicit regulatory powers over the judiciary, we are required to resolve this unprecedented, and clearly unanticipated by either the constitutional framers or our legislature,[29] issue of an incumbent justice's authority to seek another seat on the same judicial body while currently serving an unexpired term. Because of the constitutional and statutory void, and because of the pressing need to resolve this issue, this Court was forced to formulate a rule that addresses the propriety of an action which never had been attempted during the history of this state.

We wish to emphasize that our decision does not stand in conflict with the "critical postulate that sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their . . . [elected officials] . . . ." U.S. Term Limits, 514 U.S. at 795. The fundamental principles of representative democracy have not been altered by this decision. No impermissible barrier to candidacy has been erected by this decision. Justice McGraw simply has to wait until the expiration of his current term and then he may properly avail himself of the electoral process with no consequent harm to this state's judicial system.[30] "To conclude otherwise might sacrifice the political stability of the system of the State,

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[28]Both Joyner and Signorelli were cited with approval by the United States Supreme Court in U.S. Term Limits as additional authority for the permissible regulation of state officeholders. See 514 U.S. at 835 n.48.

[29]While Justice McGraw contends that the legislature has implicitly found authority for his actions as demonstrated by its recent consideration of legislation aimed at preventing future candidacies by incumbent officeholders serving unexpired terms, we find this argument to be quite specious.

[30]Contrary to the protestations of Justice McGraw regarding the disenfranchisement of this state's voters that results from granting the writ of prohibition, the citizens' right to vote for the candidate of their choice is not impeded through a temporal denial of candidacy. When Justice McGraw is eligible to seek a new term on this Court, the voters may accordingly exercise their franchise rights. To suggest, as does

(continued...)

with profound consequences for the entire citizenry, merely in the interest of [a] particular candidate[] and . . . [his] supporters having instantaneous access to the ballot." Storer, 415 U.S. at 736.

We come to the end of this case with a profound respect for our constitutionally-proscribed responsibilities and an equally healthy regard for our historical, institutionally-mandated obligations to protect the structural integrity of this Court and to apply the terms of our constitution in a manner which comports with common sense and which promotes the public weal.

Based on the foregoing, the writ of prohibition is granted as moulded and the Clerk of the Court is hereby directed to issue forthwith the mandate for this case.

Writ granted as moulded.

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[30](...continued)
Justice McGraw, implicitly if not overtly, that the right to franchise supersedes this state's legitimate interest in regulating its judicial officeholders and in maintaining the integrity of the judicial system is simply untenable. See Storer, 415 U.S. at 736 (upholding California election code provisions imposing ballot restrictions affecting independent candidates and expressly holding that "State's interest in the stability of its political system" "outweigh[s] the interest the candidate and his supporters may have" in seeking ballot access); Signorelli, 637 F.2d at 858 (explaining that while N.Y. regulation prohibiting Congressional candidacy during judicial term limits "absolutely the choice of the electorate" "for a period of time," such provision "places no obstacle between . . . [a candidate] and the ballot or his nomination or his election. He is free to run and the people are free to choose him").