

No. 27458 - State of West Virginia ex rel. George E. Carenbauer v. Honorable Ken Hechler, Secretary of State of the State of West Virginia, and the Honorable Warren R. McGraw, Justice of the Supreme Court of Appeals of West Virginia

FILED

December 14, 2000
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OF WEST VIRGINIA

RELEASED

December 15, 2000
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., dissenting:

The majority opinion unconstitutionally steals from the voters of West Virginia the right to decide whether or not *they, the voters*, would elect a qualified, eligible candidate -- Justice Warren McGraw -- to a 12-year seat on our Supreme Court of Appeals.¹

I.

*Correcting the Record Regarding Irregularities in the Selection
of the Panel that Heard the Instant Case*

The majority opinion, ___ W.Va. at ___ n.27, ___ S.E.2d at ___ n.27, Slip. Op. at 34 n.27, sharply criticizes my remarks at the oral argument of this case regarding the selection of members of the panel that heard this case.

The majority opinion characterizes my remarks as making “clear that . . . [I]

¹As I file this dissent, there are eerie parallels between the majority’s creation of a rule in the instant case that deprives the voters of West Virginia of their right to vote for a candidate -- and the decision by a 5-to-4 majority of the United States Supreme Court to create a rule that prohibits the hand count of machine-rejected ballots in the Florida Presidential election, a procedure that is clearly authorized by state law and is as established and as American as apple pie! In the case of Vice President Gore -- and in the case of Justice McGraw -- judges should not be making up rules that deny citizens their right to vote!

refuse[] to believe that the majority has not wrongly based its ruling on perceived political leanings.” *Id.* My choice would be not to respond at all to this swipe by the majority, but the reader of this opinion is entitled to the full picture. Rather than dispute the majority’s characterization of my remarks, then, I will simply set those remarks forth in full in an Appendix to this opinion.

The reader may judge for him- or herself whether the majority correctly characterized my remarks regarding the procedures used to select the panel members who heard the instant case. I suggest that the majority’s characterization is wrong.

II. *The Rhetoric of Rudeness*

To quote from the majority opinion: “The author of this opinion has experienced first-hand that the loss of collegiality can only serve to promote disharmony and impede rational discourse.” ___ W.Va. at ___, ___ S.E.2d at ___, Slip. Op. at 34. Then the majority opinion proceeds to use language conducive to anything but collegial discourse. *See, e.g.*, ___ W.Va. at ___ n.7, ___ S.E.2d at ___ n.7, Slip. Op. at 3 n.7, that credits the press with “commentary . . . [leading to a] state of calumny that has beset this institution [the West Virginia Supreme Court of Appeals]”

“Calumny” is defined in the *Oxford English Dictionary* as “slander.”

But it is a case of the pot calling the kettle black for the majority opinion to characterize *others’* language as “slanderous.”

For example, the majority opinion describes my dissenting language in this Court’s original order by which we agreed to hear the merits of this case as “contorted logic,” “shallow,” and “jurisprudentially indefensible,” ___ W.Va. at ___, ___ S.E.2d at ___, Slip. Op. at 11, 12. And the majority opinion calls Justice McGraw’s attorney “insulting and grossly unprofessional,” ___ W.Va. at ___, ___ S.E.2d at ___, Slip. Op. at 30. The majority opinion further describes Justice McGraw as “audacious” and “impugning the character” of this Court, ___ W.Va. at ___, ___ S.E.2d at ___, Slip. Op. at 6, 31.

I could go on, but these examples suffice. It was a mistake to include such ephemeral, ill-considered gibes in a formal opinion of this Court. Such an unfortunate choice of words certainly does nothing to encourage collegiality on the Court. (Dissents, being more personal than Court opinions, historically have greater latitude, but even in dissents, harsh, *ad hominem*, language does not age well.)

III.

The Majority Opinion is Legally Erroneous

The majority says that it is “impos[ing] a restriction which affects [Justice McGraw’s] eligibility for election to this body, not [his] qualifications for holding a seat on this tribunal.” ___ W.Va. at ___, ___ S.E.2d at ___, Slip. Op. at 22.

In other words, the majority says that imposing a restriction that “affects” certain people -- by saying they are not “eligible” to be elected to a seat on this Court -- is not the same thing as holding that those same people are not “qualified” to hold a seat on this Court.

For any sensible person, this is an utterly non-existent distinction.

After wading through a field of irrelevant cases that are apparently cited and discussed to provide cover for the majority's lack of authority for its holding, the majority opinion ultimately hangs its jurisprudential hat on our recent case of *Philyaw v. Gatson*, 195 W.Va. 474, 466 S.E.2d 133 (1995).

In *Philyaw*, we upheld a (properly promulgated) Supreme Court rule that said that a magistrate court employee -- not a judicial officer -- had to resign their employment with the court system, if they ran for a *non-judicial office*.

We said that this rule was not an imposition of an additional qualification on a candidate for office, but was a "reasonable requirement[] for retaining employment [in the] . . . judicial branch." We specifically grounded the reasonableness of this regulatory restriction on judicial employees upon the analogous express constitutional provision forbidding judicial officers from running for non-judicial office.

Contrasting *Philyaw* with the instant case: the majority is not reviewing an employment restriction -- it is creating one, out of whole cloth.

Prior to this case, no West Virginia judicial officer or employee has ever been barred from running for any judicial office -- because, of course, their right to do so is specifically reserved in our *Constitution*.

The majority has by its own acknowledgment created a "restriction" that has no grounding in any written provision of any rule, statute, or constitutional phrase.

The restriction that the majority is creating is not -- as it was in *Philyaw* for the judicial employee -- part of any power that is given to this Court to set the “conditions” for Justice McGraw’s “employment” in his current seat on this Court.

Justice McGraw’s “employment” conditions are entirely set by the *Constitution* and other applicable express law. Justice McGraw could be removed from office for a breach of those conditions -- not by any vote of the majority of this Court -- but only by impeachment.

Philyaw, then, the sole case that the majority uses to support its distinction-without-a-difference reasoning, is totally inapposite to the case of Justice McGraw.

IV.

*The Majority Opinion Fulfills A Warning from the Past,
and Violates Justice McGraw’s Fundamental Constitutional Rights
and the Rights of the Voters of this State*

The *West Virginia Constitution*, Art. 8, § 7, “General Provisions Relating to Justices, Judges and Magistrates,” states in pertinent part, with emphasis added:

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.

This language is easy to understand. It is clear that if Justice McGraw chose to run for Governor, or State Senator, or County Commissioner or for any other non-judicial office, he would have to first resign from the judiciary (or be automatically removed by filing for the office).

However, it is equally clear that if Justice McGraw chose to run for Magistrate, Circuit Judge, or a Supreme Court seat -- all “judicial offices” -- he is not required to resign from his currently-held judicial office.

How in the world can anyone say that -- on reading this clear language -- Justice McGraw should believe that he was barred from running for an open seat on this Court, when that open seat *is* a “judicial office?”

But the majority (in essence) says -- “. . . it just doesn’t *seem* right.”

Well, a little over 100 years ago, a great Justice [then a Judge] on this Court warned of the dangers of letting people tamper with the *Constitution* when they thought something “didn’t *seem* right.”

Not long after the *Constitution* of this state was adopted, Justice Brannon warned that permitting additional qualifications for office to be imposed -- by any process other than constitutional amendment -- would make the fundamental right to hold public office “subject to the fluctuation of sentiment, the caprices of constantly changing legislatures, the passions of the hour:”

If one additional material qualification may be prescribed, why not another? Why not many others? The constitution is fundamental law, and strictly construed in defense of the citizen’s rights. It is the Magna Charta of his freedom and rights, political and civil. Admit once that it does not fix his qualification for office. Where would his disfranchisement end? That would depend upon uncertain political, religious, or other winds. Would we limit the act within the bounds of the reasonable? That would be indefinite, unsafe, precarious, dependent upon the times and motives and aims dominating them. Against these things, it was intended to embed the right in the solid rock of the constitution.

State ex rel. Thompson v. McAllister, 38 W.Va. 485, 507-08, 18 S.E. 770, 777-78 (1893) (dissenting opinion of Justice Brannon, adopted by this Court in *Marra v. Zink*, 163 W.Va. 400, 256 S.E.2d 581 (1979)).

In the case before the *Thompson* court, an additional qualification for office had been created by at least a colorably legitimate way -- legislative enactment.

In Justice McGraw's case, an additional qualification for office has been created *by a majority of this Court*, which has asserted the right to add a qualification that is found nowhere in our *Constitution* -- in accordance with the majority's views of public policy.

In both cases, the result is the same: a fundamental constitutional right of West Virginians has been made "indefinite, unsafe, precarious, dependent upon the times and motives and aims dominating them." *Thompson*, 38 W.Va. at 508, 18 S.E. at 778.

West Virginia law is clear that *every citizen has the right to run for public office. That right can be tempered only by explicitly stated requirements:*

The right of a citizen to hold office is the general rule, and ineligibility to hold office is the exception, hence courts will hesitate to take action resulting in deprivation of the privilege to hold office, except under explicit constitutional or statutory requirements.

State ex rel. Thomas v. Wysong, 125 W.Va. 369, 24 S.E.2d 463, 468 (1943) (citation omitted); *Webb v. County Court of Raleigh County*, 113 W.Va. 474, 168 S.E. 760, 761 (1933) ("it is so generally true that one who is a citizen and voter is qualified to hold public office, that any exception to that generality should be made clear and explicit").

The majority *admits* that there is no clear or explicit constitutional or statutory

prohibition to Justice McGraw's candidacy for election to a 12-year seat. The law mandates that Justice McGraw is presumed to be eligible for office unless the *Constitution* clearly and explicitly prohibits his candidacy.

It is not Justice McGraw's burden to point to some explicit provision allowing him to run for office, because his eligibility is presumed; rather, the law is clear that *his right to run can be taken from him only by some clear and explicit constitutional restriction -- not by a judicially-imposed restriction*. The Court's ruling in this case thus turns longstanding precedent on its head.

This Court's articulation of a new public policy in this case is extraordinary, especially in light of the obvious fact that the Court's previous holdings -- recognizing that our State *Constitution* has at its core a fundamental right to run for office -- confirm that *the public policy of West Virginia is the fundamental right to run for office itself*.

Creating, from whole cloth, a vague new "public policy" that defeats the clear expression of this fundamental constitutional right, is antithetical to all known forms of constitutional interpretation. It is wrong for the Court to search outside the *Constitution*, to create a new public policy to defeat Justice McGraw's fundamental constitutional right. The heart of constitutional construction is not to search for ways to defeat a fundamental constitutional right, but *to ensure that such rights are preserved*.

Qualifications to run for office other than those explicitly stated in the *Constitution* itself are unconstitutional. Such extra-constitutional qualifications -- be they enacted by the Legislature or, as here, enacted by judicial "public policy" lawmaking -- are

expressly violative of the *West Virginia Constitution*

. . . since there is no direct authority in our *Constitution* for the Legislature to establish qualifications for office in excess of those imposed by [the *West Virginia Constitution* . . . we find qualifications other than those in [the *Constitution*] unconstitutional by its very terms and under our own equal protection, . . . due process, . . . and freedom of speech and assembly . . . provisions.

(Citations omitted.) *Marra*, 163 W.Va. at 407, 256 S.E.2d at 586.

Marra overruled a whole line of cases that appeared to allow the Legislature (but not the judiciary) to impose extra-constitutional qualifications. The majority's holding in the case at bar not only allows the extra-constitutional qualifications barred by *Marra*, it takes the heretofore never-articulated position that the judiciary may create from whole cloth new qualifications for office.

The State may not take action to deny a fundamental constitutional right unless there is a showing that such denial is necessary to achieve a "compelling state interest." Syllabus Point 3, in part, *State ex rel. Sowards v. County Com'n of Lincoln County*, 196 W.Va. 739, 474 S.E.2d 919 (1996):

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. The fundamental and constitutional right to run for public office cannot be denied unless necessary to achieve a compelling state interest.

But this "compelling state interest" analysis is used only where *the State* has taken some action to deprive a citizen of a fundamental constitutional right:

It is beyond cavil that *when a state acts* to the disadvantage of some

suspect class or to impinge upon a fundamental right explicitly or implicitly protected by the West Virginia Constitution, strict scrutiny will apply, and *the state will have to prove* that its action is necessary because of a compelling government interest.

Phillip Leon M. v. Greenbrier County Bd. of Educ., 199 W.Va. 400, 484 S.E.2d 909, 913 (1996) (emphasis added).

“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.” Syllabus Point 2, *State ex rel. Billings v. City of Point Pleasant*, 194 W.Va. 301, 460 S.E.2d 436, (1995). Accord, e.g., *State ex rel. Piccirillo v. City of Follansbee*, 160 W.Va. 329, 335, 233 S.E.2d 419, 423 (1977); *White v. Manchin*, 173 W.Va. 526, 318 S.E.2d 470 (1984).

In other words, when the State passes a law that infringes on a fundamental constitutional right, such as the right to stand for election, such a law only withstands strict constitutional scrutiny if it is narrowly tailored to meet a compelling state interest.

Never before has this Court used a “compelling state interest” analysis, not to review, but to *create from whole cloth*, a constitutional abridgement.

In the instant case, *the State* has taken no action to deprive anyone of a fundamental constitutional right. To the contrary, Secretary of State Hechler has sought to *protect* Justice McGraw’s fundamental constitutional right to stand for election.

There was an attempt in the House of Delegates this year to legislate the very restriction on Justice McGraw’s fundamental constitutional right that was sought by the

petitioner in this case. Had that measure been enacted, the question of whether the measure was designed to meet a compelling state interest may have presented itself to this Court, because such a law would have abridged Justice McGraw's clear constitutional right to run for office.

But the measure failed. Indeed, the Legislature's failure to pass such legislation is another nail in the coffin of the "public policy" rationale used by the majority. This seems clear from the reaction to this Court's decision by one of the failed House bill's sponsors:

McGraw's point of view has support from an unlikely corner: one of the legislators who introduced a bill, spurred by McGraw's candidacy, to block elected officials from running for an office in the middle of another term.

"I think the decision is ridiculous," said Delegate John Doyle, D-Jefferson.

"I don't think you ought to be allowed to do it, but I don't think it is proper for the Supreme Court to concoct a law from whole cloth making it illegal."

The ruling "has all the sounds of judge-made law," Doyle said.

The court had to go to New York to find a precedent precisely because there is nothing in West Virginia law to either forbid or permit the practice, he said.

And it should be up to the Legislature or to the voters, via constitutional amendment, to outlaw the practice, not the court, Doyle said.

It's also unclear if Thursday's ruling extends to offices other than that of Supreme Court justice, as the legislation did. The bill, which was sponsored by members of House leadership, passed the House but never came to a vote in the Senate.

March 24, 2000, *Charleston Daily Mail*.

If the “public policy” of the State is so clear as to restrict Justice McGraw’s candidacy, the Legislature presumably would have passed the measure. Concomitantly, if Justice McGraw’s fundamental constitutional rights are to be abridged, it must come from the Legislature or by constitutional amendment, not from this Court. There is no precedent that allows this Court to craft “public policy” from whole cloth and to abridge a fundamental constitutional right.²

Where a provision of the *Constitution* is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed. As stated in Syllabus Point 3 of *State ex rel. Smith v. Gore*, 150 W.Va. 71, 143 S.E.2d 791 (1965):

Where a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed.

The *Constitution* clearly and plainly allows a “justice” to run for “a judicial

² “[A] judge’s strong belief that the legislature has made a grave error of public policy is not a valid legal reason for declaring an act unconstitutional. Public policy is a legislative function, not a judicial one, and if courts infringe upon this legislative function by judicial fiat, decision or opinion, it is just as surely a violation of the separation of powers.” Franchini, Gene E., Justice, New Mexico Supreme Court, “Conscience, Judging, and Conscientious Judging,” 2 *J. App. Prac. & Proc.* 19, 21-22 (2000). In 1982, Justice Franchini resigned his (trial court) judgeship, rather than impose a legislatively-mandated prison sentence on a first-time offender for whom a jury had recommended leniency and whom the judge had concluded should be placed on probation. He later was elected to the New Mexico Supreme Court in 1990 where he now serves as a justice. In 1997-1998 he served as the chief justice of his court.

office.” *West Virginia Constitution*, Art. VIII, § 7. There is no exception to this provision; there is simply nothing that can be interpreted to limit a justice’s right to run for “a judicial office.”

Another term on the Supreme Court of Appeals is, obviously, “a judicial office.” Nothing about the relevant portion of Art. VIII, § 7 is unclear, yet the majority has grafted onto it an exception for justices who already are in office. The majority’s action in this case is not an “interpretation” of Art. VIII, § 7, but an *expansion* of it.

The Court could not possibly be interpreting the phrase “a judicial office” because that phrase is clear, and includes the office of Justice of the Supreme Court of Appeals. If it did not, circuit judges like Justice Maynard and myself, who ran for a term on the Supreme Court of Appeals while still sitting as circuit judges, would have been barred from running at that time. Rather than interpreting the provision, the majority is expanding it. Such an expansion is foreign to all precedential rules of constitutional construction.

The Court’s decision also completely ignores longstanding precedent from West Virginia and around the nation that requires every reasonable construction in favor of eligibility for office. In *State ex rel. Maloney v. McCartney*, 159 W.Va. 513, 223 S.E.2d 607 (1976), this Court stated that: “[i]n the event of ambiguity a constitutional amendment will receive every reasonable construction in favor of eligibility for office.”

Thus, even if the majority ignores the overwhelming precedent mandating that the right to run for office can be abridged only by clear and explicit *legislation*, this Court would have to determine that the provision in question was somehow “ambiguous.” And if it

was ambiguous, then every reasonable construction must be made in favor of eligibility for office.

Obviously, there is no ambiguity to construe, as there was in the case of the “law practice” requirement for judicial candidates in *State ex rel. Haught v. Donnahoe*, 174 W.Va. 27, 321 S.E.2d 677 (1984). Even if the petitioner had been able to point to some ambiguity that could conceivably be used to support his position, this Court would be ignoring the law in regard to the presumption of eligibility, if it omits any reasonable construction of the Constitution that would allow a sitting justice to run for “a judicial office.” Art. VIII, § 7, *West Virginia Constitution*.

Significantly, the petitioner has never suggested that a construction of Art. VIII, § 7, that allows a sitting justice to run for re-election before the expiration of his present term, is unreasonable.

Indeed, considering the fact that the right to run for office is a fundamental constitutional right and the fact that any ambiguity must be construed in favor of eligibility, such a construction is, at the very least, a reasonable one. It would be a departure from reason and logic and require extraordinary contortions of accepted definitions to find otherwise. The law mandates that this Court ask the question: If the provision is ambiguous, is there any reasonable construction that would allow a sitting justice to run for a separate term on the court? The *Constitution* specifically allows, *without exception*, a “justice” to run for “a judicial office.” Justice McGraw is a “justice,” and the two seats open during the 2000 election are both “a judicial office.”

VI.

The New York Opinion in Hurowitz does not Provide a Basis for this Court's Decision

The decision of the New York Court of Appeals in *Hurowitz v. Board of Elections*, 53 N.Y.2d 531, 426 N.E.2d 746, (1981), a 3-page, 4-3 decision, *construing the constitution of New York*, is the only direct authority cited by this Court for its ruling. However, *Hurowitz* does not lend any controlling legitimacy for the majority's reading of the West Virginia *Constitution*.

Most importantly, in New York State, contrary to West Virginia law, the right to hold public office is not considered to be a “fundamental right,” and it may be restricted simply upon a showing that the restriction has some “rational basis.” *In the Matter of Simon Rosenstock v. Scaringe*, 388 N.Y.S.2d 876, 357 N.E.2d 347, 40 N.Y.2d 563 (1976).

In West Virginia, by contrast, citizens have a fundamental *constitutional* right to hold public office, unless some clear and explicit constitutional provision disqualifies them. *E.g., State ex rel. Thomas v. Wysong*, 125 W.Va. 369, 24 S.E.2d 463, 468 (1943). Thus, even if the constitutions of the two states were identical -- and they are not -- only West Virginia requires that there be a clear and explicit constitutional provision in order to render a candidate ineligible for the ballot, and the New York case is easily distinguishable on that basis alone.

The New York court did not purport to find that the constitutional clause providing that a judge may not “be eligible to be a candidate for any public office other than

judicial office” clearly and explicitly barred sitting judges whose terms have not yet expired from becoming candidates for identical positions on the same court; and under New York law, unlike West Virginia law, no such clear and explicit provision was required to restrict the rights of the petitioner in *Hurowitz*. Indeed, the slim majority in *Hurowitz* based its ruling upon the entirety of New York’s extremely complex constitutional provisions regarding eligibility and terms of judicial offices.

The only authority cited by the *Hurowitz* court, *People ex rel. Jackson v. Potter*, 47 N.Y. 375 (1872), does not even mention the relevant constitutional provision; the only issue in that case dealt with the right of succession, where an incumbent judge resigned on the day before a general election. Moreover, the comprehensive constitutional scheme construed by the *Hurowitz* court provides, *inter alia*, that “[w]hen a vacancy shall occur, otherwise than by expiration of term, in the office of judge . . . it shall be filled for *a full term* at the next general election.” *New York Constitution*, Art. VI, § 21(a). Therefore, in New York, unlike West Virginia, if a judge resigns in order to accept another judicial position, the person elected to replace him is elected for a full term, rather than the unexpired portion of his original term. Obviously, this creates a much more significant potential for disruption of the court’s intended structure of staggered terms than does the comparable provision in the West Virginia *Constitution*.

When read as a whole, the New York *Constitution*’s eligibility provisions are dissimilar to those of the West Virginia *Constitution*. Simply stated, because West Virginia law and constitution require application of very different legal standards than New York law,

the *Hurowitz* ruling does not support this Court's rewriting of the clear and unambiguous provision of the West Virginia *Constitution*, which permits a judge to run for "a judicial office," without any restriction or qualification.

Lastly, the vote in *Hurowitz* was 4-3, and the whole opinion was less than three pages. I think that the minority justices in New York were correct, when they said: "As powerful as are the policy arguments for preclusion of a candidacy of the nature here involved, no such prohibition can be found in the provisions of the Constitution or of any statute. The proscription against candidacy of a Judge for public office 'other than judicial office' cannot reasonably be read as does the majority, nor do the provisions of the Rules of Judicial Conduct furnish any basis for interpretation of the Constitution . . . outlawing the instant candidacy by judicial fiat." 53 N.Y.2d at ___, 426 N.E.2d at 749.

VII. *The Business of Judging*

It is ironic that the majority panel -- entirely composed of pragmatic politician/judges who have substantial personal experience and understanding of the politics of judging -- have chosen to affix their support to the majority opinion's erroneous rhetoric about courts being "pure" and "above the fray" of the world of politics.

This rhetoric is, of course, poppycock.

As one noted scholar put it:

Whether judges are mere oracles of fixed and known legal principles is a question which most social scientists thought

resolved more than fifty years ago by the realist revolution. The battle need not be fought again here. In the modern view, well established among political scientists, sociologists, and eminent legal thinkers, judges not only make conscious policy choices in the adjudication of cases and in the exercise of the power of judicial review, but also engage in political decision-making as a matter of function. “The judges are [political] actors charged with special responsibilities, and their decisions . . . allocate values in society such as opportunity, liberty, money, protection, or representation in other types of decision-making. Like other political decision-making, this allocation of values is differential; that is, some individuals and groups are favored and others are disadvantaged. These policy outputs are called ‘justice.’”

At the appellate court level, judges are likely to confront policy choices directly in the course of developing common law principles and in interpreting state constitutional and statutory provisions. Even in the process of reviewing lower court decisions for procedural irregularities or substantive errors, however, appellate court decisions may serve to favor some kinds of interests while disadvantaging others, demonstrating thereby the political nature of the judicial function.

This view of the judicial process does not posit that judges are merely “politicians in robes” or that judicial policy-making is exactly like that engaged in by legislatures and executives; these over-simplifications do not withstand even casual analysis. Nor does it deny that relatively few cases are explicitly partisan or ideological in nature or that many times judges are called upon to make relatively minor and technical adjustments in long-settled principles of law. But it does emphasize that judicial discretion is extensive and that judges are aware of the options available to them and the differential effects alternative choices will have upon individuals and groups affected by the litigation before them. Finally, of course, this conception of the political nature of judicial decision-making recognizes that judges frequently are able to develop common law, to interpret statutes and administrative regulations, and to adjudicate constitutional disputes--all opportunities which allow judges explicitly to make, veto, legitimize, or reinforce public policies.

Phillip L. DuBois, *From Ballot to Bench*, pp. 23-24, University of Texas 1978.

Or as journalist Tom Miller more vernacularly opined in the April 3, 2000

edition of *The Charleston Gazette*:

There was some talk -- but not much -- instigated by the governor during the 2000 legislative session about the possibility of electing our Supreme Court justices in a nonpartisan election. Events in recent days prove how transparent that unlikely change would be.

Just as there is nothing more partisan than the nonpartisan county board of education in the state's 55 counties, there would be nothing more partisan in state government than a nonpartisan Supreme Court.

These five people get to make the final decisions on the tough political issues that the two other branches of government can often duck. Next on the table is the constitutional correctness of the \$4 billion pension fund bond issue. Maybe the governor and Legislature should ask these folks to solve the Public Employees Insurance Agency funding problem.

Last week, the court decided that gubernatorial candidate Denise Giardina can't have her cake and eat it too. By a 3-2 vote, the court refused to review a lower court ruling that as a member of an independent party, she can't get people who are registered with one of the two major political parties to sign her nominating petitions unless she warns them that this will prohibit them from voting in their own party's primary election in May.

The week before, the court told one of its own, Justice Warren McGraw, he can't run for a 12-year term on the court while he's serving a shorter term. And before that it was the controversial rejection of Gov. Cecil Underwood's appointment of House Speaker Bob Kiss, D-Raleigh, to fill a seat on the court.

These are partisan, political hot potatoes that demand partisan, political decisions. Probably no one among us can agree completely with all three rulings, but who can complain that they dodged the question?

What did the Legislature do about third-party candidates? Last year lawmakers did remove the penalty for signing one of these nominating petitions and then voting in the Democratic or republican primary, but didn't change the section that says it still prohibits this double dipping by voters. Lawmakers also doubled the number of signatures required for third-party nominations for

good measure.

And why did a Republican governor appoint a Democrat to the court? For the likely reason that he wanted to curry favor with Democratic voters he needs so desperately in November to win another term, with the hope that it would be rejected so he could then name a Republican to appease his own grumbling GOP ranks.

The partisan labels in the Supreme Court right now may more correctly be business and labor than Democrat and Republican, but partisanship is alive and flourishing. And changing the election labels won't alter those dynamics.

Both academics and journalists agree that a necessary part of the business of judging is deciding difficult political issues. The art of good judging, as I see it (and I think most honest judges would agree), is doing so in a way that properly respects the structure of our democratic, constitutional system.

It is utterly absurd to suggest that judges just “apply the law,” and do not make decisions that are influenced by their philosophies -- or their “prejudices” -- the unfortunate term that the majority chooses to use.

For example, my former colleague, Justice Margaret Workman, is (and was while she sat on this Court) strongly “prejudiced” toward helpless children. And whenever she could, she made judicial choices that favored those children.

Some people thought that Justice Workman sometimes “stretched the law” to favor children -- and they were probably right. But she never, in my opinion, stretched it beyond the permissible bounds imposed by our constitutional, democratic system.

The majority in this case, I suggest, are certainly bringing their “prejudices,” or philosophies, to the issues before them. There is nothing wrong with that.

But they are also improperly “stretching the law” well beyond the limits of our *Constitution*.

VIII. *A Final Note*³

³It is interesting to note that, despite a professed concern for “collegiality,” when the author of the majority opinion completed his first, or second, or however many drafts of this opinion he made, he did not share them with me, the dissenting member of the Court. For some unknown reason, after the Court voted and made a tentative decision, and I was noted as a likely dissenter to that decision, I was thereafter removed from the loop. This not only strikes against the concept of “collegial discourse,” but it was an outright violation of our longstanding internal practices and procedures.

For as long as I have been on this Court -- and for as long as other Court staff here can remember -- drafts of opinions are circulated before publication to *all* members of the Court -- dissenters included -- for review. This is done out of collegiality, to allow other members to point out possible errors or suggest corrections, and to provide the opportunity for all members of the Court to again try to persuade others to their respective points of view. After a final draft has been circulated to other members of the Court, the full Court meets -- dissenters included -- to discuss the opinion and ultimately to approve it for filing. We call this final step in the process an “opinion conference.”

In this case, not only was I not permitted to see the majority opinion before it was filed, but the opinion was filed on a Friday, after I had left town earlier in the day. *I did not learn that the majority opinion had been filed until I read about it in the newspaper*, about a week later. And, to the best of my knowledge, the Court had no “opinion conference” -- or, at least, none to which I was invited.

These circumstances hearken back to the shenanigans that occurred on this Court in 1901, when the majority believed that Judge Marmaduke Dent was not entitled to share the files and official court documents in a case involving West Virginia University, *Hartigan v. Board of Regents of West Virginia University*, 49 W.Va. 14, 38 S.E. 698 (1901). See Reid, John Phillip, “An American Judge: Marmaduke Dent of West Virginia,” New York University Press, 1968, p.64. Judge Dent wrote in *Hartigan*, in dissent:

For reasons known only to themselves my associates denied me knowledge and inspection of their opinion and syllabus until after it was handed down, or became public property. This is a matter of judicial courtesy or ethics, and, as a learned judge has said that courtesy is a mere matter of taste, about which there is no

(continued...)

In conclusion, let me step back for a moment from the specific legal reasons why the majority opinion is wrong.

I personally understand why many people would oppose allowing a sitting justice -- any sitting justice -- to run for a full term before his unexpired term is finished. If the Legislature prohibited such conduct, I might even vote as a judge to uphold such a law. And if I were writing our Constitution, I might support inserting such a clause.

But our Legislature, the elected representatives of our people, declined the opportunity to enact such a law -- just this year! And I am not writing a new *Constitution*, but applying the one we have.

Under our *Constitution*, there is only one group of people who have the legal power to say -- if they want to -- that what Justice McGraw intended to do was a bad idea.

That group is not the *ad hoc* group of judges in the majority,⁴ who have conjured

³(...continued)

disputing, and from which there is no appeal since dueling has been abolished, every judge has the right to treat his confrères as he sees proper, according to his inward consciousness and outward experience. Not having been admitted to their exclusive consultations over nor been made aware of their written conclusions until after given to the public, I deem it my duty to review these conclusions, as some of them appear to me to be plainly violative of the true principles of law and justice, and the opinion as a whole to be evasive, inconclusive, and unsatisfactory as an exposition of sound law, although an admirable paper for other purposes.

49 W.Va. at 51, 38 S.E. at 714. Perhaps the majority's conduct was right in Judge Dent's case, but I do not believe it was right in the instant case.

⁴None of the members of the majority were ever elected to this Court by the citizens
(continued...)

up a phantom restriction out of their own feelings about what seems “right” to them.

Let me reiterate: *The only group of people who have the legal right to say that what Justice McGraw sought to do would be a bad idea are the voters of West Virginia.*

The majority opinion unconstitutionally *steals* the right to choose from the voters of this State. The majority has, in effect, successfully assisted the Hilton Head/Lincoln Navigator crowd in hijacking an election from the Myrtle Beach/pickup truck folks.⁵

I therefore dissent.

⁴(...continued)
of this State.

⁵The Chief Justice of this Court who selected two of the four members of the majority panel in the instant case -- before recusing himself from the further consideration of the instant case for what I see as an unauthorized reason, *see* Appendix -- traveled to Washington, D.C. in December of 1999, to speak on a panel sponsored by the Federalist Society. In his remarks, he characterized a decision by this Court -- *Bower v. Westinghouse Electric Corp*, 206 W.Va. 133, 522 S.E.2d 424 (1999) -- as authorizing our circuit courts to make cash giveaways to undeserving West Virginians, who this justice believes would spend their “windfalls” on “pickup trucks” or “Myrtle Beach vacations.” *See* <http://www.fed-soc.org/medicalmonitoring.htm>. Of course, our decision in *Bowers* authorized no such thing. And the dissent filed by this Justice in that opinion did not repeat, for home consumption, the patronizing remarks about pickup trucks and Myrtle Beach vacations that no doubt got a real chuckle from his Hilton Head/Lincoln Navigator audience in Washington.

The Federalist Society is a corporation-funded group that promotes “hands-off” government -- when it comes to the government regulating big corporations, that is. The Society’s website features a list of “Top Ten Federal Government Efforts To Suppress Free Speech” that attacks the Child Online Protection Act, Gambling Advertising Regulations, Bank Disclosure Regulations, Civil Rights Investigations, FDA Drug Advertising and Labeling Regulations, Election Campaign Expenditure Regulations, and Workplace Harassment Laws. *See* <http://fed.soc.org/topten-freev3i1.htm>.

APPENDIX

Comments of Justice Larry V. Starcher in Court on March 17, 2000, before oral arguments were heard in *State of West Virginia ex rel. George E. Carenbauer v. Honorable Ken Hechler, Secretary of State of the State of West Virginia, and the Honorable Warren R. McGraw, Justice of the Supreme Court of Appeals of West Virginia*:

Before we begin our discussions here today, I feel compelled to make a few comments on the method this Court was filled to hear this matter. In doing so, I would first like to back up and share with you how the panel of judges that decided the *Kiss* case was selected.

First, as a member of this body, I understood the import of the *Kiss* case. I was shocked when I heard the case had been filed. Personally, I had already been assisting Speaker Kiss to move into what were to be his chambers.

In preparation for selecting acting justices to fill the *Kiss* Court, I first carefully read the relevant constitutional, statutory, and Supreme Court rules. I next researched the Court records to determine how the filling of open seats on the Court for a particular case had been done in the past . . . and then I took the matter to the full Court -- with all five justices participating -- to discuss the process to be used in filling the Court.

One of my concerns was that I did not want my legacy on this Court to be that I “packed the Court” to achieve a political end. I told the other members of the Court that I proposed to fill the Court with one retired justice and one sitting judge. I further advised the Court that I would ask all retired justices whether they would serve, if asked -- we had three in West Virginia at the time -- with Justice Caplan residing in Florida.

I next told the Court that I would try to select a sitting judge of stature who had not originally been a member of the Legislature and who had achieved his/her office by appointment (part of the issue in the *Kiss* case), and who was a judge that was not a particularly close friend of mine. Quite frankly, I had in mind Retired Justice Thomas McHugh and sitting Judge (former Justice) Arthur Recht.

Mind you, time was of the essence in the *Kiss* case as it is in this matter. So, my first round of telephone calls was made to the retired justices living in West Virginia. I initiated each of my conversations with an admonishment to “Please do not tell me if you have any preliminary thoughts about the case -- I only want to know if you are available to serve, should I ask you.” Two said they were available; one said that he felt that he was disqualified based on his current law practice.

I quickly asked Retired Justice Miller to sit and he accepted. This, in my mind, then eliminated Judge Recht as the sitting judge because both he and Justice Miller are from Wheeling, and, at one time, they worked together in the same law firm -- I believe. So, I thought back to the discussion we had when I originally took the matter to the Court. One consideration I heard was: “Why not someone from south of Route 60?” That comment was strongly stated by two members of the Court when I had taken the matter to conference.

I got out the list of our circuit judges -- called one who resides in the heart of our coal

fields . . . he declined. Called another from a southern county who said he had a conflict because his daughter was an attorney who worked in the same law firm as did Speaker Kiss, and I received a third rejection from another southern judge. I did another review of the list of judges, still knowing that I needed to act quickly.

I then set the matter aside and began reviewing our next week's docket. There were two cases on the docket from which I was disqualified because they were from my home circuit and I had been involved in them as a circuit judge prior to coming on the Court. Acting Chief Justice Maynard had appointed Judge Clarence Watt to sit on those cases in my place.

So, I said to myself . . . Judge Watt is our most senior judge in age, he does live south of Route 60 (Hurricane), and he has been a judge for over 20 years. And, I found out that had served 12 years as a prosecuting Attorney. I had never previously appointed Judge Watt to sit on the Court. I inquired of his availability, and the rest is history.

Now let me say a few words about how the panel was selected in this [Carenbauer] case. I was never, even for a split second, consulted or advised of the process by which the acting justices were selected, or who might serve on the Court. I simply had "orders laid on my desk," after the fact.

I do hold each of the circuit judges appointed to sit on this panel [Judges Fox, Jolliffe, and Keadle] in high esteem, and in no way do I question their ability or personal qualifications to sit. But it should be noted that two of the circuit judges sitting here today were appointed by a chief justice, who is either ineligible, or simply refuses, to sit on the very matter to which he made the appointments. The third was appointed by Acting Chief Justice Scott, after Chief Justice Maynard recused himself. The first I knew who would be filling the original two empty seats was when my office was presented a copy of the appointment order. Information about the third appointment took a "twisted trail."

On Tuesday, March 14, I received on my desk a lengthy memorandum from Chief Justice Maynard saying that he was not recusing himself in the matter based on Justice McGraw's second recusal motion. Even though the memo was dated March 7, the filing date in the Clerk's Office was March 13, the day before I received it. At that point I assumed Chief Justice Maynard was sitting on the case. About 2:00 in the afternoon of the same day, there was a rumor running through the halls that the Chief Justice was not going to be sitting on the case, and almost simultaneously I was provided a copy of an order whereby Acting Chief Justice Scott appointed Judge Keadle in his stead. I called Justice Scott on the phone and asked him what was the basis for that action since the latest memorandum I had received advised me that the Chief Justice was remaining on the case, and notice that his intention to remain on the Court had been filed in the Clerk's office only the day before.

Justice Scott advised me that the Chief had changed his mind and was recusing himself, and that I should have received a copy of his memorandum stating his reasons. In fact, my office had never received a copy of such memorandum. I requested it from the Clerk's office, it was provided, and in less than half an hour later another copy was provided from the Chief Justice's office.

My concern for this panel is that we have two acting justices who are now sitting on this Court who were appointed by an either ineligible Chief Justice, or one who refuses to sit in the matter. I do not believe a judge or justice can simply refuse to sit on a case. We are either eligible and have a constitutional obligation to perform our duty, or we are ineligible, and therefore should take no action in the case whatsoever.

Quite frankly, I would personally like very much not to be sitting on this case. I see myself as a loser either way. I have a good friend who is a candidate for the same office for which two of my colleagues are now candidates. If I rule against my colleagues, it's uncomfortable. If I rule against my friend it will be equally uncomfortable, but I will have to do one or the other.

This case is, to a great extent, a political case -- whether we want to say so or not. And, the process used to fill this Court being less than "squeaky clean" may very well magnify public skepticism about its fairness.

Therefore, in closing, I simply want to say the same thing that I said in the *Kiss* matter when it was presented to the Court. If you agree with the decision of this Court, you will likely herald the decision as brilliant, scholarly work; but if you disagree, you will view it as simply more political shenanigans.