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Elected Officials

Frank Venezia
West Virginia University College of Law

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ELECTED OFFICIALS

I. ELECTION MANDAMUS

A. Judicial Eligibility


Article VIII, section 7 of the West Virginia Constitution provides in part: “All justices, judges and magistrates must be residents of this state and shall be commissioned by the Governor . . . no person may hereafter be elected as a judge of a circuit court unless he has been admitted to practice law for at least five years prior to his election.” This passage is more ambiguous than it appears on first impression. Recently, in State ex rel. Haught v. Donnahoe1 two diverse interpretations emerged, resulting in a clarification of judicial eligibility requirements under the State Constitution.

Donnahoe was an original proceeding in mandamus brought by a Ritchie County voter seeking to compel the respondent ballot commissioners of Ritchie, Pleasants, and Doddridge Counties to remove Mr. Donnahoe from the ballot of the November 1984 general election. Donnahoe was the Republican candidate for circuit court judge. The petitioner further sought to compel the Secretary of State to withhold or withdraw the certification of Donnahoe’s nomination.2

The petitioner asserted that, according to Article VIII, section 7 of the West Virginia Constitution, Donnahoe was ineligible to serve as circuit court judge because he had not “been admitted to practice law for at least five years prior to his election.” Although Donnahoe had practiced law for more than fifteen years in California, he had never been admitted to the practice of law in West Virginia. The petitioner claimed that Article VIII, section 7 requires five years experience in West Virginia. Of course, Donnahoe responded that the requirement is satisfied by five years practice of law anywhere.

Before addressing the substantive issues, the West Virginia Supreme Court of Appeals reiterated that mandamus is clearly an appropriate method to resolve election conflicts of this nature.3 Further, the court stressed that a writ of mandamus could not be granted unless the court evaluated their decision from an equal protection perspective. Because the right to run for office is fundamental in West Virginia, and is worthy of protection under the equal protection provisions of the State and federal constitutions, a limitation of that right could only be sustained if a compelling state interest to restrict the fundamental right was identified.4

The court listed a number of public policy considerations underlying a com-

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2 Id. at 678.
3 W. Va. Code § 3-1-45 (1979) provides: “Any officer or person, upon whom any duty is devolved by this chapter, may be compelled to perform the same by writ of mandamus.” Also, “[a] mandamus shall be from the Supreme Court of Appeals . . . to compel any officer herein to do and perform legally any duty herein required of him.”
4 Donnahoe, 321 S.E.2d at 684.
pelling state interest. Judicial eligibility requirements were intended to insure that judges would be competent and familiar with the law of their jurisdiction and that due process demanded "a high level of jurisdictional competence and integrity in that endeavor." Also, the United States Supreme Court has held that a state's interest in protecting the fabric of its judiciary is so compelling as to allow a lesser degree of scrutiny than would be required for other restrictions. Finally, the supreme court concluded by citing authority supporting this position from the Eighth Circuit Court of Appeals, the Washington State appellate court, and in a denial of certiorari by the United States Supreme Court. With the equal protection question resolved, the court found that the writ of mandamus could be issued if the eligibility prerequisites, as interpreted by the supreme court, had not been satisfied.

As to the eligibility question, the court rejected the candidate's contention that the constitutional provision was unambiguous and insisted on applying the common and recognized rules of construction, to give effect to the intent of the law. Finding no cases on point with respect to circuit court judges, the West Virginia court analyzed analogous cases from other jurisdictions and in West Virginia dealing with experience requirements for eligibility to run for the office of prosecuting attorney. State v. Russell involved interpretation of the term "counsel" in a Wisconsin statute that dealt with the appointment of counsel to assist the district attorney. Even though the attorney in Russell was a distinguished Minnesota criminal lawyer, the Wisconsin Supreme Court held that the proper meaning of the term "counsel" in light of the statute required that such persons be members of the Wisconsin State Bar. Similarly, in State ex rel. Summerfield v. Maxwell, the West Virginia Supreme Court of Appeals concluded that a person not licensed to practice law in West Virginia would be unable to perform the enumerated duties required of prosecuting attorneys by West Virginia Code section 7-4-1. Therefore, the court in Maxwell felt that the legislative intent of section 7-4-1 was to require that district attorneys be licensed to practice in West Virginia.

In Donnahoe, the court reasoned that, if prosecuting attorneys must obtain a license to practice in West Virginia, judges must do likewise. The court noted a survey taken of forty-seven jurisdictions in which forty-five required that judges

1 Id.
2 Id.
3 Bullock v. State of Minnesota, 611 F.2d 258 (8th Cir. 1979) (similarly constituted provision held to serve compelling state interest).
4 Kraft v. Harris, 18 Wash. App. 432, 568 P.2d 828 (1977) (city charter provision that a corporation counsel candidate must have been practicing law in City of Seattle at least four years held to be reasonable requirement).
5 Trafelet v. Thompson, 594 F.2d 623, 627 (7th Cir. 1979), cert. denied, 444 U.S. 906 (1979) (equal protection clause does not prohibit adoption of more rigorous standards for assuring excellence in the judiciary than for other elective offices).
6 Donnahoe, 321 S.E.2d at 680.
7 State v. Russell, 83 Wis. 330, 53 N.W. 442 (1892).
9 Id. at 549, 135 S.E.2d at 750.
of courts of record be licensed in that particular state. Of twenty-five states surveyed, twenty-two required the same for appellate or trial court judges.\textsuperscript{14} The court felt that these statistics emphasized the traditional and inherent interterritoriality of the judiciary concerning the regulation of the practice of law.\textsuperscript{15} As persuasive authority for this position the court cited \textit{Littlejohn v. Cleveland},\textsuperscript{16} a decision where the Georgia Supreme Court reasoned that if attorneys cannot practice law unless they are members of the state bar, then people cannot qualify for an office requiring law practice unless they are members of the state bar.\textsuperscript{17}

\textit{Whitmer v. Thurman},\textsuperscript{18} cited in the \textit{Littlejohn} opinion, added a unique twist to the constitutional interterritorial discussion. In \textit{Whitmer}, the Georgia Supreme Court held in a concurring opinion that the experiential requirement had to be satisfied in Georgia.

If it were not so, then the practice of law in Kuala Lampur, Malaysia, would suffice. If practice of law in Kuala Lampur were to satisfy the requirement, then the requirement would have no reasonable basis and would be invalid as an unreasonable impairment of the right to hold public office in violation of the 14th amendment. To prevent the requirement from being so overbroad as to be invalid, it must be interpreted to be limited to the practice of law in Georgia.\textsuperscript{19}

The highest court in West Virginia therefore held that the West Virginia Constitution mandated admission to the bar \textit{in West Virginia} for five years prior to candidacy as the experiential requirement for persons seeking the office of circuit court judge.\textsuperscript{20}

B. \textbf{Gubernatorial Succession}


During the survey period, the West Virginia Supreme Court of Appeals went a long way (in a short opinion) toward clarifying an interesting question of gubernatorial succession. \textit{State ex rel. McGraw v. Willis}\textsuperscript{21} originated as a petition for a writ of mandamus brought by Senate President Warren McGraw so that he could continue to be paid as Senate President until January 9, 1985,\textsuperscript{22} despite the fact that his term as a senate member expired on November 30, 1984.\textsuperscript{23}

\begin{itemize}
  \item \textit{Donnahoe}, 321 S.E.2d at 681.
  \item \textit{Id.} at 682.
  \item \textit{Id.} at 598, 308 S.E.2d at 187.
  \item \textit{Id.} at 570, 247 S.E.2d at 106.
  \item \textit{Donnahoe}, 321 S.E.2d at 683-84.
  \item \textit{Id.} at 600.
  \item \textit{W. Va. Const.} art. VI, § 18 provides, in pertinent part, that: "Regular sessions of the legislature
Senator McGraw chose not to run for the West Virginia State senate in the 1984 election, in which Governor Jay Rockefeller was elected as one of West Virginia’s United States senators. It was rumored that Rockefeller would take his senate seat on January 3, 1985 thereby leaving the governor’s seat vacant from that date to January 14, 1985, when the new would be inaugurated. Ordinarily, the senate president would assume the governor’s chair in the governor’s absence.24 But, if it was decided that Mr. McGraw’s position as president expired with his general senate membership on November 30, 1984, West Virginia would have been without a governor for those twelve days.

Although Governor Rockefeller eventually decided not to assume his senate seat until the 1985 inauguration, the writ petition had already been filed and the West Virginia Supreme Court of Appeals felt that the question was ripe for adjudication and decided to hear the case.25 The court relied on West Virginia Constitution Article VI, section 18, which provides that the Legislature’s officers are to serve two year terms, and on West Virginia Code section 4-1-8, which mandates that these terms are to “continue until the regular meeting of the Legislature in the odd numbered year next thereafter, and until their successors are elected and qualified.”26 Based on these provisions, the court found that the office of senate president was distinct from the position of general senate member. This being the case, the court held that the senate presidency continues until the January commencement of the next legislative session even if the senatorial position expires during the November election.

C. Financial Disclosure


In State ex rel. Cohen v. Manchin,27 a mandamus proceeding, Robert Cohen, a West Virginia taxpayer and voter, sought to compel the Secretary of State to remove a supreme court candidate, William Brotherton, from the ballot in the November, 1984 election. Mr. Brotherton had defeated then Justice Harshbarger in the June primary. In an opinion written by Justice Miller, the court dismissed the writ finding that the statute governing candidate financial disclosure requirements28 was ambiguous and calling for legislative reform.

shall commence on the second Wednesday of January of each year, ... and upon the convening ..., each house shall proceed to organize by the election of its officers for two-year terms."

24 W. Va. Const. art. VII, § 16 and W. Va. Code § 3-10-2 (1979) provide in pertinent part, that in case of resignation of the governor, “the president of the senate shall act as governor until the vacancy is filled. . . .”

25 McGraw, 323 S.E.2d at 600.

26 Id. at 601.


28 W. Va. Code § 3-8-7 (1979) provides in part; https://researchrepository.wvu.edu/wvllr/vol88/iss2/16
Before addressing the fundamental issues in the case, the court considered the petitioner's motion to disqualify Justice Neely after he decided not to recuse himself. In the Democratic primary election, Justice Neely, Justice Harshbarger, Mr. Brotherton, and Mr. Charles Damron were candidates for two seats on the West Virginia Supreme Court of Appeals. Justice Neely and Mr. Brotherton won the nominations. After Cohen filed for a writ of mandamus to remove Brotherton from the general election ballot, Justice Harshbarger recused himself and was replaced by retired Justice Fred Caplan pursuant to West Virginia Constitution, Article VIII, section 8.

The petitioner moved the court to disqualify Justice Neely as well. Because Justice Neely had yet to be reelected in the general election when the mandamus issues were decided, Cohen felt that the resolution of the issues could influence Justice Neely's candidacy and that his "impartiality [in the instant case] might reasonably be questioned under Canon 3(c)(1) of the Judicial Code of Ethics." However, the court relied on an abundance of binding and persuasive authority to the effect that the decision to recuse rests with the challenged justice alone. Therefore, because Justice Neely had decided not to remove himself from the case, the motion failed.

The court then considered the assertions against Brotherton. The petitioner's primary allegation was that Brotherton should not be certified as a candidate because he failed to properly file a financial report pursuant to West Virginia Code section 3-8-7. Cohen also charged Brotherton with violating four other election laws which limit contributions, prohibit payments to influence voters, regulate unauthorized expenses, and prohibit the use of money to obtain nomination for public office.

In disposing of the last four allegations, the court held that mandamus was not the proper procedure to decide such alleged election law violations and determined that the petitioner lacked standing to raise those claims. The relevant cases cited by the court as governing the scope of election mandamus and standing were *State ex rel. Booth v. Board of Ballot Commissioners* and *Pack v. Karnes*.

*Pack* held that a citizen, taxpayer, and voter had standing to compel a board of ballot commissioners to carry out their legal duties in preparing ballots for the general election. However, in *Cohen*, the court held that *Booth* limited *Pack* to
the extent that mandamus cannot be used "to vindicate all rights claimed by one aggrieved as a result of the conduct of an election or the procedures used therein . . . ."\textsuperscript{37}

The court in Booth had denied a petition for mandamus based on alleged fraud holding that mandamus was improper when resolving "disputed factual claims involving violations of our election laws, particularly where they involve penal statutes in which the burden of proof is beyond a reasonable doubt."\textsuperscript{38} Because mandamus was not the proper procedure to decide disputed factual claims whose resolution could have penal consequences, the allegations about excessive contributions, illegal payments to influence voters, and unauthorized expenses were not considered in Cohen.

However, the court implicitly held that the alleged failure to properly file a financial report falls into a different category of grievances which may properly be reviewed through a writ of mandamus. The action attacking Brotherton's eligibility is more closely akin to the proceeding in Pack compelling the Board of Ballot Commissioners to discharge their lawful duties, than to the situation in Booth. However, in the instant case, the petitioner proceeded against the Secretary of State rather than individual county ballot commissioners. As the court indicated, this procedure is authorized by West Virginia Code section 3-5-18, which requires the Secretary of State to certify the names of candidates on the ballots in the general election for any office of a political division greater than a county.\textsuperscript{39} Furthermore, the court asserted that State ex rel. Maloney v. McCartney\textsuperscript{40} recognized that "a special form of mandamus exists to test the eligibility to office of a candidate in either a primary or general election [and] the proper party respondent . . . is the Secretary of State. . . ."\textsuperscript{41}

But, as the court pointed out, the eligibility requirement raised in the instant case is derived from section 3-8-7,\textsuperscript{42} which is not technically a candidate

\textsuperscript{37} Cohen, 336 S.E.2d at 176.
\textsuperscript{38} Id. at 185 (emphasis added).
\textsuperscript{39} W. VA. CODE § 3-5-18 (Supp. 1985) provides:
The secretary of state shall certify, under the seal of the State, to the clerk of the circuit court of each county in which a candidate is to be voted for, the name of the candidate of each political party receiving the highest number of votes in the political division in which he is a candidate, and who is entitled to have his name placed on the official ballot in the general election as the nominee of the party for such office. The secretary of state shall also certify in the same.
\textsuperscript{40} State ex rel. Maloney v. McCartney, 159 W. Va. 513, 223 S.E.2d 607 (1976).
\textsuperscript{41} Id. at 514, 223 S.E.2d at 609.
\textsuperscript{42} W. VA. CODE § 3-8-7 (Supp. 1985) provides:
Any candidate, financial agent, or treasurer of a political party committee, who fails to file a sworn, itemized statement as in this article provided, within the time required, or who willfully files a grossly incomplete or inaccurate statement, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred dollars, or imprisoned in the county jail for not more than one year, or both, in the discretion of the court. Forty
eligibility statute. The statute’s design is to prevent otherwise qualified candidates from having their names included on the ballot for failing to file proper financial statements.\(^4\) However, the court was not swayed by this minor distinction. Recalling West Virginia Code section 3-1-45, which authorizes a broad use of mandamus against public officers,\(^5\) the court held that the election mandamus proceeding is available under section 3-8-7 to affront a candidate who has allegedly filed an improper financial statement. One of Brotherton’s defenses in this case was that the relevant clause in section 3-8-7 was unconstitutional because it added an additional burden on his right to seek office. The court did not reach this issue, eventually holding that section 3-8-7 was not infringed. However, the court indicated that it would follow opinions from other jurisdictions which hold that statutes of this type do not unconstitutionally create additional candidate qualifications.\(^6\)

Turning to the merits, the court addressed the key issue: Cohen’s contention that Brotherton violated section 3-8-7 by not including in his disclosure statement a $2500 payment to a Logan County political organization. A chronology of pertinent events would aid in understanding the court’s disposition of the financial statement controversy. West Virginia’s candidate financial disclosure statute that governed the 1984 campaign, codified in West Virginia Code section 3-8-5, required candidates and organizations supporting or opposing candidates to file financial statements in three time periods: 1) the last Saturday in March or within fifteen days thereafter next preceding the primary election day, 2) not less than five nor more than ten days before the primary or other election, and 3) within thirty days after the primary or other election.\(^7\)

Mr. Brotherton’s financial agent filed the first report on April 10, 1984 covering the period between March 29 and April 9, 1984. On May 29, 1984, he filed the second statement which included the period, from April 10 to May 24. On June 1, 1984, the $2500 expenditure in question was disbursed. The primary was
held on June 5, 1984. On June 8, 1984, Brotherton’s agent filed the third required disclosure covering the period between May 24 to June 1, 1984. The $2500 expenditure was not itemized in this statement. The suit was filed on September 21, 1984, and three days later, an amended financial statement which included the $2500 payment was recorded.

Cohen contended that the June 8, 1984 report was improper because, even though it conformed to the time limitation, it failed to include “all the financial transactions which have taken place by the date of such report in connection with such primary . . .” as required by section 3-8-5. The court’s inquiry focused on the meaning of “the date of such report.” The official filing forms in the Secretary of State’s office contain blank spaces for candidates or their financial agents to use indicating the dates covered by the statements. Nothing on the official form gives the date of the report. Furthermore, section 3-8-5 does not mention what specific time period is to be covered by each report. The statute does not define “the date of the report” but only mandates the time periods in which the reports must be filed.

The court determined that the statute was ambiguous and looked to the legislative intent and public policy concerns behind its passage. The court discovered that in 1976 the Legislature had shortened the filing period for the pre-primary financial report. The court inferred that the Legislature was attempting to insure that the reports contain as much information as possible about the financial affairs of a candidate before any ballots were cast in the primary.

The court reiterated a number of public policy considerations which they had previously postulated in Buckley v. Valeo for requiring candidates to file financial disclosures. Accurate filings allow voters to access important election information, such as who contributed funds to the campaign and who received money from the candidate. The financial statement exposes large contributions and expenditures thereby reducing the risk of illegal activity. Finally, through disclosure, interested parties can gauge whether candidates are exceeding their expenditure limitations.

In Cohen, the court stressed that, under the filing system, a candidate could arbitrarily and dishonestly choose the periods to be covered by each report and frustrate the legislative purpose of section 3-8-5. By filing well in advance of the deadline, many expenditures and contributions would not be subject to public scrutiny until after the election. Nevertheless, the court found that Brotherton effectively complied with the statute. The closing date for the third report, June

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47 Cohen, 336 S.E.2d at 178-81.
48 The date that a party acknowledges the correctness of a report before a notary was rejected by the court as the “date of the report.” The closing date of the time period entered in the blank sections of the official form were questioned because, using this date would not cover all the transactions carried out in the filing period.
50 Id.
1, 1984 was five days before its earliest possible filing date, June 6, 1984, the first day after the primary election. The court held that these dates were reasonably close given the practical limitations involved in compiling the statements.

The court seemed dissatisfied with the wording of section 3-8-5 and indicated that the ambiguity could easily be resolved by amending the section to require that the closing date of the report be no earlier than the first day of the period when the form is required to be filed. The court even suggested a less cumbersome avenue of change. In a footnote, Justice Miller indicated that, as long as there was no change inconsistent with statutory provisions, there would be no constitutional obstacle preventing the Secretary of State from exercising his rights under West Virginia Code section 3-1A-6 to revise the financial reporting forms to conform to an established reporting date.

Cohen's final argument was that the candidate's agent admitted that the $2500 payment was made in connection with the primary and that the June report, filed three days after the primary, should have reflected that payment. Because the expenditure was omitted, the report did not include all the transactions made in connection with the primary. Cohen further argued that Brotherton originally wrote a personal check for the $2500 expense and that he should have filed a separate personal financial statement to assure that this payment was reported.

However, the court agreed with the respondent that reporting all his financial transactions through a financial agent was proper and sufficient as long as the agent reported all the financial transactions made for and on behalf of the candidate. The candidate was not required to file a separate personal report, but could do so if he wished. In this case, Brotherton clearly chose to operate the finances of his campaign through an agent.

Nor did the court find that the respondent's failure to include the $2500 payment violated the spirit of section 3-8-7. Mr. Cohen used Pack as authority for his contention that a candidate must set forth "all his financial transactions in connection with his candidacy." But the court countered that the real holding in Pack, as ascertained by its reference to other case law, related to a failure to file a certificate of candidacy under what is now West Virginia Code section 3-5-7 and was not concerned with a statute similar to section 3-8-7.

In a case more on point, the court cited Varney v. County Court, which involved an alleged violation of a former statute which paralleled sections 3-8-5 and

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51 Cohen, 336 S.E.2d at 179-81.
52 Id. at 181 n.16.
53 Cohen, 336 S.E.2d at 181.
54 Id. at 182.
55 State ex rel. Lewis v. Board of Ballot Comm'r, 82 W. Va. 645, 96 S.E. 1050 (1918).
56 Cohen, 336 S.E.2d at 182-83.
57 Varney v. County Court, 102 W. Va. 325, 135 S.E. 179 (1926).
3-8-7. The holding in *Varney* was that the canvassing board had no authority to pass on a candidate's eligibility.58 However, the court cautioned that *Varney* is disapproved if taken to suggest that a candidate can file no financial report and not be subject to section 3-8-7.59

The court found that there was no controlling case law directly speaking to this issue.60 They reiterated that the ambiguity in section 3-8-5 previously mentioned was the root cause of the controversy. Again they suggested amending the provision to clarify the intent of the statute. But, in the absence of any such clarification, the court held that section 3-8-7 was not violated. Accordingly, the writ was dismissed.

The West Virginia Legislature took the supreme court's recommendations to heart. The Legislature amended section 3-8-5.61 Under the amended statute, the second report is due not less than seven nor more than ten days before the primary while the third report must be submitted not less than twenty-five nor more than thirty days after the primary. Additionally, the Legislature included a provision requiring an annual statement disclosing any contributions or political expenditures over $500 and any outstanding loans to be submitted within fifteen days after the last day of March. Thus, by shortening the time period and by insisting on stricter accountability, the Legislature eliminated some of the potential for abuse that the Supreme Court of Appeals discussed in *Cohen v. Manchin*.

II. **Judicial Immunity**

*Critchard v. Crouser*, 332 S.E.2d 611 (W. Va. 1985)

A Marion County eviction action for nonpayment was the springboard for the West Virginia Supreme Court of Appeals to launch into a detailed discussion of the scope of judicial immunity. The defendants in the eviction action, the Pritchards, submitted affidavits of prejudice against three of Marion County's four magistrates including the respondent, Brad Crouser. After the affidavits were filed, the magistrate court clerk assigned the case to Crouser and he refused to recuse himself. The Pritchards subsequently applied to the Marion County Circuit Court for a writ of prohibition and court costs against the magistrate for his alleged violation of West Virginia Code section 50-4-7 which provides in part, "Upon the timely filing of such affidavit [of prejudice] the magistrate shall transfer all matters relating to the case to the magistrate court clerk who shall thereupon assign and transfer the matter to be heard by some other magistrate. . . ."

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58 *Cohen*, 336 S.E.2d at 183.
59 *Id.* at 184.
60 *Id.*
61 W. VA. CODE § 3-8-5 (Supp. 1985).
The Pritchards abandoned the writ of prohibition after they settled the eviction controversy out of court, but they still requested that the circuit court award them costs against Mr. Crouser. The circuit court found for the Pritchards and in doing so gave rise to the two certified questions presented to the West Virginia Supreme Court of Appeals in Pritchard v. Crouser: 1) whether West Virginia Code section 50-4-7, regarding the transfer of the Pritchards' case, was mandatory or discretionary; and 2) whether the circuit court was empowered to award costs against a magistrate in a writ of prohibition proceeding for refusal to transfer an action?

In response to the first question, Justice Neely writing for the court determined that, although a litigant has a peremptory right to transfer under section 50-4-7 in order to avoid undue bias or prejudice, that right has limits. The statute explicitly mandates that "no party shall be entitled to cause such a removal more than once." Thus, a party is entitled to only one peremptory challenge without a showing of actual prejudice. However in the instant case, the Pritchards initiated challenges against three of the four county magistrates. The court found that permitting this behavior would encourage forum shopping and would destroy the statute's power to curb partiality. Additionally, the court suggested other remedies available to counteract a magistrate's bias such as appeal and writ of prohibition. In short, the court ruled against an expansive reading of section 40-4-7, holding instead that transfer under this code section is discretionary and that Magistrate Crouser's refusal to disqualify himself was proper.

The second question put to the court concerned the propriety of awarding costs against Magistrate Crouser. This issue prompted a detailed analysis of the scope of judicial immunity from civil liability. Initially, the court asserted that West Virginia has always abided by the common law rule that a judge is not civilly liable when acting in his official capacity. Further, this immunity applies to all courts and all judges in the State even if they have actually exceeded their authority. As further support for this position, the court traced the historical roots of judicial immunity in United States Supreme Court holdings since 1871 concluding that the concept is at its apex now due to recent Supreme Court decisions.

The United States Supreme Court has offered three policy reasons for shielding judicial officers. The West Virginia Supreme Court of Appeals discussed these considerations in Pritchard. First, immunity insures that the judicial hallmark of independence is preserved. Without immunity, justices would be hesitant to perform their functions and would avoid unpopular decisions for fear of personal repercussion.

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63 Id. at 613.
64 Id. at 613-14.
65 Id. at 614.
sions. The West Virginia Supreme Court of Appeals noted that frequently cases requiring the greatest degree of judicial independence are the most controversial. In these cases, judges without protection would be powerless and ineffective. Immunity, the court suggested, prevents judicial self-censorship, a condition similar to the chilling effect suffered by publications in a libel suit. Therefore, the court found that while the public’s interest must be considered in assuring the bench’s accountability, the threat of frivolous and intimidating lawsuits makes judicial immunity absolutely essential.

Second, judicial immunity promotes finality of lawsuits. Justice Neely explained how litigants could avoid judgments indefinitely by suing the judges responsible for an adverse opinion. Not only would this create additional procedures to follow before a judgment could be obtained, but also numerous public expenses would emerge that would further tax an already overburdened system. Wealthy litigants could sue ad infinitum, and their ability to extend the litigation process would unjustly empower them at the expense of the judiciary. The courts would become even more inaccessible to parties unable to finance the added costs of suing a tribunal, only exacerbating the inequities between rich and poor in our court systems.

Finally, other remedies for judicial excess exist, such as appellate review. Justice Neely observed that West Virginia’s supreme court has implicitly adopted this reasoning. He noted that, while the State’s highest court has awarded costs in the past in mandamus proceedings against public officers pursuant to West Virginia Code section 53-1-8, never has a court awarded such costs in prohibition proceedings against judicial officers. The rationale is that costs have only been levied against public officers who willfully exceeded their authority, not against those acting honestly and in good faith. The court reasoned that, because it is impossible to examine a judge’s mental process, a remedy under section 53-1-8 is inappropriate. The only logical course of action would be to test the correctness of judges decisions through appellate review, not to fine them for culpable mens rea. Further, the enforcement arm of the Code of Judicial Ethics could provide another remedy for judicial excess. These two remedies, the court held, were sufficient to meet the dangers of misconduct. Neither statute nor policy supported the award of costs. Therefore the Pritchards were unable to recover from Magistrate Crouser and the principle of judicial immunity remained absolute.

III. The Proper Role of the Circuit Court Clerk

Rutledge v. Workman, 332 S.E.2d 831 (W. Va. 1985)

It would be premature to leave the “elected officials” section, so richly endowed in the survey period with partisan squabbles and vilification, without discussing

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67 Pritchard, 332 S.E.2d at 618.
68 Id. at 618-19.
the recent power struggle in the Kanawha County Circuit Court. According to Justice Neely in *Rutledge v. Workman*, the office of the circuit clerk is a "daily battleground for sordid, unnecessary and debilitating political infighting." 70

The details of this controversy were revealed in a writ of prohibition brought by Phyllis Rutledge, Kanawha County Circuit Clerk. The writ was designed to keep Judge Margaret Workman from entering an order voiding Rutledge's removal of a deputy circuit clerk from Judge Workman's court. Rutledge claimed that the circuit court should have absolute control in the disposition of personnel in the clerk's office, citing as authority West Virginia Code section 6-3-1(a)(1) which provides in part that "the clerk ... of any circuit ... court ... may, with the consent of the court ... appoint any person or persons his deputy or deputies."

Judge Workman began her tenure as circuit court judge in November, 1981 without a courtroom clerk and was not assigned one until Mrs. Iris Brisendine took that position in March, 1982. A year later, Mrs. Rutledge replaced her with Ms. Louise Owenby and Rutledge assigned Mrs. Brisendine to Judge Robert K. Smith's court. Both Judge Workman and Judge Smith sent written protests to Mrs. Rutledge about this change; the protests were ignored. Chief Judge MacQueen testified that he had asked Mrs. Rutledge to reconsider this exchange of courtroom clerks but that Mrs. Rutledge refused to do so stating that Mrs. Brisendine was becoming too loyal to Judge Workman and it was necessary that she reestablish control over Mrs. Brisendine.

In February, 1984, Mrs. Rutledge replaced Mrs. Owenby with Ms. Jacqueline Ray. Judge Workman soon fired Ms. Ray for rank insubordination and disrespect to the judge in the presence of others. Three days later Mrs. Rutledge re-employed Ms. Ray as a staff assistant without making a serious effort to investigate the reasons for her discharge by Judge Workman.

Judge Workman was without a regularly assigned clerk for three months after Ms. Ray's dismissal. The judge was often forced to work with more than one clerk in a single day. Judge Workman repeatedly requested a permanent courtroom clerk, and finally, in May, 1984 Ms. Dee Ann Hill was assigned to her court. The situation climaxed in November, 1984 when Mrs. Rutledge announced her intention to transfer Ms. Hill. Judge Workman entered an order prohibiting the transfer and this writ of prohibition followed.

This case presented West Virginia's supreme court with a question of first impression: whether the clerk of a circuit court is part of that court and subject to the discretion of the chief circuit judge, or, whether the clerk is an independent, elected official with unbridled discretion over the administration of her office. 71

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70 Id. at 832.
71 Id. at 833-34.
The court began its inquiry with an historical analysis. Before the Judicial Reorganization Amendment of 1974, there was one circuit judge for each county and that judge was clearly in charge of the court system. Today, one circuit court bench may have several judges with equal authority and a chief circuit judge who is elected by them.

As the present case indicates, there was some confusion as to the extent of circuit court judges' authority after the Reorganization Amendment. However, the court was certain that the 1974 Act vested the supreme court with administrative power over this centralized system.

Because the new scheme so closely resembled an older New Jersey system, the court looked to New Jersey as well as West Virginia case law. The court discovered that the bench has routinely flexed its administrative muscle. Therefore, to insure the fair and effective dispensation of justice, the court determined that they and, by delegation, the circuit judges have a constitutional mandate to administer the judiciary.

However, the question remained whether the circuit clerk (an elected county official) is within the sphere of the judicial branch. The court responded that the offices of all county officials are created under West Virginia Constitution, Article IX except for the office of circuit clerk which originates in Article VIII, the judicial article. Thus, the power to regulate the conduct of the courts is squarely in the hands of the West Virginia Supreme Court of Appeals, and the court may delegate that power to the circuit judges to exert control over the circuit court clerks who are within the judicial sphere. Furthermore, the court found implied statutory authority for this holding because West Virginia Code section 6-3-1(a)(1) provides that the clerk may appoint deputies "with the consent of the court." This phrase indicates that the clerk's power is subject to the circuit judge's discretion.

Given the clear constitutional placement of the circuit clerk within the hierarchy of the judiciary, the court ruled that clerks are subject to the overall administrative control and direction of West Virginia's Supreme Court of Appeals and the daily supervision of the chief circuit judge. Also, the court held that clerks are obliged to act with the utmost good faith and, failing that, are subject to removal. When there is conflict concerning the proper role of the clerk, the chief circuit judge's opinion is definitive. Obviously, Mrs. Rutledge's writ of prohibition was denied.

Frank Venezia

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