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Republican Party of Minnesota v White and the Canons Regulating Judicial Elections

In *Republican Party of Minnesota v White*, decided on June 27, 2002, the United States Supreme Court held that the portion of Canon 5(A) of the Minnesota Code of Judicial Conduct providing that a “candidate for a judicial office, including an incumbent judge” shall not “announce his or her views on disputed legal or political issues”, violates the First Amendment.

This decision was widely reported in the news media, with much of the press treatment strongly suggesting that the Supreme Court’s decision had invalidated all regulation of judicial campaign conduct. That interpretation is erroneous. The Court’s decision was far more limited than the media coverage implied. The Court’s decision was focused exclusively on the “Announce Clause” and the Court expressly declined to hold that the First Amendment requires that judicial elections be governed by the same rules as apply to elections for political offices.

Recognizing that some Supreme Courts and other bodies responsible for oversight of judicial election campaigns have already taken or are considering steps in response to the *White* decision, this memorandum provides a more careful analysis of *White* than it received in the media. It first examines the very limited scope of the Court’s ruling, and then considers the implications for other canons regulating judicial election campaigns.

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Judicial Elections and the First Amendment: The Court rejected the argument that judicial elections must be governed by the same rules that apply to other elections. As the majority opinion stated: “we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative elections.” (Slip Op. at p. 17, 2002 U.S. LEXIS 4883 at *32.) To be sure, the Court held that strict scrutiny applies to restrictions on judicial campaign speech, so that restrictions must be narrowly tailored to promoting a compelling state interest. But it did not hold that there are no interests that would justify regulation of judicial campaigns. The Court’s invalidation of the Announce Clause was premised on a finding that the Clause did not promote the goal of judicial impartiality rather than on a rejection of impartiality as a compelling state interest that would justify limiting some campaign conduct.

Specific Rules: The Announce Clause. *White* clearly renders Announce Clauses comparable to Minnesota’s unconstitutional. In addition to Minnesota, the canons of eight states include such clauses, which were drawn from the 1972 ABA Model Code of Judicial Conduct. Clauses imposing speech rules that are broader and more restrictive than the Announce Clause are also constitutionally invalid.

Pledge or Promise Clause. The Court’s opinion specifically distinguished the Announce Clause from the provisions of the judicial campaign canons that bar candidates from making “pledges or promises” concerning judicial decisions. The Court stated that the “so-called ‘pledges or promises’ clause . . . is not challenged here and on [it] we express no view.” (Slip Op. at p. 4, LEXIS at *10-11). Indeed, the Court noted the distinction between a mere announcement of views and a pledge or promise in holding that the prohibition on announcements could not be justified by the interest in protecting the open-mindedness of the judge, indicating, albeit not deciding, that the interest in judicial open-mindedness might support the ban on pledges and promises. (Slip Op. at 14, LEXIS at *26-28). In any event, the Court was careful to state it was not expressing a view on the validity of the Pledge or Promise Clause. (Slip Op. at 12, LEXIS at *24.)

Partisanship. In an earlier stage of the *White* case, plaintiffs had challenged the Minnesota canon precluding a judicial candidate from accepting partisan endorsements. That provision was upheld below, and the issue was excluded from the grant of certiorari. The Supreme Court decision, thus, does nothing to cast doubt on the ban on partisan endorsements or other canons designed to limit partisanship, such as the prohibition on a candidate’s identification of his or her own party allegiance.

Commit Clause. The Court’s treatment of the canon precluding a candidate from making “statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court” was, unfortunately, not a model of clarity. The Court briefly referred to this provision of the 1990 ABA Model Code of Judicial Conduct in footnote 5 (Slip Op. At 7, LEXIS at *15).. The Court noted that “respondents argued that the limiting constructions placed upon Minnesota’s announce clause by the Eighth Circuit and [subsequently] adopted by the Minnesota Supreme Court, render the scope of the clause no

broad than the ABA's 1990 canon. . . . The ABA . . . agrees with respondent's position, Brief for ABA as *Amicus*" The Court initially cast doubt on this Commit Clause-based reading of the Announce Clause, noting that the Minnesota Supreme Court had earlier been "urged to replace the announce clause with the new ABA language" but had not done so. The Court then concluded that footnote: "We do not know whether the announce clause (as interpreted by state authorities) and the 1990 ABA canon are one and the same. No aspect of our constitutional analysis turns on this question."

This Delphic statement is difficult to interpret. One possible reading is that as no "aspect of our constitutional analysis" turns on whether the Announce Clause is the same as or different from the Commit Clause then, if the Announce Clause is unconstitutional so is the Commit Clause. The better reading is that the Court, which was very careful to limit the scope of its decision in text, did not go that far. The discussion of the Commit Clause came in a footnote analyzing whether the Eighth Circuit's decision to limit the Announce Clause to the announcement of views concerning disputed legal or political issues matters "likely to come before the court" – language borrowed from the Commit Clause – narrowed the Announce Clause sufficiently to save it. The Court, in text, noted that given the wide scope of matters that could come before a court, this reading would have little narrowing impact. Even with the Commit Clause language read into the Announce Clause, the Announce Clause would still effectively preclude a "judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running." (Slip Op. p. 7, LEXIS at *15).

In other words, the Court was only considering whether use of the Commit Clause would narrow the scope of the matters precluded from discussion in an election when it concluded that the Commit Clause would not have affected its decision. The Court, however, was not considering whether or not judicial candidates could be precluded from making commitments concerning cases, controversies or issues. That is quite different.

Commitments more closely resemble the pledges and promises distinguished by the Court, than the announcements of views that the Court's decision protects. A commitment, like a pledge or promise, undermines the open-mindedness that is a basic component of impartiality. As previously noted, the Court left open the protection of impartiality as a justification for judicial campaign codes (Slip Op. at 12, LEXIS at *23-24). All the Court found was that the Announce Clause was not justified by openmindedness-as-impartiality because the Clause is under inclusive (it doesn't reach pre-campaign statements) and over inclusive (an announcement is not as binding as a promise, and promises are barred by the Pledges or Promises Clause) (Id. at 14-15, LEXIS at *27-28). The interest in open-mindedness, thus, remains a justification for restrictions on promises and pledges. Commitments pose the same problem as promises and pledges. Indeed, a commitment is just another form of statement that compromises open-mindedness.

Given the similarity between commitments and pledges, and the sharp difference between commitments on the one hand and mere announcements of views on the other, it is hard to

believe that an opaque statement at the end of a footnote, without analysis, was intended to invalidate the Commitment Clause.

Campaign Conduct Committees and Voluntary Pledges. Nothing in *White* addresses let alone invalidates official or bar association or other campaign conduct committees that would criticize statements by judicial candidates deemed to be inconsistent with judicial impartiality. Indeed, Justice Kennedy, in his concurrence, implicitly praised this approach when he stated: “The legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence.” (Slip Op. at 4, LEXIS at *51-52). The four dissenters, in Justice Stevens’ opinion, agreed that even after the Court’s decision although “the Minnesota Lawyers Professional Responsibility Board . . . may not sanction a judicial candidate for announcing his views on issues likely to come before him, it may surely advise the electorate that such announcements demonstrate the speaker’s unfitness for judicial office.” (Slip Op. At 1, LEXIS at *55)

By the same reasoning, Bar or judicial efforts to promote voluntary pledges by candidates to abide by Canon provisions, with no sanctions for violation, are unaffected by the *White* decision and remain presumptively constitutional.

We agree that (as the National Center for State Courts said in its press release about *White*), “The overwhelming majority of women and men who seek judicial office want to campaign in ways that do not compromise their performance on the bench. Direct enforcement of proper campaign conduct through official regulation is just one mechanism for ensuring that judicial elections remain different.” We believe that the *culture* of judicial election campaigns is significant in itself.

Conclusion: The *White* decision will lead many state supreme courts and other bodies responsible for oversight of judicial election campaigns to re-examine their canons of campaign conduct – just as it will no doubt embolden the critics of those canons to bring more constitutional challenges. We are collecting information about reactions to *White* and will have that available for you upon request. We would also appreciate hearing from you concerning any developments in your State.

White clearly underscores the applicability of the First Amendment to regulation of campaign speech. But the decision also declines to hold that judicial campaigns may not be subject to regulation, and it leaves alone most of the judicial campaign rules currently in the canons. New analysis of these canons in light of the decision is entirely appropriate. Pell-mell revision of the canons on the media-driven assumption that the Court has held them invalid is unwarranted.