
The states' response to *Republican Party of Minnesota v. White*

by Cynthia Gray

At the end of its most recent term, by a vote of 5 to 4, the United States Supreme Court held that the canon in Minnesota's code of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment (*Republican Party of Minnesota v. White* (122 S. Ct. 2528 (2002))). The majority opinion is based on a concept of judicial impartiality that seems more academic word play out of the context of the increasingly infamous tactics of judicial campaigns than analysis of the role of judges in the context of the entire code of judicial conduct. However, the decision was less about the free speech rights of judges and candidates than the information needed by voters when they choose judges. The decisive factor for the majority was: "We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election."

Since the June decision, there has been much debate about the effect of the holding on efforts to hold judicial candidates to different standards than candidates for other offices. Only nine states still had the "announce clause" in their codes of judicial conduct at the time of the *White* decision, the other states having eliminated it after the American Bar Association omitted it when the model code was revised in 1990. However, most codes in states with an elected judiciary do have other restrictions on campaign speech, prohibiting judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the

duties of the office" and 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" (in addition to prohibitions on making misrepresentations).

The decision in *White* stated that it was not expressing a view on the constitutionality of the "pledges and promises clause," which was not challenged in the case. There was some confusion about the "commitments clause" because the defenders of the announce clause, including the ABA in an amicus brief, argued that, construed to reach only disputed issues that are likely to come before the candidate if elected, the announce clause was no broader than the commitments clause. Noting it did not know whether the announce clause and the commitments clause "are one and the same," the majority stated that no aspect of its constitutional analysis turned on the question.

Changing the code

The ABA Working Group on the First Amendment and Judicial Campaigns is currently considering changes to the ABA model code in light of the decision in *White*. Prompted by *White*, the Texas Supreme Court has already amended its code of judicial conduct. The revisions struck a provision prohibiting statements indicating an opinion "on any issue that may be subject to judicial interpretation" by the office a judge holds or a candidate seeks (which had been held unconstitutional by a federal court in August), extended the prohibition on public comments on pending cases to apply to judicial candidates as well as judges, and revised the

pledges and promises provision. The new version of the pledges and promises canon states:

A judge or judicial candidate shall not make pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge.

Noting a more extensive study of the rules would be undertaken, the court explained "the immediacy of pending elections requires that these amendments be undertaken without the full and deliberate study the Court would ordinarily employ."

Affirming restrictions

Several states have issued statements affirming the continuing validity of restrictions on campaign speech other than the announce clause after *White*. For example, after "carefully studying the state's code of judicial conduct in light of the recent ruling," the Georgia Judicial Qualifications Commission stated "going forward in this election season, the Commission will be vigilant in enforcing" the prohibitions on pledges and promises, commitments with respect to cases, and misrepresentations. Similar statements have been issued by the Florida Supreme Court Judicial Ethics Advisory Committee, the Indiana Commission on Judicial Qualifications, the Kentucky Judicial Conduct Commission, the Missouri Supreme Court, and the Ohio Supreme Court Board of Commissioners on Grievances and Discipline.

There is some indication, however, that while states intend to enforce the remaining provisions of the code, those provisions may be more narrowly interpreted following the decision in *White*. For example, the California Commission on Judicial Performance dismissed formal charges it had filed against a former

judge based on statements during her unsuccessful re-election campaign without any explanation other than that the dismissal was based on a review of *White*. (*Inquiry Concerning Former Judge Patricia Gray*, Decision and Order of Dismissal (California Commission on Judicial Performance August 27, 2002) (cjp.ca.gov/pubdisc.htm)). Moreover, in light of the decision in *White*, the Alabama Judicial Inquiry Commission withdrew a judicial ethics opinion that advised judicial candidates not to respond to a questionnaire from the Christian Coalition. (See *Alabama Advisory Opinion 00-763* (www.alalinc.net/jic/opinions/ao00-763.htm)).

Similarly, although noting that the "announce clause" held unconstitutional in *White* had been eliminated in Indiana in 1993, the Indiana Commission on Judicial Qualifications acknowledged that:

to some extent, the Qualifications Commission's advice to judicial candidates about campaign speech has been based on a broad interpretation of the rules against making pledges or promises of conduct in office and against making statements which appear to commit the candidates to the outcomes of cases. . . . In doing so, the Commission, in effect, has counseled candidates against announcing views on disputed social and legal issues.

(*Indiana Advisory Opinion 1-02* (www.in.gov/judiciary/admin/judqual/opinions.html)). Therefore, the Commission amended its advice about certain campaign speech where the prior advice would not be enforceable under *White*, although it stated it would continue to enforce the other restrictions in the code. Although declining to make a "list of approved and disapproved statements," the Commission did set out some parameters and expressed the "hope that judicial candidates in Indiana will conduct themselves during their campaigns with a focus not on avoiding disciplinary charges and, instead, on the promotion of the impartiality and integrity of the judiciary."

The Ohio Supreme Court Board of Commissioners on Grievances and Discipline has also issued an advisory opinion about the effect of *White* that

included 11 guidelines for judicial candidates. (*Ohio Advisory Opinion 02-8* (www.sconet.state.oh.us/Judicial_Candidates/notes/notice0820.asp))

Recusal standards

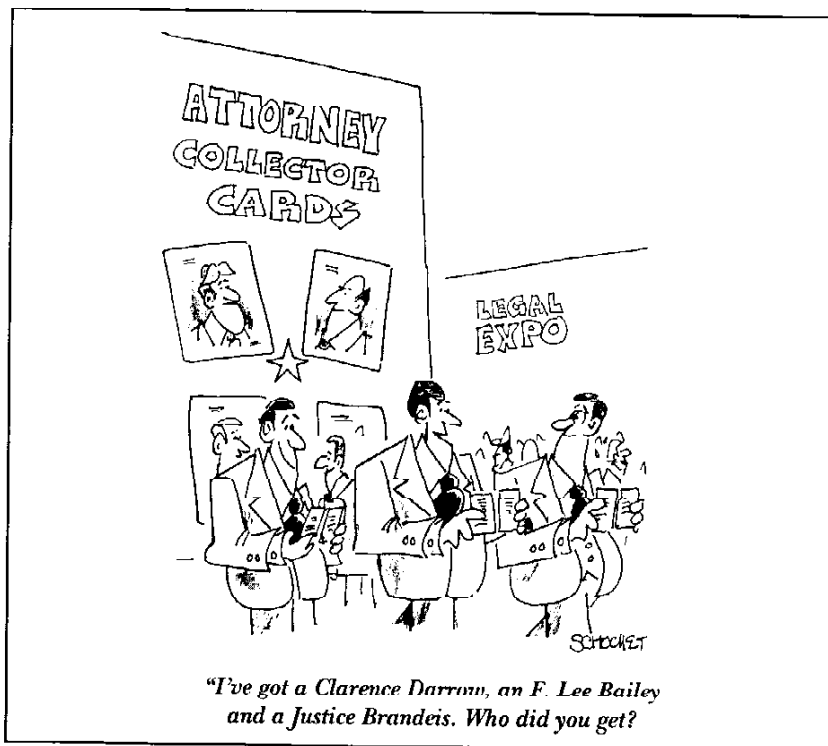
The decision in *White* may not only change how judicial campaigns are conducted—and almost inevitably how the public views the judiciary in elected states—but who may hear cases following campaigns in which candidates compete for votes with slogans about legal and political issues. *White* allows candidates to announce their views on issues, but it does not prohibit codes from requiring judges to disqualify from cases in which campaign statements raise questions about their impartiality. In his opinion concurring with the majority decision, although affirming that states may not "censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer," Justice Kennedy concluded that states "may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards" to ensure that the judiciary

reflects "the characteristics that exemplify judicial excellence."

The Missouri Supreme Court has already cautioned that, "Recusal, or other remedial action may . . . be required of any judge in cases that involve an issue about which the judge has announced his or her views as otherwise may be appropriate under the Code of Judicial Conduct." Similarly, the Indiana Commission noted that candidates who make specific rather than general statements may not only run the risk of making an inappropriate commitment, but may invite recusal requests or even mandate recusal. Thus, the effect of the *White* decision may be that voters will vote for judicial candidates based on their views expressed during the campaign only to find that the expression of those views precludes the candidates as judges from hearing many of the cases in which the issues important to those voters will be decided. ☐

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