

The good news in *Republican Party of Minnesota v. White*

The *White* decision does not affect code restrictions that apply outside the context of judicial campaigns.

In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the United States Supreme Court held by a vote of 5 to 4 that a state cannot, consistent with the First Amendment, prohibit judicial candidates from announcing their views on disputed legal and political issues. Strictly speaking, only those nine states that in 2002 had the “announce clause” in their codes of judicial conduct were directly affected by the decision. However, all states with judicial campaigns have been searching for portents of how the Court might rule in challenges to other campaign and political restrictions by reading the majority opinion written by Justice Scalia, the two concurring opinions written by Justice Kennedy and Justice O’Connor, and the two dissents written by Justice Stevens and Justice Ginsburg.

The states’ reactions have ranged from capitulation out of a fear of being sued, giving up any attempt to require judicial candidates to campaign differently than candidates for other offices (see code changes in North Carolina (www.aoc.state.nc.us/www/public/html/rulesjud.htm)), to continuing enforcement of narrower restrictions, believing that the principles of judicial impartiality and independence should apply to even an elected judiciary (see discipline decisions in New York and Florida (*In the*

Matter of Watson, 794 N.E.2d 1 (New York 2003); *Inquiry Concerning Kinsey*, 842 So. 2d 77 (Florida 2003), *cert. denied*, 124 S. Ct. 180 (2003)). What repercussions *White* will have in the long term on judicial campaign and political activities is not yet settled as the state courts continue their re-evaluation and the federal courts consider new challenges.

What is certain is that *White* raises no doubts about the constitutionality of any code provision that does not involve campaign or political conduct, such as those limiting a judge’s comments on pending cases or extra-judicial activities. The decision did not announce any new-found, unassailable First Amendment rights for judges that would apply in other contexts, but focused exclusively on the needs of voters for information about the candidates in judicial election campaigns.

The problem with the announce clause, Justice Scalia wrote in the majority opinion, was that it “prohibits speech on the basis of its content and burdens a category of speech that is ‘at the core of our First Amendment freedoms’—speech about the qualifications of candidates for public office,” creating “an obvious tension between the article of Minnesota’s popularly approved Constitution which provides that judges shall be elected, and the Min-

nesota Supreme Court’s announce clause which places most subjects of interest to the voters off limits.” The Court concluded: “We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.”

Similarly, in her concurring opinion, Justice O’Connor wrote that in choosing “to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system . . . the State has voluntarily taken on the risks to judicial bias”

As a result, the State’s claim that it needs to significantly restrict judges’ speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.

In his concurring opinions Justice Kennedy also emphasized that “the political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose,” noting “deciding the relevance of candidate speech is the right of the voters, not the State.” Justice Kennedy concluded that “the State may not regulate the content of candidate speech merely because the speakers are candidates.”

Not relevant

None of these rationales for the Court’s decision to invalidate the announce clause are relevant to the canons that apply outside the con-

text of judicial campaigns with no infringement on the core First Amendment freedoms implicated by restrictions on speech intended to persuade voters in an election. The provisions regulating judicial and extra-judicial activities apply to judges because they are judges, not because they are candidates, and all apply regardless how judges are selected. The problems addressed by the other canons are not created by a state's decision to elect judges but are inherent in the judicial role under any type of selection method.

Although *White* did not expressly hold that an impartial judiciary is a compelling state interest (finding instead that the announce clause was not narrowly tailored to serve that interest), the five opinions demonstrate that the justices believe that the states have a legitimate, substantial interest in promoting, and ensuring public confidence in, an independent judiciary comprised of judges who act with integrity to effectively and impartially administer justice. Because the canons in the code

of judicial conduct are carefully designed to advance that interest, the incidental restrictions on judges' speech and conduct are justified, probably even if a strict scrutiny test is used but certainly under the less rigorous, less inevitably fatal inquiry that would be applied.

Unlike the announce clause, other canons in the code of judicial conduct would not be subject to the strict scrutiny triggered in *White* by the election context. The more applicable test when core First Amendment freedoms are not involved, as Justice Kennedy suggested, would balance the interests of a judge, as a citizen, in engaging in certain speech and the interest of the state in promoting the effective administration of justice. The restriction on commenting on pending cases, for example, has already survived several challenges on that basis. See *Broadman v. Commission on Judicial Performance*, 959 P.2d 715 (California 1998), *cert. denied*, 525 U.S. 1070 (1999); *In re Broadbelt*, 683 A.2d 543 (New Jersey 1996), *cert. denied*, 520

U.S. 1118 (1997); *In re Schenck*, 870 P.2d 185 (Oregon 1994), *cert. denied*, 513 U.S. 871 (1994). Nothing in *White* undermines the rationale of those holdings.

Commentary to Canon 2A of the American Bar Association Model Code of Judicial Conduct explains that because "public confidence in the judiciary is eroded by irresponsible or improper conduct by judges," "a judge must expect to be the subject of constant public scrutiny" and "accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." No citizen has absolute First Amendment rights, and the canons reflect the balance most judges "freely and willingly" accept in deference to the justice system they serve and the public it protects. ❧

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The 19th National College on Judicial Conduct and Ethics Chicago, Illinois October 21 – 23, 2004

The Center for Judicial Ethics will hold its 19th National College on Judicial Conduct and Ethics on October 21-23, 2004 at the Embassy Suites Downtown Lakefront, 511 N. Columbus, Chicago, Illinois. Registration for the College will be \$250. The rate for rooms will be \$169 a night (for single occupancy; \$189 a night for double occupancy), plus tax.

The National College provides a forum for judicial conduct commission members and staff, judges, and judicial educators to learn about and discuss professional standards for judges and current issues in judicial discipline. The College will begin Thursday afternoon with registration and a reception. Friday through Saturday morning, there will be six sessions with three concurrent workshops offered during each session. Topics include: developments following *Republican Party of Minnesota v. White*; judicial ethics and problem solving courts; revisions to the ABA model-code of judicial conduct; ethical issues for appellate judges; ethical issues for court staff; attending seminars; appearance of impartiality and community activities; issues for new members of conduct commissions; and the role of public members.

For more information and registration materials, or to register on-line, visit the Center web-site at www.ajs.org/ethics. If you have any questions, contact Cindy Gray at cgray@ajs.org or 773-248-6005.