

The limits of *White*

Many would read *Republican Party of Minnesota v. White* expansively, but to do so is an unjustified abandonment of the state courts' efforts to promote judicial integrity, impartiality, and independence.

Relying on recent federal decisions, judicial candidates and others are testing the limits of what campaign and political conduct is acceptable for judges and judicial candidates. In a challenge to a provision in the Minnesota code of judicial conduct, the United States Supreme Court held that states could not, consistent with the First Amendment, prohibit judicial candidates from announcing their views on disputed legal and political issues.¹ On remand, the Court of Appeals for the Eighth Circuit held that prohibitions on judicial candidates identifying themselves as members of a political organization, attending political gatherings, using endorsements from political organizations, and personally soliciting contributions from large groups or in writing are also unconstitutional.²

No doubt some who continue to defend traditional interpretations of all the canons are unrealistically optimistic about the limits of the decision in *White* or simply disagree with it. Other groups, however, have just as clearly exaggerated the effect of the holdings and argued, in comments filed with the American Bar Association Joint Commission to Evaluate the Model Code, that almost all restrictions on the political activity of all judges should be elimi-

nated—not just the restrictions on campaign activity and not just the restrictions on elected judges. That argument goes far beyond the actual holdings, and such an expansive reading is an unjustified abandonment of the state courts' efforts to promote judicial integrity, impartiality, and independence.

Although the Supreme Court majority opinion had some broad comments about judicial impartiality, the primary focus of the opinion was allowing candidates to communicate relevant information to voters during an election campaign. It is not likely that the justices intended to announce a principle that would allow even federal judges to, for example, serve as leaders of political parties and endorse candidates for president, which is the position the Joint Commission is being urged to take. Moreover, it is important to consider before attempting to apply the holding to other contexts that the vote was 5-4, and that two members of the majority are no longer with the Court.

Partisan activity

Because the Eighth Circuit is not the Supreme Court, states in other circuits or with different canons are not compelled to follow the remand decision, particularly in light of the very

convincing dissent and some flaws in the majority's argument. The majority did not even understand what the case was about, claiming it was "not about what happens after an election." The interest advanced by the state, however, was judicial impartiality, clearly and crucially implicating the judicial decision making that "happens after an election."

The majority concluded that the Minnesota canon's ban on involvement with political parties was underinclusive because it did not prohibit membership in interest groups such as the National Rifle Association or the National Organization for Women. Even assuming that membership in those organizations is not prohibited under other provisions of the code, the majority itself elsewhere explained why such a distinction is legitimate: associating with an interest group that is narrowly focused on particular issues "conveys a much stronger message of alignment with particular political views and outcomes," and, therefore, is more likely to be protected under *White* than association with a political party.

Moreover, as the dissent argued, the partisan activities clause regulates "a judicial candidate's relations with people, and organizations of people, not the candidate's relations with issues."

[O]nce the partisan activities clauses are gone, having espoused similar positions on issues will be the least signifi-

1. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

2. *Republican Party of Minnesota v. White*, 416 F.3d 738 (2005), cert. denied, *Dimick v. Republican Party of Minnesota*, 126 S. Ct. 1165 (2006).

cant aspect of the party's relationship to its successful candidate; the truly significant point is that the candidate may owe his or her accession to the bench to the litigant before the bar and may be similarly dependent on that litigant for any hope of success in future elections.

The trap

One of the most disturbing aspects of the majority analysis was its conclusion that, in effect, the Minnesota Supreme Court was lying when it said that it adopted the canons to promote judicial integrity and independence. Instead, the court surmised that the canons were designed to help the incumbent justices keep their jobs. The federal court claimed that the state court adopted the restrictions on partisan activity "without any stated or readily discernible authority whatsoever" and failed even to cite the state statute that requires that judicial elections be non-partisan. As the dissent noted, the Minnesota Supreme Court adopted the partisan activities clause "as part of an effort to clarify and formalize Minnesota's tradition of non-partisan elections and to supplement the guidance given by the non-partisan election statute." The Minnesota canon does not restrict political parties but governs judges and lawyers as judicial candidates, individuals traditionally within the supervisory power of a state supreme court.

The dissent noted the "Catch 22 situation" created by the majority, a trap in which the state supreme court's "very effort to avoid overinclusiveness makes the measure vulnerable to attack for underinclusiveness." That the state court was unable to hit the very thin line between being unconstitutionally overbroad and being unconstitutionally underinclusive does not indicate that it had an ulterior motive or contradict the claim of a compelling state interest, and it was unfair for the Eighth Circuit to presume otherwise.

The majority concluded that the partisan-activities clause was "woefully underinclusive" because it only requires a candidate "to sweep under the rug his overt association with a political party for a few months during a judicial campaign." That analy-

sis is simply wrong because the restrictions apply to candidates who win and, therefore, to more than the few months of a judicial campaign. Moreover, it ignores the impossibility of a code of judicial conduct applying to everyone who might some day in the future think about maybe running for judicial office or prohibiting individuals who have been involved with political parties from running for judicial office.

The temporal underinclusiveness found by the majority was addressed by commentary proposed by the American Judicature Society in comments to the ABA Joint Commission:

By requiring judicial candidates and judges to relinquish political activities, the partisan-activity restrictions demonstrate to voters that judges and judicial candidates are committed in the future to put aside any previous party loyalties in order to serve and appear to serve the entire community regardless of political affiliations in the interests of judicial impartiality, integrity, and independence.

Just as judges who were prosecutors, for example, must take that hat off when they take the bench, judges who were politicians must insofar as possible disengage from the political process once they take the bench if the third branch is to remain independent. Allowing judges to closely affiliate with political parties opens them up to the influence and pressure—and the appearance of influence and pressure—from the leaders of that party serving in the other branches, a threat to independence and the separation of powers.

The disqualification alternative

Contrary to some arguments, requiring a judge to disqualify based on political conduct that raises a question about impartiality is not an effective alternative to a prohibition on the conduct. Disqualification in many states is self-executing. A judge who should recuse may not do so, and having the decision reversed on appeal years later is not an adequate remedy and damages trust in the judicial process. And if a state supreme court justice refuses to disqualify, litigants

generally have no way of even challenging that decision.

If political activity is allowed by the code of judicial conduct, all or most judges presumably will engage in it, resulting in frequent disqualifications that will create chaos in the court system. Further, on the supreme court level, frequent disqualifications will mean that the people chosen by voters to resolve the thorniest legal issues in the state are unavailable to do precisely that. It is a con game with voters as the marks for candidates to run for judicial office and then to voluntarily engage in political conduct that will disqualify them from the cases voters elected them to hear.

Campaign speech

In response to the U.S. Supreme Court decision in *White*, the ABA amended the model code to prohibit a judicial candidate from making "with respect to cases, controversies, or issues that are likely to come before the court . . . pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office." Arguing that even that canon is too broad, some filing comments with the ABA Joint Commission claim that, under *White*, candidates should be able to make any pledges and promises on issues as long as they do not promise certain results in particular cases.

As AJS has argued to the Joint Commission, such a limit would be a completely ineffective measure. It would allow a candidate to promise, for example, to declare unconstitutional any tort reform legislation passed by the legislature, casting serious doubts on the candidate's impartiality and open-mindedness even though the candidate could not identify the particular case that would raise the issue or even the particular future statute that might be challenged. Similarly, a candidate could promise to deny all motions to exclude evidence on Fourth Amendment grounds in

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criminal cases because that does not identify a particular case or even pledge a certain result (the prosecution could still fail to win a guilty verdict), but criminal defendants would reasonably believe that the candidate would be biased against them as a judge and the public would reasonably believe that the candidate was not interested in affording defendants a fair trial.

The challenges to the code restrictions are not being filed by First Amendment advocates but by groups with political agendas, and future challenges are inevitable until those political agendas are accomplished and judges become

indistinguishable from politicians in the other branches. It is, of course, impossible to predict how federal courts will rule in those challenges and, particularly in light of the state-court-bashing and sloppy reasoning displayed in the *White* remand, it is tempting to abandon the restrictions in light of the expense of defending them.

However, as the dissent in the *White* remand noted, “the word ‘compelling’ is hardly vivid enough to convey” the importance of the interests at stake. Thus, the ABA and others devoted to an ethical judiciary should not give up trying to draft a code that addresses *White* in a way that may survive First Amendment challenge but continues to promote judicial integrity, impartiality, and independence. ❧

The effect of the decision in Republican Party of Minnesota v. White will be a topic of one of the sessions at the 20th National College on Judicial Conduct and Ethics sponsored by the Center for Judicial Ethics, in Chicago, October 19-21, 2006. For more information, go to www.ajs.org/ethics. For more information about the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, go to www.abanet.org/judicialethics/home.html. To view AJS's comments to the ABA Joint Commission, go to www.ajs.org/ethics/eth_ABA_commission.asp.

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