## *Perspectives on* Republican Party v. White

# To Speak or Not to Speak: Unconstitutional Regulation in the Wake of *White*

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Judicial candidates throughout the United States are in a quandary. During their campaigns, should they state their views on disputed legal and political issues and expose themselves to possible discipline, or should they keep quiet and yield their constitutional right to speak freely? While the United States Supreme Court has held that judicial candidates have a right to announce their views during their campaigns, various states, adopting rules put forth by the American Bar Association, have not been so accommodating. In particular, in many states, rules are in place that discipline judicial candidates for exercising their constitutional rights. These rules are the "pledges-and-promises" clause and the "commits" clause.

## The History of the Clauses

The pledges-and-promises clause and the commits clause are the result of numerous attempts on the part of the American Bar Association to offer guidelines to judges and judicial candidates regarding their conduct. The ABA first began this endeavor in 1924, adopting a Code of Judicial Ethics that served as "a proper guide and reminder for judges, and as indicating what the people have a right to expect from them" (*Canons,* 1923:1). With regard to statements made during a candidacy for office, Canon 30 of 34 stated that:

> A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination (Canons, 1923:7).

This provision was officially divided into the pledges clause and the announce clause in 1972, when the ABA revised its Code to impose stricter enforcement measures for violating the Code and revised Canon 30—renumbered as Canon 7B—to state that judicial candidates "should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues" (Garwin and Maher, 2004:355).

In 1990, due to criticisms about their vagueness, the ABA revised the Canons again, consolidating them from seven canons to five and omitting the announce-

clause prohibition. This revision replaced the announce clause with a "commits" clause in light of federal litigation challenging the announce clause as unconstitutional. The resulting provision, found in Canon 5A(3), now read:

> [A] candidate for a judicial office: (d) shall not: (i) make pledges or promise of conduct in office other than the faithful performance of the duties of the office; (ii) make statements that commit or appear to commit the candidate with respect to case, controversies or issues that are likely to come before the court (Garwin and Maher, 2004:355).

The litigation challenging the announce clause culminated in a United States Supreme Court decision in 2002. In *Republican Party of Minnesota v. White*, the Court held that the announce clause was unconstitutional under the First Amendment's free-speech clause because it did not serve a compelling interest in impartiality. In particular, the Court, interpreting "impartiality" to prevent "bias for or against parties" and possibly to preserve the "openmindedness" of a judge, found that preventing judicial candidates from merely announcing their views on various legal, political, and social issues did not address those concerns at all and, consequently, could not justify the restriction of an express constitutional right to free speech.

Although numerous states removed the announce clause from their judicial canons either before or as a result of the *White* decision, many of them, by adopting the ABA's pledges-and-promises clause and commits clause, restricted the same speech as the announce clause held unconstitutional in *White*. For example, the Kentucky Supreme Court, in upholding the commonwealth's clauses in *Deters v. Judicial Retirement & Removal Commission* (2004), stated that a judicial candidate's announcement of his views on abortion "appeared to commit him to a position" in violation of the commits clause (at 203). In Indiana, the Commission on Judicial Qualifications issued Preliminary Advisory Opinion 1-02 (2002), in which the commission noted that while a judicial candidate can announce his or her views, the more specific the statements a candidate makes regarding those views, the more likely that "the candidate incurs the risk of violating the 'commitment' clause and/or the 'promises' clause" (at 3).

In North Dakota, the Judicial Ethics Advisory Committee issued a letter in August 2002 stating that the state's canons did not include an announce clause, so *White* did not apply and the canons were still in full force for all judicial candidates (North Dakota Judicial Committee, 2002:¶ 6). In Alaska, a letter issued in 2002 advised judicial candidates that "questions that reflect a pre-judgement of a controversial issue or judicial philosophy that could predict outcome in a case are to be avoided" (at 1). And in 2006, Kansas judicial candidates were notified that they could not announce their views by answering a questionnaire because doing so would violate the pledges-and-promises clause and the commits clause (Kansas Judicial Opinion, 2006:2). These provisions have since been challenged in federal court, with the result that the pledges-and-promises clause and the commits clause were found unconstitutional under the free-speech clause of the First Amendment (*Indiana Right*

*to Life*, 2006; *Kansas Judicial Watch*, 2006; *Alaska Right to Life*, 2005; *North Dakota Family Alliance*, 2005; *Family Trust Foundation*, 2004).

In light of the Supreme Court's ruling and this subsequent litigation, the ABA again sought to revise its canons and, in 2003, adopted revisions that combined the pledges-and-promises clause and commits clause as follows:

> with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office (ABA, 2004:¶ 5A(3)(d)(i)).

The "appears to commit" language of earlier versions was removed, but it was moved—along with other language from the 1990 version—to the disqualification clause of Canon 3, which requires judges to disqualify themselves if their impartiality can be reasonably questioned and offers a list of circumstances where it could be questioned (ABA, 2004:¶ 3E(1)). Included in this list was the requirement that a judge disqualify himself or herself from a case if

> the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to (i) an issue in the proceeding; or (ii) the controversy in the proceeding (ABA, 2004:¶ 3E(1)(f)).

This was the first time the disqualification clause ever required disqualification for merely "appear[ing] to commit"—announcing one's views. Its constitutionality has also been called into question (Bopp and Woudenberg, forthcoming).

In 2006 the ABA completely reorganized the canons and in February 2007 adopted four revised canons. This revision made slight alterations to the combined pledges, promises, and commits clause, as well as an addition to the new disqualification clause from 2003. This new commits clause now states that a judge or judicial candidates shall not,

> in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office (ABA, 2007:138).

Several states, including Florida, Wisconsin, and Arizona, have adopted forms of the provisions similar to those the ABA has advanced. However, such adoption of the ABA's new revisions is premature. While the changes made by the ABA may have sought to take into account *White*, they do not adequately do so.

## LINGERING CONSTITUTIONAL PROBLEMS

The ABA's revision of the earlier version of the commits clause acknowledged the unconstitutionality of the scope of the clause. Thus, its removal of "appearance of

commitment" in the revision was appropriate. Such language makes it unclear as to what is prohibited and can include within it statements that merely announce one's views, a prohibition that is contrary to *White*. Of course, the ABA's removal of this provision from one canon only to drop it into another is perplexing. The effect of such a change is to allow judicial candidates to announce their views but then to discipline them if they fail to disqualify themselves for such announcements. Indeed, it is likely that the same chilling of speech that occurred as a result of the commits clause will continue in light of the new disqualification clause, because judicial candidates will not want to cause instances of required disqualification, despite the fact that they hold those views whether they announce them or not.

While the removal of "appears to commit" was a step toward remedying the failings of the commits clause, such a change is hardly adequate, and other constitutional problems remain unchecked. First, the ABA retained the modifier "likely to come before the court," although doing so is clearly contrary to the *White* decision. As the *White* Court observed, "'there is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction'" (at 772). Thus, it is not clear what purpose the provision serves, as it provides little limitation upon the scope of the clause.

What justification the ABA might have for retaining such language is also unclear. If the desired effect of this modifier is to limit the commits clause, it is vague in doing so. How is a judicial candidate to know what is likely to come before him or her or what is not? In courts of general jurisdiction, presumably any matter could come before a judge. Consequently, judicial candidates are likely to interpret the clause broadly, preventing them from making comments on any issue, despite their constitutional right to do so.

More fundamentally, however, the modifier is misleading. It implies that judicial candidates can make pledges or promises in cases not likely to come before the court. And surely this is not a judicial posture the ABA—nor any state judiciary—seeks to promote. Judicial candidates should not make a promise of certain results in a particular case, regardless of the likelihood of that matter ever appearing before them. Judges must weigh the law and facts before them, even in matters that are novel to that jurisdiction. Yet this modifier leaves judicial candidates with a false impression that they can promise particular results in particular cases, provided that the issue is unlikely to come before them.

Indeed, this distinction between issues "likely to come before the court" and other issues is irrelevant to impartiality concerns. Due process mandates that, even for those who raise a novel or an "unlikely" issue before a judge, a fair and impartial consideration of that issue must be afforded. A promise made by a sitting judge regarding a novel issue prohibits that judge from being impartial and fair, as required. Consequently, the focus for judicial candidates and in the canons should be on whether judicial candidates are pledging or promising certain results in particular cases, regardless of whether the issue is likely to come before them. This modifier alone, then, renders the commits clause unconstitutional.

Yet there are further failings in the commits clause. The ABA combined the pledges-and-promises clause with the previous commits clause, yet chose to include all three terms—"pledge," "promise," and "commit"—in one canon provision. The by-product of this choice is to make the scope of the provision ambiguous. If "commitment" has the same meaning as "promise," then "pledge or promise" would suffice. If "commit" is broader because it refers to any suggestions judicial candidates might make regarding their views or how they might decide cases, then "commitment" is overbroad. It regulates judicial candidates' announced views without being narrowly tailored to the state's interest in impartiality, a regulation that the U.S. Supreme Court has already declared unconstitutional in *White*. As a result, the commits clause continues to be either vague in its scope or unconstitutionally overbroad.

Finally, the ABA continues to use the expression "inconsistent with the impartial performance of the adjudicative duties of judicial office." This phrase offers nothing to assist judicial candidates in understanding the parameters of the commits clause's prohibition. Instead, it appeals to an abstract ideal, saying nothing about what would be consistent, much less inconsistent, with the candidates' role as judge, much less about in whose eyes such an inconsistency might be viewed. Because of such ambiguity, judicial candidates will again be forced to err on the side of caution and offer less speech than they are both willing and constitutionally allowed to offer under *White*.

What the ABA should have elected to do was drop the commits clause entirely and refine the language of the pledges-and-promises clause to prohibit judicial candidates from "pledging or promising certain results in a particular case or class of cases." This would not only alleviate the problems of their current commits clause, but also fall squarely within the parameters of *White*. It would give judicial candidates sufficient and concrete notice as to what is prohibited under the canons. And it would satisfy *White* by directly serving the state's interest in impartiality by ensuring fairness to parties and preserving the appearance of open-mindedness of judicial candidates who become judges.

## CONCLUSION

The *White* decision has created "a sea change in the law of extrajudicial speech" (Jackson, 2004:1165). As a result, "*White's* treatment of the judicial impartiality rationale and its application of the narrow tailoring requirement raise questions about whether any judicial campaign restriction could pass strict scrutiny. The decision casts a shadow of unconstitutionality over the entire project of judicial election campaign regulation" (Briffault, 2004:182-83, emphasis in original).

The courts have readily recognized that the *White* case was a landmark decision regarding judicial speech with principles that are applicable not just to judicial candidates' right to announce their views but also to other canons affecting judicial speech: "With its decision in *Republican Party of Minnesota v. White*, the United States Supreme Court changed the landscape for judicial ethics, at least with respect to political campaigns" (*Griffen v. Ark. Judicial Discipline Com'n*, at 535).

Unfortunately, the ABA and the states that follow its recommendation have chosen to ignore these changes—changes easily incorporated into their canons—to the detriment of all involved. **jsj**

## REFERENCES

American Bar Association (2007). *Model Code of Judicial Conduct February 2007*. Retrieved March 15, 2007, from http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf

American Bar Association (2004). *Model Code of Judicial Conduct 2004 Version*. Retrieved March 15, 2007, from http://www.abanet.org/cpr/mcjc/toc.html

Alaska Commission on Judicial Conduct (2002). Letter on file with authors.

Briffault, R. (2004). "Judicial Campaign Codes After *Republican Party of Minnesota v. White*," 153 *University of Pennsylvania Law Review* 181.

Bopp, J., and A. Woudenberg (forthcoming). "An Announce Clause by Any Other Name: The Unconstitutionality of Disciplining Judges Who Fail to Disqualify for Exercising Their Freedom to Speak," *Drake Law Review*.

*Canons of Judicial Ethics* (1923). ABA Reports 48, 74.

Garwin, A., and K. Maher, eds. (2004). *Annotated Model Code of Judicial Conduct*. Chicago: ABA Publishing.

Jackson, T. P. (2004). *"Beyond Republican Party v. White:* A Plea for a Rule of Reason for Extrajudicial Speech," 32 *Hofstra Law Review* 1163.

North Dakota Judicial Ethics Advisory Committee (2002). Retrieved March 15, 2007, from http://www.court.state.nd.us/court/committees/jud_ethc/canlet.htm

Kansas Judicial Ethics Advisory Opinion JE 139 (2006). Retrieved March 15, 2007, from http://www.kscourts.org/clerkct/JE139.pdf

Indiana Preliminary Advisory Opinion (2002). Retrieved March 15, 2007, from http://www.ai.org/judiciary/jud-qual/docs/adops/1-02.pdf

## CASES CITED

*Alaska Right to Life v. Feldman*, 380 F. Supp. 2d 1080 (D. Alaska 2005).

*Deters v. Judicial Retirement & Removal Commission*, 573 S.W. 200 (Ky. 2004).

*Family Trust Foundation of Kentucky v. Wolnitzek*, 345 F. Supp. 2d 672 (D. Ky. 2004).

*Griffen v. The Arkansas Judicial Discipline and Disability Comm'n*, 130 S.W.3d 524 (Ark. 2003).

*Indiana Right to Life v. Shepard*, 2006 WL 3314565 (N.D. Ind. Nov. 14, 2006).

*Kansas Judicial Watch v. Stout*, 440 F. Supp. 2d 1209 (D. Kan. 2006).

*North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (D. N.D. 2005).

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