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Impact of
Republican Party v. White, 122 S. Ct. 2528 (2002)
on
N.D. Code Jud. Conduct Canon 5A(3)(d)(ii)

This memorandum provides an analysis of the recent United States Supreme Court opinion which struck down, as violative of the First Amendment, the Minnesota "announce clause," a canon of judicial conduct which prohibits judicial candidates from announcing their views on "disputed legal or political issues." Republican Party v. White, 122 S. Ct. 2528 (2002). Specifically, the analysis concerns how that opinion affects North Dakota's canon which prohibits a judicial candidate from "mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." N.D. Code Jud. Conduct canon 5A(3)(d)(ii). This subsection of the North Dakota canon will be referred to as "the commitment clause."

Scholars and observers are pondering the same question in the wake of the Supreme Court's 5-4 White decision. See Marcia Coyle, New Suits Foreseen on Judicial Elections, Nat'l L.J., July 8, 2002. In White, the Court held only that the announce clause violated the First Amendment because it was not narrowly tailored to serve the asserted interest in the judiciary's impartiality. 122 S. Ct. 2528, at *6. The Court did not address the constitutionality of the "pledges or promises clause" of Minnesota's canon 5A(3)(d)(i), identical to North Dakota canon 5A(3)(d)(i). White, 122 S. Ct. 2528, at *3. Nor did the Court specifically address the validity of the argument that the announce clause had been limited by judicial opinion such that it was no broader in scope than the commitment clause. Id. at *4, n.5.

In its amicus brief to the United States Supreme Court, the American Bar Association took that position. Brief for Amicus, American Bar Ass'n, at *5, Republican Party v. White, 122 S. Ct. 2528 (2002), available at 2002 WL 354098 (citing Republican Party v. Kelly, 247 F.3d 854, 881-82 (8th Cir. 2001) (limiting announce clause to a judicial candidate "publicly making known how they would decide issues likely to come before them as judges") and In re Code of Judicial Conduct, 639 N.W.2d 55 (Minn. 2002) (order) (adopting the interpretation of the eighth circuit)). By the ABA's reckoning, both clauses prohibit judicial candidates from "seeking political support on the basis of commitments or apparent commitments on how they would decide cases if elected." Id. Thus, while advocating for the upholding of Minnesota's announce clause, the ABA may have also hoped to have upheld commitment clauses adopted from its 1990 model code. The Supreme Court declined the apparent invitation, writing, "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." White, 122 S. Ct. 2528, at *4, n.5. The Court did, however, label the argument "somewhat curious," citing the ABA's own disavowal of the announce clause. Id.

In 1990, the ABA Model Code replaced the announce clause with the commitment clause, a provision that prohibits a candidate from "mak[ing] statements that commit or appear to commit

the candidate with respect to cases, controversies or issues that are likely to come before the court." ABA Model Code of Judicial Conduct, canon 5A(3)(d)(ii) (2000) (quoted in White, 122 S. Ct. 2528, at *4, n.5). The ABA made the change because the announce clause was viewed as an overly broad restriction on speech. Brief for Amicus, American Bar Ass'n, at *8-*9, Republican Party v. White, 122 S. Ct. 2528 (2002), available at 2002 WL 354098. The Minnesota Supreme Court chose to retain the announce clause but at least 25 other states, including North Dakota, adopted the commitment clause instead. White, 122 S. Ct. 2528, at *4, n.5 (citing Final Report of the Advisory Committee to Review the ABA Model Code of Judicial Conduct and the Rules of the Minnesota Board on Judicial Standards 5-6 (June 29, 1994)); Marcia Coyle, New Suits Foreseen on Judicial Elections, Nat'l L.J., July 8, 2002.

Which brings us to the crux of the inquiry: If no aspect of the Court's constitutional analysis in White turns on the question whether the announce and commitment clauses are one and the same, where does that leave the commitment clause after White? No one is certain. From newspaper sources, a number of reactions to White from bench and bar spokespersons in Minnesota and in states which have adopted the commitment clause were collected. These are included at the end of Section E of this memorandum.

A. Commitment Clause Before White Decision

Before White, the commitment clause had been upheld by the Kentucky Supreme Court in Deters v. Judicial Retirement & Removal Commission, 873 S.W.2d 200 (Ky. 1994), and by a Kentucky federal district court in Ackerson v. Kentucky Judicial Retirement & Removal Commission, 776 F. Supp. 309 (W.D. Ky. 1991). In Deters, the Deters campaign ran advertisements in newspapers proclaiming "Jed Deters is a Pro-Life Candidate," which the Commission concluded amounted to a public announcement of candidate Deters' view on the abortion issue, and a violation of the canon prohibiting the making of statements that commit or appear to commit the candidate to a position with respect to cases, controversies or issues that are likely to come before the court. 873 S.W.2d at 201-02; Ky. Code of Jud. Conduct canon 7B(1)(c) (now numbered Ky. Code of Jud. Conduct canon 5B(1)(a)). In upholding that canon against a first amendment challenge, The Kentucky Supreme Court found a compelling state interest in limiting a judicial candidate's speech because "the making of campaign commitments on issues likely to come before the court tends to undermine the fundamental fairness and impartiality of the legal system." Id. at 205.

The federal district court in Ackerson reviewed the pledges and promises clause and the commitment clause of the Kentucky Code of Judicial Conduct, based on the 1990 ABA model and identical in relevant part to North Dakota Code of Judicial Conduct Canon 5A(3)(d)(i),(ii). Ackerson v. Kentucky Judicial Retirement & Removal Comm'n, 776 F. Supp. 309 (W.D. Ky. 1991). The court found that both clauses were fatally overbroad to the extent that they prohibited a candidate from making pledges, promises or commitments regarding administrative matters in the court for which he was a candidate. Cf. N.D. Code Jud. Conduct 5A(3)(d) cmt. (candidate not prohibited from making pledges or promises regarding improvements in court administration). Ackerson wished to comment on matters including case backlog, methods of case assignment, hiring and firing employees, and travel expenses. Both clauses were upheld, however, to the extent they prohibited speech by the judicial candidate on general legal issues which were likely

to come before the court of appeals. The district court conceded that almost any issue may come before a court at some point but reasoned that the interest in an impartial judiciary justified any chilling effect upon a judicial candidate's speech: "This interest is simply too great to allow judicial campaigns to degenerate into a contest of which candidate can make more commitments to the electorate on legal issues likely to come before him or her."

Discipline based on violation of the 1990 model commitment clause was also imposed without constitutional outcry in Indiana. In re Spencer, 759 N.E.2d 1064 (Ind. 2001) (candidate's television commercial stated judge would put away more child molesters, burglars, and drug dealers) (stipulation); In re Haan, 676 N.E.2d 740 (Ind. 1997) (judicial candidate stated, if elected, he would "stop suspending sentences" and "stop putting criminals on probation").

B. The commitment clause after White

Four days after White was handed down, the New York Court of Appeals reviewed a judicial conduct rule based on the 1990 ABA Model and identical to North Dakota's Canon 5A(3)(d). In re Shanley, 2002 WL 1401699 (N.Y. July 1, 2002). The case was decided without reference to first amendment concerns or to White. In Shanley, the candidate for judicial office identified herself in campaign literature as a "Law and order Candidate." The Commission on Judicial Conduct argued that the plain upshot of the phrase was a promise to sternly treat criminal defendants, a violation of subsections (i) [pledges and promises of conduct in office other than the faithful and impartial performance of the duties of the office] and (ii) [statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court]. The Court of Appeals found the phrase too diluted by its indiscriminate use in everyday parlance and particularly election campaigns to constitute either a commitment or a pledge or promise. Cf. In re Hafner, 2000 WL 33172938 (N.Y. Comm'n of Judicial Conduct Dec. 29, 2000) (judicial candidate admonished for violating pledges or promises and commitment clauses) (campaign advertising states, "Are you tired of seeing career criminals get a 'slap' on the wrist? So am I...." and "Soft judges make hard criminals!"); In re La Cava, 1999 WL 994135 (N.Y. Comm'n on Judicial Conduct, Sept. 16, 1999) (judicial candidate admonished for taking position on abortion issue including making statement "I think it's murder"); In re Polito, 1998 WL 939714 (N.Y. Comm'n on Judicial Conduct Dec. 23, 1998) (judicial candidate admonished for "graphic and sensational advertisements [that were undignified,] portrayed him as a judge who is biased against criminal defendants," and for statements disparaging alternative sentences which appeared to commit him to imposing prison terms in every case); In re Herrick, 1998 WL 184273 (N.Y. Comm'n on Judicial Conduct Feb. 6, 1998) (judicial candidate admonished for promising he would jail every person charged with violating a protective order instead of judging the merits of each case); In re Birnbaum, 1997 WL 640687 (N.Y. Comm'n on Judicial Conduct Sept. 29, 1997) (judicial candidate censured for giving impression that he would favor tenants over landlords).

C. The White Opinion

On June 27, 2002, the United States Supreme Court handed down its decision in Republican Party v. White, 122 S. Ct. 2528 (2002). Gregory Wersal, a candidate for judicial office in Minnesota, originally filed suit against the Minnesota Lawyers Professional Responsibility

Board and the Minnesota Board on Judicial Standards (collectively Lawyers Board), seeking a declaratory judgment that the announce clause of the Minnesota Code of Judicial Conduct, canon 5A(3)(d)(i), violated the First Amendment. Republican Party v. Kelly, 63 F. Supp.2d 967 (D. Minn. 1999). Wersal was joined in his suit by the state Republican Party and several other political groups. The district court upheld the announce clause, id., and the Eighth Circuit affirmed, Republican Party v. Kelly, 247 F.3d 854 (8th Cir. 2001).

The Supreme Court, however, reversed. Using strict scrutiny, the Court held the announce clause was not narrowly tailored to serve a compelling state interest. White, 122 S. Ct. 2528 (2002). The Court stopped short of holding that judicial campaign speech was beyond all regulation or that there is no reason to treat campaigns for judicial office different than campaigns for political office. It ruled that "[E]ven if the First Amendment allows greater regulation of judicial election campaigns than legislative election campaigns, the announce clause still fails strict scrutiny because it is woefully underinclusive, prohibiting announcements by judges (and would-be judges) only at certain times and in certain forms." 122 S. Ct. 2528, at *9.

In its analysis, the Court first attacked the thorny issue of what speech by a judicial candidate the clause prohibits. The answer was: too much speech to pass first amendment muster. In a nutshell, the clause prohibits a statement of the candidate's views "on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions--and in the latter context as well, if he expresses the view that he is not bound by stare decisis." 122 S. Ct. 2528, at *4.

The Court then considered whether the announce clause was narrowly tailored to serve a compelling state interest. The Lawyers Board identified two state interests served by the restriction on campaign speech: 1) preservation of judicial impartiality and 2) preservation of the appearance of impartiality. Id. at *5. The Court supplied its own definitions of the word "impartiality," since the Lawyers Board had failed to do so. The word means either 1) a lack of bias toward particular parties, or 2) a lack of preconception toward a particular legal viewpoint, or 3) openmindedness. Id. at *6-7. Under the first meaning, the clause was not narrowly tailored because it was directed at bias regarding issues, not bias regarding parties. Id. at *6. Under the second definition, the interest was not compelling because the Court believed it "virtually impossible [and most undesirable] to find a judge who does not have preconceptions about the law." Id. Finally, regarding the third definition, the Court refused to give any credence to an assertion that the announce clause served an interest in preserving the openmindedness of elected judges by relieving a judge from pressure to rule consistent with statements he has made. Id. at *7. If that were Minnesota's purpose--and the Court did not believe it was--the clause is "woefully underinclusive" since campaign statements are just the tip of the iceberg when it comes to commitments to legal positions taken by judges and would-be judges. Id. Before their elevation to the bench, judges may have committed themselves in speeches, lectures, or books they have authored. Id. The judicial conduct code does not forbid this type of speech even when it regards legal issues judges must later rule upon. Id. On the contrary, the Code encourages it. Id. (citing Minn. Code Jud. Conduct, canon 4(b) & cmt. (permitting and encouraging judges to write, lecture, teach, and speak concerning the law)). Nor does the Code prohibit such pronouncements at any time other than during an election campaign. See id. (stating that the candidate may engage in prohibited statements on legal issues the "very day before he declares

himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected"). Singling out election campaigns for this restriction on an incumbent judge or a would-be judge's speech turns First Amendment law on its head since the Court has never countenanced prohibiting candidates from communicating relevant information to the voters. Id. at *8. The Court appeared to take Minnesota to task for providing for the popular election of its judges but preventing the candidates from "discussing what the elections are about." Id. at *11. If a state conducts judicial elections, it must not do so under conditions which breed voter ignorance, the court said. Id. Instead, the state must allow candidates' discourse to touch on the subjects of interest to the voters, including the candidates' views on disputed legal issues. Id. To do less, violates the first amendment rights of those candidates. See id.

D. Application of White to North Dakota's Commitment Clause

Canon 5A(3)(d)(ii) of the North Dakota Code of Judicial Conduct prohibits a judicial candidate from "mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." The White opinion did not address the validity of this language although it mentions it in a footnote, quoting it as a provision of the ABA Model Code of Judicial Conduct. 122 S. Ct. 2528, at *4, n.5. The respondents in White, had argued that the meaning of the announce clause had been limited by the Eighth Circuit and the Minnesota Supreme Court so that it was no broader than the ABA Model Canon 5A(3)(d)(ii), the commitment clause upon which North Dakota's is based. The Court said, "We do not know whether [Minnesota's] 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." Thus, the Court did not pass upon the validity of the commitment clause.

In general, judicial codes of conduct contemplate three levels of restriction on the speech of judicial candidates. The broadest restriction is represented by the announce clause which the Supreme Court struck down. The narrowest restriction is represented by the promises or pledges clause which was not at issue in White. See White, 122 S. Ct. 2528, at *3. "(We know that 'announc[ing] . . . views' on an issue covers much more than promising to decide an issue in a particular way."). Somewhere in the middle is the commitment clause upon which the Court also did not pass judgment. See id. at *4, n.5.

The Minnesota Supreme Court, the federal district court, and the Eighth Circuit all agreed that the Minnesota announce clause reached only disputed legal issues "likely to come before the candidate if he is elected judge." 639 N.W.2d at 55, 63 F. Supp. 2d at 986; 247 F.3d at 881-82. How the United States Supreme Court viewed this avowed limitation on the scope of the announce clause is important because that same qualifier is part of North Dakota's commitment clause. See N.D. Code Jud. Conduct canon 5A(3)(d)(ii) (prohibiting candidates from "mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court") (emphasis added). The Court viewed the argument with suspicion, stating, "Limiting the scope of the [announce] clause to issues likely to come before a court is not much of a limitation at all." White, 122 S. Ct. 2528, at *4. With the exception of legal or political issues over which a court lacks jurisdiction, "'[t]here 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." Id. (quoting Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 229 (7th Cir. 1993), and giving as a lone example of an issue unlikely to come before a state court whether the United States should end the embargo of Cuba). Thus, the Court labeled the "likely to come before the court" limitation as no limitation at all on the scope of the announce clause. Id. To the contrary, the Court found that, even if limited to issues likely to come before the court, the clause swept too broadly into the area of first amendment free speech. Id. at *4-5 (indicating agreement with eighth circuit recognition that announce clause "prohibits speech on the basis of 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") (citing Republican Party v. Kelly, 247 F.3d at 861, 863).

If North Dakota cannot justify the imposition of the commitment clause on the basis of its limitation to cases, controversies and issues likely to come before the court, then the clause can survive White only if there is a distinction between announcing views and making statements that commit or appear to commit the candidate with respect to those cases, controversies, and issues. See Abdon M. Pallasch, Top Court Lets Judge Hopefuls Air Issues, Chicago Sun-Times, at 12, June 28, 2002, available at 2002 WL 6463017 (quoting retired Illinois appellate judge Gino Divito as joking that, in order to take advantage of the White decision while still complying with Illinois' commitment clause, judicial candidates may try to make "an announcement but not a commitment").

The dictionary defines an "announcement" as "the act of making something publicly known." American Heritage College Dictionary 55 (3d ed. 1993). It defines "commitment" as "the act or an instance of committing", id. at 281, and defines "to commit" as "to make known the views (of oneself) on an issue," id. at 280. Thus, the dictionary makes no principled distinction between an announcement and a commitment as both mean making something, including one's views, publicly known. Nor does the dictionary draw much of contrast between a commitment and a pledge or a promise. See id. at 281 (alternately defining commitment as "a pledge to do,"); id. at 1049 (defining pledge as "a solemn binding promise to do, give or refrain from doing something;" id. at 1095 (defining promise as "a declaration assuring that one will or will not do something; a vow"). The parties in White and the Supreme Court, however, professed to find a distinction at least between announcing and pledging or promising. See White, 122 S. Ct. 2528, at *3 ("The [announce clause] prohibition extends to the candidate's mere statement of his current position, even if he does not bind himself to maintain that position after election. All the parties agree this is the case, because the Minnesota Code contains a so-called 'pledges or promises' clause, which separately prohibits judicial candidates from making 'pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.'"); id. at *7 (identifying as separate classes of speech "pledges or promises" and "nonpromissory statements").

The cavalier manner in which the majority opinion in White dismisses the arguments of the four dissenters suggests the two clauses not considered by the opinion--the commitment clause and the pledges or promises clause--are also not long for this world. The justifications in support of the announce clause offered by the Minnesota Lawyers Board--the preservation of an impartial judiciary and the appearance of an impartial judiciary--seem likely to be the same justifications North Dakota would advance in support of the commitment clause. In White, those justifications

were not given much deference by the Court. Instead, the Court wanted to debate the meaning of the asserted goal, "impartiality." Only the root meaning, i.e., "a lack of bias for or against either party to the proceedings," seemed to resonate with the Court. See id. at *6. But the Court held the announce clause was "barely tailored" to serve that interest, insufficient under strict scrutiny, because the clause restricted speech for or against particular issues rather than for or against particular parties. Id. Likewise, North Dakota's commitment clause is not directed at statements reflecting bias or favoritism toward parties but rather statements regarding cases, controversies, and issues. N.D. Code Jud. Conduct canon 5A(3)(d)(ii). Thus, if the commitment clause is asserted to serve the state's interest in an unbiased judiciary, it is, like the announce clause, "barely tailored" to that end.

The second possible meaning of impartiality did not fare well with the Court, either. The Court specifically identified as noncompelling the state's interest in a judiciary without preconceived notions about legal issues. White, 122 S. Ct. 2528, at *6. If North Dakota were to assert this interest in support of its commitment clause, it would lose because it is neither possible nor desirable to fill the bench with judges who do not have preconceptions about "the law," a term broad enough to include cases, controversies, and issues. See id. Furthermore, presenting the mere appearance that judges' minds are blank slates, as would be necessary to serve the "appearance of impartiality," cannot rise to the level of a compelling state interest, either. See id.

Finally, the Court was skeptical that Minnesota had adopted its announce clause in order to preserve the openmindedness of its judiciary and relieve the pressure a judge might feel to make rulings which were consistent with statements he has previously made. Id. at *7. Were this interest asserted by North Dakota in support of the commitment clause, it would likely be found to be underinclusive for the same reason the White Court disapproved of Minnesota's announce clause: it leaves unregulated similar speech made by the candidate outside of an election campaign. Id. at *9 (stating announce clause is underinclusive because it prohibits speech only at "certain times and in certain forms."). A person who delivers a lecture or writes a book on some case, controversy or issue before he seeks election to the bench might feel the same pressure to support those views with consistent rulings once installed on the bench yet, because the statements were not made while the speaker was a candidate for judicial office, the canon doesn't touch him. Thus, it is underinclusive.

Nor would the Court be likely to buy an argument by North Dakota that there is something special about election to the office of judge that justifies reigning in the campaign speech of those who want that office. In her dissent, Justice Ginsburg stated that judges represent the law and not the voters who put them in office, and thus "are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation." White, 122 S. Ct. 2528, at *20 (Ginsburg, J., dissenting). In other words, "[I]t is the business of judges to be indifferent to popularity," id. at *21 (quoting Chisom v. Roemer, 501 U.S. 380, 401 n.29 (1991)), and it is the right of the states to design a judicial election system which keeps judges above the political fray, id. at *22. The majority opinion found the distinction Justice Ginsburg drew between judicial office and legislative office exaggerated. In the American system, judges make law just as surely as the representatives sitting in the statehouse. Id. at *9.

The Court stopped short of holding that no restriction on judicial speech could be fashioned that would satisfy the First Amendment. See id. Thus, scholars and lesser lights are forced to guess at the impact the opinion will have on judicial conduct code provisions like the North Dakota commitment clause.

E. Reaction to White

There were a number of reported reactions to the White decision, focusing in particular on states which, like North Dakota, adopted the 1990 ABA Model Code's commitment clause. The President of the ABA, Robert Hirshon, has said that the ABA will redraft its Model Code of Judicial Conduct in order to comply with the White decision. Marcia Coyle, New Suits Foreseen on Judicial Elections, Nat'l L.J., July 8, 2002. This may be telling in that the current Model Code does not contain an announce clause like the one struck down in White. It does, however, contain both a pledges or promises clause and a commitment clause, both adopted by North Dakota. ABA Model Code of Judicial Conduct, canon 5A(d)(3)(i),(ii) (2000); N.D. Code of Jud. Conduct, canon 5A(d)(3)(i),(ii). Given Hirshon's remark, it may be reasonable to assume that one or both of these sections are in for a re-draft by the ABA following White. If that is the case, it seems likely that North Dakota would follow the ABA's lead and revise canon 5.

There is much uncertainty regarding the scope of the White opinion. "It's a Star Wars-like adventure, where no man has gone before," said ABA president Hirshon. Kevin Diaz & Robert Whereatt, Supreme Court Rulings; Restraints on Judicial Campaigns Thrown Out, Star-Trib. (Minneapolis), June 28, 2002, at 1A, available at 2002 WL 5377663. Among questions being pondered is "Did White leave room for any regulation of the speech of judicial candidates?" Deborah Goldberg, deputy director of the Brennan Center for Justice says, "There's still considerable room for regulation of judicial elections, in my view. Obviously, exactly what the parameters of that are will be tested over time." Marcia Coyle, New Suits Foreseen on Judicial Elections, Nat'l L.J., July 8, 2002. She believes that state supreme courts, the promulgators of judicial codes of conduct, can encourage voluntary pledges to adhere to speech restrictions, as does Barbara Reed, counsel and policy director of the Constitution Project's Courts Initiative, who adds, "I wouldn't be surprised if all that's left [after White] is voluntary forms of oversight." Id.

In the state directly affected by the White ruling, Minnesota, the reaction ranged from exultation, on behalf of the winning parties, to consternation on behalf of the losers. James Bopp, who represented the Minnesota Republican Party in the case, says that the commitment clause is likewise unconstitutional if, as was argued to the Supreme Court by, among others, the ABA, it is construed to prohibit the same speech as Minnesota's announce clause. Marcia Coyle, New Suits Foreseen on Judicial Elections, Nat'l L.J., July 8, 2002. In his opinion, White opens the door for judicial candidates to say "they're pro-life, they're pro-choice, they're pro-family, or that they think that homosexual marriage is good . . . . They can talk about their values. . . . Until now, they couldn't say anything other than give their name, rank and serial number." Kevin Diaz & Robert Whereatt, Supreme Court Rulings; Restraints on Judicial Campaigns Thrown Out, Star-Trib. (Minneapolis), June 28, 2002, at 1A, available at 2002 WL 5377663. The Minnesota Supreme Court issued a public statement, vowing that it would "continue to support impartiality, and a high level of integrity and competence in Minnesota judges. These principles are the very

life-blood of the public's trust and confidence in the judiciary." Id. Interestingly, after the United States Supreme Court accepted certiorari in White but before the ruling, the director of the Minnesota Office of Lawyers' Responsibility, Edward Cleary, was convinced that if the Supreme Court struck down the announce clause, Minnesota could go to Plan B: He presumed that the Minnesota Supreme Court would replace the announce clause with the 1990 ABA Model Code's commitment clause. Edward J. Cleary, Column, Professional Responsibility, Republican Party, et al. v. Kelly, et al., Bench & Bar Minn. Feb. 2002, at 15. Since the ruling, however, Cleary has said that the White decision "changed the landscape" of judicial elections. Kevin Diaz & Robert Whereatt, Supreme Court Rulings; Restraints on Judicial Campaigns Thrown Out, Star-Trib. (Minneapolis), June 28, 2002, at 1A, available at 2002 WL 5377663.

In Florida, there was a difference of opinion regarding the impact of White on the commitment clause. The chairman of the Florida Supreme Court Judicial Ethics Advisory Committee, Circuit Judge Scott J. Silverman, said that the White decision will have no effect on the Florida Code which contains a commitment clause but does not contain an announce clause. Beth Reinhard & Lesley Clark, Would-be Judges Free to State Views, Miami Herald, June 28, 2002, at 18, available at 2002 WL 22116765. Joseph H. Serota, the former president of the Dade County Bar Association thought that, although the language of the Florida and Minnesota judicial codes differed, the restriction both codes imposed on campaign speech is essentially the same. Id.

In Georgia, a review of the commitment clause is in the offing to determine whether the White decision mandates changes. Bill Rankin, Ruling Removes Muzzle on Judicial Candidates, Atlanta J. & Constitution, June 28, 2002, at A3, available at 2002 WL 3728028 (statement attributed to chairman of Judicial Qualifications Comm'n, Steve Jones).

Douglas Kmiec, dean of Catholic University of America law school, told the Chicago Tribune that the White opinion "just scratched the surface" of the judicial speech issue. Jan Crawford Greenburg & John McCormick, Justices: States Can't Block Judge Hopefuls' Speech, Chicago Tribune, June 28, 2002, at 12, available at 2002 WL 2669842. Dean Kmiec added, "Fashioning those limits with the 1st Amendment is going to remain problematic . . . . Being able to define what is and is not a commitment is very difficult." Id. In the same article, Steven Lubet, a law professor at Northwestern University, says that although the White opinion does not directly address the commitment clause, "it will make its enforcement difficult." Id. James J. Alfini, a law professor at Northern Illinois University agreed. Alfini said the White decision "seems to put the Illinois rule into question" without offering guidelines as to acceptable limitations on a judicial candidate's speech. Gina Holland, Judicial Candidates May Talk About Issues, High Court Rules, St. Louis Post-Dispatch, June 28, 2002, at A-7, available at 2002 WL 2570944.

Mississippi's Chief Justice of the Supreme Court, Edwin L. Pittman, is confident that his state's pledges or promises and commitment clauses are unaffected by the White ruling. Pittman Says Judicial Candidate Conduct Unaffected by Ruling, Associated Press Newswires, July 10, 2002, available at WESTLAW, AllNewsPlus. "We are untouched," he told a convention of Mississippi lawyers and judges. "I'm very proud of the Mississippi Supreme Court in that we carefully drafted a Code of Judicial Conduct that was undisturbed by the Minnesota case." The Mississippi Supreme Court removed the "announce clause" language when it revised the Mississippi Code of Judicial Conduct in April and added the commitment clause at that time. See Legal Code OK in

Free Speech Ruling, Commercial-Appeal (Memphis, Tenn.), July 11, 2002, at 2, available at 2002 WL 19244812.

In Ohio, however, the chief justice was nervous. On the heels of the White ruling, Ohio Chief Justice of the Supreme Court, Tom Moyer, called for a vote of the court's justices to delete the state's commitment clause. Karl Turner & T.C. Brown, Court Unmuzzles Judicial Candidates, Cleveland Plain Dealer, June 28, 2002, at A1, available at 2002 WL 6371510. "We need to move fairly quickly in deciding to delete it," Moyer said. "We don't need to have lawyers challenging that rule." Id. Ohio State University Law Professor Edward Foley said, "The court has recognized that some restrictions are appropriate but states can go too far. Minnesota went too far . . . but it is unsettled where the line is." Id.

The Chief Justice of the Texas Supreme Court, Tom Phillips, says, "We're not absolutely sure the commitment clause in the 1990 ABA rule is effective now, and we don't know if there are other isolated parts of our code that are in trouble." Marcia Coyle, New Suits Foreseen on Judicial Elections, Nat'l L.J., July 8, 2002.

West Virginia's Supreme Court Administrator, Barbara Allen, distinguished that state's commitment clause as "much more tailored to the question of preventing judges from commenting on issues that could come before them in court" than Minnesota's announce clause. Court Ruling Could Lead to Lively W.Va. Judicial Campaigns, Associated Press Newswires, July 3, 2002, available at WESTLAW, AllNewsPlus. Still, she was unsure whether the West Virginia Supreme Court would revise the commitment clause or await a challenge to it. Id.

As the range of commentary demonstrates, the Supreme Court's White decision has raised more questions than it answered for those bodies charged with establishing ethical standards for the judiciary. Ray Schotland of Georgetown University Law Center has chided the Supreme Court for blurring what was thought to be a bright line rule and inviting more litigation. Marcia Coyle, New Suits Foreseen on Judicial Elections, Nat'l L.J., July 8, 2002. "What will happen is we will have much more litigation," he predicts, as candidates test the boundaries of the White decision. Id. James Bopp, who represented the Republican Party in White, thinks that no matter what state supreme courts do with their judicial conduct codes, candidates will look to the federal courts to settle the question whether a particular restriction on their speech is valid. Id.

Sources:

Chisom v. Roemer, 501 U.S. 380 (1991);

Republican Party v. White, 122 S. Ct. 2528 (2002);

Republican Party v. Kelly, 247 F.3d 854 (8th Cir. 2001);

Republican Party v. Kelly, 63 F. Supp. 2d 967 (D. Minn. 1999);

Ackerson v. Kentucky Judicial Retirement & Removal Commission,

776 F. Supp. 309 (W.D. Ky. 1991);

In re Spencer, 759 N.E.2d 1064 (Ind. 2001);

In re Hann, 676 N.E.2d 740 (Ind. 1997);

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