FREE SPEECH VS. FORCED SPEECH:
THE LIMITS OF JUDICIAL CAMPAIGN RHETORIC AFTER *REPUBLICAN PARTY OF MINNESOTA VS. WHITE*

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By: Bill Ogden and Jackie Gorham
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I. Introduction

On June 27, 2002, the United States Supreme Court decided *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S. Ct. 2528 (2002). The Supreme Court declared that Canon 5 of the Minnesota Code of Judicial Conduct, which prohibited a judge or judicial candidate from announcing his or her views on disputed legal or political issues, violated the candidate's First Amendment rights of political expression.

Following *White*, many states have struggled with amending their Codes of Judicial Conduct. The Texas Supreme Court amended Canons 3 and 5 of the Texas Code of Judicial Conduct by order dated August 22, 2002. A copy of the Texas Amendments and the Advisory Committee Report is Appendix A. The Texas Supreme Court has also appointed an advisory committee to study a more thorough overhaul of the entire Code of Judicial Conduct. That committee has yet to report its findings.

Also following *White*, the American Bar Association has proposed amendments to its Model Code of Judicial Conduct which will be considered by the ABA Board of Delegates in August 2003. The ABA proposals are attached as Appendix B.

Cases and commentary dealing with limits of judicial campaign rhetoric almost always recognize the fundamental tension between maintenance of an impartial and independent judiciary on the one hand, and First Amendment rights of expression for candidates and interest groups on the other. The problem threatens to grow more acute as judicial campaigns grow more strident and more expensive. As Chief Justice Phillips has noted, rising campaign costs have made fundraising a disturbing preoccupation for most judicial candidates. Candidates may confront contributors or special interest groups that expressly or impliedly seek to link a contribution to the candidate's support for a particular agenda. The donations themselves can become campaign issues, especially when contributions come from lawyers or clients with frequent business before the courts. Even when the candidates themselves "take the high road" with respect to campaign rhetoric, more strident advertising can originate from special interest groups with their own court agendas: the insurance industry, the gun lobby, the plaintiff's bar, the gay/lesbian caucus, religious fundamentalists, etc. *See* Phillips, "We've Sold Out Our State Judicial Elections," www.calahouston.org/soldout.html.

The changing legal landscape presents judicial candidates with new hazards. Ironically, a decision in the name of "free speech" seems to present some incumbents and challengers with a dilemma of "forced speech." While candidates formerly could invoke the Code of Judicial Conduct in declining to announce their personal views on "hot button" issues, they now risk

being pressured by those who read *White* as liberalizing the bounds of judicial campaign rhetoric.

This outline is certainly not intended as an exhaustive treatment of all issues regarding free speech in judicial campaigns. Plainly, the law in this area is in rapid transition, and definitive answers are not possible for many of the obvious questions. The authors have more modest ambitions for this outline. We intend simply to gather some of the materials reflecting ongoing changes to the Texas Code of Judicial Conduct and the ABA Model Code, to provide a rudimentary analysis of the *White* opinion, to inventory the few precedents decided in the year since *White* was handed down, and to provide the reader with a bibliography of additional resources which can serve as a starting point for further research.

II. Overview and Terminology

A. Scope of Judicial Elections: 39 states currently provide for some form of elections for their trial and/or appellate judges.

1. 53% of state appellate judges must run in contested elections for their initial term on the bench. 66% of state trial court judges must first run in contested elections. 87% of all state trial and appellate judges face some type of election for subsequent terms, either contested or a retention election. Baran, "Judicial Candidate Speech After *Republican Party of Minnesota v. White*," Spring 2002, Court Review.

2. A convenient summary of judicial election laws in all 50 states can be found at the American Judicature Society website: www.ajs.org/select11.html.

B. The Codes of Judicial Conduct: The first code regulating judicial conduct was adopted by the American Bar Association in 1924. The ABA model code has been amended or revised from time to time. The version of the ABA model code at issue in *Republican Party of Minnesota vs. White* was the ABA's 1972 version. Few states still have this "old" code. The ABA amended its model code of judicial conduct in 1982, 1984, 1990 and 1997.

1. Further amendments to Canons 1, 2, 3 and 5 are scheduled for debate before the ABA Board of Delegates in August 2003. These amendments are a reaction to the *White* decision. See Appendix B.

2. The Texas Supreme Court also amended the Texas Code of Judicial Conduct in August 2002 following the Supreme Court decision in *White*. The text of the amended Texas code is contained in the order of the Texas Supreme Court in Misc. Docket No. 02-9167, attached as Appendix A. Note: For some reason the August 2002 amendments to Canon 3(B) and Canon 5 were not picked up in the West 2003 pocket part to the Government Code.

C. Terminology. Cases and commentary discussing constitutional challenges to restrictions on judicial campaign activities deal with a variety of prohibitions. The most commonly discussed are the following.

1. Announce Clause. The so-called Announce Clause is one of the oldest restrictions on judicial campaign rhetoric. The earliest version of the Announce Clause appeared in the first ABA proposed model code in 1924: "A candidate for judicial position . . . should not announce in advance his conclusions of law on disputed issues to secure class support..." ABA Canon of Judicial Ethics 30 (1924). The Announce Clause was the restriction at issue in *Republican Party of Minnesota v. White*. Canon 5 of the Minnesota Code included language adopted from the 1972 ABA Model Code: "A candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues." In addition to being the oldest restriction on judicial campaign rhetoric, the Announce Clause is also the most vague, and thus most vulnerable to constitutional challenge. The Supreme Court noted that the Announce Clause was originated by the ABA, which has long been an opponent of judicial elections. Between 1972 and 1994, the ABA House of Delegates has approved recommendations stating their preference for merit selection of judges on five different occasions. *White*, 536 U.S. at 787. Texas law: The Texas Code does not have an Announce Clause.

2. Commit Clause. A narrower refinement of the Announce Clause. Florida's Code is typical: "A candidate for judicial office . . . shall not . . . make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . ." FLA. CODE JUD. CONDUCT, Canon 7A(3)(d)(ii). Texas law: The Texas Code does not specifically have a Commit Clause. Former Canon 5(1) generally prevented judges or judicial candidates from making "statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought," but the Texas Supreme Court struck Canon 5(1) from the Texas Code of Judicial Conduct following the *White* decision, Misc. Docket No. 02-9167 (August 22, 2002), Appendix B, after Judge Nowlin ruled old Canon 5(1) unconstitutional. *Smith v. Phillips*, 2002 WL 1870083 (W.D. Tex. 2002). The Texas Supreme Court also re-wrote part of Canon 3(B)(10), to require that judicial candidates "abstain from public comments about a pending or impending proceeding . . . in a manner which suggests to a reasonable person the judge's probable decision in any particular case."

3. Pledges or Promises Clause. This is the more common and more modern restriction on judicial campaign speech effective in most states. Most are a variation of Canon 7(1) of the ABA model code: judges and 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." Texas law: Old Canon 5(2) of the Texas Code contains language almost identical to the ABA model code. Following *White*, however, the Supreme Court amended Canon 5 of the Texas Code, which now reads as follows:

> A judge or judicial candidate shall not:
>
> (i) 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.
>
> (2002 Amendment underlined).

4. Misrepresent Clause. Most codes contain some prohibition against misrepresentations, such as the ABA model Canon 7: "A candidate, including an incumbent judge, . . . should not . . . misrepresent his identity, qualifications, present position, or other fact." Texas law: The Texas Code is slightly more precise than the ABA model code:

> A judge or judicial candidate shall not: . . .
>
> (ii) knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent . . .

Texas Code of Judicial Conduct, Canon 5(ii).

5. Political Activity Clause. Many codes contain other restrictions on campaign speech or campaign activity, which generally prohibit a judge or judicial candidate from making specific endorsements of other candidates, or spending campaign funds in support of any candidacy other than his or her own. Texas law: Revised Texas Canon 5(2) states that "a judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party." The Texas Code specifically authorizes a judge or judicial candidate to attend political events and to express his or her views on political matters, except that the judge or judicial candidate must "abstain from public comment about a pending or impending proceeding which may come before a judge's court in a manner which suggests to a reasonable person the judge's probable

decision on any particular case." Texas Code of Judicial Conduct, Canon 3(B)(10).

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

A. Nature of the Controversy: Gregory Wersal was a 1996 candidate for an associate justice seat on the Minnesota Supreme Court. In his 1996 campaign, Wersal distributed literature criticizing past state Supreme Court decisions on crime, welfare and abortion.

1. An ethical complaint was filed against Wersal. The Minnesota Lawyers Professional Responsibility Board dismissed the complaint and expressed doubt that the Minnesota Announce Clause was constitutional. Nonetheless, fearing further complaints, Wersal withdrew from the 1996 election.

2. In 1998, Wersal ran again for the state Supreme Court. He sought an advisory opinion from the Lawyer's Board as to whether it planned to enforce the Announce Clause. The Board equivocated in its response.

3. Wersal then filed suit in federal court against the Minnesota Board for a declaratory judgment that the Announce Clause violates the First Amendment. The Republican Party joined as a Plaintiff, claiming that the Announce Clause prevented them from learning his views and deciding whether to support or oppose his candidacy.

4. The trial court ruled in favor of the Minnesota Board, holding that the Announce Clause was constitutional. 63 F. Supp.2d 967 (D. Minn. 1999). The Eighth Circuit affirmed. 247 F.3d 854 (2001).

5. The Supreme Court reversed, holding that Minnesota's Announce Clause was an unconstitutional violation of the First Amendment rights of judges and judicial candidates.

B. Construction of the Minnesota Code: Canon 5 of the Minnesota Code was based upon Canon 7(B) of the 1972 ABA Model Code. Judicial candidates and incumbents shall not "announce his or her views on disputed legal or political issues."

1. The Supreme Court distinguished the Announce Clause from the Pledges or Promises Clause. The Announce Clause is broader in reach, and the *White* opinion expresses no view on the constitutionality of a Pledges or Promises Clause.

2. The Court accepted limiting constructions placed upon the Code by the Minnesota Judicial Board: (a) the Minnesota Announce Clause does not

prohibit judicial candidates from criticizing past court decisions, and (b) the Announce Clause only affects disputed issues that are likely to come before the candidate if elected.

C. Holdings of the Supreme Court:

1. The Announce Clause prohibits speech on the basis of its content, and also burdens speech about the qualifications of candidates for public office, which is at the core of First Amendment freedoms. Accordingly, the Court applies the strict-scrutiny test: the clause must be (1) narrowly tailored, to serve (2) a compelling state interest. 536 U.S. at 775.

2. Minnesota argued there are two compelling interests:

   (a) Preserving the impartiality of state judges. This is compelling because it protects the due process rights of litigants.

   (b) Preserving the appearance of impartiality of the state judiciary. This is compelling because it preserves public confidence in the Court system.

3. The Supreme Court was critical of Minnesota's position, since Minnesota did not define impartiality. The Court considered three possible meanings of an "impartial" judiciary, and held the Announce Clause failed strict scrutiny under any definition:

   (a) Lack of bias for or against either party. This is the traditional dictionary definition of impartiality. The Court found it is also the most common formulation in the due process argument. But the Announce Clause is not narrowly tailored to serve this definition of impartiality, because it restricts speech based on *issues*, which is more than restricting speech for or against particular *parties*.

   (b) Lack of preconception for or against a particular legal view. Impartiality in this sense is not a compelling state interest. All judges have preconceptions about the law: "Proof that a justice's mind at the time he joined the court was a complete *tabula rasa* . . . would be evidence of lack of qualification, not lack of bias." 536 U.S. at 778. Avoiding judicial preconceptions on legal issues is neither possible nor desirable.

   (c) Openmindedness. This sense of impartiality seeks to guarantee litigants at least some chance of persuading the judge as to a particular legal view. The Supreme Court finds that this rationale was not the purpose behind Minnesota's Announce Clause. Judges can state their view on disputed legal issues outside of the

campaign context – in classes, in books, and in speeches. In essence, the Court again concluded that the Announce Clause is not narrowly tailored to serve this particular state interest.

D. Writings on the nature of judicial campaigns:

1. The majority opinion notes "an obvious tension between the article of Minnesota's popularly approved constitution which provides that judges shall be elected, and the Minnesota Supreme Court's Announce Clause which places most subjects of interest to the voters off limits." 536 U.S. at 787.

   (a) The majority notes the ABA's longstanding opposition to election of judges, and also notes that the Founding Fathers probably also would have opposed election of judges. Vermont is the only state which elected any of its judges before formation of the Union. Georgia was the first state to provide for judicial elections in 1812.

   (b) Even assuming that opposition to judicial elections may be well taken, the First Amendment does not permit the state to leave elections in place while preventing candidates from discussing what the elections are about. In other words "the greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance." 536 U.S. at 788.

2. The majority neither asserts nor implies that the First Amendment requires judicial campaigns to sound the same as other political campaigns. The majority thus leaves open the possibility that *some* restrictions on judicial campaign rhetoric (a Pledges or Promises Clause?) may withstand strict scrutiny.

3. In her concurring opinion, Justice O'Connor noted the increasing costs of judicial campaigns and the appearance of impropriety raised by contributors with cases before the court. O'Connor cites a Texas study to the effect that 40% of the $9.2 million contributed in amounts of $100 or larger raised in Texas Supreme Court races came from parties or lawyers with cases before the court, or contributors closely linked to those parties.

4. Justices Ginsburg, Stevens, Souter and Breyer dissented, arguing that the rules for judicial campaigns should not mirror the rules for political campaigns generally. The judicial office requires impartiality, which justifies restricting judges from any comments that cater to particular constituencies or commit to particular issues. The dissent would give credence to the limiting construction placed on the Announce Clause by Minnesota courts. The Minnesota construction allows candidates to (a)

criticize prior court decisions, (b) make statements of historical fact, (c) make qualified statements, and otherwise (d) make statements framed "at a sufficient level of generality." Properly construed, the Announce Clause only bars a category of statements that essentially commit the candidate to a position on a specific issue or with regard to a specific party. In other words, the dissent blurs the distinction between the Announce Clause and a Commit Clause, or a Pledges or Promises Clause.

IV. The Texas Reaction

A. Texas Supreme Court candidate Steven Wayne Smith filed suit before the 2002 elections to declare unconstitutional Canon 5(1) of the Texas Code of Judicial Conduct. Following the U.S. Supreme Court's decision in *White*, Judge Nowlin declared Texas Canon 5(1) unconstitutional and enjoined its enforcement. *Smith v. Phillips*, 2002 WL 1870083 (W.D. Tex. 2002).

B. On August 22, 2002, the Texas Supreme Court entered its order in Misc. Docket No. 02-9167, striking Canon 5(1) from the Texas Code of Judicial Conduct, and rewriting Canons 3 and 5 in light of *White*. Appendix A.

C. The text of old Canon 5 which is now declared unconstitutional formerly read as follows:

> A judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except the discussion of an individual's judicial philosophy is appropriate if conducted in the manner which does not suggest to a reasonable person a probable decision on any particular case.

D. The newly rewritten Canon 5 contains, essentially, three prohibitions: a Pledges or Promises Clause, a Misrepresentation Clause, and a watered-down version of a Commit Clause:

Canon 5

(1) A judge or judicial candidate shall not:

(i) make pledges or promises of conduct in office regarding pending or impending cases, specifics 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;

(ii) knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent; or

(iii) make a statement that would violate Canon 3(B)(10).

E. Newly rewritten Texas Canon 3(B)(10) contains the following additional limitation on judges and judicial candidates:

Canon 3(B)(10)

> A judge shall abstain from public comment about a pending or impending proceeding which may come before a judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. This prohibition applies to any candidate for judicial office, with respect to judicial proceedings pending or impending in the court on which the candidate would serve if elected. . . .

F. The revisions to the Texas Code of Judicial Conduct do not provide a definition of "impartiality." The definition of impartiality is included in the proposed amendments to the ABA Model Code. Appendix B. The lack of a definition of impartiality in the Minnesota Code was criticized by the majority in *White*. The Advisory Committee Report states that the intent of the Canon is to foster "openmindedness" as discussed in the majority opinion in *White*. Appendix A.

G. The Texas Supreme Court has named a new Advisory Committee to make a comprehensive study of the Judicial Code. Justice Wallace Jefferson is the Court's liaison. As of July 15, 2003, the Committee had not yet met.

V. Post-*White* Decisions

A. *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002)

1. George Weaver ran as a candidate for election to the Georgia Supreme Court. He distributed brochures and ran TV ads criticizing his opponent's positions on same-sex marriages, traditional moral standards, and the death penalty. The Judicial Qualifications Commission issued Weaver a confidential cease-and-desist order, based upon Georgia Canon 7(B), which prohibits false or misleading misrepresentations. When Weaver ran the ads again, the Judicial Qualifications Commission issued a public reprimand stating that Weaver had "intentionally and blatantly" engaged in unethical, false and deceptive campaign practices. In the election held six days later, Weaver was defeated. Holding: Georgia Canon 7(B) is unconstitutional and fails to pass strict scrutiny, but Weaver is not entitled to a special election.

2. The Code: Georgia Code of Judicial Conduct, Canon 7(B)(1)(d), prohibits candidates from making any statement "which the candidates knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading or which is likely to create an unjustified expectation about results the candidate can achieve."

3. The statements: Weaver's campaign ads included the following:

   (a) Justice Sears has stated that it is not yet a perfect world because lesbian and gay couples in America cannot legally marry.

   (b) When the Supreme Court upheld a traditional moral standard, Justice Sears said the result was "pathetic and disgraceful."

   (c) Justice Sears said she supports the death penalty, but she has called the electric chair "silly."

4. The Court applied strict scrutiny. The stated interest in Canon 7(B) is that of "preserving the integrity, impartiality and independence of the judiciary" and "ensuring the integrity of the electoral process and protecting voters from confusion and undue influence." The Court agreed those interests may be compelling, but held that Canon 7(B) is not narrowly tailored to serve those interests. By prohibiting false statements which may merely be negligent, and some true statements that may also be misleading or deceptive, the Canon does not afford breathing room for protected speech.

   (a) The Court adopted an actual malice standard for false campaign rhetoric.

   (b) The Court declined to adopt a lower standard for judicial elections than other types of elections. Speech by judicial candidates is entitled to no less protection than speech by other candidates. The distinction between judicial elections and other types of elections has been greatly exaggerated.

   (c) The Court found Canon 7(B) is not narrowly tailored to serve an interest in judicial impartiality. "The impartiality concerns, if any, are created by this state's decision to elect judges publicly." This part of the ruling was directed at the portions of the Georgia Code which prohibited judicial candidates from personally soliciting campaign contributions.

B. ***In re Kinsey*, 842 So. 2d 77 (Fla. S. Ct. 2003).**

1. Charges were brought against Judge Kinsey before the Florida Judicial Qualifications Commission ("JQC") on 11 ethical violations of improper conduct during her campaign for county court judge. Kinsey's alleged campaign statements were said to violate Florida's Pledges or Promises Clause, as well as the Commit Clause in the Florida Code of Judicial Conduct. Holding: Charges confirmed, and the Florida Pledges or Promises Clause and Commit Clause were held constitutional. Kinsey was publicly reprimanded and fined $50,000.00 plus costs, representing 50% of her annual salary.

2. The Code: The Court noted that Florida's Pledges or Promises Clause and Commit Clause were more narrowly drawn than the Announce Clause in *White*. The Florida Code contain the following restrictions:

   A candidate for judicial office . . . shall not:

   (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or]

   (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the Court . . .

3. The statements: The Court considered a series of 11 ethical charges including a number of similar or related statements, largely touting the candidate's pro-law enforcement stance, and criticizing her opponent as "soft on crime." The essential campaign claims included the following:

   (a) "Pat Kinsey is the unanimous choice of law enforcement for County Judge. Police officers expect judges to take their testimony seriously, and to help law enforcement by putting criminals where they belong: behind bars."

   (b) A judge should protect victim's rights. Judges must support hard working law enforcement officers by putting criminals behind bars, not back on the streets.

   (c) Kinsey's interview: "As a prosecutor, I am different from a defense attorney. Bill Green, before he went on the bench, he was a defense attorney. He is trained to do whatever he could, under the law, to get his client free. I think we have such a philosophical difference, and in my opinion, Judge Green is still in that defense mode."

(d) As a judge I will "bend over backward" to ensure that honest, law-abiding citizens are not victimized a second time by the legal system that is supposed to protect them.

(e) "Above all else," Pat Kinsey identifies with victims of crime. A judge should protect the victims of crime.

4. The Court found that the Florida Canons were more narrowly drawn than the Minnesota Announce Clause at issue in *White*. The Florida Pledges and Promises Clause and the Commit Clause serve a compelling state interest in preserving the integrity of the judiciary and maintaining public confidence in an impartial judiciary. The Court found those restraints were narrowly tailored without unnecessarily prohibiting protected speech. Notably, the Court agreed that some of the charges against Judge Kinsey, taken in isolation, would not violate the Judicial Canons. But when taken together it seemed clear to the Court that Judge Kinsey was running on a platform which stressed allegiance to police officers, pledges to crime victims, a promise to identify with victims "above all else," and a pronounced prosecutorial bias.

C. ***Spargo v. New York State Commission on Judicial Conduct*, 244 F. Supp. 2d 72 (N.D. N.Y. 2003).**

1. Proceeding by New York State Commission on Judicial Conduct ("Commission") against Thomas Spargo, a New York trial judicial candidate. Spargo was charged with five instances of misconduct under the New York Code of Judicial Conduct, generally concerning prohibited partisan political activity. Holding: New York Code Sections 100.1, 100.2(A) and 100.5(A) are an unconstitutional prior restraint, and are also void for vagueness.

2. The Code: The challenged provisions in the New York Code include the following paraphrased restrictions:

Judges should maintain "high standards of conduct . . . so that the integrity and independence of the judiciary will be preserved." Judges "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Judges and judicial candidates "shall refrain from inappropriate political activity." Prohibited political activities include engaging in any partisan activity except the judge's own campaign, permitting the judge's name to be used in connection with any activity of a political organization, publicly endorsing or opposing any other candidate for public office, or attending political gatherings. Judges and candidates "shall maintain the dignity appropriate for judicial office and shall act in a manner consistent with the integrity and independence of the judiciary."

3. The charge: Spargo was accused of engaging in several counts of partisan political activity, including the following:

   (a) handing out coupons redeemable for free donuts or for $5 in gasoline;

   (b) buying a round of drinks at the bar of a local restaurant;

   (c) identifying himself as a candidate for town justice and handing out half gallons of cider and donuts;

   (d) giving away pizzas;

   (e) after his election, failing to disclose to defense attorneys that he had represented the campaign of the district attorney-elect and that the campaign owed him $10,000.00 for legal services;

   (f) participating in a demonstration against the presidential ballot recount process during the 2000 Bush-Gore campaign outside the Miami-Dade County Board of Elections;

   (g) attending the 39th Annual Monroe County Conservative Party Dinner and serving as keynote speaker at that event, which was a fund raising event.

4. The Court held that there was no equal protection violation under the New York Code. Siding with the dissent in *White*, the Court held that judicial candidates and candidates for other political office are not similarly situated, and could be treated differently under the constitution. However, the Court agreed that the provisions of section 100.5 of the New York Code were a prior restraint on political activity, and thus had to be reviewed under strict scrutiny.

   (a) The compelling interest asserted by New York was an *independent judiciary*, as opposed to an impartial judiciary. The Court assumed that an independent judiciary referred to "the ability of judges to make their decisions free of the control or influence of other persons or entities."

   (b) The prohibition in the New York Code, however, was broader than in *White*. As applied, the Code prohibits New York judges from participating in politics at all, except to participate in their own campaigns. The Court holds that the proper remedy for influence or bias is recusal, not sanction.

(c) The New York Code was void for vagueness. A standard requiring the judge to "uphold the integrity and independence of the judiciary" and to act "in a manner that promotes public confidence in the integrity and impartiality of the judiciary" simply gave no adequate guidelines to determine permissible and impermissible conduct.

D. ***In re Watson*, 2003 WL 21321435 (N.Y. Ct. App. 2003).**

1. The New York Commission on Judicial Conduct sustained one charge of misconduct against the campaign of William Watson, who was successfully elected to a city judgeship. The Commission determined that Judge Watson's violation was sufficiently serious to warrant his removal from office. Holding: The charge of misconduct was sustained. The New York Pledges and Promises Clause is constitutional. However, the correct sanction is censure, rather than removal.

2. The Code: The New York Pledges and Promises Clause prohibits a judge or judicial candidate from "making pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." The complaint also alleged that Judge Watson's campaign violated the New York Commit Clause: a judge or judicial candidate shall not "make statements that commit or appear to commit" the judge or candidate with respect to cases or controversies.

3. The Charge: Campaign literature included the following statements:

(a) "Put a real prosecutor on the bench." "We are in desperate need of judge who will work with the police, not against them. We need a judge who will assist our law enforcement officers as they aggressively work towards cleaning up our city's streets."

(b) Lockport is attracting criminals from Rochester, Niagara Falls and Buffalo, to come into our city to peddle their drugs and commit their crimes. As a prosecutor, Watson had sent a message that this type of conduct will not be tolerated in Niagara County.

(c) "Arrests tell the story." Watson has "proven experience in the war against crime." "My opponents have been in office together for the last several years, and arrests have skyrocketed even though crime is down statewide and nationally."

(d) The Court must remain impartial, but the city must establish a reputation for zero tolerance and deter criminals before they come into the city.

(e) Once we gain a reputation for being tough, you'd be surprised how many [criminals] will go elsewhere, making the case load much more manageable.

4. The Court held that New York's Pledges or Promises Clause is more narrow and sufficiently precise than the Announce Clause in *White*. Statements that merely express a viewpoint do not amount to promises of future conduct. Conversely, however, candidates need not use the specific words "I promise" before their remarks may reasonably be interpreted as a pledge to act or rule in a particular way.

(a) The Court found that all of the comments taken together, in light of Watson's "comprehensive campaign theme," violate the Pledges and Promises Clause. "When viewed as a whole, petitioner's campaign effectively promised that, if elected, he would aid law enforcement rather than apply the law neutrally and impartially in criminal cases."

(b) The Court distinguishes *Matter of Shanley*, 98 N.Y. 2d 310 (N.Y. 2002), in which the use of the single phrase "law and order candidate" did not violate the Pledges and Promises Clause.

(c) A Pledges and Promises Clause does not prohibit judicial candidates from articulating their views on legal issues. The state has a valid interest in preventing party bias, promoting openmindedness, and increasing public confidence in the judiciary. The Pledges and Promises Clause is narrowly tailored to further this interest in impartiality and the appearance of impartiality.

E. ***In re Raab*, 2003 WL 21321183 (N.Y. Ct. App. 2003).**

1. Like *Spargo*, this appeal concerned Canon 100.5(A)(1) of the New York Code, which generally prohibits a sitting judge or judicial candidate from engaging in partisan political activity, except with respect to the judge's own campaign. Petitioner Raab was a candidate for a state trial bench. He met with Democratic Party officials to discuss campaign expenditures, and agreed to a round-figure $10,000.00 contribution to the party that was not tied to itemized expenses for his own campaign. He was later elected to a different trial bench, and while serving as a state district judge, took part in a Working Family Party "phone bank" on behalf of a county legislative candidate. The New York Commission on Judicial Conduct sustained four charges of misconduct against Raab, and imposed a sanction of censure. Holding: affirmed. The Code's rules against partisan political activity in 100.5(A)(1) are narrowly tailored to serve a compelling interest in preventing political bias or corruption in the judiciary.

2. The Code: The relevant portions of New York Code Section 100.5 are set forth above. *See*, discussion of the *Spargo* case, *supra*. Generally, the New York Code prohibits partisan political activity by a judge or judicial candidate, except with respect to his or her own campaign.

3. The Charge: Raab made a $10,000.00 contribution to the democratic party, together with other prospective judicial candidates who met with party officials and made similar contributions. His contribution was not tied to his own campaign expenses. He thereafter secured the Democratic Party nomination. The second charge concerned his work in a partisan phone bank on behalf of a county legislative candidate after he was elected to a different trial bench.

4. The Court found that the rules against partisan political activity were distinguishable from the Announce Clause in *White*, and more narrowly drawn. The Court acknowledged that judges and judicial candidates had certain free speech and associational rights protected under the First Amendment. However, the state must also ensure the judicial system is fair and impartial for all litigants, free of the taint of political bias or corruption, or event the appearance of bias or corruption. The Court viewed it as critical that the rules distinguish between conduct for a judicial candidates own campaign, and activity in support of other candidates for party objectives. "Needless to say, the state's interest in ensuring that judgeships are not – and do not appear to be – "for sale" is beyond compelling."

APPENDIX

A. Amendments to the Texas Code of Judicial Conduct, Misc. Docket No. 02-9167 (Aug. 22, 2002)

B. Proposed Amendments to the ABA Model Code of Judicial Conduct (August 2003)

C. Transcript of Oral Argument, *Republican Party of Minnesota v. White* (March 26, 2002)

D. Bibliography

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 02-9167

APPROVAL OF AMENDMENTS TO THE TEXAS CODE OF JUDICIAL CONDUCT

In *Republican Party of Minnesota v. White*, 122 S.Ct. 2528 (2002), the United States Supreme Court held that Minnesota's canon of judicial conduct, which prohibits judicial candidates from announcing their views on disputed legal and political issues, violates the First Amendment. In light of that decision, this Court determined it was appropriate to review the provisions of the Texas Code of Judicial Conduct to determine the extent to which changes to the Code were necessary. The Court appointed an advisory committee, composed of nationally recognized experts in the area of judicial ethics and free speech, to advise the Court about *White's* impact on the Texas Code of Judicial Conduct. The Committee's performance of its charge was exemplary and provided valuable insights to the Court. We commend the following members of the Committee for their dedication to this task:

Mr. Charles L. Babcock, Chair
Professor Elaine Carlson
Mr. R. James George
Professor Douglas Laycock
Dean John B. Attanasio
Mr. Leon Carter
Professor David M. Guinn
Professor Roy Schotland

The Court, having carefully considered the Committee's comments and recognizing that a general election involving a substantial number of judges and judicial candidates will take place shortly, has determined that it is appropriate to make amendments to the Texas Code of Judicial Conduct. These amendments should be placed in proper context. While there is no doubt that *White* compels amendments to our Code, the immediacy of pending elections requires that these amendments be undertaken without the full and deliberate study the Court would ordinarily employ. Like many of our sister states, we are called upon to provide immediate guidance to judges, judicial candidates and the electorate before the next election in November 2002. Thus, while we are inclined to engage in an extended debate on the impact of *White* with scholars, judges, the media, the Commission on Judicial Conduct, and other interested parties, we must yield to the reality that hundreds of judicial races will be contested this November and that the judges and candidates involved in those races are entitled to some direction on the permissible limits on judicial speech during this election cycle.

These changes represent our initial attempt to satisfy the requirements placed on our judicial conduct code by *White*. The Court will continue to examine the extent to which these or additional changes to the Texas Code of Judicial Conduct are required. Subsequently, the Court will announce the formation of a committee to examine all of provisions of the Texas Code of Judicial Conduct.

Accordingly, it is

ORDERED that:

1. The Texas Code of Judicial Conduct is amended as follows:

   a. Canons 3(B)(10), 6(B), and 6(C)(1) are amended; and

   b. Canon 5 is amended and a comment is added

2. These amendments take effect immediately;

3. The Clerk is directed to file an original of this Order with the Secretary of State forthwith, and to cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*.

SIGNED AND ENTERED this 22nd day of August 2002.

Thomas R. Phillips, Chief Justice

Nathan L. Hecht, Justice

Craig T. Enoch, Justice

Priscilla R. Owen, Justice

James A. Baker, Justice

CANON 3(B)(10)

(10) A Judge shall abstain from public comment about a pending or impending proceeding which may come before a judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. ***This prohibition applies to any candidate for judicial office, with respect to judicial proceedings pending or impending in the court on which the candidate would serve if elected. A*** [~~The~~] judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge or ***judicial candidate*** is a litigant in a personal capacity.

CANON 5

(1) [~~A judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individual's judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case.~~

~~(2)~~] A judge or judicial candidate shall not:

(i) 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*** [~~judicial duties other than the faithful and impartial performance of the duties of the office, but may state a position regarding the conduct of administrative duties~~] ;

(ii) knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent; ***or***

(iii) make a statement that would violate Canon 3B (10).

(2) [~~(3)~~] A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party. A judge or judicial candidate may attend political events and express his or her views on political matters in accord with this Canon and Canon 3B (10).

(3) [~~(4)~~] A judge shall resign from judicial office upon becoming a candidate in a contested election for a non-judicial office either in a primary or in

a general or in a special election. A judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention or while being a candidate for election to any judicial office.

(4) ~~[(5)]~~ A judge or judicial candidate subject to the Judicial Campaign Fairness Act, Tex. Elec. Code § 253.151, *et. seq.* (the "Act"), shall not knowingly commit an act for which he or she knows the Act imposes a penalty. Contributions returned in accordance with Sections 253.155(e), 253.157(b) or 253.160(b) of the Act are not a violation of this paragraph.

COMMENT

A statement made during a campaign for judicial office, whether or not prohibited by this Canon, may cause a judge's impartiality to be reasonably questioned in the context of a particular case and may result in recusal.

CANON 6

B. A County Judge who performs judicial functions shall comply with all provisions of this Code except the judge is not required to comply:

(1) when engaged in duties which relate to the judge's role in the administration of the county;

(2) with Canons 4D (2), 4D (3), or 4H;

(3) with Canon 4G, except practicing law in the court on which he or she serves or in any court subject to the appellate jurisdiction of the county court, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.

(4) with Canon *(5)(3)* ~~[5(4)]~~.

C. Justices of the Peace and Municipal Court Judges.

(1) A justice of the peace or municipal court judge shall comply with all provisions of this Code, except the judge is not required to comply:

(a) with Canon 3B(8) pertaining to ex parte communications; in lieu thereof a justice of the peace or municipal court judge shall comply with Canon 6C(2) below;

(b) with Canons 4D(2), 4D(3), 4E, or 4H;

(c) with Canon 4F, unless the court on which the judge serves may have jurisdiction of the matter or parties involved in the arbitration or mediation; or

(d) if an attorney, with Canon 4G, except practicing law in the court on which he or she serves, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.

(e) with Canon *5(3)*[~~5(4)~~].

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 02-9167

STATEMENT OF JUSTICE HECHT CONCURRING IN THE AMENDMENTS TO THE TEXAS CODE OF JUDICIAL CONDUCT APPROVED AUGUST 21, 2002

Before promulgating any rule, the Supreme Court of Texas must, in my view, determine that the rule does not violate the United States Constitution, the Texas Constitution, or federal or state law. The Court should not adopt rules of doubtful validity. A strict adherence to this standard must yield to present circumstances.

After the United States Supreme Court's decision in *Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002), it is clear that Canon 5(1) of the Texas Code of Judicial Conduct violates the First Amendment to the United States Constitution and should be repealed. It is less clear whether other Code provisions relating to judicial speech — Canon 3(B)(10) and the remainder of Canon 5 — are likewise infirm. The eminent members of the advisory committee appointed by the Supreme Court of Texas are not of one mind on the subject, and the issues and arguments they have raised in their deliberations over the past few weeks deserve thoughtful consideration. This can be done, however, only at the expense of delaying guidance to the scores of judicial campaigns well underway across the State. I agree with the Court that some immediate action is necessary while the Code is reviewed further.

Therefore I join in the Code amendments approved today although I remain in doubt whether they are sufficient to comply with the First Amendment.

Nathan L. Hecht
Justice

Charles L. Babcock
(713) 752-4210
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August 20, 2002

Chief Justice Thomas R. Phillips
Justice Nathan L. Hecht
Justice Craig T. Enoch
Justice Priscilla R. Owen
Justice James A. Baker
Justice Deborah G. Hankinson
Justice Harriet O'Neill
Justice Wallace B. Jefferson
Justice Xavier Rodriguez
The Supreme Court of Texas
201 West 14th Street
P.O. Box 12248
Austin, Texas 78711

Re: Second Report of the Judicial Speech Advisory Committee

Dear Justices:

The Judicial Speech Advisory Committee is pleased to present this second report to the Court which discusses the constitutionality of Canon 5(2) and 3(B)(10) after the United States Supreme Court decision in *Republican Party of Minnesota v. White,* 122 S.Ct. 2528 (2002). We also consider the Texas recusal rules in light of *White*. We have held five meetings, the last three of which were transcribed. We appreciate your consideration of our thoughts.

I. CANON 5 (2)(i)

The Committee recommends that if Canon 5(2)(i) is retained, that it be amended as follows:

(2) A judge or judicial candidate shall not:

(i) 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 or;

Committee members Elaine Carlson, Leon Carter, Douglas Laycock, John Attanasio and Roy Schotland believe that Canon 5(2)(i) should be retained with this change; Committee members Charles Babcock, Jim George, and David Guinn believe Canon 5(2)(i) should be entirely repealed.

Pledges or promises concerning pending or impending cases are a form of comment covered by Canon 3(B)(10), as amended, if the Court accepts the Committee's recommendation to make that section applicable to both judges and judicial candidates. The pledge-or-promise provision is therefore significant to the extent that it goes beyond specific cases that are pending or impending at the time of the promise.

The principle reason for retaining a rule against pledges or promises is to protect the due process rights of future litigants. The Committee believes that a pledge or promise is different from a statement of position. It is one thing to state a present position, even on a specific legal issue; it is another to promise to rule that way in the future without regard to the record or the arguments presented to the Court. A judge or candidate cannot promise that he will not "consider views that oppose his preconceptions," or that he will not "remain open to persuasion, when the issues arise in a pending case." *White,* 122 S.Ct. at 2536. The pledge or promise of future judicial conduct crosses this line.

The Committee also recognizes that the line is fine between a statement of current position and a promise of future conduct. Emphatic statements of current position may be as politically effective as a pledge or promise; a judge may be persuaded by subsequent arguments despite having made a pledge or promise. The prohibition on pledges and promises is partly of symbolic value; it reminds judges and candidates of their constitutional duty to remain open to evidence and argument, and campaign discussion of why no candidate can make pledges or promises would remind the voters of this duty.

The prohibition on pledges and promises also has important practical value in protecting the judicial process and the rule of law from abusive practices by prospective litigants. The committee is informed that judges and candidates are served with what amount to demand letters from interest groups, often associations whose members are frequent litigants. Sometimes explicitly and more often by strong implication, these letters promise campaign contributions or endorsements and a block of votes in exchange for a pledge on particular issues. Such demands seek to entirely bypass the adversary process and to secure the judge's decision in advance, by means of a pledge or promise. The Committee believes that for a judge to succumb to such demands would be both unethical and a violation of the due process rights of future litigants adversely affected by the pledge.

Only the ban on pledges and promises prohibits this abuse. The Committee sees no workable way to write a rule that distinguishes voluntary pledges and promises from pledges and promises demanded by associations of prospective litigants. Moreover, some members of the Committee believe that a pledge or promise in either context presents the same evils, and that the pledge demanded by an interest group simply presents those evils more graphically.

The argument for repealing Canon 5(2)(i) starts from the fineness of the distinction between a statement of position and a pledge or promise. Because the line is so fine, the reasoning of *White* might lead to invalidation of pledge-or-promise provisions as well. It is for this reason that the Committee recommends narrowing the provision to only those pledges or promises that most directly threaten due process.

The Committee believes that as amended, Canon 5(2)(i) is more likely than not to be upheld. Committee members Charles Babcock, Jim George, and David Guinn, however expressed considerable doubt that the current United States Supreme Court would uphold Canon 5(2)(i) as currently written. Other Committee members read the majority opinion in *White* as strongly suggesting that at least one member of that majority was unwilling or unready to strike more (or much more) than the "Announce Clause," Minnesota's equivalent of our Canon 5(1).

The fineness of the distinction between statements of position and pledges or promises also goes to the question whether Canon 5(2)(i) is sound policy. Charles Babcock, Jim George, and David Guinn would repeal it on the ground that after *White* and the recommended repeal of Canon 5(1), Canon 5(2)(i) accomplishes little, and that it may ensnare unsophisticated candidates while doing little to control the campaign behavior of candidates who choose their words more carefully. Five members of the Committee believe, with varying degrees of enthusiasm, that Canon 5(2)(i) makes some independent contribution to the protection of due process, and that it is worth keeping even without Canon 5(1).

We also believe that "impending" needs to be defined, whether in Canon 8 or elsewhere, as used in Canon 3(B)(10) and as used in Canon 5(2)(i) if that Canon is retained and amended as we have proposed. We suggest:

(b) A proceeding is "impending" if:

(i) it is pending in a court or administrative agency whose decisions are subject to review by de novo review, original proceeding, or appeal, in the judge's court; and

(ii) the judge has actual knowledge, through press reports or otherwise, that a litigant has specific plans to file a proceeding in the judge's court or in a court or agency described in subparagraph (i); or

(iii) the judge has actual knowledge, through press reports or otherwise, that a specific event has occurred that is highly likely to lead to litigation in the judge's court or in a court or agency described in subparagraph (i).

II. CANON 5 (2)(ii)

The prohibition on false statements of fact in Canon 5(2)(ii) is also derived from ABA models. There are similar provisions in other states, and also more expansive provisions that have produced some litigation.

A majority of the Committee believes that Canon 5(2)(ii) should be limited to material misstatements. With that amendment, it would read:

(2) A judge or judicial candidate shall not:

. . .

(ii) knowingly or recklessly misrepresent the identity, qualifications, present position, or other material fact concerning the candidate or an opponent;

Three members, John Attanasio, Charles Babcock, and Jim George, believe that it is inappropriate and probably unconstitutional for any government agency to police the truth or falsity of campaign rhetoric outside the scope of the existing law of defamation. Canon 5(2)(ii) applies to defamation of one's opponent, but it also includes false claims about one's self, and it may also go beyond the law of defamation to the extent (if any) that some false statements about one's opponent are material to an election but not defamatory.

The Supreme Court of the United States has often said that there is no constitutional value in false statements of fact. *E.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990). False statements of fact are constitutionally protected only where necessary to avoid deterring other statements that *are* of constitutional value. *See*, most recently, *BE & K Const. Co. v. N.L.R.B.*, 122 S.Ct. 2390, 2399 (2002). But these repeated statements have been applied only in settled contexts such as defamation, fraud, perjury, and false advertising; they are dicta as to broader or more novel applications. There is dicta about the state's interest in regulating false statements in campaigns in *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 349-51 (1995), but no decision and few hints about the scope of permissible regulation, if any.

The best known application of the limited protection for false statements of fact is defamation law; false statements of fact, made with knowing or reckless disregard of the truth, may be subject to civil liability, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), or even criminal prosecution, *Garrison v. State of La.*, 379 U.S. 64 (1964), although the latter is quite rare and no member of the Committee expressed any support for criminal enforcement. There is a steady trickle of defamation suits arising out of election campaigns, *e.g., Casso v. Brand*, 776 S.W.2d 551 (Tex. 1989), and while most of these suits are unsuccessful on the facts, courts have not suggested that campaign speech gets any special privilege beyond the *New York Times* standard. There is a recent and controversial criminal defamation conviction in Kansas, against a newspaper and its editors for falsely reporting that a candidate for public

office lived outside the jurisdiction. Anne Lamoy and Mark Wiebe, *Jury Convicts Newspaper, Editor, Publisher of Criminal Defamation*, Kansas City Star, 2002 WL 23069558 (July 18, 2002).

Recent cases in other jurisdictions have invalidated more intrusive regulations of misleading statements in judicial campaigns, but each of these opinions has indicated in dicta that a simple prohibition on knowingly or recklessly false statements of fact would be upheld. *Butler v. Alabama Judicial Inquiry Commission*, 802 So.2d 207 (Ala. 2001); *In re Chmura*, 608 N.W.2d 31 (Mich. 2000); *Weaver v. Bonner*, 114 F. Supp. 2d 1337 (N.D. Ga. 2000), *appeal pending*. There is also a contrary opinion in *State ex rel. Public Disclosure Com'n v. 119 Vote No! Committee*, 957 P.2d 691 (Wash. 1998). The Washington court invalidated a ban on knowingly false statements of facts in campaigns, as applied to a referendum; there was no occasion to consider whether judicial campaigns might be different. There was a strong dissent, and both sides agreed that the holding was the first of its kind. There is also a well-done student note arguing for the validity of provisions like Canon 5(2)(ii). Adam R. Long, *Keeping Mud Off the Bench: The First Amendment and Regulation of Candidates' False or Misleading Statements in Judicial Elections*, 51 Duke L.J. 787 (2001). This note describes two earlier decisions enforcing misrepresentation rules in judicial elections. *Harper v. Office of Disciplinary Counsel, Supreme Court of Ohio,* 113 F.3d 1234, 1997 WL 225899 (6th Cir. 1997) (not officially reported); *In re Baker*, 542 P.2d 701 (Kan. 1975).

The Committee believes that Canon 5(2)(ii) incorporates the *New York Times* standard, and that it applies only to knowingly or recklessly false statements of fact. So interpreted, a majority believes that it is constitutional. Without necessarily endorsing the details in each opinion, a majority of the Committee believes that the reasoning of the Alabama and Michigan courts, the federal district court in Georgia, and the Washington dissent, is generally more in accord with prevailing doctrine in the Supreme Court of the United States.

All members of the Committee agree that it is especially sensitive for a government agency to decide what is true or false in the context of an election campaign. The majority believes that in the campaign context, "statements of fact" may have to be confined to objectively verifiable statements of fact; neither the courts nor an administrative agency should resolve disputes about the truth of statements that depend in part on judgments best left to the voters. The Committee thus understands Canon 5(2)(ii) to reach statements of fact that can be determined to be true or false without relying on judgments of value or policy. "My opponent lacks judicial temperament" is a conclusion based on underlying facts and also on a judgment about what constitutes appropriate judicial temperament; "three past presidents of the bar association say my opponent lacks judicial temperament" is a verifiable statement of fact that may be true or false. A candidate who knowingly makes such a false statement both distorts the electoral process and demonstrates his unfitness to be a judge. A majority of the Committee believes that such applications of Canon 5(2)(ii) would be upheld.

The minority of the Committee believes that these concerns are reasons to repeal the rule entirely and leave false campaign statements to the law of defamation. And they believe that the Supreme Court of the United States is unlikely to uphold regulation of campaign speech that is more intrusive than the law

of defamation. They also suggested that there is a potential problem dealing with false statements of positions. For example, if a candidate stated his or her position to one group one way and to another group another way, the difference could generate disputes that they believe are best left to the voters.

III. CANON 5 (2)(iii)

The Committee proposes a new Clause at the end of whatever is retained of Canon 5(2):

(3) A judge or judicial candidate shall not:

(iii) make a statement that, if made by a sitting judge, would violate Canon 3(B)(10).

This is a simple cross-reference, incorporating Canon 3(B)(10) and making it immediately visible in the Canon on political activity. Canon 3(B)(10) was previously irrelevant to campaigns, because Canon 5(1) covered all the same ground and much more. Canon 3(B)(10) now applies to campaigns if our recommendations are adopted; and it will still apply to the noncampaign behavior of sitting judges. It is best to refer to the rule in both places.

IV. CANON 3 (B)(10)

This section is an imperative in that it serves to insure the integrity of the judiciary. Preserving the integrity of the judiciary and maintaining public confidence in the judiciary is a compelling state interest of the highest order. This provision is narrowly drawn and, in our opinion, suffers no problems in regard to over breadth. The provision is designed to insure that due process of law will be afforded to all litigants by an impartial judiciary. The Supreme Court emphasized this over seventy years ago in *Tumey v. State of Ohio*, 273 U.S. 510 (1927), emphasizing that an impartial judge is an absolute essential to due process. As the Supreme Court recently pointed out in *White*, impartiality is subject to a multitude of definitions. The impartiality we seek to accomplish is open-mindedness. As Justice Scalia pointed out, "This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so. It may well be that impartiality in this sense, and the appearance of it, are desirable in the judiciary. . .."

As outlined in our first report, we do believe that Canon 3(B)(10) should be made applicable to both judges and judicial candidates. This could be accomplished by the addition of a sentence at the end of the section as follows: "This section will apply to any candidate for judicial office, *with respect to judicial proceedings pending or impending in the court on which the candidate would serve if elected.*" The definition of "impending" suggested for Canon 5(2)(i) should also be added to, or made applicable to, Canon 3 (B)(10).

V. RECUSAL

The Committee had a detailed discussion of recusal in the context of campaign speech in judicial campaigns. Elaine Carlson provided a helpful memorandum on the issue that is attached. The Committee concluded that it had no real data on which to base a recommended change to Tex. Rules of Civil Procedure 18b or Tex. Rule of Appellate Procedure 16.2.

The Committee believes that the courts may require recusal in a particular case on the basis of judicial campaign speech that it may not prohibit. And the Committee believes that Canon 5 should contain language making judicial candidates aware of this position. Professor Carlson's memorandum sets out the language used by the Supreme Court of Missouri in its July 18, 2002 ruling changing that State's Code of Judicial Conduct in light of *White*.

We suggest the following language be added to Canon 5:

"Statements made during campaigns for judicial office, whether or not prohibited by this Canon, may cause a judge's impartiality to be reasonably questioned in the context of a particular case and may result in recusal or other remedial action."

VI. ADDITIONAL COMMENTS

A. Professor Schotland's Comments

Professor Schotland has provided a helpful analysis on the issue of why judicial elections, as opposed to legislative or executive branch elections, are different in Texas. Some members of our committee believe, however, that, in practice, there is little difference. I provide Professor Schotland's scholarship below for the Court's review:

> The *White* decision opens many questions that are not easy to answer. Although our voters elect judges, the Texas Constitution includes several provisions that treats judges as uniquely different from other elective officials: (1) appellate judges' terms are uniquely long (six years, Art. 5 Secs. 2 and 6); (2) all judges must have training and experience (Art. 5, Sec. 2); and (3) only judges are subject to mandatory age of retirement (Art. 5, Sec. 1-a1). Also, the Code of Judicial Conduct requires a judge to resign before becoming a candidate in a contested election for a non-judicial office (canon 5(4)).
>
> Such provisions in our Constitution, similar provisions in the Constitutions of other States that elect judges, and numerous other statutes and rules in many States, all reflect the fact that a judge's job

differs in fundamental ways from the work of other elective officials. Such differences are the reason that so many States have sought to regulate judicial elections in ways, which would be inconceivable for any other elections. The *White* decision requires review of various provisions that aim at regulating appropriately, and remapping the contours of what is "appropriate" is a substantial task that will take a substantial period of time.

B. **Dean Attanasio's Comments – Judicial Electioneering and Retention Elections: The Missouri Plan**

In discussions before the committee, Dean Attanasio noted that Justice O'Connor's opinion in *White* focused on the inherently political nature of judicial electioneering itself. In her concurring opinion, Justice O'Connor was concerned that "the very practice of electing judges undermines" the state interest in an impartial judiciary. In this connection, she remarked, "Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so." Moreover, citing Professor Schotland's work, Justice O'Connor critically noted the impact fundraising on the process of electing judges. Specifically referring to Texas, she cited a study claiming that a substantial percentage of the funds raised by Justices of the Texas Supreme Court "'came from parties and lawyers with cases before the court or contributors closely linked to these parties.'" To avoid these difficulties, Justice O'Connor recommended that states adopt the Missouri plan of uncontested retention elections for judges. "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."

On behalf of the Committee, I want to thank the Court for allowing us to serve you and the citizens of Texas on these important matters.

Very truly yours,

Charles L. Babcock, Chairperson
Judicial Speech Advisory Committee

CLB:dal

AMERICAN BAR ASSOCIATION

MODEL CODE OF JUDICIAL CONDUCT

PROPOSED AMENDMENTS
AUGUST 2003

Additions underlined; deletions struck through

Terminology

...

"Impartiality" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

...

CANON 1

A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

Commentary:

Deference to the judgments and ruling of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. A judiciary of integrity is one in which judges are known for their probity, fairness, honesty, uprightness, and soundness of character. An independent judiciary is one free of inappropriate outside influences. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

CANON 2

A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPORIETY IN ALL OF THE JUDGE'S ACTIVITIES

A. A judge shall respect and comply with the law* and shall act at all times in a manner that promotes public confidence in the integrity and impartiality* of the judiciary.

Commentary:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. Examples are the restrictions on judicial speech imposed by Sections 3(B)(9) and (10) that are indispensable to the maintenance of the integrity, impartiality, and independence of the judiciary.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired. See also Commentary under Section 2C.

...

CANON 3

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

...

B. Adjudicative Responsibilities.

...

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require* similar abstention on the part of court personnel* subject to the judge's discretion and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(10) A judge shall not, 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.

Commentary:

family* to adhere to the same standards of political conduct in support of the candidate as apply to candidate;

...

(d) shall not:

(i) with respect to cases, controversies, or issues that are likely to come before the court, make pledges, ~~or~~ promises or commitments ~~of conduct in office other than~~ that are inconsistent with the ~~faithful and~~ impartial* performance of the adjudicative duties of the office; or

~~**(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or**~~

~~(iii)~~

(ii) knowingly* misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent;

Commentary:

Section 5A(3)(d) prohibits a candidate for judicial office from making statements that ~~appear to~~ commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. See also Sections 3B(9)and (10), the general rules on public comment by judges. Section 5A(3)(d) does not prohibit a candidate from making pledges or promises respecting improvements in court administration. Nor does this Section prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties. This Section applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming appointment. See also Rule 8.2 of the ABA Model Rules of Professional Conduct.

...

Report

The American Bar Association (ABA) Standing Committee on Judicial Independence and the Standing Committee on Ethics and Professional Responsibility have collaborated on a recommendation to amend portions of the ABA Model Code of Judicial Conduct in light of recent First Amendment challenges to judicial campaign speech restrictions.

Background

In September 2001, the ABA Standing Committee on Judicial Independence formed a Working Group on the First Amendment and Judicial Campaigns to review Canon 5 of the ABA Model Code of Judicial Conduct in light of recent First Amendment challenges to restrictions on judicial campaign speech. The Working Group is the next logical step in a series of projects undertaken by the ABA. In 1998, Part II of the report of the Task Force on Lawyers Political Contributions[1] made recommendations specifically addressing contributions to judicial campaigns, urging the House of Delegates to amend the ABA Model Code of Judicial Conduct. These recommendations were withdrawn from the House of Delegates and the Ad Hoc Review Committee on Judicial Election Campaign Finance Reform was formed by ABA President Philip Anderson to review how the objectives of the Task Force Report Part II might best be given effect. The Ad Hoc Committee ultimately made recommendations for amendments to the Model Code relating to judicial campaign contributions that were adopted by the ABA House of Delegates in August 1999.[2]

The Ad Hoc Committee, in its report submitted to the ABA House of Delegates, suggested that further study was necessary in certain areas. One area addressed the possibility of using public financing as a tool for reducing the high campaign costs and rhetoric involved in state judicial elections. The Standing Committee on Judicial Independence formed a Committee to review this proposal and in February 2002 issued a comprehensive, seminal report recommending full public financing for states that elect judges at the appellate level. This ground-breaking report has led to numerous legislative proposals in the states. In the fall of 2002, the first of these legislative proposals based, in part, on the recommendations of the Committee, was signed into law in North Carolina.

The debate over public financing is premised on the concern that judicial elections are becoming costlier and more contentious. The increased cost of judicial elections, combined with the new age of television advertising, has contributed to a new dynamic for judicial elections. Judicial candidates are beginning to question ethics restrictions on judicial campaign speech, designed to protect the independence and impartiality of the judiciary. Raising First Amendment arguments, challenges to provisions of judicial canons across the states have surfaced in the past few years. In addition, national attention has been brought to the issue with two conferences held by the National Center for State Courts (NCSC). In December 2000, the NCSC hosted a National Summit on Judicial Selection. Teams attended the summit from approximately 17 states that elect their judiciaries. The teams included the Chief Justice of the state as well as

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[1] ABA Report and Recommendations of the Task Force on Lawyers Political Contributions, Part II (1998).

[2] *See* amendments to AMERICAN BAR ASSOCIATION MODEL CODE OF JUDICIAL CONDUCT CANONS 3C(5); 3E(1)(e); and 5C(3) and (4). House of Delegates Report 123, Annual Meeting 1999.

representatives of the legislature and the public. During the summit, which focused on campaign finance issues in judicial elections, questions arose regarding judicial campaign speech, given the changing nature of judicial campaigns. Following up on those concerns, the NCSC convened a Symposium on Judicial Campaign Conduct and the First Amendment, in November 2001. At this conference, scholars, judges, state chief justices, ethics experts and others debated the various approaches to, and justifications for, restrictions on judicial campaign speech.

At this same time the Working Group convened to begin its evaluation of Canon 5 provisions regarding judicial campaign speech. The Working Group drew its members from a number of ABA entities directly involved in judicial issues. The Standing Committee on Judicial Independence and the Standing Committee on Ethics and Professional Responsibility were represented by a majority of the Working Group members. The Judicial Division also provided a representative. Members included Margaret Childers, Executive Director, Alabama Judicial Inquiry Commission; Ralph Elliot; Hon. Ralph Erickson; Daniel Hildebrand; Douglas Houser; M. Peter Moser; Hon. Randall Shepard; Paul Verkuil; and Hon. Laurie Zelon. Judge James Wynn of North Carolina chaired the Working Group and Professor James Alfini of Northern Illinois University College of Law served as the reporter.

In addition to the members of the Working Group, an active and diverse group of special advisors was formed to assist the Working Group in its efforts. Those special advisors included New York Supreme Court Justice George Marlow, nominated by Chief Judge Judith Kaye; attorney James Bopp; Professor Robert O'Neil of the University of Virginia and Professor Roy Schotland of Georgetown University Law Center.

The Working Group suspended its efforts in March 2002, after the Supreme Court of the United States heard oral arguments in *Republican Party of Minnesota v. White*. 122 S. Ct. 2528 (2002). This case challenged a provision of the Minnesota Code of Judicial Conduct restricting a candidate's ability to "announce his or her views on disputed legal or political issues."[3] Following the Court's ruling in the case, finding the "announce clause" unconstitutional on First Amendment grounds, the Working Group began again in earnest to review Canon 5, as well as other provisions of the Model Code, in light of the Court's opinion.

The Working Group held a number of meetings and conference calls, reviewed extensive materials, and debated a variety of alternative wordings to Model Code provisions. A preliminary proposal of amendments to the Model Code was presented at the American Judicature Society 18th National Conference on Judicial Conduct and Ethics, in October 2002. Over 200 conference attendees, including directors of state judicial ethics commissions, lawyers, judges and scholars, were given an opportunity to review and comment on the preliminary amendments. Based on these comments and those received from a meeting of the Arizona Judicial Conduct Commission, the Working Group again revised its amendments to the Model Code. The final version of the proposed amendments was voted on and approved by the Working Group in January 2003. The Standing Committee on Judicial Independence approved the report in February 2003 and the Standing Committee on Ethics and Professional Responsibility approved the report in April 2003.

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[3] MINN. CODE OF JUDICIAL CONDUCT, CANON 5A(3)(d)(i) (2000).

The resulting proposed amendments seek to update the Model Code of Judicial Conduct by accommodating judicial independence and impartiality with First Amendment principles protecting the interest in vigorous electoral activity.

Republican Party of Minnesota v. White

Challenges to the constitutionality of ethics provisions restricting judicial campaign speech escalated in the 1990s and into the twenty-first century, culminating in the U. S. Supreme Court ruling in *Minnesota Republican Party v. White.*[4] In this case, a provision of the Minnesota Code of Judicial Conduct restricting judicial campaign speech was ruled unconstitutional on First Amendment grounds. The decision in *White*, which was handed down on the final day of the 2002 term, was awaited with a great deal of apprehension because it was the first time that the United States Supreme Court had ruled on the constitutionality of a judicial ethics provision.

The Court's ruling in *White* has provoked extensive commentary. Some have claimed that the decision effectively closes the door on attempts to restrict candidate speech in judicial election campaigns. However, disciplinary bodies and judicial ethics advisory committees in a number of jurisdictions have stated that campaign speech restrictions not explicitly addressed by the *White* decision should continue to be enforced.[5] Similarly, the ABA Working Group on the First Amendment and Judicial Campaigns believes that the decision can and should be read narrowly, leaving the door open for the drafting of campaign ethics restrictions that will pass constitutional muster.

In the *White* case, the Supreme Court of the United States, in a five to four decision, ruled: "The Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment."[6] The majority opinion was authored by Justice Scalia, with concurring opinions by Justices O'Connor and Kennedy. Justice Stevens authored a dissenting opinion that was joined by Justices Souter, Breyer, and Ginsburg. Justice Ginsburg authored a separate dissenting opinion joined by Stevens, Souter, and Breyer.

The language that the Supreme Court declared unconstitutional is an outdated attempt at regulating judicial campaign speech. The offending language reads as follows: "a candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues."[7] This so-called "announce clause" was a key provision in the 1972 version of the ABA Model Code of Judicial Conduct. Only nine states, including Minnesota, still had the announce clause in their judicial ethics canons at the time of the decision in *White*.[8] Due to concerns over the constitutionality of the "announce clause," the 1990 version of the ABA Model Code of Judicial Conduct does not contain this language.

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[4] Republican Party of Minnesota v. White, 122 S. Ct. 2528 (2002).
[5] *See* Cynthia Gray, *The states' response to Republican Party of Minnesota v. White*, 86 Judicature 163 (2002).
[6] *White*, 122 S. Ct. at 2542.
[7] MINN. CODE OF JUDICIAL CONDUCT, CANON 5A(3)(d)(i) (2000).
[8] Materials prepared in conjunction with Aug. 9, 2002 ABA Standing Committee on Judicial Independence CLE program, "The Supreme Court Speaks – Can Judicial Candidates? Life After Republican Party of Minnesota v. White," at the 2002 Annual Meeting of the ABA in Washington, D. C.

In the lower court opinion, *Republican Party of Minnesota v. Kelly*,[9] the Eighth Circuit declared that it was construing the "announce clause" narrowly and that the Court was effectively reading into it the "commit clause"[10] language from the 1990 version of the Model Code. At present, thirty states have language similar to the "commit clause."[11] Thus, the critical question for most states is, how does the Court's opinion affect this and other provisions in the 1990 Model Code that regulate campaign speech? In addition to the "commit clause", Canon 5A(3)(d) includes the "pledges or promises clause,"[12] and the "misrepresent clause."[13] Forty-one states have language similar to the "pledges or promises clause," and 41 states have language similar to the "misrepresent clause."[14]

A narrow reading of the *White* decision has led many to conclude that the campaign speech provisions of the 1990 ABA Model Code of Judicial Conduct are still viable. With regard to the "pledges or promises" clause, Justice Scalia seemingly ducks the issue by stating: "... this is a prohibition that is not challenged here and on which we express no view."[15] As to the "commit clause," the Court again arguably avoids the issue by stating: "We do not know whether the announce clause (as interpreted by state authorities) and the 1990 ABA Canon are one in the same. No aspect of our constitutional analysis turns on this question."[16] Subsequent to the Court's decision in *White*, at least five states that have provisions similar to those in the 1990 ABA Model Code—Florida, Georgia, Kentucky, Indiana, New York and Ohio--have issued statements through their high courts or conduct commissions that these provisions are not affected by the *White* decision and will continue to be enforced.

To conclude, however, that the *White* decision leaves the current Code provisions intact may fail to reckon with certain aspects of the Court's analysis. Although the court explicitly declined to rule on the constitutionality of the pledges-or-promises and commit clauses, both of these provisions and the "misrepresent clause" are, like the "announce clause", content-based restrictions on a candidate's speech and would therefore be subject to strict scrutiny if challenged in subsequent cases. That is, defenders of these provisions would have the burden of showing that they are "(1) narrowly tailored, to serve (2) a compelling state interest."[17] Justice Scalia's majority opinion finds unconvincing the state's argument that the "announce clause" restriction is justified because of the state's compelling interest in preserving judicial impartiality and the appearance of impartiality.

Justice Scalia considers three possible definitions of impartiality. The first definition considers impartiality in its "traditional sense,"[18] citing earlier Supreme Court cases, as a "lack of bias for or against either party."[19] Because the announce clause prohibits expressions of bias

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[9] 247 F.3d 854 (2001).
[10] *Id.* citing AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (1990).
[11] ABA Materials, *supra* note 8.
[12] AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (1990).
[13] AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(iii) (1990).
[14] ABA Materials, *supra* note 8.
[15] *White*, 122 S. Ct. at 2532.
[16] *Id.* at 2534, footnote 5.
[17] *White*, 122 S. Ct. at 2534.
[18] *Id.* at 2535.
[19] *Id.*

with regard to issues rather than parties, the Court concludes that impartiality is not preserved in this sense. The second definition construes impartiality as a "lack of preconception in favor of or against a particular legal view."[20] Although impartiality, so defined, ostensibly is protected by the announce clause, the Court failed to see a compelling state interest in discouraging judges, in light of their legal backgrounds, from developing and expressing views on legal issues. Finally, the Court posits that impartiality might mean "open-mindedness",[21] but states that the announce clause fails to preserve impartiality in this sense because it is under-inclusive, preventing judicial candidates from announcing their positions only while campaigning for office.[22]

The majority opinion in *White* greatly informed the work of this project. Members of the Working Group carefully analyzed the provisions of the Model Code directly related to campaign speech and arrived at a series of recommendations to accommodate the important interest of preserving judicial impartiality, integrity and independence with the equally important concepts embodied in the First Amendment. The Working Group did not undertake a comprehensive revision of the entire Model Code. Instead, the Working Group proposed the following series of discrete amendments.

Recommended Revisions to the 1990 Model Code of Judicial Conduct

In light of the *White* opinion, the Working Group believes that restrictions on judicial speech will most likely pass constitutional muster if they are:

1. supported by a definition of "impartiality" to be added to the terminology section of the Code of Judicial Conduct, that comports with the discussion of impartiality in the majority opinion in *White*;
2. narrowly crafted to further the compelling state interest in judicial impartiality; and
3. imposed on judges in connection with all of their judicial duties, in response to the majority's criticism that the announce clause restriction was under-inclusive.

Terminology

The definition of "impartiality" tracks the analysis of impartiality in the majority opinion of *White*, by couching the definition in terms of an absence of bias or prejudice towards individuals and maintaining an open mind on issues. References to impartiality already existed in the Model Code and the Working Group felt it was important to provide a clear definition of its meaning. By following the language found in the Court's opinion, the Working Group developed a definition that is narrowly tailored yet encompasses the general concepts of judicial impartiality that are vital to the maintenance of an independent judiciary.

Commentary Revisions

Members of the Working Group determined it was important to reiterate and reinforce the need to preserve the crucial values of judicial impartiality, integrity and independence. Language was added to the commentary sections of Canons 1, 2 and 3 to supply a clearer definition of the importance of these judicial attributes. Given the scope of the Working Group's

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[20] *Id.* at 2536.
[21] *Id.*
[22] *Id.* at 2537.

project, members did not feel that it was appropriate to completely revise all portions of the Model Code. Therefore, the Working Group decided only to amend portions of the commentary sections of these Canon provisions to provide a clearer understanding of judicial impartiality, integrity and independence. The Standing Committee on Judicial Independence and the Standing Committee on Ethics and Professional Responsibility acknowledge that further study of the black letter of these canons might be necessary and support the need for a comprehensive review of the Model Code of Judicial Conduct.

Canon 3

Recognizing the necessity to make all speech restrictions applicable to sitting judges as well as judicial candidates, members of the Working Group sought to amend the provisions of Canon 3. Members of the Working Group deliberated over the merits of amending Canon 3B(9) to incorporate language more akin to the restrictions of Canon 5A(3)(d). The members settled on adding a new provision to the enumerated adjudicative responsibilities of Canon 3B. By adding a new provision that mirrors the speech restrictions for judicial candidates but is applicable to all sitting judges during the administration of their regular adjudicative responsibilities, the prevailing goal of preserving judicial independence, integrity and impartiality will be better served.

Disqualification

The members of the Working Group determined it was important to include a provision within the disqualification provisions of Canon 3 that related directly to judicial campaign speech. The proposed new Canon 3E(1)(f) is designed to make the disqualification ramifications of prohibited speech violations explicit. The language of this provision reflects the goals of Canon 5A(3)(d). A few states, in reviewing their codes of judicial conduct in light of the majority opinion in *Republican Party of Minnesota v. White*, have provided for disqualification as a remedy for preserving judicial impartiality.

Campaign Speech

The directive of the Working Group focused on analyzing the judicial campaign speech restrictions primarily found in Canon 5A(3)(d). The Working Group carefully considered the components of the majority opinion in *White* and rigorously reviewed each provision related to restrictions on judicial campaign speech. The members of the Working Group agreed that the addition of "impartiality" was a necessary addition to the provision of Canon 5A(3)(a) directing a judicial candidate to maintain the dignity appropriate to judicial office and to act in a manner consistent with the impartiality, integrity and independence of the judiciary.

The Working Group focused much of its discussion on the three provisions of Canon 5A(3)(d). These provisions, modified most recently in the 1990 revision of the Model Code, are commonly referred to as the "pledges and promises" clause, the "commit" clause and the "misrepresent" clause. The Working Group determined that it was appropriate at this time to maintain the current format of the "misrepresent" clause.

The provisions of the "pledges and promises" clause and the "commit" clause were carefully analyzed by the Working Group and a number of revisions were considered. Among other options, the members debated whether to maintain the current construction of both clauses,

completely eliminate the "commit" clause, or modify the language of both the "pledges and promises" clause and the "commit" clause to provide tighter construction. The final determination of the Working Group collapsed certain portions of the "commit" clause into the "pledges and promises" clause, and modified the language of that newly constructed clause. Specifically, members decided that restrictions on statements that commit a judge or judicial candidate "with respect to cases, controversies or issues that are likely to come before the court" served to protect a compelling interest in the maintenance of judicial impartiality, integrity and independence. The Working Group determined, though, that restrictions on statements that "appear to commit" were too vague to withstand strict scrutiny analysis. Therefore, the Working Group voted to strike "appear to commit" from the language of this provision.

Further, the Working Group determined that it was in the best interest to provide one provision that clearly stated what type of speech was restricted in a judicial campaign. Therefore, the Working Group voted to combine the remaining elements of the "commit" clause with the "pledges and promises" clause. In addition, the Working Group voted to amend the "pledges and promises" clause by removing reference to "conduct in office" and the "faithful" performance of the duties of the office. Reference to "faithful' was removed after a determination that this did not adequately state the compelling state interest in the preservation of judicial impartiality, integrity and independence. The new wording of the provision provides a clear enumeration of the restricted speech ("with respect to cases, controversies or issues that are likely to come before the court") and a clear statement of what is being protected by the restriction of this speech ("inconsistent with the impartial performance of the adjudicative duties of the office"). In the opinion of the Working Group, and adopted by both Standing Committees, these amended provisions of Canon 5A(3)(d) provide the appropriate construction to balance the First Amendment interest in vigorous and informative campaign speech with the compelling state interest in performing the duties of the judicial office impartially.

Provisions Requiring Further Study

The Standing Committee on Judicial Independence and the Standing Committee on Ethics and Professional Responsibility recognize that a comprehensive review and revision of the Model Code of Judicial Conduct is a necessary undertaking, given the changing nature of judicial elections and the role of judges in the 21st Century. Indeed, the Commission on the 21st Century Judiciary, convened in 2002 by ABA President Alfred P. Carlton, Jr., highlights the need for a comprehensive Model Code revision in its report and recommendations submitted to the House of Delegates this August. According to the report of the Commission on the 21st Century Judiciary a comprehensive revision of the Model Code should be undertaken soon in light of the implications of *White*; the changing role of the trial court judge as evidenced by the emergence of problem-solving courts; and the recognition that the last major Model Code revision was completed over 13 years ago, prior to the latest escalation of interest in judicial independence and accountability.

Conclusion

The Standing Committee on Judicial Independence and the Standing Committee on Ethics and Professional Responsibility, in adopting the recommended amendments of the Working Group on the First Amendment and Judicial Campaigns, seek to update the important provisions of the Model Code designed to preserve judicial impartiality, integrity and

independence. The Standing Committees acknowledge that judicial campaigns have entered into a new dimension with higher costs, more advertising and greater competition. Ushered in with this new age of judicial campaigns have been challenges to the Model Code restrictions on judicial campaign speech. Given this new climate of judicial elections and challenges to existing Model Code provisions, it is imperative that the ABA work quickly and efficiently to review and update its judicial speech restrictions. The maintenance of judicial impartiality, integrity and independence is crucial to the effective functioning of the judicial branch, at both the state and federal level. While judicial codes should be flexible to meet the demands and challenges of a new age, it is vitally important that a balance be found that preserves the independence, impartiality and integrity of the judiciary. The Standing Committees believe that these amendments are an important first step, followed closely by a comprehensive revision of the Model Code, to ensure that the Model Code continues to provide relevant, useful guidance for years to come.

Respectfully submitted,

D. Dudley Oldham, Chair
Standing Committee on Judicial Independence

Marvin L. Karp, Chair
Standing Committee on Ethics and Professional Responsibility

<<For opinion see 122 S.Ct. 2528>>

Briefs and Other Related Documents

United States Supreme Court Official Transcript.
REPUBLICAN PARTY OF MINNESOTA, et al., Petitioners,
v.
Verna KELLY, et al.
No. 01-521.
Tuesday, March 26, 2002.

Oral Argument

Washington, D.C.

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

JAMES BOPP, JR., ESQ., Terre Haute, Indiana; on behalf of the Petitioners.

ALAN I. GILBERT, ESQ., St. Paul, Minnesota; on behalf of the Respondents.

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*3 PROCEEDINGS

[10:08 a.m.]

CHIEF JUSTICE REHNQUIST: We'll hear argument now on number 01-521, The Republican Party of Minnesota, et al., versus Verna Kelly. Mr. Bopp.

ORAL ARGUMENT OF JAMES BOPP, JR.,
ON BEHALF OF PETITIONER

MR. BOPP: Mr. Chief Justice, and may it please the Court: Like most states, Minnesota selects its judges through periodic popular elections. And when candidates' speech is severely restricted, the people are denied access to the

APPENDIX C

information they need to make an informed choice. While state court judges are different from other elected officials, Minnesota's Announce Clause, as now interpreted by its supreme court, goes too far resulting in elections without campaigns.

QUESTION: Could we find out from you just what the Announce Clause prohibits that isn't already prohibited by the Pledges and Promises Clause, as it's been interpreted?

MR. BOPP: Yes, Justice O'Connor. The Announce Clause prohibits, according the decision of the Eighth Circuit, any general--allows general discussions of the law, while it prohibits any implying of how a person would rule--a candidate would rule, on an issue or case before *4 the Court.

QUESTION: How does that differ, then, from the Pledges or Promises Clause?

MR. BOPP: The Pledges and Promises Clause prohibits any pledge or promise that--other than faithful performance of duties in office. The difference between "announce," the plain language of the clause, and "pledge or promise"-- "announce" is simply making known, is one of the formulations of the Eighth Circuit, or implying; while "pledging or promising" is making a commitment on how you would rule in a future case.

QUESTION: But you think the Announce Clause, even as interpreted by the Eighth Circuit to be the same as the ABA canon, goes beyond that?

MR. BOPP: Well, Your Honor, there is one aspect of the current 1990 ABA canon that has--was not discussed by the Ninth Circuit or by the ABA brief. And that--

QUESTION: And where does that appear in your brief? Where is the ABA canon we're talking about? Where is it? I want to look at it while you're talking about it.

MR. BOPP: I do not have a reference to the ABA canon, Your Honor. I apologize. The ABA canon states that a--the 1990 ABA canon states that a candidate may *5 not make statements to commit, or appears to commit in deciding cases, controversies, or issues likely to come before the Court. While the ABA and the Eighth Circuit seem to imply that the 1990 canon was similar, if not the same, as the 1972 canon, they did not discuss the difference between the words "announce" and "commit."

"Commit," if you look in the dictionary, says "pledge." And, thus, the 1990 canon appears to be more narrow under plain--

QUESTION: Well, the Eighth Circuit did say that it was--that Minnesota's provision is the same as the ABA canon, right?

MR. BOPP: It did, Your--it did, Your Honor.

QUESTION: And the ABA canon prohibits candidates, judicial candidates, from making statements that commit or appear to commit a candidate.

MR. BOPP: Yes.

QUESTION: And that looks very much like the Pledge or Promise language. I--I don't know how we should interpret this.

MR. BOPP: Well, one of the problems, Your Honor, is that the January 29th opinion of the Minnesota Supreme Court interpreting the Announce Clause adopted the Eighth Circuit opinion and its interpretations.

QUESTION: Right.

*6 MR. BOPP: Unfortunately, the Eighth Circuit had conflicting statements about the scope of the interpretation that it was announcing.

QUESTION: Well, you were--you appear to be arguing, in your brief at least, that the Announce Clause is unconstitutionally vague.

MR. BOPP: Yes, Your Honor.

QUESTION: Is that your argument you're making?

MR. BOPP: Yes, we are.

QUESTION: But did you make that argument below?

MR. BOPP: Yes, we did, as to the interpretation proffered in the district court, adding the words "likely to come before the Court." But where we are now, Your Honor, is that the Eighth Circuit sua sponte added other glosses to this canon, even though it was not advocated by any of the parties.

QUESTION: You didn't include a vagueness challenge in your petition for certiorari, did you?

MR. BOPP: Yes, we did.

QUESTION: Is it in the question on which we granted cert, do you think?

MR. BOPP: No, but it is encompassed within the violation of the First Amendment that we allege.

QUESTION: But I wouldn't have thought vagueness was a First Amendment issue.

*7 MR. BOPP: Well, in the context of First Amendment protected speech, a--something that chills First Amendment speech, because of--it is a vague rule, and therefore does not provide a bright line necessary for the exercise of that speech, that it constitutes a First Amendment violation.

QUESTION: One of the statements of the Eighth Circuit--and I don't have the citation to the brief; I have the citation to the Federal Third--247 F.3d 881. It says that the Announce Clause applies only to discussion of a candidate's predisposition on issues likely to come before the candidate if elected to office.

MR. BOPP: That is one of the three constructions.

QUESTION: If we could--would you agree that that's perhaps the narrowest of the three constructions? I want to find what might be the most likely statement to survive review and then have you discuss that, because I take it that you would not be--you would not agree that even that is constitutional.

MR. BOPP: It is not the narrowest, Your Honor, because it uses the word "issue." There are other formulations--

QUESTION: Yes.

MR. BOPP: --in the Eighth Circuit case where *8 they use the word "decide a case," such as on page 45a of the petition--the petition appendix. It prevents candidates from, quote, "implying how they would decide cases," end of quote. And they also, on page 52a of the appendix to the petition, say that, quote-- that the canon, quote, "applies only to discussions of a candidate's predisposition on issues," as you've quoted, and then finally concludes on page 53 with the statement that it prohibits candidates, quote, "only from publicly making known how they would decide issues." So we have conflicting interpretations of--

QUESTION: Well, let's take the--let's take the last one. I take it, if that were the authoritative narrowing constructing that were before us, you would disagree with its constitutionality.

MR. BOPP: Yes, Your Honor.

QUESTION: Would you agree that that would be a constitutional standard if it were part of a code of judicial ethics that applied to the judge after the judge was on the bench?

MR. BOPP: No, and--but I believe that this canon does apply to judges once they are elected and on the bench.

QUESTION: Well, are judges, after they are on the bench, subject to, all of the same rights that they *9 have before they go on the bench, insofar as making public comments?

MR. BOPP: No, they may be limited in a number of different ways, Your Honor, that are necessary to advance compelling interests.

QUESTION: Well, why is it that, if an election is in July, the State can, under your view, not prohibit statements in June before he's elected, but they can prohibit the statements in August, after he's elected?

MR. BOPP: Well, Your Honor, the First Amendment applies--has its most urgent application in campaigns for election, and it is--and while both judges and judicial candidates may be limited in their speech, it has never been held that simply announcing your views on a disputed legal or political issue constitutes an indication of partiality such that would justify, for instance, recusal or disqualification.

QUESTION: But I thought you said it would be okay. Then maybe I didn't understand your answer. I thought you said that the kind of limitation that Justice Kennedy referred to would be all right for sitting judges, that you could prohibit sitting judges from letting their views be known on any controversial issues.

MR. BOPP: Well, then I misspoke, if that was your understanding.

*10 QUESTION: Like the incorporation doctrine or substantive due process and so forth--

MR. BOPP: Canon 4--

QUESTION: --you think you could prohibit judges from discussing those matters.

MR. BOPP: No. Canon 4--and in fact, Canon 4(b) of the Minnesota canons encourages judges to propose changes in the substantive and procedural law, even individually.

QUESTION: Sitting judges--sitting judges run for election. So whatever rights the contender would have in an election, I assume that the sitting judge who was running for reelection would have those same rights, in your view.

MR. BOPP: We believe that they should.

QUESTION: Because the sitting judge could not be restricted, could he or she, in a way?

MR. BOPP: Well, sitting judges are restricted, for instance, from commenting on pending cases that are pending before them, quite properly. But here we are talking about stating general views about the law.

QUESTION: So sitting--

QUESTION: You wouldn't object to candidates being prohibited from commenting about particular cases either, would you?

*11 MR. BOPP: No, I would not.

QUESTION: I didn't take your objection to be that you say, you know, that there's a case pending in the courts, if I were appointed, I'll tell you how I would decide that case. You--

MR. BOPP: We--

QUESTION: --wouldn't permit that, would you?

MR. BOPP: We believe that that can properly be--

QUESTION: I thought you gave examples, or your--one of the briefs gave examples of commenting on specific decisions that had been rendered by the Minnesota Supreme Court, and you said that restraint on that comment was impermissible.

MR. BOPP: Yes.

QUESTION: Am I not right?

MR. BOPP: Yes. That is our position.

QUESTION: So you're making--

QUESTION: That was a past case. That was a distinction you're making between past cases and pending cases in the court that are likely to come before you if you're elected.

MR. BOPP: Yes, I--the First Amendment protects discussion of past cases. However,

the Eighth Circuit opinion only allows discussion of past cases while *12 the enforcement authorities, specifically the Office of Lawyers Professional Responsibility, had previously said that you could criticize those opinions.

QUESTION: Well, supposing that--supposing that Minnesota--the Minnesota Supreme Court had announced that its Fourth Amendment was more protective than the federal Fourth Amendment and a candidate running for that court saw that several cases, the evidence had been suppressed in Minnesota courts, the defendant was acquitted, so he said, "I think we should go back to the idea that our Fourth Amendment is the same as the federal Fourth Amendment." Would that be permitted under this rule?

MR. BOPP: Under the Announce Clause?

QUESTION: Under the Announce Clause.

MR. BOPP: Not if it's considered implying how you would rule in a future case.

QUESTION: But do we know that--do we--is there any mechanism for getting a clarification? And the big problem in this case is this is a frontal attack, and so we have no specific examples. And you can say, "I think this would fit, and I think that wouldn't fit." Is there any mechanism in Minnesota for seeking clarification? For example, whether the Minnesota Supreme Court's current rule is, indeed, the ABA's 1990 rule?

*13 MR. BOPP: You can seek a private advisory opinion that is not binding on either the office or the board. And petitioner Wersal sought such an opinion after suit was filed regarding other matters, and they declined to provide that advice.

QUESTION: Mr. Bopp, I would assume your answer would be that if it's too fuzzy for us to understand what it means in order to rule upon its constitutionality, it's also too fuzzy for a judicial candidate to know what it means in order to conform his conduct to it and, therefore, unconstitutional.

MR. BOPP: Yes, sir, Your Honor, not only to candidates, but this canon binds the family members, the supporters of the candidate. If they say anything that is viewed to violate this construction--this new construction of this rule, then the candidate, him or herself, is subject to discipline or removal from office.

QUESTION: Well, I still want to make clear your position. Your position is--is that the judge can, after the judge's election, be disciplined, sanctioned for certain remarks that he could not be sanctioned for before the election. Is that correct?

MR. BOPP: No, Your Honor, and if I gave you that impression, I apologize.

QUESTION: In other words, the rule--

*14 MR. BOPP: I am not--

QUESTION: --post and pre-election, the rights--

MR. BOPP: The rule--

QUESTION: --to speak are the same.

MR. BOPP: The rule is the same. But I think the point I was making was that once a judge assumes office, there are restrictions on, for instance, his ability to discuss a pending case that is not imposed upon a lawyer that is not involved in the case in any way.

QUESTION: Well, do you claim--

MR. BOPP: So then--

QUESTION: All right. Then your position is that there is a difference as it applies to pending cases as to which a sitting judge has to--to which a sitting judge has been assigned.

MR. BOPP: Yes, there are specific ethical--

QUESTION: And--

MR. BOPP: --canons that apply in that.

QUESTION: And that's all.

MR. BOPP: And that's appropriate--

QUESTION: Now--

MR. BOPP: --an appropriate limit.

QUESTION: --are there limits on what the candidate can say?

*15 MR. BOPP: Yes. I--

QUESTION: And those are what?

MR. BOPP: It's in the realm of Pledges and Promises. It would apply to candidates whether they're sitting judges or not, and that is that a candidate for judicial office shall not pledge or promise certain results in deciding a particular case or issue in a case without regard to the law or facts of the case.

QUESTION: Suppose he said, "There are a lot of criminal cases pending," and, to take the Chief Justice's hypothetical, "we've gone too far in interpreting the Fourth Amendment, and I'm going to be more strict." In your view--

MR. BOPP: I think that's a--

QUESTION: --that could be prohibited.

MR. BOPP: No, that is allowed, Your Honor, because he's not promising certain results in a particular case. That is, again--

QUESTION: He says, "I promise when these cases come before me, this is what I'll do."

MR. BOPP: Then that is a pledge or promise of an outcome.

QUESTION: And in your view, that can be prohibited.

MR. BOPP: Yes, because there is a--

*16 QUESTION: Well, I'm surprised you take that view.

MR. BOPP: Well, Your Honor, there is a public perception of the impartiality of the judiciary that I think properly can be taken into account.

QUESTION: Well--

MR. BOPP: And I think this rule announces a rule that is consistent with the judge's obligation to decide cases in accordance with his or her role.

QUESTION: Well, that's an extremely fine line you're drawing, it seems to me, because I think a moment ago, in response to my question, you said that a candidate would be prohibited, and wrongly prohibited, under your view--on your view of it and from saying that Minnesota should adopt the federal Fourth Amendment standard rather than the more liberal Fourth Amendment standard that the Supreme Court of Minnesota hypothetically had it. You say that a candidate ought to be allowed to do that, but he isn't under the Minnesota rule?

MR. BOPP: He is not, under the--well, to the extent that we know what the Announce Clause means--

QUESTION: Yeah.

MR. BOPP: --with this conflicting formulations under the Eighth Circuit opinion, talking about cases or issues--talking about, implying, or making known--to *17 the extent that we know the rule, it would appear that such a statement would be prohibited--

QUESTION: And you--

MR. BOPP: --because it would imply what he would rule in the future.

QUESTION: And you say that the First Amendment prohibits that?

MR. BOPP: No, I'd say the First Amendment protects talking about prior decisions.

QUESTION: What about--

MR. BOPP: And one of the problems is we're talking about the rule--the Minnesota rule versus--

QUESTION: Yeah.

MR. BOPP: --other proposed rules.

QUESTION: But if--

QUESTION: What about comment on a--by a candidate who is not yet a judge on a case which is then pending before the court? In your view, can the State prohibit the candidate from saying, "I've been reading about this case. I know what the

evidence is, and I believe so and so should be convicted, and I think the sentence ought to be the following." Could the State, consistently with the First Amendment, prohibit that kind of a comment?

MR. BOPP: Well, there would seem to be, under *18 Gentile, more leeway for a lawyer not in a pending case to discuss a pending case.

QUESTION: What's the answer to my question?

MR. BOPP: I think--I think it could not be prohibited.

QUESTION: In the question that the Chief Justice asked, suppose the judge said, "I pledge and promise that if you elect me, I will vote in every Fourth Amendment case to restore the law to what it was." That's a pledge and a promise, which I thought your argument started out saying you accept that the pledge or promise is a valid restriction--

MR. BOPP: I do, Your Honor.

QUESTION: --that you can't go on that to the Announce. So suppose that instead of--the Chief Justice suggested, "I think it would be a good idea if the court went back there"--but if he said, "I pledge and promise that I will vote that way"--

MR. BOPP: That is a classic pledge and promise that I think can be appropriated prohibited under the First Amendment.

QUESTION: As to issues and not as to particular cases.

MR. BOPP: As both to issues and cases.

QUESTION: So that you--you can't disable *19 yourself from being--

MR. BOPP: Open minded.

QUESTION: --persuaded by counsel that the views you've held your whole life over the incorporation doctrine, turn out to be wrong.

MR. BOPP: Yes. And while judges certainly have views, and they announce these views in numerous different ways, if they are binding themselves not to have an open mind and to decide a case in advance, then that is a violation of the oath, and that type of pledge or promise should be and can be prohibited under the First Amendment.

QUESTION: Is this different from that? That is, I read through the Minnesota Bar Association's brief, the ABA's brief, and portions of the Brennen brief. All right? They all suggested to me that this ethical rule, like all ethical rules, is vague, interpreted by interpretive opinions, of which there are many. I mean, there are two pages of them in these briefs.

Now, as I understood it, it comes down to an effort to do just what I did in my own Senate confirmation hearing, to say, "I will try to reveal my judicial philosophy. I will try to stay away from anything that is going to commit myself or appear to commit myself about how to decide a future case." All right.

MR. BOPP: And I agree.

*20 QUESTION: Now, if that's what they're trying to do--do you agree that is what this is trying to do? And, second, if that is what they're trying to do, why is that unconstitutional?

MR. BOPP: If it amounts to a pledge or a promise--

QUESTION: No, it doesn't. I used the words that--of the ABA brief. I've used the words--I'm referring to the briefs to call those arguments to your mind.

What they say this comes down to is you cannot commit yourself or appear to commit yourself as to how you will decide a particular case or issue if it arises. But you can, and there are two pages of this in the Minnesota Bar brief. I'm just trying to call that to your mind--

MR. BOPP: Thank you.

QUESTION: --of all the things you can discuss: judicial philosophy, character, this and that. There were two pages of them, and they're all quotes--in quotes. All right. So, one, am I correct in my interpretation?

MR. BOPP: Yes.

QUESTION: Two, if I am, why does the Constitution forbid it?

MR. BOPP: If the word "commit" means "pledge," then I think you're correct in--

*21 QUESTION: No, I told you what it means. "Commit" means "commit." We can't go more than the words "commit" or "appear to commit," other than to illustrate them by example. And the Bar Association brief contains 18 examples that have been given. They're all in quotes. They come from an authoritative source. So that's where I am in what this means. Am I right? And if I am right, what's wrong with it?

MR. BOPP: Well, Your Honor, what is wrong with it--

QUESTION: But first, am I right, in your opinion?

MR. BOPP: you're not right. And what is wrong with it is that the ABA suggested that "commit" means the same thing as "announce." And what I--my course of my argument is that "commit" means "pledge," and that, to that extent, the ABA canon is different than the current Announce Clause. In fact, it's--

QUESTION: All right, so if you're saying the word is "announce," and all these briefs and the bar association are wrong when they say that means commit or appear to commit, on that view, what should I do with this case?

MR. BOPP: You should strike down the Announce Clause, because it is impossible--hopelessly impossible *22 to know what is included within the rule and what is outside the rule. That, and not only did the Eighth Circuit use different formulations of the rule that mean different things, in terms of its scope and application, but it also had exceptions to the rule, discussion-- a general discussion of case law or a candidate's judicial philosophy, but with the proviso that if you imply how you will rule in a particular case, then you have violated

the rule.

10 QUESTION: And on an issue on a particular case.

MR. BOPP: An issue, including--

QUESTION: Can I just follow that up for one second? All right, now take the other assumption. Let's assume that it does mean, as the ABA says, "appear" or "appear to commit." On that view of it--and assume that I'm right. I know you think I'm wrong on that. Assuming that I'm right--

MR. BOPP: With all due respect.

QUESTION: --then is it constitutional, in your opinion?

MR. BOPP: No, because of the "appear to commit" language.

QUESTION: So you think the ABA can and is, itself, unconstitutional.

MR. BOPP: As I interpret it, yes, because the *23 "appear to commit" takes us back away from a bright line of a pledge or a promise into the realm of implying what you are saying. And there--

QUESTION: What is the ABA's position on judicial elections?

MR. BOPP: They are not in favor of judicial--

QUESTION: I didn't think they were.

(Laughter.)

QUESTION: But you're submitting this case to us on the proposition that, under the First Amendment, a judicial candidate can be subjected to restraints on speech that other--that are inapplicable to other candidates.

MR. BOPP: I believe that they can, Your Honor, because judges have a dual role. One role is to make law, and particularly state court judges making common law, but they also have a duty to decide cases impartially. So while they are running for office, in order to respect judicial impartiality, they should not be pledging to violate the oath. That is promising now how to decide a case in the future when it comes before--

QUESTION: Well, how does this play out with sitting judges who write opinions saying, "In my view, for example, I think the death penalty is unconstitutional"? There it is for everybody to see. And presumably in a *24 state like Minnesota, that judge will come up for election again or in another state for retention election. You don't think it's--can that be prohibited--

MR. BOPP: No.

QUESTION: --somehow?

MR. BOPP: No. No, it may not.

QUESTION: And that judge has expressed a view that presumably the judge will follow in a future case.

MR. BOPP: But that is--but that is different from declaring or announcing that you have a closed mind as to any future--

QUESTION: No. I don't know, if it's thoroughly expressed. Now, if the next case comes along involving that very issue, can the judge be changed for bias?

MR. BOPP: No. No, you may not be recused, and due process is not violated.

QUESTION: But what if a candidate says not, "I pledge that in every case I will say vote against the death penalty," but, "I have real doubts about the death penalty jurisprudence." I mean, I don't think Minnesota has a death penalty, but--

MR. BOPP: No, it doesn't.

QUESTION: --let's assume it does. "And I think it probably should change." Is that permissible under this rule? And if the rule says it's not *25 permissible, is that statement protected by the First Amendment?

MR. BOPP: I'm sorry. Under the Minnesota rule or my rule?

QUESTION: Under the Minnesota rule.

MR. BOPP: It--well, it's very difficult to know, Your Honor.

QUESTION: Okay, well, under your rule.

MR. BOPP: Under our rule, it would be allowed. And, in fact, judges are encouraged to do--make proposals just like that under these canons.

QUESTION: Now I don't understand what you say the Minnesota rule is. I would have thought your answer would be, "That's probably okay under the Minnesota rules," because he only says probably--"I think it's probably, you know, unconstitutional."

MR. BOPP: Under the Minnesota rule if you simply imply how you might rule--

QUESTION: Well, it doesn't. It says, "I have doubts about it," according to the Chief Justice, "I have doubts about it." I think that doesn't necessarily imply--but I thought--

MR. BOPP: Well, it's--

QUESTION: I thought--

MR. BOPP: It's hard to know.

*26 QUESTION: But I thought that your position with regard to judicial opinions is--is that it is perfectly okay for a sitting judge to make known to the public his view on something like the death penalty when he does it in an opinion and, therefore, that can be out there.

MR. BOPP: Yes, it is--

QUESTION: Subject to criticism, indeed.

MR. BOPP: Yes--

QUESTION: But somebody who's running against him in an election cannot let be known what his view is on the death penalty.

MR. BOPP: It is perfectly appropriate for a judge to do that in an opinion or in speeches or a law review article.

QUESTION: In speeches? You mean the judge could go out and--a sitting judge can go out and make a speech and say, "In the next death penalty case to come before me, I'm going to vacate. I'm going to vote to vacate the death penalty. I don't care what the argument is."

MR. BOPP: Then not that statement. If he made that statement, he'd be subject to recusal and a proper application of--

QUESTION: Okay, well--

MR. BOPP: --the pledge rule.

*27 QUESTION: Okay. Well, then what he can say in speeches certainly is less than what he can say in a judicial opinion in which he says, "I vote to vacate the death penalty because I believe it's unconstitutional." I mean, there's some line between them.

MR. BOPP: Yes, I would think he would. He does, Your Honor. And may I reserve the balance of my time?

QUESTION: Very well. Mr. Gilbert, we'll hear from you.

ORAL ARGUMENT OF ALAN I. GILBERT
ON BEHALF OF THE RESPONDENTS

MR. GILBERT: Mr. Chief Justice, and may it please the Court: I would like to take the opportunity to try to clarify some of the questions and answers that have been provided as to what the construed rule in Minnesota means. And I refer the Court to page 53a, of the cert petition appendix, where the Eighth Circuit stated the definitive narrow construction of this rule which says that the rule only prohibits candidates from--

QUESTION: Whereabouts on the page?

MR. GILBERT: The beginning of the second paragraph, Your Honor. It only restricts judicial candidates from publicly making known how they would decide issues likely to come before them as judges. That *28 is the narrow construction of this Eighth Circuit opinion. That is the construction that's being applied by the two boards that I represent, and that is the construction that has been incorporated in an authoritative order by the Minnesota Supreme Court.

QUESTION: What about the example I posed to your opponent? Someone says, "I think the Minnesota Supreme Court's ruling on the Fourth Amendment, the state Fourth Amendment being broader, is wrong, and I--if you will elect me as a judge, I would

try to change that around."

MR. GILBERT: Your Honor, this is where the record is very clear as to what Mr. Wersal has done. And in response to your question, the candidate could criticize a prior decision of a judge, but could not say as to a future case how that candidate would decide the case. And that's precisely--

QUESTION: So let me put that to the test. If I say, "I think the decision of the Supreme Court of Minnesota two years ago saying that the Fourth Amendment-- state Fourth Amendment protected more than the federal Fourth Amendment is wrong," he could do that, but he couldn't say, "If you elect me to the Supreme Court, I would carry out my view."

MR. GILBERT: Well, that would be a future case. *29 And there's other considerations--

QUESTION: Well, he told me he couldn't even say, "I think that opinion is wrong. And that is not my position concerning the meaning of the Fourth Amendment"--

MR. GILBERT: Your Honor--

QUESTION: --"in Minnesota."

MR. GILBERT: That's not correct, Your Honor. I refer you to the record in this case and what Mr. Wersal has said in his literature. If you look at the first volume of the Joint Appendix, pages 34 to 38, as well as pages 86 to 91, they contain the actual statements that Mr. Wersal made as part of his campaign.

QUESTION: What pages?

MR. GILBERT: 30--let's see--34 to 38, and 86 to 91. And look what he said. First of all, he talked about his judicial philosophy. He has said that he can't talk about his judicial philosophy. He did. He said, "I'm a strict constructionist," and he criticized the Minnesota Supreme Court for being a judicial activist. But more--

QUESTION: What does that mean? I mean, that's so fuzzy, that doesn't mean--

MR. GILBERT: Well, but--

QUESTION: --that doesn't mean anything. It *30 doesn't say whether you're going adopt the incorporation doctrine, whether you believe in substantive due process. It is totally imprecise. It's just nothing but fluff.

MR. GILBERT: And candidates can say that. And that's the point.

QUESTION: Can they say anything more than fluff?

QUESTION: Can they say anything that has any meaning?

MR. GILBERT: Absolutely. And what they can do--look at what Mr. Wersal--

QUESTION: But what about my example?

MR. GILBERT: Your example, Your Honor, the candidate can, as Mr. Wersal did, criticize a prior decision of the Court. And that's very clear from what has happened in the Wersal case. What the candidate cannot do is say that, "If I'm elected, I'm going to overturn that decision."

QUESTION: Does that dichotomy make any sense at all?

MR. GILBERT: Well, it does in the sense, Your Honor, that there's different dynamics involved once a judge is elected and has to overturn a decision that's already precedent in the State of Minnesota.

QUESTION: So a candidate says, "This is the *31 worst decision that's come down since Dred Scott, it's a plague on our people, it's an insult to the system, but I'm not telling you how I'll vote."

(Laughter.)

MR. GILBERT: Your Honor, that's the point.

QUESTION: It's more than that. You assert that that does not, within the language that the Supreme Court has adopted, it does not imply how he will vote on that issue at a future date. He says, "It's the worst case we've ever done." That doesn't imply how he's going to vote on it?

MR. GILBERT: Well, that might well imply whether he's going to overturn it. But what the candidate can say and what Mr. Wersal said--if you look at the criticism that he leveled at these decisions of the Minnesota Supreme Court, he said just as you indicated, Justice, that, "These decisions are"--

QUESTION: What are you reading? Where are you reading from?

MR. GILBERT: If you look at pages--page 36, for example, of the--this is of the Joint Appendix--he says, on abortion, "The Court ordered the State must use welfare funds to pay for abortion despite state law to the contrary. The dissenting judge remarked," et cetera. This is under the topic of "Examples of Judicial *32 Activism." But then he goes into greater detail on page 38.

QUESTION: But is the statement at page 36 that you read--is that proscribable under the State's rule?

MR. GILBERT: No. And that's the point. What has happened here, Your Honor, is that there was a complaint filed against Mr. Wersal for all of this campaign material. And the then-director of the Lawyers Board, Marcia Johnson, in an opinion, on pages 20 and 21 of this appendix, said that the statements made by Mr. Wersal are not proscribable. And that's even before the rule is narrowed.

And if you look at page 21, the executive director said specifically that Mr. Wersal can criticize prior decisions of the Court. And that's consistent with what the Board on Judicial Standards did in--

QUESTION: What do you say--

QUESTION: May he also, at the same time as they criticized the decision, say, "I do not believe in stare decisis"?

MR. GILBERT: Yes. He can't, because that is--

QUESTION: Well, then isn't he saying how he's going to rule on the case then?

MR. GILBERT: Well, Your Honor--it might be, *33 Your Honor. People might be able to imply from it, but it's still--the distinction is--

QUESTION: Might be able to imply that I don't believe in stare decisis and I think this case is wrong.

(Laughter.)

QUESTION: Pretty clear, I think.

MR. GILBERT: No, and I understand what you're saying, Your Honor. The distinction that's made, if you look at all the cases that have dealt with this issue, is a distinction between past cases on one hand and then pending and future cases on another.

QUESTION: As long as you're silent on your views on stare decisis, that's a fine distinction. But if you do reveal your views on stare decisis, that distinction is meaningless.

MR. GILBERT: Perhaps. There could be other issues that come up in terms of a case that would be a vehicle to overturn particular decisions--standing, things of that kind.

QUESTION: So now you're saying there's a distinction between issues and cases. And I'm saying you're categorically stating your view about a particular issue, as the Chief Justice's example states, and you also categorically state, "I think stare decisis has no place in constitutional adjudication." Can he do that?

*34 MR. GILBERT: Your Honor, again, the--no, under the State's interpretation of the rule. And I understand your point. It is a fine distinction. But what the State is trying to do is protect the integrity of the judiciary at that point. And to the extent--

QUESTION: This protects its integrity?

MR. GILBERT: Your Honor, we think so. And the reason for that is that--

QUESTION: I mean, it's just a game. It's just a dance, you know--

MR. GILBERT: Well, this is--

QUESTION: --I don't say anything about stare decisis and it's okay. If I say something about stare decisis, it's not okay?

MR. GILBERT: Well, again, Your Honor, I understand the hypothetical. This is a hypothetical that is kind of on the fringe. I would agree with you. But at the same time, most of the situations are going to be clear, are going to be--

QUESTION: Well, it is such a problem to know exactly what the provision covers now. It isn't clear to me. And what we end up with at the end of the day is a

system where an incumbent judge can express views in written opinions, and perhaps otherwise, as well, and yet a candidate for that office is somehow restricted from *35 discussing the very same thing in the election campaign. That's kind of an odd system, designed to what? Maintain incumbent judges, or what?

MR. GILBERT: No, it's not, Your Honor. In fact, that is not correct in terms of the effect of that situation. Again, if you look at page 20 of the Joint Appendix, what the executive director of the Lawyers Board has said is that an incumbent judge can criticize the prior decision of that sitting judge. So that the challenger actually has greater opportunity than an incumbent judge, because an incumbent judge has a record of decisions.

QUESTION: Do you--you misspoke, I think. You meant the challenger--

QUESTION: You did--

MR. GILBERT: The challenger. I'm sorry.

QUESTION: --the challenger, who is not a judge, can criticize the specific decision of the judge who wrote it.

MR. GILBERT: That's correct, Your Honor.

QUESTION: So they're equally free at the least to discuss the specific past cases.

MR. GILBERT: At the least. And I would submit that the challenger is in a better situation because of the--

*36 QUESTION: All right. Can I ask you this question--

MR. GILBERT: Yes.

QUESTION: --because I understand that--I have two questions, really. One is the line that's being--that you're trying to draw, everyone would concede is a very difficult one to draw, but it is the line that I tried to draw.

MR. GILBERT: Yes.

QUESTION: Now, what would happen if, instead of my being in the Senate, I had been in an election campaign, and I was trying to draw this very line between commitments to future cases, specific ones, and general judicial philosophy. And suppose my opponent, after, said, "Breyer made a mistake. He didn't get it right," but I was in good faith. What could happen, or would likely happen, to me under this rule?

MR. GILBERT: As a--I'm sorry, as a sitting judge, Your Honor?

QUESTION: Well, I then--suppose I won. Fine. I've won the election. My opponent--what I'm trying to understand is what are the consequences? It is, after all, an ethical rule, and ethical rules are often blurry.

MR. GILBERT: Yes.

QUESTION: And I want to know what would likely *37 happen to a person who makes a

mistake in drawing this very fine line, assuming that it's in good faith.

MR. GILBERT: Your Honor, the Board on Judicial Standards or the Lawyers Board would have jurisdiction with respect to a violation which sounds like a technical violation, as you describe it, and could impose some discipline, but I would suspect that discipline would be very minute, if at all--

QUESTION: Could a state--

MR. GILBERT: --under those circumstances.

QUESTION: --make a violation of the provisions you described a criminal offense?

MR. GILBERT: No, Your Honor. These are not criminal statues.

QUESTION: But could a state do it under the First Amendment? Is there any authority you have for the proposition, that can--a state can impose a civil sanction, but not a criminal sanction?

MR. GILBERT: I'm not aware of any authority that would allow a criminal sanction for such a thing.

QUESTION: Can I ask you one other question?

QUESTION: That's not my question. Is there any authority that a state, under the First Amendment, is free to impose a civil sanction but not a criminal sanction on particular speech?

*38 MR. GILBERT: I'm not aware of authority to that effect either, no.

QUESTION: This is a technical question, but the sentence you started out reading from the Eighth Circuit's opinion is not identical to the ABA canon. And obviously if this rule differs from the ABA canon and is stricter, one could say there's a less restrictive alternative, namely the ABA canon. And so I'm quite concerned about how to deal with that problem. Do I assume that, in fact, Minnesota does mean it's indistinguishable from ABA canon, which is what the ABA says? Or what your opponent says? How do I deal with that?

MR. GILBERT: Your Honor, our position is, just as the ABA indicated, that our rule is the functional equivalent of a commitment clause.

QUESTION: The Minnesota Supreme Court turned down the ABA rule, the ABA rule--we're talking--they're both ABA rules. Minnesota now has on its books the 1972 rule. The 1990 rule is the one that you said is the functional equivalent of the current rule. And yet the Minnesota Supreme Court considered and turned down that rule. So that's one of the aspects of this case that makes it very fuzzy. The court that turned it down now says, "We agree with the Eighth Circuit." And you're telling us that the Eighth Circuit has adopted, *39 essentially, the ABA's current rule.

MR. GILBERT: Yes, Your Honor, and that is the case, and you are right. Back in 1995, there was discussion of adoption of the commit clause by the Minnesota Supreme Court. It did not occur at that time. There has been a lot that has evolved over the last seven years, Your Honor, and the Minnesota Supreme Court has

made the decision in its January 29th, 2002, order that this construction by the Eighth Circuit is the construction that they are going to place on their clause.

QUESTION: Whatever that is.

MR. GILBERT: Well, this construction, Your Honor, is, for all practical purposes, identical to the commitment clause. And--

QUESTION: Mr. Gilbert, may I ask--

MR. GILBERT: Yes.

QUESTION: --a question based on what you said about stare decisis? You say-- have said consistently you can discuss your judicial philosophy. Well, why wouldn't one's position on stare decisis fall under judicial philosophy?

MR. GILBERT: I think it would, Your Honor.

QUESTION: So that--so you're changing back then, because you said a while ago that stare decisis--if you said, "I think that decision about the Fourth *40 Amendment was wrong, and I don't believe in stare decisis," you said you couldn't put those two together.

MR. GILBERT: Your Honor, you can put them together. I think the question was, could someone then conclude from that what the ramifications would be if that particular candidate came to the Supreme Court, for example, on what the candidate would do with respect to that decision--whether the candidate would overturn or not.

QUESTION: And your answer was it would imply how he's going to vote and, therefore, would not be--

MR. GILBERT: Again--

QUESTION: --would not be acceptable, right?

MR. GILBERT: Yes, Your Honor, with the distinction being to protect the integrity of the judiciary.

QUESTION: Well, let me ask about that. You know, in evaluating whether a state has demonstrated the kind of significant interest necessary to abridge speech, it seems to me we have to look at the entirety of the state law to see what interest it's pursuing.

I, frankly, am absolutely befuddled by the fact that Minnesota wants its judges elected--that's its constitutional provision--and then enacts statutory provisions that are intended to prevent the electorate *41 from knowing, even by implication, how these candidates are going to behave when they get on the bench. It seems to me a total contradiction. And, indeed, it looks to me like a legislative attempt to simply repeal Minnesota's constitutional provision providing for the election of judges, which is a neat and easy way to get rid of it if you can't do it by plebiscite.

Why does it make any sense to vote for a judge in an election, a judge who is not

able, even by implication, to tell the electorate what kind of a judge he would be?

MR. GILBERT: Well, but, Your Honor, that's the fallacy in that statement, is that a candidate can tell the electorate what kind of candidate they are. The only thing that the candidate cannot say--it's a very limited restriction--and that is, how I am going to decide a future case.

QUESTION: Not a particular--well, no, not just a future case, a future issue--any, not a particular case, but any issue--

MR. GILBERT: And--

QUESTION: --how I will vote on the Fourth Amendment situation, how I will vote on the incorporation doctrine. I can understand your saying, he shall not commit himself, "I promise to vote this way." No judge *42 should do that. He should be able to be persuaded that he's been wrong. But to say that my current view is that the Fourth Amendment should be just like the federal Fourth Amendment, and stare decisis in constitutional matters is not a doctrine that I think is very strong--it seems to me you ought to be able to say that.

MR. GILBERT: And they can say that. I think the difference of opinion we have here is whether they can go the extra step and just say, "And I would try to overturn the decision if I'm elected."

QUESTION: Well, if that--

MR. GILBERT: I have to--

QUESTION: --if that indicates a disqualification or a lack of temperament for the bench, the voters can decide that. The bar association and the judges can come out and say, "We have a candidate running who doesn't have the right judicial temperament," and the voters decide. That's the way elections work.

MR. GILBERT: They can do that, but I submit to you, what happens if that judge wins? What happens if that judge wins and the litigants come before that judge who has prejudged that case?

QUESTION: Well, I suppose the people have said what kind of judges they want.

MR. GILBERT: Oh, and it's all of a sudden *43 majority opinion?

QUESTION: Why is that any worse than litigants who come before a judge who's already sitting and who has said in a prior opinion that he thinks the Fourth Amendment in Minnesota should be interpreted the same way the federal Fourth Amendment is? Why--

MR. GILBERT: Because in--

QUESTION: --is that any different?

MR. GILBERT: Because in a prior opinion, due process was accorded, because the judge actually heard the argument of the litigants, heard the facts and the applicable law.

QUESTION: You mean a judge can't have an opinion without hearing from all sides and going in briefs and so forth?

MR. GILBERT: Absolutely.

QUESTION: Well, what if--even if he gives a speech, does he have to first have this sort of vetting?

MR. GILBERT: Not at all, Your Honor. The only--again, the limited restriction here is that the--a judge cannot--I'm sorry--a judicial candidate cannot prejudge a future case, cannot say, "I think this statute over here is unconstitutional," or, "I think, in consumer fraud cases, that anybody who wins is entitled to punitive damages."

*44 QUESTION: So you don't trust the electorate in Minnesota to decide whether a judge has a judicial temperament. You wish us to depart from the usual philosophy--

MR. GILBERT: Again--

QUESTION: --that we do not allow the State to presume that the public is better off not having complete information.

MR. GILBERT: Well--

QUESTION: Maybe we should know about this judge's temperament. And if he spouts off on all sorts of issues, we say, this is not the kind of judge we want.

MR. GILBERT: Your Honor, again, this is a balance that's being struck. There's competing interests here. There's the First Amendment interest that we're all familiar with. There's the due process interest of individual litigants. There's the compelling governmental interests that the State has in ensuring the integrity of the judiciary, both in terms of the actual integrity and the perception of it. And that's why this limited restriction is appropriate.

QUESTION: Maybe you shouldn't have judicial elections the last is a significant State interest.

MR. GILBERT: Well, Your Honor, that's--

QUESTION: To the degree that you're making it a *45 significant State interest here. See, I just question whether it is a significant State interest, because you have a constitution that says, "We're going to have judicial elections." Now, that may be a very bad idea, but as long as that's in your constitution, I find it hard to believe that it is a significant State interest of Minnesota to prevent elections from being informed.

MR. GILBERT: Well, again, Your Honor, we're trying to weigh the different interests. I am sure you wouldn't suggest that the State doesn't have a compelling interest in the integrity of the judiciary, and that is a competing interest that is being weighed here, and that results in the commitment clause that the ABA has adopted and the parallel provision that has been construed narrowly by the Eighth Circuit, which, again, only forbids or prohibits a judge saying, "I'm going to decide this particular issue this way in the future."

QUESTION: So you're saying the public doesn't know enough in order to determine whether a judge has the requisite qualifications for office.

MR. GILBERT: Your Honor, I'm not saying that the public knows or doesn't know. The concern is what happens if that candidate is elected, and then you or any other litigant comes before that candidate, who is now a judge, and tries to litigate the issue that the judge has *46 already prejudged.

QUESTION: Well--

MR. GILBERT: How fair is that?

QUESTION: My goodness, we--I think we have --I will say present company excluded--I know we have had judges on this Court who have answered questions about particular legal issues to the Senate confirmation hearing. Are you saying that those judges were disqualified from sitting in cases in which that issue would later come up?

MR. GILBERT: No, Your Honor, I'm not. And actually, I'm surprised to hear that.

QUESTION: Is it--oh. It's--

MR. GILBERT: I am surprised to hear that, in light of the testimony that is in our brief and other briefs--

QUESTION: You should go before the Senate--

(Laughter.)

MR. GILBERT: But, Your Honor--

QUESTION: I actually found that when they approached a particular case about how you were going to decide in the future, both the senators--in my experience, since it only concerns me--would not press the issue of how you would decide a particular case.

QUESTION: I'm not talking about--

*47 QUESTION: And that's why--a particular case.

QUESTION: I was--my reference was to a particular issue. A particular issue.

MR. GILBERT: Your Honor, cases are made up of issues. And sometimes a case only has one issue. Issues are important in and of themselves.

QUESTION: Mr. Gilbert, do you think we should draw any distinction, or whether it would be reasonable for us to draw any distinction, between the application of the rule to the candidates themselves and the application of the rule to all of these ancillary individuals around them--their associates, their families? Let's assume that we say that the rule passes muster with respect to the candidate. What's the justification for muzzling the candidate's spouse? I mean, I know, in fact, what--

MR. GILBERT: Yeah.

QUESTION: --it is, because we figure, you know, that's how you get the message out. But do we have a more difficult First Amendment hurdle?

MR. GILBERT: Your Honor, I don't think so, not at all. I think it's really a misnomer to talk about muzzling, which is what the petitioners have indicated.

QUESTION: Let's say "limiting."

MR. GILBERT: Well, it's not even that. What the rule does is ask the judicial candidate to encourage *48 close family members not to effectively circumvent the rule by announcing views that they might be aware of that the judicial candidate would support.

QUESTION: But if the family member says, "Well, I'm going to tell anyway."

MR. GILBERT: "I'm going to tell anyway"--there's no penalty.

QUESTION: But the--

MR. GILBERT: There's no--

QUESTION: But there could be. Do I understand that there would be an inquiry in that event as to whether the candidate had, indeed, encouraged the family member to be quiet?

MR. GILBERT: Your Honor, the standard is "knowingly permit." So, in other words, some--the judicial candidate would actually have to be the actor behind those actions.

QUESTION: All right, but I want to know, in practical terms, what happens. The spouse makes a statement--any one of the statements that have been mentioned here, except as suggesting prejudgment of a case. The candidate stays mute. I presume that a complaint would be filed against the candidate, and I presume the candidate would have to answer to the commission as to whether the candidate had, indeed, *49 knowingly encouraged this.

MR. GILBERT: Your Honor, I'd assume a complaint would not be filed under those circumstances.

QUESTION: Why not? I mean--

MR. GILBERT: Well, I don't--

QUESTION: Are your opponents forgiving in your state?

MR. GILBERT: Pardon me?

(Laughter.)

QUESTION: I mean, are opponents just forgiving of their opponents in your state?

MR. GILBERT: Well, Your Honor, it's a very difficult standard to satisfy, "knowingly permit."

QUESTION: Well, maybe it's difficult to satisfy. I'm just trying to get a sense of what the burden on the individuals involved is.

MR. GILBERT: Well--

QUESTION: And I assume that there could be a complaint, simply based on the emphatic statement of the spouse. And my question is, does the candidate have to show, in that event, that he did not knowingly encourage, or does the State have to show--or the prosecutor or whoever it is--that he knowingly did encourage. What's the drill?

MR. GILBERT: Yes, of course, the burden's on *50 the State. And not only is it on the State, but the State would have to show by clear and convincing evidence.

QUESTION: Okay.

MR. GILBERT: And the--

QUESTION: But the candidate would have to answer.

MR. GILBERT: The--possibly. The Lawyers Board--

QUESTION: Why not?

MR. GILBERT: --sometimes doesn't investigate complaints where they don't have sufficient evidence to think there's even a basis for the complaint.

QUESTION: Well, would they have sufficient evidence in the event that a spouse made an emphatic statement saying, "His view is," or "Her view is"?

MR. GILBERT: Yeah, it's conceivable, Your Honor, but, again--

QUESTION: Counsel, is that--is that part of the canon part of the question in this case? I know it's part of the canon. I didn't understand that it was presented to us in the petition. What's your view?

MR. GILBERT: Your Honor, it's kind of oblique. The focus is on Mr. Wersal's comments. And then there are other comments. And I think one of the justices mentioned a vagueness challenge. To the extent there's any *51 vagueness challenge at all that was discussed at the Eighth Circuit and is part of the petition, it deals with these third parties and the phase "knowingly permit." And the issue--

QUESTION: Because we didn't have the interpretation that was later adopted--

MR. GILBERT: Right.

QUESTION: --by the Eighth Circuit. What Counsel says is that the new vagueness issues that he's raising are a consequence of the opinion which your Supreme Court has adopted, the Eighth Circuit's opinion.

MR. GILBERT: Well, we--Your Honor, you're correct. However, the Eighth Circuit opinion is the opinion that's being appealed here. And what the petitioners have done is, they have refused to acknowledge that narrow construction. And the fact of the matter is that the Minnesota Supreme Court has now authoritatively adopted

that as a state court construction. But the fact of the matter is, as well, that the Eighth Circuit already opined on what the standard is, and that issue was not raised by them, in terms of vagueness. It simply was not raised.

QUESTION: Was not raised where?

MR. GILBERT: In the petition.

QUESTION: In the petition. The petition is *52 whether it's, it unconstitutionally impinges on the freedom of speech. And one of the principles of freedom of speech is that you cannot--you cannot chill speech by having a prohibition that is not clear. I don't think that this is a separate issue from the First Amendment issue at all.

MR. GILBERT: Well, they have not--

QUESTION: We have lots of cases like that, about chilling speech because it's not clear what the coverage of the prohibition is.

MR. GILBERT: Your Honor, in their petition, though, they have not made those kinds of arguments specifically as to--

QUESTION: They certainly did in the reply brief.

MR. GILBERT: They have in the reply brief, but not in the petition, which was the question that was asked previously. And as to vagueness, I should say that this court has been really clear in the Broadrick v. Oklahoma case, for example, and the Colton v. Kentucky case, that sometimes rules and statutes-- and, frankly, all the time, rules and statutes are not conducive to mathematical precision, that there are going to be, as the Court has said, germs of uncertainty in how these laws are applied. And these laws are going to be applied based upon facts *53 and circumstances. And in this particular case, I think it's really significant that we don't have any facts and circumstances as to what Mr. Wersal wants to say.

QUESTION: Well, I think you could set up a system where you get advisory opinions, but I don't know that we've ever allowed that to be done in the First Amendment area.

MR. GILBERT: Oh--

QUESTION: "Please may I say this?" You know, you submit what you want to say, and somebody tells you, "Yeah, okay. You can say that." That's certainly contrary to our approach to the First Amendment.

MR. GILBERT: Well, Your Honor, I don't--Your Honor, first of all, I'm not a proponent of what--of that. But in Letter Carriers, that was a critical consideration in upholding the Hatch Act against constitutional attack, because there was the ability of people who had questions about the application of the statute to actually go to an advisory board and get an opinion.

Similarly here, both of the boards that are parties to this case do provide advisory opinions, and they provide them on short notice, as well. So there is that mechanism. I'm not suggesting it's a substitute, but it is a consideration in terms of if there is a close *54 question on an issue and someone wants some

assurance as to how that particular situation would be interpreted, they can go to the boards and ask that question.

QUESTION: Well, how soon can you get something from the board? If somebody wants to give a speech in a political campaign, I assume you can't get a 12- hour ruling from the board.

MR. GILBERT: Well, they actually do advisory opinions over the phone, Your Honor, on very short order, and they could do it in a matter of hours or days, depending upon what the needs are.

QUESTION: Mr. Gilbert, you brought out that this is not just a question of the candidate informing the voter, that behind all of this is a litigant who's going to be in a future case. How does it work in Minnesota? Suppose, to take an example that Mr. Bopp provided in his brief, the judge--or the candidate is campaigning "Tough on Drunk Driving." And then I'm a drunk driver, and I come before this judge, now elected, and I say, I want him to recuse, he said he's tough on drunk driving.

MR. GILBERT: Are you asking in the--

QUESTION: Would there be, under Minnesota law, a grounds to say, "I don't want that judge, because he's announced in the election that he's tough on drunk driving"?

*55 MR. GILBERT: No, I don't think so, Your Honor, not under those circumstances.

One distinction I would like to make here--oh, I'm sorry, Your Honor.

QUESTION: Thank you, Mr. Gilbert. Mr. Bopp, you have three minutes remaining.

REBUTTAL ARGUMENT OF JAMES BOPP, JR.,
ON BEHALF OF THE PETITIONERS

MR. BOPP: Your Honor, I don't think this is a matter of mathematical precision. The State brief, itself, states two different formulations of the rule. They say, quote, "It is clear that the clause applies to statements about how they would decide, quote, issues, end of quote, on pages 1 and 47. And then they say it is, quote, "clear," end of quote, that the announced clause applies to statements about cases. And that is on pages 12 and 37. The rule is not even clear in terms of the 18 State's own formulation of its scope.

Secondly, as the Joint Appendix indicates on pages 111 through 123, announcing your views also includes simply answering questions on radio interviews or after speeches. It is hardly a remedy for a candidate to call up the board or the office for an oral opinion which is not binding on them about whether or not they can answer a question on the radio.

*56 And, finally, it is undisputed that the people of Minnesota want an impartial judiciary. Governor Arnie Carlson, at Joint Appendix page 247, said--who's a State's witness--that people do not want judges who are pre- committed. Thus, candidates who would make excessive statements, who would appear to be partial, risk defeat at the polls in Minnesota. Thus, the people can be trusted to make the decisions that they, themselves, have conferred upon themselves, as long as they

have the information they need to make that choice. The First Amendment guarantees that they should receive that information, which the Announce Clause both prohibits and chills. It is, therefore, unconstitutional.

QUESTION: Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bopp. The case is submitted.

(Whereupon, at 11:07 a.m., the case in the above-entitled matter was submitted.)

DIGEST

DIGEST CLASSIFICATION TO PETITIONER'S ARGUMENT:

Republican Party of Minnesota v. Kelly

92 CONSTITUTIONAL LAW
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
Most Cited Cases
92k90.1(1.2) k. Election regulations. Most Cited Cases
Does the provision of the Minnesota Code of Judicial Conduct that prohibits a candidate for elective judicial office from "announc[ing] his or her views on disputed legal or political issues" unconstitutionally impinge on the freedom of speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution? U.S.C.A. Const.Amends. 1, 14; 52 M.S.A., Code of Jud.Conduct, Canon 5 , subd. A(3)(d)(1).

DIGEST CLASSIFICATION TO PETITIONER'S ARGUMENT:

Republican Party of Minnesota v. Kelly

92 CONSTITUTIONAL LAW
92XII Due Process of Law
92k274.1 Freedom of Speech, Press, Assembly, and Petition, Deprivation of in General
92k274.1(2) Particular Applications
Most Cited Cases
92k274.1(2.1) k. In general. Most Cited Cases
Does the provision of the Minnesota Code of Judicial Conduct that prohibits a candidate for elective judicial office from "announc[ing] his or her views on disputed legal or political issues" unconstitutionally impinge on the freedom of speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution? U.S.C.A. Const.Amends. 1, 14; 52 M.S.A., Code of Jud.Conduct, Canon 5 , subd. A(3)(d)(1).

DIGEST CLASSIFICATION TO PETITIONER'S ARGUMENT:

Republican Party of Minnesota v. Kelly

227 JUDGES
227I Appointment, Qualification, and Tenure
227k11 Removal or Discipline
Most Cited Cases
227k11(1) k. In general; constitutional and statutory provisions. Most Cited Cases
Does the provision of the Minnesota Code of Judicial Conduct that prohibits a candidate for elective judicial office from "announc[ing] his or her views on disputed legal or political issues" unconstitutionally impinge on the freedom of speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution? U.S.C.A. Const.Amends. 1, 14; 52 M.S.A., Code of Jud.Conduct, Canon 5 , subd. A(3)(d)(1).

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92V Personal, Civil and Political Rights
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92k90.1(1.2) k. Election regulations. Most Cited Cases
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227I Appointment, Qualification, and Tenure
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227k11(1) k. In general; constitutional and statutory provisions. Most Cited Cases
Does the provision of the Minnesota Code of Judicial Conduct that prohibits a candidate for elective judicial office from "announc[ing] his or her views on disputed legal or political issues" unconstitutionally impinge on the freedom of speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution? U.S.C.A. Const.Amends. 1, 14; 52 M.S.A., Code of Jud.Conduct, Canon 5, subd. A(3)(d)(1).

DIGEST CLASSIFICATION TO RESPONDENT'S ARGUMENT:

Republican Party of Minnesota v. Kelly

92 CONSTITUTIONAL LAW
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
Most Cited Cases
92k90.1(1.5) k. Attorneys and judges, regulation. Most Cited Cases
Formerly 92k0.1(1.5)
Under the Due Process and Free Speech Clauses, may the State of Minnesota, in order to foster and preserve the actual and perceived independence and impartiality of its judiciary, restrict candidates for judicial office from publicly making known how they would decide issues likely to come before them as judges? U.S.C.A. Const.Amends. 1, 14; 52 M.S.A., Code of Jud.Conduct, Canon 5, subd. A(3)(d)(I).

DIGEST CLASSIFICATION TO RESPONDENT'S ARGUMENT:

Republican Party of Minnesota v. Kelly

92 CONSTITUTIONAL LAW
92XII Due Process of Law
92k278.4 Regulations Affecting Public Officers and Employees
Most Cited Cases
92k278.4(2) k. Eligibility and appointment, election, or promotion. Most Cited Cases
Under the Due Process and Free Speech Clauses, may the State of Minnesota, in order to foster and preserve the actual and perceived independence and impartiality of its judiciary, restrict candidates for judicial office from publicly making known how they would decide issues likely to come before them as judges? U.S.C.A. Const.Amends. 1, 14; 52 M.S.A., Code of Jud.Conduct, Canon 5, subd. A(3)(d)(I).

DIGEST CLASSIFICATION TO RESPONDENT'S ARGUMENT:

Republican Party of Minnesota v. Kelly

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Most Cited Cases
227k3 k. Appointment or election. Most Cited Cases
Under the Due Process and Free Speech Clauses, may the State of Minnesota, in order to foster and preserve the actual and perceived independence and impartiality of its judiciary, restrict candidates for judicial office from publicly making known how they would decide issues likely to come before them as judges? U.S.C.A. Const.Amends. 1, 14; 52 M.S.A., Code of Jud.Conduct, Canon 5, subd. A(3)(d)(I).

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