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Report on Judicial Campaign Conduct: Aftermath of Minnesota v. White

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California Judicial Campaign Conduct

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I. Introduction

Five years have passed since the United States Supreme Court held that rules prohibiting judicial candidates from announcing their views on disputed legal and political issues violated the First Amendment. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002). The majority opinion invited a vigorous dissent and a robust academic debate. This particular debate is hardly a theoretical one. Although the federal judiciary is composed of lifetime appointees, most states elect some or all of their judges. Over the years, these judicial campaigns have become more costly and more divisive, even before the Supreme Court's decision was handed down. That decision opened the door to campaigns in which future legal issues are openly debated by the candidates, before they have been considered by a court. It has also deepened

concerns that judicial independence and impartiality are being eroded at an alarming rate. This report examines *White* and its impact on judicial campaigns.

II. State Models for Selecting Members of the Judiciary

In 1812, Georgia became the first state to elect judges of inferior courts. *See* Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, Am. Judicature Soc'y (1999), *available at* http://ajs.org/js/berkson.pdf (last accessed on October 19, 2007). As Jacksonian Democracy spread across the country, the practice of electing judges gained support. *Id*. Mindful of the judiciary's special role, many states developed election procedures designed to maintain judicial impartiality and its appearance. In four states, the governor appoints judges, although some of those states, such as California, have retention elections for sitting judges. *Id*. at 2. Moreover, even states that permit partisan elections place limits on partisanship. For example, Michigan permits parties to nominate candidates, but no party designation appears on the ballot. Mich. Comp. Laws § 168.393 (2007). Other state laws prohibit judicial candidates from soliciting campaign contributions, making misleading statements, or promising to decide certain issues a particular way. *See*, *e.g*., Ga. Code of Judicial Conduct Canon 7 (2002) (prohibiting misleading statements and personally soliciting campaign contributions). Many of these laws have been amended following *White* and lower court decisions invalidating specific regulations, but they reflected attempts to preserve the impartiality of the judiciary as well as the appearance of impartiality.

There is no single, prevalent method for selecting members of the judiciary at the state level. The four states that use gubernatorial appointment include both California and New Hampshire. Berkson, *supra* at 2. In California, candidates are subject to approval by a three-member judicial commission. *Id*. New Hampshire requires the approval of an elected council. *Id*. The other two states that use gubernatorial appointment, Maine and New Jersey, require senatorial approval. *Id*. In South Carolina and Virginia, the state legislatures are responsible for selecting members of the judiciary, although South Carolina only receives nominations after they have been screened by a judicial merit selection commission. *Id*.

Eight states use partisan elections to select justices for the state supreme court. *Id*. at 3. An additional thirteen states use nonpartisan elections. *Id*. Among the forty one states with intermediate appellate courts, seventeen use elections to select candidates. *Id*. In total, over thirty states use some form of popular election to select judges at the trial court, intermediate appellate court and highest court levels. *Id*. at 2. Only a small minority of states follows the model which the authors of the United States Constitution adopted for the federal judiciary, lifetime appointments by the executive branch with senate approval. Against this backdrop, the *White* decision would prove to be explosive.

III. Judicial Conduct Canons: Preserving an Impartial and Independent Judiciary

The American Bar Association's Model Code of Judicial Conduct includes a definition of impartiality. ABA Code Judicial Conduct, Terminology (2007) (emphasis added). The Code defines impartiality as "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, *as well as maintenance of an open mind in considering issues that may come before a judge*." *Id*. This definition was incorporated into many judicial canons. Similarly, in Minnesota, before and after the *White* decision, impartiality "denotes absence of bias or prejudice in favor of, or against, particular parties or classes or parties, as well as maintaining an open mind in considering issues that may come before the judge." Minn. Code Judicial Conduct 5 (2005). That same canon also prevents judges from announcing their views on disputed legal issues. *Id*.

During the 1990s, these clauses, which had been adopted by many states, were challenged in federal courts with mixed results. The United States Court of Appeals for the Third Circuit upheld Pennsylvania's announce clause, even though it prevented judicial candidates from announcing their views on specific legal issues. *Stretton v. Disciplinary Board*, 944 F.2d 137 (3rd Cir. 1991). The court distinguished legislative and executive offices from judicial offices. *Id.* at 142. Preventing candidates from announcing their views during a judicial campaign preserved both impartiality and independence because "the judicial system is based on the concept of individualized decisions on challenged conduct and interpretations of law enacted by the other branches of government." *Id.* The United States Court of Appeals for the Seventh Circuit, by contrast, invalidated an Illinois regulation that prohibited candidates from announcing their views on disputed legal issues and a related regulation that prevented candidates from pledging or promising to decide issues in a certain way. *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993). Although the court agreed that states could prohibit candidates from promising to decide "in particular ways in particular cases or types of cases," a statute forbidding privileged speech "is not saved by the fact that it also forbids unprivileged speech and could in application be confined to the latter." *Id.* at 230. It would take nearly a decade for the Supreme Court to resolve this issue.

IV. Republican Party of Minnesota v. White

Before *White* was decided, at least eight states prohibited candidates for judicial offices from broadcasting their views on legal issues. Rachel Paine Caufield, *In the Wake of White: How States are Responding to Republican Party of Minnesota v. White and How Judicial Elections are Changing*, 38 Akron L. Rev. 625 (2005). As discussed above, a split had developed in the federal circuit courts over the constitutionality of these restrictions. While undoubtedly restricting free speech, the state laws were in place to preserve due process guarantees. *See, e.g., State v. Chamberlin*, 162 P.3d 389, 393 (Wash. 2007) (discussing litigant's due process right to an impartial judge). Litigants before a judge with a commitment to a position on an unresolved legal issue come to court with an expectation that they can convince a judge that their legal arguments are correct. However, if the judge announces her belief that the law permits or does not permit something, the litigants know what to expect before entering chambers. A judicial candidate who announces her belief that the legislature may constitutionally ban same-sex marriages has in effect already decided a legal issue that might appear before her in the future.

Yet this was the precise example Justice Scalia used to strike down the Minnesota Supreme Court's "announce clause" canon. *White*, 536 U.S. at 779-80. In *White*, Gregory Wersal, a lawyer running for the state supreme court, unsuccessfully requested an advisory opinion from the state agency responsible for investigating ethical violations by candidates for judicial office. *Id.* at 769. Specifically, Wersal sought an advisory opinion from the Minnesota Lawyers Professional Responsibility Board (Board) on the "announce clause" forbidding judicial candidates from announcing their views on disputed legal or political issues. The clause prohibited a candidate from announcing his or her views on disputed legal or political issues. *Id.* at 768. A separate provision of the Minnesota Code of Judicial Conduct, not before the Court, prohibited candidates from pledging or promising to decide issues in any particular way. *Id.* at 769. The Board refused to issue an advisory opinion, stating that although it had significant doubts about the constitutionality of the announce clause, Wersal had not provided a specific list of the announcements he wished to make. *Id.* at 769. Two years earlier, Wersal had withdrawn from a judicial election after a complaint was filed with the Board. *Id.* That complaint had challenged campaign literature criticizing Minnesota Supreme Court decisions on welfare, abortion and crime. *Id.* At the time, the Board had dismissed the complaint, expressing doubts that the clause could be constitutionally enforced. *Id.* Nevertheless, Wersal had withdrawn from the earlier race because he feared the impact a negative decision would have on his ability

to practice law. *Id*.

After the Board refused to issue an advisory opinion during the second judicial campaign, Wersal filed a lawsuit in federal district court seeking a declaration that the clause violates the First Amendment and sought an injunction against its enforcement. *Id*. at 770. The Supreme Court granted certiori after the Eighth Circuit affirmed the district court's holding that the announce clause did not violate the First Amendment.

Because the announce clause was a content-based regulation, and one that concerned "speech about the qualifications of candidates for public office," the Supreme Court applied strict scrutiny to test the law's constitutionality. *Id*. at 770. To survive a First Amendment challenge, the state agency had the burden to prove that the announce clause (1) served a compelling state interest and (2) was narrowly tailored. *Id*. at 774-75. While the Court accepted judicial impartiality as a compelling state interest where lack of bias for or against a *party* to the proceeding was at issue, the Court held that the announce clause was not narrowly tailored to serve that interest. *Id*. at 775-77. The Court considered and rejected two additional conceptions of impartiality: lack of preconception in favor of or against a particular legal view and open-mindedness. Because avoiding judicial preconceptions on legal issues was neither possible nor desirable (at least from the Court's perspective), any state interest in that type of impartiality could not be "compelling." *Id*. at 777-78.
The Court's analysis of the open-mindedness question was more thorough. The Court noted that Minnesota judges were encouraged to engage in extra-judicial activities where they were likely to state their views on a variety of legal issues. *Id*. at 779. Yet the announce clause only prohibited judicial candidates from expressing those views; before announcing their candidacy, individuals were permitted to express their views on legal issues even while on the bench. *Id*. at 779-780. As a means of preserving judicial open-mindedness, or its appearance, the announce clause was simply underinclusive. *Id*. at 780.

In a dissent joined by three other justices, Justice Ginsburg argued that the majority had failed to distinguish judicial elections from elections for a political office. *Id*. at 805-06 (Ginsburg, J., dissenting). Minnesota, she argued, could depart from the federal model with respect to who chooses judges without departing from the federal position on the criteria relevant to that choice. *Id*. at 806. She also argued that the announce clause was required to prevent circumvention of the ban on pledging or promising to decide legal issues a certain way. *Id*. at 807-08. She reasoned that a candidate who promised to uphold the legislature's power to prohibit same-sex marriage would not feel any more pressure to honor that statement than a candidate who appears before a crowd of supporters and tells them he believes the legislature may constitutionally prohibit same-sex marriages. *Id*. at 820. Both candidates, in effect, have made promises to their supporters, but under the Court's holding only the former candidate could be sanctioned. *Id*. at 820. As Justice Ginsburg noted, a judicial candidate is free to announce how she will rule in particular cases, but only if her language is cautious enough to circumvent the literal language of the rule.

V. White's Fallout

White had an impact on litigation that was already pending in federal court. In *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), the Eleventh Circuit determined that Georgia's Code of Judicial Conduct included two unconstitutional provisions. A prohibition on negligently making false and true but misleading comments was invalid, as was a provision prohibiting candidates from personally soliciting campaign contributions. While invalidating the solicitation provision, the court noted that a candidate's election committee was permitted to solicit campaign contributions. The court noted that a candidate will feel beholden to the people who helped to elect her regardless of who engaged in the solicitation. The provision failed because it chilled speech without advancing the state's asserted interest in impartiality. *Id*. at 1322-23.

The court also invalidated a provision that prohibited negligently-made false statements and true-but-misleading or deceptive statements. The court identified "the dramatic chilling effect" of the provisions; negligent misstatements had to be protected to give protected speech "breathing space." *Id*. at 1320. The court also stated that Georgia's interests in judicial impartiality were not advanced by the provision; it was the general practice of electing judges, not judicial campaigning, that gave rise to impartiality concerns. *Id*.

Judicial candidates are not the only constituency that "benefits" from *White*. In 2005, the Pennsylvania Family Institute (PFI) sued the Pennsylvania Judicial Conduct Board (Board). *Pa. Family Inst., Inc. v. Black*, 489 F.3d 156 (3rd Cir. 2007). PFI distributed questionnaires to judicial candidates. Candidates were asked to, *inter alia*, respond to questions such as "Do you believe that the Pennsylvania Constitution recognizes a right to same-sex marriage?" and questions concerning their judicial philosophy. *Id*. at 160. The questionnaires included a "Decline to Answer" option, with an asterisk corresponding to a footnote stating that "this response indicates that I believe I am prohibited from answering this question by Canon 7(B)(1)(c) of the Pennsylvania Canons of Judicial Conduct…" *Id*. The court affirmed the dismissal of the case for lack of standing. *Id*. at 169. The prepackaged "Decline to Answer" footnote was insufficient to show there was a judicial candidate who did not answer the questions because of the Canon. *Id*. However, the court suggested that a party could establish standing as a "willing listener" if a candidate stated she would be willing to provide answers to their questions if the judicial conduct canon did not prevent her from announcing her views. *Id*. The First Amendment protections advanced in *White* also applied to PFI's "right to listen," assuming there was a willing speaker. *Id*. at 167-68. Just as judicial candidates have a right to announce their views, the electorate has a right to hear them.

On the other hand, courts have been unwilling to circumvent canons prohibiting candidates from promising certain results if elected. During her 1998 election campaign, Judge Patricia Kinsey engaged in campaign conduct that prompted the state Judicial Qualifications Committee to charge and convict her of several violations applicable to judicial candidates. *In re Kinsey*, 842 So. 2d 77 (Fla. 2003). Her campaign literature included statements that "a judge should protect victims' rights" and should support "hard-working law enforcement officers by putting criminals behind bars, not back on our streets," among other things. *Id*. at 80. The Florida Code of Judicial Conduct prohibited candidates from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." *Id*. at 87 (quoting the judicial canon). After she was found guilty of ethical violations, she challenged the charges on First Amendment grounds.

The Florida Supreme Court upheld some of her convictions, including convictions for stating that judges should "help law enforcement by putting criminals where they belong-behind bars." *Id*. at 88-89. The court refused to extend *White* to cover Judge Kinsey's conduct and distinguished its own judicial canon from the "announce clause" at issue in *White*. *Id*. at 86-87. The court concluded that the canon was narrowly tailored because it permitted a candidate to state her personal views on disputed issues. *Id*. at 87. Kinsey's statements went farther than that, suggesting bias favoring victims and particular witnesses. *Id*. at 89.

The dissenting justice in the *Kinsey* case, Justice Lewis, agreed with the majority that Kinsey's statements were not protected speech, but thought that removal from the bench was the only appropriate sanction. *Id*. at 99 (Lewis, J., dissenting). Justice Lewis warned that the imposition of the $50,000 fine "sends the message to future candidates that they may violate the Code and commit ethical breaches, if they are prepared to pay a monetary fine following the election." *Id*. Judge Kinsey remained on the bench, notwithstanding the appearance of impropriety that clouded her courtroom during criminal proceedings.

As *In re Kinsey* illustrates, states are not powerless to regulate judicial candidates. A candidate who appears

to commit themselves to a particular outcome through her conduct or statements may still be sanctioned. Pledge or promises prohibitions, as in Florida, have survived constitutional scrutiny elsewhere. *See, e.g., In re Watson*, 794 N.E.2d 1 (N.Y. 2003). In practice, however, *White* has opened a loophole to these limitations. A judicial candidate may opine on legal issues and solicit campaign contributions from like-minded supporters with impunity. As discussed below, these kinds of changes may have a tremendous impact on state court campaigns.

VI. The Perfect Storm: A More Expensive and Divisive Landscape

Even before the decision in *White*, state judicial elections were changing. In 2000, the New York Times reported that state supreme court races had become heated and costly, with interest groups and political parties rallying behind and against various candidates. William Glaberson, *Fierce Campaigns Signal a New Era For State Courts*, N.Y. Times A1 (June 5, 2000). By the summer of that year, candidates in a state supreme court contest in Ohio had expended over $5 million. *Id*. In a stunning ouster of an incumbent state supreme court justice in Idaho, the challenger, who attacked judges that "legislate from the bench," stated that he was morally opposed to abortion and could "scientifically" prove that evolution was impossible. *Id*. A Republican Illinois Supreme Court justice, Justice Rathje, was unseated in a primary election after a challenger paid for campaign fliers that were distributed by anti-abortion groups. *Id*. The fliers claimed that the challenger was the only endorsed pro-life candidate. *Id*. Reflecting on his campaign loss, Justice Rathje said that litigants will have to get used to appearing before judges who have already stated their views. *Id*. Two years later, his concerns would be further confirmed by the United States Supreme Court.

It is difficult to separate expensive and divisive judicial campaigns from public debates over "cultural" or "social" issues, including abortion and same-sex marriage. Less than a year after the Massachusetts Supreme Judicial Court held that the state constitution mandated equal treatment under the law for same-sex couples, voters in nearly a dozen states approved state constitutional amendments prohibiting same-sex marriages, civil unions or domestic partnerships. Charles Forelle, et al, *Gay Agenda Is Seen as Rallying Point --- Some Democrats Suggest Same-Sex Marriage Issue Cost Kerry the Presidency*, Wall St. Jrnl. A5 (Nov. 5, 2004). These amendments were largely prophylactic attempts to prevent similar court decisions in those states, as none of those states recognized same-sex marriage at the time the amendments were passed.

Indeed, the passage of state constitutional amendments or popular initiatives poses serious questions about judicial independence, particularly in states that have judicial elections. The late Justice Otto Kaus described the dilemma of deciding controversial issues before reelection as akin to finding a crocodile in your bathtub-when you use the bathroom in the morning: you can try not to think about it, but it is difficult to think of much else. Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 Notre Dame L. Rev. 1133 (1997). This is particularly true in states where voters routinely pass legislation by popular elections. When a judge is called on to determine the constitutionality of a statute passed by a majority of the voters, he is open to a potentially vicious campaign challenge, even if the vote is simply to retain him. *Id*. at 1136-37. In California in the 1980s, three sitting state supreme court justices were unseated after a successful pro-death penalty campaign convinced voters that a no vote on retention was a yes vote on the death penalty. *Id*. Perhaps unsurprisingly, the number of decisions affirming the imposition of the death penalty increased. *Id*. The rate is highest in Texas, where the Criminal Court of Appeals candidates run in partisan elections. *Id*.

Justice Kaus' observation is not limited to the death penalty arena. Justice Rives Kistler of the Oregon Supreme Court, the only openly gay justice sitting on the highest court of any state, faced a challenge from the Oregon Christian Coalition in 2004, while the issue of same-sex marriage was being litigated in Oregon

courts. Joan Biskupic, *Amid Debate Over Rights, Number of Gay Judges Rising; Most Report Sexual Identity Not an Issue, but Conservative Groups Wary*, USA TODAY, 5A (Oct. 18, 2006). Justice Kistler ultimately voted with a unanimous court that affirmed the state's ban on same-sex marriage, reasoning that any change in the law had to come through the legislature, not the judiciary. *Id*. His rival in the Oregon campaign, however, had supported a constitutional amendment to ban same-sex marriage. *Id*. The Kistler campaign illustrates the curious intersection of the judiciary, personal life and politics. Kistler considered recusing himself because he was gay, not because of any statements he made in favor of same-sex marriage. He only participated in the decision after consulting a judicial ethics panel, which informed him that there was no conflict. *Id*. By contrast, Kistler's opponent felt free to discuss the constitutional merits of banning same-sex marriage, and if elected, he would have been permitted to hear the debates on the merits. The plaintiffs would have hardly had much confidence in his open-mindedness.

As the Eleventh Circuit's decision in *Weaver* illustrates, the reasoning of *White* has also exposed other ethics provisions to constitutional challenges, including the solicitation of campaign contributors. As the cost of judicial campaigns rises, there is a corresponding need to actively solicit campaign contributions. Concerns over impartiality are virtually nonexistent in races for political offices; candidates are expected to formulate policy if they win, and their backers are presumably ideologically aligned with the candidate's own positions on any number of issues. Yet as advocates of judicial restraint often point out, a judge is distinct from a legislator. The duty of a judge is to uphold existing law, not to formulate or implement public policy from the bench.

The holding in *White* may also affect the cost of judicial campaigns. After *White*, Pennsylvania was the first state to hold statewide judicial elections without the benefit of its now unconstitutional "announce" clause. Caufield, *supra* at 637-38. The two candidates for the state supreme court received $3.34 million in campaign contributions. *Id*. at 638. The Democratic candidate won the vacant seat after outspending his Republican opponent by nearly half a million dollars. *Id*. There was additional evidence that other state-supreme-court races became much more costly in the wake of *White*. *Id*.

Before *White*, Professor Uelmen cited Florida as a possible model for preserving judicial independence in states where judges run for reelection. Uelmen, *supra* at 1153. Specifically, three Florida Supreme Court justices were retained without challenge in 1996. *Id*. Yet as Professor Uelmen himself notes, these same justices were targeted in the early 1990s after striking down a state statute requiring parental involvement when a minor chose to have an aborition. *Id*. at 1146. Two justices, including the author of the majority opinion and another justice who joined the majority, were retained only after spending more than $500,000 in their campaign. *Id*. Professor Uelmen suggested that the Florida result could be explained, at least in part, by a unified defense of the court from the organized bar and a significant monetary investment into the retention campaigns. *Id*. at 1153. A successful initial defense, according to Professor Uelmen, may force opponents of sitting judges to abandon their campaigns. *Id*. Five years after *White*, no Florida Supreme Court justice has been voted out of office. William R. Levesque, *Cantero, Bell Easily Hang on to Seats*, St. Petersburg Times, 7B (Nov. 3, 2004). Perhaps Professor Uelmen's hypothesis rings true for Florida.

The same cannot be said for other state judges. In 2004, Justice Warren McGraw of the West Virginia Supreme Court lost his seat to a Republican candidate backed by business and coal interests. James Dao, *West Virginia Heads Down A Political Road Less Taken*, N.Y. Times, 20A (Nov. 16, 2004). Justice McGraw lost his seat in the same year that eleven state constitutional amendments banning same-sex marriage were passed in response to concerns that state courts would legalize gay marriage by judicial fiat. In Mississippi, which passed an anti-gay marriage amendment by a four-to-one margin, Justice James Graves, the only African-American justice on the Mississippi Supreme Court, was forced into a runoff

election after he failed to win the percentage of votes required to stave off a Republican-backed challenger. Greg Zoroya, *Election 2004: Regional Roundup*, USA TODAY, 8A (Nov. 4, 2004).

In 2006, South Dakota voters considered the "Judicial Accountability Initiative Law," or "JAIL" for short. The initiative would have created a special grand jury to handle citizen complaints that judges violated the law or otherwise abused their discretion. Tim Jones, *Voters, Activists Put Heat on Judges; Interest Groups, Playing to Voter Resentment, Mount TV Attack Ads*, Chicago Tribune, 1 (Dec. 5, 2005). Donald Dahlin, a professor of political science at the University of South Dakota, believed that the initiative was a reflection of growing resentment of judicial power. *Id*. Clearly, *White* has made it more difficult to preserve judicial independence at a time when political partisans routinely attack it. It has also made it easier for judicial campaigns to target judges on single issues, often gay rights, abortion and the death penalty.

VII. Conclusion

The *White* decision was handed down slightly over a year before the Massachusetts Supreme Judicial Court handed down a decision authorizing same-sex marriage, a hypothetical alluded to in the *White* decision. Five years and multiple election cycles later, judicial campaigns are more expensive and divisive, with a sizable number of citizens frustrated with state judicial decisions they disagree with. This frustration manifests itself in elections, with judges running on policy platforms that suggest a commitment to particular outcomes in controversial legal debates.

Single issue campaigns have not proven fatal for all judicial candidates. The Florida Supreme Court justices survived a six-year, sustained campaign against four of its members by anti-abortion groups, and California voters have not repeated anything like the 1986 recall of justices perceived as "soft" on the death penalty. Nevertheless, these states do not have contested elections for sitting appellate judges. In states that have contested or partisan elections, judicial independence does not fare so well, as the examples of Idaho, Mississippi and West Virginia illustrate.

The only way to ensure the impartiality of judges is to secure their independence from the political branch. This would require adopting the federal model or something similar, perhaps giving judges a single term of twelve years on a court. Any solution short of that, including merit retention elections, invites the partiality alluded to by the *White* dissent. For the time being, however, Justice Rathje's comment rings true: People need to become accustomed to the idea of appearing before judges who have publicly announced their views on the legal issue they are raising before the court.