



## The Unconstitutionality of Elected State Judges Monroe H. Freedman<sup>1</sup>

In *Republican Party of Minnesota v. White* the Supreme Court held that an elective state judge has a First Amendment right to “announce his views on disputed legal or political issues.” Accordingly, the Court struck down the “announce” clause of the ABA Model Code of Judicial Conduct (1972).

The majority opinion was written by Justice Scalia, joined by Rehnquist, O’Connor, Kennedy, and Thomas. The dissenters were Stevens, Souter, Ginsburg, and Breyer.

Even more important than the holding in *White* is the strong suggestion in the opinions of Justices O’Connor and Ginsburg (writing for a total of six justices) that no judge subject to reelection can decide a controversial case without violating due process. The reason is that due process is denied if there is a “*possible* temptation to the average ... judge ... which *might* lead him not to hold the balance nice, clear, and true....”

There is substantial reason to believe that elective judges are influenced in controversial cases by the threat of being voted out of office. Particularly in cases involving issues like the death penalty or abortion rights, therefore, there is a strong argument that a decision by such a judge violates the Due Process Clause of the Fourteenth Amendment.

Indeed, Justice O’Connor’s concerns ultimately go beyond the controversial case, to challenge the entire system of electing judges. Joined by Justice Kennedy, O’Connor wrote a concurring opinion to express her objections to “judicial elections generally.” Referring to the state’s claim of a compelling interest in “an actual and perceived ... impartial judiciary,” she notes that “the very practice of electing judges undermines this interest.” That is, elected judges “cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects,” giving them “at least some personal stake in the outcome of every publicized case.” Moreover, even when judges succeed in overcoming their concern with voters’ displeasure, “the public’s confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so.”

O’Connor refers to the observation of a state supreme court judge that ignoring the political consequences of controversial cases is like “ignoring a crocodile in your bathtub.” She also relies on statistics indicating that judges who face elections are far more likely to override jury sentences of life without parole and impose the death penalty.

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In addition, O'Connor discusses the pernicious effects of campaign fundraising in judicial elections. Not surprisingly, lawyers and litigants who appear in court are among the major contributors to judges' campaigns, and "relying on campaign donations may leave judges feeling indebted to certain parties or interest groups."

When lawyers and litigants appear to be buying influence with campaign contributions, the appearance of partiality goes beyond the highly publicized case, tainting any case in which money may have passed. Thus, O'Connor's ultimate due process challenge is to the entire system of judicial election of judges, in cases of both major and minor public interest.

Similarly, Justice Ginsburg concludes that a litigant is deprived of due process when the judge who hears his case has a "direct, personal, substantial and pecuniary" interest in ruling against him; that the judge's interest is sufficiently "direct" if the judge knows that "his success and tenure in office depend on certain outcomes;" and that due process does not require a showing that the judge is biased in fact as a result of his self-interest. Rather, the Court's decisions have "always endeavored to prevent even the probability of unfairness." Ginsburg's remarks are applicable to any judge who "may be voted off the bench and thereby lose her salary and emoluments" if her decision displeases the voters.

Since *White* was decided, Rehnquist and O'Connor have left the Court. However, that still leaves a majority of five justices - Stevens, Kennedy, Souter, Ginsberg, and Breyer - who have indicated that state judges who are subject to reelection cannot decide cases without violating due process of law.