

# Speak Not Until Spoken To

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*EDITORIAL [Note: The opinions expressed in our Editorials are those of the publisher. NYPRR invites comment from lawyers on issues of Ethics and Professionalism.]*

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We were taught to think that judges – especially appellate judges, and most especially, Supreme Court Judges – were supposed to speak only from the bench and in their written opinions. Not that the notion of judicial reticence was discussed very much at law school; it was understood, intuited, felt, instinctive – basic to our understanding of how the judicial process worked.

Imagine our surprise, therefore, when we read an AP story in the New York Times in January about a speech by no less a public figure than Justice Antonin Scalia, who was described as “the principal speaker at an event for Religious Freedom Day.” The Times headline itself prompted our initial surprise: *Scalia Attacks Church-State Court Rulings*. The first paragraph of the article confirmed our concerns: “Justice Antonin Scalia of the United States Supreme Court said today that the courts had gone overboard in keeping God out of government.”

We knew, of course, that Justice Scalia had written the majority opinion in the Court’s 5-4 decision in *Republican Party of Minnesota v. White*, U.S. No. 01-521, June 27, 2002 (*see*, NYPRR September 2002, p. 6). But we knew also that that case concerned political speech not by a sitting judge but by a candidate for judicial office. Although we did not agree with the Court’s decision in the Minnesota case, we did recognize that there was a subtle but important difference between political speech by a judicial candidate and political speech by a sitting judge. In the case of a judicial candidate, the public could listen, weigh and decide. In the case of a sitting judge, especially one appointed for life, the public had no recourse except to listen. It was powerless to respond in any meaningful way.

There is no more controversial or “political” issue in contemporary American life than the relationship between church and government, nor any issue which comes so frequently before the courts. However one may feel about the gap between church and state, the issue is the subject of constant debate and controversy. Only last week, the Supreme Court itself refused to take an appeal from a decision by the 10th Circuit in Colorado which upheld the right of the Columbine High school district to prevent parents from placing commemorative tiles containing a reference to God among other tiles in the school’s corridors.

In a democracy, any issue which needs to be resolved by public discussion and debate is a political issue. Under our tripartite system of government, political questions are left to the legislative and executive branches. Judges are expected to refrain from political activity or comment. This simple concept becomes clearer when we construe the codes which were designed to influence the conduct of judges.

Proper judicial conduct is codified in the ABA Model Code of Judicial Conduct. The rules for sitting judges are contained in Canon 3, A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently. The relevant provisions of this Canon are:

B. (2)...A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not...by words or conduct manifest bias or prejudice, including...bias or prejudice based on race, sex, religion...

(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...

In his speech before the Religious Freedom Day crowd, Justice Scalia pointed to a case pending in the courts of California. According to the AP story, the case was resolved by an appellate court ruling upholding the right of the state to prevent students from reciting the Pledge of Allegiance with the phrase "one nation under God." Judge Scalia acknowledged that the case was still pending and that it might ultimately reach the Supreme Court. According to the AP, this did not prevent him from commenting that the ruling had "plausible support" in prior decisions of the Court, but that the issue should be left to the legislature and not the courts.

What Justice Scalia fails to see is that sensitive political issues will keep coming before the courts and that the courts cannot refuse to resolve them. What he also fails to see is that it's the responsibility of a Supreme Court judge to abide the process by which an issue reaches the Court, not to frame or influence it in advance.

As his colleague, Justice Ginsburg, said in her dissent in the Minnesota case,

Unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation.