

Perspectives on the New Code

JUDGES AND POLITICS: WHAT TO DO AND NOT TO DO ABOUT SOME INEVITABLE PROBLEMS

ALAN B. MORRISON

The recently approved American Bar Association Model Code of Judicial Conduct is a major revision to the previous version and in many respects a major improvement. This essay discusses two of the most significant and controversial topics that it covers: how judicial election races should be conducted and what judges may do regarding political organizations once in office. It makes three main points: First, the term “political organizations” should not be limited, as the ABA has done, to political parties and candidate committees, but should include any political or advocacy organization that is likely to have a case before the court on which the judge sits, or whose lawyers are likely to have such cases. Second, some of the rules are too broad and others too narrow, leading to both over- and under-regulation. Third, many problems could be avoided and most First Amendment issues eliminated by making some of the rules advisory and not enforceable by legal sanctions.

Under the platonic ideal, judges would be completely detached from all political activities and organizations, both in their selection and in what they do once on the bench. They would then decide the facts and law in the cases that come before them, without outside influences. Such a regime is not possible in the real world, or at least not in twenty-first-century America. This essay attempts to sketch out the kinds of measures that are desirable, and those that are not, in minimizing the risks to an impartial judiciary from various “political” influences, while still retaining the existing processes for choosing judges. It also recognizes that, even after judges take office, they cannot, and should not, be totally divorced from all contacts with anyone associated in any way with a political entity that might come before them as litigant or lawyer.

The essay is divided into two parts. The first deals with elections, which are the principal means of judicial selection in the United States today. Federal judges and some state court judges are appointed. For them, there are no issues relating to financing election races, and any restrictions on political activities would operate in a very different milieu. In general, the rules applicable to appointments have drawn much less interest and criticism, and hence are not discussed further in this essay. The second topic is the appropriate range of judicial activities relating to political and other outside groups once the judge is in office, however chosen.

I do not attempt to deal with every variation in the ever-changing election processes, but instead I set forth the governing principles that can then be applied to each jurisdiction’s specifics. Similarly, the essay will not cover all post-selection

activities that may raise concerns, such as memberships in clubs that practice various forms of discrimination, gifts from nonfamily members who might have some business before the court, or judges being invited for all-expense-paid trips to high-priced resorts for private educational programs, either as attendees or as speakers with limited duties. Instead, the essay focuses on interactions between judges and organizations with agendas that might create an appearance that the judge lacks impartiality in cases involving that organization.

As used here, “political organization” is a broad phrase that reaches not only the political parties that sponsor candidates for offices, but also other organizations (generally nonprofits) that focus on issues or causes, such as the NAACP, Chamber of Commerce, ACLU, NRA, AFL-CIO, and Association of Trial Lawyers of America. Some of these groups become involved in partisan elections for legislative, executive, or judicial branch offices, either directly or through affiliated political committees, and most of them have more than a passing interest in judicial elections because they or their members have cases and issues that will come before the courts. Although there are differences between them and the formal political parties, I will argue that, for purposes of electing judges and for a judge’s relations with these groups once on the bench, both should generally be treated in the same way.

The recently adopted amendments to the American Bar Association’s *Model Code of Judicial Conduct*, approved by the House of Delegates in February 2007, define political organization in a way that does not include entities not engaged in electoral politics; it further limits the term to organizations connected to candidates or political parties (ABA Judicial Code, Terminology, “Political organization”). As a result of this latter limitation, the definition excludes some entities that engage in electoral activities, such as the so-called 527 organizations that spend money on elections but do not make contributions to candidates or parties, as well as political committees, such as those organized by trial lawyers and by doctors, that have been involved in state judicial elections and that make contributions to candidates. These omissions create serious problems of under-inclusion, even assuming that it makes sense to draw a sharp line between organizations that engage in electoral politics and those that do not.

To minimize risks under the First Amendment, I urge that there should be fewer mandatory rules of the “must” or “must not” variety, and more precatory statements, encouraging judges and candidates for judicial office to do the “right thing,” but letting voters, rather than a disciplinary body, decide whether the candidate acted properly or not. My assumption is that “shoulds” and “should nots” will work reasonably well for most aspects of this problem, especially when joined with a more vigorous recusal practice when claims of partiality arise in an actual case. There are also places where valid rules are drawn too broadly or where sensible exceptions are needed because the purpose behind the rule simply does not apply. Finally, some parts of the new Code are either not “tough enough” or too strict, and a better balance is needed

between the desire for impartiality and the recognition that judges should not be wholly isolated from the rest of the world.¹

JUDICIAL ELECTIONS

Fund-raising. For better or for worse, most judges in the United States are elected, and despite the efforts of the ABA and others, that is unlikely to change any time soon. In this country, elections mean raising money, which presents special problems in the judicial context. For both executive and legislative offices, the Supreme Court has permitted the government to regulate the levels of campaign contributions, within some limits, to avoid the “appearance of corruption,” that is, the appearance that large contributions may influence the official actions of the recipient. In judicial elections, the appearance problem is probably greater because a single judge can often determine the fate of a litigant, and those who contribute to judges’ campaigns are often either lawyers who appear before them or clients who have frequent business in the courts. In any event, if there is a need to regulate contributions in legislative and executive branch races, that need also exists when the election is for a judgeship.

Thus, the first step should be to set contribution limits, yet some of the more than thirty states that elect some or all of their judges have no such limits. The Minnesota Supreme Court had strict rules about how money for judicial elections could and could not be raised, which the Eighth Circuit struck down in part in *Republican Party of Minnesota v. White* (2005). However, because there were no limits on how much any one could give to support a judicial candidate, those rules were harder to defend than if there had been contribution ceilings. The ABA now recognizes the need to provide contribution limits “in conformity with applicable law” (Rule 4.4(B)(1), Comment [3]). This presumably means that the amounts will be set by the state’s legislature, which sets all other electoral contribution rules. There is the further question of whether corporations and labor unions should be permitted to make contributions in judicial races, with states taking different views on the question. There are a number of other related issues, such as the time period during which campaign funds can be raised (both before and after an election) that arise in connection with all elections, and the Code takes no position on them but does note that the need also exists to comply with such other legal requirements (Rules 4.4(B)(2) and (3)).

¹ Shortly before the proposed Code was to be voted on by the ABA House of Delegates, there were a number of protests about the proposed treatment of Canon 1 that directs judges to “avoid impropriety and the appearance of impropriety,” because the Scope section stated that only violations of rules, not canons, could lead to judicial discipline. The stated concern was that the draft could be seen to downgrade the importance of avoiding the appearance of impropriety by making the canon in effect into a “should” instead of a “shall.” Although no one was able to give examples of cases where judges had been disciplined for violating this canon alone (rather than having the charge included with other violations), the commission agreed to adopt an amendment to the Scope section eliminating the two problematic sentences and replacing them with the following: “Although a judge may be disciplined only for violating a Rule, the Canons provide important guidance in interpreting the Rules.”

Virtually every state except Texas recognizes the special problem of a sitting judge or a candidate for judicial office making a direct request for a contribution to a potential supporter, especially to a lawyer who practices in the judge's court or a party with regular business there. Such a request, especially if made in person, in circumstances in which an immediate response is expected, can be seen to carry with it an implied promise—support me and I'll vote with you—or an implied threat—if you don't support me, I'll vote against you. Either way, these requests are inconsistent with the appearance of judicial impartiality, particularly if the person making the request is already a judge. It is for this reason that the ABA requires candidates to raise money exclusively through a separate committee (Rule 4.1(A)(8); Reporter's Explanation of Changes to Rule 4.1, # 6).

Typically, those committees operate without involvement of the candidate and without the candidate's knowledge of who has, and has not, made a contribution and in what amount. In most states, all substantial contributions are matters of public record, and so a candidate interested in who made a contribution can find out, as there is no rule or statute that forbids it. And, of course, the states have not tried to, and probably could not constitutionally, forbid a donor from telling a candidate, especially a long-time friend or family member, that he or she made a contribution to support the candidate's election. Despite these minor imperfections, the committee system seems like a sensible buffer between the candidate and would-be supporters, and to date no one has challenged it as an unconstitutional barrier to running in a judicial election.

One aspect of the committee system needs tightening. Currently, there are no limits on the number of potential committee members who may be asked to serve. This raises the question of whether the process of forming a committee is consistent with the personal-solicitation ban because a request for a contribution is surely implicit in a request for a person to serve on the committee. But "coercion" seems to be the wrong way to describe asking a close friend or law partner to serve as one of the members, or even the chair, of the campaign committee, or at least it is not the kind of coercion that can be totally avoided because the candidate has to ask someone to serve.

The greater danger is that the committee-formation process can be abused if the candidate asks 500 or even 5,000 of his closest friends to be on the committee. To prevent wholesale evasion of the basic prohibition, the law should place some limit on how many individuals the candidate may solicit for committee membership, or how large the committee may be before no more requests may be made. A similar problem relates to endorsements. The ABA has placed no limits on how many lawyers and others may endorse a candidate, nor on the number of people a candidate may ask. A request by a judge to a lawyer to sign a public list of supporters is not the equivalent of a request for money, but it is pretty close, and yet the entire process is left untouched.

When the Minnesota Supreme Court interpreted the personal-solicitation ban to include written communications signed by the candidate and oral requests to large

groups of potential supporters, for example, at a public forum where some or all the candidates may be present, the Eighth Circuit struck it down. *Republican Party of Minnesota v. White* (2005). If the justification for the ban on in-person solicitation is to prevent actual or implied undue pressure to contribute, it is difficult to see how the candidate's signature on the fund-raising letter, perhaps with a short P.S., is any more "coercive" than the same letter, with a "Candidate for Judge" letterhead, signed by the chair of the committee, who everyone knows was chosen by the candidate. Similarly, if a candidate for a judgeship appears at a bar- or League of Women Voters-sponsored event to which all candidates are invited, it stretches the concept of coercion almost beyond recognition to forbid a candidate from telling the 500 assembled voters, "Running for circuit judge costs money and I need your support because I am not a wealthy person who can finance this myself," on the theory that such a statement unduly pressures everyone in the room to give to the nominee's committee.

The ABA has faced a similar issue in a related context: the extent to which direct solicitation of a potential client by a lawyer seeking a commercial engagement should be forbidden. Consistent with Supreme Court First Amendment decisions in this area, such as *Edenfeld v. Fane* (1993), the ABA concluded that only in-person or telephonic communications in circumstances that demand an immediate response are sufficiently coercive to warrant a prohibition (ABA Model Rule of Professional Conduct 7.3(a)). That approach should also be followed regarding solicitation by judicial candidates, and the result in *White* (2005) should be adopted generally.

There should also be an exception for solicitations of immediate family members and close personal friends. The ABA Code already allows judges to accept gifts from such individuals (Rule 3.13(B)(2)). If judges can receive gifts from those individuals, that strongly suggests that there is an insufficient likelihood of improper coercion to justify a total ban on a judicial candidate's personal solicitation of campaign contributions from those same persons.

The ABA has also concluded that, even with limits on campaign contributions, situations may arise in which, because a party or a lawyer contributed to the judge's campaign, it may appear that the judge favors the contributor, and hence the judge should disqualify himself from the case (Rule 2.11(A)(4)). The rule wisely recognizes that strict numerical tests are not appropriate, and hence it uses a "totality of the circumstances approach," including aggregating all such contributions, rather than looking at them individually to see whether each raises a question on its own. Unfortunately, the rule is under-inclusive by appearing to exclude contributions by amici curiae and by trade associations of which a party is a member—and their lawyers—and by not including as relevant factors the timing of the contributions and whether the contributor was a member (or perhaps even the chair) of the judge's campaign committee. It is impossible to capture all the possible relevant factors in a rule, and hence the rule should not only list these sources of contributions and circumstances as raising potential disqualification problems, but also use the term "includes" to make clear that other factors may be relevant in other circumstances.

The use of disqualification to deal with these appearance-of-partiality problems and others discussed below is superior to broader prophylactic rules in several respects. Any interference with the election is much more attenuated because recusals are at most a possibility, whereas a prohibition on speech or conduct has an immediate impact, with possible First Amendment implications. A violation of a rule can lead to a sanction, including possible removal from office, whereas recusal is not normally thought of as the type of action that would give rise to a First Amendment claim by the judge. Moreover, to the extent that there is a First Amendment claim, it must be balanced against the due-process rights of the litigant to a neutral decision maker in a specific case. Finally, because recusals are case-specific, only the conduct of the judge that directly relates to the case is relevant, thereby ensuring that any action taken is based on conduct that may actually affect a litigant in a concrete way. Making a recusal motion, even based on large contributions from an opponent and its counsel, is never a pleasant experience, but, on balance, it is a far more appropriate way to handle these issues than a broad prophylactic rule that will surely present First Amendment difficulties.

Taking Positions on Legal Issues. In *Republican Party of Minnesota v. White* (2002), a ruling with which I agree on both policy and First Amendment grounds, the Supreme Court held that Minnesota's rule that forbade candidates for judicial office from "announcing" their views on issues likely to come before their court violated the First Amendment. The *White* majority was clear that it was not opining on the provision still found in most judicial codes, and not challenged in *White*, that candidates may not make a "promise or pledge" with respect to a case or an issue likely to come before them. Since then, other plaintiffs have been testing that rule. In a lengthy opinion on the Kansas equivalent, *Kansas Judicial Watch v. Stout* (2006), the district court found that the state interest in ensuring an impartial judiciary, that is, a judge who is open to reasoned debate on an issue, was compelling. Therefore, a person who makes a commitment to decide a case in a particular way, in an effort to become a judge, would be acting in a manner inconsistent with the basic requirements of being a fair judge, and could be sanctioned for doing so, consistent with the First Amendment. However, the court said that a state advisory board had gone too far when it told judicial candidates that, to answer eight questions propounded to all candidates by a citizen watchdog group would, without regard to the answers given, violate the "pledge" or "promise" ban, and it struck down that interpretation as applied to that questionnaire.

If a candidate for judicial office was so unwise ("injudicious") as to actually use words like pledge or promise, or to make other statements during a campaign indicating that his mind was irrevocably closed on an issue that is likely to come before his court, the Supreme Court would probably uphold the rule—but it might not, because the ban has serious under-inclusion problems. One, noted by the Eighth Circuit in *White* (2005), is that the rule applies only to statements made during the campaign, and not even to all of them. The avowed purpose of the rule is to prevent judges from

committing themselves to a position on an issue before receiving briefs and arguments in the actual case, but a candidate could have written a law-review article, years before deciding to run for office, expressing views no less equivocal, and perhaps in much more detail, that would be preserved forever by Westlaw and Lexis/Nexus, without violating the rule. Even more problematic is the judge who is running for reelection or elevation to a higher court who has actually decided that issue in a case, perhaps even in an opinion issued during the campaign, which the rules do not, and probably constitutionally could not, forbid.

Beyond this temporal issue, there is the problem of deciding precisely how far candidates can go in “announcing” their views on an issue without straying into the forbidden land of “pledges” and “promises.” Assuming that sophisticated candidates will not actually utter the prohibited terms, will they find other ways to stop just short of crossing the line, and what will courts do then? Congress faced a similar problem in responding to the “magic words” test created by the Supreme Court in *Buckley v. Valeo* (1976) in deciding whether an ad fell within the federal election laws. To eliminate the loophole created by the “magic words” test, Congress enacted a statute that was designed to be sufficiently objective and narrow that it passed muster under the First Amendment, and the Supreme Court upheld it in *McConnell v. Federal Election Commission* (2003). However, that approach is unlikely to work in controlling “pledges” and “promises” because of the lack of objective standards regarding the way that judicial candidates take positions on legal issues.

Instead of trying to draft more-precise restrictions, enforceable by state-supported sanctions, the Code should take a different approach: it should use hortatory language such as “candidates should avoid taking positions on issues that may come before them if elected.” A candidate who strayed from this admonition would be subject to possible public criticism, which might have an impact on those voters who are more concerned with ensuring the open-mindedness of judicial candidates than on where the candidates stand on particular legal issues. There would be no First Amendment problem under this approach because there would be no state sanction imposed for not following that admonition. More significantly, the rules should also be clear that a judge who has not followed the admonition may be subject to recusal if a case presenting the issue on which the judge has previously committed herself comes before the judge on the bench. And if, as seems quite likely, the judge never sees a case in which that issue arises, the precise contours of the rule and the import of what the judge said and did not say will never have to be adjudicated.

State court judges also have functions other than deciding cases, such as issuing rules governing the bar and establishing procedures for summoning jurors, that do not arise in specific cases, with specific parties who are winners or losers. Whatever pre-commitment rules are issued should be limited to the adjudication context so that judicial candidates are not discouraged from taking firm positions during their campaigns on various issues related to the administration of justice and the regulation of the bar. Thus, even the prohibitions on promises and pledges should not apply to

these non-adjudicative functions, which the Code now makes clear by inclusion of the term “adjudicative” in Rule 4.1(A)(13), the provision dealing with promises and pledges.

Restrictions on Political Activities. Until this point, I have treated all judicial elections alike, but in some states, those elections are labeled nonpartisan and have more stringent rules governing what candidates may and may not do during them. Some of the ABA’s restrictions apply even to partisan elections. However, because the best case for imposing restrictions is when an election is nonpartisan, I will discuss them in that context, leaving open the possibility of different results for some in partisan elections.

The term “nonpartisan election” primarily means that the political party of the candidate does not appear on the ballot. It does not mean that the candidate can have had no prior position with a political party, nor even that the candidate must resign from a party and not vote in its primaries. And it surely does not mean that political parties cannot endorse someone for judicial office, because, as the Supreme Court held in *Eu v. San Francisco County Democratic Central Committee* (1989), that would be unconstitutional. The purpose of laws creating nonpartisan elections, including those for positions other than judgeships, is to send a message to the electorate that, in the eyes of the legislature, those elections are different and that partisan considerations should not be relevant to how one votes. Even then, those laws do not make it *illegal* for a voter to prefer a candidate because of a general preference for candidates of that party.

The approach of the ABA Rules for nonpartisan elections is to tell the candidate, “Don’t do anything that might make this race seem like partisan politics has anything to do with how people should vote or on what a judge might do once elected.” Based on this general admonition, the rules provide that judicial candidates may not a) make contributions to political parties or candidates; b) attend meetings of political parties; c) speak on behalf of political parties and, since they cannot attend party events, address party members at those events; d) identify themselves as members of a party; and e) seek, accept, or use the endorsement of a political party (Rule 4.1).² Even without the rules being mandatory, most judicial candidates would follow most of these rules and most voters would look more favorably on those who followed them if the state has decided that an election should be nonpartisan. But because violating these rules can lead to sanctions for a judge who is elected and even for a lawyer who is defeated, these are not simply “should and should not” rules; they are laws that must be obeyed.

Parts of these rules—all but a) and c)—were successfully challenged in *White* (2005). They were defended on the ground that where a state has chosen to conduct nonpartisan judicial elections, it may take necessary measures to preserve the appearance that judges are not partisans and hence dispense justice and not patronage or

² Rule 4.1 (the general prohibition provision) must be read in conjunction with Rule 4.2 (the exceptions for elections) to see what is forbidden in nonpartisan elections. In the text I have used letter designations because the numerical prohibitions in Rule 4.1 range from 1 to 13.

political favoritism. Beyond the basic flaws discussed below, there are a number of practical and definitional problems with these prohibitions. Does the ban on identification forbid a candidate from including in a campaign biography the fact that he or she was an official in a political party or nominated as a candidate of that party for state office? Does it also forbid answering questions or even correcting false statements if the response would “identify” the candidate as a party member? Any rule forbidding a person from making true statements of objective facts has a nearly impossible burden to sustain against a First Amendment challenge.

Similarly, assuming that a candidate cannot affirmatively seek a party’s endorsement, does that apply to her committee and other supporters with no connection to the committee? And do the rules really mean to forbid a candidate from attending a national political convention, along with thousands of others, even if a close friend or family member is speaking or being nominated, or sending \$100 to a family member running for office in another state? And if the candidate cannot make the contribution, is it really so different if the spouse writes the check, whether from their joint account or a separate one?

Those issues aside, there are two larger reasons why these restrictions are of dubious wisdom and constitutionality. The first involves the same kind of temporal problem noted above. Simply telling a judicial candidate to don nonpartisan robes during a campaign does not change the underlying political person, especially those who, like many judicial candidates, have been active in politics for most of their adult lives. It is a legitimate state interest to tell judges to shed partisan politics on the bench, but is it realistic to expect them to do so when they are running in an election that the state labels nonpartisan? Indeed, the rules are even more irrational, because they assume that these restrictions tip the balance and, if not followed, turn a nonpartisan candidate into a partisan judge, or create the appearance of being one, even for those who have been active in politics since before they were eligible to vote. Moreover, the rules have an especially heavy burden to overcome because they involve core First Amendment activities, such as speaking and associating with candidates and political parties.

A second set of problems arises because the rules do not apply to entities other than political parties, such as the National Right to Life Committee, Planned Parenthood, the AFL-CIO, the Chamber of Commerce, the NRA, and ATLA, all of whom are vitally concerned with issues coming before the courts. A candidate for judicial office is free to seek and use their endorsement, speak at their meetings, and identify themselves as members, yet identical conduct involving a political party is forbidden. This distinction is unwisely applied even to nonprofit trade associations, the majority of whose funding comes from for-profit corporations or individuals who are in a business or a profession.

To be sure, as the defendants in *White* (2005) argued, those groups are different from political parties, but as the court of appeals concluded, the difference hurts not helps the defense of those rules. Political parties, or at least the major ones in this

country, have, of necessity, a broad-based membership, and they take positions on a wide range of issues. For those reasons, a party member will rarely agree with his party on every issue but usually will have decided that, overall, one party reflects his preferences better than the alternatives. Other groups, like the NRA, often focus on a single issue or a relatively narrow set of issues, such that an endorsement from one of them almost certainly means that the candidate agrees with them on their core positions. However, with the exception of cases in which the political parties are directly involved, such as election contests or redistricting, a political-party endorsement tells a voter almost nothing about what the candidate thinks on the manifold issues on which the party takes a position, let alone how the candidate would decide a case if one came to his or her court. Even in election and redistricting cases, the likelihood of actual favoritism or its appearance is far greater based on a candidate's activities before a judicial race begins than on having done any of the acts prohibited by the Code's restrictions on political activities during a race for judicial office.

Despite these criticisms, these restrictions on political activities do make sense as a matter of policy when a state has chosen to make its judicial elections nonpartisan. The problem arises when the state seeks to enforce these norms, and the First Amendment is raised in opposition. But if the rules are not binding, and if no one can be sanctioned for not following them, there is no First Amendment defense to overcome. Thus, once again, if a state court were to promulgate advisory standards, using "should" and "should not," instead of "shall" or "shall not," it would create norms that the vast majority of candidates would follow because they and the voters think they are the right way to conduct an election. That approach should apply not just to political parties, but to all "political organizations," broadly defined. And if, contrary to expectations, there were widespread deviations from some of the standards, and if that created problems for the litigation of cases before judges who did not follow them, that might form the basis for a narrow mandatory rule that could withstand a First Amendment challenge.

While most of my criticism of the new ABA Code is that it forbids too much, there is one area in which it permits political activity for which there seems to be little or no justification. In Rule 4.1(A)(3), the ABA Code forbids endorsements by judicial candidates of persons running for public offices, except that Rule 4.2(B)(3) allows a candidate in a judicial election to endorse a person running for a position on the same court as the candidate. The basic prohibition, which applies even where the judicial race is partisan, seems advisable in that it sends a message that judicial candidates should stay out of other elections so that they will appear to be above politics once in office. Rather, it is the exception that seems unnecessary and ill-advised. If the race is overtly partisan, voters will assume that all those running for judgeships as Democrats will support the others, and hence it is difficult to see what the exception adds to informing voters. However, in nonpartisan races, it allows, and I think more likely pressures, judges to support other people from their party, or perhaps other incumbents, either as part of a tradeoff for a cross-endorsement, or to prevent the can-

didate from staying silent with the negative inference that it creates, especially when another incumbent is running. Despite my misgivings about allowing the exception, my inclination is not to remove it but to make it cautionary only—a “should not,” not a prohibition.

RESTRICTIONS ON “POLITICAL” ACTIVITIES IN OFFICE

Once judges are selected, by whatever process, the rules discussed in this section apply to all of them. Many of the same issues with respect to interaction with various political organizations continue, but with an important difference. The First Amendment still applies in balancing the free-speech and associational interests of the judge against the desire of the state to maintain an impartial judiciary, but the counterweight of an election has been removed from the expressive side of the balance. Nonetheless, even if the Constitution would permit a state to enact a particular restriction, sound public policy, including the desire to attract and retain quality judges, would counsel against prohibiting every form of speech or association not protected by the First Amendment.

Relations with Political Parties and Candidates. A major dispute between the majority and dissent in *White* (2002) was whether there were any material ways in which judicial elections differed from other elections. The dissent urged that judge-ships are different from other political offices, and the majority did not so much disagree with that conclusion as it found it to be insufficient to justify the “announce” ban while there is an ongoing election. During a campaign, the interest of the candidates in being able to inform the voters about who they are and what views they hold, as well as the interest of the voters in learning as much about the candidates as they can, overrode any state interest in an impartial judiciary that might be furthered by denying candidates the opportunity to express their views on important legal issues to the voters. Outside the context of an election, however, those interests have much less, if any, weight, and hence the interest of the state in having a judiciary that appears impartial has far greater significance. It was on this basis that the Supreme Court, in *United States Civil Service Commission v. National Association of Letter Carriers* (1973), upheld a law that severely restricted civil servants’ political activities, not only while at work, but also on their own time.³

Once in office, judges are not supposed to be political persons, and so there is no reason to allow them to address political gatherings or to endorse any candidate for political office—judicial or otherwise. Nor should a judge be permitted to be an officer or take any other active role in a political party. Other restrictions, however, raise some questions. Consider the blanket prohibition on campaign contributions by judges. *Buckley v. Valeo* (1976) makes clear that the right to make contributions

³ After an election is over, a sitting judge should have no need to raise further money. However, some judges end up in debt after their election, and some states allow a limited period of time in which to raise additional funds to erase the debt. Postelection fund-raising is troublesome, but if it is allowed, the election would not be “over” until the postelection fund-raising is concluded.

to a candidate or a political party is protected to a considerable degree by the First Amendment, and hence in the context of the rights of judges, the rule is plainly overbroad as an across-the-board prohibition. Why should local judges not be able to send \$100 to support the candidate of their choice for president, or to the state political party with which they have been affiliated all their adult life and which helped them get elected? On the other hand, contributions to local officials, whose decisions can be expected to be challenged in a judge's court, would present a far greater likelihood of creating at least the appearance of favoritism, especially for cases already on a judge's docket involving the party or the official. Recusal is always available, but avoiding the appearance of political preference is a legitimate state interest that would justify some limits on to whom a sitting judge may make political contributions. Whether covered by a prohibition or (my preference) an admonition, the limitation should be on making a contribution to any candidate for office whose decisions might reasonably be expected to come before that judge for review, with an additional cautionary note that contributions should be appropriate in amount and number for a person who is holding an office that is supposed to be nonpolitical.

Nor would I forbid a judge from attending a political convention, provided that the judge took no active role there. Judges should be encouraged not to do so, absent some special reason, such as a close family member participating or being nominated. Large gatherings, where the judge could easily go unnoticed, would seem to be preferable to smaller ones, and that preference should be conveyed to judges in an advisory, not mandatory, form.

Relations with Nonprofit Organizations. When discussing elections, I recommended that candidates not seek endorsements from nonprofit organizations that work on issues that are likely to come before a judge because such endorsements are at least as much a concern as are those from political parties. Some nonprofits, such as the Chamber of Commerce or the Association of Trial Lawyers of America, are funded by for-profit businesses, and the separate and generally quite restrictive rules for sitting judges engaging in for-profit activities should apply to a judge's relations with those nonprofits.

For activities in office, the issue does not relate to endorsements of the judge by the organization, but what the judge can appropriately do for the organization—the opposite side of the coin. Possibly problematic activities include service on a nonprofit board or as an officer, making a financial contribution, speaking at a dinner or other event, with possible distinctions based on whether it is formally a fund-raiser or not, and actively soliciting money for the organization.

Assuming that the activities do not involve commitments of time that interfere with the judge's primary job of judging, what limitations are appropriate and perhaps constitutional, in light of the First Amendment right to associate, which judges do not surrender entirely on taking their oath of office? The general answer ought to be that, if the organization engages in activities for which there is a reasonable likeli-

hood that it or its lawyers will come before the court on which the judge sits, the judge should say no.

Some specifics may be useful in elucidating how this standard applies and why the ABA Code is either too permissive or too restrictive, largely because it fails to focus on the key problem of the need to avoid possible disqualification. First, simply because a nonprofit is a university, either state or private, does not guarantee that the judge can properly serve on its board. Universities are regularly sued on a whole range of issues from employment discrimination, to torts, to zoning and other property disputes. To the extent that those cases come with any frequency before the court on which the judge sits, recusal is not enough, in part because the judge might become a witness and have to appear before a colleague. On the other hand, if the university is in another state, or even a different part of the state, or if the judge handles only criminal matters, there is no reason to bar service on its board.

Second, the traditional exception in Rule 3.7(A) for groups whose purpose it is to foster the “administration of justice” sounds acceptable, but there are a wide range of such groups, at various places on the political spectrum, that would describe their mission in those terms. If a group, or the clients that lawyers who work for the group represent, regularly has cases in the judge’s court, the judge should decline to associate with that group lest that association be seen as an endorsement of the group’s activities. On the other hand, if the group or its lawyers do not appear in that court, there is no reason for the judge to decline to serve, unless the entity’s non-litigation activities are intensely political and hence inappropriate for a judge to join. Thus, even if the judge sat only on probate matters, and the entity worked, for example, on abolishing the death penalty or cutting back on illegal immigration, referring to those goals as relating to “the administration of justice” does not eliminate their highly political aspects from which judges should stay clear.

Judges are often asked to speak before meetings of nonprofit organizations, and speaking at most such events is not only not objectionable, but should be encouraged. For example, the Federalist Society and the American Constitution Society regularly hold meetings at which judges are asked to speak on various topics, some of which are controversial. Because those programs are generally open to the public and the press, perhaps for a fee, and because those organizations do not litigate, there is little danger of endorsements or secret exchanges of the kind for which there are legitimate concerns. Even if other groups that litigate were to hold educational programs, open to the public, with efforts made to ensure some balance in viewpoints, judges should be able to participate without being seen to endorse their goals. Of course, there may be limits, similar to the restrictions on making promises and pledges, on what the judge should say, but that is different from being able to appear at all.

Many of these events charge a fee, and in some cases, the fees are set at levels that may produce a profit that the group can use for its other activities. In other cases, such as dinners that may honor someone affiliated with the organization, or even an

outside lawyer or judge, the fund-raising purpose is explicit. In both cases, when the judge is asked to speak, either as part of a panel, or to say a few words about the honoree, the perception may be that the judge is lending the judge's good name to help raise money for the group, which can be a problem if the group or its lawyers regularly appear before the judge or in that court.

However, telling the judge not to speak affects more than the sponsor, because those who attend will presumably benefit from the judge's thoughts, and the judge will benefit from interacting with lawyers and others in the community. The fact that the event may produce some profit for the sponsor should not preclude the judge from participating where the inference of support for the sponsor is weak, and the inference that the judge was invited because of his interest in, and knowledge about, the subject is strong. Even when the principal purpose of the event is to raise money, so that the link between the judge and the cause is much stronger, that might still not be enough to forbid the judge's participation if the sponsor were, for example, the local symphony or a foster-care facility. In both cases, the proper inquiry should be, what message is being sent by the judge's participation? Once again, because many of these questions will involve close calls, the Code ought to be written in "should not" rather than "shall not" language, at least until there is a demonstrated need for stronger medicine.

Recommendations on Legal Issues and on Behalf of Individuals. Judges are called on from time to time for their advice on proposals to change substantive areas of the law and to give job recommendations for lawyers, judges, and others whom they know. In the former area, judges have been allowed to participate in organizations like the American Law Institute, to teach courses, and to write law-review articles and books. None of those kinds of activities raise any concerns so long as the judge is careful not to promise or pledge to rule in a particular way when an issue comes before the court.

On the other hand, the Code quite properly takes a fairly restrictive view of what judges may do when a judge is being asked to provide a personal recommendation. Judges are often asked to recommend their former law clerks or lawyers who have appeared before them. Sometimes the request comes from the person who wishes to be recommended, while in other cases the inquiry comes from a third party, such as a prospective employer. The problem is that a strong recommendation from a judge may make it difficult for the employer to say no, especially when the employer is a law firm that has regular business before the judge.⁴ The problem is significantly lessened when it is the employer, not the judge, who initiates the process. This is recognized by Rule 1.3 and associated Comment [2] that caution judges to avoid using the prestige of their office to advance the interests of others, and by Rule 3.3 that tells judges

⁴ When I was an assistant U.S. attorney in the Southern District of New York, law clerks then working for the judges in that district would apply to the office, and there was often subtle pressure from judges for us to hire them. The problem was eventually solved in a neutral manner: job applicants were required to have several years of experience so that most law clerks were not eligible until some time after they left the judge's service, by which time the pressure seemed to be reduced.

not to volunteer to testify about a person's good character in an adjudicatory proceeding, but to insist upon a subpoena. To some degree these rules reflect concerns analogous to those that animate the ban on judicial candidates seeking in-person contributions for their campaigns: the fear of subtle and not-so-subtle coercion.

Judges are also admonished by Rule 3.2 not to testify before legislative or administrative bodies except on matters directly related to the administration of their courts, on which they have particular expertise, or where they may be personally affected, such as by a zoning change near their home. The concern is that judges not become too involved in the political process and be seen to lose their neutrality. Judges are also frequently consulted by judicial nomination commissions, by the American Bar Association when it reviews federal judicial nominations, and sometimes even by appointing authorities, such as governors or the president, about whether an individual should be considered for a judicial appointment. Assuming the judge has relevant information, it would disserve the ends of justice for the judge to be precluded from answering, and the Code properly allows a response, presumably in private, when the selection is "being considered" (Comment [3] to Rule 1.3).

It is against this background that the Senate Judiciary Committee invited the late former Chief Judge Edward Becker of the Third Circuit, plus five of his colleagues and one former colleague, to testify on the nomination of Judge Samuel Alito of their court to the Supreme Court. They accepted, without a subpoena. Not surprisingly, their testimony strongly supported the nominee and was no doubt helpful to him. As Senator Coburn noted, their opinions are very persuasive since these judges are "the people that you work with and the people that you spend the greatest amount of time with and the people who see you under stress" (Alito Hearings, 2006:680). Although Judge Alito surely would have been confirmed without his colleagues' help, a few questions were raised at the time about whether it was appropriate for the sitting judges to appear. Provisions of the separate Code of Conduct for United States Judges and the comments and advisory opinions interpreting them suggest that the sitting judges should not have testified (Canons 2B, 4B, and 7A(2); Advisory Opinions 59 and 73). The more important question is whether this practice should be specifically disapproved so that it does not happen again. For me, the answer is clearly yes.

The rules governing federal judges require them to stay away from political activities, and it is hard to imagine a more political activity than the confirmation of a Supreme Court justice. There is no pretense that competence, integrity, and judicial temperament are all that matter, nor is there any doubt that presidents do take political considerations into account and that the Senate does also. This fact alone should be enough to preclude federal judges from testifying at confirmation hearings, but there are other reasons as well.

Although this next scenario did not happen at the Alito hearings, it surely could have, and may well occur if the practice continues. After hearing favorable testimony, none of which is likely to be very specific, a senator would ask a question such as, "Judge, can you give us an example of a case that illustrates the proposition that

the nominee is open-minded and changes his views when presented with strong contrary arguments?" The judge surely would, and should, refuse to supply such specifics, if there are any, because to do so would violate the sanctity of the judges' conference. If such a scenario took place in a courtroom, with an ordinary witness, the witness could not refuse to answer, or if he did, his prior testimony would be stricken. What would happen in the Senate? Would the committee, and the remaining senators who were not on the committee, be instructed to disregard the testimony of the judges, or would the judges be compelled to violate their rules of confidentiality? Either way, the situation would be quite awkward, with the need for information to test the statements made in support of the nominee on one side and the need to guard the confidentiality of communications between judges regarding their cases on the other.

The judges who testified for Judge Alito did so freely, and indeed they may have volunteered without being asked by the nominee or someone acting on his behalf. But won't it be rather awkward to say "No" next time, especially with a Supreme Court seat at stake? "If Judge Alito's colleagues did this for him, is there any reason why you won't do this for me (or my boss)?" For some judges, that will not be a problem, but those who are ambivalent might ask themselves what would happen if they declined. I doubt that many judges would think in terms of retaliation, although that is one of the concerns behind the ban on personal solicitation of campaign contributions. However, they may think of some advantages in going along, such as favorable treatment for their law clerks, access to tickets for their friends for high-profile arguments at the Court, and a greater likelihood of having a justice address their law school or some other group with which they are affiliated. Yet what if a judge is asked and says "No" for some reason unrelated to his views about the nominee, and no other judge on that court thinks it appropriate to testify? Would the nominee then be faced with the negative inference that his colleagues do not respect him and do not want him elevated? And what is he supposed to do to counteract that?

Finally, some day, some judge, perhaps one ready for retirement, will not only decide not to support a nominee, but actually ask to testify in opposition. I can think of several instances in which appeals courts judges have had very strong, and very unfavorable, opinions of certain of their colleagues and who might, given this precedent, wish to testify in opposition if that colleague were nominated for a higher court. Although there would appear to be no basis to block such testimony after the Alito precedent, having one sitting judge testify against a colleague would surely be unseemly and might well violate the implicit judicial understandings regarding the confidentiality of their internal deliberations. Thus, one should ask whether allowing the supporting testimony for Judge Alito is worth having if it also means allowing opposing testimony in some future hearing.

A rule making all judicial testimony on judicial nominations off-limits would provide a safe harbor for all judges who did not want to testify, although it would also preclude those who wanted to do so "willingly." It would not, however, deny the

Senate the benefit of their views, although they could not be made on the public record. In fact, at the very same hearing at which the Third Circuit judges appeared, representatives of the ABA Standing Committee on the Federal Judiciary also testified and reported their private conversations with unidentified colleagues of Judge Alito (Alito Hearings, 2006:645). There was no indication of negative comments from any judge about Judge Alito, but there have been negative comments from federal judges for other nominees for lower federal courts (American Bar Association, 2006). The Senate and the public do not know who spoke with the ABA committee and who declined, nor do we know what specific comments were made by specific judges. Some might say that open public testimony is better, which might be true if there were no counterbalancing factors, but there are.

Over the years, the Senate has held hearings on some very controversial Supreme Court and lower-federal-court nominees without judges being witnesses. In the Alito hearings, the judges were from the federal bench, but in future cases, they might come from state courts as well. The Senate confirmation process has many problems, but none of them will be cured, and some will be made worse, if the Alito precedent is allowed to continue. Nonetheless, I would not forbid a judge from testifying about the nomination of a colleague because in some future situation a judge may have relevant information that is not available to anyone else and providing it in confidence to the ABA would not suffice. Instead, I would urge only a strongly worded negative admonition.

CONCLUSION

All of the rules regarding “political activities” discussed in this essay were enacted with the worthy goal of ensuring an impartial judiciary. But that is not the only relevant consideration, both during a judicial election and after a judge is in office. Too often the writers of these rules concluded that having a judicial candidate as pure as possible controlled all decisions about what could and could not be done, until the Supreme Court in *White* (2002) held that these rules must take into account other values, including the need to conduct an election and the First Amendment rights of candidates for judicial office. *White* (2005) then held that the rules must give similar, although perhaps not identical treatment to the relationships between candidates and political parties and between candidates and nonprofit organizations that are involved in controversial issues that are likely to come before the courts.

The courts have yet to consider rules that affect judges once in office as they relate to both types of organizations. However, the handwriting should be on the wall that such rules, like those for elections, must be carefully drawn and narrowly tailored, and they must treat both types of organizations similarly if the rules are to be sustained in the face of a First Amendment challenge. One way to avoid such challenges is by making many of these rules strongly advisory, so that no adverse action can be taken against the judge for what is, in most cases, no more than a lapse in judgment or a

failure to consider how others might perceive the conduct at issue. Like everyone else, judges are not perfect, but in general we should assume that they will follow even nonbinding advice in their judicial code about how to conduct their affairs, including their election races, because they know that voters and others will be watching them and because they are generally good people who comply with society's norms. This does not mean that no rules should be mandatory, or that recusals do not have their proper place. However, if the judges who actually adopt judicial codes were more willing to trust candidates for judicial office and those who become judges, they might conclude that there were far fewer such rules than there have been in the past or that the ABA has recently adopted. **jsj**

REFERENCES

- American Bar Association (2007). *Model Code of Judicial Conduct*. Chicago: American Bar Association.
- American Bar Association (2002). *Model Rules of Professional Conduct*. Chicago: American Bar Association.
- American Bar Association (2006). Standing Committee on the Federal Judiciary Statement on Michael Brunson Wallace, July 19.
- Judicial Conference of the United States (1992). *Code of Conduct for United States Judges*, Canons 2B, 4B, & 7A(2).
- Judicial Conference of the United States (1998). Committee on Codes of Conduct, Advisory Opinions 59 and 73.
- Morrison, A. B. (2003). "The Judge Has No Robes: Keeping the Electorate in the Dark About What Judges Think About the Issues," 36 *Indiana Law Review* 719
- United States Senate (2006). Hearing Before the Committee on the Judiciary on the Nomination of Samuel A. Alito Jr. to be an Associate Justice of the Supreme Court of the United States, January 12.

CASES CITED

- Buckley v. Valeo*, 424 U.S. 1 (1976).
- Edenfeld v. Fane*, 507 U.S. 761 (1993).
- Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989).
- Kansas Judicial Watch v. Stout*, 440 F. Supp 2d 1209 (D. Kan. 2006).
- McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).
- Republican Party of Minnesota v. White*, 416 F. 3d 738 (8th Cir. 2005).
- Republican Party of Minnesota v. White*, 436 U.S. 765 (2002).
- United States Civil Service Commission v. National Assoc. of Letter Carriers*, 413 U.S. 548 (1973).