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AN ESSAY ON THE RIGHT OF JUDGES AND JUDICIAL CANDIDATES TO FREEDOM OF SPEECH*

JUSTICE ROBERT F. ORR**

Elected judges and judicial candidates often face a difficult dilemma – balancing their need to campaign and First Amendment right to free speech with principles of judicial ethics. It is in this context that courts have attempted to deal with the issue – and caused controversy in the process. The Supreme Court of the United States exacerbated these controversies when it declared parts of Minnesota’s Code of Judicial Conduct unconstitutional in *Republican Party of Minnesota v. White*.¹ In response to *White*, the North Carolina Supreme Court revised its state Code of Judicial Conduct, generating increased controversy over the proper scope of political conduct by judges and judicial candidates in that state.²

The tension between a judicial candidate’s First Amendment rights and the need for judicial independence and impartiality cannot be easily remedied. In a recent *Columbia Law Review* article, author Matthew J. Medina wrote:

‘If there is a hierarchy of protected speech, political speech occupies the top rung’ because ‘discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government

* Traditionally, a law review article is a scholarly discussion of a pertinent legal issue; however, since my approach to the topic presented takes a more practical track, I have entitled it an Essay. Forgive the non-scholarly approach and lack of esoteric discussions of the law and instead reflect on the real world dilemma faced by judges and judicial candidates as they balance the right to free speech against the principles of judicial ethics.

** Associate Justice, North Carolina Supreme Court, 1995-2004.

1. 536 U.S. 765 (2002).

2. See N.C. CODE OF JUDICIAL CONDUCT Canon 7 (2004).

established by our Constitution.’ ‘The free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy—the political campaign. In a nation in which sovereignty is ultimately derived from the people, ‘the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.’ The First Amendment thus ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.’³

This is the crux of the conflict at hand: we want a campaign for political office to enjoy the “fullest and most urgent application”⁴ of the First Amendment, but we do not want judges and judicial candidates to be “politicians” and campaign for office.

It is a conflict that has been self-created; in her concurring opinion in *White*, Justice O’Connor wrote, “[i]f the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.”⁵ Still, the conflict is a reality. Purists and guardians of judicial independence tell judicial candidates that they cannot cross a rigidly defined boundary of conduct in the course of their campaigns. Such a position leads to the simple truth that campaign by resume and word-of-mouth may not produce a winner who is best suited for the position. The people put in the middle of this conflict are, of course, the judges and would-be-judges. For the incumbent judge seeking to be re-elected and continue his or her

3. Matthew J. Medina, *The Constitutionality of the 2003 Revisions to Canon 3(E) of the Model Code of Judicial Conduct*, 104 COLUM. L. REV. 1072, 1085-86 (2004) (internal footnotes omitted) (quoting ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.3.6.3, at 1032-33 (2d ed. 2002), *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam), *Eu v. County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989), *Brown v. Hartlage*, 456 U.S. 45, 53 (1982)).

4. *Id.* at 1086.

5. *White*, 536 U.S. at 792 (O’Connor, J., concurring).

judicial career, the choice is particularly stark – either win the election or hang up the robe and search for a new career and means of supporting yourself and your family.

It is within this context that judges and courts across the country wrestle with these issues. My goal is to give some insight into this conflict as it relates to judicial elections in North Carolina through a historical look at the state judiciary, statutes relating to judicial conduct, examples of the current conflict, and steps that the North Carolina Supreme Court and other parties are taking to resolve it.

JUDICIAL OFFICE IN NORTH CAROLINA: A HISTORICAL PERSPECTIVE

From 1776 until 1868, judges in North Carolina were selected by the General Assembly for life appointments.⁶ With the advent of the 1868 Reconstruction constitution, judges were elected by the people for the first time in North Carolina.⁷ By act of the General Assembly, the elections were partisan.⁸ This trend in Jacksonian democracy may well have seemed like a progressive idea to the framers of that constitution, and it put North Carolina in line with many other states in the union, but not all agreed that it was a good idea.⁹ In a prescient report filed in the 1869 – 1870 session of the North Carolina General Assembly, William M. Robbins, Chairman, submitted the following observation:

[E]lect your judges for short terms, make them the playthings of the popular breath, and you drag them down from the pinnacle where justice sits robed in eternal sunshine, into the fog of passion and prejudice, if not corruption. You, in a manner, compel them to be politicians and therefore partisans, and expose

6. JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE* 113 (1993).

7. *Id.*

8. *See id.*

9. *See, e.g.,* WILLIAM S. POWELL, *NORTH CAROLINA THROUGH FOUR CENTURIES 269-70* (1989).

them to evil influences without number. Some will stand firm and remain pure; some will become corrupt, but *all* will be suspected. Those who *deserve* public confidence, will often fail to command it; for multitudes will suspect others of yielding to temptations which themselves would not resist. And popular distrust of the judiciary is an evil only less than a corrupt judiciary itself.¹⁰

Judicial elections produced little in the way of political fireworks for the first few decades and resulted in, essentially, a one-party judiciary comprised of Democrats.¹¹ In the 1890s the so-called Fusion Coalition emerged, consisting of Populists, Republicans, and African-American voters.¹² This coalition resulted in the election of Republicans to the Supreme and Superior Courts.¹³ However, with the white supremacy campaign of 1898,¹⁴ and the impeachment and nearly successful removal of two Republican Supreme Court justices in 1901,¹⁵ the short era of two-party contests for judicial seats came to a temporary end in North Carolina.¹⁶ Judicial elections essentially became a perfunctory process except for the occasional Democratic primary, and once elected, the system operated as a virtual lifetime appointment for the incumbent Democrat.¹⁷

With the emergence of the Republican Party in North Carolina in the 1970s, judicial elections began to move away from their previously gentile nature and became just another political race. Perhaps the low point in this period was an unsuccessful 1974

10. WILLIAM M. ROBBINS & C.T. MURPHY, N.C. GEN. ASSEM., REPORT OF THE SPECIAL COMMITTEE ON THE SENATE BILL TO PROVIDE FOR CALLING A STATE CONVENTION, S. DOC. NO. 34, at 7-8 (1869-70 Sess. 1870).

11. See POWELL, *supra* note 9, at 405-06.

12. *Id.* at 427-30.

13. *Id.* at 429.

14. *Id.* at 435-36.

15. *Id.* at 445. "[H]ouse representative . . . [brought] impeachment charges for a technical violation of the constitution against the new chief justice, David M. Furches, and Associate Justice Robert M. Douglas." *Id.*

16. See *id.* at 439.

17. See *id.*

bid for Chief Justice of the Supreme Court by a Republican candidate who was a fire extinguisher salesman.¹⁸ This candidacy prompted the passage of a state constitutional amendment that required at least a law license to run for judicial office.¹⁹ While the amendment prevented judicial office from being like any other elected position, the reality remained that all you needed to be elected – at any level of the state court system – was a law license, filing fee, and a lucky roll of the election dice.

It was not until the late 1980s and 1990s that the state's one-party domination began to crumble as Republican candidates began an inexorable and politically unpredictable march to gaining parity in the judiciary. After winning a few seats in the late 1980s, two Republicans won Supreme Court races in 1994 – for the first time in the Twentieth Century.²⁰ Six of the seven current North Carolina Supreme Court Justices, including the Chief Justice, are Republicans and all, with the exception of Justice Paul Newby, were elected on partisan ballots.²¹ Republicans also hold seven

18. See Matthew Eisley, *Lack of a License a Bar to Bench*, THE NEWS & OBSERVER (Raleigh, N.C.), May 18, 2004, at B5 (“North Carolina voters added the requirement to the state’s constitution in 1980, after fire-extinguisher salesman James Newcomb of Williamston ran in 1974 for chief justice of the state Supreme Court.”) [hereinafter *Lack of a License*].

19. N.C. CONST. art. IV, § 22 (“Only persons duly authorized to practice law in the courts of this State shall be eligible for election or appointment as a Justice of the Supreme Court, Judge of the Court of Appeals, Judge of the Superior Court, or Judge of District Court.”). The amendment was adopted through popular vote on November 4, 1980 and became effective January 1, 1981. See also, Matthew Eisley, *Non-Lawyer Spars for Spot on the Ballot*, THE NEWS & OBSERVER (Raleigh, N.C.), Oct. 14, 2004, at B5 (discussing an attempt by a non-lawyer to gain a place on the ballot in the 2004 judicial election for the North Carolina Court of Appeals); *Lack of a License*, *supra* note 18.

20. Joseph Neff, *Party’s Court Win in Doubt*, THE NEWS & OBSERVER (Raleigh, N.C.), Feb. 20, 1996, at A3 (“Republicans won all eight of the Superior Court races they entered when the votes were counted statewide.”); see Matthew Eisley, *GOP Now Has Deep Bench*, THE NEWS & OBSERVER (Raleigh, N.C.), Jan. 4, 2001, at A1 [hereinafter *GOP*].

21. The political party registration of North Carolina voters is available at <http://www.sboe.state.nc.us/votersearch/seimsvot.htm>. A check of the current court shows that six of the seven justices are registered Republicans.

seats on the fifteen-seat Court of Appeals.²² In addition, a large number of trial judges are Republicans, although both Superior Court judges and District Court judges have been running in nonpartisan elections longer than appellate judges.²³ The once invincible Democrat-dominated judiciary has now reached a relatively balanced status between the two political parties.

THE NORTH CAROLINA CODE

Prior to 1972, address and impeachment were the only two procedures available for handling judicial misconduct in North Carolina.²⁴ Since 1868, only two North Carolina judges have been impeached and, apparently, no judge has ever been subject to address.²⁵ Many felt that system did not provide feasible alternatives, or adequate remedies, for those situations in which a judge's conduct did not rise to a level warranting removal, but was nonetheless improper.²⁶

Many states responded to the need for – and the public's interest in – a more effective system of policing judicial conduct. In North Carolina, this was accomplished by creating a judicial qualifications commission by constitutional amendment.²⁷ North Carolina's constitutional amendment states:

(2) *Additional method of removal of Judges.*

The General Assembly shall prescribe a procedure, in addition to impeachment and

22. *Id.*

23. *GOP*, *supra* note 20.

24. N.C. CONST. art. IV, § 17 cl. 1; *see also In Re Peoples*, 296 N.C. 109, 159-60, 250 S.E.2d 890, 919 (1978) (holding that address is a procedure whereby a judge may be removed for mental or physical incapacity by joint resolution of two-thirds of the General Assembly and impeachment is a procedure whereby the House of Representatives brings charges and the Senate sits as the court); Edwin Warren Small, *Judicial Discipline – The North Carolina Commission System*, 54 N.C. L. REV. 1074, 1075 n.2-3 (1976).

25. *See* Small, *supra* note 24, at 1075 n.7.

26. *Id.* at 1075 (citing AMERICAN JUDICATURE SOCIETY, JUDICIAL DISABILITY AND REMOVAL COMMISSION, COURTS AND PROCEDURES *i* (1972)).

27. *Id.* at 1075 n.4 (“The amendment changed art. IV, § 17(1), and added art. IV, § 17(2).”).

address set forth in this section, for the removal of a Justice or Judge of the General Court of Justice for mental or physical incapacity interfering with the performance of his duties which is, or is likely to become, permanent, and for the censure and removal of a Justice or Judge of the General Court of Justice for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.²⁸

The General Assembly proposed the amendment and the voters approved it in the general election on November 7, 1972.²⁹ In anticipation of the passage of this amendment, the General Assembly adopted legislation, conditioned upon ratification of the proposed amendment, establishing the North Carolina Judicial Standards Commission.³⁰ The Commission was designed to be the appropriate agency for review of complaints “concerning the qualifications or conduct of any justice or judge of the General Court of Justice.”³¹ The function of the Commission was to investigate complaints against sitting judges and candidates for judicial office and to recommend to the Supreme Court what, if any, disciplinary action should be taken.³²

According to state statute, in North Carolina a judge may be censured or removed for “willful misconduct in office, willful and persistent failure to perform his duties, habitual intemperance,

28. N.C. CONST. art. IV, § 17 cl. 2.

29. See Act of June 14, 1971, ch. 560, 1971 N.C. Sess. Laws 488 (providing procedures for the censure and removal of Justices and Judges of the General Court of Justice).

30. *In Re Peoples*, 296 N.C. 109, 160, 250 S.E.2d 890, 919 (1978); see Act of June 17, 1971, ch. 590, 1971 N.C. Sess. Laws 517 (codified at N.C. GEN. STAT. §§ 7A-375 to 378 (2003)).

31. N.C. GEN. STAT. § 7A-377(a) (2003); Edward B. Clark, *The Discipline and Removal of Judges in North Carolina*, 4 CAMPBELL L. REV. 1, 19 (1981).

32. *In re Renfer*, 345 N.C. 632, 632, 482 S.E.2d 540, 540 (1997).

conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.”³³ Note that the language used in the statute tracks the language used in the Constitutional amendment. The Supreme Court has held that this language is not so vague as to be constitutionally infirm.³⁴

To clarify the language used in the statute, the Supreme Court adopted specific guidelines for judicial officers and set them forth in the North Carolina Code of Judicial Conduct.³⁵ The North Carolina Code was originally based in large part on the language used in the ABA’s 1972 Model Code.³⁶ Since the main purpose of the code was to better define the constitutional and statutory standards, there is little authority for the proposition that it was meant to be an enforceable set of guidelines. Instead, the code was meant to be a resource that guided the Court’s and the commission’s interpretation of the statute.³⁷

It is important to note that the Commission itself can neither censure nor remove. The Commission aids the Supreme Court or Court of Appeals in determining the fitness of a member of the judiciary, but it is up to the appropriate court to actually impose sanctions.³⁸ As a corollary, the only grounds upon which a judge may be censured or removed are the constitutional and statutory grounds for such censure or removal.

North Carolina’s Code of Judicial Conduct was amended in 1974. The Court added more specificity to the reporting requirement for extra-judicial activity in Canon 6 and edited the language in Canon 7 to allow judges who were not running for election to judicial office to endorse particular candidates for judicial office.³⁹ Canon 7 was again amended in 1976 to allow

33. N.C. GEN. STAT. § 7A-376 (2003).

34. *In re Nowell*, 293 N.C. 235, 243, 237 S.E.2d 246, 251 (1977) (citing *In re Edens*, 290 N.C. 299, 305-06, 226 S.E.2d 5, 9 (1976)).

35. *Nowell*, 293 N.C. at 243, 237 S.E.2d at 252; see N.C. COURTS COMM’N, REP. TO THE GEN. ASSEMB. 28 (1971); Small, *supra* note 24, at 1081.

36. LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 109 app. c (1992).

37. *Nowell*, 293 N.C. at 243, 237 S.E.2d at 252.

38. Clark *supra* note 31, at 19.

39. See Amendment to Code of Judicial Conduct, 286 N.C. 729 (1975).

candidates for judicial office to endorse another candidate for judicial office, but adding a provision that prohibited judges from contributing to candidates for non-judicial office.⁴⁰ Thereafter, the code remained unchanged until 1997 when the state Supreme Court adopted additional amendments, essentially in response to the possibility that a federal court might declare parts of the code unconstitutional.⁴¹ The 1997 amendments removed the “announce” clause, which prohibited the discussion of legal or political issues, from Canon 7B(1)(c).⁴² It is in this context that the North Carolina Supreme Court faced the prospect of dealing with the result of *White*.

THE IMPACT OF *MINNESOTA V. WHITE* IN NORTH CAROLINA

The Supreme Court’s decision to strike down the so-called “announce clause” in the Minnesota Canons of Judicial Conduct led to other federal court cases, including *Weaver v. Bonner*⁴³ and *Spargo v. N.Y. State Comm’n on Judicial Conduct*.⁴⁴ These cases followed, at least in part, the holding from *Minnesota v. White*. In the light of these decisions, the North Carolina Supreme Court determined to further examine the state’s Code.

The potential for challenges to provisions of the North Carolina Code of Judicial Conduct and the increasingly partisan use of the Code in the context of judicial campaigns concerned the Court. In this context, in 2002 and 2003, the Court undertook an exhaustive review of the existing Code, the cases striking down provisions in similar Codes, and the political realities that judges were facing by having to run for election. Consistent with prior practice, the Court did not open the process to public debate or input, but instead spent more than a year internally reviewing all of

40. See Amendments to Canon 7A Code of Judicial Conduct, 289 N.C. 733 (1976).

41. See Verified Complaint for Injunctive Relief and Declaratory Judgment at 1, *Brooks v. North Carolina State Bar*, No. 2:96CV00857 (M.D.N.C. 1996).

42. See Order Adopting Amendments to the Code of Judicial Conduct, 346 N.C. 806 (1997).

43. 309 F.3d 1312 (11th Cir. 2002).

44. 244 F. Supp. 2d 72 (N.D.N.Y. 2003).

the provisions in the Code. The end result was a comprehensive revision of the Code and a unanimous, bipartisan vote by the Court to adopt the changes. In April 2003, the new Code was adopted and subsequently put in place.⁴⁵

With the 2004 election cycle looming, the Court wanted to get the new provisions out to the judiciary and bar so that any questions could be resolved quickly. Presentations were made to the trial judges explaining the changes and the rationale for making them. Months went by with virtually no complaints or other responses to the changes. However, in October, several articles appeared in media publications that generated a degree of criticism from some members of the judiciary,⁴⁶ in addition to a few editorials condemning the changes.⁴⁷

The primary changes to the Code that sparked this concern were: (1) judges could no longer be punished for making a direct solicitation for support; (2) the so-called “pledge or promise” clause was removed from the Code; and (3) the revised code clarified and expanded the permissible ways for candidates to attend and participate in political events and make endorsements in non-judicial elections.⁴⁸ Unfortunately, the descriptions of these changes as reported by the media were neither accurate nor reflective of the purposes behind the Code changes.⁴⁹ The Court responded by attempting to explain the reasoning behind the changes in an effort to quell a growing body of misleading information.

As to the first revision allowing direct solicitation for support by a candidate for judicial office, the Court carefully

45. See N.C. CODE OF JUDICIAL CONDUCT (2004).

46. See Matthew Easley, *Bench Hopefuls Bank on Personal Beliefs*, THE NEWS & OBSERVER (Raleigh, N.C.), Oct. 31, 2004, at B1. *But see* David Ingram, *Ethics Rules Reformers Upbeat*, WINSTON-SALEM J., Oct. 18, 2004, at A1.

47. See Matthew Easley, *Judicial Campaigns Take ‘Non’ Out of ‘Nonpartisan’ Races*, THE NEWS & OBSERVER (Raleigh, N.C.), Oct. 26, 2004; *see generally*, Steve Ford, *When Prosecutors Say, ‘My Bad,’* THE NEWS & OBSERVER (Raleigh, N.C.), Oct. 31, 2004, at A34.

48. N.C. CODE OF JUDICIAL CONDUCT, Canon 7(B)(1)-(4) (2004).

49. See Matthew Easley, *Not Really Nonpartisan; Candidates for Judgeships in North Carolina Keep Party Affiliations, Except on the Ballot*, THE NEWS & OBSERVER (Raleigh, N.C.), Oct. 3, 2004, at B8.

studied and followed the guidelines set out in *Weaver v. Bonner*.⁵⁰ In *Weaver*, the Eleventh Circuit struck down a portion of Georgia Code of Judicial Conduct Canon 7(B) which prohibited direct solicitation of contributions.⁵¹ The *Weaver* court determined that the restriction was unconstitutional since it was not narrowly tailored and chilled candidates from discussing their need for support with donors and endorsers.⁵² In addition, the North Carolina Supreme Court made the change to remove what the Court perceived to be the hypocrisy under the prior Code. Previously, it was permissible for a judicial candidate to ask a supporter to endorse the candidate publicly, raise money for the campaign, host or sponsor a fundraiser, or otherwise become actively engaged in all necessary elements of a campaign.⁵³ In addition, the candidate could appear in front of special interest groups or Political Action Committees (PACs) and directly seek an endorsement, knowing full well that the endorsement carried with it a PAC contribution plus the practical benefit of the group's active support in the way of distributing material supportive of the candidate. Yet, a judicial candidate could be punished under the prior Code for asking his or her neighbors to buy a \$25 ticket to a campaign barbeque. Removal of the direct solicitation ban was seen as complying with First Amendment principles for political campaigns and eliminating unequal treatment in the methods judges and judicial candidates used to garner support.⁵⁴

50. 309 F.3d 1312 (11th Cir. 2002) (holding that Canon 7(B) of the Georgia Code of Judicial Conduct was unconstitutional because it chilled core political speech and did not satisfy the stringent requirements of strict scrutiny).

51. *Id.* at 1323.

52. *Id.* at 1322-23.

53. N.C. CODE OF JUDICIAL CONDUCT Canon 7(A)(4)-(5) (1999).

54. Order Adopting Amendments to the North Carolina Code of Judicial Conduct, Canon 7 (Apr. 2 2003), available at <http://www.aoc.state.nc.us/www/public/aoc/NCJudicialCode.pdf> [hereinafter N.C. Order on Canon 7] (stating that provisions of Canon 7 were, in part, designed to work in conjunction with the "right of judicial candidates to engage in constitutionally protected political activity"). It should be noted that the amended Code in no way encourages a direct solicitation of the practices previously mentioned; it only concludes that a judicial candidate will not be punished for it.

Ultimately, the reaction to the change bordered on the ridiculous as opponents contended that the Court had allowed judges to “shake down” the lawyers appearing before them.⁵⁵ The Court pointed out in measured responses that the statutory offense of “conduct prejudicial to the administration of justice” was sufficiently clear and expansive to cover any such behavior.⁵⁶ Solicitation of support in any form – whether permissible under the prior Code or the revised one – has to be determined on a case-by-case basis; the hypothetical examples of extreme conduct were neither contemplated as permissible nor realistically supportable. The specific circumstances surrounding the direct solicitation would ultimately determine if it was “conduct prejudicial to the administration of justice” and thus punishable.

The second revision of concern dealt with the removal of the so-called “pledge or promise” clause. Under the previous Code a judge or judicial candidate could not “make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.”⁵⁷ As a practical matter, this clause was drawn so narrowly that one could question whether it was permissible to promise to support “mom, America and apple pie.” In light of *Minnesota v. White* and the difficulty in distinguishing between a candidate’s right to “announce” a position on issues and a candidate’s perceived right to make a “pledge or promise” of something beyond the “faithful and impartial performance of judicial duties,” the Court eliminated the provision from the Code.⁵⁸

Again, the anguished cry of opponents to the change conjured up horrible scenarios of judges promising to convict all drivers charged with drinking and driving or stating how they would rule in advance on a case pending before them. These claims ignored, as previously noted, the statutory grounds for punishment for certain acts that could be “prejudicial to the administration of

55. Matthew Eisley, *Election Rules Relaxed for Judges*, NAT’L L.J., Oct. 13, 2003, at 7.

56. See N.C. Order on Canon 7, *supra* note 54.

57. N.C. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1999).

58. See N.C. CODE OF JUDICIAL CONDUCT Canon 7 (2004).

justice.”⁵⁹ Could anyone seriously contend that a judge stating how he or she would rule in advance of hearing a case should not be found guilty of conduct prejudicial to the administration of justice? The answer is obvious; at a minimum, any judge would have to be recused from the case if guilty of such imprudent conduct.⁶⁰

Finally, opponents lamented the broadening of the Code in the area of endorsements and participation in political events. Here, the Court drew upon the realities of campaigning statewide – often for periods of time stretching over a year. Historically, judicial races in North Carolina have been substantially underfunded and generally ignored by the press and public.⁶¹ Thus, out of necessity, judicial candidates have been forced into the retail politics of appearing at various political functions and associating themselves with better known and better financed candidates for non-judicial office. A judicial candidate’s appearance at political functions and direct or indirect association with other non-judicial candidates was viewed by the Court as conduct that should not be punishable. The revised Code took great care to expand the endorsement process to only judicial candidates and not judges generally.⁶² In addition, the Court explicitly defined “endorsement” so that ambivalent conduct such as being on a platform with other candidates in a supportive fashion was not deemed an endorsement; rather, the definition required an express endorsement of that candidate for office.

While other changes to the Code engendered some discussion and controversy, the areas discussed above were the most criticized. From the Court’s perspective, the critics failed to give full meaning to *Minnesota v. White* and its recognition that

59. See N.C. GEN. STAT. § 7A-376 (2004).

60. N.C. CODE OF JUDICIAL CONDUCT Canon 3(C) (2004).

61. Part of the reason for voter apathy may have been due to a lack of available information on the candidates. Fifty-seven percent of voters taking part in the 2000 North Carolina elections had little to no information about the judicial candidates, and 43 percent said the primary reason they were not more interested in judicial elections was because they did not know enough about the candidates. N.C. Ctr. for Voter Education, *Opinion Poll*, at http://www.ncvoterred.com/downloads/PDF/poll_052002/memo.pdf (last visited Nov. 19, 2004) (on file with the First Amendment Law Review).

62. N.C. CODE OF JUDICIAL CONDUCT Canon 7(A)(3) (2004).

judicial candidates have the same First Amendment rights as any other candidate. Instead, critics seized upon doomsday scenarios that would not realistically be permitted under the revised Code or under the actual statutory standards set out as grounds for discipline.⁶³ Furthermore the Court, heeding Justice O'Connor's previously noted statement⁶⁴, believed that if the state continued to require judges to be elected, then the practical realities of campaigning needed to be taken into consideration and judges or judicial candidates should not be punished for doing what was necessary to conduct a viable campaign. Whether to full advantage of the Code changes was a decision left to the individual candidates – and ultimately the voters, who could reject any conduct that they found inappropriate by voting against that candidate.

A MOVE TOWARDS CONSENSUS: THE ADVISORY COMMITTEE

Throughout the discussions that led to Code changes, the North Carolina Supreme Court considered the creation of a committee to provide guidance about the ongoing issue of regulating judicial conduct generally – and in particular political conduct under Canon 7 of the Code. With the changes to the Code producing a degree of controversy and concern, the Court determined that a study of the issue would be useful. Chief Justice I. Beverly Lake, Jr. subsequently announced the creation of an Advisory Committee on Permissible Political Conduct for Judges and Judicial Candidates. The Committee was chaired by two members of the Supreme Court and included two judges from the Court of Appeals, eight Superior Court judges, and ten District Court judges.⁶⁵ In addition, there were eight licensed attorneys

63. See N.C. GEN. STAT. § 7A-376 (2004).

64. Republican Party of Minn. v. White, 536 U.S. 765, 792, (O'Connor, J., concurring); see *supra* note 5 and accompanying text.

65. N.C. Advisory Committee on Permissible Political Conduct for Judges and Judicial Candidates roster (on file with the First Amendment Law Review). The Supreme Court justices were Robert F. Orr and Robert H. Edmunds, Jr. Court of Appeals judges were Patricia Timmons-Goodson and Ann Marie Calabria. Superior Court judges were James L. Baker, David S. Cayer, Howard E. Manning, Jr., Quentin T. Sumner, Allen Cobb, Melzer A. Morgan, Jr., Marlene Hyatt, and W. Russell Duke. The District Court judges

including a law professor, former president of the North Carolina Bar Association, the now vice-president elect of the North Carolina State Bar, two trial lawyers representing the plaintiff's bar and the defense bar, a member of the Appellate Defender's office, an attorney who specializes in First Amendment work for various press organizations, and a former practicing attorney now working for a law school.⁶⁶ There were also three public members including a theologian, university provost, and a public affairs consultant.⁶⁷ Finally, there were four members of the General Assembly – two each from the House and Senate, all of whom were licensed attorneys.⁶⁸ The Committee was staffed by Professor Jim Drennan and Professor Jessie Smith of the Institute of Government at the University of North Carolina at Chapel Hill.

The Committee was comprised of numerous judges who had run for judicial office either in district elections or statewide, representing an almost equal number of registered Democrats and Republicans. It was geographically balanced and reflected a diverse composition along racial and gender lines. Initially pilloried in the press for not being inclusive in addressing the Code issues initially, the Court hoped that this group would reflect the Court's interest and concern. Unfortunately, the press virtually ignored the creation of the Committee and its composition.

Over the course of the following months, the committee met several times. Meetings consisted of a variety of activities, including discussion among members, guest speakers from states who had already addressed the problem, and small group discussion of specific examples of questionable conduct.⁶⁹ At the time of the

were Gary S. Cash, Randy Pool, Denise S. Hartsfield, James R. Fullwood, Regina Rodgers Parker, William A. Leavell, Jane Harper, Jimmy L. Myers, Wendy M. Enochs, and Lee W. Gavin.

66. *Id.* Attorney members of the committee were Herman E. Gaskins, Jr., J. Norfleet Pruden, III, Steven D. Michael, Karen Frasier Alston, J. Nicholas Ellis, Janet Moore, E. Gregory Wallace, and John A. Bussian.

67. *Id.* Public members of the committee were Roger Brown, Audrey Galloway, and Gilbert A. Greggs, Jr.

68. *Id.* Committee members from the House were Deborah K. Ross and Timothy Keith Moore. Senate members were Walter H. Dalton and Richard Yates Stevens.

69. *See infra* notes 70-79 and accompanying text (discussing some of

drafting of this essay, Professor Drennan and Justice Edmunds were preparing a draft report and summary of the Committee's votes and the impressions generated by the discussions among the members and the various guest speakers. It is intended that after the draft report is submitted and reviewed, a final group report will be issued and the individual members can attach comments or observations to it. Ultimately, the final report will be submitted to the Chief Justice and the entire North Carolina Supreme Court for consideration as to future modification of the Code of Judicial Conduct.

There was also a set of proposals for legislative and structural changes in the operation of the Judicial Standards Commission which has not been discussed in this essay. Those proposed changes submitted by John C. Martin, Chief Judge of the North Carolina Court of Appeals and Chairman of the state Judicial Standards Committee, and based upon his discussions with former members of the Commission and its current Executive Director Paul Ross will ultimately be considered by the Court, the General Assembly and the Judicial Standards Commission members where appropriate.

THE CONFLICT BETWEEN POLITICAL CAMPAIGNING AND JUDICIAL IMPARTIALITY

In light of the United States Supreme Court's decision in *White* and the need for revision of the North Carolina rules, the Committee considered a variety of scenarios designed to help meet the need for clarity and fairness in the North Carolina judicial conduct rules.

The scenarios submitted to the committee dealt with three general areas of political conduct. The first dealt with the ability of judges and judicial candidates to attend political events.⁷⁰ The second set of scenarios dealt primarily with fundraising⁷¹ and the

those examples).

70. Scenarios #1: Political Conduct Issues (Tentative Draft) (on file with the First Amendment Law Review) [hereinafter Scenarios 1].

71. Scenarios #2: Campaign Conduct Issues (Tentative Draft) (on file with the First Amendment Law Review) [hereinafter Scenarios 2].

third addressed the candidates' rights of free speech.⁷² Each of the scenarios had three participants: an incumbent judge up for reelection in the immediate election cycle, an attorney who intended to run against the incumbent judge, and an incumbent judge who was not up for reelection in the immediate election cycle, but would be in the following one.⁷³ The idea, in part, was to see if the committee members viewed conduct differently depending on the status of the three fictional participants.

In the first set of scenarios, the committee reviewed the types of campaign events that a candidate might want to attend: a party-sponsored political dinner, a fundraiser for an incumbent Congressman, a fundraiser for another judicial candidate, and a PAC reception.⁷⁴ There was also a changing element of timing – whether or not activities would be permissible before an official notice of candidacy or after.⁷⁵

As a practical matter, candidates running for any office – particularly statewide office – need to have visibility in the political community and in the public if they are to be successful in their election bid. Deciding where to draw the line between acceptable and forbidden conduct is not an easy task, as the group's discussions disclosed.

The second set of scenarios implicated fundraising, including: asking an accountant neighbor to buy a ticket for a campaign event, asking a former law partner to be Chairperson of the Election committee, and asking a former law school classmate (who practices in the court in the election at hand) to be campaign finance director.⁷⁶ Other scenarios have judicial candidates asking attorneys to sell tickets for or host campaign events. While the public financing component of the Judicial Reform Act⁷⁷ potentially mitigates this problem for appellate judges, it does nothing for trial

72. Scenarios #3: Speech Issues (Tentative Draft) (on file with the First Amendment Law Review) [hereinafter Scenarios 3].

73. Scenarios 1, 2 and 3, *supra* notes 70-72.

74. Scenarios 1, *supra* note 70.

75. *Id.*

76. Scenarios 2, *supra* note 71.

77. 2002 N.C. Sess. Laws 158, codified at N.C. GEN. STAT. §§ 163-278.61 to 278.70, 163-278.13, 105-41, 105-159.2, 163-321 to 335 (2003).

judges who do not have access to public financing.

Another serious solicitation issue is that of appearances in front of PACs and other special interest groups. Endorsements from these organizations have played a very large role in judicial races and will likely have an even greater effect in non-partisan races. The impact of an endorsement comes from the potential for a financial contribution – but more importantly, from the ability of the group to communicate support for the candidate to its membership. The ethical challenge (and I would say hypocrisy) of the prior rules was that it was a violation of the Code to ask a neighbor to buy a ticket to a campaign barbeque, but permissible to ask a PAC for an endorsement – knowing that the endorsement carried with it a \$2000 check and the efforts of the group in aiding your election.

The third set of scenarios addressed the candidates' right to free speech under the First Amendment. The questions included whether the candidates could state their positions on “hot-button” issues such as tort reform and same-sex marriage or become involved in (and seek endorsements of) groups that held strong pro or con views on a specific subjects.⁷⁸

Another important speech issue is whether a candidate can answer questions about these sorts of issues to media representatives or PAC endorsement committees. Finally, the committee looked at the permissibility of a candidate participating in a professional seminar where the merits of prior decisions would be discussed.⁷⁹

Few of the circumstances discussed in these scenarios resulted in easy answers. It is difficult to balance a candidate's First Amendment rights and the public's interest in the impartiality and independence of the judiciary. The committee has made an effort to weigh these interests carefully and recognize the difference between conduct which is not desired or recommended and conduct which should result in the candidate being disciplined.

78. Scenarios 3, *supra* note 72.

79. *Id.*

CONCLUSION

Without prejudging the outcome of the Committee's report or attempting to speak for its members, a few observations are in order. First, the Committee members came away from the exercise realizing that there is no simple answer – particularly in the context of the balancing act between what judges and judicial candidates are allowed to do under *White*, and the First Amendment and the public and professional interest of maintaining judicial independence and public confidence in the impartiality of the judiciary. Many of the answers to the factual scenarios resulted spirited debate and split votes among the members. While recognizing that there was a substantial difference between what a judge or judicial candidate should do and whether that conduct was punishable, the Committee members at times struggled with finding the right answers or reaching a consensus.

On a structural note, virtually all of the non-judges were astounded that there was no compilation by the Judicial Standards Commission of advisory opinions or ethics opinions that could serve to guide judges or judicial candidates in this area. Historically, as one observer noted, you could ask for an advisory opinion and get a different answer depending on when you called and who you spoke with. There appeared to be clear agreement that a system for judges akin to the State Bar's method of compiling and publishing Ethics Opinions should be instituted.

As previously noted, the Committee's work arose in part out of a series of events criticizing the Code changes made by the North Carolina Supreme Court and predictions of catastrophic consequences in the upcoming election. As this essay goes to press, the election has come and gone under the Code. While controversies arose and complaints were filed with the Judicial Standards Commission, the changes to the Code do not appear to have negatively impacted the process. Of particular interest, in a yet unpublished post-election survey conducted jointly by the North Carolina Bar Association and the Center for Voter Education the voters strongly indicated a desire for more information from judicial candidates, particularly their party affiliation, stand on issues, and political philosophy.

While this observation is no guarantee that future elections will be equally uncontroversial, it is worth noting that so far the “controversial” Code changes appear to work. There is, and has been, a statutory framework in place that attempts to guide and control judicial conduct. The Supreme Court maintains the ultimate authority to punish judges, and is willing to exercise that authority. However, the Court – as shown by the changes made to the Code – is not willing to improperly infringe on the constitutional rights of candidates for judicial office simply to appease public or press sentiment. The problem is neither the Court nor the judicial candidates. The problem that creates these conflicts is the state constitutional mandate that judges be elected and the unwillingness of the General Assembly and the public to change the system. Until that happens we must struggle along this foggy, pothole-strewn path, teetering on the edge of an ethical precipice looking for the safe, proper, and constitutionally correct course.