



2005

Judicial Independence and Accountability Meet Extra-Judicial Speech and the First Amendment: An Uneasy Co-Existence

Honorable Wendell L. Griffen

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>



Part of the [Judges Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Honorable Wendell L. Griffen, *Judicial Independence and Accountability Meet Extra-Judicial Speech and the First Amendment: An Uneasy Co-Existence*, 28 U. ARK. LITTLE ROCK L. REV. 103 (2005).

Available at: <https://lawrepository.ualr.edu/lawreview/vol28/iss1/4>

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

JUDICIAL INDEPENDENCE AND ACCOUNTABILITY MEET EXTRA-JUDICIAL SPEECH AND THE FIRST AMENDMENT: AN UNEASY CO-EXISTENCE

*Honorable Wendell L. Griffen**

I. INTRODUCTION

On March 18, 2002, I fulfilled an invitation by Arkansas state Senator Tracey Steele of North Little Rock to share my perspective about racial inequities in higher education in our state during a public meeting convened by the Arkansas Legislative Black Caucus in the Old Supreme Court Chamber of the Arkansas State Capitol Building. Senator Steele knew that I attended the University of Arkansas as an undergraduate and for law school¹ and that I had been president of the Black Alumni Society of the Arkansas Alumni Association.² Based on that knowledge and our personal acquaintance, he asked me to attend the meeting and share my views about racial inequities in higher education during the March 18 meeting of the Legislative Black Caucus.³

* Judge, Arkansas Court of Appeals. I thank the officers and members of the UALR Law Review and the benefactors of the Ben J. Altheimer Symposium series for the honor of being involved in this program. The fact that the program is dedicated to the memory of Judge Richard Sheppard Arnold makes the invitation all the more meaningful. Judge Arnold took time to encourage me when I was a new lawyer and was a gentle and generous influence on so many people.

I am also grateful to Nate Coulter (my lawyer), to the members of my chambers staff between March 2002 and November 2003 (Donna Long, Angie Foster, and Oliver Hahn), and to Professors Morton Gitelman and Cynthia E. Nance of the University of Arkansas School of Law for the legal assistance they provided throughout my ordeal. Finally, I will always owe a debt to my family and friends for the support (moral, emotional, spiritual, and financial) they gave me throughout this experience and from which I continue to draw strength in various ways.

1. Bachelor of Arts (political science), May 1973; Juris Doctor, May 1979.

2. 1995–2000. The Department of Political Science named me its Distinguished Alumnus for the year 2000.

3. As a dormitory resident advisor during college, I had numerous firsthand experiences with racism and racial inequities. I later taught race relations as an Army officer following graduation in 1975 from the Department of Defense Race Relations Institute (“DRRI”) at Patrick Air Force Base in Florida. Then referred to as DRRI and now known as the Defense Equal Opportunity Management Institute (DEOMI), the Institute was perhaps the pioneer program for educating and training managers and leaders concerning race relations, racism, sexism, religious accommodation, and equal opportunity. See <https://www.patrick.af.mil/deomi/About%20DEOMI/deominfo.htm> (last visited Sept. 13, 2005) for more information about the history and mission of the Institute.

In 1973 the U.S. Department of Education was sued for its failure to enforce Title VI of the Civil Rights Act of 1964 in a number of education areas. As a law student, I was one of several black students from around the nation who journeyed to Washington and met

I reviewed the Arkansas Code of Judicial Conduct before I issued my remarks.⁴ At that time Canon 4C(1) of the Arkansas Code of Judicial Conduct ("the Code") read as follows:

A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.⁵

Because I had long been actively engaged in trying to rectify racial inequities at the University of Arkansas, I concluded that this provision permitted me to appear before and address the Legislative Black Caucus as someone "acting pro se in a matter involving the ... judge's interests." I was further convinced that my appearance was permissible under the Code in view of Canon 4B, which states

Avocational Activities. A judge may speak, write, lecture, teach on and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.⁶

I addressed the Caucus meeting on March 18, 2002, as planned. My comments criticized the poor performance of my alma mater concerning recruiting, retaining, and advancing black students, staff members, and faculty. I concluded my remarks by urging the legislators to remember that poor performance when considering the budget appropriation for the University.⁷ Within a fortnight, my remarks were part of an anonymous written

with Department of Education officials about racial inequities in higher education during the summer of 1977 as the Department considered racial inequity issues addressed in that litigation, *Adams v. Califano*, 430 F. Supp. 118 (D.C. Cir. 1977). After law school my personal commitment to racial justice continued, particularly regarding the University of Arkansas. As a member of the Arkansas Alumni Association Board of Directors during the early 1990s, I worked with other alumni and with faculty, staff, administrators, and students at the University of Arkansas on the challenging issues of recruiting and retaining black students, staff, and faculty. I recount this history to refute the notion that my efforts concerning racial inequities in higher education somehow began when Nolan Richardson, Jr. was fired as head men's basketball coach for the University of Arkansas on March 1, 2002.

4. Although some observers may have trouble believing that I consulted the Arkansas Code of Judicial Conduct before making my remarks, my law school classmates who remember Professor Robert Knowlton and my colleagues who practiced law with Robert Lindsey and Alston Jennings understand that my action merely reflected the influence of their tutelage.

5. ARK. CODE OF JUD. CONDUCT CANON 4C(1) (1993).

6. *Id.* at 4B.

7. In my remarks, I observed that no black person had served as chair of an academic department in the history of the University of Arkansas, only one person had served as an

complaint lodged against me with the Arkansas Judicial Discipline and Disability Commission (JDDC). The anonymous complainant(s) charged that my remarks constituted violations of several provisions of the Code.⁸ I admitted that I appeared and issued a statement during the March 18, 2002, Caucus meeting, denied that my conduct violated the Code of Judicial Conduct, and urged the JDDC Executive Director to dismiss the complaint because prosecuting it posed a threat to my rights under the First Amendment to the federal Constitution.

The Executive Director of the JDDC did not dismiss the anonymous complaint.⁹ Rather, on July 17, 2002, the Executive Director issued a Statement of Allegations against me alleging that my remarks violated Canon 4C(1) of the Arkansas Code of Judicial Conduct.¹⁰ The Statement of Allegations cited the following provisions of the Code:

academic dean (there were no black academic deans as of March 18, 2002), and no black person had been named to the rank of University Professor, the highest professorial rank. I also reported that scholarship assistance to black students had been substantially decreased. Although the University of Arkansas was represented at the March 18, 2002, meeting, none of the data presented during my remarks was contradicted at that time or has otherwise been accused to be inaccurate since that date. Thus, the controversy over my remarks had nothing to do with factual accuracy. Indeed, factual accuracy of my criticisms apparently did not matter to the JDDC or the Arkansas Supreme Court. None of the four opinions issued by the Arkansas Supreme Court in my appeal addressed the accuracy of the remarks. Although I referred to the March 1, 2002, dismissal of Nolan Richardson, Jr. as head coach of the men's basketball team, I did so to remind my audience that Richardson had frequently remarked about the lack of racial diversity within the University.

8. In fact, three complaints were lodged against me altogether, but only the anonymous complaint (JDDC Case No. 02-197) became the basis for eventual disciplinary action (Letter of Admonishment) and the ensuing decision by the Arkansas Supreme Court on November 20, 2003, which quashed that disciplinary action. On March 3, 2002, more than two weeks before the March 18 remarks before the Legislative Black Caucus, an e-mail message was sent by a named complainant who objected to a remark I made in response to a newspaper interviewer in which I stated that "People of color want to send their children to places where they will have strong role models." That statement, made in the aftermath of the firing of Nolan Richardson, Jr., became the basis for JDDC Case No. 02-161. On March 29, 2002, a named complainant wrote a handwritten letter to the JDDC that also complained about the "people of color" statement made in the newspaper interview. That complaint became JDDC Case No. 02-191. Both of the named complainants alleged that the "people of color" remark demonstrated racial bias. Those complaints were dismissed by the JDDC following its preliminary investigation.

9. James Badami was and remains Executive Director of the Arkansas Judicial Discipline and Disability Commission.

10. Rule 8E of the Arkansas Judicial Discipline and Disability Rules provides that if it appears, after initial investigation and evaluation, that there is sufficient cause to proceed, a complainant "shall be asked to file a detailed, signed, sworn complaint against the judge," which sets forth the underlying facts upon which the allegation of misconduct is based. However, the Rule states that "[w]hen a sworn complaint is not obtained, a clear statement of the allegations against the judge and the alleged facts forming their basis shall be prepared by the executive officer." ARK. R. JUD. DISCIPLINE & DISABILITY COMM'N 8E (2003).

Canon 2A: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."¹¹

Canon 2B: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others."¹²

Canon 3B(5): "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race"¹³

Canon 4A: "A judge shall conduct all of the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's ability to act impartially as a judge"¹⁴

Canon 4C(1): "A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests."¹⁵

The Commission conducted a preliminary hearing regarding the Statement of Allegations on September 20, 2002. At the preliminary hearing, I asserted my right to confront the author of the anonymous complaint and reasserted my position that my remarks and conduct did not violate the Code. The Commission voted to proceed with a probable-cause hearing regarding the anonymous complaint as to whether my conduct violated Canon 4A and 4C(1) but did not find sufficient cause to proceed with a probable-cause determination concerning the alleged violations of Canons 2A, 2B, and 3B(5).

The Executive Director presented no evidence during the November 15, 2002, probable-cause hearing. At the outset of the hearing, my legal counsel challenged the proceeding on the ground that I was not allowed to know the identity of and confront my accuser(s). However, the Executive Director maintained that the probable cause hearing was not an adversarial proceeding.¹⁶ My legal counsel also sought to have the Statement of Allega-

11. ARK. CODE OF JUD. CONDUCT CANON 2A (1993).

12. *Id.* at 2B.

13. *Id.* at 3B(5).

14. *Id.* at 4A.

15. *Id.* at 4C(1).

16. Persons accustomed to the usual order and burden of proof in adjudications may, as I did, find it rather disconcerting to learn that the JDDC Executive Director does not consider a proceeding based on formal allegations of judicial misconduct against a judge an adversarial proceeding. Lest readers question the accuracy of this disclosure, the following colloquy

from the November 15, 2002 probable cause hearing is provided.

MR. COULTER (Counsel for Judge Griffen): I'm of the impression that the complaint is anonymously submitted. I have been told by staff that they don't know who submits it. I, therefore, assume that the staff is now the complaining party. The staff has, in essence, taken up the issue and advanced the allegation.

MR. BADAMI: If I may. This proceeding might be in re Judge—whoever it happens to be here. It's not staff against Judge. It's not Commission against Judge. It's an in re matter. The complainant is just the person or entity that filed the complaint. And so the answer is: I don't understand the question, the nature of the question.

...
MR. COULTER: As a procedural question, then I think my next concern is who has the burden of proving what the complainant anonymously has complained about?

MR. WILLS (Assistant Executive Director of JDDC): I think at that juncture, the Commission does pick that up and investigates it and proceeds on and determines what information you find, what allegations would be based on that complaint. We proceed on what information we find and what facts that we find and proceed to present that at this junction. That's why we set out the statement of allegations and submitted them to Judge Griffen and go from there in defense of same.

MR. COULTER: So if in the instance of Judge Griffen, he's defending responding to the allegation. So we know what to respond to, can we be clear about what the record is? It would seem normal, obviously, to the lawyers that the party making the allegation would move with its evidence and then we respond to that. I take it that's not the normal procedure here.

MR. WILLIS: Well, basically what I'm asking you to do is to take the allegations and the information that we have submitted to you and basically respond. That would be our moving situation at this time.

...
MR. COULTER: I think I'm with you on that. Now, my next question is: What is the evidence that has come forward with those two charges that's in front of the Commission at this point, because, you know, initially there was a whole bunch of stuff, documents?

MR. BADAMI: I think we're having a little bit of philosophical—you're saying charges and I think you have—I've not made it clear. This is—there are no charges pending against your client. This is an investigation. This is still part of that investigation. If the Commission decides that they want to go forward to a Formal Disciplinary Hearing, charges will be prepared. Right now we have allegations, and they are in the fact gathering mode to determine whether or not there should be charges. This is part of their investigation, and you are given an opportunity to submit further information in support of whatever position you want to take. But there are no charges.

MR. COULTER: One other question then, I guess, is: Is it appropriate, then, for the party responding or defending the investigation to go first or not?

MR. BADAMI: The normal procedure this Commission has followed is you have every piece of information that we have available, and I believe the Chair will ask you to proceed with whatever you want to present.

tions dismissed at the outset of the probable cause hearing because there was no known complainant and because a letter from an alternate member of the JDDC who participated in the September 20, 2002, preliminary proceeding had challenged the accuracy of the vote to proceed to a probable cause hearing.¹⁷

The defense consisted of live testimony by Senator Steele, Rev. Dr. William J. Shaw (President of the National Baptist Convention, USA, Inc.), Professor Morton Gitelman (University of Arkansas School of Law), and my testimony. The Commission then retired to deliberate, resulting in a decision to issue a Letter of Admonishment.¹⁸ I then filed a federal civil rights suit which challenged the Letter of Admonishment on constitutional grounds. That lawsuit was dismissed without prejudice after the JDDC chal-

Although the Executive Director and his assistant characterized such a process as "normal," it runs counter to anything I suspect most informed observers have experienced about the order and burden of proof in litigation. It also violates Arkansas law. *See* Ark. Code. Ann. § 16-40-101 (Repl. 1999), which provides (a) that the party holding the affirmative of an issue must produce the evidence to prove it, and (b) that the burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side. I challenged the JDDC "normal" process before the Arkansas Supreme Court as a violation of the statute and my right to due process of law under the Fourteenth Amendment to the federal Constitution. However, the Supreme Court did not address that challenge because it quashed the disciplinary action taken by the JDDC as a violation of my rights under the First Amendment.

17. Circuit Judge Leon Jamison was an alternate member of the JDDC who participated in the September 20, 2002, preliminary proceeding but did not participate in the November 15, 2002, probable cause hearing. After the Executive Director issued an official report stating that the vote to proceed to a probable cause hearing was unanimous, Judge Jamison issued a letter to members of the Commission and counsel for the parties in which he disputed the accuracy of the vote. Although my attorney raised that point at the outset of the probable cause hearing, the Commission proceeded with the probable cause hearing nonetheless. This was yet another irregularity that will linger in my memory concerning how judicial disciplinary proceedings are handled in Arkansas.

18. The Letter of Admonishment was issued November 20, 2002. On June 23, 2003, the JDDC filed a report with the Clerk of the Arkansas Supreme Court as required by Rule 12A of the JDDC Rules of Procedure. That report contained the following findings:

(1) Wendell L. Griffen is a judge on the Arkansas Court of Appeals. (2) On March 18, 2002, Judge Griffen appeared before the Legislative Black Caucus of the Arkansas General Assembly during a public hearing at which he testified. (3) The Legislative Black Caucus is part of a legislative body, the Arkansas General Assembly. (4) Judge Griffen testified about 'inequities in higher education in our state,' a matter of personal concern to him. A copy of Judge Griffen's remarks to the Legislative Black Caucus is attached to this report as 'Attachment E.' Judge Griffen's testimony did not concern the law, the legal system or the administration of justice. Judge Griffen's appearance was not in connection with a matter involving himself or his interests."

Letter of Admonishment, to Judge Wendell Griffen, Ark. Jud. Discipline & Disability Comm'n (Nov. 20, 2002) (on file with author).

lenged federal jurisdiction.¹⁹ My petition for certiorari was then filed in the Arkansas Supreme Court, which ultimately issued a 4-3 decision that granted certiorari, quashed the Letter of Admonishment, and held that Canon 4C(1) of the Arkansas Code of Judicial Conduct was unconstitutional.²⁰

The following analysis is offered to demonstrate what I term the “uneasy coexistence” of judicial ethics, judicial independence, and extra-judicial speech from the perspective of First Amendment jurisprudence. Despite my conviction that the process to which I was subjected was fundamentally unfair, due process considerations related to the Arkansas judicial disciplinary scheme are outside the scope of this presentation.²¹ Rather, I shall address the tension between notions of judicial independence and the validity of treating extra-judicial conduct and speech as legitimate grounds for protection by the First Amendment, on one hand, versus what appears to be discomfort about the ethical propriety of extra-judicial speech and conduct when a judge interacts with executive or legislative officials.

In doing so, I will focus primarily on the majority opinion authored by Justice Robert L. Brown and joined by Chief Justice Arnold and Justices Imber and Thornton.²² The majority held that the writ of certiorari would be granted and the Letter of Admonishment would be quashed

because the canon involved, Canon 4C(1), is not sufficiently drawn so as to advise Judge Griffen under what circumstances he might consult with a legislative official on a matter of personal interest. Because of this, the canon did not place Judge Griffen sufficiently on notice as to what is

19. *Griffen v. Ark. Jud. Discipline and Disability Comm’n*, 266 F. Supp. 2d 898 (E.D. Ark. 2003).

20. *Griffen v. Ark. Jud. Discipline and Disability Comm’n*, 355 Ark. 38, 60, 130 S.W.3d 524, 538 (2003).

21. At some point in what I hope is the near future, serious attention will be given to what I consider flagrant and persistent violations of procedural due process as well as the Arkansas Freedom of Information Act by the JDDC. For instance, I learned while successfully defending myself against a subsequent disciplinary misconduct allegation that the JDDC bars the media and public from its preliminary investigation proceedings even when a judge has filed a written waiver of confidentiality pursuant to JDDC Rule 7C(1). I have yet to find a record of the actual votes cast by members of the JDDC on disciplinary complaints.

22. My comments and observations concerning the views expressed by Justice Brown (author of the majority opinion) and Justices Glaze, Corbin, and Hannah (authors of the dissenting opinions) are not intended and should not be interpreted as personal attacks or criticisms. My oral and written comments address the constitutional and judicial disciplinary policy implications that arise, and with which there appears to be a discernible discomfort in certain quarters, regarding extra-judicial speech and conduct that does not involve pending or impending litigation or speech that is defamatory, incendiary (“fighting words”), or otherwise recognized as outside of First Amendment protection.

proscribed conduct. As a result, the canon intrudes on legitimate free speech.²³

In reasoning to this holding, the majority opinion first remarked about the importance of judicial independence, and the relationship of Canon 4C(1) to that concept, as follows:

The purpose behind Canon 4C(1) and its predecessor, Canon 4B, is to preserve judicial independence from the executive and legislative branches of government. Judges who lobby either branch of government on matters other than the administration of justice necessarily thwart that purpose. To that end, the improper use of the prestige of the judicial office must be avoided, and the commentary to Canon 2B to which the commentary to Canon 4C(1) refers us makes this abundantly clear. In a similar vein, the Arkansas Constitution assures the separation of powers among the three branches of government by providing that each branch is a separate department and that no person in one department shall exercise a power belonging to either of the other departments. *See* Ark. Const. art. 4, §§ 1 and 2. The public policy in our canons and the Arkansas Constitution is radiantly clear. Judicial independence is a hallmark of our system of government, and we cannot abide the entanglements between the judicial and other branches of government to which lobbying executive and legislative officials would unquestionably lead.

We hold that judicial independence is a fundamental principle to which the people of this state and the members of this court have subscribed. We have no hesitancy in adding that judicial independence is a compelling interest of the State. We cannot and will not countenance a blurring of the judge's role with that of the executive or legislative branches.²⁴

II. LEGAL VERSUS NON-LEGAL LOBBYING AND JUDICIAL INDEPENDENCE

The majority in *Griffen* reasoned that preserving judicial independence from the executive and legislative branches of government formed the purpose behind Canon 4C(1) and Canon 4B, its predecessor, and that "judicial independence is a compelling interest of the State."²⁵ Because the meaning of "judge's interests" was not defined by the Code, the majority concluded that Canon 4C(1) failed to provide judges with clear notice about under what circumstances judges could properly lobby executive or legislative officials concerning extra-judicial non-legal matters.

23. *Griffen*, 355 Ark. at 41, 130 S.W.3d at 525.

24. *Id.* at 51, 130 S.W.3d at 532.

25. *Id.*, 130 S.W. 3d at 532.

Obviously, I am pleased that the court quashed the Letter of Admonishment and held that the Commission violated my rights under the First Amendment when it sanctioned me. I share the view that judicial independence is indispensable to the proper balance of powers in our constitutional democracy. I also agree that judges must avoid misusing the authority and prestige of judicial office, be it in their extra-judicial dealings with executive and legislative officials or with other persons. Nor do I disagree with the holding that the State has a compelling interest, asserted through its judicial discipline rules and process, in protecting and preserving judicial independence and judicial integrity. I suspect that few people are troubled by those aspects of the Court's decision.

However, it is unfortunate that the opinion of the court in *Griffen* does not specify which judicial powers are exercised when a judge consults with a legislative or executive official about extra-judicial non-legal matters. Canon 4C(1) was plainly written to permit such consultations. There is no reason to believe that the drafters of the Canon were ignorant of the relationship between judicial independence and separation of powers when they included that provision in the Code of Judicial Conduct. Hence, it is fair to search the majority opinion in *Griffen* for clues, findings, or at least some suggestions about what extra-judicial contact between judges and legislative or executive officials is permissible. *Stated differently, what factors are considered relevant by the court in determining whether extra-judicial contact between judges and legislative or executive officials concerning non-legal subjects is permissible?* Thus far, I have not uncovered a sentence in the majority opinion or any of the dissenting opinions on this subject. Plainly, the court is concerned about the threat posed to judicial independence and the separation of powers by improper involvement by judges with legislative or executive officials. Yet, the opinions in *Griffen* do not even hint that there are instances when judges may ethically lobby executive or legislative officials about non-legal subjects.

It is clear that the drafters of Canon 4C(1) recognized there are instances when a judge can ethically consult (lobby) an executive or legislative official that do not threaten judicial independence. Thus, a judge may consult an executive or legislative official about the law, the legal system, and the administration of justice. Apparently, the drafters contemplated that those interactions between judges and executive or legislative officials are ethical whether a judge is acting pro se or as part of a group. Insofar as judicial independence is concerned, the Code does not suggest that interactions by judges with executive or legislative officials regarding the law, the legal system, and the administration of justice implicate the separation of powers doctrine.

It is equally clear that Canon 4C(1), as it existed at the time of my conduct, contemplated that judges may ethically consult with executive or legislative officials about non-legal matters, albeit in limited instances. The

permissible circumstances occur when a judge lobbies executive or legislative officials in a pro se capacity concerning matters that constitute the "judge's interests." Thus, *Canon 4C(1)* contemplates that there are legitimate situations and circumstances when judges may permissibly lobby legislative or executive officials about matters unrelated to the law, the legal system, and the administration of justice.

Query, however, whether the potential for violating the separation of powers doctrine is increased when judges lobby legislative or executive officials about legal topics (the law, legal system, and administration of justice). If the purpose of the separation of powers doctrine is to prevent collusion between the separate branches of government, is it not more inimical to that purpose for judges to consult with legislative or executive officials about the very subject matter on which judicial power and authority is exercised? I pose the question because it warrants at least critical consideration and debate if one is to honestly and intelligently be faithful to judicial independence and the separation of powers given the Court's declaration that judicial independence is "a hallmark of our system of government, and we cannot abide the entanglements between the judicial and other branches of government to which lobbying executive and legislative officials would unquestionably lead."²⁶

If judicial independence is truly "a compelling interest of the State," it is reasonable to question whether that interest is less compelling or less threatened when judges lobby legislative or executive officials concerning legal subjects than on non-legal subjects. After all, judges may not ethically practice law. Courts do not issue advisory opinions. Consequently, one might question whether the legal versus non-legal distinction contemplated by Canon 4C(1) represents a distinction based on something other than regard for the separation of powers and judicial independence, whatever that may be. From the standpoint of concern for separation of powers and judicial independence, it is worth pondering what values are advanced by permitting judges to lobby legislators about legal subjects that are so important as to justify the sweeping declaration that such lobbying is ethical per se, and the implication that lobbying on non-legal matters is ethically suspect.

One response might be that the separation of powers doctrine does not prohibit *collaboration between persons* in different branches of government (about legal or non-legal subjects), but prohibits *collusion of powers* held by persons in different branches of government. That notion would appear consistent with the principle of judicial independence as well as the aim of safeguarding the public from the evils that are threatened when the powers of separate branches of government are massed together. I advanced that argument in my briefs and during oral argument. Thus far, I have not found

26. *Id.*, 130 S.W.3d at 532.

anything in any of the four opinions issued by the Supreme Court that seems responsive to that argument. In fact, none of the opinions even refer to it.

At any rate, the fundamental problem insofar as judicial independence is concerned is to determine what judicial power, authority, or prestige is exercised when a judge consults with a legislative or executive official about extra-judicial *non-legal* matters. As previously mentioned, it is at least conceivable that judicial prestige, authority, and power might be involved when judges lobby legislative or executive officials about the law, legal system, and administration of justice. For whatever reasons, the Code does not treat such lobbying as inimical to judicial independence and the separation of powers doctrine.

Furthermore, Canon 4B explicitly provides that a judge “may speak, write, lecture, teach on and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice *and non-legal subjects*, subject to the requirements of this Code.”²⁷ Canon 4B does not intimate that such efforts threaten judicial independence or implicate the separation of powers doctrine. In fact, the Commentary to Canon 4B states:

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law²⁸

If Canon 4B recognizes that judges who engage in extra-judicial speech concerning legal subjects pose no threat to judicial independence and the separation of powers, it seems reasonable that judges may engage in Canon 4B activities with executive or legislative officials. Judges often appear on panels, forums, and co-author papers with persons from the other branches of government concerning legal matters. This demonstrates that even when the issues on which judges exercise their official authority, power, and prestige are involved (the law, legal system, and administration of justice), judicial independence is not threatened and the separation of powers doctrine is not violated by cross-branch collaboration and consultation in the Canon 4B.

That is what makes the Court’s opinion in *Griffen* puzzling regarding its analysis of the “judge’s interest” exception in Canon 4C(1). When a judge personally lobbies a legislative or executive official about a non-legal matter, one would think that judicial independence is implicated less than

27. ARK. CODE OF JUD. CONDUCT CANON 4B (1993) (emphasis added).

28. *Id.*

when the lobbying involve legal subjects. After all, the law, the legal system, and the administration of justice are matters particularly within the ambit of judicial power. One might expect a legislator to be more impressed by what a judge thinks about the law than what the judge thinks about the state of racial diversity at his or her college alma mater.

Again, none of the opinions in *Griffen* specify what judicial prestige, authority, and power is involved or implicated when judges lobby legislative or executive officials about non-legal subjects. The majority opinion does indicate, drawing from the Commentary to Canon 2B, that it would be inappropriate for judges to use the resources of their office (such as official letterhead) during such lobbying efforts.²⁹ There was no allegation or proof that such impropriety occurred in *Griffen*. Instead, the majority opinion proceeded to issue a sweeping declaration that "a judge never sheds the judicial role so long as he or she remains in office."³⁰ Respectfully, that statement demands more serious reflection than is indicated by the Court's opinion in *Griffen*.

III. TRUISM IS NOT TRUTH

The court's assertion that "a judge never sheds the judicial role so long as he or she remains in office"³¹ is a truism, much like the statement, "nothing lasts forever." Asserting that a judge never sheds the judicial role implies that a judge inevitably exercises judicial authority, power, and prestige even when engaged in extra-judicial conduct in non-legal interactions with executive or legislative officials. However, that is inconsistent with the Code.

Assume that X is a judge who marries Y, a legislator. Taking the Court's declaration in *Griffen* to mean what it says and say what it means, that marriage constitutes a per se threat to judicial independence and the separation of powers, no matter whether X and Y never discuss legal matters, sometimes discuss legal matters, or always discuss legal matters. So, if X is an alumnus of the University of Arkansas, the declaration in *Griffen* means that X cannot ethically talk with Y about his views on racial diversity at the University of Arkansas. If the court's declaration is to be taken seriously, as we must, X can not ethically commend or criticize the University of Arkansas regarding racial diversity. To do so would threaten the republic.

The obvious reaction to this curious prohibition is to ask why judicial independence and the separation of powers are threatened when judges consult with executive or legislative officials concerning non-legal subjects in

29. *Griffen*, 355 Ark. at 52, 130 S.W. 3d at 533.

30. *Id.* at 53, 130 S.W. 3d at 533.

31. *Id.*, 130 S.W.3d at 533.

which they have an clear personal interest. The majority opinion does not tell us why or how a judge is inevitably engaged in the exercise of judicial power during non-legal interactions with executive or legislative officials. Nor does the majority opinion suggest how a judge who is not exercising judicial power, prerogatives, or functions threatens judicial independence when dealing with executive or legislative officials on non-legal matters of legitimate public interest. Perhaps one might eventually become comfortable with that unanswered question. I have yet to attain that comfort, but that might be due to my extraordinary eccentricity. I do not think so, but offer that possibility, nonetheless.

Yet, another unanswered question is even more disquieting. *What body of evidence (historical, judicial, or otherwise) supports the notion that judicial power, prestige, and authority is always exercised once a person enters judicial office?* Perhaps one would not expect persons engaged in idle conversation about this issue to cite objective evidence to support the sweeping declaration that “a judge never sheds the judicial role so long as he or she remains in office.”³² But when the assertion is made in the context of litigation in an appellate opinion that announces a result embraced by a court of last resort, it is not inappropriate to expect the assertion to be backed by something other than the power of the declarant to utter it.

I have read each opinion authored in *Griffen* several times. None of the opinions cite a case, statute, rule, or fact of history to substantiate the sweeping declaration that “a judge never sheds the judicial role so long as he or she remains in office.” Yet, the majority opinion declares that “we are *firmly convinced* that a judge never sheds the judicial role so long as he or she remains in office.”³³ At the risk of being misunderstood, I respectfully suggest that it would have been helpful to the rest of us if the court had condescended to state the facts that substantiate its conviction.

Instead, the court uttered a truism: “a judge never sheds the judicial role so long as he or she remains in office.” This truism purports to utter a truth in the context of litigation regarding whether a given judge is guilty of misconduct for engaging in extra-judicial speech about a non-legal subject with legislative officials. Given that the court cited no facts in my case to justify its assertion, we are left to assume that either the assertion is true per se or we must assume facts that make it true. Judicial independence is certainly a cherished principle of American democracy. The separation of powers doctrine is entitled to great respect. However, neither respect for judicial independence nor the separation of powers doctrine justify suspending the requirement that judicial pronouncements that bear on the exercise of First Amendment rights be based on objective proof rather than supposi-

32. *Id.*, 130 S.W.3d at 533.

33. *Id.*, 130 S.W.3d at 533 (emphasis added).

tion. Otherwise, First Amendment rights for judges exist at the mercy of notions of political orthodoxy rather than sound jurisprudence.

IV. THINGS MAY BE WORSE THAN WE THINK

I make this observation to set the stage for addressing the Court's failure to define "judge's interest" in its opinion and its subsequent decision to discard the "judge's interests" exception from Canon 4C(1) altogether by its July 1, 2004, per curiam opinion. Based on the Court's per curiam order, Canon 4C(1) now states: "A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice."³⁴ The present version of Canon 4C(1) is lamentably worse than its predecessor because it is unconstitutionally overbroad, meaning that it prohibits speech otherwise allowed under the First Amendment and explicitly encouraged under Canon 4B. It is also unworkable.

Pursuant to the overbreadth doctrine, the United States Supreme Court recognized in *Shelton v. Tucker*³⁵ that where a governmental regulation sweeps so broadly as to impinge upon activity protected by the First Amendment, its overbreadth may render it unconstitutional.³⁶ Thus, overbreadth is a judicially-created doctrine designed to prevent the chilling of protected expression.³⁷ The current version of Canon 4C(1) is overbroad because it (1) flatly prohibits a judge from having *any non-legal subject matter* communication with a legislative or executive official, and (2) prohibits a judge from engaging in speech that is otherwise allowed under Canon 4B, which explicitly allows a judge to speak regarding non-legal subjects.

Furthermore, Canon 4C(1) is now unworkable from the perspective of encouraging compliance by judges interested in expressing themselves on non-legal subjects as permitted by the First Amendment. Under Canon 4B, a judge may write an editorial opinion about a non-legal subject. Canon 4C(1) prohibits the judge from directly telling a legislative or executive official what he or she may have written to the general public in the opinion editorial. However, any other persons (non-judges) in the general public can send the editorial opinion to legislative or executive officials. Persons who are not judges can appear before legislative or executive bodies and quote from or cite to the editorial opinion. Thus, the current version of Canon 4C will work the bizarre result of prohibiting a judge who authors an editorial opin-

34. In Re: Ark. Code of Jud. Conduct Canon 4C(1), 2004 Ark. Lexis 448 (July 1, 2004).

35. 364 U.S. 479 (1960)

36. *Id.* at 488.

37. *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989).

ion about homelessness, AIDS research, or racial inequality in higher education from saying the very words before a legislative committee or executive official that were published in the editorial.

It is not disrespectful to declare that a rule is absurd when it invites judges to accomplish through surrogates what it prohibits them from doing directly. And it is not far-fetched to believe that a governmental rule that prohibits judges under Canon 4C(1) from engaging in legitimate extra-judicial non-legal expression permitted by Canon 4B is unconstitutional on its face.

V. CONCLUSION

The Arkansas Supreme Court's discomfort with the idea of judges engaging in extra-judicial non-legal speech with legislative or executive officials is obvious. It is equally obvious that the court struggled in *Griffen* with the interplay between judicial independence and judicial ethics, on the one hand, and respect for the First Amendment. What remains to be seen is whether the bench and bar have the requisite courage to admit that the struggle produced an unworkable and unconstitutional outcome, however much we may respect the court for its effort.

I suspect that the court's facile declaration that "a judge never sheds the judicial role so long as he or she remains in office" and its decision to completely discard the "judge's interests" exception to Canon 4C(1) have less to do with a well-ordered judiciary and more to do with a desire to impose an unspoken norm regarding extra-judicial conduct and speech. My conduct obviously was not universally popular. That did not render it unethical. Sadly, the court's language in *Griffen* and its decision to discard the "judge's interests" exception demonstrate its refusal or inability to distinguish speech that may be politically unpopular from that which is illicit.

