From Earl Warren to Wendell Griffen: A Study of Judicial Intimidation and Judicial Self-Restraint

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I. INTRODUCTION

It is a matter of the greatest personal satisfaction for me to be here today to speak at this symposium, which is being held in honor of the late Judge Richard Sheppard Arnold. Judge Arnold was a close friend whom I admired and loved. I am sure he is looking down today on these events with great pleasure and pride.

I must also confess that I stopped wearing bowties in the 70s with the exception of black tie, to my wife Charlotte’s total chagrin. But in honor of Richard Arnold, I broke down, and I’m wearing one today. It is actually one of Richard’s bowties which his widow, Kay, was kind enough to give me. I decided that on this occasion, I had to wear it.

My topic for the symposium is From Earl Warren to Wendell Griffen: A Study of Judicial Intimidation and Judicial Self-Restraint. Clearly, the scope of my address is expansive. I will be discussing several facets of judicial independence. The most obvious is the danger to judicial impartiality that comes from outside threats and retaliation following judicial decisions. In addition to outside forces, I will be addressing self-imposed pressures brought about by the judges themselves that affect the judges’ impartiality. I will also discuss the judicial boundaries for public comment, assuming there are any left after Republican Party of Minnesota v. White.1 And I will end by touching on the always controversial subject of the activist judge. Is judicial activism judicial independence run amok? Justice Scalia certainly thinks so.

There is no question that the role of judges is undergoing intense scrutiny and reevaluation in our society on many fronts and from many quarters. The ultimate question posed is should there be any curbs or restraints on judicial decision-making and if so, in what form? The corollary question raised is how “active” do we want our judges to be? How active should they be in their judicial decision-making, in announcing their views on disputed issues in judicial campaigns, and in commenting on non-judicial issues as sitting judges?

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II. EARL WARREN AND IMPEACHMENT

A. Impeachment of Judges

I will deal first with public and legislative reactions to specific judicial decisions and to so-called activist judges. I went to law school in the mid-sixties, some ten years after the two Brown decisions and after Reynolds v. Sims, Mapp v. Ohio, and the other landmark decisions of the Warren Court. The Miranda decision would soon follow. The tumult from these decisions, and particularly the two Brown decisions followed by Cooper v. Aaron, which called for immediate desegregation of the Little Rock schools, was cacophonous and far reaching. "What have these activist judges on the United States Supreme Court wrought?" was the battle cry. How can they simply strike down the Jim Crow way of life that was so deeply embedded in the culture of so many states for centuries with the sweep of a judicial pen? Wasn't that a matter for legislation and congressional action? The Supreme Court, in the minds of many, had gone way too far and had made a mockery of the separation of powers in that the Court was now legislating and usurping the role of Congress. These were activist judges, the critics said, and that was clearly meant to be a pejorative term. Surely, the framers of the Constitution had never intended judicial interpretation of the Constitution to have such far-reaching consequences, they railed. Because the Justices had violated their oaths of office, they should be impeached.

Earl Warren, as Chief Justice of the Court and author of the two Brown decisions, became the poster child for the impeachment effort in the 1950s. "Impeach Earl Warren" was the mantra, and signs to that effect, sponsored

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2. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954) (holding that doctrine of "separate but equal" violates the Fourteenth Amendment); Brown v. Bd. of Educ. of Topeka, 349 U.S. 294 (1955) (remanding to the federal district courts for orders necessary to admit the parties to public schools on a racially nondiscriminatory basis "with all deliberate speed").

3. 377 U.S. 533 (1964) (holding that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis").


5. See Miranda v. Arizona, 384 U.S. 436 (1966) (establishing procedural safeguards for defendants in custody prior to taking statements in order to secure privilege against self-incrimination).


7. See id. at 17 (holding that desegregation of Little Rock public schools should not be delayed and that "the constitutional rights of children not to be discriminated against in school admission on grounds of race or color . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers.")
by the private right-wing organization known as the John Birch Society, popped up around the country and especially in the South. Drive him from office, the critics howled, because he had expanded his judicial authority unconscionably and exponentially. Never mind that the Warren Court was unanimous in the *Brown* opinions and had performed its role of interpreting state law in light of the United States Constitution. This, of course, dated back to Federalist Paper No. 78 and to Chief Justice John Marshall, who wrote in the seminal case of *Marbury v. Madison* that the Constitution controls any legislative act "repugnant to it" and that it was the province of the Supreme Court to say what the law is. Never mind that the "separate but equal" doctrine was odious and pernicious and clearly flew in the face of the Fourteenth Amendment, as Mr. Justice Harlan had so perceptively understood and so eloquently put it in his dissent in *Plessy v. Ferguson* in 1896 where he alluded to our "color-blind" Constitution.

It was abundantly clear that Earl Warren's critics sought to retaliate against the Chief Justice personally and the Court as a whole for decisions they found to be abhorrent. It was retaliation, but it was also calculated intimidation designed to take the edge off constitutional interpretation in the

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9. *Id.* Chief Justice John Marshall wrote:

> It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

*Id.* at 177–78.

11. Justice Harlan stated:

> But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

*Id.* at 559 (Harlan, J., dissenting).
years to come and to stand judicial independence on its head. Looking back these fifty years, it seems incredible that this effort to impeach Earl Warren would have gained any traction, but it certainly did. More than a million Americans signed a petition for his ouster.  

The Earl Warren impeachment effort was a frontal assault on judicial independence, and we are all fortunate that it was unsuccessful. It failed, in part, because wiser heads in Congress prevailed. There is no question that what the Warren Court did in 1954 and 1955 was considered judicial “activism” by some at that time. Yet today it is almost universally acclaimed. As Chief Justice William H. Rehnquist said in January of this year: “Federal Judges were severely criticized fifty years ago for their unpopular, some might say activist, decisions in the desegregation cases, but those actions are now an admired chapter in our national history.”

History tells us that repercussions following unpopular decisions are not a new phenomenon. Thomas Jefferson, when president, was successful in having Samuel Chase, a Justice on the United States Supreme Court, impeached for “unbecoming conduct” for a circuit judge in 1804, which was “part of Jefferson’s continuing assault on the Federalist-dominated judiciary.” Justice Chase was impeached but not convicted. What the House of Representatives charged Justice Chase with in that impeachment matter was no high crime or misdemeanor, as required by the Constitution, but rather Chase’s alleged incompetence as a trial judge. Approximately 150 years later, Justice William O. Douglas of the United States Supreme Court was also the victim of an unsuccessful impeachment attempt, following his grant of a stay of execution to convicted espionage agents, Julius and Ethel Rosenberg. We are also all familiar with President Franklin Roosevelt’s astonishing move in 1937 to dilute the impact of a majority of the United States Supreme Court by adding six more justices. The Court at that time had incurred the President’s wrath by ruling certain New Deal measures unconstitutional. Fortunately for the country, Roosevelt’s effort was thwarted by the United States Senate.

Chief Justice Earl Warren, of course, was a federal judge, appointed essentially for life by President Eisenhower and subject to removal only if he failed to conduct himself with good behavior or was convicted of treason, bribery, or other high crimes and misdemeanors. It is important to

16. See U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour. . . .”). See U.S. CONST. art. II, § 4 (“The President, Vice President and all civil officers of the United States, shall be removed from
note that over the history of this country only fourteen federal judges have ever been impeached and faced trials in the senate, and only seven have been convicted.\textsuperscript{17} Judicial rulings formed none of the grounds for those fourteen who were impeached.\textsuperscript{18} Yet the threat of retaliation for unpopular decisions remains, as evidenced by the efforts waged against Chief Justice Warren and Justice Douglas.

Arkansas had its own brush with the impeachment of judges in the nineteenth century during Reconstruction, including the impeachment of Arkansas Supreme Court justices.\textsuperscript{19} These were largely matters of political intrigue, and no convictions resulted.

B. Procedures to Intimidate Judges

There are other questionable procedures, in addition to impeachment, that can be used to retaliate against a judge for an unpopular ruling. Special elections for judicial retention in states that have the Missouri Plan, where voter turnout is typically low, are uniquely susceptible to manipulation by special interest groups. Witness the defeat of Justice Penny White, in Tennessee in 1996, because she agreed with an opinion written by a fellow justice to send a death penalty case back to the trial court for resentencing.\textsuperscript{20} Tennessee Governor Don Sundquist weighed-in in opposition to Justice White's retention. When asked whether it was a good idea for judges to constantly be looking over their shoulders before making decisions, he replied: "I certainly hope so."\textsuperscript{21} So much for judicial impartiality. And before Justice White, in California in 1986, three justices of the California Supreme Court were defeated in retention elections due to their opinions or votes cast on the death penalty in individual cases.\textsuperscript{22}

A variation of the danger inspired by the special retention election is the recall election. A judge issues an unpopular opinion, and recall petitions office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.


\textsuperscript{18} See id.


\textsuperscript{20} See State v. Odom, 928 S.W.2d 18 (TENN. 1996) (vacating sentence of death and remanding for resentencing).


\textsuperscript{22} Chief Justice Rose Bird and Associate Justices Cruz Reynose and Joseph Grodin were defeated in California in 1986 due to opinions or votes cast which were perceived as being in opposition to the death penalty.
are then circulated with regard to that judge requiring X number of signatures and calling for a recall election. The judge must then campaign against his or her recall. That is a perfidious system. Why would any judge worth his or her salt want to serve and make the hard decisions that the job requires with the threat of recall constantly hanging over that judge's head? That is precisely what the recall mechanism is designed to do—intimidate judges.

In 2003 Senate Bill 378 was introduced before the Arkansas General Assembly to provide a procedure for the recall of judges. Under the original legislation, a recall election could have been set in motion by a petition filed with the signatures of fifteen percent of the qualified electors of the state. It was widely viewed as a retaliatory measure designed to threaten judges who had made unpopular decisions. The recall measure sailed through the Senate by a unanimous vote but stalled in the House Judiciary Committee. Following an Attorney General's opinion declaring the recall bill itself to be in conflict with the Arkansas Constitution, the bill was unceremoniously laid to rest.²³

Other efforts to retaliate against the judiciary by state legislatures are equally suspect. For example, in this current session of the Arkansas General Assembly, bills were introduced to limit state courts from determining the constitutionality of the school funding system and to limit the terms of Supreme Court Justices.²⁴ Fortunately, neither bill has made much headway.

I am convinced that the procedures most states, including Arkansas, already have in place to protect against judicial wrongdoing are satisfactory bulwarks. Arkansas, for example, has two such provisions in its state Constitution. The first is the standard impeachment and conviction process vested in the General Assembly, when a judge engages in high crimes and misdemeanors and gross misconduct in office.²⁵ The second is the Judicial

25. See ARK. CONST. art. 15 § 1–3.

§ 1. Officers Subject to Impeachment; conditions
The Governor and all State officers, Judges of the Supreme and Circuit Courts, Chancellors and Prosecuting Attorneys, shall be liable to impeachment for high crimes and misdemeanors, and gross misconduct in office; but the judgment shall go no further than removal from office and disqualification to hold any office of honor, trust or profit under this State. An impeachment, whether successful or not, shall be no bar to an indictment.

§ 2. Impeachment Powers of the House; trial by the Senate
The House of Representatives shall have the sole power of impeachment. All impeachments shall be tried by the Senate. When sitting for that purpose, the Senators shall be upon oath or affirmation; no person shall be convicted without the concurrence of two-thirds of the members thereof. The Chief Justice shall preside, unless he is impeached or otherwise disqualified, when the Senate shall select a presiding officer.
Discipline and Disability Amendment, which amended the Arkansas Constitution and which was adopted overwhelmingly by a vote of the people in 1988.\textsuperscript{26} This Amendment establishes a Judicial Discipline and Disability Commission and provides for the removal of judges from office and other sanctions for wrongdoing. And, finally, for those states, like Arkansas, that have selection of judges by popular election, there is removal at the ballot box.

To a considerable extent, federal judges are more immune from direct assaults on their impartiality and independence than most state judges, especially because they have lifetime appointments and are not subject to removal by election. This is not to say that federal judges are immune from politics, however. As much as I respect my federal counterparts on the bench, a sense of being beholden to their appointer, the President of the United States, appears to afflict some judges. The same sometimes holds true for justices appointed by state governors under the Missouri Plan or to fill a vacancy.

Perhaps the most recent egregious example of this was Judge Harold Baer Jr., the federal district judge for the Southern District of New York, who had been appointed by President Bill Clinton and who suppressed drug evidence in a case in 1996. The suppression caused a firestorm in Congress with more than 200 members in the House of Representatives calling for Judge Baer's resignation.\textsuperscript{27} Senator and presidential nominee Bob Dole went further and called for his impeachment.\textsuperscript{28} It appears that even President Clinton considered calling for his resignation.\textsuperscript{29} Judge Baer then reversed himself on the suppression issue and granted the government's motion for reconsideration. Let me hasten to add that I have no idea whether Judge Baer actually succumbed to political pressure. Indeed, some commentators have maintained fervently that he did not.\textsuperscript{30} But the appearance that he did defer to the will of the man who appointed him judge is palpable and if he did so, judicial impartiality was grievously impaired.

What about the subtle pressures on state judges and particularly state judges who are elected by a vote of the people? Is their judicial independence curtailed by capitulating to what they perceive to be the majority will

\textsuperscript{26}. See ARK. CONST. amend. 66.
\textsuperscript{28}. Id. at 158.
\textsuperscript{29}. Id. at 157.
\textsuperscript{30}. Id. at 164.
on divisive issues? I have always supported the election of judges, believing wholeheartedly in Jacksonian democracy. And I must confess to some displeasure in reading Justice Sandra Day O’Connor’s concurrence in Republican Party of Minnesota v. White, where she opines that if states that hold popular elections to select their judges are experiencing the risk of judicial bias due to free speech, those states brought this on themselves by selecting judges by popular election.31

But aside from Justice O’Connor’s dubious and, yes, even, undemocratic comment, electing judges is no more political in my experience than the appointment system. If anybody here today truly believes that federal appointments or even state appointments to the judiciary are not political, I have some excellent swamp land in the Arkansas bottoms I would like to sell you. The federal appointment system merely calls into play a different set of politics. In that regard, I had the honor of “campaigning” for Judge Richard Arnold when he was considered for a seat on the United States Supreme Court in 1994. Justice Stephen Breyer ultimately was appointed, but my campaigning and that of many others consisted of calling people of prominence around the country and cajoling them to write President Clinton on Judge Arnold’s behalf. I must add as a footnote that it did not take much cajoling.

Critics of judicial elections vigorously assert that the threat of removal from office by judicial election throws a monkey wrench into the whole concept of judicial independence. Moreover, they assert that political fundraising, even if the judge is not directly involved in soliciting money, is iniquitous and by necessity makes that judge beholden to certain individuals or interest groups. I disagree strongly, however, that selection by election automatically means a judge will not be impartial, objective, and independent or the judge will mold his or her decisions to what he or she perceives to be the popular will. Of course, it depends on the man or woman. And to be sure, demagoguery on the part of some judicial candidates can and does rear its ugly head. But I am convinced that it comes down to the character of the person who is serving as judge, whether that person is elected or appointed.

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31. Justice O’Connor wrote:

Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan. In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State’s claim that it needs to significantly restrict judges’ speech in order to protect judicial impartiality is particularly troubling. If 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.

White, 536 U.S. at 792 (O’Connor, J., concurring).
C. Judicial Canons and Free Speech

I have already made reference to the Judicial Discipline and Disability Commission established under Amendment 66 to the Arkansas Constitution, which oversees judicial conduct and sanctions judicial wrongdoing. This segues nicely into a different type of perceived impediment to the independence of judges which is very topical today and which is the subject of intense debate in virtually every state. Here, I am not talking about repercussions from the General Assembly or special interest groups for a judge’s unpopular ruling, but, rather, the conflict between, first, judicial candidates and sitting judges who assert their right to free speech by speaking out on issues, and, second, our canons of judicial conduct, which proscribe addressing issues or engaging in conduct in certain contexts. One aspect of this debate is to what extent can a judicial commission such as we have in Arkansas curtail or prevent a judicial candidate or a sitting judge from voicing opinions on any given subject?

1. Code of Judicial Conduct

Arkansas like most if not all the states has adopted in large part the Model Code of Judicial Conduct prepared and updated periodically by the American Bar Association. Initially, this Model Code was drafted in 1972 under the auspices of Arkansas’ own lawyer and former president of the American Bar Association, Edward L. Wright. This Judicial Code states in its Preamble that it strives to strike a balance between judges using their position to extract favorable treatment as one extreme, which of course is verboten, and judges legitimately working at non-judicial tasks in their communities and voicing their opinions on matters of importance to them. Without question, the Code’s ultimate purpose is to prevent a judge from improperly using his or her judicial office to gain favorable treatment and to eliminate the potential for conflicts of interest.

Another stated goal is to maintain the people’s honor and respect for the judicial office so that the public will maintain confidence in the judicial system. On this point, it is worth noting that public respect for our system of justice is high. According to one survey by the American Bar Association taken in 1999, under the auspices of then-president Philip S. Anderson, seventy-nine percent of those surveyed were extremely confident or somewhat confident with federal judges and seventy-five percent expressed the same confidence with state judges. The United States Supreme Court had the

highest confidence rating of eighty-five percent. I will not tell you which professions or government entities ranked the lowest.

To achieve these goals set out in the Code’s Preamble, Arkansas’ Judicial Code limits the activities of judges in several key respects. According to the Code, a judge, for example, shall not:

A. demean the judicial office.\(^{35}\)

B. personally participate in the solicitation of funds.\(^{36}\)

C. consult with an executive or legislative body or official except on matters concerning the law.\(^{37}\)

D. solicit funds for, pay an assessment to or make a contribution to a political party or candidate.\(^{38}\)

E. publicly identify his or her current political party affiliation.\(^{39}\)

F. make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.\(^{40}\)

In 2002, the United States Supreme Court handed down a decision in favor of the First Amendment and against state judicial codes which I have already mentioned—Republican Party of Minnesota v. White.\(^{41}\) This five-four decision struck down the Minnesota Judicial Code section that precluded a judicial candidate from announcing “his or her views on disputed legal or political issues” on the basis that this prohibition abridged that candidate’s free-speech rights.\(^{42}\) Currently percolating in the Eighth Circuit Court of Appeals are collateral issues in the White case relating to whether judicial codes can prevent a judicial candidate from directly soliciting funds from potential contributors or from voicing a preference for a political party. These issues were orally argued before the court, sitting en banc, on October 20, 2004. The Arkansas Supreme Court and the State of Arkansas have joined the amicus curiae briefs of sister states in support of the constitutionality of our Judicial Code provisions. Now the Bar and judiciary in every state anxiously await the Eighth Circuit’s decision, which will further

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34. See id.
35. ARK. CODE OF JUDICIAL CONDUCT Canon 4A(2) (2005).
36. ARK. CODE OF JUDICIAL CONDUCT Canon 4C(3)(b)(i).
37. ARK. CODE OF JUDICIAL CONDUCT Canon 4C(1).
38. ARK. CODE OF JUDICIAL CONDUCT Canon 5A(1)(e).
39. ARK. CODE OF JUDICIAL CONDUCT Canon 5A(1)(f).
40. ARK. CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii).
41. 536 U.S. 788 (2002).
42. White, 536 U.S. at 788.
set the boundaries for judicial speech. Ultimately, I suspect the United States Supreme Court will be called upon to make the final decision.

2. Vagueness in the Judicial Canons

In one respect, the Arkansas Supreme Court has been ahead of the judicial curve in addressing the ripple effect of *White* on the free-speech rights of sitting judges. In *Griffen v. Arkansas Judicial Discipline & Disability Commission*, my court addressed the issue of to what extent our Judicial Discipline and Disability Commission could prevent a sitting African-American judge, not a judicial candidate, from consulting with African-American members of the Arkansas General Assembly, known as the Black Caucus, on a legislative appropriation to the University of Arkansas. In that case, my friend, Judge Wendell Griffen of the Arkansas Court of Appeals, who is African-American, and who will have the last word today, made an appearance before the Black Caucus on March 18, 2002, to advocate that the Black Caucus not “reward” the University of Arkansas by appropriating more tax revenue for its programs, because, in his words, the University mistreats black students, and previous appropriations have been used to “maintain longstanding inequities.” He pointed specifically to the university’s firing of basketball coach Nolan Richardson, who had won a national championship in 1995. In his closing remarks, Judge Griffen told the Black Caucus “to send a clear signal to the University” and added that he did not believe the basketball coach at the university was fired for lack of confidence in his leadership. He concluded: “send them a budgetary vote of no confidence concerning sorry leadership about racial inclusion over the past years at the University of Arkansas. Show them the money!”

Because of this and other statements Judge Griffen had made regarding racism and Coach Richardson, he was charged by the Judicial Discipline and Disability Commission with violating several provisions of the Judicial Code, including Canon 4A(2), which prevents a judge from “demeaning” the judicial office and Canon 4C(1), which prevents a judge from consulting with legislators on matters not involving the administration of justice. After a hearing before the Commission, he was found guilty of violating Canon 4C(1) for basically lobbying members of the General Assembly.

44. See id.
45. Id. at 41–43, 130 S.W.3d at 526–27.
46. Id. at 42, 130 S.W.3d at 526.
47. Id. at 62, 130 S.W.3d at 538.
48. Id. at 62, 130 S.W.3d at 540.
49. *Griffen*, 355 Ark. at 44–45, 130 S.W.3d at 528.
50. Id. at 47, 130 S.W.3d at 528.
He was admonished by the Commission for this offense by a vote of four to three.\textsuperscript{51} Throughout, Judge Griffen maintained that he was acting \textit{pro se} in a matter involving his personal interests, which was an exception to Canon 4C(1).\textsuperscript{52}

Judge Griffen appealed to the Arkansas Supreme Court court, and we reversed the Judicial Discipline and Disability Commission and the admonishment by a vote of four to three.\textsuperscript{53} In doing so, we focused on the judge’s interest exception to Canon 4C(1).\textsuperscript{54} The quandary for a majority of my court was: What does the “judge’s interests” mean?\textsuperscript{55} Judge Griffen maintained that this exception meant he could voice his longstanding opposition to racism, which was a personal interest of his.\textsuperscript{56} At the very least, he maintained, the exception for “the judge’s interests” was vague and unclear as to exactly what judges were permitted to do.\textsuperscript{57}

A majority of my court agreed with Judge Griffen and found the term to be vague and ambiguous and, as such, repugnant to the First Amendment.\textsuperscript{58} I must confess that I wrote the majority opinion. Two dissenters, however, opined that Judge Griffen knew he was wrong to lobby the Black Caucus, and, for that reason, he should have been sanctioned.\textsuperscript{59} They also questioned how the majority could hold that a rule the court itself adopted was vague.\textsuperscript{60} A third dissenter wanted to revive a charge for another alleged violation of the canons which the Judicial Discipline and Disability Commission had already dismissed.\textsuperscript{61}

As an aside, recently, I came across the words of Judge Richard Arnold written last year for the Martin Luther King vigil at Philander Smith College here in Little Rock. They address the issue of the all-important First Amendment. Judge Arnold wrote:

\begin{quote}
Even though the courts are not able to enforce a “Higher Law,” as such, and even though we would not trust judges with such power, the courts are by no means impotent in the face of injustice
\end{quote}

\begin{itemize}
\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} \textit{Id. at 44, 130 S.W.3d at 527–28.}
\item \textsuperscript{53} \textit{See id. at 48–61, 130 S.W.3d at 530–39.}
\item \textsuperscript{54} \textit{Id. at 48–61, 130 S.W.3d at 530–39.}
\item \textsuperscript{55} \textit{See Griffen, 355 Ark. at 52–59, 130 S.W.3d at 532–38.}
\item \textsuperscript{56} \textit{Id. at 52, 130 S.W.3d at 533.}
\item \textsuperscript{57} \textit{Id. at 54, 130 S.W.3d at 534.}
\item \textsuperscript{58} \textit{See id. at 60–61, 130 S.W.3d at 537.}
\item \textsuperscript{59} \textit{Id. at 70, 130 S.W.3d at 543 (Corbin, J., dissenting).}
\item \textsuperscript{60} \textit{Id. at 70, 130 S.W.3d at 543 (Corbin, J., dissenting).}
\item \textsuperscript{61} \textit{Griffen, 355 Ark. at 61, 130 S.W.3d at 539 (Glaze, J., dissenting).}
\end{itemize}
In some ways, our highest calling is to make sure that the first amendment is observed and enforced. In doing so, we always remain open to appeals like Dr. King's Letter from Birmingham Jail.\footnote{52. Program for Martin Luther King, Jr. Day (Philander Smith College Jan. 12, 2005). Reprinted remarks by Judge Richard Arnold made on Martin Luther King, Jr. Day (Jan. 19, 2004).}

There is a very real conception on the part of some in our society that judges should be insulated and isolated from their communities and that they should only emerge from their caves bewigged and berobed from time to time to decide cases and to hand down opinions. Otherwise, they should remain hermetically sealed and eschew all public comment. In short, they should do little more in the community than strike a judicial pose.

Quite frankly, that attitude is antiquated at best and somewhat quaint and unrealistic. Moreover, voicing that view subscribes to an ideal that never has really existed. It also would render our judges less than human, which the Judicial Code expressly opposes. The commentary for Canon 4, for example, reads, “Complete separation of a judge from extra-judicial activities is neither possible or wise; a judge should not become isolated from the community in which the judge lives.”\footnote{63. ARK. CODE OF JUDICIAL CONDUCT Canon 4A cmt. (2005).}

I did not agree with the comments Judge Griffen made to the Black Caucus for reasons I will explain later. Yet voicing opinions on social issues, and race in particular, was not the real issue in Judge Griffen’s case before the Arkansas Supreme Court. No one seriously contends that Judge Griffen was improperly flaunting his judicial authority before this group, or threatening the Black Caucus with retaliation from the bench if the caucus did not follow his advice and “send a message” to the University of Arkansas through the appropriation process. The core issue in the Griffen case was whether the applicable Judicial Canon 4C(1), with the judge’s-interest exception, adequately apprised Judge Griffen of when he was running afoul of the Code. In other words, turning to the Code and reading Canon 4C(1), would Judge Griffen have known what statements were permissible as falling under the rubric of “the judge’s interests?”

Justice Scalia, in writing the lead opinion in the plurality decision of White, concluded that the state has no compelling interest to support curbing the speech of judicial candidates who wish to express their views on the burning issues of the day.\footnote{64. White, 536 U.S. at 788.} Of course, the United States Supreme Court has not decided an issue similar to the Griffen issue. Yet, it is not too much of a stretch to conclude that an ill-defined phrase in any state’s judicial code regarding what constitutes appropriate speech or, more specifically, what
constitutes lobbying on behalf of the judge’s pro se interests, is in danger, at least from a majority of the Supreme Court.

The Arkansas Supreme Court has now amended Canon 4C(1) to eliminate the judge’s-interests exception in its entirety so that the prohibition against judicial lobbying on matters other than the administration of justice is unquestionably forbidden. But is this Canon, as amended, safe from First Amendment attack? That remains to be seen. It may not be because now Canon 4C(1) eliminates all lobbying by a judge to protect his or her “interests, whatever that term means.

What is more to the point is the question of whether now, in the wake of White, all our canons of judicial conduct are constitutionally infirm if they restrict speech. If so, are we now forced to rely on self-regulation by our judges not to speak out on issues as our only protection? Also, and even though a majority of my court held it was not a violation of the canons, was it questionable judgment on Judge Griffen’s part to lobby the Black Caucus as he did, since his statements could come back to haunt him later in cases which involve either the University of Arkansas or racial discrimination?

It is my strong belief that a judge can never disassociate himself or herself completely from his or her judgeship. In this regard, what appears to have offended Judge Griffen’s critics the most, though he was not specifically sanctioned for this, is the fact that lobbying members of the General Assembly on combustible issues like racism, a renown basketball coach, and the University of Arkansas, demeaned his judgeship and public respect for his position. But, again, is that a valid reason to limit his First Amendment rights? That is the issue. Today, under Arkansas’ Judicial Code, the answer is “yes,” it is a valid reason for limiting free speech, if the judge’s conduct, including his remarks, undermines respect for the bench. Nonetheless, I am not totally sanguine that our Judicial Code will withstand constitutional scrutiny on this point, if ever challenged in the federal courts.

3. Recusal for Bias

Apart from the Judicial Code, however, public comment by judges on popular issues has additional consequences. There is no question but that commenting on a matter likely to come before a judge in a later case is dangerous practice and would be grounds for forcing a recusal of that judge on the basis that he or she had already prejudged the issue. Indeed, as already mentioned, lobbying members of the General Assembly on an issue like systemic racism at the University of Arkansas or in our society at large could conceivably subject Judge Griffen to motions to recuse on all cases that (1) touch and concern racial discrimination; or (2) touch and concern the University of Arkansas. Is that sufficient reason for judges to keep their powder dry and not comment on highly inflammable matters likely to come before them? I think so.
Let's assume the doomsday scenario which is that the United States Supreme Court will eventually strike down all judicial canons that in any way curtail a judicial candidate or sitting judge from practicing his or her right to free speech. What will be the safeguard against a judge hearing a case where that judge's views on a central issue involved in that case have already been made public? Just to be perfectly clear, I am not talking about views expressed in a previous legal opinion, but rather views expressed in a judicial campaign or in some other public forum.

The obvious answer is the recusal motion and allegations of bias by the offended party. And if that judge does not recuse, after being requested to do so by a party, there is the potential for appeal to a higher court and removal as a sanction. Nothing in my judgment undermines the public's respect for the judiciary as much as the perception that the judge is already prejudiced in favor of one party on the issue at hand. The impartiality and objectivity of the judge is compromised, and faith in a fair resolution of the matter is shattered.

About three weeks ago, a federal district judge in North Dakota made this point in the case of North Dakota Family Alliance v. Bader. In Bader the judge struck down canons in the North Dakota Judicial Code as violating free speech, which forbade a candidate for judicial office from making promises about the way the candidate would act in office, if elected, or statements that would commit that candidate on issues likely to come before the court. The commitment-on-issues clause is similar to what we have in Arkansas. The judge observed that he was convinced that White governed the “commitment” language even though that case expressly dealt with “announcing views” rather than “committing” on issues.

The North Dakota case specifically dealt with whether a judicial candidate was prevented under the canons from answering a questionnaire about social and family issues submitted by the North Dakota Family Alliance. The court held that the candidate was not prohibited from answering the questionnaire, but wrote the following:

Any judicial candidate who responds to a survey similar to the 2004 Voter's Guide Questionnaire may indeed create a serious ethical dilemma for himself or herself that would require recusal at a later date. It is well-established that there is a judicial obligation to avoid prejudg-

66. Id. at 1044–45.
67. Id. at 1028.
68. See id. at 1025–28.
ment and all litigants are entitled to "an impartial and disinterested tri-
bunal in both civil and criminal cases."^{69}

Amen.

Ultimately, it will rest with the appellate courts to decide bias and
recusal matters even if judicial free speech ultimately trumps our canons of
judicial conduct. And that in and of itself will become the protection that the
canons previously insured against judicial candidates or sitting judges
commenting on matters likely to come before them. It also offers some pro-
tection against judicial candidates who pledge to be "tougher" on certain
criimes. Accordingly, it is my view that the threat of removal of a judge
from a case for bias will foster judicial restraint on the part of our judiciary.

4. Judicial Activism

As a final point, I want to return to the issue of judicial activism. I have
discussed the dire effect of curbing judicial independence by retaliating
against a judge for specific rulings. I have discussed restrictions on imparti-
ality by a judge's self-imposed subservience to the popular will to assure
reelection or the desire to accede to the will of the executive who made the
judicial appointment. And I have talked about too much judicial independ-
ence—that is, a judge espousing views or taking actions that could later
subject that judge to allegations of bias and recusal motions.

But there is no more hotly debated issue than that of judicial activism.
A most recent example is found in two Supreme Court decisions involving
the death penalty. The first is *Atkins v. Virginia*,^{70} where the Court ruled that
the execution of the mentally retarded was cruel and unusual punishment
under the Eighth Amendment to the Constitution, as viewed in light of
"evolving standards of decency."^{71} The second is the very recent decision of
*Roper v. Simmons*,^{72} which halted the execution of minors on the same
grounds.^{73} Both cases relied on the 1958 case of *Trop v. Dulles*^{74} where the
Court first used the evolving-standards-of-decency test to determine if pun-
ishments are so disproportionate as to be cruel and unusual punishment.^{75}

The dissenters in both cases, with Justice Scalia leading the charge, ex-
coriated the majority for setting public policy as the "sole arbiter of our na-
tion's moral standards" by looking to opinions of foreign courts and to state

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69. *Id.* at 1045 (citations omitted).
70. 536 U.S. 304 (2002).
71. *Id*.
73. See *id*.
74. 356 U.S. 86 (1958) (plurality opinion).
75. See *id*. 
legislatures. How can the Supreme Court determine whether there is a "national consensus" on a moral issue? Justice Scalia asked. This task, according to Justice Scalia, falls exclusively to the legislative branch of government. Should judges be deciding what classes of people should be excluded from the death penalty? He persisted. Isn’t this simply expanding Constitutional rights by judicial fiat?

In his dissent in the *Roper* case, Justice Scalia wrote:

> What a mockery today's opinion makes of [Alexander] Hamilton’s expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years — not, mind you, that this Court's decision 15 years ago was wrong, but that the Constitution has changed. The Court reaches this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to "the evolving standards of decency," . . . of our national society.

What Justice Scalia espouses, in the mold of Justice Felix Frankfurter, is judicial self-restraint. And, to be sure, Justice Scalia’s position does have the beauty of ironclad simplicity and dogmatic charm. I for one champion Justice Scalia’s ongoing crusade to look to the plain meaning of words when engaged in judicial interpretation. Yet surely this country and our courts are not locked into interpreting what constitutes cruel and unusual punishment in light of 1789 and 1791 moral and ethical standards. Is it activism then to acknowledge that our standards of decency with respect to determining what is cruel and unusual punishment have evolved over the past two centuries? I think not. And this is precisely what Chief Justice Rehnquist acknowledged when he observed Chief Justice Earl Warren’s *Brown* decisions, which were anathema to some as judicial activism at the time, are today almost universally praised. Justice Stevens, in his concurrence to *Roper v. Simmons*, makes the point even more cogently that had the meaning of the Eighth Amendment been frozen in time, "it would impose no impediment to the execution of 7-year-old children today."

Hence, while I question the Court’s citation to foreign laws in *Roper*, and while I agree with Justice Scalia that we should look to the plain meaning of words, I cannot conclude that justices who interpret what is cruel and unusual punishment by looking to policy changes in this country as exemplified by state legislatures have violated the separation of powers and run amok. I am simply disinclined to view the moral ramifications of the Eighth Amendment through Ben Franklin’s spectacles.

76. *Roper*, 125 S. Ct. at 1217 (Scalia, J., dissenting).
77. *Id.* (Scalia, J. dissenting) (emphasis in original).
78. *Id.* at 1205 (Stevens, J., concurring).
As can be readily gleaned from this paper, I abhor litmus tests for judges, whether in the form of a question from a senator at a Senate confirmation hearing or a special interest questionnaire submitted during a political campaign. What flies in the face of judicial independence and impartiality more than placing an aspiring judge into a philosophical or legal strait jacket by forcing a commitment on issues he or she will ultimately hear? The point is our judges must remain persuadable on issues and not simply be forced to adopt certain positions, which by definition means that judge will be biased when that matter comes before him or her for resolution.

Moreover, I am more and more convinced that judicial activism is in the eye of the beholder. You may want judges to be more active or less active in finding a remedy or expanding a constitutional right, depending on what your philosophical or moral preference is.

Lest I end this paper on a negative note, let me say that I ultimately have faith that our American judiciary is strong and will never founder on the shoals of bias or partiality. After all, the American judiciary has withstood impeachment, court packing, and, for the most part, egregious demagoguery for more than two hundred years. Its independence is the envy of the world and it forms the bedrock of our system of government. It is that independence that inspires such great confidence in the American people. That fact as much as any other convinces me that our citizenry will never allow our judiciary to be compromised or weakened in any serious respect. Too much is at stake. As I began this paper, I will end it. I have great regard for the wisdom of the American people. That leads to my conviction that the independence of the American judiciary will continue to prevail.