ACLU of Arkansas

Via Hand Delivery

July 10, 2007

Arkansas Judicial Discipline and Disability
Commission
323 Center Street, Suite 1060
Little Rock, AR 72201

Re: Case Nos. 05-328 and 05-356

Dear Commissioners:

The American Civil Liberties Union of Arkansas is submitting this letter as an *amicus curiae* in the above referenced cases to express to the Commission the ACLU's brief analysis of the important First Amendment issues presented by these cases. It is our view that any discipline by this Commission of Judge Griffen based on the current charges would constitute a violation of the First Amendment.

First, it is clear that Judge Griffen's speech cited in the charges as violative of various Canons constitutes commentary on matters of great public concern and importance. Speech on such political issues cuts to the core values of the First Amendment.

Second, Judge Griffen's speech did not concern matters that one might reasonably expect to come before him as a judge.

Third, Judge Griffen's speech did not demean individuals on the basis of their race, religion, or other similar factors.

Under the holding of *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), Judge Griffen is privileged to express his political and legal views unless the State can demonstrate a compelling interest to restrict his speech that is narrowly tailored to that purpose. The State here alleges violations by Judge Griffen of various Canons, none of which plausibly can be said to embody such a sufficiently narrowly tailored restriction. Whether the alleged violations are stated as a matter of judicial integrity and independence under Canon 1, impropriety or the appearance thereof, by lending the prestige of office, under Canon 2, casting reasonable doubt on the judge's capacity to act impartially under Canon 4, or inappropriate political activity under Canon 5, *White* makes clear that an elected judge cannot be barred from the typical speech in which political office holders engage, whether during a campaign or while holding office, without surviving the strict scrutiny stated above.

The critical point here is that the State cannot demonstrate that restricting this type of speech through the discipline of judges is a sufficiently narrowly tailored means of ensuring impartiality. That is, it simply cannot be said that forbidding an elected judge from speaking on matters of public concern will do anything to ensure that judge's impartiality. Rather, forcing judges to conceal partiality that they otherwise would reveal in their speech merely leads to litigants being unaware of a judge's potential bias and thus unaware when they should seek recusal. Recusal,

which includes concerns about the appearance of bias, was cited in *White* as "the least restrictive means of accomplishing the state's interest in impartiality articulated as a lack of bias for or against parties to the case."

While the State may assert that a system beset with recusal motions undermines the appearance of impartiality, the truth is that few elected judges choose to speak on issues of the day, even as candidates, and therefore it hardly undermines the judicial system to have the electorate as the ultimate arbiter of any particular judge's behavior in so speaking out. Certainly there is no evidence that Judge Griffen's speech has resulted in any recusal motions, much less a pattern or number of recusal motions such that the issue would be expected to be ripe for consideration by the voters. If such a recusal issue did arise, however, the voters, rather than the State, must decide whether the judge is to continue to serve. As *White* makes clear, the State having devised a system of elected judges, it must accord those elected office holders the right to political speech. Recusal, when necessary, and this Commission's oversight of a judge's responsibility when required to recuse, must—and does in a precisely tailored fashion—take care of the State's interest in ensuring impartiality.

Moreover, the State does not have a compelling interest in attempting to stifle the speech of judges merely in order to foster the appearance of impartiality. As the Mississippi Supreme Court recently noted in *Mississippi Comm'n on Judicial Performance v. Wilkerson*, 876 S.2d 1006 (Miss. 2004), where discipline was struck as violative of the First Amendment for a judge in non-campaign speech stating that "gays and lesbians should be put in some type of mental institute," impartiality is not the same thing as the appearance of impartiality. The State's compelling interest is in providing an impartial court, and not in having unsuspecting litigants appear before partial judges who are forbidden to speak.

Finally, the Commission should consider carefully the ramifications of disciplining the content of judicial public speech on any matter that a potential litigant may find controversial. When a judge praises the actions of a government official, such as Governor Beebe's efforts to reduce the sales tax on food, or President Bush's appointment of Chief Justice John Roberts, is the Commission prepared to discipline those judges upon a complaint by a citizen who is opposed to such actions?

For all of the reasons stated above, the ACLU of Arkansas urges that this Commission dismiss the charges against Judge Griffen in these cases.

Thank you for your consideration.

Sincerely,

Holly Dickson

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cc: Frank J. Wills, III
Honorable Wendell L. Griffen