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Stephen Gillers, Vice Dean and Professor of Law

VIA FACSIMILE AND MAIL

February 26, 2003

Honorable Charles E. Schumer
United States Senate
313 Hart Senate Office Building
Washington, DC 20510

Dear Senator Schumer:

This letter replies to an inquiry from your office on a matter of judicial ethics. I have taught legal and judicial ethics at New York University School of Law for 25 years and do nearly all my research and writing in the field. I feel entirely qualified to respond to the inquiry.

I am asked whether it would be appropriate for a nominee for a seat on a lower federal court to respond to the following request in connection with his or her confirmation hearings:

Please identify three Supreme Court cases that have not been reversed and which you have not previously criticized publicly where you are critical either of the Court's holding or reasoning and please discuss the reasons for your criticism.

I conclude that it would be appropriate for a nominee to answer the question posed. Our judicial conduct rules – both those promulgated by the ABA and those issued by the Judicial Conference of the United States – explicitly encourage judges to participate in the effort to improve the law, including “decisional law,” in their extrajudicial activities. Expressing an extrajudicial opinion on a decided legal issue – as opposed to expressing an extrajudicial opinion on a pending or impending case – does not signal any lack of impartiality that will disqualify a judge from participating in a later case that contains that issue.

Discussion

I assume that the nominee is not a sitting judge. Nonetheless, judicial candidates should avoid public statements that a judge would be forbidden to make. The ABA Code of Judicial Conduct purports to govern the behavior of candidates for judicial office (whether appointed or elected) as well as judges. ABA Model Rule 8.2(b), widely adopted, likewise provides: “A

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lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct."

We should also recognize that the judicial conduct code governing federal judges is not the ABA Model Code of Judicial Conduct, but the Code of Conduct for United States Judges, promulgated by the Committee on Codes of Conduct of the Judicial Conference of the United States. The Code of Conduct for U.S. Judges derives from the ABA Model Code but differs in certain regards. Nonetheless, a nominee for a federal judicial post should comply with restrictions on speech that the ABA Code validly imposes on candidates for judicial office.

No one doubts that every lower federal and state court judge will disagree with some number of Supreme Court decisions. No one doubts, too, that despite disagreement, lower court judges are fully able to implement decisions with which they disagree. Our system of justice depends on it. Sometimes, indeed, we know for a fact that lower federal or state court judges disagree with a Supreme Court decision, yet we give those judges the responsibility of implementing the decision. This happens, for example, whenever the Supreme Court reverses a circuit or state court and remands the case for further consideration. The case will almost always return to the very same circuit judges (and always to the same state court) whose decision the Supreme Court reversed. Obviously, those judges (or those in the majority) disagree with the Supreme Court's opinion - they were reversed - but we trust them to comply with the Supreme Court's mandate. We do not require remand to different judges.

We are fortunate to have the views of the Supreme Court itself on the legal appropriateness of answering the question you pose. Just last term, *Republican Party of Minnesota v. White*, 122 S.Ct. 2528 (2002), considered the constitutionality of a Minnesota rule restricting judicial campaign speech. A candidate for election to the Minnesota Supreme Court had challenged the state's restriction on his ability to publicly criticize certain decisions of the very court for which he was a candidate. When the case reached the Supreme Court, the lower federal courts and the Minnesota Supreme Court had construed the state's restriction quite narrowly. As construed, the Minnesota rule only prohibited campaign statements on "disputed issues that are likely to come before the candidate if he is elected judge." Even on those issues, the lower courts said, the candidate could offer "general discussions of case law and judicial philosophy." *Id.* at 2533. Despite the narrow holding, Justice Scalia's opinion for the Court said that the Minnesota rule violated the First Amendment. Because the Minnesota rule, as construed, was substantially less restrictive of speech than current language in the ABA Model Code, the Court's decision renders that language unconstitutional as well. The ABA is now working on new language to satisfy the Court's opinion.

The candidate in *Republican Party* was seeking election to the very court whose opinions he wanted to criticize. He would if elected be in a position to limit or overrule those precedents. This is not so for the lower court nominees before you, who will be bound by Supreme Court opinions whether or not they agree with them. In other words, a federal court nominee's

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criticism of a Supreme Court opinion cannot be interpreted as a veiled promise to change the law. He or she will have no power to do so. As a result, the danger to the nominee's appearance of impartiality is even less than in *Republican Party*.

Justice Scalia discussed the interest in impartiality from multiple perspectives, two of which are relevant here.

Justice Scalia said that impartiality may mean "lack of preconception in favor of or against a particular *legal view*." *Id.* at 2536 (emphasis in original). The Court held that this state interest was not sufficient to overcome First Amendment objections. Justice Scalia recognized that judges have legal views on issues all the time and still may sit in cases raising those issues. Quoting Chief Justice Rehnquist's memorandum opinion declining to recuse himself in *Laird v. Tatum* (1972) despite congressional testimony that Mr. Rehnquist had given as an Assistant Attorney General, Justice Scalia wrote:

A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. As then-Justice Rehnquist observed of our own court: "Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers." Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. *Id.* (Internal citation omitted.)

Justice Rehnquist also wrote in *Laird* that a lack of preconceived views on legal issues "would be evidence of lack of qualification, not lack of bias." *Id.*

Next, Justice Scalia said that the state's interest in impartiality "might be described as [an interest] in open-mindedness. This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case." In response, Justice Scalia pointed out that judges will often have expressed an opinion on a legal issue, yet we nevertheless deem them able to sit in a case raising that issue. Justice Scalia wrote:

Most frequently, of course, that prior expression [of a legal position] will have occurred in ruling on an earlier case. But judges often state their views

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on disputed legal issues outside the context of adjudication – in classes that they conduct, and in books and speeches. *Id.* at 2537.

Here Justice Scalia cited Canon 4(B) of the ABA Code of Judicial Conduct, which provides: "A judge may write, lecture, teach, speak and participate in other extra-judicial activities concerning the law." (The Code of Conduct for U.S. Judges has a parallel provision in Canon 4(A).) The definition of "law" about which judges may speak and write explicitly includes "decisional law." ABA Code, Terminology. Although the authority to engage in "extra-judicial activities concerning the law [is] subject to the requirements of this Code," that clause "is used notably in connection with the judge's governmental, civic or charitable activities." Canon 4(B), Commentary.

It does not matter to this analysis that the candidate in *Republican Party* was running for elective office while nominees before you seek confirmation in the United States Senate. *Republican Party* tells us that impartiality is not compromised when a judge or candidate criticizes decisional law. Its holding does not depend on whether the candidate is seeking election or confirmation. Consequently, it would be appropriate for the nominee to reply. If anything, *Republican Party* presented a more compelling case for restricting speech because the candidate there, if elected, would be in a position to change the law with which he disagreed.

Of course, a candidate for judicial office should not signal how he or she would decide particular cases. But speaking generally, even critically, about decisional law is quite different from addressing how the nominee would decide particular cases. *Republican Party, id.* at 2535-36 (distinguishing between speech that reveals partiality toward "parties" and speech that reveals a position on "issues"). Obviously, this requires some line-drawing and sensitivity on the part of both the Judiciary Committee and the nominee. But the distinction is clear. See generally, Stephen Gillers, "If Elected, I Promise [____]" – *What Should Judicial Candidates Be Allowed to Say?*, 35 *Ind. L. Rev.* 726 (2002). Furthermore, the risk of nominees signaling how they would decide particular cases is illusory in this situation because they will be bound to apply Supreme Court decisions with which they disagree.

I hope I have responded adequately to the question posed by your office. Please feel free to call me if I can be of further assistance.

Sincerely yours,



Stephen Gillers