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Dear Chip and Doug:

Justice Jefferson from the Supreme Court of Texas called me last week and asked that I serve on the ad hoc committee for the Supreme Court that would advise that court on the impact of Republican Party of Minnesota v. White, 563 U.S.___ (June 27, 2002). Justice Jefferson indicated the committee would advise the court on July 24, 2002. I will be out of the country on holiday from July 16 – July 26, 2002. Justice Jefferson indicated that Chip would be the chairman of the committee and that Doug would be a member of the committee. Since I will be at a remote place on Hudson's Bay on July 24th, I am taking the liberty to send you this letter to express my views on the issue.

Given the United States Supreme Court's stringent application of the "compelling State interest" analysis, I believe that Canon 3B (10), Canon 5 (1), (2)(ii), and (3) must be carefully examined. Canon 3B (10) and Canon 5 (1) involved comments by a judge or a judicial candidate on particular cases. In my view, these two canons are designed to deal with the type of "impartiality" discussed by the majority of the Supreme Court of the United States and Part II C of its opinion in Republican Party of Minnesota v. White. As I see it, the impartiality in the sense that a judge should be willing to as least hear the litigants argument and the litigants before deciding the case. Justice Scalia said that "It may well be that impartiality in this sense and the appearance of it are desirable in the judiciary but we need not pursue that inquiry, since we do not believe that the Minnesota Supreme Court adopted the announcement clause for that purpose." (Slip opinion at 12.) Thus the Court did not decide the issue.

If the court believes that Texas litigants and thus the State itself, has a vital, compelling State interest that each litigant be assured that no judge will decide or say how the case will be decided, before that judge hears the facts and legal arguments and before the process provided for by our judicial system is completed, then I believe that Canon 3B (10) and 5 (1) can be modified so that they will comply with a "compelling State interest" requirement of the First Amendment of Constitution of the United States. I would advise the court to rewrite Canon 5 (1) to make it clear that it is limited to cases actually pending at the time the statement is made in the court that is the subject of the campaign for office or that are "impending" in a sense that they are pending in lower courts and are likely to be appealed to the court that is subject to the election. I would also advise the court to make clear that Canon 5 (1) and Canon 3B (10) are

necessary to guarantee litigants due process under the Texas Constitution, Article 1, Section 19 and the Fourteenth Amendment to the Constitution of the United States. To the extent that there are additional findings or observations that can support these arguments, they should be documented like a legislation history in the event of a later challenge.

I see no way to justify under the compelling State interest standard, the first sentence in Canon 5 (3) (concerning endorsement of other candidates) and I would recommend it being removed. I also am unable to find a compelling State interest that would support Canon 5 (2) (ii). Obviously, it is inappropriate for candidates for any public office to misconstrue their qualifications or positions or of those of their opponent, but it is a fact of political life and as long as a selection of judges in Texas is committed to the voters, I do not see how the State can attempt to enforce some sort of monitoring of the honesty of campaign rhetoric.

The views I have set out above assume the court believes that there is a compelling State interest in Texas judges not deciding or saying they have decided particular cases, involving particular litigants until they hear the unique evidence and unique arguments relating to that particular case and those particular litigants. Personally, I do not see how the requirements of either the Fourteenth Amendment of Constitution of the United States or Article I, Section 19 of our Constitution can be complied with when the people who either hear the case or are campaigning for the office announce prior to hearing the case what they have decided.

Of course, the simplest way to comply with the principals announced in the Republican Party of Minnesota v. White, is to remove from the Canons of Judicial Conduct any comment that would limit a judge's or candidate's judicial office's right to make statements about anything.

I hope that you find this somewhat helpful. I regret again, that I will not be able to come to the July 24th proceeding, but my partner, David Donaldson, is available to attend. I am sure you and your capable committee will give the court excellent advice.

Best personal regards.

Yours sincerely,

GEORGE & DONALDSON, L.L.P.

By _____
R. James George, Jr.

RJGjr:mp

cc: David Donaldson
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