

JUDGES' AND RESTRICTED EMPLOYEES' PARTICIPATION IN PARTY CAUCUSES AND PRIMARIES:

Recommended Changes to the Code of Judicial Conduct and the Judicial Department Personnel Rules

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I. Introduction

This memo discusses two recommendations: (1) that the Supreme Court amend comment [6] to Rule 4.1 of the Colorado Code of Judicial Conduct (the Colorado Code); and (2) that the Judicial Branch (the Branch) amend Rule 23.C.a of the Colorado Judicial System Personnel Rules (the Colorado Personnel Rules). The amendments would prohibit judges and restricted employees of the Branch from participating in party caucuses. But, as noted below, we believe that judges and restricted employees should be permitted to participate in primary elections.

Comment [6] to Rule 4.1 of the Colorado Code states that

Judges and judicial candidates retain the right to participate in the political process as voters in both primary and general elections. For purposes of [Canon 4 of the Colorado Code], *participation in a caucus-type election procedure does not constitute public support for*

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or endorsement of a political organization or candidate,
and is not prohibited by paragraphs (A)(2) or (A)(3) [of
Rule 4.1].

(Emphasis added.) Rule 4.1(A)(2) of the Colorado Code prohibits judges from making “speeches on behalf of a political organization,” while Rule 4.1(A)(3) bars them from “publicly endors[ing] or oppos[ing] a candidate for any public office.” This same language appears in Rule 4.1(A)(2) of the Model ABA Code of Judicial Conduct (the Model Code). The language of comment [6] mirrors that of comment [6] to Rule 4.1 of the Model Code.

Similarly, Rule 23.C.a of the Colorado Personnel Rules says that restricted Judicial Branch employees “are prohibited from taking an active role in partisan politics by . . . [p]ublicly endorsing a partisan political candidate or organization by authorizing use of the employee’s name, making speeches, or participating in a partisan political convention or fund-raising activity, *except that participation in a partisan political caucus is acceptable.*” (Emphasis added.)

II. Party Caucuses in Colorado

In Colorado, party caucuses are “meetings of registered electors within a precinct who are members of a particular major political party.” Colorado Sec’y of State, Caucuses, Assemblies and Conventions FAQs,

<https://www.sos.state.co.us/pubs/elections/Candidates/FAQs/caucuses.html> (last

visited December 7, 2021) (FAQs). The major parties in the state organize and operate the caucuses, “meaning Colorado’s Democratic and Republican party leaders take on the bulk of the organization and administrative efforts” involved with the caucuses. Jay Bouchard, *Yes, Colorado Still Has Caucuses. Here’s How It All Works*, 5280 (Mar. 6, 2020), <https://www.5280.com/2020/03/yes-colorado-still-has-caucuses-heres-how-it-all-works/> (“5280 Article”). Caucuses are conducted in even-numbered years.

To participate in a party caucus, an individual need only register to vote, affiliate with a party, and appear at the caucus location. Unaffiliated voters may not participate in a party caucus. Party caucuses play a critical role in the selection of candidates for a party’s primary ballot. “The purpose of the precinct caucuses is not to elect candidates directly or even to decide the ballot. Instead, it’s one of the first steps in those processes and where the parties formulate platforms moving forward.” *Id.* “In Colorado, major-party candidates can qualify for the primary ballot through the traditional party caucus and assembly process” *Kuhn v. Williams*, 2018 CO 30M, ¶ 8, 418 P.3d 478, 481 (citation omitted).

“The caucus business consists of three main tasks: select two precinct leaders to two-year terms; elect delegates and alternates to county assemblies and possibly the state convention; and vote on issue resolutions to the party platform.”

John Frank, *Colorado Caucuses: 10 Things You Need to Know*, Denver Post (Feb. 27, 2016; updated Apr. 24, 2017)

<https://www.denverpost.com/2016/02/27/colorado-caucus-10-things-you-need-to-know/> (“Denver Post Article”). The delegates at the various assemblies choose the local, state, and federal candidates who will appear on the party’s primary ballot. FAQs; *see* § 1-4-102, C.R.S. 2021. In presidential election years, they also elect delegates to the party’s national convention. FAQs. The parties’ local and statewide candidates are then elected at the state primary. (The presidential primary is conducted on a different date from the state primary. *Id.*)

This description fails to capture fully the public and partisan nature of a party caucus. At caucuses, voters who reside in the precinct publicly reveal their party affiliation by their mere attendance, speak in favor of or against candidates, and may debate issues proposed for the party’s platform. After the results of candidate straw polls are tabulated, caucus participants break out into separate groups pledged to their candidate for the purpose of electing delegates to the appropriate assembly. For example, supporters of candidates for statewide office elect delegates to the county assembly, while supporters of candidates for the U.S. House of Representatives elect delegates to the Congressional District assembly. The delegates at the county assemblies, in turn, elect delegates to the state

convention, at which candidates for statewide office are placed on the primary ballot. The parties also conduct separate State House and State Senate district assemblies. *See* FAQ's; Denver Post Article. (Candidates can bypass the caucuses by qualifying for the primary ballot through a petition process. *See* § 1-4-102; *see also* Colorado Sec'y of State, Major Party Candidate Petition, <https://www.coloradosos.gov/pubs/elections/Candidates/MajorPartyPetition.html> (last visited December 7, 2021).)

III. Selecting Presidential Candidates in Colorado: Party Caucuses and Primaries

Following the passage of Referendum 2 in 1990, Colorado conducted presidential primaries between 1992 and 2000. Amanda King, Legis. Council Staff, No. 18-07, Overview of Primary Election Laws 1 (June 2018) (“King Report”). “In 2003, Senate Bill 03-188 eliminated presidential primary elections.” *Id.* From 2004 to 2016, voters could only participate in their party’s selection of a presidential candidate by attending a party caucus. King Report at 1. In 2016, Colorado voters approved Proposition 107, which restored Colorado’s presidential primary. *Id.*; *see* §§ 1-4-1201 to -1207, C.R.S. 2021 (specifying the procedures for the presidential primary). Colorado held a presidential primary in 2020. *Id.*; FAQs.

For this reason, Colorado voters who wished to have a voice in the selection of their party's presidential nominee in the 2004, 2008, 2012, and 2016 elections could only express their preference by participating in their local party caucus. Denver Post Article. Starting in 2020, however, voters who wished to participate in their party's presidential nomination process could support their preferred candidate at their precinct caucus *and* by voting for the candidate in the presidential primary. At all times relevant to this memo, political parties in Colorado selected their local and state candidates through primaries.

Unlike caucuses, primaries involve a secret ballot. Today, voters can express their preferences for their party's nominees for all political officers by casting a secret ballot in the presidential or state primary. *See* § 1-4-101(4), C.R.S. 2021.

Unlike states that limit participation in primaries to members of a political party, Colorado voters need not affiliate with a party to vote in a primary election. *See* § 1-4-101(2)(b) ("The county clerk and recorder shall send to all active electors in the county who have not declared an affiliation or provided a ballot preference with a political party a mailing that contains the ballots of all of the major political parties."). Unaffiliated voters may cast a ballot in only one party primary, however, and must discard all other primary ballots they receive. *Id.*

This rule applies to the presidential and state primaries alike. *See*

§ 1-4-1203(2)(b), C.R.S. 2021. Thus, Colorado voters can participate in a primary even if they have not affiliated with a political party.

Colorado primaries, like other elections in the state, are conducted by mail. Although public records reveal which party's primary ballot a particular individual submitted, Esteban L. Hernandez, Heads Up, Unaffiliated Colorado Voters: The Party Whose Primary You Vote in Will Be Public Information, *Denverite* (June 13, 2018), <https://denverite.com/2018/06/13/colorado-primary-election-unaffiliated-public-information/>, the use of mail ballots increases voters' privacy. With voting by mail, no one can overhear an individual's request for a particular party's primary ballot at a public polling place. An individual's vote for specific candidates in the primary is not public. *Id.* So, for example, while it is possible to discover that a particular Colorado unaffiliated voter submitted a ballot in the 2020 Republican presidential primary, it is not possible to determine which candidate that voter selected.

IV. The History of Comment [6] to Rule 4.1 of the Colorado Code and Rule 23.C.a of the Personnel Rules

In 2008, when the party caucus was the only means by which Colorado voters could participate in their party's selection of a presidential nominee, a judge

requested an advisory opinion on whether he could participate in his caucus. At the time, Canon 7 of the Colorado Code of Judicial Conduct barred judges from, among other acts, “mak[ing] speeches for a political organization or candidate or publicly endorse a candidate for public office.” Canon 7(C)(1) stated that “[a] judge may attend and participate in nonpartisan gatherings at which legal or social issues are addressed, provided that the judge shall neither discuss cases in which he or she has participated that are not yet final, nor state how the judge would rule on any case or issue that might come before him or her.” The 2008 version of the Colorado Code did not expressly permit or preclude judges from participating in caucuses.

In C.J.E.A.B. Advisory Opinion 2008-2, effective April 4, 2008 (Colorado Opinion 2008-02), the Colorado Judicial Ethics Advisory Board (the “C.J.E.A.B.”) addressed a judge’s inquiry regarding participation in caucuses and primaries:

The requesting judge wished to attend February’s political party caucuses at which record numbers of Coloradoans turned out to help determine the presidential nominees for both of the major political parties. Ultimately, he did not attend the caucuses, but would like to do so in the future. In addition, he wishes to vote in the upcoming primary elections. He asks whether, under Colorado’s Code of Judicial Conduct, a judge may attend a political party caucus or vote in a primary election. If not, he questions whether such a prohibition violates his First Amendment rights.

The C.J.E.A.B. concluded that “[a] judge may not attend or participate in a precinct caucus; however, a judge may vote in a primary election.”

In reaching its decision, the C.J.E.A.B. reasoned that

[a] judge’s attendance at a precinct caucus would necessarily involve a judge in partisan political activity, in violation of Canon 7A(1)(c), and participation in the caucus would offend Canon 7A(1)(b)’s prohibition against publicly endorsing candidates for office. A “precinct caucus” as defined by the Uniform Election Code of 1992, C.R.S. § 1-1-101 et seq., is a meeting organized by a political party, under the rules and regulations of the party, and at which only those electors affiliated with the political party that organized the meeting may vote.

The C.J.E.A.B. noted that

[s]ince, by definition, a caucus is a partisan political gathering, and a judge’s attendance indicates that he or she may be, or quite likely is, an elector, the judge’s attendance at the caucus would violate Canon 7A(1)(c). Furthermore, since the usual manner of conducting business at a precinct caucus is by open forum discussion, the judge’s participation implies public endorsement of a candidate for office in violation of Canon 7A(1)(b).

In contrast, the C.J.E.A.B. recognized that a primary election is “not an open political gathering but rather is a secret ballot election organized and run by election officials employed by the state and subject to the requirements of the election code.” The C.J.E.A.B. also observed that “the election process is designed

to guarantee the anonymity of a voter's choice of party and preferred candidates.” (But, as noted above, public records reflect which party's primary ballot a particular voted submitted.) While the Advisory Opinion concluded that a “judge may not attend or participate in a precinct caucus,” it did not consider whether the prohibitions on political participation set forth in Canon 7A violate a judge's First Amendment rights.

In 2009, during the open comment period for changes to the Personnel Rules, an unidentified person inquired about participation in caucuses: “Under Rule 23.A.4 Restricted employees may not take an active role in political events. I assume with non-political events one would be able to particip[ate]? I assume that it is alright? How about voting, that is political? Participating in caucuses in a non active role?”

The Branch responded, in relevant part:

[Y]ou are correct that those employees identified as restricted for purposes of this rule would be able to participate in non-partisan activities. Any employee regardless of their restriction status is able to vote *and participate in caucuses*; as long as they follow the other provisions of the rule such as refraining from displaying campaign paraphernalia on work premises and time.

(Emphasis added.)

Justice Márquez noted in an email that, in 2008, when she was working in the Attorney General’s Office, “a law clerk filed a [section] 1-1-113 action seeking to participate in the caucuses that year. As I recall, she lost her suit, but that likely prompted changes” to Rule 23 of the Personnel Rules and “may have led” to the adoption of the current version of comment [6] to Rule 4.1.

The Supreme Court adopted the Model Code, including comment [6] to Rule 4.1, effective July 1, 2010, following a public hearing and a public comment period. *See* Rule Change 2010(09). At a hearing conducted on October 22, 2009, Eileen Kiernan-Johnson, at the time Counsel to the Chief Justice, discussed the Model Code and briefly addressed comment [6]. She noted that the comment reflected a departure from Colorado practice. Ms. Kiernan-Johnson explained that the comment allowed judges to participate in party caucuses because there is “no other way to vote or express a preference for a candidate,” even though publicly supporting a candidate at a caucus could be viewed as taking an active role in partisan politics.

Because Colorado law did not provide for presidential primaries in 2009, Ms. Kiernan-Johnson’s statement was accurate at the time, when the party caucus was the sole avenue through which a voter could express a preference for a presidential candidate. However, her statement was not accurate regarding

expressions of support for candidates seeking an office other than president. As noted above, voters could “vote or express a preference” for those candidates by casting a secret ballot in a primary. The historical record does not reflect the supreme court’s reasoning in adopting the Comment.

Similarly, the Branch amended Rule 23.C.a of the Colorado Personnel Rules in 2010 to allow restricted employees to participate in party caucuses. Terri Morrison could not locate advice regarding that amendment from the Attorney General’s Office, the Office of Legal Counsel, or the State Court Administrator’s human resources attorney.

Thus, since 2010, judges and restricted employees in Colorado have been permitted to participate in party caucuses, as well as primaries.

V. Other Jurisdictions’ Opinions on Judicial Participation in Party Caucuses and Party Primaries

Ethics opinions in several other jurisdictions have considered whether judges and judicial department employees may participate in party caucuses and primaries. Generally, the authorities support our belief that a judicial officer and certain court staff should not participate in party caucuses (at least where the party caucus is not the sole avenue for selection of candidates) but may participate in primary elections. We discuss those ethics opinions below.

A. Opinions Concerning Participation in Party Caucuses

1. The Federal Judiciary

Canon 5(A) of the Code of Conduct for United States Judges states that federal judges should not

- (1) act as a leader or hold any office in a political organization;
- (2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or
- (3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.

“Political organization” includes a political party. Commentary to Canon 5.

Similarly, Canon 5(A) of the Guide to Judicial Policy, which applies to federal judicial branch employees, advises that they “should refrain from partisan political activity; should not act as a leader or hold any office in a partisan political organization; [and] should not make speeches for or publicly endorse or oppose a partisan political organization or candidate” The Code of Conduct for United States Judges does not refer to participation in caucuses.

The federal Committee on Codes of Conduct issued an advisory opinion on judicial employees’ permitted political activities in 2017. Comm. on Codes of

Conduct Advisory Op. 92: Political Activities Guides for Judicial Employees (2017). Opinion 92 takes a nuanced approach to employee participation in caucuses, and considers whether a caucus is the only means by which the employee may express a preference for his or her party’s nominee: Employees “may participate *in caucuses in those states where caucuses substitute for primary elections, but only to the extent necessary to cast a vote.*” *Id.* (Emphasis added.) Employees “may not participate beyond that extent, for example by attempting to influence other voters, and they may not identify themselves as associated with the court” *Id.* Thus, judicial branch employees and, by extension, federal judges, are barred from participating in caucuses — unless the caucus is the only means by which the judge or employee can participate in his or her party’s selection of a nominee.

2. Kansas

The Kansas Judicial Ethics Advisory Panel summarily addressed judges’ participation in caucuses in 1988. Kan. Jud. Ethics Adv. Comm. Op. JE 24 (1988). Kansas Judicial Ethics Opinion JE-24 states that a judge may not attend a “political party caucus” conducted to “elect[] delegates as a part of the political process now in progress for the office of President of the United States of America” that is limited to voters registered as members of a political party. The opinion further

provided that judges could neither speak on behalf of a candidate for delegate nor vote for a delegate even if they were permitted to attend caucuses.

The opinion's reasoning is limited to a citation to then-Canon 7(A)(3)(b), which stated that a judge holding office "under the nonpartisan selection and retention system 'should not take part in any political campaign,'" and the conclusion that "the above-described caucus and the purpose of the caucus" are "part of a 'political campaign.'"

3. Nebraska

In Nebraska Judicial Ethics Opinion 08-1, the state's Judicial Ethics Committee also concluded that judges are prohibited from participating in presidential caucuses. Neb. Jud'l Ethics Comm. Op. 08-1 (2008). The Opinion noted that

The circumstances and procedures of a political party caucus give rise to the conclusion that such a caucus is a "political gathering" for purposes of Canon 5A(1)(d), and mere attendance at it would violate the Code. It is a public meeting used to elect delegates who will vote for the selection of the party's presidential nominee.

It explained that

a caucus is a public meeting where participants publicly endorse or publicly oppose another candidate for public office by either actions or words or both. At a caucus, a participant may publicly endorse a candidate without saying a single word by simply standing or congregating

with other participants favoring a certain candidate and thereby opposing another candidate. Thus, participating in the proceedings of a caucus would constitute a public endorsement of a candidate in violation of Canon 5A(1)(b).

For these reasons, the opinion concluded that

since a political party caucus to elect delegates to vote for a presidential nominee is a political gathering, the requirements of Canon 5A(1)(d) prohibit a judge from attending. The Committee further concludes that participating in the caucus would constitute a public endorsement in violation of Canon 5A(1)(b). We recognize that the comment to Canon 5A states, “A judge or candidate for judicial office retains the right to participate in the political process as a voter.” However, the Committee believes that this comment addresses voting in an election where ballot secrecy is preserved and is not applicable to a public caucus process.

4. Utah

Utah Formal Opinion 02-1 addressed two questions: “[m]ay a judge participate in neighborhood party caucuses as long as the judge does not seek election or appointment to any office which the caucus may elect” and “[m]ay a judge vote in a primary election when the election is limited to registered members of a particular party?” Utah Jud. Ethics Advisory Comm. Op. 02-1 (2002). The opinion answered the first question in the negative and the second question in the affirmative. (We discuss the section of Utah Formal Opinion 02-1 concerning primaries *supra* Part V.B.2.)

Utah Formal Opinion 02-1 described Utah’s caucuses as follows:

At the caucuses, people gather to discuss issues and to vote for delegates who will vote at the political party conventions. Each caucus meeting is sponsored by a partisan political party, typically either the Democrats or the Republicans. At a Republican party caucus, for example, the individuals will discuss issues and positions that the Republican party deems important and will elect delegates to attend the Republican party convention.

In an earlier informal ethics opinion, the Utah Ethics Advisory Committee stated that, under the Utah Code of Judicial Conduct, a judge “should neither attend nor host a party caucus.” Utah Jud. Ethics Advisory Comm. Informal Op. 88-7 (1988).

Utah Formal Opinion 02-1 concluded that, because “judges may not attend any events that are political in purpose, even if those events are bi-partisan or non-partisan,” a judge “clearly may not attend a political party caucus. These events are political in purpose”

B. Opinions Concerning Participation in Primaries

1. The Federal Judiciary

The Code of Conduct for United States Judges and Canon 5(A) of the Guide to Judicial Policy do not expressly address judges’ participation in primaries. But the Committee on Codes of Conduct of the Judicial Conference of the United States Advisory Opinion 92 states that, consistent with Canon 5(A), employees of

the federal judicial branch may “register and vote in any primary or general election, including register as a member of a political party.” Under the same logic, federal judges may also vote in primaries.

2. Utah

Utah Formal Opinion 02-1 conducted a thoughtful analysis before arriving at the conclusion that judges may vote in primary elections. The opinion acknowledged that primaries may be viewed as political gatherings because “they are a part of the parties’ nominating process and their purpose is to bring together individuals with similar political philosophies.”

Even though judges are “entitled to entertain [their] personal views of political questions [and are] not required to surrender [their] rights or opinions as . . . citizen[s],” a judge “who becomes the active promoter of the interest of one political party” may come under “suspicion of being warped by political bias.” Thus, “one who accepts judicial office must sacrifice some of the freedom in political matters that otherwise [one] might enjoy.”

But the Formal Opinion determined that primaries are not “political gatherings.”

However, the Judicial Council believes that an election should not be considered a political gathering for purposes of the Code of Judicial Conduct. Because

judges are prohibited from attending partisan, non-partisan and bi-partisan political gatherings, to declare an election to be a political gathering may have unintended consequences for other, permitted activities by a judge.

The Utah opinion then reviewed the analyses in the Washington and Virginia opinions discussed below. As explained further *infra* Parts V.B.3 and V.B.4, Washington Ethics Advisory Committee Opinion 92-4 (which has since been withdrawn) concluded that judges may participate in a presidential preference primary, while the Virginia Judicial Inquiry and Review Commission Opinion 99-6, which the Virginia Supreme Court later effectively overruled, took the opposite approach. The Utah opinion noted that judges in Washington, who must seek election in partisan elections, are permitted to be more political than judges in Virginia, who, like judges in Utah and Colorado, are subject only to retention elections.

The Utah opinion said that, in certain parts of the state,

one of the political parties is so dominant that other parties do not offer a candidate in opposition, or the opposition candidate does not have a reasonable chance of being selected during the general election. The point is made that, if a judge is denied an opportunity to participate in the primary election, the judge has been effectively disenfranchised.

The Utah opinion concluded that judges may vote in primaries:

[T]he Judicial Council believes that the disenfranchisement specter must weigh heavily into the considerations. The Judicial Council believes that the political proclivities of a judge are not so closely watched by the public that reasonable conclusions could be drawn from a judge's participation in the primary election process. Participation in the process would be witnessed by relatively few and would have no impact on the perceived impartiality of the judiciary.

It further explained that,

[a]lthough the Ethics Advisory Committee has previously determined that a judge may not maintain membership in an organization that endorses candidates for partisan political office, the Judicial Council believes that this conclusion should not be extended to the point that a judge would be prohibited from participating in an election. The Code is concerned with public endorsements and affiliations by judges. The Code does not specifically prohibit party affiliation in this circumstance. Registering with a political party is largely a private act, known only to the judge and the individual or individuals accepting the judge's application. Although the information then becomes public, such information is rarely sought out or disclosed.

The opinion stressed that elections are “relatively private” and that a judge “appearing at a polling place will be seen by few people and the perception of the appearance is most likely to be recognition of the fact that the judge is participating in an election process, and not a perception that the judge is tied to any political ideology.” This is so because “[t]he public recognizes the rights of judges as

citizens and understands that a judge’s participation in that process does not have significant meaning related to the integrity and partiality of the judiciary.”

3. Virginia

We consider Virginia Judicial Inquiry and Review Commission Opinion 99-6 below, even though it has been superseded, because its analysis remains instructive. (The Virginia Supreme Court effectively overruled Opinion 99-2 by amending the commentary to Canons 2A and 5A of the Canons of Judicial Conduct for the Commonwealth of Virginia on November 2, 2004, to allow judges to vote in “open” primaries — one that is open to all voters.) Although the opinion concerned whether “it is proper for a judge to vote in a primary election,” it noted the different avenues for selecting party nominees in Virginia: caucuses; conventions; “firehouse primaries,” which are restricted to party members and may require a loyalty oath to the party; and primary elections conducted by the State Board of Elections. Virginia Opinion 99-6 concluded that judges could not participate in primaries because “reasonable” people “could easily perceive that a judge who votes in a party primary is unable to act with impartiality.” It noted that judicial participation in primaries risks “compromising the non-partisan, apolitical nature of the judiciary and eroding the public respect accorded the judiciary.”

Virginia Opinion 99-6 said that the “average citizen” views elections as “partisan vehicles” and explained that

[v]oters in a primary may include not only the party faithful seeking to nominate the strongest candidate but also members of the opposition party seeking to nominate a weak opponent. Either type of voter in a primary is perceived to be partisan. Therefore, judges who vote in a party primary risk compromising the non-partisan, apolitical nature of the judiciary and eroding the public respect accorded the judiciary.

After listing what judges shall and shall not do, Canon 5 concludes with the statement that

a judge shall not engage in any other political activity except in behalf of measures to improve the law, the legal system, or the administration of justice.

“Any other political activity” would encompass voting in a party primary because the party primary is not directed toward “improv[ing] the law, the legal system, or the administration of justice.”

The Commentary to Canon 2(a) of the Virginia Canons of Judicial Conduct now provides that

A judge may vote in a primary election conducted by the State Board of Elections that is open to all registered voters qualified to vote pursuant to Code § 24.2-530. Voting in such a primary election does not constitute an act of partiality by a judge as prohibited by subdivision A. The act of a judge voting in a primary election is the discharge of an honorable civic duty, an obligation of

responsible citizenship, and does not give the “appearance of impropriety.”

The statutory requirements for voting in a primary election reflect voting in a primary election by a judge as an act of “impartiality” as used in subdivision A(1)(c) because there is no registration by political affiliation, no loyalty or political party oath required to vote, and no pledge of support for any person or political group. It is the impartial nature of such a primary election that enables judges to avoid an “appearance of impropriety.”

The Commentary to Virginia Canon 5(A) similarly states, in part:

The statutory requirements for voting in a primary election distinguish voting in a primary election by a judge from a “political gathering” as used in subdivision A(1)(c) because there is no registration by political affiliation, no loyalty or political party oath required to vote, and no pledge of support for any person or political group. For the same reasons, voting in a primary election by a judge is not engaging “in any other political activity” as used in subdivision A(3).

The outlier view of judicial participation in primaries reflected in Virginia Opinion 99-6 has been criticized. One commentator noted that it is an example of the problems created when advisory committees are granted the authority to “interpret the jurisdiction’s judicial code without regard to state or federal constitutions, statutes, rules, or other regulations.” Raymond J. McKoski, *Judges in Street Clothes: Acting Ethically Off-the-Bench* 20-21 (2017). A federal court, however, acknowledged the opinion’s reasoning. *See Kemler v. Poston*, 108 F.

Supp. 2d 529, 543 (E.D. Va. 2000). In that case, two Virginia state judges raised a First Amendment challenge to Virginia Opinion 99-6. The court held that the lawsuit was non-justiciable, in part because the judges' claims did not pass "the fitness [and] hardship prongs of the ripeness analysis." *Id.* The court also observed that

[n]othing in Opinion No. 99-6 actually prohibits a judge from voting in a primary election. Rather, the effect of Opinion 99-6 is to define as unethical conduct the exercise of the right. And, unethical conduct by a judge exposes the judge to several serious consequences Plaintiffs are exposed to these sanctions if, as Opinion No. 99-6 articulates, voting in a primary is unethical conduct and if Plaintiffs vote in a primary.

Id.

4. Washington

In 1992, the Washington Ethics Advisory Committee issued an opinion concluding that judges could participate in a presidential preference primary, particularly because primary elections in that state did not require party identification as a condition of participation. Washington Ethics Advisory Op. 92-04 (1992). The opinion was, however, withdrawn on March 3, 2011, without explanation.

In 2019, the Washington legislature amended its election laws to "require a voter's declaration of a political party as a condition of voting in the presidential

primary for that party's candidate.” Wash. Ethics Advisory Comm. Op. 20-04 (2000). Such votes are “tabulated and reported separately from other votes cast at the primary and may be used by a major political party in its allocation of delegates from this state to the national nominating convention under the rules of that party.” *Id.*

Following this change to the election laws, the Washington Ethics Advisory Committee issued an opinion addressing whether judges could participate in a presidential primary that required participants to declare a party preference publicly. *See id.* Opinion 20-04 noted that Canon 4.1(A)(5) of the Washington Code of Judicial Conduct CJC 4.1(A)(5) prohibits judges from “publicly identifying himself or herself as a member or candidate of a political organization except (a) as required to vote, or (b) for participation in a precinct caucus limited to selection of delegates to a nominating convention for the office of the President of the United States.” Further, comment [6] to Canon 4.1(A)(5)(a) states that “judges retain the right to participate in the political process as voters in both primary and general elections.”

Opinion 20-04 reasoned that

[a]lthough marking a box on the ballot has the appearance of endorsing a political party in violation of [Canon] 4.1(A)(5), the Committee interprets the action of

marking a party declaration for purposes of having the judge's ballot count in Washington's presidential primary as acting in compliance with the statute and the [Canons].

It concluded that Canon 4.1(A)(5)(a) allows judges to “make a party declaration for the presidential primary.”² Although the reasoning of Opinion 20-04 was cursory, it appears to have rested on the express language of Canon 4.1(A)(5) allowing the judge to identify himself or herself as a member of a political organization “as required to vote.”

5. Application in Colorado

Although Rule 4.1 of the Colorado Code does not contain the same “publicly identifying” language that appears in the Washington version of the Code, comment [3] to Colorado Rule 4.1 states that “judges . . . may register to vote as members of a political party.” And while Colorado Rule 4.1 contains specific prohibitions against actions involving “political organizations,” it does not address actions involving a “political organization” that may be required as a condition for voting. Specifically, judges in Colorado are prohibited from

² In New York, where trial judges and certain other judges run for office in partisan elections, judges are permitted to attend party caucuses and may vote for their candidates of choice even if the voting is not accomplished by secret ballot. N.Y. Advisory Committee on Judicial Ethics Op. 09-180 (Sept. 10, 2009).

- “act[ing] as a leader in, or hold[ing] an office in, a political organization,” Colorado Rule 4.1(A)(1);
- “mak[ing] speeches on behalf of a political organization,” Colorado Rule 4.1(A)(2);
- “solicit[ing] funds for, pay an assessment to, or make a contribution to a political organization . . . ,” Colorado Rule 4.1(A)(4);
- “attend[ing] or purchas[ing]e tickets for dinners or other events sponsored by a political organization . . . ,” Colorado Rule 4.1(A)(5);
- “publicly identify[ing] himself or herself as a candidate of a political organization,” Colorado Rule 4.1(A)(6); and
- “seek[ing], accept[ing], or us[ing] endorsements from a political organization,” Colorado Rule 4.1(A)(7).

For these reasons, although the Colorado and Washington versions of Rule 4.1 differ, we conclude that under the reasoning of Opinion 20-04, Colorado judges are not precluded from voting in primaries.

VI. Our Recommendations

We recommend that the Supreme Court amend comment [6] to Rule 4.1 of the Colorado Code and that the Branch amend Rule 23.C.a of the Colorado Personnel Rules to prohibit Colorado judges and restricted employees from

participating in party caucuses. We need not weigh in whether judges and restricted employees should have been permitted to participate in caucuses during the four presidential election years in which Colorado did not conduct a presidential primary. This is because Colorado voters today have the opportunity to express their preferences for all their party's candidates — including presidential candidates — by casting a secret ballot in the primary. Participation in a party caucus is no longer the exclusive means by which Coloradans can have a say in their party's selection of a presidential candidate.

The compelling logic of Opinion 2008-2 still applies today: Participation in caucuses is partisan and public. We believe that judges' participation in caucuses is inconsistent with Rules 4.1(A)(2) and 4.1(A)(3) of the Colorado Code, which, as Opinion 2008-2 noted, prohibit judges from making “speeches on behalf of a political organization” and “publicly endor[sing] or oppos[ing] a candidate for any office.” Opinion 2008-2 is consistent with the federal, Kansas, Nebraska, and Utah opinions that concluded judges may not participate in party caucuses. Despite the language of comment [6] to Rule 4.1 of the Model Code regarding judges' participation in caucus-type election procedures, we were unable to find a single ethics opinion holding that judges could participate in caucuses.

In a state that rejected partisan elections of judges fifty-five years ago, judicial participation in caucuses creates the risk that the public will conclude that, despite our system of merit selection, judges are political. A judge's attendance at a caucus — even if the judge remained silent throughout the proceedings — would send the message that he or she is an active member of a political party. Such a perception could undermine confidence in the judiciary as a fair and impartial institution that decides cases without political considerations. For the same reasons, we recommend that the Branch prohibit restricted employees from participating in caucuses.

But, for the reasons articulated in the Utah and Washington opinions discussed above, we believe that judges and restricted employees should be permitted to cast ballots in primaries. Colorado voters need not affiliate with a party to vote in a primary election, and our state's primaries are conducted by secret ballot. Although a member of the public could research which party's ballot a judge submitted in a primary election, we do not think that judges and restricted employees should be deprived of the right to participate in a party's candidate selection process.

But judges are not required to register as unaffiliated voters. As comment [3] to Colorado Rule 4.1 states, judges may register to vote as members

of a political party consistent with the Colorado Code. There is a material distinction between submitting a form indicating a party affiliation and participating in a caucus that is inherently a highly public and partisan act that necessarily involves discussions of candidates and controversial topics. In any event, barring judges and restricted employees from affiliating with a political party or voting in a primary would likely raise First Amendment concerns beyond the scope of this memorandum.

VII. Conclusion

We urge the Court to amend Comment [6] to Rule 4.1 of the Colorado Code as follows:

Judges and judicial candidates retain the right to participate in the political process as voters in both primary and general elections. ~~For purposes of this Canon, p~~Participation in a caucus-type election procedure ~~does not constitute public support for or endorsement of a political organization or candidate, and is not prohibited~~ by paragraphs (A)(2) and (A)(3).

In addition, we recommend that the Branch amend Rule 23.C.a of the Colorado Personnel Rules to state that restricted employees are prohibited from taking an active role in partisan politics by “[p]ublicly endorsing a partisan political candidate or organization by authorizing use of the employee’s name, making speeches, ~~or~~ participating in a partisan political convention or fund-raising

activity, ~~or except that participation~~ **participating** in a partisan political caucus ~~is~~
acceptable”

Thank you for considering our recommendations.