

MICROFILM DIVIDER

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SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

3002

2007 HOUSE JUDICIARY

HCR 3002

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HCR 3002

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 1/16/07

Recorder Job Number: 1148,1149, 1153

Committee Clerk Signature

R. Penrose

Minutes:

Chairman DeKrey: We will open the hearing on HCR 3002.

Vonette Richter, Legislative Council: Explained the bill (see attached testimony). During the Interim there was a task force formed by the State Bar Association that also studied this issue and provided information to the committee. These two decisions affect how elections are conducted in the state or in the country. The conclusions of the committee and the task force you will find on the last page of the handout. They concluded at this point that it is best to continue the study and that is why you have the resolution before you. They recommended that the study continue in the judicial election and selection process in ND and also there was a recommendation that LC pursue a public information and education program with the State Bar Association, which would include public forums around the state regarding the judicial selection methodology and the conduct of judicial elections.

Chairman DeKrey: Thank you. Further testimony in support.

Bill Neumann, State Bar Association: We support this resolution. We will continue to participate and help with this study.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition. We will close the hearing.

(Reopened later in the same session)

Chairman DeKrey: What are the committee's wishes in regard to HCR 3002.

Rep. Delmore: I move a Do Pass.

Rep. Koppelman: Second.

12 YES 0 NO 2 ABSENT

DO PASS

CARRIER: Rep. Koppelman

Date: 1-16-07
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HCR 3002

House JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Rep. Delmore Seconded By Rep. Koppelman

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	✓	
Rep. Boehning	✓		Rep. Meyer	✓	
Rep. Charging	✓		Rep. Onstad	✓	
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Heller	✓				
Rep. Kingsbury					
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 13 No 0

Absent 1

Floor Assignment Rep. Koppelman

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HCR 3002: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO PASS and BE PLACED ON THE CONSENT CALENDAR (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HCR 3002 was placed on the Tenth order on the calendar.

2007 SENATE JUDICIARY

HCR 3002

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HCR 3002

Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: March 7, 2007

Recorder Job Number: 4595

Committee Clerk Signature

Maura R. Solbey

Minutes: Relating to study the judicial election and selection process in ND.

Senator David Nething, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following hearing:

Testimony in Favor of the Bill:

Bill Nuemann, Executive Director of the State Bar Assoc. of ND Introduced the bill – Att. #1

Sen. Nething asked, why the bill, is there a need perceived by the public of a structural change in the system. Her referred to a MN commission, speaking of there process stating that in ND we like to elect our officials more then to have them appointed. The interim committee recommends the continuation of the study.

Vonette Richter, Legislative Council Staff Council for the committee – Att #2 presented the committee with a portion of the final report referring to the bold print on the last page.

Testimony Against the bill: None

Testimony Neutral to the bill: None

Senator David Nething, Chairman closed the hearing.

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HCR 3002

Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: March 12, 2007

Recorder Job Number: 4894

Committee Clerk Signature

Monica L. Halberg

Minutes: Relating to study the judicial election and selection process in ND.

Senator David Nething, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following committee work:

Sen. Lyson reviewed the bill for the committee.

Sen. Nelson made the motion to Do Pass HCR 3002 and **Sen. Lyson** seconded the motion.

All members were in favor and the motion passes.

Carrier: **Sen. Nelson**

Senator David Nething, Chairman closed the hearing.

REPORT OF STANDING COMMITTEE (410)
March 12, 2007 4:41 p.m.

Module No: SR-46-5050
Carrier: Nelson
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HCR 3002: Judiciary Committee (Sen. Nething, Chairman) recommends DO PASS
(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HCR 3002 was placed on the
Fourteenth order on the calendar.

2007 TESTIMONY

HCR 3002

EXCERPT FROM 2007 LEGISLATIVE COUNCIL REPORT OF THE JUDICIAL PROCESS COMMITTEE

JUDICIAL ELECTIONS STUDY

House Concurrent Resolution No. 3014 directed a study of judicial elections and recent federal court decisions affecting the conduct of judicial elections. Testimony in support of the resolution indicated that recent federal court decisions will have an impact on how judicial candidates campaign and solicit funds, thus creating a need for a study.

Court Decisions

In June 2002, the United States Supreme Court handed down its first ruling regarding judicial elections. A 5-4 majority in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) held that part of the Minnesota Code of Judicial Conduct was unconstitutional as violating the First Amendment of the United States Constitution. A similar provision in the North Dakota Code of Judicial Conduct was challenged in *North Dakota Family Alliance, Inc. v. Bader*, 361 F.Supp.2d 1021 (D.N.D. 2005). Both cases are summarized below.

Republican Party of Minnesota v. White

In *Republican Party of Minnesota v. White*, the United States Supreme Court held that part of the Minnesota Code of Judicial Conduct was unconstitutional as violating the First Amendment of the United States Constitution. The specific clause at issue in this case is known as the "announce clause" and states that "[a] candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues." In *White*, a judicial candidate alleged that he was forced to refrain from announcing his views on disputed issues during a campaign because of this provision, in violation of the First Amendment. A majority of the Supreme Court agreed and held that Minnesota's announce clause is unconstitutional. Justice Scalia, writing for the majority, found that the standard of there being a compelling state interest, and any restraints being narrowly tailored in order to restrict speech, was not met. Justices Scalia, Rehnquist, O'Connor, Kennedy, and Thomas were in the majority. Justice Stevens filed a dissenting opinion, in which Souter, Ginsburg, and Breyer joined. Justice Ginsburg also filed a dissenting opinion, in which Stevens, Souter, and Breyer joined.

In 1996, Gregory Wersal ran for associate justice of the Minnesota Supreme Court. He distributed literature critical of several Minnesota Supreme Court decisions. An ethics complaint was filed against him; however, the board that was to review the complaint dismissed the charges. In 1998, Wersal ran again for the same office. This time Wersal preemptively filed suit in federal district court against Suzanne White, the chairman of the Minnesota Board on Judicial Standards, charging that the "announce clause" limited his right to free speech and made a mockery of the election process by denying him the ability to wage a meaningful campaign. The Republican Party of Minnesota joined in the lawsuit, arguing that the restrictions prevented the party from learning Wersal's views on the issues, and as a result either opposing or supporting his candidacy. The district court found that the announce clause did not violate the constitution. Wersal appealed to the United States Court of Appeals for the Eighth Circuit, and the circuit court affirmed the district court's decision. Wersal filed a writ of certiorari to the United States Supreme Court, which was granted.

In *White*, the United States Supreme Court struck down the campaign ethics rule prohibiting judicial candidates from announcing their views. The Supreme Court held that the portion of Canon 5A of the Minnesota Code of Judicial Conduct which provided that a "candidate for a judicial office, including an incumbent judge" shall not "announce his or her views on disputed legal or political issues," violates the First Amendment. Using strict scrutiny, the Court held the "announce clause" was not narrowly tailored to serve the asserted compelling state interest in the

judiciary's impartiality. The Supreme Court then remanded the case to the Eighth Circuit Court of Appeals to determine what effect, if any, its decision would have on the rest of the plaintiff's challenge. A three-judge panel of the Eighth Circuit issued a decision and found that some of the candidates' speech prohibitions were unconstitutional but upheld others. *Republican Party of Minnesota v. White*, 361 F.3d 1035 (8th Cir. 2004). The Eighth Circuit vacated the panel decision and decided to hear the case en banc.

On August 2, 2005, in the remand of *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005) the Eighth Circuit held:

1. Minnesota Code of Judicial Conduct Canon 5B(2), which prohibits a judicial candidate from personally soliciting campaign contributions, is unconstitutional insofar as it prohibits a judicial candidate from soliciting contributions from large groups and transmitting solicitations above their personal signature, to the extent of the plaintiffs' challenge; and
2. Minnesota Code of Judicial Conduct Canons 5A(1) and 5B(1), which prohibit judges or judicial candidates from identifying themselves "as members of a political organization" attending political gatherings, and seeking, accepting, or using endorsements from a political organization, are unconstitutional.

North Dakota Code of Judicial Conduct Canons 5A and 5B contain language that is substantially similar to Minnesota's "partisan-activities clause" and "solicitation clause."

North Dakota Family Alliance, Inc. v. Bader

In *North Dakota Family Alliance, Inc. v. Bader*, 361 F.Supp.2d 1021 (D.N.D. 2005), United States District Judge Dan Hovland held that the "pledges and promises clause" and the "commit clause" of the North Dakota Code of Judicial Conduct Canon 5A unconstitutionally restrict speech. The judicial canon at issue in this case was Canon 5A(3)(d)(i) and (ii) of the North Dakota Code of Judicial Conduct, which provides that a candidate for a judicial office may not "make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" or "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."

In this case, North Dakota Family Alliance, Inc., a nonprofit educational organization, sought to collect and publish data regarding judicial candidates' political philosophy and stance on disputed legal and political issues by sending a questionnaire to judicial candidates. Many judicial candidates refused to answer the questions on the survey and the candidates cited the relevant canon of ethics.

The district court, in its analysis, stated that in *White*, the Supreme Court held that Minnesota's "announce clause" violated the First Amendment because the canon was not narrowly tailored to serve a compelling state interest. The district court also noted that the Supreme Court did not address the constitutionality of the "pledges or promises" clause of Minnesota's Canon 5A(3)(d)(i) which is identical to North Dakota's Canon 5A(3)(d)(i) nor did the Supreme Court address the validity of the "commit clause," which is a clause that prohibits a judicial candidate from making statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court.

The district court held that if North Dakota's interest ultimately concerns a judge's impartiality toward parties, the language of Canon 5A(3)(d)(i) and (ii) is overbroad and does not reflect that interest. The district court held that like the "announce clause" in *White*, the "pledges and promises clause" and the "commitment clause" are too broadly tailored to serve that interest. According to the district court, these clauses forbid the same type of speech that was found to be constitutionally protected in *White*. The court found little distinction between the clauses at issue in *White* and the clauses at issue in this case. The district court concluded that "Canon 5A(3)(d)(i) and (ii) of the North Dakota Code of Judicial Conduct impermissibly burdens free speech and violates the First Amendment of the United States Constitution." According to the district court, "[t]he 'pledges and promises,' and the 'commitment clause,' are essentially de facto 'announce clauses' which were found to be unconstitutional by the United States Supreme Court in *Republican Party of Minnesota v. White*. For the same reasons stated in *White*, the Court finds that these clauses violate the First Amendment."

The district court concluded that there is nothing in its opinion which requires a judicial candidate to respond to a survey in the future; however, the court noted that responding to such a survey may create a serious ethical dilemma that may require recusal at a later date. Finally, the district court concluded that it is clear under *White* that "because North Dakota has chosen to select its judges by popular election, the State may not impermissibly restrict the constitutionally-protected speech of judicial candidates."

In *North Dakota Family Alliance, Inc. v. Bader*, the court also analyzed a challenge to the constitutionality of Canon 3E(1) of the North Dakota Code of Judicial Conduct which relates to the recusal obligations of judges. The canon requires judges to recuse themselves from those proceedings in which impartiality "might reasonably be questioned." The district court concluded that this canon is narrowly tailored to serve a compelling state interest. According to the district court, the recusal provisions in Canon 3E(1) serves the state's interest in impartiality and the canon is narrowly drafted to achieve that interest and, therefore, survives a constitutional challenge.

Testimony and Committee Considerations

The committee received information and testimony from the North Dakota Supreme Court and the State Bar Association of North Dakota regarding judicial conduct and judicial elections.

The committee received testimony from the Supreme Court regarding the effect of recent federal court decisions on certain judicial election canons. According to the testimony, federal judges are of the opinion that a judicial election is the same as any other election. It was noted that while judicial candidates are subject to the same campaign statutes as are any other election candidates, the Rules of Judicial Conduct add another layer of rules on top of the election laws. The state's election laws provide that a judicial candidate cannot solicit funds but rather must set up a committee for that purpose. The election laws also provide that the candidate is not permitted to know the identity of the contributors. The testimony indicated that this process may not survive the recent federal court rulings.

The testimony from the Supreme Court also indicated that judges who seek political party endorsements, solicit campaign contributions, and declare their beliefs on issues are more likely to have to recuse themselves from hearing cases because their impartiality might be questioned. It was noted that because North Dakota has a very small judiciary, if judges are recusing themselves, it creates a problem in finding judges to replace them. According to the testimony, while a general statement about judicial philosophy may not be grounds for recusal, it is difficult to determine at what point a recusal is appropriate.

According to the testimony, as a result of the recent Court decisions, a judge or a judicial candidate is permitted to answer certain questions but is not required to answer. According to the testimony, while there is no requirement that the candidate answer certain questions, there may be political repercussions for not answering. The testimony indicated that the Rules of Judicial Conduct which were held to be unconstitutional will need to be revised before the next judicial election.

The committee also received extensive testimony, information, and recommendations from a special task force formed by the State Bar Association of North Dakota. The task force was formed to address issues raised by the recent Court decisions involving judicial elections. The task force was composed of judges, lawyers, and legislators from around the state. The committee received regular reports from the task force. Based upon these reports, the committee's considerations focused on four areas: the North Dakota Code of Judicial Conduct; the election statutes affecting judicial elections; the method of selecting judges in North Dakota; and the task force's conclusions and recommendations.

North Dakota Code of Judicial Conduct

The committee received testimony from the task force that in the past the North Dakota Rules of Judicial Conduct have limited what candidates for judicial office were allowed to say and do when campaigning. It is portions of these rules that were specifically addressed and declared unconstitutional by the United States Supreme Court and the Eighth Circuit Court of Appeals in *Minnesota Republican Party v. White* and the United States District Court in *North Dakota Family Alliance v. Bader*. It was noted that setting ethical standards for the behavior of judges is the

responsibility of the North Dakota Supreme Court. According to the testimony, these rules have been or are in the process of being addressed by the Judiciary Standards Committee, one of the Supreme Court's standing committees.

According to the testimony, the *White* decision deals not only with the right of the candidate to speak but also deals with the right of people to endorse a candidate. It was noted that a judicial candidate's refusal to accept an endorsement may only work for a limited time. Because a candidate may want funding from one party or another, the candidate may seek the endorsement of a party.

According to the testimony, changes that have been adopted by the Supreme Court include a restriction on judges and candidates making "pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office," and a definition of "impartiality" that includes not only absence of bias or prejudice for particular parties but also "an open mind in considering issues that may come before the judge." The testimony indicated that other recommendations that have been forwarded to the Supreme Court for its consideration include retaining the limitations on active involvement with "political organizations," but adding an expanded definition of "political organization" which would include not only political parties but also organizations whose purpose is to "support or oppose the continuation, amendment, repeal, enactment, initiative or referendum of any constitutional, statutory or regulatory provision." According to the testimony, the basis for this proposed change is the Eighth Circuit's criticism of the old canon's ban on political involvement as underinclusive.

According to the testimony, the proposed canons would limit political endorsements. It was noted that if the proposed canons stand up to the requirements set forth in the federal cases, seeking an endorsement would be prohibited. It was noted that the proposed canons would permit an organization to give a letter of support. According to the testimony, it is the intent of the Supreme Court to have all amendments in place in time for the 2006 election cycle.

Election Statutes Affecting Judicial Elections

The committee received testimony from the task force regarding North Dakota election statutes, specifically NDCC Section 16.1-11-08. This section requires judicial candidates and others to run on a no-party ballot without reference to a party affiliation. According to the testimony, opinions were divided on whether, in light of the federal decisions, this statute is entirely unconstitutional, whether it might be saved by some form of amendment, or whether a change to the statute was necessary at all. It was noted that if the statute is repealed entirely, questions are raised about the application of some of the other election laws and whether judicial candidates would be forced to run under a party designation if the no-party portion of the ballot were abolished.

According to the testimony, the task force concluded that the *White* and *Family Alliance* cases have no impact on the use of a no-party ballot in North Dakota and therefore raise no concern for the constitutionality of NDCC Section 16.1-11-08 as long as the possibility of endorsement by political parties or other interest groups is permitted.

Method of Selecting Judges in North Dakota

The committee received testimony that any effort to change the method of selecting judges in North Dakota must include long-term structural considerations of whether the method of selecting judges in North Dakota should be modified in some way in order to avoid full-scale political elections for judicial office. It was emphasized that any effort in this area would require an in-depth study and a long-term approach. According to the testimony, North Dakota citizens are comfortable with the no-party approach for judicial elections. The testimony indicated that there likely is not a way to avoid making changes to the conduct of judicial elections as long as the state has judicial elections. It was noted that because North Dakota citizens like elections, there probably is not a great deal of support for adopting the federal system of lifetime judicial appointments. It was the consensus of the task force that the subject of judicial selection in North Dakota requires further study.

Task Force Conclusions and Recommendations

The task force presented the following conclusions and recommendations to the committee:

1. The task force should continue to monitor and comment upon, as appropriate, any proposed changes to the North Dakota Code of Judicial Conduct which deal with judicial selection or election;
2. The State Bar Association of North Dakota should consider and adopt a resolution at its annual meeting in June 2006 setting forth the association's official position on the extent to which judicial candidates should make "pledges or promises" or "commitments" to the voters;
3. The interim Judicial Process Committee should not propose and the Legislative Assembly should not enact any immediate legislative changes as a result of the recent trilogy of cases involving judicial selection and election; and
4. The interim Judicial Process Committee should propose a concurrent resolution draft to continue the present study of the Judicial Process Committee into the next biennium and pursue a joint legislative and State Bar Association of North Dakota public information and education program, including public forums around the state, regarding judicial selection methodology and the conduct of judicial elections.

Based upon the conclusions and recommendations of the task force, the committee considered a concurrent resolution relating to a study of judicial election and selection issues which would continue the present study into the next interim.

Testimony in support of the concurrent resolution indicated that although recent federal court opinions have limited the restrictions the state can place upon judicial elections and judicial candidates, the study could provide for a review of the way judges are selected, including the possibility of changing from an elected system to an appointed system. It was suggested that the concurrent resolution be amended to provide for a joint legislative and State Bar Association of North Dakota public information and education program regarding judicial selection methodology and the conduct of judicial elections. It was noted that the program should include public forums around the state.

Recommendation

The committee recommends **House Concurrent Resolution No. 3002** to study judicial election and judicial selection issues. The concurrent resolution also provides that the Legislative Council study should include a public information and education program with the State Bar Association of North Dakota which includes public forums around the state regarding judicial selection methodology and the conduct of judicial elections.

AH #1
3-7-07

March 7, 2007

Sixtieth Legislative Assembly
Senate Judiciary Committee

HCR 3002

CHAIRMAN NETHING AND COMMITTEE MEMBERS:

My name is Bill Neumann, I am the Executive Director of the State Bar Association of North Dakota. The Bar Association supports House Concurrent Resolution 3002.

Prior to 2006 North Dakota had Rules of Judicial Conduct that said candidates for judicial office could not make pledges or promises about cases that were likely to come before the court, they could not raise campaign funds directly, and they could not seek the endorsement of political parties. However, in 2002 and 2005, federal courts held all such restrictions were unconstitutional—they ruled that if states are going to elect judges, then judicial candidates must have a full range of freedom of political speech, they must be able to raise funds, and they must be able to seek political endorsements.

In 2005 the 59th Legislative Assembly passed a resolution calling for a study of the effect of these changes on North Dakota judicial elections. There was great concern that special interest groups would actively seek to elect judges biased in their favor, thereby eroding the fair and impartial administration of justice in this state. The Interim Judicial Process Committee, Chaired by Senator Lyson, studied these matters, with input from a Bar Association Task Force. The Judicial Process Committee came to the conclusion that no immediate changes to our laws were required, but that it was too soon to judge the long-term impact of the federal court decisions on North Dakota's judicial elections.

In the meantime, the North Dakota Supreme Court has made some changes to the Rules of Judicial Conduct to try to comply with the federal rulings while still preserving a fair and impartial judiciary. The State Bar Association has also passed a resolution calling on judicial candidates to exercise restraint in their campaigns.

Since then we have had just one contested judicial election, in 2006; it is much too soon to determine the exact impact of these changes on our judicial elections, but the experience of other states has not been encouraging. In the meantime it is very important to educate the public about these changes and their potential impact on our judicial elections; if changes are going to be necessary to maintain a fair and impartial justice system in North Dakota, then it is absolutely essential that we have a knowledgeable, informed public.

This resolution therefore calls for further study of judicial election and selection issues, and for the study to include a public information and education program, to be conducted in cooperation with the State Bar Association.

Thank you for your time. If you have any questions, I would be happy to try to answer them.