VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12th day of March, 2021.

On January 19, 2021, came the Judicial Ethics Advisory Committee and presented to the Court Opinion 20-2 pursuant to its authority established in this Court's order of April 18, 2019. Upon consideration whereof, the Court approves the opinion as set out below.

Judicial Ethics Advisory Committee

Opinion 20-2

ISSUE:

May a judge write and publish an article that analyzes a particular criminal law statute, asserts that the statute has been incorrectly interpreted by the Supreme Court of Virginia, and provides an alternative interpretation, with appropriate disclaimers?

Answer: No. Under the facts presented, a judge may not author an article asserting that a criminal law statute has been incorrectly interpreted by a superior court and providing an alternative interpretation without risking the perception or appearance of partiality prohibited by the Canons of Judicial Conduct for the Commonwealth of Virginia ("the Canons").

FACTS:

A judge wants to write an article to be submitted for consideration by publications such as the Virginia State Bar's *Virginia Lawyer* or the Virginia Bar Association's *VBA Journal*, the topic of which is a particular criminal statute. According to the judge, the article would analyze the statute at issue, assert that it has been incorrectly interpreted by the Supreme Court of Virginia ("the Court"), and provide an alternative interpretation that the judge maintains is consistent with the principles of statutory construction stated by the Court. The judge also proposes to include a statement that the views expressed in the article 1) are in accordance with Canon 4B and its Commentary, and 2) are not to be construed as expressing any opinion on any case which may come before the judge. The issue the judge proposes to write on is not one that is currently before him or her, but the judge recognizes that the issue is one that conceivably could arise in a future case. The judge would not be compensated for writing or publishing the article. Finally, the Committee has not been provided any proposed draft of the article but bases its opinion on the general content proposed.

DISCUSSION:

"It is a time-honored tradition that judges may engage in lecturing and scholarship concerning both legal and non-legal subjects." CHARLES GARDNER GEYH, ET AL., JUDICIAL CONDUCT AND ETHICS § 9.02, at 9-1 – 9-2 (5th ed. 2013). As recognized by the Canons, there is a great benefit to having learned judges involved in teaching and publication, and other extra judicial activities designed to improve the law, the legal system, and the administration of justice. *See generally* Canon 4.

However, those activities may not be undertaken at the expense of other judicial ethical obligations, particularly the requirement to be impartial.

> It is a fundamental principle of our legal system that judges should perform their duties impartially, free of personal interest or bias. There is perhaps no more basic precept pertaining to the judiciary than the one holding that judges should be sufficiently detached and free from predisposition in their decision-making.

GEYH, ET AL., *supra* at 4-2.

1. Applicable Canons

Canon 2 mandates that a judge avoid impropriety and the appearance of impropriety in all activities, both personal and professional. Canon 2A explains that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

The Commentary to Canon 2A notes that "[a] judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." Finally, "[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity and impartiality is impaired."

Canon 3 also requires a judge to perform his or her duties impartially and diligently. Canon 3B(5) provides that "[a] judge shall perform judicial duties without bias or prejudice." Canon 3E(1) requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." (Emphasis added). That disqualification is required "whenever" that impartiality might reasonably be questioned, "regardless whether any of the specific rules in Section 3E(1) apply." Canon 3E(1), Commentary.

With respect to commenting on cases, "[a] judge shall abstain from public comment about a pending or impending proceeding in any court. . . ." but "[t]his subsection does not prohibit judges or court personnel from speaking on the legal system or the administration of justice. . . ." Canon 3B(9). As for when a case is pending or impending: the requirement to abstain from public comment "continues during any appellate process and until final disposition." Canon 3B(9), Commentary.

Finally, Canon 4 governs a judge's extra judicial activities. Canon 4A provides that:

A judge shall conduct all of the judge's extra judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
(2) demean the judicial office; or
(3) interfere with the proper performance of judicial duties.

Avocational activities are addressed in Canon 4B: "[a] judge may speak, write, lecture, teach and participate in other extra judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of these Canons." The Commentary to Canon 4B explains further that "[a]s a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice."

2. Analysis

In the context of the Canons, and particularly in the area of impartiality, the Committee has previously opined on the extent of a judge's extra judicial activities in the area of teaching or lecturing on two occasions. In Va. JEAC Op. 01-4 (2001), the Committee opined that a judge may lecture or teach at a police training academy, provided that the programs are clearly educational and would not give an appearance that the judge is acting as an agent of the police or biased in favor of police officers in the courtroom. The Committee cautioned that "[c]omments by a judge, even in an education forum, could be interpreted as an advisory opinion of the judge or a court. The judge should make it clear that his or her comments are not intended as advisory opinions or to commit the judge or any other judge to a particular legal position in a court proceeding." *Id.* The Committee finds that the guidance to avoid issuing advisory opinions or committing oneself to a specific legal position to be particularly instructive here.

In Va. JEAC Op. 19-3 (2019), the Committee opined that a judge may participate in a continuing legal education (CLE) seminar, subject to the restrictions imposed by the Canons. The Committee advised the judge to be mindful that comments or remarks made during that CLE seminar not reasonably call into question the judge's impartiality with respect to pending matters, requiring recusal. *Id.* Furthermore, the Committee cautioned the judge to not make public comments about any pending or impending proceedings in any court. *Id.*

Against this backdrop, the Committee considers the proper parameters for a judge authoring an article that proposes not to merely analyze a particular criminal statute, but in the context of that analysis, to assert that the current interpretation of the statute by the Court is incorrect and to offer an alternative interpretation. The question posed by the requesting judge is an issue of first impression for the Committee.

The Committee presumes that the case or cases the judge wishes to distinguish in the proposed article are not pending or impending before any court. Otherwise, such public comment would be in clear violation of Canon 3B(9). While advisory opinions from other jurisdictions reach similar conclusions based on the pending or impending nature of the case upon which a judge wished to comment, few examples of advisory opinions exist on the issue presented in this case, which pertains to comment on a completed case.

The New York Advisory Committee on Judicial Ethics ("the New York Committee") considered a judge's request to comment on a completed case. *See* N.Y. Jud. Adv. Op. 03-141 (2004). A private publication reported on a landlord-tenant decision of the requesting judge,

who believed the editor had "misinterpreted some of the holdings and facts" and wanted to comment for publication. *Id.* The New York Committee opined that the judge could do so, provided the judge did so in a "dignified, discreet and impartial manner without indicating a predisposition in future cases." *Id.* In that case, the judge sought not to criticize another court decision but to respond to what the judge perceived to be misinterpretations of the judge's own decision by others.

In terms of commenting on other cases or statutes, similar, but not identical, advisory opinions from other jurisdictions rely on the concept of impartiality to guide their decisions. Whether those opinions found the judges' proposed conduct permissible or not, there appears to be a consistent caution against an appearance of partiality or of prejudging matters.

For example, in Wash. Jud. Eth. Op. 87-11 (1987), the Washington Ethics Advisory Committee ("the Washington Committee") opined that a part-time municipal court judge could not write a newspaper column on legal issues, including the judge's opinion on recent legislation and case law. The Washington Committee noted that the canon at issue "permits a judge to engage in activities to improve the law, legal system and the administration of justice but only when these activities do not cast doubt on the judge's capability to decide impartially any issue which comes before the judge." *Id.* The opinion did not elaborate on any details of the content in the planned columns, but instead opined on the general concept of impartiality to find a prohibition.

Similarly, the Florida Judicial Ethics Advisory Committee ("the Florida Committee") has issued several opinions regarding judges' ability within ethical constraints to address various legal topics in print and other media. In Fla. JEAC Op. 2000-02 (2000), the inquiring judge proposed to publish an article regarding the effect of new legislative amendments and their constitutionality, absent any litigation or controlling appellate opinion. The Florida Committee opined that the judge may not ethically do so, citing in part the fact that the conclusions reached by the judge prejudged matters that had yet to be litigated before him or any other court. *Id.* The Florida Committee noted that it had recently approved a judge authoring a monthly newspaper column, but with the warning that the requesting judge "not intimate how he would rule on matters pending before any court." *Id.* (citing Fla. JEAC Op. 99-14 (1999) (emphasis omitted)).[1]

The Florida Committee noted that the warning in Opinion 99-14 was given in reference to Fla. JEAC Op. 81-12 (1981). In Opinion 81-12, the requesting judge inquired as to the propriety of appearing in a televised "guest editorial" on the issue of bail bonds in drug trafficking cases. The Florida Committee in Opinion 81-12 "became concerned with the Judge expressing <u>his own views</u> on certain matters of law <u>as opposed to educating others on the status of the law</u>." Fla. JEAC Op. 2000-02 (emphasis in original). Finally, in Opinion 2000-02, the Florida Committee noted that without any appellate opinion on the matters discussed in the proposed article, the judge left himself open to disqualification, which in turn could lead to widespread reassignment of civil cases. *Id.*

The Florida Committee also addressed whether a judge could write a biweekly column for publication regarding the issue of attorney's fees. Fla. JEAC Op. 95-37 (1995). The stated purpose of the article was to analyze Florida appellate cases in order to educate the readers, with an intention to "point out some of the problems that such decisions may create and 'offer

suggestions as to how to remedy these problems'" and included a list of suggested topics. *Id.* The Florida Committee found the proposed activity permissible under its judicial canons,

> with the caveat that you should refrain from stating how you would rule on a related question. Further, you need to be careful as to how you "offer suggestions as to how to remedy these problems" caused by appellate or Florida Supreme Court decisions so that you do not cast doubt on your impartiality.

Id.

In the current case before the Committee, the judge proposes to author an article analyzing a criminal statute and the interpretation of it by the Court. If the substance of the article were to stop there, the content of such an article would likely be within the bounds of Canons 4A and 4B, providing a permissible educational or scholarship exercise concerning the law, the legal system, and the administration of justice, but without creating any perception or appearance of partiality. Like the New York Committee's guidance, this Committee agrees that any publication should be done in a discreet and dignified manner. *See* N.Y. Jud. Adv. Op. 03-141. At a minimum, such an article should be scholarly, respectful, not offensive, and undertaken in a manner that would not undermine public confidence in the integrity and impartiality of the judicial system.

The difficulty lies with the judge's stated intention to assert that the Court has interpreted the statute "incorrectly" and to provide an alternative interpretation. The crux of the issue is the critique; the decision to criticize a superior court's decision in a public forum (as opposed to authoring a judicial opinion in the context of an active case being decided by the judge). The Florida Committee identified that:

> The balance between a judge's right, and even duty, to speak, write, or lecture to improve the law, the legal system, and the administration of justice on the one hand, and his duty to not cast doubt on his ability to decide impartially on the other hand, is extremely important.

Fla. JEAC Op. 81-12. Relying on earlier precedents, the Supreme Court of Florida summarized the dividing line between appropriate and inappropriate disagreement by a judge as to the current state of the law:

> There is no doubt that a judge in an appropriate forum may express his protest, dissent, and criticism of the present state of the law as long as he does not appear to substitute his concept of what the law ought to be for what the law actually is, and as long as he expresses himself in a manner that promotes public confidence in his integrity and impartiality as a judge.

In re Inquiry Concerning a Judge, Gridley, 417 So.2d 950, 954 (1982). More recently, the 7th Circuit Judicial Council explained "[i]f a particular judge makes statements, on the bench or off, that undermine confidence in that judge's ability to approach cases impartially, such statements impair the ability of the entire judicial system to serve the public and to engender the public's confidence in judicial decisions." *Resolution of Judicial Misconduct Complaints about District Judge Lynn Adelman*, 965 F.3d 603, 609 (7th Cir. Judicial Council 2020).[2]

The Committee is mindful that impartiality does not mean that judges have no prior opinions about legal issues that come before them. It is expected that "judges should be open-minded about legal issues, and should not pre-judge them before reading the memoranda or briefs in a case, and hearing oral argument." GEYH, ET AL., *supra* at 1-3 – 1-4. There exists a natural tension with the fact that judges are not "blank slates" when it comes to having opinions about legal issues but are still required to be open-minded. *Id*. at 1-4. "While impartiality requires that judges remain open-minded and willing to entertain opposing points of view on the legal issues before them, it does not require judges to pretend that they have not thought about the law or developed their own points of view on legal issues." *Id.*[3]

The article as proposed would not only assert that the Court has interpreted the statute incorrectly; by providing an alternative interpretation, the likely inference would be that the judge views the alternative interpretation as the correct one. Such a public comment would appear to reasonable minds to communicate how the judge would rule if the issue were presented to him or her. At the very least, it would seem to instruct litigants in a case involving the relevant statute or issue on how to present their case to appeal to this particular judge. The proposed opinion on the correctness of the Court's interpretation carries weight because the author is a judge – there is no way to reasonably interpret such an article as an opinion rendered solely in an individual capacity. In terms of that natural tension between having developed opinions about certain areas or issues of law and being open-minded, the proposed content of the article appears to be the type of pre-judging or predisposition that would create in reasonable minds a perception that the judge is partial. This is not permitted by the Canons.

In the Committee's view, the inclusion of the suggested statements or disclaimers by the judge that the views expressed in the article 1) are in accordance with Canon 4B and its Commentary, and 2) are not to be construed as expressing any opinion on any case which may come before the judge, are not enough to render the proposed article permissible under the Canons. Despite any disclaimer, should the issue arise in a case before the judge, litigants would be on notice of how the judge is predisposed to deciding the case, and would have to tailor their arguments accordingly. More likely, a litigant with facts or arguments that conflicts with the judge's interpretation would request the judge's recusal per Canon 3E(1), since the judge's impartiality might reasonably be questioned. Depending on the number of cases that arise involving that statute, continual recusals could potentially impact the workload in that judicial district.

Moreover, while the aim may be to author such an article in accordance with, or under the authorization of, Canon 4, such extra judicial activities may only be undertaken if they do not cast doubt on the judge's ability to act impartially, not demean the judicial office, or interfere with the proper performance of judicial duties. *See* Canon 4A. Even Canon 4B authorizes extra judicial activities "subject to the requirements of these Canons." Extra judicial activities are secondary to a judge's other ethical obligations. "Canon 4 does not excuse the violations of other canons." *In re Inquiry of Broadbelt*, 683 A.2d 543, 550 (1996) (finding a judge's appearances on television violated two canons of New Jersey's Code of Judicial Conduct, even though the judge's comments "may be of educational value under Canon 4").[4] "Conduct that is violative of another canon is not excused because it appears to be authorized by Canon 4." *Id.* at 551.[5]

Finally, the Committee is aware that some judicial disciplinary case decisions from other jurisdictions addressing sanctions for expressing certain opinions appear more permissive than this opinion. Resolution of such cases necessarily turned on their specific facts and the interpretation by courts of the effect of such expressions on the public's confidence in the integrity and impartiality of the judiciary,[6] including statements by the sanctioned judge as to maintaining impartiality and the reasonableness of that perception.[7] Some of those cases were decided on constitutional grounds instead of ethical ones, particularly where the First Amendment was alleged as a defense.[8]

While natural to ponder such constitutional implications, those questions are outside the scope of this Committee's authority. *See* Order of the Supreme Court of Virginia re-establishing Judicial Ethics Advisory Committee, Paragraph 19 (April 18, 2019) ("The Committee may not issue an advisory opinion that interprets any constitutional provision, statute, rule or regulation that does not relate to judicial ethics."). As such, the Committee declines to opine on any issue outside of the Canons.

CONCLUSION:

The Committee agrees that judges are in a unique position to offer valuable insights into the law, the legal system, and the administration of justice, and should be encouraged to share those insights by speaking, writing, lecturing, teaching and other extra judicial activities. But those activities must be undertaken within the requirements of the Canons.

The opportunity to opine on the proper boundaries of authorship is an issue of first impression for the Committee, and a line that can be difficult to discern between acceptable scholarship and criticism that amounts to an impermissible partiality or predisposition.

Without a draft to review, the Committee assumes that the proposed article would be authored in a scholarly and respectful manner, with a tone that would not otherwise undermine public confidence in the integrity and impartiality of the judicial system. The problem with the article as proposed lies in the critical nature of the content. Under the facts as presented the Committee finds that the judge may not author the article as proposed, because the criticism that the Court incorrectly interpreted a criminal law statute, coupled with the proposed alternative interpretation, risks the perception in reasonable minds that the judge is predisposed or has pre-judged the issue in a manner that is not permitted by the Canons. The judge's proposed disclaimers are important and in the Committee's view, a necessary addition, but in this case are not enough to overcome the perception of partiality.

REFERENCES:

Canons of Judicial Conduct for the Commonwealth of Virginia, Canon 2, Canon 2A, Canon 3, Canon 3B(5), Canon 3B(9), Canon 3E(1), Canon 4, Canon 4A, Canon 4B.

CHARLES GARDNER GEYH, ET AL., JUDICIAL CONDUCT AND ETHICS § 1.03, § 4.01, § 9.02 (5th ed. 2013).

Va. JEAC Op. No. 01-4 (2001).

Va. JEAC Op. No. 19-3 (2019).

N.Y. Jud. Adv. Op. 03-141 (2004).

Wash. Jud. Eth. Op. 87-11 (1987).

Fla. JEAC Op. 2000-02 (2000).

Fla. JEAC Op. 99-14 (1999).

Fla. JEAC Op. 81-12 (1981).

Fla. JEAC Op. 95-37 (1995).

In re Inquiry Concerning a Judge, Gridley, 417 So.2d 950 (1982).

Resolution of Judicial Misconduct Complaints about District Judge Lynn Adelman, 965 F.3d 603 (7th Cir. Judicial Council 2020).

Republican Party of Minnesota v. White, 536 U.S. 765 (2002).

In re Inquiry of Broadbelt, 683 A.2d 543 (1996).

Inquiry Concerning Miller, 644 So.2d 75 (1994).

In re Hill, 8 S.W.3d 578 (2000).

In re Conduct of Schenck, 870 P.2d 185 (1994).

Mississippi Commission on Judicial Performance v. Wilkerson, 876 So.2d 1006 (2004).

Order of the Supreme Court of Virginia re-establishing Judicial Ethics Advisory Committee (April 18, 2019).

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FOOTNOTES:

[1] The actual caution provided by the majority of the Florida Committee to the judge in Opinion 99-14 was that "he should not intimate how he would rule on matters that may come before him or upon matters pending before any court." Fla. JEAC Op. 99-14 (1999). Even with that caution, one member disagreed with the majority's decision, "stating that in all likelihood the inquiring judge will end up commenting on matters before the Court and be placed in a very difficult position." *Id.*

[2] In *Adelman*, complaints were filed against a U.S. District Judge who published a law review article critical of U.S. Supreme Court decisions under Chief Justice John Roberts. 965 F.3d at 604-06. The Judicial Council found most of the article permissible, except the first two sentences about the Chief Justice "and pointed criticisms of Republican Party policy positions" which "could be seen as inconsistent with a judge's duty to promote public confidence in the integrity and impartiality of the judiciary and as reflecting adversely on the judge's impartiality." *Id.* at 610-11. In arriving at its conclusion, the Judicial Council noted that judges sometimes harshly criticize one another's reasoning, but "[n]othing said in this decision on the complaints should be interpreted as suggesting judges should be silenced from criticizing court decisions." *Adelman*, 965 F.3d at 610.

[3] *See also Republican Party of Minnesota v. White*, 536 U.S. 765, 775-788 (2002) (discussing potential meanings of judicial impartiality, in the context of finding that the "announce clause" in Minnesota's canons of judicial conduct violated the First Amendment.)

[4] At the time of the decision by the Supreme Court of New Jersey, Canon 4 in New Jersey's Code of Judicial Conduct was worded similarly to Virginia's Canon 4B. *See Broadbelt*, 683 A.2d at 550.

[5] *See also Inquiry Concerning Miller*, 644 So.2d 75 (1994), wherein the court found a judge's letters to a local newspaper warranted a reprimand, because even though Florida's Canon 4A allows a judge to undertake certain writings, a judge "still must uphold the integrity and independence of the judiciary (Canon 1), avoid impropriety or its appearance (Canon 2), and perform the duties of office impartially and diligently (Canon 3)." *Id.* at 78. *See also In re Hill*, 8 S.W.3d 578, 583 (2000); *In re Conduct of Schenck*, 870 P.2d 185, 202 (1994).

[6] *See, e.g., Adelman*, 965 F.3d at 610-611.

[7] *Compare Miller*, 644 So.2d at 78 (noting that although the judge "indicated in his writings that he would uphold the law, it is nonetheless apparent that some of his comments could be interpreted as making him less than impartial."), *with Gridley*, 417 So.2d at 955 (finding no violations of the judicial canons where a judge published his criticisms of the death penalty yet "made it clear that he was duty bound to follow the law and that he would do so although he did advocate law reform in the area of capital punishment.").

[8] *See, e.g., Mississippi Commission on Judicial Performance v. Wilkerson*, 876 So.2d 1006 (2004) (finding a judge could not be sanctioned by the state's code of judicial conduct for his extra judicial anti-gay statements because they were protected by the First Amendment).

MINORITY OPINION:

I respectfully dissent from the majority opinion of the committee because scholarly and professional discourse regarding the law is not a sign of partiality or disrespect nor is it an invitation for legal nullification. Rather, scholarly works commenting on the law – especially when an error in interpretation or analysis may have occurred – are healthy and constructive activities that promote public confidence in the integrity and impartiality of the judiciary.

I agree, of course, that a judge should never engage in disrespectful commentary that telegraphs a lack of respect for other members of the Court or serves as a call to disregard precedent from a higher Court. If that were the fact scenario before us, I would agree that such actions by a judge would be inappropriate.

But the issue before us is whether a judge is ethically permitted to author an article to be published in a legal journal offering an analysis of a statute that applies principles of statutory construction that may have been overlooked by an appellate court. Public confidence in the judiciary is enhanced by open professional consideration being given to alternative interpretations and public confidence in the judiciary would be severely undermined by stifling such discourse.

Canon 2(A) requires judges to "respect and comply with the law" and to act "in a manner that promotes public confidence in the integrity and impartiality of the judiciary." A judge who takes the time and effort to offer constructive comment about interpretation of a statute is demonstrating respect for the law. Moreover, suggesting an alternate analysis to be applied by the Supreme Court is not the same as suggesting that the article's author or anyone else should disregard the effect of precedent. Publishing constructive criticism does not mean that a judge is going to disregard his or her duty to adhere to decisions of higher courts. Moreover, a judiciary that bars constructive comment about the law implies that appellate courts are closed minded, not open to discussion and unfairly biased toward their own predisposition.

Canon 3(B)(3) requires a judge to "be faithful to the law and maintain professional competence in it." The legal system would be greatly weakened by a rule foreclosing a judge's suggestion that rules of construction support a different interpretation of an existing statute. Such limitation on open dialogue would compromise the opportunity to achieve greater competence and thereby undermine faith in the law.

Canon 3(E)(1) limits the timing of constructive comment. I agree with the majority that if a case is pending or is about to be presented to the court, the judiciary may not comment because such comment would appear to be lobbying for a particular result in a case. But that is not applicable in the scenario before us.

Canon 4(B) expressly permits a judge to "speak, write, lecture, [and] teach" about the law and the legal system. If such activities were restricted to only voicing *approvals* of case decisions, the teaching or writing would fall woefully short of acceptable educational standards. Critical analysis is part of teaching, lecturing and writing.

Moreover, the majority's suggestion that a judge would inappropriately display bias by *criticizing* an appellate decision presents a one-sided censorship. If we were to even-handedly apply that same principle, then a judge's public comment *complimenting* an appellate court decision or publicly embracing an appellate court's reasoning, would likewise suggest a bias.

Neither prohibition should apply because improving the law is best done in an environment of robust and honest dialogue. We should not add to the Judicial Canons the motherly maxim, "if you don't have something good to say, don't say it at all!"

Lastly, Canon 4 prohibits a judge from acting in such a way as to "cast reasonable doubt on the judge's capacity to act impartially as a judge, demean the judicial office, or interfere with the proper performance of judicial duties." This canon would prevent a judge writing an article advocating nullification of a law (but that's not the issue before us), or casting aspersions on the competence or integrity of members of the judiciary (but that's not the issue before us), or suggesting a need for rebellion and defiance against the appellate court's ruling (but that's not the issue before us).

Barring publication of constructive and scholarly comments by a judge on issues relating to legal analysis would have the following effects: (1) it would silence those who would be most competent to speak to the issue, (2) it would inappropriately suggest that decisions of appellate judges are beyond criticism, and (3) it would inappropriately curtail activities designed to improve administration of justice.

Constructive comment by judges is essential to improving and correcting the law. Without constructive comment suggesting a change in analysis the judiciary would be forever bound by *Dred Scott* (at least until the constitutional amendment was adopted), and bound by *Apodaca v. Oregon*, 406 U.S. 404 (1972) overruled by *Ramos v. Louisiana*, 140 S.Ct. 1390, 1399 (2020) (finding *Apodaca*'s poor reasoning no longer justified allowing non-unanimous verdicts in state criminal cases; for forty-eight years "no one has found a way to make sense of" the ruling in *Apodaca*), to name a few examples.

Scholarly works on legal topics should be encouraged among judges – especially when an appellate court may have misapplied a rule of construction or applied faulty logic. If, to borrow from Hans Christian Andersen's folk tale, the emperor has no clothes, it's up to the members of his court to *respectfully* point that out.

For these reasons I dissent from the majority's opinion.

REFERENCES IN THE MINORITY OPINION:

Canons of Judicial Conduct for the Commonwealth of Virginia, Canon 2A, Canon 3B(3), Canon 3E(1), Canon 4, Canon 4B.

Dred Scott v. Sandford, 60 U.S. 393 (1857).

Apodaca v. Oregon, 406 U.S. 404 (1972).

Ramos v. Louisiana, 140 S.Ct. 1390 (2020).

AUTHORITY:

The Judicial Ethics Advisory Committee is established to render advisory opinions concerning the compliance of proposed future conduct with the Canons of Judicial Conduct . . . . A request

for an advisory opinion may be made by any judge or any person whose conduct is subject to the Canons of Judicial Conduct. The Judicial Inquiry and Review Commission and the Supreme Court of Virginia may, in their discretion, consider compliance with an advisory opinion by the requesting individual to be a good faith effort to comply with the Canons of Judicial Conduct provided that compliance with an opinion issued to one judge shall not be considered evidence of good faith of another judge unless the underlying facts are substantially the same. Order of the Supreme Court of Virginia entered April 18, 2019.