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FORMAL WRITTEN

ADVISORY OPINION

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**ISSUE: ETHICAL CONSIDERATIONS REGARDING PARTY
REGISTRATION IN IDAHO'S "CLOSED PRIMARY"**

Judge Winmill's decision in *Idaho Republican Party v. Ysursa*, No. 1:08-cv-165-BLW, March 2, 2011 required Idaho to change its "open primary" system to a "closed primary" system. In response, the Legislature passed and Governor Otter signed HB No. 351. This law requires registration by any individual who desires to vote in the Republican Primary. A voters' party registration or party choice in the primary would be public record.

The question posed is whether a judge's registration in the closed primary violates Canon 5. Notably, Idaho's version of Canon 5 does not specifically prohibit a judge from announcing party affiliation. Some states such as Kentucky, Oregon and Washington have such a specific restriction in their canons, while other states such as Florida and Oklahoma have forbidden it by statute. The object of the restriction is that by registering as a member of a political party, a judge may be perceived as endorsing the candidates who ultimately receive the party nomination, even if the judge did not vote for the candidates. The ethical restriction is seen as preserving the appearance and reality of an impartial and independent judiciary, and furthers the public trust and confidence in the impartiality of judicial decision making.

There are a significant number of cases that have found unconstitutional, pursuant to the First Amendment, various ethical provisions with respect to campaigning and elections. An example is *Carey v. Wolnitzek* (6th Cir., Case No. 8-6468, July 13, 2010) wherein the U.S. Court of Appeals for the Sixth Circuit struck a regulation that prohibited judicial candidates from identifying their political party affiliation. In response to this decision, the Supreme Court of Ohio removed a ban on judicial candidates identifying themselves as a member of or affiliated with a political party. In the Court's official comment to the amended ethical rule, the Court advised "although these

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affiliations and others may be communicated to the electorate, a judicial candidate should consider the effect that partisanship has on the principles of judicial independence, integrity, and impartiality."

The Utah Judicial Council issued a formal opinion in 2002 allowing a judge to vote in a primary when participation is conditioned on party affiliation. The formal opinion noted as follows:

It could be argued that primary elections are political gatherings because, particularly as presently constituted, they are part of the parties' nominating process and their purpose is to bring together individuals with similar political philosophies. However, the Judicial Council believes that an election should not be considered a political gathering for purposes of the Code of Judicial Conduct.

The Utah Judicial Council found 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. The thought being that participation in the process would be known by a relative few persons and would have no impact on the impartiality of the judiciary. This conclusion is certainly subject to disagreement.

In light of the above-noted authority, and since Idaho does not have a *per se* restriction on a judge announcing party affiliation, the Idaho Judicial Council has determined that a judge is ethically allowed to register to vote in the Republican Primary election.

A judge in Idaho therefore has the following options available to him or her in light of this opinion and current law:

- 1) Not vote at all.
- 2) Vote with respect to the Democratic, Constitutional or Libertarian Parties' ballot
- 3) Register as unaffiliated and vote non-partisan ballot issues
- 4) Register as a Republican and vote with respect to the Republican Party ballot and thereafter maintain such party registration. Only registered Republican voters will be allowed to vote in the Republican Primary.
- 5) On election day, register as a Republican and the next day after the election declare yourself "unaffiliated" at the County Clerk's Office. Note: the Poll Book, a public record, will still record your vote and party affiliation in all circumstances.

Please see the Idaho Secretary of State website at "Idaho Primary Election - 2012" for more details.