

JUDICIAL QUALIFICATIONS COMMISSION
STATE OF GEORGIA

Public Comments for Proposed Formal Advisory Opinion 2021-01

Pursuant to Judicial Qualifications Commission (“JQC”) Rule 28.B (3), the JQC Hearing Panel is posting this proposed Formal Advisory Opinion on the websites of the JQC, the Administrative Office of the Courts, and the State Bar of Georgia to solicit public comments on the proposed opinion. Anyone who wishes may submit a comment on the opinion by e-mail to admin@gajqc.gov. The Hearing Panel will receive and consider comments through **July 6, 2021**.



Judicial Qualifications Commission
State of Georgia

FORMAL ADVISORY OPINION 2021-01¹
PARTICIPATION IN MARCHES, VIGILS, AND PROTESTS

Pursuant to Rule 28(B)(1) of the Rules of the Judicial Qualifications Commission (JQC), the Director of the JQC has requested that the Hearing Panel of the JQC issue an opinion on the recurring question of whether judges may participate in public marches, vigils, protests, and similar activities. The Hearing Panel concurs that a Formal Advisory Opinion on this topic is appropriate, given the issue’s interest to members of the judiciary and its impact on the public. JQC Rule 28(B)(2).

For the reasons set forth below, the Hearing Panel concludes that, in order to maintain public confidence in the independence and impartiality of our State’s judiciary, judges generally should not participate in such public events.

The first Canon of the Code of Judicial Conduct (“CJC”) demands that judges “uphold the independence, integrity, and impartiality of the judiciary...”² The prominence of this duty continues: the second Rule of the CJC directs that “Judges shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.” Rule 1.2(A) of the CJC.

¹ Beginning with this Formal Advisory Opinion (FAO), the first in 2021, the Judicial Qualifications Commission is adopting a new numbering system for its FAO’s. Rather than simply running FAO’s in absolute sequential order, the numbering will consist of the year in which the FAO was issued, followed by its sequential position for that year. Thus, FAO 2025-07 would be the seventh FAO issued in 2025. FAO’s from years prior to 2021 will be similarly renumbered.

² The Code of Judicial Conduct defines “impartiality” as the “absence of bias or prejudice in favor of, or against, a particular party, parties, or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.”

Indeed, the Rules themselves observe that “[a]n independent and honorable judiciary is indispensable to justice in our society.” Rule 1.2(B) of the CJC.

The Rules go further, to the point of specifically directing judges to refrain from staking out positions on issues that may come before them:

Judges shall not, in connection with cases, controversies, or issues that are likely to come before the court, make promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

Rule 2.10(B) of the CJC. The commentary to Rule 2.10 notes that the Rule’s restrictions on judicial speech are “essential to the maintenance of the independence, integrity, and impartiality of the judiciary.”³

The question thus presented when a judge considers whether she should join a public march, rally, or protest is whether such participation (1) is “judicial speech” which (2) constitutes a “commitment” on an issue that may come before the court.

The answer is that it almost always does. Marches are messages. Protests are politics. The decision to participate in a vigil or to join a rally conveys a message of identification with whatever issue is at stake. Simply being present in the group is an exercise of speech and an expression of belonging to a group of like-minded individuals who are staking out a position on an issue of public prominence. By walking with the marchers, by rallying with the protesters, or by standing with those in the vigil, the judge is making a quintessentially public declaration about some issue.⁴ The dilemma for judges is that these issues inevitably end up in the courts.

³ This question of participating in public marches, protests, etc., also implicates, albeit less directly, Rules 1.3 (prohibiting judges from lending the prestige of their office to their private interests) and 2.4(C) (“Judges shall not convey or enable others to convey the impression that any person or organization is in a position to influence the judge”) of the CJC.

⁴ The potential for judicial anonymity provided by the “cover” of a large group protest or march does not insulate the judge from this analysis. As the New York State Commission on Judicial Conduct has noted, “concealing one’s name and judicial status does not ordinarily render prohibited political conduct permissible.” New York Advisory Opinion 2016-85.

It is, of course, entirely possible for a judge to participate in a march or join a protest and maintain her impartiality about the issue motivating the marches or protesters. That is not the extent of the impartiality test, however; the inquiry is not limited to the internal operations of the judge's mind but extends to the public's perception of that judge. Recall Rule 1.2(A) of the CJC: "Judges shall act at all times in a manner that promotes *public* confidence in the independence, integrity, and impartiality of the judiciary." (Emphasis added.) When the local television station broadcasts footage of the vigil on the capitol steps and the keen-eyed reporter notes that Judge X was in the crowd, it is fair, reasonable, and natural for the public to assume that that judge has aligned herself with the cause being pursued. Mere presence becomes judicial speech that erodes public confidence in impartiality. Indeed, when judges join in such events, they are -- whether they intend to or not -- directly and physically connecting themselves in the public eye with the message and the politics of the moment. That is something they are not free to do, given the responsibility they have accepted as impartial, independent jurists in our State.

This view finds clear support in other jurisdictions. The Arizona Supreme Court's Judicial Ethics Advisory Committee has opined that

[i]f a judge participates in a march, rally, or protest focused on social, legal, or political issues that may become the subject of litigation ... a reasonable person may have cause to question the judge's independence and impartiality when making decisions about those issues ... in subsequent cases.

Arizona Advisory Opinion 18-06. Similarly, the New York State Commission on Judicial Conduct has concluded that

appearing at the candlelight vigil held for those affected by domestic violence would compromise the judge's appearance of impartiality in future cases because such activity suggests that the judge is sympathetic to the plight of victims -- when a judge is required to apply -- and appear to apply -- the law in a completely neutral fashion.

New York Advisory Opinion 2010-59. And, most currently, the Connecticut Committee on Judicial Ethics ruled that, because judges will be called upon to rule in cases involving claims of law enforcement misconduct, they may not attend a march protesting police violence against Black men, as “participation in this extrajudicial activity may appear to a reasonable person to undermine the judge’s independence and impartiality.” Connecticut Advisory Opinion 2020-03. *See also* Massachusetts Supreme Judicial Court CJE Opinion No. 2016-10 (advising against participating in marches with clear political overtones); New York Advisory Opinion 2017-38 (concluding that judges should not attend a march involving a “subject of public controversy”).⁵

Prior Georgia FAO’s also provide indirect support for this conclusion that judges should not participate in marches, protests, rallies, or vigils. In FAO 115, the JQC concluded that a judge should not serve on the advisory board of “End Violence Now”, a group advocating for certain policy improvement for dealing with intimate partner violence, including victim assistance and sentencing alternatives for abusers. In reaching its conclusion, the JQC noted that it “has consistently held that a judge should not become personally associated as an activist with particular causes which relate to issues which may come before him in his judicial capacity.” FAO 78, upon which FAO 115 relied, concluded that a judge may not co-sign a public letter calling for a mandatory treatment program for DUI drivers in Georgia, noting that “it is not appropriate for a judge to be personally associated with particular causes as an activist, no matter how worthy they may be.”

⁵ While the clear weight of opinion is against judicial participation in marches, rallies, and vigils, there is not unanimity among the states. *See, e.g.*, Opinion 96-16 of the State of Washington’s Ethics Advisory Opinion, authorizing a judge to attend a “Day of Remembrance” ceremony to recognize victims of intimate partner violence.

These same principles inform the JQC’s reasoning here: judges are not free to join public protests, marches, rallies, or vigils precisely because such participation risks creating the perception in the public’s mind that the judge is -- literally and conceptually -- an “activist” who is marching, walking, or otherwise actively participating in a public event promoting a particular cause. No matter how worthy or laudable that cause may seem, some aspect of it will eventually make its way onto the judge’s docket. And when that happens, the parties and the public will be justified in concluding that they are being deprived of an impartial and independent jurist who has not publicly staked out a position on the matter before him.

This limitation on public political expression may not seem fair to the judge who is passionate about an issue and who wants to support those who share his view. But that is a sacrifice the judge must make:

The prohibition on political activity is a heavy burden. However, it is one individuals must accept if they wish to take on the sensitive and critically important role of judges ... because it is absolutely necessary to maintain an impartial judiciary both in practice and perception.

New York Advisory Opinion 2017-38.

Of course, there is a balance to be struck. Not all outside public activities are off-limits for judges. Canon 3 of the CJC instructs judges to “regulate their extra-judicial activities to minimize the risk of conflict with their judicial duties.” Rule 3.1(C) in turn authorizes judges to engage in extra-judicial public activities, “provided that doing so will not ... cast doubt on their capacity to impartially decide any issue.” Thus, coaching a soccer team (or playing on one) or conducting a church choir (or singing in one) does not implicate the impartiality issues presented by protests, marches, or vigils. Similarly, joining in an apolitical public march -- like a parade celebrating a local sports team’s victory -- would generally be permissible.

In summary, the Commission concludes that judges should not participate in a public march, rally, protest, or vigil if:

- (1) attendance would cause a reasonable person to question the judge's independence or impartiality;
- (2) the event relates to issues or causes likely to be litigated, directly or indirectly, before the judge;
- (3) the event is organized or sponsored by entities or individuals who have clearly and publicly expressed views on issues or causes likely to be litigated, directly or indirectly, before the judge;
- (4) the event has ties to an individual or organization that practices invidious discrimination;⁶
- (5) participation could reasonably be viewed as supporting or opposing another candidate for public office or as speaking publicly on behalf of a political organization;⁷ or
- (6) participation will interfere with the proper performance of judicial duties or will lead to frequent disqualification.⁸

If the event the judge desires to attend violates none of the above conditions, then it is likely that the judge need not be concerned about any ethical violations should she ultimately choose to participate.

⁶ The CJC defines “invidious discrimination” as “any action by an organization that characterizes a person’s age, disability, ethnicity, gender or sex, marital status, national origin, race, religion, or sexual orientation as odious or as signifying inferiority, which therefore is used to justify arbitrary exclusion of persons possessing those traits from membership, position, or participation in the organization.”

⁷ The CJC defines “political organization” as “a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political or public office.”

⁸ These guidelines are developed from similar provisions articulated in Arizona Advisory Opinion 18-06.