

JUDICIAL COUNCIL OPINION

81-1

Hearing Date: November 15, 1981

Date Opinion Issued: April 15, 1982

Majority Opinion	Page 1
Dissenting Opinion	Page 7
Appendix	Page 12

Judicial Council members Alford, Greenberg, Hopfenbeck, Rosenberg, and Wilkerson delivered the majority opinion.

### Introduction

At a hearing on November 15, 1981, the Judicial Council granted Defendant's Motion to Dismiss based on the Council's lack of jurisdiction and dismissed the plagiarism charge against the Defendant. The Judicial Council made the following findings of fact and conclusions of law:

### Findings of Fact

1. The Defendant is a candidate for the degree of Juris Doctor.
2. The Defendant submitted a casenote in the writing competition held by the Northwestern University Law Review, Journal of Criminal Law and Criminology, and Journal of International Law & Business. The competition began on August 24, 1981 and entries were due on September 1, 1981.
3. Pursuant to the Honor Code, the Journal of Criminal Law and Criminology, in an undated letter, notified the Special Prosecutor of suspected plagiarism by the Defendant.
4. Professor Haddad, in response to the undated letter from the Journal of Criminal Law and Criminology, sent a memorandum on October 2, 1981 to the Student Bar Association President.
5. In accordance with Article II, Section 7 of the Honor Code, the Special Prosecutor conducted an investigation and presented his findings to the Student Bar Association Executive Committee. On October 26, 1981, the Executive Committee found probable cause for a complaint to issue.
6. On October 27, 1981, the Prosecutor served the complaint on the Defendant and notified the Defendant to appear before the Judicial

Council on October 28, 1981 at 7:00 p.m. The Prosecutor gave a copy of the complaint to the acting chairperson of the Judicial Council on October 28, 1981.

7. On October 28, 1981, the Judicial Council fulfilled the notice requirements of the Honor Code, Article II, Section 10 and proposed November 13, 1981 as a hearing date. The Defendant stated a desire to have the hearing as soon as possible. A Council member suggested that the Defendant consider the need for sufficient time to consult with the faculty advisor and to prepare a defense; however, the Defendant reiterated a preference to begin the hearing in three days. In response, the Prosecutor stated his refusal to present his case at a hearing beginning in less than seven days, which he deemed the minimum time necessary for the Defendant to review the evidence and prepare a defense. It was decided that the Prosecutor would tender his evidence to the Defendant the following day and that the parties and the Judicial Council would reconvene in two days, on October 30, 1981, to set a hearing date.

8. The Judicial Council, Prosecutor, and Defendant met on October 30, 1981 to set a hearing date. The Prosecutor stated that he was ready to present his case. The Defendant was not prepared to go forward with a hearing.

There was preliminary discussion about the Honor Code Article III, section 1 requirement that "All trials must be commenced within four weeks of the report of an Honor Code violation..." Initially the Judicial Council requested both parties to submit briefs and prepare arguments to be heard November 2, 1981 regarding interpretation of this section. However, the Judicial Council recessed and determined that this course of action was unnecessary and burdensome. At that time, the Council was aware that if

"report" were construed to mean the date of the report to the Prosecutor, then Article III, Section 1 had been violated already by not commencing trial on or before October 30, 1981. The Council concluded that it was impossible to have held a hearing comporting with minimum standards of fairness and due process on or before October 30, 1981. In light of the serious nature of the charge and the potentially severe consequences, the Council decided that the three days which had passed since the Defendant was served with notice were insufficient to have prepared a defense. The Defendant had had no opportunity to evaluate his/her own position or to consult an advisor. The Defendant's Article II, Section 14 rights to discovery had been fulfilled only the previous evening by the Prosecutor's tendering of his evidence. Emphasizing the equitable nature of its decision, the Judicial Council orally issued its opinion that a reasonable interpretation of "report" in Article III, Section 1 of the Honor Code was the date of service of the complaint on the Defendant. Thus, the Council found that Article III, Section 1 required that a hearing commence within four weeks from October 27, 1981, the date of service of the Defendant.

The Judicial Council set November 15, 1981 as the hearing date.

9. The hearing began on November 15, 1981. The Defendant moved under Article II, section 13 of the Honor Code to disqualify the chairperson of the Council. Following a recess of the Council, the chairperson recused himself. (See Appendix).

10. The Defendant moved to dismiss the complaint on the grounds that the Judicial Council lacked jurisdiction because trial had not commenced within the period mandated by Article III, Section 1 of the Honor Code.

### Conclusions of Law

1. In accordance with the directive of Article VI, Section 1 of the Honor Code, the Council decided that in construing provisions of the Code it would look only to the Code and interpret provisions with reference to one another.

2. The Honor Code, Article III, Section 1 provides that "all trials must be commenced within four weeks of the report of an Honor Code violation..." The Council determined that this provision is to be understood to require the commencement of trial four weeks from the time the prosecutor is notified of an alleged violation.

3. In light of Findings of Fact, paragraphs 3 and 4, the Council determined that October 30, 1981 was the last date on which trial could have commenced in order to meet the requirements of Article III, Section 1 of the Honor Code.

### Discussion

1. The Prosecutor contended that the word "report" in Article III, section 1 of the Honor Code should be understood as the date when the Defendant was served with the complaint. If this construction were accepted by the Council, the four week period within which trial must commence would have begun on October 27, 1981. The Council found that neither the plain meaning of the words in Article III, Section 1 of the Code nor the language of other Honor Code provisions support the construction proposed by the Prosecutor.

2. The Council determined that the plainly understood meaning of the words "report of an Honor Code violation" in Article III, Section 1 refers to the act of notifying the proper authority that a violation has occurred. The Council concluded that the word "report," as commonly used, does not denote service of a complaint on an accused.

3. The word "report" appears in only one other provision of the Honor Code: Article I, Section 3 instructs that "any student who witnesses an alleged Honor Code violation shall have a duty to (1) approach the accused violator and request that he/she report voluntarily to the Prosecutor, or (2) report the alleged violation to the Prosecutor." (emphasis added). The Council noted that the use of "report" in this section is consistent with our construction of Article III, Section 1.

4. Article III, Section 2 provides, "notwithstanding Section 1, any alleged violations arising at the end of a semester during the final examination period shall be investigated and brought to trial within, but no later than, four weeks after the date of the last scheduled examination." Pursuant to Article II, Section 7 of the Honor Code, the Prosecutor completes his investigation of an alleged violation before the complaint is served on the accused. Taken together, these sections indicate that the drafters intended that the period beginning with the investigation through commencement of trial was to be no more than four weeks.\*

5. In support of his proposed construction, the Prosecutor asserted that Article III, Section 1 of the Honor Code was patterned after a "speedy trial" provision. The Judicial Council recognized that Article III, Section 1 operates similarly to a traditional speedy trial provision to assure prompt adjudication of complaints. However, the Council noted that this Honor Code provision serves additional interests peculiar to the law school environment. The Council concluded that the purpose of this provision is to assure that both the investigation and resolution of an alleged violation are conducted in a timely fashion.

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\*See Report of the Student Honor Code Revision Committee, Commentary to Proposed New Article III, Sections 1 and 2, p. 100 (April, 1977). This Report was made available to the Judicial Council after the Council had reached the decision in this case. The Commentary indicates the accuracy of the Council's conclusion. ("The four week periods in Sections 1-2 will allow ample time for a full investigation of the alleged violation.")

### Conclusion

The Judicial Council recognizes that its final decision reverses its oral opinion issued on October 30, 1981. The decision reached by the Council on October 30 was a consequence of the inequities which would have resulted by proceeding to trial on that date. See Findings of Fact, paragraph 8. Nevertheless, the Council's final ruling is based on a careful reading of the Honor Code as a whole. We firmly believe that this is the correct interpretation of the Code and that this holding reflects the purposes of the provision in Article III, Section 1 as drafted.

Judicial Council members Grant and Haddix delivered the dissenting opinion.

We must respectfully dissent. The decision of the Council to dismiss this complaint for failure to comply with Article III, Section 1, the "speedy trial" provision, misconstrues the demands of that article. Furthermore, even if the majority's interpretation of the Code were correct, we feel that proceedings in this matter commenced at a sufficiently early date to meet the demands of the Code.

Article III, Section 1 does speak plainly: All trials must be commenced within four weeks of the report of an Honor Code violation . . ." (emphasis added). The purpose for this provision is not set forth in the commentaries to the Code, but may be assumed to reflect a general policy of resolving the doubt and controversy over an Honor Code violation as quickly as possible.

Neither the article nor the commentaries, however, make clear what is meant by the key word, "report." According to the majority, "report" means that time at which the SBA prosecutor is informed of an alleged Honor Code violation. Referring to Article II, Section 1, however, we find that the word "charge" is used to designate this time. Thus, according to the Code, the time when a prosecutor first learns of a violation is the "charge." If the drafters of the Code had meant to require that all trials must commence within four weeks of this time, it is safe to assume that they would have used the word "charge" in Article III, Section 1. Having taken the trouble to define that term and then to use it many times throughout Article II in setting forth rules for pre-trial procedure, it would have been natural for the drafters to employ the same word in the succeeding article in setting time for the commencement of trials. The fact that a different word was used -- the word "report" -- indicates to us that the drafters had some different point in mind.



The drafters did not make this explicit; one hopes that a future amendment to the Code might clarify this matter. In the absence of such clarity, however, we think it natural to interpret Article III's speedy trial requirements in conjunction with the provisions of Article II regarding pre-trial procedure. Reading the two Articles together makes the majority's interpretation of Article III even more improbable.

Article II, Section 7, for instance, makes several requirements. A prosecutor must "fully investigate the facts and allegations, conduct interviews of potential witnesses and consult on an ongoing basis with the faculty advisor." Within a reasonable time of receipt of the charge, a prosecutor must report to the Executive Committee of the Council, which may either request more investigation on the part of the prosecutor, replace the prosecutor, or make a determination of probable cause. If such a determination is made, then the provisions of Article 8 require, that, again within a reasonable time, a formal complaint be drafted and be served upon the accused and the Council. The accused is to be provided (see Section 10) with information on the nature of the allegation, the known witnesses, his rights and the time, date and procedure for a hearing. The accused must also decide whether to represent himself or to retain counsel.

The Honor Code, therefore, contemplates a regimen of pre-trial procedure that is inconsistent with the speedy trial requirements that would be imposed by the majority. Although the questions in this case were fairly simple and perhaps may have been capable of speedier resolution in the pre-trial phase, we do not think it is consistent with the Code granting of "reasonable time" to require that all of the above-listed tasks be accomplished within four weeks of a report to the Prosecutor.

Service as Prosecutor is, thankfully, very much a part-time job.

The law student who holds the post may be expected to have, in addition to class work, the normal regimen of interviews, clinic or outside employment and other responsibilities that fall to third-year students.

The responsibilities of the office must necessarily be carried out with dispatch, but to require the completion of all the requirements of Article II, Section 7 within less than a month's time is simply not reasonable.

If the Code were only capable of one interpretation, our opinion as the "reasonability" of its provisions would be irrelevant. However, as to the deliberations of this body made clear, the Code is capable of at least two interpretations with regard to its speedy trial requirements. Reading those requirements in conjunction with closely related provisions of the Code convinces us that the majority's interpretation violates the standard of reasonableness that those other provisions of the Code suggest. It would be far more reasonable to interpret "report" to mean the time of service of the complaint.

Furthermore, we feel that this trial commenced on October 30, 1981, within four weeks of the report of this violation to the SBA Prosecutor. It was indicated at oral argument that the charge was filed with the SBA Prosecutor on or around October 2, 1981, exactly four weeks before October 30. In that time, a Special Prosecutor had to be appointed, as the regular Prosecutor was unable to handle this particular incident. The requirements of Article II for pre-trial procedure were met and on October 26 a complaint was served upon the Defendant and the Council. It should also be noted that for most of the month of October, there were no third-year members of the Council, due to a lack of interest at the time of elections. The appointment of these three persons added to the duties that, according to the majority, would have to be completed within four weeks of the date of the charge.

Finally, on October 30, the full Council met with the Defendant, Prosecutor, and defense counsel to commence these proceedings. After informal discussion at which the speedy trial requirements of the Code were discussed, the Prosecutor indicated that he was ready at that moment to proceed with his case. The Defendant was less clear on his/her level of preparation, but did indicate that he/she would be able to go forward that night should the Council require. The Council deliberated and reached a consensus that pushing the trial ahead on that Friday night would be unfair to the Defendant. The Defendant would benefit from extra time to prepare his/her case, and from the attention of a more alert and prepared Council, a full third of which had been appointed only two days earlier. The date for continuation of the trial was set for November 15th in order to accommodate the travel and interview schedules of several people, notably the Defendant. When the issue of Article II, Section 1 was brought up, it was our understanding that the Council felt that this session on October 30 had "commenced" the trial.

Apparently, the majority feels that a different understanding was reached on that evening. The obvious retort would be a query as to why we didn't write everything down or have a court reporter. The answer is that this wasn't possible given the time constraints.

Although we agree that the entire procedure should have been conducted in a more orderly fashion, it remains true that such proceedings are exceedingly rare and thus, cranking up the machinery contemplated by the Honor Code takes some time. We feel that a best effort was made by all concerned to expedite the trial in a reasonable speedy fashion, reasonable from the perspective of getting the matter settled, and reasonable from the perspective of fairness to the Defendant in preparing his/her case. In our view,

the Defendant took advantage of this flexibility on the part of the Council, first agreeing to a continuation of the trial on October 30, and then moving on November 15, the agreed-upon trial date, for dismissal on grounds of Article III. After first adopting a flexible attitude in setting this date, the Council turned around on November 15th and adopted a rigid attitude that made the proceedings on that date, and the preparation that went into them, a waste of time. In short, the Council changed its mind on the meaning of Article III between the time of October 30 and November 15. Having made agreement to continue the trial on November 15, the Council should have abided by that agreement.

## Appendix

By McDermott, Chairperson of the Judicial Council

Article II, Section 13 of the Honor Code provides: "Before the hearing, the accused may move (a) that any Judicial Council member disqualify himself/herself because of prejudice." Section 13 also provides that after hearing argument on such motion, the Judicial Council will issue a written opinion expressing its decision.

On October 28, 1981 the Judicial Council fulfilled the notice requirements of the Honor Code, Article II, Section 10. Following this notification to the Defendant of his rights under Section 10, the Defendant was also alerted to his/her Section 13 right to request disqualification of any Council member because of prejudice. At that time the Chairperson of the Council, who is also a Note and Comment editor on the Journal of Criminal Law and Criminology, explained that several weeks earlier he had learned that a controversy existed concerning a writing competition submission. The Chairperson told the Council and the Defendant that he had never read or reviewed any portion of this submission but that he had discussed it with another Journal editor who had seen it. At this point in the proceedings, neither the Chairperson nor any other Council member knew that the charge against the defendant was related to this particular writing competition submission. The Chairperson did not participate in any formal or informal Journal of Criminal Law and Criminology action taken with regard to the submission. Additionally, the Chairperson disclaimed any bias against the Defendant, either on the grounds of his position as a Note and Comment editor on the Journal or because of any prior knowledge which he had. The Defendant then declined to request disqualification of the Chairperson or any other Council member.

However, at the hearing on November 15, 1981 Defendant's counsel moved that the Chairperson disqualify himself. The basis of this request was that since the charge of plagiarism was derived from a referral by the Journal to the Executive Committee, the Chairperson -- as a Journal editor -- was inevitably placed in the position of an "accuser sitting in judgment of the accused."

The Council then recessed to discuss this issue in chambers. The consensus was that while no grounds existed to suspect any real bias on the Chairperson's part, proper consideration must be accorded to the appearance of fairness and impartiality. Several members found that the appearance of fairness had not been legitimately called into question and accordingly argued that disqualification was unwarranted. The Chairperson, weighing the factors cited by the other members, opted to disqualify himself and thereby remove the issue of bias from the remainder of the hearing and as a possible issue for appeal. The Chairperson believed that any suspicion by Defendant or his/her counsel that the Chairperson was unable to conduct a fair hearing, regardless of the accuracy of this assessment, would undermine the final verdict of the Council.

The Chairperson relinquished the Chair to the Vice-Chairperson who replaced him for the remainder of the proceedings against the Defendant.