

PHOTOGRAPHY BY TOD MARTENS

# *the* Big Bopper

This Terre Haute Lawyer Is Exploding the  
Canons of Judicial Campaign Ethics

TERRY CARTER

**J**AMES BOPP JR. IS DRIVING HIS SIX-YEAR-OLD LINCOLN LS past the Vigo County Courthouse in Terre Haute, Ind. The huge limestone neo-Baroque structure looms over much of an otherwise sparse area at the edge of downtown.

Bopp frequented the building when he augmented his fledgling general practice as a part-time prosecutor in the late 1970s. Along with personal injury cases, he handled welfare fraud. He is believed to have gotten the first murder conviction there against a woman; he also put away the youngest murder defendant, age 16. Bopp's practice has mostly outgrown the old courthouse, now only an occasional venue for him in state election law matters.

"It dawned on me a few years ago that I no longer have any clients in Terre Haute," says Bopp—except for the estates of his late father and father-in-law.

The 58-year-old Bopp now ranges so far from home that he soon will have argued in every federal circuit. It's hard to imagine anyone other than, say, a career appellate lawyer with the National Labor Relations Board pulling that off.

He has argued four cases at the U.S. Supreme Court and won three of them. He's taken on the Federal Election Commission in 11 cases, winning seven and part of two (two are pending).

All that with a shingle hanging in Terre Haute. Like many American cities, particularly in the heartland, it has struggled for reinvention in the face of decline. The city's population is steady now at about 60,000. Driving past some of the sites,

Bopp ticks off a list of manufacturers that have left since he was a boy. The aluminum and steel fabricating plants have shut down, the Pfizer drug plant vastly scaled back, and the tally goes on. The federal prison remains as a major employer, after expanding when the government moved its death row there in 1999. Timothy McVeigh drew his last breath there in 2001.

It also is a college town, where the legendary Larry Bird played for Indiana State University in the late 1970s. The school boasts the biggest homecoming parade in the country, which booms along Wabash Avenue and past the former Merchants Savings & Loan at the corner of South Sixth Street.

Bopp bought the building in 1997 for Bopp, Coleson & Bostrom, now at its biggest with 10 lawyers. The others are not partners; he is sole proprietor. They also constitute the James Madison Center for Free Speech, a political litigation arm reaching all over the country. Half of his litigation comes through the privately funded center.

### THE MAN BEHIND THE MACHINE

NATIVE SON JIM BOPP IS PROBABLY TERRE HAUTE'S MOST significant new industry in the past generation. The impact, political and economic, is almost wholly elsewhere.

He has become perhaps the most prominent lawyer in the country in campaign finance and election law, especially as the go-to-guy for conservative religious groups wanting to work within the system, but work it for sure.

Most recently, Bopp has been on a tear to make judicial campaign speech more wide open and more like that for the other branches of government. He wants judges and candidates to say what they think, especially about abortion, assisted suicide and same-sex marriage. Some states' judiciaries are convulsing in their attempts to deal with the pressures and lawsuits he is bringing to bear.

Over the years, Bopp says, he has brought, or occasionally defended, 75 campaign finance and election law cases in 35 states—concerning all branches of government. Of 56 decided on the merits, he has won 49.

In all this, Bopp is unabashedly about abortion. His motivation isn't religious—he is a Methodist, but not evangelical. As a boy, he was steeped in the medical profession's responsibility and sanctity for life. His father, grandfather and uncle were physicians in Terre Haute, and he hoped to follow them. But Bopp was dispatched to another career by second-semester organic chemistry.

As far as his clients are concerned, Bopp is doing the work of the Lord—many of them think that literally. And he bedevils his opponents.

Bopp stands 6-foot-1-inch and has a full head of silver, blow-dried hair parted nearly in the middle. For an interview, he's

in his usual, casual attire—khaki pants and a gray polo bearing the logo "Republican National Committee 2000." He's still on the committee and involved in crafting the Republican platform. When a photographer shows up another day, he's in a light-blue dress shirt and tie.

Bopp sometimes speaks in halting fashion when addressing a topic of substance, often repeating the last few words to build on them. It's as if he's making an appellate argument. He is soft-spoken and unassuming—at least until the passion kicks in on particular points and the volume is dialed up. He sometimes does that in court.

That passion and his talent for creative maneuverings keep bringing the highest-profile matters to his door. Most recently the Texas Republican Party tapped him in its bid to get Tom DeLay, the former House majority leader, off the November congressional ballot. They may have recalled that Bopp came up with the cause of action that George W. Bush's lawyers ultimately used to sway the U.S. Supreme Court and give the presidency to Bush in 2000.

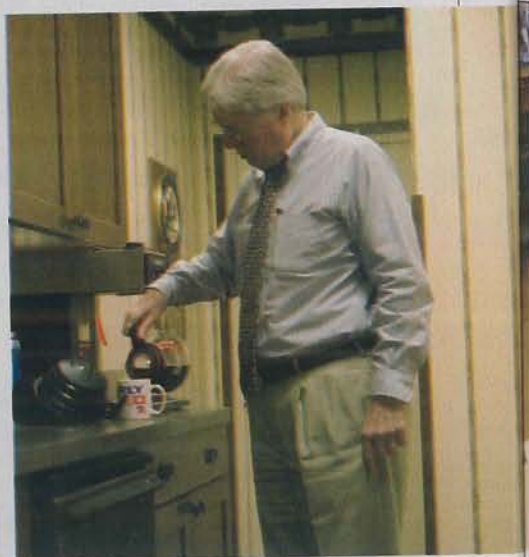
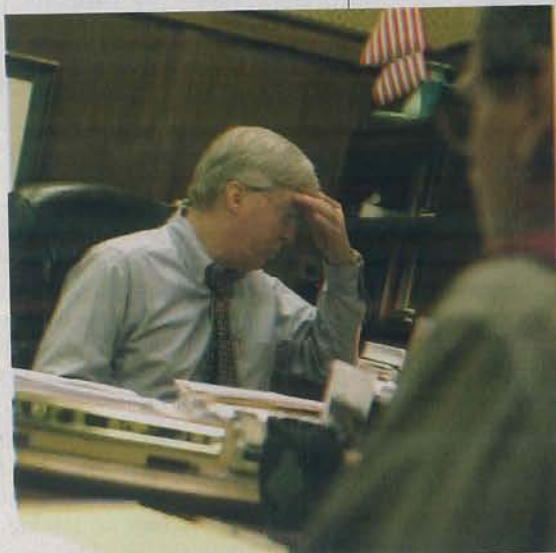
Bopp could easily be earning top dollar in Washington, D.C. But he's third-generation Terre Haute and it's where he and his wife, Tina, chose to raise their three daughters.

"Everyone thinks that if you have a problem with the federal government, you need to hire a D.C. lawyer," he says. "But I have a ton of clients there. And, of course, other people all over the country."

### A FREE SPEECH SPRINGBOARD

BOPP HAS BEEN LEVERAGING HIS JUDICIAL CAMPAIGN speech cases off his biggest win in the Supreme Court, *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). He adopted someone else's loser of a case from a federal circuit and, to the surprise of many, got the high court to reverse it and strike down the "announce clause" in the state's judicial canons. The court ruled that the clause violated the First Amendment rights of judicial candidates by prohibiting them from announcing their views on disputed legal or political issues.

Although many states had already removed the announce clause from their canons, related restrictions often remain, such as prohibitions against judicial candidates making



“pledges,” “promises” or “commitments” on controversies or issues that are inconsistent with impartiality on the bench. Bopp is extending his First Amendment argument to those, too.

He also is challenging, with success thus far, canons prohibiting partisan activities and direct solicitation of campaign funds by candidates.

“I think there is a limit on what judicial candidates can say that does not apply to the other branches of government,” he says. “Judges decide on the facts and law. The legislature can ignore the facts and change the law.” (He laughs as he delivers that last line.)

“Judicial candidates can be prohibited from saying ‘I’ll throw all drunk drivers in jail’ or ‘I’ll overturn *Roe v. Wade* if given the chance,’ but they should be able to say ‘I’m pro-life,’” he says.

Bopp says that while his clients want to know a candidate’s personal values on issues such as abortion, they expect judges to follow the facts and law wherever they lead. He also knows that judges make common law. And their personal values cannot help but influence them in those endeavors.

“Anybody who tells you it doesn’t matter what judge you get is a fool,” Bopp says. “Judges have discretion. Their personal opinions matter and their views matter.”

He points to the 1986 retention-election loss of California Supreme Court Chief Justice Rose Bird. She was hounded off the bench by interest groups upset that during her tenure the court reversed 59 of 64 death penalty sentences. Bird voted to overturn all the cases.

“Somewhere around 20 or 30 or 40 people got the

idea that, ‘Well, she’s flat-out against the death penalty,’” Bopp says, his voice rising an octave and into a shout. “She used her position contrary to the law. The people had a referendum and wanted the death penalty, and the court had not ruled that unconstitutional.”

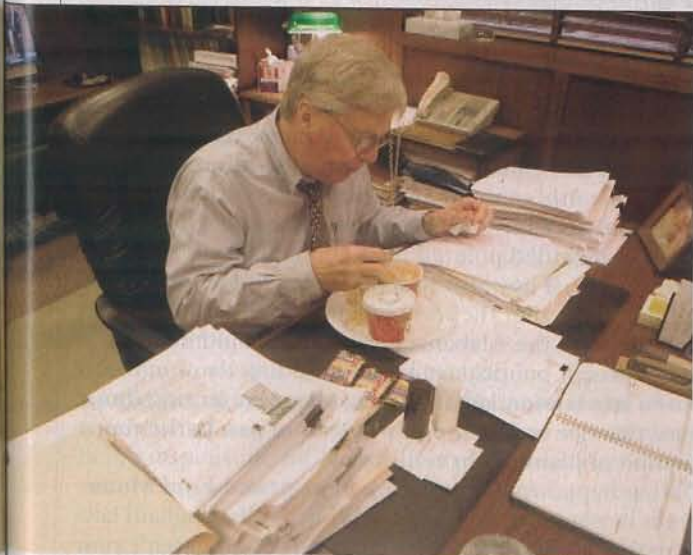
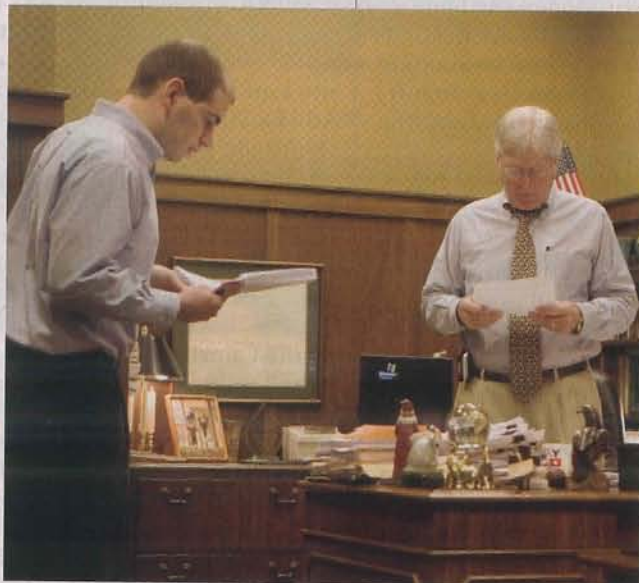
Judges making law according to the values of the people is a good thing, Bopp says.

On the heels of Bopp’s win in *White*, the ABA House of Delegates in 2003 amended the Model Code of Judicial Conduct to comply with the decision and launched a commission to work on the first sweeping revision of the judicial canons since 1990. The ABA Joint Commission to Evaluate the Model Code of Judicial Conduct was originally scheduled to submit proposed revisions for the association’s House of Delegates to consider at its midyear meeting in 2005. Then 2006. The final draft recently was completed and is expected to be a go at the 2007 midyear meeting. Bopp has appeared before the commission and offered detailed written suggestions.

Despite his efforts, the commission is holding its ground on concerns about promises, pledges and commitments by judicial candidates. “We think that there’s a direct

correlation between expressing one’s views and potential for disqualification,” says Mark Harrison, a Phoenix

*Anchored in Indiana, Bopp and his privately funded political litigation center have made waves across the country.*



lawyer who chairs the commission.

In fact, Justice Anthony M. Kennedy, in his concurrence in the *White* case, wrote that states “may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.”

Bopp says if that happens, he will sue over the disqualification standards. He believes candidates and judges should be able to say what they think, and then be expected to act according to the law and facts.

“I don’t think he’d admit this, but he wants judges who are ideologically accountable, which is inimical to the Constitution,” Harrison counters.

### OF CLARITY AND QUESTIONNAIRES

BOPP IS ALSO FORCING THESE ISSUES IN THE COURTS WITH the use of interest-group questionnaires being sent to judges up for retention or re-election and to their challengers.

It’s an issue he understands from the inside out, since he has created and vetted such questionnaires for conservative groups like the Florida Family Policy Council, which is affiliated with Focus on the Family, a national group with an evangelical mission that includes “helping to preserve traditional values and the institution of the family.”

The groups sending questionnaires clearly are looking for candidates who will rule the way they want on abortion and other issues on their agenda, says George T. Patton Jr., a Washington, D.C., lawyer with an Indianapolis firm who has faced Bopp in judicial campaign cases.

“I call it ‘nudge-nudge, wink-wink,’” he says of the argument that they can say what they want, and still be impartial and follow the law.

For example, a questionnaire sent by the Florida Family Policy Council to judicial candidates this summer asks about such topics as marital status, number of children and charitable donations. It asks which current U.S. Supreme Court justices reflect their judicial philosophy and the same for Florida’s high court.

The questionnaire also cites and details Florida Supreme Court decisions on abortion, assisted suicide and gay adoption. Respondents are asked to check one of the following: agree, disagree, undecided, decline\*, refuse to respond.

The asterisk by “decline” refers to a nearly 200-word footnote indicating that respondents would answer the question but believe it would subject them to recusal from certain cases because of Florida’s judicial canons.

Three Florida Supreme Court justices running for retention election declined to respond to this questionnaire, noting in their Aug. 22 statement that doing so “could be interpreted as a position on an issue that may come before the judge.”

The Florida Family Policy Council, represented by Bopp, filed suit six days later. It claims sections of the state Code of Judicial Conduct are unconstitutional insofar as they are being used to prohibit judicial candidates from expressing their views on important issues. *Florida Family Policy Council v. Freeman*, No. 4:06CR395 (N.D. Fla.).

In Bopp’s favor is an emerging body of case law based on his Supreme Court win in the *White* case, most recently a ruling by a Kansas federal judge that the state’s ethics advisory panel has led to unconstitutional prohibitions on campaign speech by candidates for the bench. The ruling is on appeal. *Kansas Judicial Watch v. Stout*,

No. 06-4056-JAR (D. Kan. July 19).

Hoping to keep judicial elections on the high road—and out of the courts—an advisory committee for the National Center for State Courts sent a memorandum to state chief justices Aug. 28, detailing possible ways to deal with the proliferation of questionnaires.

The advisory memorandum was dated the same day Bopp filed suit in Florida. It offered five guidelines. Perhaps the most important one says: “Never use a judicial canon to justify a decision not to respond. Since *White*, interest groups have successfully litigated (in four states, with two more pending) to strike down canons that are read as prohibiting responses to their questionnaire, with recovery of costs and fees from the states.”

Indeed, if Bopp wins these cases, and he usually does, he often collects legal fees from the other side. His biggest payday by far came with the *White* case: \$867,000.

“The state judiciaries are providing him a living, and it’s the damndest thing I’ve ever seen,” says Jan W. Baran, a prominent Republican election-law lawyer in Washington, D.C. He also is a member of the ABA commission revising the canons. “They keep on reading the Supreme Court’s decision in *White* very narrowly and pushing these codes that just invite constitutional challenges.”

Roy Schotland, a professor at the Georgetown University Law Center and a member of the NCSC’s National Ad Hoc Advisory Committee on Judicial Campaign Oversight, believes Bopp is “in denial that judges and candidates are lawyers who are professionals and have views of the role of a judge that differ from his, and the rule of law depends on their protecting that view.”

Bopp does seem to have the judiciary tied in knots. Or maybe he’s just pulling tight the already entangled strings.

He is always looking for the next fight. Bopp represented the Christian Coalition for several years but has since parted ways. To obtain tax-exempt status, the Christian political advocacy group entered an agreement with the IRS in 2005 that Bopp doesn’t care for. It calls for reining in the strongly political and ideological nature of questionnaires in all campaigns, as well as curtailing techniques for coercing certain responses.

Among the settlement requirements: Candidates should be permitted to give at least 25-word responses rather than be required to give yes or no answers to detailed questions. Questions should not be altered and should be reprinted in full along with answers provided in voter guides. And candidates should get at least 21 days to answer.

Christian Action Alabama, a Bopp client that was dropped as an affiliate of the Christian Coalition in August, recently sent out an aggressive questionnaire that was its undoing with the national group. The 39 questions included pointed ones about abortion and assisted suicide. They also added a new wrinkle, asking candidates whether they would agree to this pledge: “As a candidate for the Alabama judiciary, I should not and will not accept political contributions, directly or indirectly, from any lawyer, law firm or agents representing those whose practice is devoted in whole or in part to the representation of plaintiffs in civil action.”

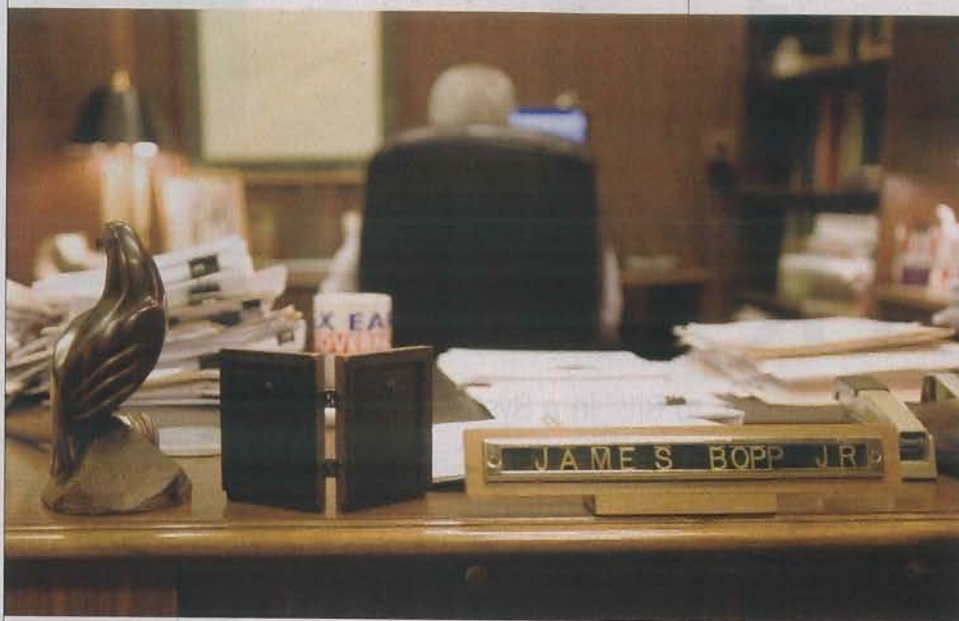
“What happens when Alabama Power and Ford Motor Co. get in a lawsuit?” asks Mark White, a Birmingham lawyer on the NCSC’s ad hoc committee. “Those aren’t your

typical plaintiffs lawyers, but they fit this definition. The problem with these things isn't so much the questions; it's trying to dictate what the answers are."

Bopp says he is ready to do battle over the Alabama group's questionnaire and others like it. But he doesn't expect it to occur. "The IRS picks its battles, and I don't think they'd be confident of winning this one," he says.

#### THE FIGHT ON OTHER FRONTS

THROUGH THE 1980S AND '90S, BOPP TARGETED THE LEGAL lines between "express advocacy," meaning ads touting particular candidates by name, and "issue advocacy."



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—James Bopp

Congress could constitutionally ban corporate contributions supporting the former kind of advocacy, but not the latter, under the Supreme Court's 1976 decision *Buckley v. Valeo*, 424 U.S. 1. Bopp started out representing the National Right to Life Council and its affiliates but, as his belt became heavy with pelts, others, such as the Christian Coalition, came to him.

These groups wanted to lobby on issues—usually anti-abortion—during political campaigns. The first widespread use of voter guides, by the National Right to Life Council and its affiliates in 1980, was seen by many as being responsible for Ronald Reagan's come-from-behind victory to gain the presidency. The guides came out during the 10 days before the election. "And remember," Bopp says, "they also helped Republican challengers defeat 12

incumbent senators. That was huge."

The Federal Election Commission wanted to make sure those ads didn't somehow, though pretending otherwise, advocate the election or defeat of a particular candidate.

In one of his biggest wins against the FEC, on First Amendment grounds, Bopp knocked down a regulation that voter guides must not "suggest or favor any position on the issues covered" or add any "editorial opinion." *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991).

But Bopp's string of successes ended on Dec. 10, 2003. That's when the Supreme Court decided *McConnell v. FEC*, 540 U.S. 93, which upheld the Bipartisan Campaign Reform Act of 2002, known as the McCain-Feingold Act. He represented some of the plaintiffs, but did not argue the case.

The act includes a ban on nonpartisan issue ads by corporations and labor unions that refer to candidates for federal election without expressly advocating election or defeat, beginning 60 days before general elections or 30 before primaries. That went to the heart of voter guides. It would be hard to overestimate their significance.

"I don't think he has got his footing back yet after that loss," says Trevor Potter of D.C., an ex-chairman of the FEC. "And he's trying to do that with all these so-called grassroots cases, which are just the same old issue advertising with a new label."

Indeed, Bopp has been trying to chip away at *McConnell* with his argument that the ban on nonpartisan issue ads before elections cannot constitutionally be applied to "grassroots lobbying" ads. This year the U.S. Supreme Court gave Bopp a victory in that area, allowing him to pursue an "as applied" challenge by Wisconsin Right to Life. *Wisconsin Right to Life v. FEC*, 126 S. Ct. 1016 (Jan. 23).

"He is the Energizer Bunny of campaign law reform," says Norman Ornstein, a scholar and political analyst at the American Enterprise Institute for Public Policy Research in D.C. and principal author of significant sections of McCain-Feingold. "Whenever he loses, he just files more and more lawsuits."

It is in judicial elections that the Energizer Bunny's drum is banging longest and loudest these days. Bopp's courtroom opponent, Patton, believes the judicial campaign speech issues may end up before the Supreme Court.

Bopp says he's eager for that so he can move on to something else. "I just want them to get it right," he says of those fighting him to keep pure politics out of judicial elections. "There are plenty of other issues out there we can fight over. I have clients who want to fight over [same-sex] marriage. We can fight over abortion and assisted suicide, or whatever, until we get those right." ■

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