



Symposium On Judicial Campaign Conduct And The First Amendment

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Symposium on Judicial Campaign Conduct and the First Amendment Chicago, Illinois November 9-10, 2001

The Symposium on Improving Judicial Campaign Conduct was recommended in the [Call To Action](#) issued by participants in last year's Summit on Improving Judicial Selection. (The [Call To Action: Statement of the National Summit on Improving Judicial Selection – Expanded Edition with Commentary](#) is also available on-line (*click on title*). A hard copy is available by contacting the National Center for State Courts at research@ncsc.dni.us.) The Symposium addressed two problems shown to be acute during last year's judicial elections. First, while the canon limiting what judicial candidates can say in campaigns traditionally regulated candidates' conduct, court decisions over the last decade have limited the canon itself. Second, participation by non-candidates in judicial campaigns is at unprecedented levels, presenting a major challenge to effort to keep judicial elections different. The relationship between these two problems, and the complexity of each, are the reasons for this Symposium of experts, Chief Justices, other judges, and legislative leaders.

The objective of the Symposium was not to air academic issues about the relationship between the First Amendment and judicial campaigns. Rather, the Symposium was structured to redesign and fine tune methods that, without infringing on the First Amendment, ensure that the people's right of access to an impartial judiciary is not compromised by judicial campaign activity.

Indiana Chief Justice Randall Shepard chaired the Symposium, working with a steering committee of five other state chief justices and Professor Roy Schotland of Georgetown University Law Center. The National Center for State Courts was responsible for the organization and delivery of the Symposium.

Briefing papers circulated in advance of the Symposium provided facts, set out the key issues, and, where possible, proposed practical actions that met the objectives of the Symposium. The papers, and commentaries commissioned on each paper, maximized the time for focused debate and deliberation. The main themes that were addressed are:

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- **Television Ads in Judicial Campaigns** by Professor Anthony Champagne – ([Executive Summary available in PDF format](#))
- **The Effects of Media-Based Campaigns on Candidate and Voter Behavior: Implications for Judicial Elections** by Professor Shanto Iyengar of Stanford University (a comment on *Television Ads in Judicial Campaigns*) - ([Executive Summary available in PDF format](#))
- **The Canons in the Courts: Recent First Amendment Rulings** by Professor Robert O'Neil of the University of Virginia School of Law - ([Executive Summary available in PDF format](#))

- ***Restrictions on the Speech of Judicial Candidates Are Unconstitutional*** by Professor Erwin Chemerinsky of USC Law School (a comment on *The Canons in the Courts: Recent First Amendment Rulings*) - ([Executive Summary](#) available in PDF format)
- ***“If Elected, I Promise [_____]” – What Can Judicial Candidates Say?*** by Professor Stephen Gillers of New York University Law School (a comment on *The Canons in the Courts: Recent First Amendment Rulings*) - ([Executive Summary](#) available in PDF format)
- ***Constitutional Issues in Disclosure of Interest Group Activities*** by Deborah Goldberg and Mark Kozlowski of the Brennan Center at NYU Law School - ([Executive Summary](#) available in PDF format)
- ***Compelled Disclosure of Independent Political Speech and Constitutional Limitations*** by Jan Baran, Esq. (a comment on *Constitutional Issues in Disclosure of Interest Group Activities*) - ([Executive Summary](#) available in PDF format)
- ***Judicial Campaign Conduct Committees*** by Barbara Reed of the Constitution Project and Professor Roy Schotland of Georgetown University Law Center - ([Executive Summary](#) available in PDF format)
- ***Some Reservations About an Elegant Solution*** by Professor Steven Lubet of Northwestern University School of Law (a comment on *Judicial Campaign Conduct Committees*)
- ***Public Funds or Publicly Funded Benefits and the Regulation of Judicial Campaigns*** by Professor Richard Briffault of Columbia University Law School - ([Executive Summary](#) available in PDF format)
- ***A Commentary on Public Funds or Publicly Funded Benefits and the Regulation of Judicial Campaigns*** by Professor Lillian BeVier of University of Virginia School of Law

These briefing papers and commentaries will be forthcoming in 2002 in the *Indiana Law Review*.

The agenda and a list of participants are also available in PDF format.

- [Symposium Agenda](#)
- [Symposium Participants](#)

An agreed Statement modeled after the Call To Action will be drafted. With commentary and annotations, the Statement will serve as a roadmap for states intent on more effective regulation of campaign conduct or under threat of suit.

The [Call To Action: Statement of the National Summit on Improving Judicial Selection – Expanded Edition with Commentary](#) is now available on-line (*click on title*). A hard copy is also available by contacting the National Center for State Courts at research@ncsc.dni.us.

If you have any questions about the Symposium, please contact David Rottman at the National Center for State Courts. He can be reached at:

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Television Ads in Judicial Campaigns by Anthony Champagne

Executive Summary

- Judicial campaigns are becoming “nastier, noisier, and costlier.”
- Television has become the major venue for modern supreme court campaigns.
- The only available data suggest that television ads are remarkably effective in influencing voters in judicial campaigns.
- In the 2000 elections, non-candidates as well as candidates were heavily involved in broadcasting judicial campaign ads. Of 55 ads that were examined, 28 were candidate-sponsored; 10 were sponsored by political 14 by business interests; and 3 by plaintiffs’ attorneys and unions. Those 55 ads were shown 13,023 times—6,052 of parties; those broadcasts were sponsored by non-candidates.
- Unlike ads sponsored by candidates, non-candidate ads are not subject to the Canons of Judicial Ethics—and those ads tended to be much more overt in discussing legal issues and in attacking opponents.
- Signaling the attitudes and values of judicial candidates, even in candidate-sponsored ads, was common.
- The ads emphasized three major themes: (1) Crime control; (2) Tort law; and (3) Family values. Twenty-three of 55 ads emphasized crime control, 12 of those ads were candidate-sponsored. Twenty-one of 55 ads stressed tort law issues, 5 of which were candidate-sponsored. Nineteen of the 55 ads discussed family values and 7 of the ads were candidate-sponsored.
- Attack ads were common. There were 17 such ads, two of them sponsored by candidates. One technique of the attack ad was to focus on an unpopular decision made by a judge. Eight ads attempted to reply to and rebut the attack ads. Of the eight, one was candidate-sponsored.
- Only 8 ads (all candidate-sponsored) avoided signaling the candidates’ attitudes and values, avoided attacking the opponent, and stressed the traditional themes of experience and judicial qualifications.
- The most important aspect of judicial television ads in 2000 was the involvement of interest groups. Their involvement has added to the viciousness of judicial campaigns and has emphasized tort law issues.
- Modern judicial politics will continue to involve television in campaigns, leading to the problem that judicial candidates may have to appeal more to the support of vastly opposing interests. This, in turn, may lead to less moderation in judicial decisions.

The Effects of Media-Based Campaigns on Candidate and Voter Behavior: Implications for Judicial Elections

by Shanto Iyengar

Abstract

This comment addresses the reasons for the increased prominence of advertising in judicial elections and the likely consequences for candidates and voters. I attribute the importance of advertising to the insufficient “newsworthiness” of judicial races (from the perspective of media sources) and to the desire of consultants to expand their client base.

Social scientific studies of the effects of advertising in non-judicial races suggest that exposure to advertising makes voters more familiar with the sponsoring candidate(s), and directs their attention to specific issues or topics which then become the principal yardsticks for evaluating the candidates. By running ads on crime, voters choose on the basis of the candidates’ credentials as crime fighters. But advertising also affects attitudes toward the political process. In particular, the spectacle of negative campaigns—in which candidates attack and demean their opposition—foster political cynicism, thus reducing turnout.

In closing, I recommend the use of a modernized version of judicial election guides as a new form of candidate outreach. A multimedia CD, by allowing voters to see and hear the candidates in person, is more likely to engage voters than a bland pamphlet listing the candidates’ educational and professional credentials.

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The Canons in the Courts: Recent First Amendment Rulings

by Robert O'Neil

Executive Summary

Recent court decisions have been strikingly unreceptive to state regulation of judicial campaign rhetoric. Though the effort to restrict what judges and candidates for the bench may say during campaigns is hardly new, the pace of litigation intensified during the 1990s. The Michigan and Alabama supreme courts, and federal courts in other states, struck down provisions of the Canons on First Amendment grounds. Only the Federal Eighth Circuit reached a different conclusion, sustaining Minnesota rules which are designed to preserve the state's system of non-partisan judicial elections.

Several factors may partially explain these recent trends. Several of the rules that were struck down constrained judicial speech more broadly than do the canons of most states—specifically, by barring electoral claims which omit a material fact, or which are likely to “create an unjustified expectation about what the candidate can achieve,” rather than limiting the ban to knowingly false campaign statements. The canons that have fared poorly in recent litigation have also seemed suspect, in terms both of procedure and of the potential for partisan interference or influence.

Two especially troubling features mark these recent rulings on judicial campaign speech. On one hand, courts have unwarily invoked certain frail analogies—to defamation, for example—or have relied on the Supreme Court's sole judgment about campaign rhetoric, without noting obvious and profound contrasts between campaigns for legislative or executive office and judicial campaigns.

Equally troubling is a curious indifference in recent cases to certain basic government interests which warrant special regulation of judicial campaigns. In place of such ephemera as “public confidence” or “civility,” courts should focus instead on the basic need to ensure due process and fairness throughout the judicial system, regardless of the means by which judges are chosen and retained. Courts are profoundly different from other institutions in various ways that warrant curbing campaign speech to a degree that is neither necessary nor acceptable for other branches. Such restraints reflect, among other factors, the dramatically different relationship between a judge and those whose support he or she seeks at the polls.

Finally, even for judges, elections are sufficiently distinctive from other judicial activity that they warrant special constraints, without threatening generally to abridge judicial speech. Despite understandable concern that stricter regulation of campaign rhetoric might signal a lessening of judicial free speech outside the election period, a clearer understanding of why elections present special needs should avoid any such inference, and should allay concerns. Cleaner judicial campaigns and freer judicial expression should not be seen as incompatible.

Restrictions on the Speech of Judicial Candidates Are Unconstitutional

by Erwin Chemerinsky

Executive Summary

My thesis is that if states are going to make judges and judicial candidates into politicians by having them run for office or retention, then these individuals should have the same basic free speech rights as all others standing for election. The limits on speech imposed on judges and judicial candidates are content-based restrictions on political expression. To be constitutional, they therefore must meet strict scrutiny. Professor O'Neil, in his thoughtful paper, fails to show that strict scrutiny is met by these laws. I do not believe that the laws are necessary to assuring due process or ensuring impartial judges, so I believe that the restrictions are unconstitutional.

My paper reasons in six steps:

1. An individual's views effect how he or she acts on the bench as a judge.
2. Those selecting or evaluating a judicial candidate should consider the views of the individual as they relate to likely performance on the bench.
3. The restrictions on speech in the Code of Judicial Conduct prevent judicial candidates from expressing their views and thus voters from learning of them.
4. The restrictions on speech are thus content-based restrictions on political speech.
5. Content based restrictions on political speech must meet strict scrutiny.
6. The restrictions on political speech of judicial candidates fail to meet strict scrutiny. Professor O'Neil focuses on providing due process as the primary justification for restricting speech of judicial candidates. Although this undoubtedly is a compelling interest, I do not believe that he shows that restricting speech is necessary to achieve it. All judges come to the bench with views and it is unclear when these prior positions make a judge sufficiently biased to deny due process. Nor is it clear as to the point at which the appearance of prejudice denies due process. Does it violate due process for Antonin Scalia to participate in abortion cases because it is clear how he will vote? Why does a comment in an election campaign deny due process, but not one in a prior opinion? Professor O'Neil assumes that knowing the judges views in advance is undesirable. My sense is the opposite: as an attorney or litigant, I would rather know where the judge stands on the issue in advance if he or she has views on the matter.

If Elected, I Promise [.....] What Can Judicial Candidates Say? By Stephen Gillers

Executive Summary

A case is composed of a major premise (the law), facts, and a verdict or judgment derived from applying the law to the facts. If voters are asked to choose judges, they must have a rational basis for choosing. Giving voters only career facts and general promises to uphold the law is inadequate. It does not recognize the serious responsibility we have asked voters to assume. It does not respect their intelligence.

Candidates should be permitted to give voters their tentative views on major premises – i.e., legal rules – but they should not be allowed to state or imply how they would decide any particular case. This is a question of degree. Candidates should not be so specific in stating their position on the law or a legal question that they are in effect promising to decide particular cases in particular ways. Further, whenever they offer their views on legal questions, a candidate should be required to explain that the views are tentative and that the candidate may change or modify them depending on particular facts, the arguments of counsel, and deliberation with judicial colleagues. Allowing candidates to do this respects the intelligence of the voter.

Voters will get much of this information anyway, though less forthrightly and with less clarity and precision. Among other ways voters will get this information are through the speech of interest groups that support a candidate, through editorial comment, through the candidate's prior work or writings (as a judge or otherwise), and from political commercials that signal a candidate's position on particular issues, often in nebulous but dramatic ways.

In deciding the meaning of the First Amendment as it applies to the speech of candidates for judicial office, these policy considerations should be influential.

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Constitutional Issues in Disclosure of Interest Group Activities

by Deborah Goldberg and Mark Kozlowski

Executive Summary

Although interest groups—particularly the U.S. Chamber of Commerce—spent record amounts of money in the 2000 state judicial elections, they were able to do so without revealing who contributed to their advertising campaigns, the amounts contributed, or the precise sums expended on the advertisements. The question therefore arises to what extent states may constitutionally compel disclosure of such information.

In its 1976 decision in *Buckley v. Valeo*, the U.S. Supreme Court held that compelled disclosure implicates the First Amendment rights of individuals and entities spending money on political communications. Regulations seeking to inform the electorate about who is trying to influence electoral outcomes must therefore be narrowly tailored.

With respect to money spent upon political communications *independently* of any particular candidate, the *Buckley* Court drew a distinction between independent communications that actually support or oppose candidates (“express advocacy”) and communications that discuss political issues (“issue advocacy”).

Communications that qualify as express advocacy are properly subject to disclosure regulations. The Chamber of Commerce contended that its advertising campaigns during the 2000 judicial elections were issue advocacy and thus exempt from disclosure.

The precise boundaries of this distinction, however, remain unclear. Some courts have interpreted *Buckley* to require that “express advocacy” be limited to communications that actually employ so-called “magic words,” i.e., “elect Smith,” or “vote for Jones.”

But in a later case, *FEC v. Massachusetts Citizens for Life, Inc.* (“*MCFL*”), the Court looked beyond magic words and found express advocacy on the basis of language that “in effect” supported or opposed particular candidates. Lower courts remain divided on the issue.

A related issue is whether independent groups may be required to disclose their financial sponsors in the communications they broadcast. In a 1995 case, *McIntyre v. Ohio Elections Commission*, the Supreme Court struck down a state law forbidding anonymous election communications. However, the decision is a narrow one, and a majority of courts have since upheld regulations requiring sponsor identification.

The extent to which disclosure regulations may cover ads without “magic words” varies among jurisdictions.

Reformers may wish to consider legislation modeled on the current McCain-Feingold and Shays-Meehan bills, which require disclosure of spending for communications that mention a candidate, and are broadcast within a fixed time before an election.

First Amendment concerns may also be allayed by treating the foregoing test as a rebuttable presumption and requiring the state to prove by clear and convincing evidence that an interest group advertising campaign is in fact attempting to influence electoral outcomes.

Although no court has yet adopted the position, it is also possible that regulations specifically applicable to judicial elections may receive more favorable treatment than regulations applicable to elections generally. This is because the government’s undoubted interest in maintaining the integrity of the judiciary provides additional force to the argument that the electorate should be informed as to which entities and individuals are trying to influence the outcome of judicial elections.

Compelled Disclosure of Independent Political Speech and Constitutional Limitations

by Jan Baran

Executive Summary

An inherent tension exists between respect for the First Amendment rights of independent political groups and regulation of political activity. This tension has recently emerged in the context of judicial elections which have been drawing greater public attention.

In 1976, the Supreme Court addressed these competing goals in *Buckley v. Valeo* and struck the balance in favor of First Amendment rights. It determined that regulation of political speech, including financial disclosure by independent groups engaged in public commentary about candidates and policies, must be narrowly limited to speech that in express terms advocates the election or defeat of a clearly identified candidate. The Court made clear that its “express advocacy” standard requires the presence of words such as “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” “reject,” or their near synonyms. The Court recognized that this standard would not capture all political speech that may influence elections. However, it concluded that this restrictive test was needed to avoid the possible chilling effect on protected political speech that would result from broader regulation.

The Brennan Center for Justice has made four arguments to justify regulation of independent political speech beyond *Buckley*’s “express advocacy” standard. First, it claims that the Supreme Court expanded the meaning of “express advocacy” found in *Buckley* when it decided *FEC v. Massachusetts Citizens for Life, Inc.* This claim is in conflict with every Federal Court of Appeals to have ever considered the two cases. Second, it argues for enactment of legislation that would regulate speech based upon content and proximity to election day. However, the Supreme Court has already found a similar proposal constitutionally infirm. Third, it suggests that regulation of political speech may be based upon a rebuttable presumption of “express advocacy.” This suggestion fails because *Buckley* effectively created a presumption in favor of political speech and at the expense of regulation. Finally, the Brennan Center argues that because judges occupy a role unique compared to the other branches of government, preserving “judicial integrity” justifies broader regulation of speech during judicial campaigns. However, “judicial integrity” is a legitimate basis only for regulating the speech of judicial candidates. Regulation on this basis cannot be extended to speech uttered by independent organizations.

Regulation of independent speech is a misguided approach to combating whatever inequalities are perceived to exist when groups exercise their First Amendment rights. Campaign finance reform proposals should focus on ways to expand resources for debate. This can be done through public financing of judicial campaigns and by otherwise promoting political speech. As Justice Brandeis noted in another context: “the remedy to be applied is more speech, not enforced silence.”

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Judicial Campaign Conduct Committees by Barbara Reed and Roy Schotland

Executive Summary

Three major lessons emerge from past and current attempts to regulate judicial campaign conduct:

- Despite suffering the first decision overturning a canon on First Amendment grounds, Florida (along with Ohio) has taken the lead in ensuring appropriate conduct in judicial campaigns.
- Enforcement of the relevant canons is rare; in many jurisdictions, local and professional norms provide the only check on candidates' behavior.
- Judicial campaign conduct committees bridge this gap in regulation and enforcement.

Judicial campaign conduct committees provide certain intrinsic benefits:

- They can educate candidates at the outset of the campaign regarding what conduct is appropriate.
- They can be available during the campaign to respond to candidates' queries and render advisory opinions.
- If they do find misconduct, they can make a public statement, "meeting speech with more speech."

Judicial campaign conduct committees can provide guidance and enforcement for specific, recurring problems:

- Problematic ads, including factual misstatements, "signaling," and attack ads.
- Campaign finance problems.

Three basic types of committees exist:

- Official (conducted by state officials, with or without the power to sanction): Florida, Georgia, Nevada, and Ohio.
- Quasi-Official (in mandatory-bar states, or appointed by state officials, but with no power to sanction): Alabama, Michigan, and South Dakota.
- Unofficial (those in states with voluntary bars, or administered by private entities, such as bar associations): California, New York, North Carolina, and Ohio (select counties for local races).

Most jurisdictions use some form of a candidate pledge.

Advantages of unofficial judicial campaign conduct committees:

- Diversity and credibility of membership.
- Freedom from constitutional requirements.

Recommendations:

- To maximize effectiveness, we recommend that judicial campaign conduct committees be unofficial (although, of course, they might be initiated by the bar in mandatory-bar states, or encouraged by the Supreme Court or other official body).
- Bar associations should take the lead in establishing such committees.
- Such committees should be established pursuant to by-laws, with prescribed procedures.
- Committees should consider the following factors:
 - Diversity of membership, including nonlawyers;
 - Scope (*e.g.*, speech, advertisements, campaign finance, etc.);
 - Need for candidate education;
 - Use of pledges;
 - Use of “hotlines” to answer candidate queries;
 - Whether to act *sua sponte* or only upon a complaint;
 - Use of a “rapid response” mechanism in the weeks immediately preceding an election;
 - Contacts with leaders of civic organizations, political parties, and other groups that may participate in judicial campaigns.

Public Funds or Publicly Funded Benefits and the Regulation of Judicial Campaigns

by Richard Briffault

Executive Summary

The National Summit on Improving Judicial Selection recently recommended public funding of judicial candidates as a means of addressing the rising costs of judicial elections, and the concomitant concern that large private donations to candidates may undermine, or appear to undermine, the integrity of judicial decision-making. Could public funding also be used to regulate the content of judicial campaigns? Specifically, could a state require, as a condition for the provision of public funds, that a candidate abide by a code of campaign speech that the state could not otherwise constitutionally impose?

The United States Supreme Court has held that although a mandatory limit on campaign spending is unconstitutional, a grant of public funds to a candidate may be conditioned on the candidate's agreement to limit expenditures. If public funding can be conditioned on a waiver of the right to engage in unlimited spending, it might also be conditioned on a waiver of the right to engage in constitutionally protected political speech. The unconstitutional conditions doctrine, however, provides that some conditions on government grants are unconstitutional.

It is uncertain whether a speech code condition on public funding for judicial candidates would survive constitutional attack. Although the code would be voluntary in the sense that a candidate would be free to decline the public grant and thereby avoid the speech restriction, the voluntariness of the program may not be enough to save the condition. Such a condition could not be justified in terms of the traditional goals of public funding, that is, reducing fund-raising burdens, mitigating the potential corrupting effects of contributions, and facilitating candidate communications with the electorate. Rather, the condition would change the content of campaign statements. This could be seen as triggering the Supreme Court's concern about conditions on government grants that unconstitutionally seek to "distort" a "medium of expression."

On the other hand, it could be argued that such campaign speech codes promote the important due process value of judicial impartiality. The combination of the voluntariness of the speech condition with the substantial constitutional concern the condition arguably advances might be enough to justify a government decision to use public funds as an incentive to secure a candidate's agreement to a speech condition that is more restrictive than the government could constitutionally impose.

Other mechanisms for using public funds to regulate campaigns include mandatory debates and voter pamphlets. Some jurisdictions that provide candidates with public funds also require those candidates participate in televised debates as a condition for the funding. Such a requirement almost certainly passes constitutional muster, although there appear to be no cases on point. Several jurisdictions also publish and distribute to the voters pamphlets or guides that include statements from the candidates. A state can almost certainly require that those statements abide by certain content restrictions. This would provide a means of shaping the content and tone of the information judicial election voters are most likely to rely on.

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