

# HOW MUCH SPEECH FOR JUDGES?

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In examining the question “How much speech for judges?” this essay will provide both some analysis of contemporary jurisprudence and a normative response. Current case law does not fully answer the question and, thus, leaves open the debate about how much judicial speech is required as a matter of law and desirable as a matter of policy.

To be sure, we have some guidance from the U.S. Supreme Court. In *Republican Party of Minnesota v. White* (2002), the Court ruled that candidates for judicial office must be allowed to announce their views on disputed legal and policy issues. Moreover, in striking down Minnesota’s “announce clause,” the canon of judicial ethics that prohibited such announcements, *White* noted:

[T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles (at 788).

*White*, if its rhetoric is to be taken seriously, is nevertheless a narrow decision. The Court declined to draw inferences from its ruling for the constitutionality of other canons of judicial ethics. Justice Scalia, writing for the majority, also noted that “we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office” (at 783).

The tensions within *White* have produced considerable uncertainty among judicial candidates, bodies charged with regulating judicial conduct, and lower courts asked to interpret the reach of the decision. A raft of cases challenging judicial canons other than the announce clause illuminate a struggle to balance the competing constitutional concerns implicated by elections for the bench—the First Amendment rights of participants in the democratic process and the rights of litigants to due process and equal protection under the law. It is not clear, however, whether courts deciding those cases fully appreciate how their decisions are affecting the character of judicial campaigns or, in turn, the ability of elected judges to fulfill their institutional role.

The institutional role of judges within our constitutional democracy is best understood through the lens of the separation of powers. Stated in simplified form, legislatures are supposed to make the law, within limits set by federal and state constitutions; executive officers are supposed to enforce the law, within limits set by federal and state constitutions; and courts are supposed to offer neutral arbitration of disputes about how to apply or to interpret the law, including the limits set by federal and state constitutions. Yet in practice, all three branches influence the direction of public pol-

icy: the executive branch does so directly through executive orders and the regulatory apparatus of administrative agencies, and the judicial branch does so indirectly through the development of common law, statutory interpretation, and adjudication of constitutional questions. Each branch has powers that enable it to check overreaching by the others. As the ultimate arbiter of constitutional questions, the judiciary is charged with protecting minority rights against executive and legislative excesses, even though decisions that limit majoritarian power inevitably will be unpopular.

It is this institutional role of the judiciary that generates controversy not only about issues that divide the country but also about the process of electing judges. Elections, as the *White* Court recognized, are designed to give a degree of democratic legitimacy to governmental decisions. Voters hold officials accountable for their actions through the threat of defeat at the polls. Yet if we are to preserve the separation of powers and the ability of courts to protect the rights of unpopular minorities, we must find structural mechanisms that prevent judges from becoming nothing more than clones of legislators sporting law degrees.

This tension affects appointed judges as well as elected judges, although more indirectly. In the federal system, interest groups with stakes in matters that come before the courts may exert pressure on the president or on members of the Senate when there is an opening on the bench, as we recently saw with the fierce reaction—on television and on the Web—to President Bush's initial nomination of Harriet Miers (Brennan Center for Justice, n.d.). Groups also may adopt a longer-term strategy to elect a president more likely to nominate, or senators more likely to confirm, judges who share the groups' views. There is no system that eliminates politics from judicial selection, but appointive processes are inherently structured to force pressure from the electorate through the mediating screen of an appointing authority. For this reason, many people believe that appointed judges are better able than elected judges to resist interest-group pressures that interfere with the performance of their institutional role.

Because judicial elections do not have internal mediating structures, external mechanisms have developed to protect the independence and impartiality of judges. Judges typically serve for longer terms than legislative or executive officials, they may face retention elections instead of electoral contests to retain their seats, and they traditionally have been governed by canons of judicial ethics that have restrained judicial campaign conduct in ways that would not be tolerated in elections for legislative or executive offices. For example, in many states, canons bar judicial candidates from making promises about how they would rule if elected and from personally soliciting campaign contributions. The restrictions encourage candidates to keep an open mind about issues they might be asked to decide once on the bench, and they combat the reality and appearance of bias toward, and undue influence by, wealthy parties and attorneys who support the campaigns of judges hearing their cases. Even *White* recognized that the need for judicial open-mindedness and lack of bias might justify restrictions on candidate speech, and the Supreme Court has long acknowledged that preventing real and apparent corruption is a compelling reason for contribution restrictions.

Of course, some interest groups may not value impediments to their influence on judicial decision making. Their desire to advance pressing policy agendas may easily overwhelm any abstract commitment to a judiciary capable of rendering impartial justice. They may welcome changes in the dynamics of campaigns that make judges more susceptible to political and financial pressure.

Groups that do welcome such changes should be heartened by recent trends in campaigns for the bench. Since 2000, when systematic tracking of fund-raising and television advertising in state supreme court races began, money has been pouring into high-court campaigns. In 2006, of the ten states with elections wholly financed by private contributions, five set new records for candidate fund-raising in a single race. Television advertising, which drives up campaign costs, is now sponsored by supreme court candidates, political parties, and interest groups in almost every state with elections for the high court. From having television ads in only four such states in 2000, the numbers rose to ten out of eleven states in 2006. Increasingly, candidates must look to wealthy interests to bankroll million-dollar campaigns, and they must decide cases knowing that the “wrong” decision could mean the need to rebut a televised smear campaign in their next election, after losing the support of formerly friendly financiers.

*White* and some of the lower-court decisions that followed in its wake also have encouraged those who want “campaigns for judicial office to sound the same as those for legislative office.” In *Weaver v. Bonner* (2002), the Eleventh Circuit struck down a canon prohibiting candidates for judicial office from making false or misleading statements in their campaigns, including false statements negligently made and true statements that are misleading or deceptive. The decision, opening the door to candidates who believe that deceptive advertising is consistent with judicial integrity, is now visibly bearing fruit. For the first time in 2006, high-court candidates sponsored more than half (60 percent) of the negative ads on television, ads that just two years ago were almost exclusively the province of interest groups and political parties. In Alabama, Georgia, and Nevada, candidates claiming to have the judicial temperament that qualifies for them for dispassionate judging set new lows for on-the-air insults and underhanded accusations (Brennan Center for Justice, 2006).

*White* is also influencing tactics in the ground wars. Increasingly, ideological interest groups are asking candidates to complete preelection questionnaires confirming their positions on hot-button issues. Candidates who believe that what they have the right to do under *White* is the wrong thing to do when seeking a seat on the bench know that standing on principle by refusing to answer will likely mean political attacks in the literature that interest groups distribute.

Opportunities for candidates to publicize their views, and to attack their opposition in terms that stop just short of actionable malice, may well be the legitimate price of holding judicial elections. The voters’ right to meaningful information about candidates is real, and the candidates’ right to meaningful participation in competitive processes—whether partisan nominating systems, nonpartisan primaries, or gen-

eral elections—also is a First Amendment interest of the first order. The civility bred by curbing controversy may well do more to defeat those rights than it does to protect the independence and impartiality judges need to do their job. In these cases, to ensure that elections are not elections in name only, the inevitable balancing of constitutional interests may weigh in favor of free speech.

We may accept these risks to the separation of powers and the constitutional rights of litigants because mere announcements of a candidate's views, and cheap shots during thirty-second spots, do not threaten the core function of the judiciary. At some point we cross the line, however, and the ability of judges to counter majoritarian whims is dangerously compromised. It is easy to wrap every attack on campaign constraints in a First Amendment mantle, but when there are constitutional interests on both sides of the equation, some jurisprudential nuance is required.

In the campaign-finance context, the balancing should not be difficult. Already, shocking numbers of state judges admit that campaign contributions are affecting judicial decisions, and the public widely believes that the balance of justice is tilted toward wealthy interests.<sup>1</sup> Settled First Amendment jurisprudence recognizes that the strictest scrutiny does not apply to restraints on contributions, which should include not only limits on sources and amounts of donations, but also the prohibition on prospective judges' direct solicitation of funds (Briffault, 2004:225-26). Courts that read *White* broadly, as the *Weaver* court did, have invalidated such prohibitions (*Kansas Judicial Watch v. Stout*, 2006; *Carey v. Wolnitzek*, 2006), but others have recognized—correctly—that states may constitutionally erect safeguards against judges too compliant with the wishes of donors (*Wolfson v. Brammer*, 2006; *Simes v. Ark. Judicial Discipline & Disability Comm'n*, 2007; *In re Dunleavy*, 2003).

Public financing for judicial candidates is another constitutional means of protecting judges' ability to do their job. A challenge to North Carolina's full public funding system was recently dismissed for failure to state a claim (*Jackson v. Leake*, 2007). North Carolina provides participating candidates for appellate courts with grants sufficient to run their campaigns and distributes a voter guide to help voters understand the elections and the choices before them. The Supreme Court has recognized that providing public funds with which to run campaigns promotes the purpose of the First Amendment, which is to "secure the widest possible dissemination of information from diverse and antagonistic sources" (*Buckley v. Valeo*, 1976, at 49). Voluntary public funding systems enable candidates to communicate with voters, while avoiding the taint of private contributions and thereby promoting public confidence in the fairness of elected courts. That such systems are under attack strongly suggests that their opponents are seeking to secure financial advantages for particular judges, or a hold over judges who accept private funds, rather than to protect the informational interests of the electorate or judicial rights to free speech.

<sup>1</sup> Polling data are available at <http://www.justiceatstake.org/files/JASJudgesSurveyResults.pdf> (survey of state judges) and <http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf> (public opinion poll).

The right to free speech is more seriously implicated by canons banning promises, pledges, and commitments to reach particular results in disputes over controversial issues, but in this case too, the interests in open-mindedness and absence of bias should prevail. Candidates are free to announce their views; a promise to effectuate those views irrespective of the facts or law in particular cases is another matter. The promise admittedly does inform voters about the candidate's willingness to disregard the responsibilities of judicial office, but assuming that most candidates for the bench care deeply about the role they are to play if elected, we gain more by protecting them from pressures to ignore their duties than we do from freeing unethical candidates to expose their lack of fitness for the bench. And those pressures can be great, if promises are not forbidden, because interest groups will likely condition financial or political support on receipt of requested pledges or will threaten negative publicity for failure to commit, just as the groups already do when seeking announcements of a candidate's views. Under these circumstances, the candidate's interest in unencumbered campaigning is easily outweighed by the compelling public interest in fair and impartial courts. We can no more tolerate a trial in name only than we can a sham election.

There is ample Supreme Court precedent for restrictions on First Amendment rights when necessary to protect more weighty constitutional interests. For example, *Gentile v. State Bar of Nevada* (1991) upheld restrictions on counsel's pretrial statements; *Seattle Times Co. v. Rhinehart* (1984) upheld restrictions on "communications of trial participants" in criminal cases; and *Press-Enterprise Co. v. Superior Court* (1986) permitted closure of the courtroom—all in the interest of protecting due process and the right to a fair trial. A comparable analysis should govern challenges to canons barring promises and commitments.

Admittedly, not all courts have seen it this way. A number of decisions have treated canons barring pledges, promises, and commitments as the functional equivalent of the announce clause. (*Kansas Judicial Watch*, 2006; *Indiana Right to Life, Inc. v. Shepard*, 2006. But see *Wolfson*, 2006; *In re Watson*, 2003.) In part, the tendency to lump the disparate bans together results from the coupling of bans on promises with a clause prohibiting statements that not only commit but also "appear to commit" the speaker to particular rulings. Finding difficulty in ascertaining just what conduct gives the appearance of commitment, the courts have thrown the baby out with the bathwater.

Even courts that have rejected ex ante protections of impartiality have recognized, however, that litigants facing a judge whose campaign speech, fund-raising, or political activity suggests bias against them may have grounds for seeking disqualification of the judge. (*Indiana Right to Life*, 2006; *Kansas Judicial Watch*, 2006; *Alaska Right to Life Political Action Comm. v. Feldman*, 2005; *North Dakota Family Alliance, Inc. v. Bader*, 2005.) Recusal is not a punishment for the judge; there is no shame in honestly acknowledging situations in which one's fairness and impartiality might reasonably be questioned and stepping aside to protect confidence in the system. Rather, recusal is a procedure that reconciles maximal free-speech rights for judicial candi-

dates with litigants' rights to a judge who is impartial in reality and appearance. Indeed, Justice Kennedy specifically commented in *White* that, whereas states may not protect impartiality by prohibiting candidates from announcing their views, "[states] may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards" (at 794). To oppose recusal when impartiality is reasonably in doubt is to give no weight to litigants' rights in the constitutional equation.

*White*, on the other hand, does give weight to litigants' rights. Its lengthy parsing of the concept of impartiality was an effort to understand the scope of those rights. The Court held that the announce clause was not narrowly tailored to advance impartiality, but the Court did not embrace an absolutist view of the First Amendment freedoms in judicial campaigns. Under *White's* reasoning, the right to free speech does not automatically trump the principle of the separation of powers or the constitutional demand for unbiased judges. Judges get only as much speech as is consistent with the delivery of impartial justice. **jsj**

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