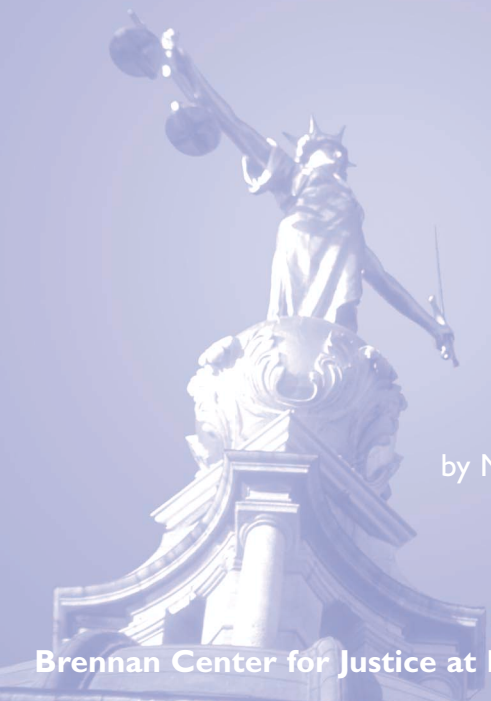
Judicial Independence Series

Regulating Interest Group Activity in Judicial Elections



by Mark Kozlowski

Brennan Center for Justice at NYU School of Law

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This paper is the first in a series of reports exploring judicial independence issues. The series will focus initially on state judicial elections. For additional resources, visit the Brennan Center's website: www.brennancenter.org.

About the Author

Mr. Kozlowski is an Associate Counsel at the Brennan Center and an expert on judicial independence issues. He is completing a book about the power of America's courts (forthcoming NYU Press 2002). Mr. Kozlowski joined the Brennan Center following his clerkship with Judge Nina Gershon on the U.S. District Court for the Eastern District of New York. Prior to his clerkship, he was a Litigation Associate at Fried, Frank, Harris, Shriver & Jacobson for five years (1991-96). A graduate of Harvard Law School (1991), Mr. Kozlowski received a Ph.D. in Political Science from Columbia University (1989), and a B.A. from Sarah Lawrence College (1980).

Acknowledgments

This paper was prepared under the auspices of the Brennan Center's Democracy Program. The Center is grateful for the generous support provided for its Judicial Independence Project by the Deer Creek Foundation and the Open Society Institute.

The author wishes to thank Deborah Goldberg, Deputy Director of the Brennan Center's Democracy Program, and Praveen Krishna, Democracy Program Research Associate, for their guidance and assistance.

Brennan Center for Justice
at NYU School of Law
161 Avenue of the Americas
New York, NY 10013
tel: 212-998-6730
fax: 212-995-4550
www.brennancenter.org

Introduction

All observers of state judicial elections are aware that in recent years these formerly sleepy contests have become more expensive and vituperative than ever before. A front-page article appearing last year in *The New York Times* sums up the nationwide trend of elections for state supreme courts:

> Millions of dollars in campaign contributions [are] flowing into races for top state judgeships this year, while candidates are testing the limits of ethics rules that forbid them to signal how they might vote on cases…Attack advertising, the use of aggressive political consultants and what are often only thinly veiled promises to sustain or overturn controversial decisions are now established parts of campaigns for seats on state courts."[1]

In short, state judicial elections are threatening to become more like elections generally. Most observers would probably agree, however, that this development is not due primarily to the actions of judicial candidates themselves. Individuals running for the bench, after all, are still subject to a range of ethical rules that restrict the sort of attacks they can level at their opponents and the sort of statements they can make with respect to how they will conduct themselves on the bench. Rather, a range of interest groups have of late decided that it is crucially important to fill state courts with sympathetic judges. Indeed, it is considered so important that they are willing to spend large amounts of money and, acting independently of any particular judicial candidate or campaign, to bring the aggressive tactics of non-judicial campaigning to judicial elections.

The group that has made the greatest impact to date is the U.S. Chamber of Commerce and its affiliated state organizations. Before the 2000 election cycle, the Chamber had never intervened in state judicial elections. But in that year, the Chamber spent over $10 million in judicial races in several states. The Chamber's election activities were the subject of particular commentary in the supreme court races of two states, Ohio and Mississippi. And although it achieved only mixed results in the 2000 elections, James Wootton, president of the Chamber's Institute for Legal Reform, has announced that the Chamber is "absolutely committed to being involved in judicial races" in the future.[2] Thus, to no one's surprise, the Chamber has become heavily involved in the biggest judicial election of 2001, a race for an open seat on the Pennsylvania Supreme Court, and the Chamber's state affiliate in Illinois is already pledging to have a decisive impact upon a November 2002 state supreme court election in that state.[3]

Yet, for all of the financial muscle that the Chamber has been exerting in state judicial politics of late, it has been able to carry on its intervention without having to disclose the identities of those individuals and entities that have funded its efforts. Indeed, it was not until almost a year after the November 2000 elections that an article in *The Wall Street Journal*

[1] William Glaberson, "Fierce Campaigns Signal a New Era for State Courts," *The New York Times*, June 5, 2000, at A1.

[2] Quoted in Katherine Rizzo, "Chamber Ads Failed in Ohio, Worked Elsewhere," *Associated Press Newswire*, November 6, 2000.

[3] See Josh Goldstein and Chris Mondies, "An Effort to Sway Pa. Court Election," *The Philadelphia Inquirer*, August 12, 2001, at 1; Daniel C. Vock, "Business Leaders See Supreme Court Race as Good Investment," *Chicago Daily Law Bulletin*, September 13, 2001, at 1.

disclosed that Wal-mart Stores Inc., Daimler-Chrysler AG, Home Depot Inc., and the American Council of Life Insurers had each donated $1 million to the Chamber's effort to elect business-friendly judges.[4] How has this been possible?

This paper seeks to do two things: (1) describe the nature of the Chamber's activities in the Ohio and Mississippi state supreme court elections of 2000 in order to highlight the threat that its activities – and the activities of other interest groups that will likely emulate the Chamber's tactics in the near future – pose to the integrity of judicial elections, and (2) suggest to reformers approaches toward providing for greater disclosure of the identities of individuals and entities supporting interest group efforts in judicial elections such that voters and the press can be fully informed as to who is trying to influence the direction of the courts in their state.

The 2000 Supreme Court Elections in Ohio and Mississippi

In response to criticism of the Chamber of Commerce's aggressive advertising campaigns in the 2000 judicial elections, James Wootton defended the organization as follows: "However distasteful it is, can anyone say it is wrong to share truthful information?"[5] No one who is committed to democratic politics is against the dissemination of truth. But a review of the Chamber's advertising in the 2000 judicial elections suggests that it disseminated more that was distasteful than what was strictly truthful.

Ohio

In Ohio the Chamber made a major effort to defeat the re-election bid of Democratic state Supreme Court Justice Alice Robie Resnick. Justice Resnick was targeted largely because she was part of a 4-3 court majority that declared unconstitutional a comprehensive tort reform statute. She was opposed by Terrence O'Donnell, an incumbent lower court judge. Both the Resnick and O'Donnell campaigns agreed to abide by the voluntary $500,000 spending limit established by the Ohio Supreme Court for high court candidates. However, spending by interest groups acting independently of campaigns is subject to no such limit.

The effort to end Justice Resnick's career began early. In November 1999, a year before the election, Americans for Job Security, a Chamber-sponsored organization based in Alexandria, Virginia, began running radio advertisements criticizing Justice Resnick's opinion for the majority in the tort reform case. In June 2001, the *Michigan* Chamber of Commerce

[4] See Jim VandeHei, "Major Business Lobby Wins Back Its Clout By Dispensing Favors," *The Wall Street Journal*, September 11, 2001, at A1.

[5] Quoted in Terry Carter, "Plugging the Dike," ABA Journal, September 2001, at 21.

… it was suggested that Justice Resnick changed her vote in a case involving wages on a construction project after an "influential contributor" complained to her about her initial stance. Justice Resnick vehemently denied this charge and the Chamber never produced any evidence to substantiate it.

launched an ad campaign in Ohio encouraging Ohio firms to move to Michigan and thereby enjoy the "judicial restraint of the Michigan Supreme Court."

But the bulk of the media war against Justice Resnick was shouldered by a state Chamber affiliate calling itself Citizens for a Strong Ohio. The group ran innocuous spots in favor of Judge O'Donnell that highlighted his career achievements and his volunteer work for the disabled. But it also ran two anti-Resnick advertisements that were quickly recognized as among the most brutal ever seen in a judicial campaign.

What became known as the "Lady Justice" ad depicted piles of paper money being showered upon one side of the scales held aloft by the archetypal figure of Justice as ominous music played. The voiceover declared that Justice Resnick had accepted $750,000 in campaign contributions from trial lawyers and labor unions, impliedly in payment for a voting record that was said to support the interests of these groups "nearly 70% of the time." The ad asked: "Is justice for sale in Ohio?" As if this were not a sufficiently blatant assault on Justice Resnick's integrity, a second advertisement essentially charged her with bribery. In that advertisement, it was suggested that Justice Resnick changed her vote in a case involving wages on a construction project after an "influential contributor" complained to her about her initial stance. Justice Resnick vehemently denied this charge and the Chamber never produced any evidence to substantiate it.

In the end, Justice Resnick won re-election. But she was clearly dispirited by the campaign and noted that advertising such as that run by the Chamber would have the likely effect of making people "think judges are politicians, that seats can be bought on courts."[6]

Mississippi

Before 2000 Mississippi had had very little experience with contentious judicial elections. But things changed mightily that year. Nine candidates for four seats on the Mississippi Supreme Court raised $1.4 million in campaign funds, a figure never before seen in the state. In addition, according to an estimate by the Mississippi Secretary of State, the Chamber spent almost $1 million on behalf of four candidates.

Relative to the ads run in Ohio, the Mississippi spots were quite tame. For example, an ad for incumbent Justice Kay Cobb, who went on to win re-election, touted her achievements in the following manner: "A teacher, a prosecutor, a Supreme Court Judge. At the Bureau of Narcotics she took drug pushers off the streets and put them behind bars. On the Supreme Court she uses common sense to protect the rights of victims." Similarly, an ad concerning incumbent Chief Justice Lenore Prather, who was defeated, touted her 35 years of legal experience and contained the

[6] Quoted in William Glaberson, "A Spirited Campaign for Ohio Court Puts Judges on New Terrain," *The New York Times*, July 7, 2000, at A15.

following words of praise: "Lenore Prather – using common sense principles to uphold the law; Lenore Prather – putting victims rights ahead of criminals and protecting our supreme court from the influence of special interests."

Although these ads – and all of the ads that the Chamber ran in Mississippi – had nothing to say about issues of specific concern to business interests, two of the four candidates supported by the Chamber were successful at the polls. Speaking at the conclusion of the campaign, a prominent Mississippi attorney echoed Justice Resnick and noted that, in the face of all the money expended, the danger existed that the public would "get the impression that the leaders of the judiciary are politicians."[7]

An interesting feature about the ads described above – and indeed about all of the ads run by the Chamber in the 2000 judicial elections – is that none of them contain a phrase like "vote for O'Donnell," "defeat Resnick" or "re-elect Cobb." As we shall now discuss, this absence of explicit encouragements to voters to vote for or against a certain candidate is the crucial means by which the Chamber – and any other interest group that chooses to follow its lead in future judicial elections – is able to massively intervene in judicial elections without informing the public as to who is financially supporting its efforts.

The Law of Campaign Finance Reporting

Just about any discussion of the law of campaign finance regulation must begin with the U.S. Supreme Court's 1976 decision in *Buckley v. Valeo*.[8] In the course of its exhaustive consideration of the constitutionality of the 1974 amendments to the Federal Election Campaign Act (FECA), the Buckley Court considered whether the First Amendment permits public officials to compel reporting of information concerning campaign contributions and expenditures.

The Court began with the proposition that there is an imposition upon First Amendment rights *whenever* the government demands disclosure of information from citizens because "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."[9] But the *Buckley* Court went on to recognize three legitimate government interests that justify disclosure of information concerning money employed to win elections:

- "[D]isclosure provides the electorate with information as to where political campaign money comes from and how it is spent" thereby "alert[ing] the voter to the interests to which a candidate is likely to be most responsive;"

[7] Quoted in Beverly Pettigrew Kraft and Jerry Mitchell, "Shakeup on Miss. Supreme Court Called 'Unprecedented,'" The Clarion-Ledger, November 8, 2000, at http://www.clarionledger.com/news/0011/08/08supremeanal.html.

[8] 424 U.S. 1 (1976) (*per curiam*).

[9] *Id.* at 64.

- "[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity;" and
- "[R]ecordkeeping, reporting and disclosure requirements are an essential means of gathering the data necessary to detect violations" of other campaign finance regulations.[10]

In furtherance of these interests, *Buckley* and later cases have generally upheld regulations that require the reporting of contributions to, and expenditures by, candidates' campaigns.[11]

However, the constitutional analysis is different with respect to reporting information about money received and spent by organizations that undertake political activity during elections *independently* of any particular candidate or campaign. Most significantly, when a group undertakes a political advertising campaign such as those directed by the Chamber during the 2000 judicial elections, there is no transfer of money to a potentially corruptible candidate. To what extent is such speech subject to reporting regulations?

FECA contained a broad provision that imposed reporting requirements on contributions supporting communications made "for the purpose of influencing a federal election." Another provision limited to $1,000 contributions supporting communications with a message containing information "relative to a clearly identified candidate." The *Buckley* Court found both of these provisions to be constitutionally infirm. First, pursuant to the "void for vagueness" doctrine of First Amendment jurisprudence, the Court held that these phrases are simply too imprecise to provide potential speakers with sufficient direction as to what speech will be subject to disclosure.[12] Relatedly, pursuant to the "overbreadth" doctrine, the Court found that the imprecision of the statutory language might lead to an improperly broad application of reporting regulations to political speech that does not contain an electioneering element.[13] Taken together, therefore, the Court concluded that the two statutory provisions would leave potential contributors with too little guidance as to what sort of conduct would be improper under the statute. The likely result would be to "chill" their desire to financially support political communication at election time.

The Court therefore held that the FECA provisions had to be narrowed. With respect to funds supporting speech by independent organizations, reporting regulations could "reach only funds used for communications that *expressly advocate* the election or defeat of a clearly identified candidate."[14] Or, as the Court detailed more specifically in what has come to be known as the "magic words" test:

> This construction [restricts] the application of [disclosure regulations] to communications containing express words of advocacy of

[10] *Id.* at 66-67 (quotations and notes omitted).

[11] *See Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 202 (1999) (recognizing the utility of regulations that inform voters of "the source and amount of money spent to get a measure on the ballot"); *Citizens Against Rent Control/ Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 765, 299-300 (1978) (noting that the reporting of contribution information protects "the integrity of the political system").

[12] 424 U.S. at 40-44, 78-80.

[13] *Id.*

[14] *Id.* at 80 (italics added).

> election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," defeat," "reject."[15]

Such "express advocacy" is to be distinguished from "issue advocacy": political communications that ostensibly discuss issues instead of telling voters to elect or defeat a particular candidate. Information regarding monies devoted to these communications is exempt from reporting regulations. Thus, as the Chamber's Jim Wootton put it with respect to the Chamber's advertising in the 2000 judicial elections, when ads "don't support candidates," but merely highlight "candidates as examples of qualities that would be valuable" in an officeholder, the identities of those who have put the ad on the air may remain secret.[16]

Political communications, however, often do not lend themselves to easy characterization according to the issue advocacy/express advocacy distinction. Indeed, as the *Buckley* Court itself recognized, "[i]t would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign."[17] Still, in the quarter-century since *Buckley v. Valeo*, the Supreme Court has only once provided further elaboration on the distinction between express advocacy and issue advocacy.

In the 1986 case of *Federal Election Commission v. Massachusetts Citizens for Life, Inc. (MCFL)*,[18] the Court determined that a voter guide prepared and distributed by a pro-life organization in advance of the 1978 elections constituted express advocacy. The guide did not explicitly endorse any single candidate, but carried the title "Everything You Need to Know to Vote Pro-Life," encouraged readers to "vote pro-life" and went on to detail candidates' positions on the abortion issue. The Court came to its conclusion by focusing on what it took to be the inescapable implication of the voter guide's express message:

> The [voter guide] cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature. The [voter guide] goes beyond issue discussion to express electoral advocacy.[19]

The crucial point here is that the Court focused on the "essential nature" of communication to determine whether it constituted electoral advocacy. Even without an explicit endorsement of a particular candidate or an explicit directive to defeat a particular candidate, a communication that "in effect" conveys the same message as do magic words is sufficient.

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[15] *Id.* at 44, n. 52.

[16] Quoted in Emily Heller and Mark Ballard, "Hard-Fought, Big-Money Judicial Races," *The National Law Journal*, November 6, 2000, at A1.

[17] 424 U.S. at 45.

[18] 479 U.S. 238 (1986).

[19] *Id.* at 249.

The Law of Sponsor Identification

Related to the issue of the applicability of reporting regulations to political communications made by independent groups is the question of whether such groups may be required to disclose their financial sponsors in the communications themselves. The only case in which the U.S. Supreme Court has squarely addressed the question is *McIntyre v. Ohio Elections Commission*.[20]

In *McIntyre*, the Court held that Ohio's ban on the distribution of anonymous campaign literature violated the First Amendment. The Court's decision rested largely on the identity of the party who had been prosecuted, a lone citizen who distributed a self-produced pamphlet in a local referendum election. In such a case, said the Court, compelled disclosure of the author's identity could not be upheld on the ground of the state's interest in an informed electorate. That is, "in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message."[21]

It must be considered unlikely that *McIntyre's* anti-disclosure holding will be expanded very far beyond its facts. First, remember that the case involved the communication of a single individual circulating a homemade pamphlet, as opposed to a well-funded interest group conducting a mass media campaign. Indeed, Justice Ginsburg, in her concurring opinion, distinguished the case of "an individual leafleteer" from one where "other, larger circumstances [may] require the speaker to disclose its interest by disclosing its identity."[22] Second, the election at issue in *McIntyre* was a *referendum* election where the state's interest in disclosure rest upon "different and less powerful interests" than is the case in *candidate* elections where potentially corruptible candidates are present.[23]

Thus, courts have generally upheld disclosure regulations in cases where there is no question that the communications at issue qualify as express advocacy.[24] Again, however, disclosure regulations attempting to reach communications found to qualify as issue advocacy have been held exempt from disclosure regulations. Thus, for example, the U.S. Court of Appeals for the Second Circuit recently invalidated a disclosure regulation that applied to any "political advertisement" that "expressly or implicitly advocate[d] the success or defeat of a candidate."[25] Again, therefore, very much depends upon how far courts can be convinced to treat messages that do not use magic words as express advocacy.

[20] 514 U.S. 334 (1995).

[21] *Id.* at 1520.

[22] *Id.* at 1524 (Ginsburg, J., concurring).

[23] *Id.* at 1523.

[24] *See, e.g., Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 648 (6th Cir 1997) (upholding state disclosure statute); *FEC. v. Survivial Educ. Fund, Inc.*, 65 F.3d 285, 293-98 (2d Cir. 1995) (upholding federal disclosure regulations).

[25] *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 387 (2d Cir. 2000).

Recommendations for Reformers

The state of the law concerning reporting and disclosure regulations is far from being set in stone. Reformers seeking to ensure that the identities of those interests expending considerable sums to influence the outcome of judicial elections will be made public have a number of options open to them.

Toward a Broader Definition of Express Advocacy.

In the absence of a clearer definition from the U.S. Supreme Court, the question of whether "express advocacy" is limited to communications that actually employ magic words, or whether some broader inquiry into the message that the communication is "in effect" expressing remains a hotly debated issue in the courts. Thus, reformers should be aware that the extent to which they can expect existing reporting and disclosure regulations to be applied to communications not employing magic words depends very much on the jurisdiction in which they are operating.

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The lead in terms of expansive definition of express advocacy has been taken by the U.S. Court of Appeals for the Ninth Circuit, the decisions of which are controlling in the federal courts of California, Oregon, Washington, Hawaii, Alaska, Arizona, Nevada, Montana and Idaho. In *Federal Election Commission v. Furgatch*, the Ninth Circuit considered a newspaper advertisement that reviewed the purportedly unethical tactics of President Jimmy Carter's re-election campaign and concluded: "If he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a level of low-level campaigning. DON'T LET HIM DO IT."[26]

Instead of engaging in the semantic dispute as to whether this language, standing alone, could be interpreted as a directive to defeat Carter at the polls, the court opted instead for an inquiry that asked whether the advertisement "when read as a whole, and with limited reference to external events, [could] be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate."[27] This inquiry, said the court, is composed of three elements:

> First, … speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action … Finally, … [s]peech cannot be "express advocacy" … when reasonable minds could differ as to whether it encourages a vote for or against a candidate ….[28]

Some state courts have followed, or at least been influenced by, *Furgatch* in rejecting a strict reliance upon the presence of magic words to define

[26] *FEC v. Furgatch*, 807 F.2d 857, 858 (9th Cir. 1987).
[27] *Id.* at 864.
[28] *Id.*

express advocacy. Relying on *Furgatch*, the Wisconsin Supreme Court has held that "explicit language advocating the election or defeat of a candidate" encompasses more than the specific terms used in *Buckley* to illustrate the concept.[29] The Supreme Court of Washington has similarly held that an advertisement that did not contain magic words could still qualify as express advocacy if it was "un-mistakable and unambiguous in its meaning, and present[ed] a clear plea for the listener to take action to defeat [the] candidate."[30] Finally, the Oregon Court of Appeals has adopted a test for express advocacy that is very close to that set forth in *Furgatch*, noting that such an approach is especially suited to a statute that provides for exclusively civil sanctions, as does Oregon's.[31]

Moreover, in *Chamber of Commerce v. Moore*, a case arising out of the 2000 state Supreme Court elections in Mississippi, a federal district court in that state relied upon *MCFL* and *Furgatch* to hold that U.S. Chamber of Commerce ads that mentioned specific judicial candidates were not exempt from state reporting requirements. In considering the Chamber's ads, the court held that *MCFL* had advanced beyond "a rigid, talismanic application of *Buckley's* [magic words test] to an 'essential nature' inquiry."[32] Seen in this light, the Chamber's ads, which "were aired at the very times statewide judicial elections were being conducted" and which "contained no true discussion of issues," but instead spoke only of "the background and experience of each candidate," concluding with "an emphatic phrase obviously designed to exhort support" were clearly express advocacy.[33] Be aware, however, that, as of this writing, this case remains on appeal to the U.S. Court of Appeals for the Fifth Circuit, which covers the states of Mississippi, Louisiana, and Texas.

In what is apparently the only other reported case arising out of a judicial election, the Texas Supreme Court has also taken a somewhat broad approach to the definition of express advocacy. In *Osterberg v. Peca*, although the advertisement at issue contained an explicit voting exhortation, the Texas court nevertheless considered it "as a whole and in context" in order to conclude that it constituted express advocacy.[34]

On the other hand, a number of federal circuit courts of appeal have adhered to a strict application of the magic words test to determine express advocacy. The First Circuit (covering Massachusetts, Rhode Island, Maine, New Hampshire and Puerto Rico),[35] the Fourth Circuit (covering Maryland, Virginia, West Virginia, North Carolina and South Carolina),[36] and the Eighth Circuit (covering Missouri, Arkansas, Iowa, Minnesota, Nebraska, North Dakota and South Dakota)[37] have all held that an explicit endorsement to vote for or against a particular candidate is necessary to a finding of express advocacy. In addition, the Second Circuit (covering New York, Connecticut, and Vermont) has recognized the need for "express advocacy" without ruling one way or the other on the magic words test.[38]

[29] *See Elections Bd. of Wisconsin v. Wisconsin Manufacturers and Commerce*, 597 N.W.2d 721, 730-31 (Wis.), *cert. denied*, 528 U.S. 969 (1999).

[30] *See Washington State Republican Party v. Washington State Public Disclosure Commission*, 4 P.3d 808, 824 (Wash. 2000).

[31] *See State ex rel. Crumpton v. Keisling*, 928 P.2d 3, 10-11 (Or. App. 1999), *review denied*, 994 P.2d 132 (Ore. 2000).

[32] *Chamber of Commerce v. Moore*, No. 3:00-cv-778 WS, slip op. at 25 (S.D. Miss. 2000).

[33] *Id.*

[34] *See* 12 S.W.3d 31, 35-36, 52 (Tex. 2000).

[35] *See Maine Right to Life Comm., Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996) (*per curiam*).

[36] *See FEC v. Christian Action Network*, 110 F.3d 1049, 1061-62 (4th Cir. 1997).

[37] *See Iowa Right to Life Comm. v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999).

[38] *See Vermont Right to Life Comm. v. Sorrell*, 221 F.3d at 338-91.

The Delimited Time Approach

In the passage quoted above from the *Moore* opinion, note that the Mississippi federal district court found it significant that the Chamber's ads were broadcast "at the very time statewide judicial elections were being conducted." The court took the timing of the advertisements to be significant because, even though the ads did not contain explicit voting directives, the fact that they spoke about particular candidates at the time the latter were themselves campaigning for election obviously lends itself to the conclusion that the ads were in effect endorsements of candidates.

Building upon this idea, some reformers have drafted reporting and disclosure regulations that employ a "delimited time" approach. Regulations of this type mandate that political communications made during a specified period of time before an election will be deemed to constitute express advocacy if they refer to a particular candidate running in that election. For example, the proposed Shays-Meehan campaign finance reform bill currently pending in Congress mandates that radio and television advertisements airing within 60 days of a general election, or within 30 days of a primary election, qualify as electioneering communications if they make reference to a candidate. In a similar vein, the Wisconsin legislature is currently considering a public financing bill that would provide matching funds enabling participating state Supreme Court candidates to respond to ads run against them, or in favor of their opponent, within a specified period of time before the election. Reformers should be aware, however, that the Second Circuit Court of Appeals has struck down a version of the delimited time approach as being overbroad.[39] In addition, two federal district courts in Michigan have prevented enforcement of a state regulation that prohibits corporations and unions from using airing advertisements containing the name or likeness of a candidate within 45 days of an election.[40]

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Protecting Against First Amendment Challenges

There are several ways that campaign finance reform laws can create additional protections for First Amendment rights. In our view, the delimited time approach is constitutionally defensible even without these provisions, but adding them may reduce the risk of legal challenge.

(1) Rebuttable Presumption. A law could establish a presumption – rather than a conclusive rule – that expenditures for a communication that mentions a specific candidate, and that is broadcast within a specified time period before an election, must be reported. This would leave the entity which aired the communication with the opportunity to rebut the presumption by demonstrating that the communication was not intended to influence the outcome of the election, but was in fact intended to inform the public with respect to a certain political issue. If such a demonstration is made, the state

[39] *Id.* at 376.

[40] *See Planned Parenthood Affiliates of Michigan, Inc. v. Miller*, 21 F. Supp. 2d 740, 742-46 (E.D. Mich. 1998); *Right to Life of Michigan, Inc. v. Miller*, 23 F. Supp. 766, 768-71 (W.D. Mich. 1998).

regulatory agency would have to muster clear and convincing evidence to prove the existence of an intention to elect or defeat a particular candidate at the polls.

(2) Self-Certification. A regulation might allow entities airing communications within a specified time period before an election to file formal statements with the regulatory agency averring that a particular communication is intended solely as issue advocacy. Expenditures for the communication would then be exempt from reporting requirements, unless the agency demonstrated that the communication was in fact intended to influence the outcome of the election.

(3) Monetary Thresholds. In accordance with the MacIntyre case discussed above, it is wise to set the level of expenditure that requires a particular individual or group to file disclosure reports sufficiently high such that lone speakers are not deterred from speaking because of the burden of disclosure.

(4) Sanctions. Laws that impose exclusively civil sanctions for their violation are likely to be subject to a less stringent First Amendment standard than laws imposing criminal penalties. We recommend that violations of reporting requirements imposed on interest groups that avoid magic words in their advertising be punished with stiff fines rather than criminal sanctions.

The Special Nature of Judicial Elections

No court weighing the constitutionality of reporting and disclosure regulations as they may apply to judicial elections has given consideration to the particular interest that the government has in maintaining the integrity of the judiciary. As a general matter, however, courts have pervasively recognized that the judicial process must be forthrightly impartial in fact as well as in appearance. Indeed, the Supreme Court has held that litigants are constitutionally entitled to proceed before "a neutral and detached judge."[41] Thus it is that, in Justice Potter Stewart's words, "[t]here could hardly be a higher governmental interest than a State's interest in the quality of its judiciary."[42]

The importance of an impartial judiciary is such that courts have upheld impositions on First Amendment activity that would clearly be impermissible were the functioning of the judiciary not at state. In *Cox v. Louisiana*,[43] for example, the Supreme Court upheld a state statute that prohibited "pickets or parades in or near a building housing a court" if such activity is conducted with "the intent of interfering with, obstructing, or impeding the administration of justice." Such restriction upon speech was permissible because observers might believe that raucous demonstrations outside of a court would exert influence upon the process of justice taking place inside. The government is legitimately empowered

[41] *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972); *see also Concrete Pipe and Prods. of Calif. v. Construction Laborers Pension Trust of S. Calif.*, 508 U.S. 602, 617-18 (1993) (litigants are entitled to a judge free of influences "which might lead him not to hold the balance nice, clear and true").

[42] *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848 (1978) (Stewart, J., concurring).

[43] 379 U.S. 559 (1965).

to counteract this perception because it may "properly protect the judicial process from being misjudged in the minds of the public."[44]

With respect to judicial elections specifically, courts have held that limitations upon campaign activities greater than those applicable to elections generally are consistent with the First Amendment. This has been true especially of restrictions upon the activities of judicial candidates themselves. Thus, the U.S. Court of Appeals for the Eighth Circuit recently upheld a range of restrictions imposed by Minnesota upon judicial candidates, including bans upon judicial candidates attending partisan political gatherings, identifying their membership in a political party, or announcing their views on disputed legal and political issues. The court held that, even though the restrictions clearly implicated First Amendment rights, they were proper because "[t]here is simply no question but that a judge's ability to apply the law neutrally is a compelling governmental interest of the highest order."[45]

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With this in mind, a showing that interest group activity in judicial elections conducted independently of any campaign threatens at least the public perception of impartial justice might be held to justify the extension of reporting and disclosure regulations to entities conducting such activity to an extent greater than in elections generally. That is, if the government can regulate the actual *content* of judicial candidate speech in furtherance of its interest in maintaining the integrity of the judicial process, then it seems reasonable that the lesser imposition of reporting and disclosure regulations to entities making independent efforts in judicial elections is constitutionally permissible, even if there is some question as to whether such efforts constitute express advocacy.

[44] *Id.* at 565.

[45] *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 864 (8th Cir.), *cert. granted in part*, 2001 WL 1160787 (Dec. 3, 2001).

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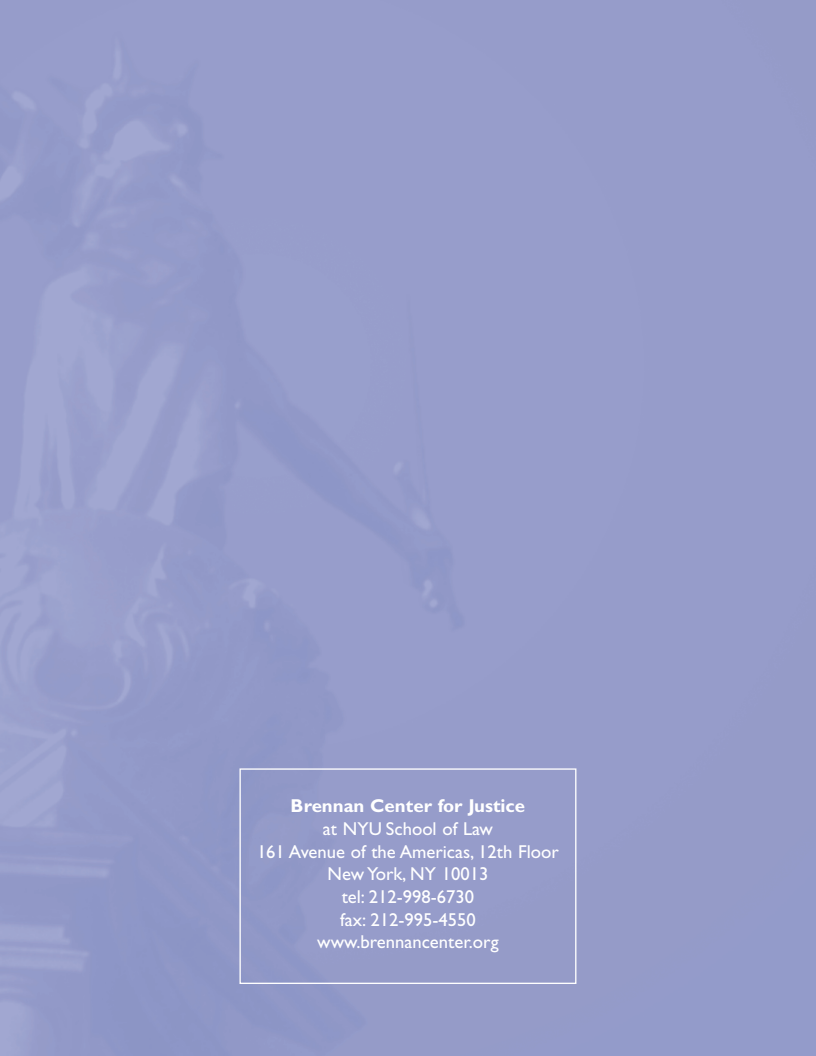

Brennan Center for Justice
at NYU School of Law
161 Avenue of the Americas, 12th Floor
New York, NY 10013
tel: 212-998-6730
fax: 212-995-4550
www.brennancenter.org