Judicial Elections

Let's face it. Judicial elections are weird. Or used to be. If you've ever attended a candidates' night, here's what used to happen. Candidates for the political offices like city council, county commission, state legislature, or governor give campaign speeches in which they make promises about what they will do if elected, and run on platforms clearly setting forth their positions. Candidates for judge used to stand up, talk about their backgrounds and why they were qualified for the position, and say nothing. They would usually explain that they couldn't make any promises or take positions on anything. The audience yawned a lot.

More weirdness. In Ohio, judges first run in a primary, which is a partisan race. When that is over they run on the nonpartisan ballot. They didn't always. Judicial elections used to be partisan, but in 1911, Ohio switched to the nonpartisan ballot. What this means is that when it comes to electing judges, there are no party labels under the candidate's name, as there would be under the name for candidates for governor or

state legislator, or any political office. So many people don't have a tool they otherwise use to decide for whom to vote.

In Ohio, as in many states, the state supreme court sets the rules for judicial elections. Judges or judicial candidates who violate these rules can be disciplined. (both incumbents and challengers are subject to these rules). Ohio's judges have long been subject to rules that do not apply to other kinds of candidates. These have included restrictions on speech, political activity, and fund raising. For many decades judges and judicial candidates could not speak about issues that might come before the court. They could not personally solicit funds. They had to have a committee do that for them. And they could not include their party affiliation on campaign literature after the primary was over.

There is a reason for all this, and to my mind, a very good one. Judges aren't representatives. Their only constituency is the law. They cannot promise how they will rule in a particular type of case. It is a judge's job to decide the individual case in front of him or her, based on the facts and law in that situation.

In 2002, the U.S. Supreme Court issued a blockbuster decision called Republican Party of Minnesota v. White. A judicial candidate in

Minnesota challenged Minnesota's restrictions on judicial candidates. In a 5-4 decision authored by Justice Antonin Scalia, the Court agreed with the candidate that many of these restrictions violated his First Amendment rights. According to Scalia, if states chose to elect their judges (and he was not saying that was a good idea; to the contrary, he seems to suggest it is not), then judges must be allowed the same rights to speak freely as other candidates so people know why they are voting for a particular judge.

Since the *White* decision came out, state supreme courts have been struggling to try and decide what to do about their judicial elections, and whether to remove some of the restrictions placed on judicial candidates. Last year, the Ohio Supreme Court loosened up the reins a bit on judicial candidate speech. The Court's rule now says that "in connection with cases, controversies, or issues that are likely to come before the court," a judge or judicial candidate cannot "make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office". So on those candidates' nights, if they want to, judges can now say more than they used to. But just

because they can doesn't mean they must. Some still don't like the idea of speaking out on issues.

Judicial candidates across the country continue to challenge other campaign restrictions placed on them by their state supreme courts. In 2006, a candidate for the Kentucky Supreme Court named Marcus Carey challenged a number of Kentucky's judicial campaign rules. He argued that Kentucky's rules forbidding a judge or judicial candidate from including his political affiliation in his campaign ads, bans on soliciting campaign funds, and the rules limiting campaign speech were unconstitutional.

That case, Carey v. Wolnitzek, was just decided by the U.S. Court of Appeals for the Sixth Circuit, which covers Ohio, Kentucky, Michigan, and Tennessee. In an opinion written by Judge Jeffrey Sutton, the court struck down the party affiliation and solicitations bans, and sent the case back to the trial court for more work on the campaign speech issues.

Ohio's political affiliation and anti-solicitation bans are similar to Kentucky's. After the Carey decision came out in July, the Ohio Supreme Court made two major changes to its rules of judicial campaign conduct. First, the Court removed the ban on identifying party affiliation in

campaign ads once the primary is over. Candidates now are free to include their party affiliation in their campaign advertisements all the way up to the general election—if they want to. Again, just because they can doesn't mean they must.

The Ohio Supreme Court also amended its anti-solicitation rule. Personal monetary solicitations by the judge or candidate are still banned, but judges and judicial candidates can now make a general request for campaign contributions when speaking to an audience of twenty people or more, and are now allowed to sign letters soliciting campaign contributions if the letters are for distribution by the campaign committee, and the letters clearly state that contributions go to the committee, not the judge.

Meanwhile, while all of this was going on, a statewide labor union, three Ohio Judicial candidates (two incumbents and one non-incumbent candidate) and the Ohio Democratic party filed a lawsuit in federal district court here in Cincinnati asking the court to throw out the nonpartisan judicial ballot and to allow judges' party affiliations to appear on the ballot. They also asked the court to throw out the rule prohibiting personal solicitation and receipt of funds.

One of the reasons for the challenge to the non-partisan ballot is that there is so much fall-off in the number of votes in these races. In Ohio, by law, the nonpartisan ballot follows all the partisan elections. Every single partisan office—like coroner, clerk of courts, and county engineer—appear on the ballot before judges. And when electors finally reach the non-partisan ballot, the judicial races aren't even first on that ballot—candidates for the state board of education are. So there is a huge drop-off in the number of people who actually vote for judges.

Chief Judge Susan Dlott, to whom this case was assigned, rejected both of these challenges. She noted that the Ohio Supreme Court had just changed its anti-solicitation rule in light of the 6th Circuit opinion, and declined to invalidate the new rule. She also declined to strike down the non-partisan judicial ballot for the upcoming election.

I particularly like this part of Judge Dlott's opinion about judges asking for money. "Abolishing all restrictions on personal solicitation could undermine public confidence that the judiciary is fair, impartial, and independent…Whether or not a judicial candidate's unbridled solicitation and receipt of campaign contributions actually resulted in favoritism, it

certainly could erode the public's trust in the integrity of its judges."

Amen.