

# JUDICIAL CAMPAIGN CONDUCT COMMITTEES: SOME RESERVATIONS ABOUT AN ELEGANT SOLUTION

STEVEN LUBET\*

## INTRODUCTION

Barbara Reed and Roy Schotland have provided us with a broad and insightful analysis of state judicial conduct campaign committees.<sup>1</sup> Prior to this excellent survey, even knowledgeable observers of judicial elections would have been unaware of the extent and scope of judicial campaign conduct committees, as well as the variations among them. For that reason alone, Reed and Schotland's Paper performs great service for all who are concerned about judicial ethics.

More important, Reed and Schotland have initiated a discussion regarding an extremely significant aspect of judicial elections. As of this writing, the United States Supreme Court has just granted certiorari in *Republican Party of Minnesota v. Kelly*,<sup>2</sup> which will be the first case on judicial election conduct to reach the Supreme Court on the merits. Depending upon the outcome of that case, judicial campaign conduct committees may well become the principal means for the implementation, or perhaps even the articulation, of ethical standards in judicial elections.

Reed and Schotland see campaign conduct committees as a creative means of "bridging the gap" between the desire to enforce speech restrictions and the need to respect the First Amendment.<sup>3</sup> In their view, a committee's declarative function—"more speech"—can achieve many of the same benefits as formal discipline while avoiding constitutional problems. That is, a committee, upon receiving a complaint, can evaluate a candidate's campaign speech (or advertisements) and, if appropriate, declare it improper or unethical while imposing no further sanctions.<sup>4</sup> The fear of such a pronouncement would

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\* Northwestern School of Law. B.A., Northwestern University, 1970; J.D., 1973, University of California at Berkeley. This Paper was prepared specifically for the *Symposium on Judicial Campaign Conduct and the First Amendment*. The views expressed in this Paper are those of the author and do not necessarily reflect the views or opinions of the National Center for State Courts, the Joyce Foundation, or the Open Society Institute. Supported (in part) by a grant from the Program on Law & Society of the Open Society Institute, as well as a grant from the Joyce Foundation.

1. Barbara Reed & Roy A. Schotland, *Judicial Campaign Conduct Committees*, 35 IND. L. REV. 781 (2002).

2. 247 F.3d 854 (8th Cir.), cert. granted, 122 S. Ct. 643 (2001).

3. Reed & Schotland, *supra* note 1, at 783.

4. As Reed and Schotland point out, the committees do more than simply rule on the appropriateness of campaign speech. Committees perform important educational and mediation function—meeting with candidates to discuss ethics rules (not limited to questions of pure speech) and attempting to resolve disputes when they arise. *Id.* In addition, committee procedures mandate a fair process before any candidate's campaign speech is found inappropriate or unethical. See *Weaver v. Bonner*, 114 F. Supp. 2d 1337, 1346 (N.D. Ga. 2000). Moreover, a committee can also

presumably keep candidates in line or, failing that, would alert the public when ethical lines have been crossed.<sup>5</sup>

It might be said that a judicial conduct committee can encourage restraint without imposing constraint. Consequently, the first section of this Paper will briefly develop the normative case in favor of restraining certain speech in judicial elections. Thereafter, Section II will evaluate the posited virtues of judicial campaign conduct committees, raising some misgivings and reservations that were not discussed by Reed and Schotland. Finally, Section III will make several additional suggestions of means to enhance the legitimacy of campaign conduct committees.

### I. THE CASE FOR RESTRAINT

The debate over judicial campaign conduct—must it be freewheeling or are there legitimate limits?—can be neatly summarized in a couple of sentences. First, there are those who say something like, “You don’t lose your First Amendment rights simply because you are running for judge.”<sup>6</sup> The equally emphatic response is “Oh yes you do,”<sup>7</sup> followed by the necessary explanation of which, and how many, restrictions the First Amendment can tolerate when it comes to judicial campaigns.<sup>8</sup>

In many ways the disagreement is over basic principles, or at least definitions. If the defining property of a judicial campaign is its *electoral nature*, then speech can hardly be limited in any significant way. Democracy demands information, and who can provide it better than the candidates? On the other hand, if the defining property is the *judicial nature* of the office sought, then there would seem to be a compelling public interest in at least those limitations necessary to protect the ultimate value of impartial judging.

For the purpose of this Paper I will assume that the constitutional problem is essentially unresolvable. It is doubtful that any method of reasoning or case analysis can tell us definitively whether—and to what extent—electoral values trump judicial values, or vice versa.<sup>9</sup> Although the trend in the courts has been

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refer a matter to the state disciplinary authority if it believes that further action is necessary. In this Paper, however, I have concentrated on the “declaration-without-more” aspect of the committees’ work, since that unique function holds the greatest promise of resolving the constitutional impasse regarding campaign speech.

5. Reed & Schotland, *supra* note 1, at 783-84.

6. See generally Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 IND. L. REV. 735 (2002).

7. See generally Robert O’Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701 (2002).

8. See generally Stephen Gillers, “If Elected, I Promise [\_\_\_\_\_]”—What Should Judicial Candidates Be Allowed to Say?, 35 IND. L. REV. 725 (2002).

9. In fact, my view is that certain restrictions on judicial campaign speech are constitutional, for many of the same reasons that other limitations on judges’ speech are permitted under the First Amendment. See, e.g., Steven Lubet, *Free Speech and Judicial Neutrality: A Reply to Monroe*

to expand the permissible scope of campaign speech, no court has been willing to jettison entirely the idea that judicial elections may be treated differently from other elections. Moreover, Professor O'Neil argues persuasively that the courts have seriously undervalued the arguments in support of restricted campaign speech,<sup>10</sup> so there is surely a possibility that the trend eventually will be arrested or reversed.<sup>11</sup>

While the constitutional outcome regarding this question is debatable, the normative principle seems far less controversial. Both the public and the judiciary are better served when judicial campaigns are clean and honest, and most especially when the candidates refrain from committing themselves to future rulings. There is simply no good argument in favor of turning judicial elections into referenda on specific outcomes. While a certain amount of precommitment or "signaling" may be unavoidable—and uncontrollable—in hard fought campaigns, there is every reason to attempt to prevent or discourage it through all constitutional means.

For this reason, it is unfortunate that the proponents of unconstrained campaign speech sometimes tend to minimize the dangers inherent in conducting judicial elections without regard to judicial ethics. For example, Erwin Chemerinsky makes a powerful case for First Amendment protection, but in doing so he discounts the possibility that judges who have made campaign promises "will be likely to decide the issue as they have promised."<sup>12</sup> Instead, he "imagine[s] that judges who made a promise in their campaign might try to 'bend over backwards' to show that they are fair and not simply following their prior speech."<sup>13</sup>

Even assuming that Chemerinsky's estimation is correct—though it hardly seems that a judge cognizant of the need to run for reelection would actually glory in a public flipflop—the fact remains that the promise in his scenario has quite evidently influenced the judge's eventual ruling. Whether the judge adheres to her commitment or "bends over backwards" to reverse it, it still

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*Freedman*, 37 COURT REV. 6 (2001); Steven Lubet, *Judicial Conduct: Speech and Consequences*, 4 LONG TERM VIEW 71 (1997); Steven Lubet, *On Judge Posner and the Perils of Commenting on Pending or Impending Proceedings*, 37 COURT REV. 4 (2000).

10. See generally O'Neil, *supra* note 7.

11. The certiorari grant in *Republican Party of Minnesota* was limited to Minnesota's so-called "announce clause," which prohibits judicial candidates from announcing their views on "disputed legal and political issues." That clause has been seriously limited in many states, however, in keeping with the 1990 revisions to the Model Code of Judicial Conduct, which now prohibits only "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court. . . ." MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (1990). Moreover, the related rule against making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office," as adopted in most states, is not under review in *Republican Party of Minnesota*. *Id.* at Canon 5A(3)(d)(i).

12. Chemerinsky, *supra* note 6, at 744.

13. *Id.*

appears that the case has been strategically decided in the shadow of the promise, rather than on the unaffected basis of facts and law. Either way, objective judging has been betrayed. Once on the bench, we hope that judges will completely ignore their campaigns, but Chemerinsky's scenario demonstrates just how difficult, or even impossible, that is in an environment that allows campaign promises.

Chemerinsky further notes that "[a]ll judges come on to the bench with views" about important issues, to which they will likely adhere even if they have not been expressed during the electoral campaign.<sup>14</sup> Since judging is inevitably influenced by the candidates' preexisting opinions, whether or not publicly stated, campaign restrictions cannot possibly result in better or more impartial judging. If true, that would be an argument in favor of abandoning not only mandatory restrictions, but even purely aspirational provisions or precatory rules as well. In fact, campaign promises would have to be encouraged so that the public would be as informed as possible about the candidates' determinative views.

But all views are not alike, in either origin or intensity, and Chemerinsky's analysis therefore conflates two very different phenomena. All judges, no doubt, come to the bench with a few relatively settled ideas about major legal issues, and these are unlikely to be enhanced (or diminished) by announcement during the campaign.<sup>15</sup> Alas, other "views," or more accurately, "stances," may be developed for the very purpose of the campaign. That is, the candidate may have no entrenched opinion about a particular matter, but she will be motivated to take a particular position in order to be elected. Such situations are often created when interest groups press candidates for answers to questionnaires, or even for outright commitments during the campaign. There would be nothing untoward about this in a campaign for legislative or executive office; politicians take positions in order to get elected and strive to fulfill them afterward. But in a judicial election, where the promises relate to specific cases, it is antithetical to the very premise of judging.

In other words, the pressure to make campaign promises may result in the multiplication of "opinions," far beyond the judicial candidates' previously settled ideas. For example, one recent state supreme court election was contested over an extraordinarily complex legal technicality—state court jurisdiction over federally reserved in-stream water flows—about which it is extremely unlikely that any candidate would have had a long-held opinion.<sup>16</sup> The election saw extensive interest-group demands for pledges to reverse an unpopular decision, thus making the situation completely different from Chemerinsky's paradigm of the sincerely-held preexisting belief.<sup>17</sup>

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14. *Id.*

15. Gillers, *supra* note 8, at 729.

16. See generally John D. Echeverria, *Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections*, 9 N.Y.U. ENVTL. L.J. 217 (2001).

17. Chemerinsky also conflates prior judicial opinions with campaign promises, asking rhetorically if it undermines impartiality "[i]f the judge has written a judicial opinion expressing

Simply stated, judicial campaign promises are bad, bad, bad. They have a corrupting influence on the judicial system itself, and they tend to undermine the basic guarantee of due process—that cases will be decided in court on the basis of individual merit, rather than at the ballot box.

Recognizing that the First Amendment may protect many categories of “bad speech,” it is undeniable that enforceable prohibitions against campaign promises—whether merely signaled or stated outright—face a steep constitutional hurdle. In that light, campaign conduct committees, armed with the power to declare “misconduct” but refraining from any other enforcement, offer a tempting solution. Can such committees effectively regulate judicial campaign conduct while avoiding First Amendment prohibitions?

## II. ELEGANT SOLUTIONS

As described by Barbara Reed and Roy Schotland, campaign conduct committees offer a truly elegant solution to the problem of objectionable judicial campaign speech—more speech.<sup>18</sup> While the form and composition of such committees varies, their hallmark, for present purposes,<sup>19</sup> is that they confine their effort to the declaration of misconduct. Thus, no actual discipline would be imposed upon a judicial candidate who violated the relevant ethics provisions, apart from the consequence of having her campaign activities declared unethical.

No penalty means no constitutional concerns, particularly if the committee is of the “unofficial” variety.<sup>20</sup> Undesirable conduct is deterred, campaigns are cleaner; neutrality is uncompromised; the Constitution is unviolated. *Voilà!*

All elegant solutions come with drawbacks, however, and judicial campaign conduct committees are no exception. In the case of judicial campaign conduct committees—official, quasi-official, or unofficial—there are substantial, and interconnected, concerns.

First, the committees may have a far greater impact on protected speech than is immediately apparent. Then again, a committee that fails to deter some speech would quickly become little more than a pointless “scolding commission.”

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views on exactly the issue now pending. . . .” Chemerinsky, *supra* note 6, at 745. See also Gillers, *supra* note 8, at 728. The missing distinction, of course, is that judges must write opinions as part of the very process of judging. To the extent that prior opinions attenuate strict impartiality, that is simply a necessary consequence of judging itself. No similar rule of necessity justifies or requires campaign promises.

18. Reed & Schotland, *supra* note 1, at 790.

19. Regarding other commendable committee functions, see *supra* note 4.

20. At least one court has held that the “‘truth declaring’ function” of even an official committee does not create a constitutional problem. *Pestak v. Ohio Elections Comm.*, 926 F.2d 573, 579 (6th Cir. 1991). This conclusion is suspect, however, since the “declaration” could just as easily be seen as an official reprimand, which does implicate the constitution. See *Oberholzer v. Commission on Judicial Performance*, 20 Cal. 4th 371 (1999), in which the California Supreme Court held that “stinger letters” require constitutional protections, even though the letters simply inform judges of declared ethics violations, with no penalties or further consequences.

Finally, the eventual credibility of a committee will be compromised to the extent that it is perceived only as a device for protecting incumbents or establishment-backed candidates.

### A. Speech

To be blunt, the purpose of a judicial election conduct committee is to delegitimize certain discourse by imposing an electoral penalty. A committee is only effective to the extent that it discourages certain forms of campaign speech, and that can only happen to the extent that the committee's pronouncements are perceived to have a likely impact on the election itself. Thus, what is sometimes discounted as a simple declaration is actually an attempt to coerce conformity by damaging disfavored candidates at the ballot box.<sup>21</sup>

Interference in election outcomes is potentially a very big stick. In the case of official and quasi-official committees, it is also an instrument of questionable virtue. Government intervention in elections, to the detriment of disfavored candidates, is the sort of activity we generally associate with authoritarian regimes and semi-democracies. In our tradition, the sitting government remains scrupulously neutral in elections. Typically, election officials do not help some candidates and disadvantage others—and it is a scandal when they do. To be sure, those in power inevitably attempt to use incumbency to their advantage, but the official organs of government do not declare that some candidates are honest and others untruthful.

Indeed, it may be that the attempt to prejudice an election *ex ante* is more constitutionally troublesome than the imposition of discipline *ex post*.

Nor can committee proponents easily disclaim this repercussion of the declarative function. The committees, after all, must operate for reasons. As Reed and Schotland point out, one of those reasons is to identify “conduct deemed inappropriate” and then “take the initiative to try to discourage or stop such conduct.”<sup>22</sup> One way to discourage candidates is to “present to the public their views of why [such] conduct is inappropriate.”<sup>23</sup>

If the task of the committee is merely to educate the erring candidates, then its ethics declaration could be made privately. Conversely, if the goal of the public pronouncement is anything other than to influence voters, then the committee's work is essentially meaningless. Why would a candidate care about a hollow rebuke?

In fact, in considering the advantages of official committees, Reed and Schotland point to the “potency” that comes with an official sanction for

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21. Speaking of the “endorsement clause” at issue in *Republican Party of Minnesota v. Kelly*, Judge Beam noted that a speech restriction on judicial candidates would also “curtail[] a party's ability to endorse the candidate of its choosing” since the “specter of an ethics violation” would likely be damaging in the election. 247 F.3d 854, 895 (8th Cir.), *cert. granted*, 122 S. Ct. 643 (2001) (Beam, J., dissenting).

22. Reed & Schotland, *supra* note 1, at 783.

23. *Id.* at 784.

misconduct.<sup>24</sup> Other considerations aside, this is only an advantage if one concedes that potent official sanctions have a role to play in determining the outcome of democratic elections.

Reed and Schotland are mindful of the constitutional implications inherent—and I think unavoidable—in official committees. Thus, they conclude on balance that unofficial committees are preferable because they avoid “constitutional limits,” and also because of their “greater credibility.”<sup>25</sup> But the credibility of an unofficial committee cannot be presumed, to which subject we shall now turn.

### B. Credibility

Reed and Schotland posit that campaign conduct committees must be composed of “diverse, respected, knowledgeable, neutral people”<sup>26</sup> and that unofficial committees will have an especially “diverse membership” that is “selected precisely because they are respected and neutral voices.”<sup>27</sup> The theory is persuasive, but in practice it is highly doubtful that everyone will agree.

In fact, the distinct possibility is that any anointed group of “respected, knowledgeable, neutral people” will be regarded skeptically by insurgent or outsider candidates, if not discounted entirely as an arm of the “establishment.” This is not a trivial concern. Outsider candidates—challenging either incumbents or well-entrenched favorites—are often those who are the most inclined to engage in vigorous, unorthodox campaigns.<sup>28</sup> Consequently, they will have good

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24. *Id.* at 790.

25. *Id.*

26. *Id.* at 789

27. *Id.* at 790.

28. For example, the plaintiff in *Weaver v. Bonner* was an insurgent candidate running for the Georgia Supreme Court against Justice Leah J. Sears, a highly regarded and widely endorsed incumbent. 114 F. Supp. 2d 1337 (N.D. Ga. 2000). His principal campaign tactic was to attack her prior statements on the death penalty and “same-sex marriage.” *Id.* at 1340. In response to complaints that Weaver’s aggressive advertisements contained “material misrepresentation[s] of fact or law,” the Georgia Judicial Qualifications Commission convened its three-member special investigating committee. *Id.* at 1339-40. Six days before the election, the special committee issued a public statement asserting that Weaver’s advertisements were “unethical, unfair, false, and intentionally deceptive.” *Id.* at 1340. The committee followed its mandated hearing process, allowing the insurgent several opportunities to be heard. That did not satisfy him, however, as he immediately filed a lawsuit in federal district court. In any event, the incumbent handily won the election. *Id.*

The issue in *Republican Party of Minnesota v. Kelly*, involved a perennial candidate for judicial office, also challenging an entrenched incumbent for a position on the state supreme court. 247 F. 3d 854, 859 (8th Cir.), cert. granted, 122 S. Ct. 643 (2001). His strategy was to obtain an unprecedented political party endorsement in an officially non-partisan election. *Id.* In an advisory opinion, the state Office of Lawyer Professional Responsibility informed the candidate that it would enforce the Minnesota canon prohibiting candidates from seeking, accepting, or using political

reason to be concerned about conduct complaints. Campaign conduct committees, however well-intentioned and non-partisan,<sup>29</sup> therefore run the risk of being perceived as simply an arm of the establishment, which can be damaging to their credibility.<sup>30</sup>

This phenomenon was evident in the 2000 election for a position on the Illinois Supreme Court. Although the seat was open,<sup>31</sup> one of the three major candidates was clearly the favorite of the legal establishment, having lined up a multitude of heavy-duty endorsements.<sup>32</sup> A maverick candidate, however, used his considerable personal wealth to run a series of contentious television advertisements that attacked his opponent in personal terms never before seen in an Illinois judicial campaign.<sup>33</sup> Most observers were outraged, and considered the attack ads to be inappropriate and unacceptable in a supreme court election.<sup>34</sup>

In response to one particularly nasty television spot, the Chicago Bar Association quickly convened its executive committee which, just a few days before the election, issued a public statement denouncing the ad as "misleading and unethical." In an unprecedented move, the bar association withdrew its "qualified" rating for the candidate and publicly branded him "not recommended."<sup>35</sup>

The Illinois bar leaders were in many ways the equivalent of an unofficial judicial campaign conduct committee, and they surely hoped to be regarded as "respected . . . neutral voices."<sup>36</sup> But not everyone saw it that way. The outsider candidate himself responded that he had "no confidence" in the objectivity of the

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party endorsements. *Id.* Again, the challenger lost and the incumbent was reelected.

29. As far as I am aware, there is no comprehensive database that records campaign conduct committee actions. Anecdotal evidence suggests that the committees have been at least as likely to criticize incumbents as challengers. If accurate, this would still not vitiate the perception that committees are establishment oriented, especially in situations where they act to the disadvantage of an aggressive outsider. *See, e.g., Weaver*, 114 F. Supp. 2d at 1337 (judicial campaign conduct committee's decision, absent notice or hearing, that non-incumbent candidate's campaign ads were unethical, did not violate the candidate's due process or First Amendment rights).

30. It is worth noting that the *Symposium on Judicial Campaign Conduct and the First Amendment* in which this Paper was presented was co-sponsored by the Conference of Chief Justices, who are incumbents by definition. One doubts that unorthodox or aggressive campaign tactics would be considered problematic by a conference of non-incumbent challengers.

31. It was actually a primary for the Democratic nomination which, in Cook County, was tantamount to the election itself.

32. Full disclosure: I also endorsed this candidate and supported his campaign.

33. Bill Granger, *Judges Show They Know a Little About Politics*, CHI. DAILY HERALD, Mar. 16, 2000, at 15.

34. Steve Warmbir, *Fitzgerald Prevails in Supreme Court Battle*, CHI. DAILY HERALD, Mar. 19, 2000, at 15.

35. *Zwick Stands by His TV Ad*, CHI. TRIB., Mar. 14, 2000, at 3 [hereinafter *Zwick Stands by His TV Ad*].

36. Reed and Schotland, however, clearly call for committees that include nonlawyers. Reed & Schotland, *supra* note 1, at 790.

bar association committee, claiming that it included supporters of his opponent.<sup>37</sup> He defended his television ads and refused to withdraw them. At least one local political columnist supported that decision, while ridiculing the bar association's action as "pious" and "wet hen" rhetoric offered in support of the status quo.<sup>38</sup> Nonetheless, the maverick candidate was soundly defeated.

The problem, as Justice Harlan once explained in a not-entirely-different context, is that "one man's vulgarity is another's lyric."<sup>39</sup> Likewise, one candidate's outrageous, unfair, unethical advertisement is another's innovative, incisive, tough campaign tactic. As with so many issues, where you stand depends on where you sit—and in the case of judicial campaign conduct committees, the greater probability is that they will both stand and sit with the entrenched bar establishment.

Reed and Schotland hope that this perception can be avoided by ensuring that the committees are composed of knowledgeable, neutral people who will merit widespread public trust.<sup>40</sup> That would work in theory, of course, if such people could be located and agreed upon. In electoral reality, however, one must wonder whether the knowledgeable-yet-neutral person is an illusion.

Why would a knowledgeable person remain neutral in a judicial election? Wouldn't knowledgeable, informed individuals be likely to develop opinions about the candidates, at least in appellate court elections? It is hard to imagine someone expending time and effort on self-education about the judiciary, and then being truly neutral about the outcome of a race.<sup>41</sup> And even if the members

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37. In addition, he called the committee "unprofessional and appalling," and his spokesman called it "a joke." *Zwick Stands by His TV Ad*, *supra* note 35. See also Steve Warmbir, *Justice Candidate Loses Rating as "Qualified" Over Negative Ad*, CHI. DAILY HERALD, Mar. 11, 2000, at 7.

38. Granger, *supra* note 33.

39. *Cohen v. California*, 403 U.S. 15, 25 (1971) (noting that the statement "fuck the draft" was constitutionally protected).

40. Reed & Schotland, *supra* note 1, at 790.

41. Reed and Schotland take sharp issue with this point, insisting to me that it is unfair to many people, such as active members of the League of Women Voters, who "spend their careers . . . doing all they can to be both knowledgeable and neutral" because they believe "the community needs some people who look beyond who wins each particular election." Email from Roy A. Schotland to author (Jan. 17, 2002) (on file with author). I am not sufficiently familiar with the League of Women Voters to know whether individual League activists are truly neutral, though I do know, of course, that the organization itself is nonpartisan. More broadly, however, it seems to me that most efforts at professional neutrality have been greeted with widespread skepticism. For example, the Federal Election Commission is often accused of partisanship (when it isn't accused of fecklessness). More pointedly, the 2000 election in Florida resulted in charges of favoritism against nearly all of the professional judges, including those with life tenure, who ventured opinions in the *Bush v. Gore* controversy. See generally 531 U.S. 98 (2000). For criticism of the Florida Supreme Court, see RICHARD POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001); for criticism of the United States Supreme Court, see JACK RAKOVE, *THE UNFINISHED ELECTION OF 2000* (2001). It is conceivable, of course, that a

of the committee are determinedly dedicated to neutrality, they would still have to convince the public and the targeted candidates. Suspicion in these circumstances is no doubt inevitable, and may sometimes be justified. On at least three occasions I have been consulted by targeted candidates who were concerned that a state judicial conduct commission included contributors and supporters of the candidate's opponents.

### III. THE SEARCH FOR LEGITIMACY

If judicial campaign conduct committees are to play the elegant role proposed by Reed and Schotland, they must above all else be seen as legitimate in their communities. The quest for knowledgeable, neutral members is neither self-fulfilling, nor will it necessarily be self-evident.

The absolute starting point is that every committee must be nonpartisan (or pan-partisan), multi-professional, and expansively inclusive. As Reed and Schotland make clear, it surely will not do for a committee to be composed exclusively of lawyers, or of lawyers and judges. The participation of sitting judges might be questioned pursuant to Rule 4C of the Model Code of Judicial Conduct, which prohibits judges from testifying at public hearings or accepting appointments to commissions concerning matters other than "improvement[s] of the law, the legal system or the administration of justice."<sup>42</sup> In any event, the involvement of judges would have the drawback of seeming to politicize the judiciary, as well as appearing to invest the committee with a pro-incumbent bias.<sup>43</sup>

Lawyers are understood to have the greatest stake in judicial elections, but that also makes them the people most interested (read: non-neutral) in the outcome. Thus, even though lawyers are presumptively the most knowledgeable about the issues and standards in a judicial election, their opinions are also likely to be the most suspect.

For the same reason, the nonlawyer members of a committee should not be drawn from the usual ranks of business leaders. Instead, committee membership should be extended in nontraditional directions to include civic activists, school teachers, community organizers, small business owners, and, shall we say, ordinary people. The risk is that a broadly constituted committee will find it difficult to reach consensus, thereby precluding definitive action in all but the most unequivocally egregious cases. Then again, it is in precisely such cases that a persuasive and unified committee voice is the most needed.

Most important, however, is the manner in which a judicial campaign conduct committee defines its warrant. The 1990 Model Code of Judicial Conduct contains three general restrictions on campaign speech. Under Rule 5A(3)(d), a judge or judicial candidate may not "[M]ake pledges or promises of

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judicial conduct committee could be composed of individuals whose neutrality is beyond question, but the task is daunting.

42. MODEL CODE OF JUDICIAL CONDUCT Canon 4C(1) and (2) cmt. (1990).

43. See Reed & Schotland, *supra* note 1, at 789-90.

conduct in office other than the faithful and impartial performance of the duties of the office”;<sup>44</sup> “make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court”;<sup>45</sup> or “knowingly misrepresent the identity, qualifications, present position or any other fact concerning the candidate or any opponent.”<sup>46</sup>

Even in the absence of constitutional objections, as in the case of an unofficial committee, only the first provision ought to be the subject of campaign conduct committee intervention.

As discussed at the outset of this Paper, the greatest harm to the judiciary is occasioned by campaign promises that commit candidates to certain outcomes. “Pledges and promises” are more clearly unethical and more dangerous to guarantees of due process, thus creating a greater need for intervention.

In contrast, the second prohibition is vague and ambiguous, and it is therefore unlikely to lead to a credible committee pronouncement. To be sure, one aspect of the rule simply restates the rule against pledges and promises, by banning “statements that commit or appear to commit the candidate with respect to cases . . . likely to come before the court.”<sup>47</sup> But the provision also applies “controversies or issues.”<sup>48</sup> It would be nothing less than a quagmire for a campaign conduct committee to condemn a statement that commits, or for that matter “appears to commit,” a candidate with respect to a mere “issue.”

For better or worse, judicial elections are contested over issues. A campaign conduct committee would risk undermining its moral authority, and all of its other pronouncements, should it attempt to drive issue discussions out of a campaign.

Finally, the matter of misrepresentations—as delineated in the third provision—ought to be left to the candidates themselves. Political campaigns are made up of charges and countercharges, and they are correctable through the ordinary processes of political debate. If a judicial candidate has been smeared or defamed, she can simply respond to the insult. Then the voters will choose. That is why they call it an election.

In sum, judicial campaign conduct committees can do their best work by exposing the unethical nature of “pledges or promises of conduct in office”<sup>49</sup> or commitments “with respect to cases.”<sup>50</sup> Not only are such promises harmful to

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44. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (1990).

45. *Id.* at Canon 5A(3)(d)(ii). The 1972 Model Code contained a broader version of this prohibition, providing that a candidate may not “announce his views on disputed legal or political issues.” MODEL CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (1972). This provision—sometimes called the “announce” clause—has been held unconstitutional by several courts, and it is currently pending before the U.S. Supreme Court in *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (8th Cir. 2000), *cert. granted*, 122 S. Ct. 643 (2001).

46. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(iii) (1990).

47. *Id.*

48. *Id.*

49. *Id.* at Canon 5A(3)(d)(i).

50. *Id.* at Canon 5A(3)(d)(iii).

the judicial process, but they also tend to have a multiplier effect, as one candidate's promise may lead to an opponent's promise in response. The candidates (or their supporters) cannot be relied upon to remedy this one-way ratchet. Thus, the intervention of an ethics committee can be most helpful in breaking or forestalling a cycle of unethical promises.