

ETHICS AND RHETORIC IN WISCONSIN JUDICIAL ELECTIONS

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Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially.

— Socrates

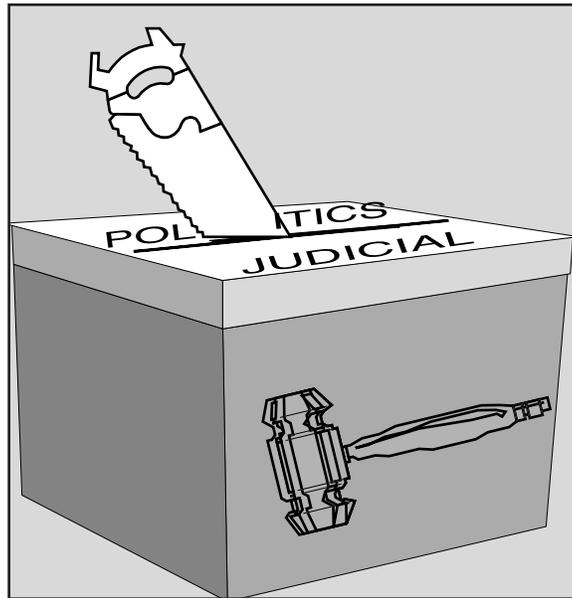
He appointed judges in the land, in all the fortified cities of Judah, city by city, and he said to them: "Take care what you do, for you are judging, not on behalf of man, but on behalf of the Lord; he judges with you. And now, let the fear of the Lord be upon you. Act carefully, for with the Lord, our God, there is no injustice, no partiality, no bribe-taking."

— Second Book of Chronicles, 19:5-7

I ... do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Wisconsin; that I will administer justice without respect to persons and will faithfully and impartially discharge the duties of [my] office to the best of my ability. So help me God.

— Oath of Office, Wisconsin Justice or Judge

Two principles are in conflict and must, to the extent possible, be reconciled. Candidates for public offices should be free to express their views on all matters of interest to the electorate. Judges should decide cases in accordance with law rather than with any express or implied commitments that they



may have made to their campaign supporters or to others. The roots of both principles lie deep in our constitutional heritage. Justice under law is as fundamental a part of the Western political tradition as democratic self-government and is historically more deeply rooted, having been essentially uncontested within the mainstream of the tradition since at least Cicero's time. Whatever their respective pedigrees, only a fanatic would suppose

that one of the principles should give way completely to the other — that the principle of freedom of speech should be held to entitle a candidate for judicial office to promise to vote for one side or another in a particular case or class of cases or that the principle of impartial legal justice should be held to prevent a candidate for such office from furnishing any information or opinion to the electorate beyond his name, rank, and serial number.

— Chief Judge Richard Posner, United States Court of Appeals for the Seventh Circuit, in *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1993).

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The imperative of impartial justice under law is deeply rooted in our history and essential to the preservation of our democratic self-government. One of the most important responsibilities of a judge is impartiality, and one of the most important qualities we look for in a judge is the mental discipline to avoid prejudging a case or legal issue until all the facts are in, and the law has been argued and analyzed in the context of the facts. Only then have the parties to the lawsuit and the public at large received the justice they are due, their “day in court.”

This is the essence of fairness, and one of the reasons that longstanding rules of judicial ethics in Wisconsin prohibit judges and judicial candidates from, among other things, engaging in campaign rhetoric about cases or legal issues that may come before them. The reason for this is obvious: how can the public or a person with a lawsuit expect a fair hearing from a judge with an agenda, a judge who has committed himself or herself to a particular position on a case or legal issue during the course of a campaign? We instruct jurors not to make up their minds until they have heard the entire case; we expect no less from elected judges. So we require judges to avoid certain sorts of campaign behavior. Generally speaking, when a judge offers an opinion about a case or class of cases, he or she does so from the bench, not the campaign trail. In this way, the democratic values of judicial accountability (of the direct, ballot box variety) and judicial independence can peacefully coexist.

Or can they? The modern political process as applied to the election of judges poses special challenges for impartial justice under law. Candidates for judicial office nowadays face intense political pressure to behave in ways that threaten to compromise their impartiality and weaken their independence. Special interest groups and the media demand to know how judicial candidates will vote on particular cases or legal issues, and heap criticism on those who refuse to be drawn into such discussions. Commitments are expected in exchange for endorsements. “Litmus tests” are proposed. Candidates are pushed to run legislative-style

campaigns that include promises to rule this way or that on hot-button legal issues. Some do it by design, as a matter of strategy, essentially reinterpreting the rules of judicial ethics which, in this area at least, are rarely enforced, — First Amendment line-drawing is difficult to do — and therefore frequently violated.

On one hand, the phenomenon is completely understandable. Judicial campaigns, like campaigns for other public offices, are obviously *political* (as distinct from partisan — in Wisconsin, at least) events. How can voters form a judgment about a judicial candidate without knowing the candidate’s views on issues of consequence? How can a judicial candidate communicate his or her candidacy to the electorate without saying what he or she stands for on the important legal issues of the day? How can the government, consistent with the First Amendment, circumscribe the ability of judicial candidates to engage in basic political speech in the course of a judicial campaign? And how can the media do its job of informing the public if it cannot discover a judicial candidate’s position on particular cases or classes of cases?

And yet judges cannot correctly and credibly carry out their core constitutional functions if the pressures of politics push them to carve out positions on cases and legal issues in order to get elected. Any litmus test approach to judicial selection misunderstands the nature and role of the judiciary, and any capitulation to this sort of political pressure weakens the institution’s credibility and integrity. Choosing judges is not like choosing legislators or congressmen.

Wisconsin’s Code of Judicial Ethics attempts to strike a balance in this clash of values by imposing this rule on judges and judicial candidates:

A judge who is a candidate for judicial office shall not make or permit others to make in his or her behalf promises or suggestions of conduct in office which appeal to the cupidity or partisanship of the electing or appointing power. A judge shall not do or permit others to do in his or her behalf anything which would commit or

appear to commit the judge in advance with respect to any particular case or controversy or which suggests that, if elected or chosen, the judge would administer his or her office with partiality, bias or favor. — *Wisconsin Code of Judicial Ethics, SCR 60.06(3)*.

The original of this rule was adopted by the Wisconsin Supreme Court effective January 1, 1968, as a part of the promulgation of the state's first comprehensive judicial code of ethics.¹ The 1968 ethics code was based largely on the American Bar Association's Canons of Judicial Conduct, adopted in 1924.² The ABA Canons were replaced by the ABA Model Code of Judicial Conduct in 1972, which was again revised in 1990.³ A comprehensive revision of Wisconsin's Judicial Code of Ethics was rejected by the Supreme Court in 1992.⁴ However, many of the proposed revisions were eventually approved by the Court four years later, but those relating to the rules governing political and campaign activity by judges were not, and the 1968 rules in this area were left in place.⁵ In 1997, the Court established a commission, chaired by the Honorable Thomas E. Fairchild of the United States Court of Appeals for the Seventh Circuit, to study the ethics of judicial campaigns and make recommendations to the Court. The Commission filed its final report in June of 1999, and its recommendations are currently pending before the Court. In the meantime, judges in Wisconsin have continued to be bound by Rule 60.06(3).

Many circuit court races are uncontested, and those that are not typically do not become ideological battles that focus on the candidates' views on specific cases or legal issues.⁶ But some do. And almost every Supreme Court

race in the last decade has been a philosophical contest characterized by one or both candidates offering extra-judicial opinions — some enthusiastically, some reluctantly — on significant past cases or legal issues. To be sure, one way to walk the ethical line is to pick and choose which cases or classes of cases to discuss from the stump, trying to guess at which might come up again, and avoiding any comment that could be construed as an advance commitment. But it is the nature of the law that past cases — especially the really important ones that are most likely to generate interest during a judicial campaign — present themselves over and over again, for application, modification and sometimes reversal. As Judge Posner noted in *Buckley v. Illinois Judicial Inquiry Board*, “[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction.”⁷ It was this reality, in part, which lead Judge Posner and his colleagues on the United States Court of Appeals for the Seventh Circuit to strike down the Illinois rule of judicial ethics regulating campaign rhetoric, finding a violation.⁸ Said Judge

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First Amendment
Posner:

[T]he principle of impartial justice under law is strong enough to entitle government to restrict the freedom of speech of participants in the judicial process, including candidates for judicial office, but not so strong as to place that process completely outside the scope of the constitutional guaranty of freedom of speech. Beyond that valuable generality the cases do not provide much guidance, but they certainly do not support the proposition that to prevent the slightest danger of judicial candidates' making statements that might be interpreted as commitments a state is free to circumscribe their freedom of speech by a rule so sweep-

ing that only complete silence would comply with the literal, which is also so far as appears the intended and reasonable, interpretation of the rule.”⁹

The Wisconsin rule has not been challenged, and is different from the Illinois rule invalidated in *Buckley v. Illinois Judicial Inquiry Board*. But the same principles are in conflict, and the task falls to the individual candidate judges to reconcile them, not in the contemplative quiet of chambers but in the heat of a campaign, in each interview with an editorial board, union political action committee, or radio host, in every speech, and in the development of a paid advertising campaign, which is the dominant mode of modern political communication. The trend has *not* been to err on the side of impartial justice under law. Instead, what we have seen is an increased willingness to campaign on a specific legal/policy agenda rather than a general judicial philosophy. We have seen, for example, candidates for Supreme Court build their campaigns around their support for environmental and labor laws, the constitutionality of the sex predator law, and pending legislation regarding campaign finance reform. This phenomenon is fed by the media and special interest players in the political arena who are so influential to the success or failure of any candidacy. There is now an expectation among many reporters, editorial writers, and political action committees that Supreme Court candidates will weigh in on important legislative initiatives and declare how they would have voted on high-profile court cases. Refusing to do so (either categorically *or* case-by-case) carries a potential political price: bad press and loss of endorsements, both editorial and organizational. And so the candidates are drawn in. What all this threatens to do is turn judicial elections into legislative ones, which in turn threatens to populate the judiciary with men and women of legislative rather than judicial mindset.

The difficulty of reconciling the competing principles of impartial justice and free speech in modern judicial politics, of finding the proper balance between judicial independence and judicial accountability in our constitutional system, inevitably raises the question of the advis-

ability of maintaining an elected judiciary.¹⁰ The federal system of lifetime judicial appointment, of course, subordinates judicial accountability in order to maximize judicial independence. I do not sense any widespread public support for the elimination of Wisconsin’s elected judiciary; I suspect that Wisconsin voters would not wish to disenfranchise themselves over the direct selection of their judges. The Supreme Court will take up the Fairchild Commission’s recommendations next term.

For my own part, in my recent Supreme Court campaign, I attempted to balance these competing values by welcoming discussion of my judicial philosophy, background and experience but declining questions about specific cases or legal issues. For this I was criticized by the media, some special interest groups, and my opponent, who labeled it a “don’t ask, don’t tell” policy. I was accused of “hiding behind the robes.” This makes for good sound bites but trivializes the principle of impartial justice. The media, it seems, wants to have it both ways: it decries the politicization of the judiciary and then demands that judges behave like politicians.

But I believed it was important to reverse the rhetorical trends in these races in order to restore the principle of impartial justice to its rightful place in the judicial selection process. In this way, we have a better chance of achieving the reality of it in our courtrooms. The public, it seems, agreed.¹¹

Notes

1. See *The Long and Winding Road: Political and Campaign Ethics Rules for Wisconsin Judges*, Professor Charles D. Clausen, *Marquette Law Review*, Vol. 83, No. 1 (Fall 1999), at 1-6.
2. *Id.* at 5-9.
3. *Id.* at 8-12.
4. *In re* Review of the Code of Judicial Ethics, SCR Chapter 60, 169 Wis. 2d xv.
5. *In re* Amendment of Supreme Court Rules: SCR Chapter 60 – Code of Judicial Ethics, 202 Wis. 2d xx.
6. See *The Long and Winding Road: Political and Campaign Ethics Rules for Wisconsin Judges*, Professor Charles D. Clausen, *Marquette Law Review*, Vol. 83, No. 1 (Fall 1999), at 18.

7. *Buckley v. Illinois Judicial Inquiry Board*, 997 F. 2d 224, 229 (7th Cir. 1993).
8. [A] candidate, including an incumbent judge, for a judicial office filled by election or retention ... should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity ... or other fact; provided, however, that he may announce his views on measures to improve the law, the legal system, or the administration of justice if, in doing so, he does not cast doubt on his capacity to decide impartially any issue that may come before him." *Id.* at 225, citing Ill. S.Ct. Rule 67(B)(1)(c), Ill.Rev.Stat. ch. 110, par. 67(B)(1)(c).
9. *Id.* at 231.
10. It would take a constitutional amendment to change it. A bill was introduced in the Wisconsin legislature last term to begin the amendment process to eliminate the election of Supreme Court justices in favor of appointment by the governor, subject to confirmation by the State Senate.
11. I won the election, by a margin of 66%. I am very grateful to the people of Wisconsin who have entrusted me with the administration of impartial justice on the Wisconsin Supreme Court for the next 10 years.