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THE ROLE OF THE BAR IN POLITICIZED JUDICIAL ELECTIONS

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I. INTRODUCTION

The Supreme Court of the United States has now laid it down that the First Amendment governs speech in judicial elections.1 The immediate issue addressed by the Court was the right of a judicial candidate to speak about the candidate’s own qualifications. However, the same protection clearly would extend to others addressing the subject, including opposing candidates and various interest groups and onlookers. The Court’s opinion does not precisely address any limits on the content of speech in judicial elections, but we may assume that the general rules apply, particularly those applicable to “public figures.” Under the rules of speech concerning “public figures, anything goes short of falsehoods uttered with “malice,” whatever that is.2

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The concept of malicious falsehood in the First Amendment context is not at all clear. However, I suppose—or perhaps it is only that I would like to think—that, in Oregon, that concept poses a purely theoretical issue in the context of judicial elections. The Oregon electorate is relatively sophisticated and generally fair-minded. Historically, it has not been easily misled by political lies. Hence, we may assume that politically effective speech in Oregon judicial elections will be at least minimally relevant and truthful.

II. THE OLD REGIME IN JUDICIAL ELECTIONS

Justice Paul DeMuniz has provided a very useful analysis of Oregon judicial elections under the old regime, that is, elections conducted before the new decision. Under that regime as I interpret it, there were few contested judicial elections, fewer still of elections for judges at the appellate levels, and still fewer in which statements about judicial qualifications had much prominence. Generally, the bar played a modest role, arguing that judicial elections should not be “political” and providing attestation of the qualifications of candidates who enjoyed professional respect. Self-constituted groups of lawyers also participated. They provided modest campaign assistance to candidates facing opposition, including fund-raising, media publicity, public appearances, etc. Compared with contested elections for legislative and executive offices, these were very tame efforts, perhaps even amateurish ones. It was a generally satisfactory arrangement.

Probably that basic pattern will continue, given the nature of the Oregon community. The people of this state have always prized independence as distinct from narrow partisanship and have generally been unimpressed by crude political rhetoric. Massive and expensive campaigns can backfire in such a community, if the people perceive that interest groups are trying to buy an election. There is reason to think that the Oregon electorate understands the concept of judicial independence and values judicial candidates who do not present themselves as partisans. Nevertheless, it seems also safe to predict that in the years ahead there will be some seriously contested judicial elections.

Under the old regime, the role of the candidates in judicial elections was fairly clear, both as a matter of law and as a matter of pro-

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fessional ethics. The candidates could recount their experience and
the endorsements from the bar that they may have received. They
could make very general statements about judicial probity and in-
dependence, and about their commitment to those standards. The term
"independence" sometimes was voiced in terms suggesting independ-
ence from "the establishment," but that was about as far as appeal to
popular sentiment would go. Lawyers observed the restrictive ethical
rules governing statements about judges and judicial candidates. The
contests ordinarily would not focus on specific hot issues, such as
abortion or property taxes or criminal prosecution and sentencing.

The typical judicial election in states having a nonpartisan tradi-
tion such as Oregon—including Minnesota, where the White case
arose—therefore was a very tame affair, indeed a dull and uninfor-
matie one. The members of the Supreme Court of the United States un-
doubtedly were well aware of that fact. One therefore could interpret
their decision as something like this:

Look, folks, judicial office involves hot political issues, as we well know. We express no opinion about the desirability of
elections for judicial office, being ourselves appointees for life.
But if judicial offices are to be filled by popular election, then the
election campaigns must be open for discussion of hot political is-

The judicial candidates themselves must be free to talk about
those issues.

I do not see why this syllogism holds together, but such now is the
law.

III. THE NEW REGIME

The new regime has already arrived in some other states. In
some states, judicial office is filled not only by elections but also by
elections in which candidates appear under party designation. In
some states, elective appellate judgeships have become subject to bit-
terly and expensively contested political campaigns. Such are recent

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4. Id. (referencing OREGON CODE OF JUDICIAL CONDUCT JR 4-102(B) (2001)).
F.3d 854 (8th Cir. 2001), cert. granted, 534 U.S. 1054 (2001), rev'd, Republican Party of Min-
developments in Alabama and Ohio. Politicized judicial elections are possible not only where judges run on party designations, but also where the elections are "nonpartisan." The same can occur in "retainer" judicial elections, where there are not competing candidates and voters address only the issue of whether an incumbent should be retained. Such is the system in California. Only a few years ago a well-organized political campaign resulted in ouster of the Chief Justice of California and two of her colleagues.

Intensely contested elections may be temporary phenomena, the result of political vulnerability of specific judicial candidates and political opportunity of specific political interests. However, the general pattern in political elections is toward more intensive "issue" politics and more heavily financed contests. There is no reason to suppose judicial elections will be immune from this development, and no reason to suppose that Oregon will be spared its effects.

It may be useful to speculate about the consequences. First, all judges, particularly appellate judges, will have to think in political terms far more discerningly than they have in the past. I do not think that such an awareness—wariness, more exactly—is incompatible with judicial independence. Good judges can also have "political smarts." However, political smarts involves an additional faculty of mind that many good lawyers have not cultivated, or lack all together. Indeed, many members of our profession can think about politics only with distaste, even disgust. Lawyers of that frame of mind will find the new regime quite inhospitable.

Second, judges will have to perform their duties of office in terms that are politically more sophisticated. For example, they may have to display less original intellectual creativity and present themselves as merely applying settled law. They may have to rely more heavily on precedent and less on the law reviews, and ascribe policy determinations to the legislature or to constitutional provision. They will have to leave some things simply unsaid. They will have to think more carefully about the difference between their own policy preferences and what the law is or ought to be. None of those developments is necessarily unacceptable, but they require different and subtler ju-

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dicial technique.

Third, the pool of prospective candidates for judicial office will be different from what it has been. It will no longer be sufficient to be a good lawyer of established repute and with a record having no serious blemishes. It will be necessary to be politically acceptable to a broader range of public sentiment, or strongly preferred by a narrower segment of opinion. The political requirements for judicial office will feed back into the nomination process, just as they have done for the federal judiciary. It is not that there will be an inadequate number of would-be judges. The number of lawyers who want to be judges will probably always exceed the available vacancies. However, the qualities of the candidates may not remain the same.

There will be other consequences as well, because judicial selection is an integral part of the American political system, and our political system is very complicated. One can imagine judicial election campaigns in which candidates become embroiled in disputes over the meaning of the Ten Commandments rather than the Due Process Clause. However, there is one prospect in the future to which I wish to draw particular attention: the role of the bar.

IV. THE ROLE OF THE LEGAL PROFESSION IN CONTESTED JUDICIAL ELECTIONS

The bar will feel no more comfortable in the new regime than do most judicial candidates. However, lawyers should alert themselves to the need for change.

First, freedom of speech in judicial elections cuts in more than one direction. I believe the overwhelming sentiment in the bar is that judicial elections should not be “politicized” and therefore that judicial candidates should not directly address controversial issues. If that is indeed the sentiment of the bar, then the bar could consider adopting and promoting a policy statement to that effect. Essentially, the statement would say that judicial candidates should advertise their professional capabilities but should not directly address issues that could come before the court to which they are seeking election. The bar could also express disapproval of judicial candidates who deviate from that policy.

The policy would of course not be legally enforceable. But it could be politically enforceable, a matter of free speech. The policy is in fulfillment of the bar’s interest in professionalism, quite as the bar is interested in truthful advertising of legal services and in limiting the
practice of law to persons who have had a legal education and passed the bar examination. On that basis, formulating and promulgating the policy is within the proper purposes of a state bar under the rule in *Keller v. State Bar of California.* If this analysis is correct, it is a lovely irony that the First Amendment both permits judicial candidates to make political speeches and protects the bar in protesting if they do so.

Second, there will be a greater interest among sectors of the bar in actively supporting judicial candidates who are indeed nonpolitical in the classic sense. That view is shared by other voices in the community. In my opinion, there is no necessary contradiction between saying that judicial office involves dealing with political issues and that judicial office should be performed without political bias, even when the judges are elected. The animating sentiment for elective office for judges is not that judges should be politicians like legislators. Rather, the sentiment has been that judges should not be appointees chosen in closed political chambers. Whether that sentiment reflects an accurate assessment of the alternatives is something else. The point is that people think judges, however chosen, even when chosen by popular election, should be politically neutral.

These days the very idea of political neutrality is widely unpopular. Conservatives say that they want judges who are not “activist,” but on that basis they support judges who will be actively nonactivist. Many of a leftish persuasion continue to look to the judiciary to fulfill social objectives that cannot be obtained from legislatures. Many of more radical outlook deny the very possibility of political neutrality. Political neutrality has itself become a political issue.

V. CONCLUSION

Even though the concept of political neutrality is now controversial, it is a concept on which the legal profession bases its identity. That is, lawyers believe and affirm that there is a difference between law and politics. Our vocation depends upon there being an understanding of “law” that is shared across the widest spectrum of political opinion. It is not an oxymoron to speak of conservative lawyers and radical lawyers, signifying that they are all lawyers regardless of political orientation.

Stated broadly and in crude terms, the difference between law

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and politics is between the process of formulating legal rules for forthcoming future events and the process of appraising evolving events in terms of previously stated rules. Of course the distinction is imperfect and incomplete. Its ambiguity is most evident in constitutional litigation, where the courts apply legal rules to determine the legal validity of other legal rules. But imperfection and ambiguity do not equate to emptiness or mere illusion. There is a discernible distinction between law and politics. And that distinction is the basis for identifying the peculiar characteristics of judicial elections.