PRESERVING AN INDEPENDENT JUDICIARY: THE NEED FOR CONTRIBUTION AND EXPENDITURE LIMITS IN JUDICIAL ELECTIONS

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INTRODUCTION

Chancellor James Kent had an advantage in his career as a state court judge compared to most state judges in the United States today: he never had to run for election or retention to the bench. As Governor of New York, John Jay appointed Kent to a series of judicial posts, as a master of chancery, then to a part-time municipal court judgeship, and finally to the New York Supreme Court where he ultimately became chief justice.[1] In contrast, in the United States today the vast majority of state court judges either are elected or face review in retention elections. In twenty-three states judges are selected via elections, with ten of these states using partisan elections and thirteen using nonpartisan ones.[2] In fifteen additional states judges are appointed through some merit selection process and then face periodic retention elections.[3]

The reality of running for any office in a contested election is that it is expensive, and increasingly that is true of judicial elections.[4] Where do candidates for judicial office, whether in elections or retention elections, turn for money to fund their campaigns? Lawyers and litigants with regular business before the courts are the primary donors.

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1. *See* John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 561-63 (1993).

2. *See* Jason Miles Levien & Stacie L. Fatka, *Cleaning Up Judicial Elections: Examining the First Amendment Limitations on Campaign Regulation*, 2 MICH. L. & POL'Y REV. 71, 74-75 (1997).

3. *See id.*

4. *See* AMERICAN BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS (1998) (hereinafter REPORT). The increasing costs of judicial elections are discussed in Part I of this paper.

Not long ago, I was the moderator for a panel on judicial independence at the annual meeting of the American Judicature Society. After the program, a highly respected California Superior Court judge told me that routinely the conversation in the judges' lunchroom is about which law firms give the most money to judicial campaigns. She said that often when she returns to the bench after lunch those are the very firms appearing before her.

In Part I of this paper, I argue that fund raising in judicial elections is a serious threat to judicial independence. I document the increasing cost of judicial elections and that the source of campaign funds is primarily lawyers and litigants. I contend that such expenditures are a grave threat to judicial independence because they risk both the reality of undue influence and the appearance of impropriety.

In Part II, I argue that judicial independence requires strict limitations on both campaign contributions and campaign expenditures. I recognize, though, that *Buckley v. Valeo* seems to create a serious impediment to limits on campaign expenditures.[5] *Buckley* upheld the constitutionality of government-imposed contribution limits, but found that restrictions on campaign expenditures violated the First Amendment.

Buckley, however, did not create an absolute bar to government regulation of expenditures. Rather, it imposed strict scrutiny as the test that must be met. For example, it found that government restrictions on contributions met strict scrutiny, but concluded that limits on expenditures were unconstitutional because the exacting test was not met.[6]

I contend that strict scrutiny is met by restrictions on expenditures in judicial elections. There obviously is a compelling interest in ensuring an independent judiciary and the public perception of one. Limits on expenditures and contributions are necessary to achieve the goal because there is no less restrictive alternative available. Disclosure, often thought to be the check on corruption, may make matters worse in the context of judicial elections by allowing judges to know who supported them financially and who did not. Recusal of judges never has been, and realistically cannot be, applied in every situation where a lawyer or litigant contributed money to the judge's campaign. Indeed, that would

5. 424 U.S. 1, 143 (1976).
6. *See id.*

create an incentive for a lawyer or party to contribute only to the worst candidates so that they would be disqualified from any future case.

The only solution is strict limits on expenditures and contributions in judicial elections. *Buckley's* rejection of expenditure restrictions for presidential and congressional elections is distinguishable because of the unique nature of the judicial role and the importance of judicial independence.

The topic of judicial independence has deservedly received much attention in recent years. Interestingly, more of the attention has focused on judicial independence at the federal level than at the state level. In 1997, the American Bar Association's blue ribbon Commission on Separation and Judicial Independence presented a detailed report on the current threats to an independent judiciary.[7] The report focused virtually entirely on ensuring independence for federal judges.

Yet, the greatest threats to judicial independence are at the state level. The life tenure of federal judges provides them an independence that elected state court judges never can enjoy. Increasingly, state court judges are being targeted for particular rulings and are being ousted from office for their decisions.[8] This paper focuses on another aspect of the threat to judicial independence at the state level: the costs of judicial elections are skyrocketing and judicial candidates are raising ever larger amounts of money from lawyers and litigants who appear before them. Preserving judicial independence demands campaign finance reform for judicial elections.

I. CAMPAIGN FINANCE AS A THREAT TO JUDICIAL INDEPENDENCE

Across the country, a high percentage of state court judges are reviewed by the voters at the polls at regular intervals. At the state appellate court level, 81.9% of the judges face some form of election.[9] More specifically, 47.9% face contestable elections; 34% face retention elections only; 14% face contestable nonpartisan elections;

7. *See* COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, AMERICAN BAR ASS'N, AN INDEPENDENT JUDICIARY (1997).

8. *See, e.g.*, Penny J. White, *An America Without Judicial Independence*, 80 JUDICATURE 174 (1997) (a former Tennessee Supreme Court Justice describing the campaign that ousted her from office).

9. *See* REPORT, *supra* note 4, at 3 n.1.

and 33.9% face contestable partisan elections.[10]

An even higher percentage of state trial court judges face electoral review. In state courts of general jurisdiction, 86.9% of the judges stand for election of some type and 77.3% face contestable elections.[11] Of those chosen through contestable elections, 43.2% of the races are partisan elections and 34.1% are nonpartisan.[12]

If no one opposes a judicial candidate's election or retention, little, if any, money need be raised for a campaign. Increasingly judicial elections are contested, however, whether they are retention elections or challenges by other candidates. The result is that judicial candidates must raise increasing sums of money, just like candidates in all other contested elections.

The statistics are startling. The American Bar Association's Task Force on Lawyers' Political Contributions released its report in July 1998 documenting the dramatic increase in the costs of judicial elections. For example, in Alabama, two supreme court candidates in 1986 spent a total of $237,281; in 1996, two candidates spent a total of $2,080,000.[13] In Wisconsin, two candidates in 1979 raised a total of $102,564; in 1997, two candidates raised a total of $899,074.[14] In Pennsylvania, in 1987, the largest amount raised by a candidate for the state supreme court was $407,711; in 1995, the largest amount raised by a candidate was $1,848,142.[15] In 1980, the race for chief justice cost $100,000; in 1986, the race cost $2,700,000.

This pattern is present even in retention elections and in nonpartisan elections. For example, in California in 1986, $10,700,000 was spent in connection with the retention elections of three members of the California Supreme Court.[16] The opponents of these justices raised $6,600,000 and the justices raised $4,100,000. All three—Rose Bird, Joseph Grodin, and Cruz Reynoso—lost at the polls and were denied retention on the court. In nonpartisan races for the California Superior Court, the median spending has gone from $3,177 in 1976 to $70,000 in 1994.[17]

Where does this money come from? Who has reason to

10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.* at 35.
14. *See id.*
15. *See id.*
16. *See id.* at 6.
17. *See id.*

contribute to political campaigns? Lawyers and litigants are the primary contributors. Although their motive may be simply to elect the judges that will best reflect their views and serve their interests, the impact is that it is those that appear before the judges who fund their campaigns. In North Carolina, Chief Justice Burley Mitchell raised $543,000 for his 1996 reelection campaign, primarily from lawyers and pork producers.[18] In Texas, Chief Justice Thomas Phillips raised $486,809 from corporate defense lawyers; $213,016 from energy and natural resource companies; and $159,498 from finance, insurance, and real estate firms.[19] In Ohio, Judge Evelyn Stratton raised $139,900 from lawyers and lobbyists; $74,885 from finance, insurance, and real estate firms; and $16,476 from medical interests.[20] In Alabama, businesses determined to defeat incumbent Justice Kenneth Ingraham contributed more than $668,704 to his opponent, Harold See.[21] In Pennsylvania, Judge Russell Nigro received more than $453,473 from lawyers.[22] In Nevada, Judge William Maupin received more than $80,000 from casinos and gambling interests, much of it while ruling favorably on an important casinos case.[23] Gerald Stern, administrator of the New York State Commission on Judicial Conduct, believes that lawyers provide 90% of the money contributed to judicial elections in that state.[24]

Spending matters in elections. A study by the nonprofit California Commission on Campaign Financing found that winners of open judicial seats outspent losers four to one, $128,000 to $32,000.[25] Nor is this surprising. Judicial candidates generally have little name recognition. Probably few voters in Los Angeles could name a superior court judge other than Judge Lance Ito and few could name a member of the California Court of Appeal or even of the California Supreme Court. Spending is needed to build name recognition and also to shape the voters' perception of the judicial candidate.

Fund raising by candidates for judicial office poses a serious

18. *See Running for Office Compromises Judges: Merit Selection of Judges Should Replace Partisan Elections*, GREENSBORO NEWS & REC., June 23, 1998, at A8.

19. *See* Shelia Kaplan & Zoe Davidson, *The Buying of the Bench*, NATION, Jan. 26, 1998, at 11.

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.*

24. *See* Mark Hansen, *The High Cost of Judging*, A.B.A. J., Sept. 1991, at 44, 46.

25. *See* Henry Weinstein, *Court Rejects Claim that County Judicial Races Violate Rights of Non-Wealthy*, L.A. TIMES, Dec. 17, 1997, at A29.

threat to judicial independence. Can a judge truly be neutral, or be perceived as neutral, if handling a case where one side contributed a sizable amount to his or her campaign? There is a grave risk that a judge will be more favorably disposed to those who gave or spent money and those who might be counted on for contributions or expenditures in the future. At the very least, the appearance of impropriety is inevitable; litigants and the public will perceive that decisions were influenced by money. The Institute for Policy Research surveyed Ohio residents for their attitudes about campaign finance in judicial elections.[26] Only 7% of those in Ohio said that they believed that judges' decisions are never influenced by campaign contributions, while 58% said that judges' decisions are sometimes influenced, and 23% felt that judges' decisions are influenced most of the time.

There is no way to prove the extent to which contributions and spending actually affects judicial decision-making. If the insurance industry donates a large amount of money to a judicial candidate and as a judge the individual later consistently rules in favor of insurance companies, cause and effect cannot be known. Perhaps the insurance company spent money on behalf of the candidate because of his sympathetic views and he or she would have voted the same way no matter what the spending. Or perhaps the spending had a subtle effect in reinforcing the individual's pro-insurance views or even in moving them in that direction. It certainly also is possible that the judge was consciously aware of the campaign spending in deciding the cases and was thinking of the next election that needed to be funded. There is no way to know, but no matter what, the appearance inevitably will be that the judges' rulings were bought and paid for.

The image of an independent judiciary deciding cases on the merits is thus seriously tarnished and undermined. Especially after all that has been written in recent years, little additional needs to be said about the importance of judicial independence. Declarations about the importance of judicial independence in the United States can be traced to its earliest days. Alexander Hamilton, quoting Montesquieu, forcefully declared: "For I agree, that 'there is no liberty, if the power of judging be not separated from legislative and executive powers . . . the complete independence of the courts of justice is peculiarly

26. *May Reform Please the Court*, PLAIN DEALER, Mar. 20, 1995, at 8B, *quoted in* Levien & Fatka, *supra* note 2, at 78.

essential in a limited constitution.'"[27] The Constitution's Framers were acutely concerned about judicial independence because of their experience with judges in the colonies who served at the pleasure of the King and were widely distrusted.[28]

Thus, it is imperative that action be taken to deal with the threat to judicial independence posed by campaign contributions by lawyers and litigants. The problem has grown enormously in the 1990s and reform is essential.

II. THE CONSTITUTIONALITY OF CAMPAIGN FINANCE REFORM FOR JUDICIAL ELECTIONS

Meaningful campaign finance reform requires limiting the amount that can be contributed and spent in judicial elections. The problem, however, is that the Supreme Court has held that campaign expenditure limits violate the First Amendment. Section A describes the Court's holding in *Buckley v. Valeo*. Section B then argues that strict scrutiny is met in imposing expenditure limits on judicial elections; there is a compelling interest in preserving the integrity and appearance of integrity of the bench and no other alternative is likely to succeed.

A. Buckley v. Valeo *as an Obstacle to Campaign Finance Reform*

Buckley involved a challenge to the 1974 amendments to the Federal Election Campaign Act of 1971,[29] a law adopted after the abuses uncovered during the Watergate investigation.[30] The 1974 amendments were a sweeping reform of campaign financing. First, the law created a limit on campaign contributions. The law imposed a $1,000 ceiling on political contributions made by an individual or a group to candidates for federal office and a $5,000 limit on contributions by a political committee to a candidate. The law also imposed an annual limit of $25,000 for each contributor. Second, the law created a limit on campaign expenditures. Individuals were limited to spending $1,000 "relative to a clearly identified

27. THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 1990) (quoting 1 CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 181 (1748)).

28. *See* Charles Gardner Geyh, *The History and Evolution of Judicial Independence*, *in* AN INDEPENDENT JUDICIARY, *supra* note 7.

29. 2 U.S.C. § 441 (1994).

30. *See Buckley v. Valeo*, 424 U.S. 1, 6 (1976).

candidate."[31] The Act also set limits on expenditures by a candidate from personal funds or the funds from his or her immediate family; the limits are $50,000 for Presidential or Vice-Presidential candidates, $35,000 for Senate candidates, and $25,000 for House candidates. Third, the law created disclosure requirements for individuals and committees giving money to political campaigns. Finally, the law created public funding for presidential elections.

The Court began a lengthy per curiam opinion by noting that the "Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."[32] The Court said "Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two."[33]

Thus, *Buckley* clearly treats spending money in a political campaign as a form of political speech. The Court said:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.[34]

Buckley, therefore, clearly means that spending in connection with judicial campaigns—both contributions and expenditures—is speech protected by the First Amendment.

The Court drew a distinction between the contribution limits and the expenditure limits, upholding the former and invalidating the latter. In part, the distinction was based on the way in which each affected speech; the Court saw expenditure limits as restricting the nature and quantity of speech that would occur but saw little direct effect on speech through contribution limits. The Court explained:

> The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. . . .

31. 18 U.S.C. § 608(e)(1) (repealed 1976).
32. *Id.* at 14.
33. *Id.* at 16.
34. *Id.* at 19 (footnote omitted).

> By contrast, ... [a] limitation on the amount of money a person may give to a candidate or campaign organization ... involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.[35]

The Court's distinction was also based on the stronger justifications for contribution as opposed to expenditure limits. The Court said that restrictions on the amount that a person or group could contribute to any particular candidate were justified to prevent "the actuality and appearance of corruption resulting from large individual financial contributions."[36] The Court explained:

> To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.... Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.[37]

In contrast, the Court said that independent expenditures to support a candidate do not have the same risk of corruption or the appearance of corruption. The Court expressly rejected the argument that the government could restrict expenditures so as to equalize political influence. The Court stated:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.[38]

The Court used this same reasoning to invalidate ceilings on overall campaign expenditures by candidates seeking office. The law said that presidential candidates could not spend more than $10,000,000 in seeking nominations and $20,000,000 in the general election campaign and that House candidates could not spend more than $70,000 in a campaign. Spending limits for Senate campaigns depended on the size of the state. The Court again rejected the argument that the government could seek to equalize spending in election campaigns. The Court said that reducing "skyrocketing costs

35. *Id.* at 19-21.
36. *Id.* at 26.
37. *Id.* at 26-27.
38. *Id.* at 48-49.

of political campaigns" did not justify the restrictions on spending; the Court explained that the

> First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.[39]

The Court upheld the disclosure requirements imposed by the law because they provide important information to the electorate about candidates, they "deter actual corruption and avoid the appearance of corruption," and they provide crucial information for enforcing the contribution limits in the law.[40] The Court noted, however, that there might be instances involving minor or dissident parties "where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally supplied."[41] The Court said that there was no proof of such an impact in the case before it.

Finally, the Court upheld the provision of the law that provided for public funding of presidential elections. The Court said that such government financing does not restrict speech, but rather increases expression in connection with election campaigns. The Court said that the provision is a "congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people."[42] The Court said that expenditure limits were permissible as a condition for receipt of such federal money because "acceptance of public financing entails voluntary acceptance of an expenditure ceiling."[43]

39. *Id.* at 57.

40. *See id.* at 67.

41. *Id.* at 71; *see also* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982) (invalidating disclosure requirements as applied to the Socialist Workers Party). The issue of disclosure is discussed in more detail in § 11.5.3 concerning freedom of association.

42. *Buckley*, 424 U.S. at 92-93.

43. *Id.* at 95. In *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), however, the Court declared unconstitutional a statutory provision prohibiting groups from spending more than $1,000 for candidates receiving federal funding.

B. Overcoming Buckley

Buckley clearly holds that expenditure and contribution limits must meet strict scrutiny. But strict scrutiny does not mean that all restrictions on political spending or even political speech will be invalidated. In *Buckley*, the Court upheld the limits on contributions. Also, in *Burnson v. Freeman*, the Court upheld a state law that prohibited either the soliciting of votes or the display or distribution of campaign materials within 100 feet of the entrance of a polling place.[44] The plurality opinion by Justice Blackmun said that strict scrutiny was appropriate because the law was a content-based restriction on speech and a restriction of political speech. But the plurality concluded that strict scrutiny was satisfied. Justice Blackmun explained:

> A long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect [the] fundamental right [to vote]. Given the conflict between those two rights [(speech and voting)], we hold that requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise.[45]

I believe that limits on expenditures on judicial candidates, as well as contribution limits, are constitutional because such restrictions meet strict scrutiny. There is no doubt that ensuring an independent judiciary—and the public perception of one—is a compelling government interest. It is imperative that judges be perceived as deciding cases on the merits and not on the basis of who contributed more in the last campaign or who might donate more in the next one.

Indeed, *Buckley* can be distinguished based on differences between judicial candidates and those running for Congress or President. *Buckley*, of course, involved exclusively the latter: candidates for Congress and for President and Vice-President. It is accepted that these officials are influenced by many factors, including explicit lobbying. Certainly, buying their votes or decisions with campaign contributions or expenditures is impermissible, but some influence is accepted as a part of the system.

Indeed, I am skeptical about *Buckley*'s distinction between contributions and expenditures in any context.[46] Elected officials can be influenced by who spends money on their behalf, just as they can

44. 504 U.S. 191 (1992).

45. *Id.* at 211.

46. *See, e.g.*, Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045 (1985).

be influenced by who directly contributes money to them. The perception of corruption might be generated by large expenditures for a candidate, just as it can be caused by large contributions.[47]

The need to ensure that judges are perceived as neutral and not influenced by any external pressures, however, such as who donated money to their campaign, is far greater than for other elected officials. Unlike other elected officials, judges are not subjected to lobbying. Judges are supposed to decide cases solely based on the record before them and their best judgment as to the law. In *Cox v. Louisiana*, the Supreme Court upheld a restriction on speech near the courthouse and explained that a "[s]tate may also properly protect the judicial process from being misjudged in the minds of the public."[48] At a time of great public cynicism over the current system for campaign financing and its effects on decision-making, it is all the more important that judges be perceived as apart from such influences. This is a vital interest and should be regarded as a compelling purpose under strict scrutiny analysis.[49]

Few likely would deny that preserving judicial independence is a compelling goal; the more difficult question is whether restrictions on expenditures are *necessary* in order to achieve the objective. More specifically, are there less restrictive alternatives that can succeed and thereby render expenditure limits unconstitutional?

I believe that no alternative can substitute for expenditure limits in ending the corrosive effect of money on judicial elections. Three primary alternatives have been suggested. First, disclosure requirements are a traditional mechanism of ensuring integrity in the election system. As described above, *Buckley* upheld disclosure requirements for presidential and congressional elections. The recently released *Report and Recommendations of the Task Force on Lawyers' Political Contributions* of the American Bar Association emphasizes disclosure as a solution. Specifically, the Task Force recommended that

47. Unfortunately, there is no sign that the Supreme Court is likely to reverse *Buckley* and treat expenditures the same as contributions. In fact, recently Justice Thomas argued for the opposite: invalidating contribution limits. "I would reject the framework established by *Buckley v. Valeo*. . . . Instead, I begin with the premise that there is no constitutionally significant difference between campaign contributions and expenditures: both forms of speech are central to the First Amendment." Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604, 631, 640 (1996) (Thomas, J., concurring in the judgment and dissenting in part).

48. 379 U.S. 559, 565 (1965).

49. *See* Levien & Fatka, *supra* note 2, at 85-87.

> Cannon 5 of the Model Code of Judicial Conduct should be amended with regard to disclosure requirements . . . to include the following: A candidate's committee shall, in addition to complying with the jurisdiction's requirements for disclosure of campaign contributions, file all disclosure reports with the clerk of the court to which the candidate seeks election, and shall take all practicable steps to assure full disclosure of lawyers' contributions.[50]

The Task Force defended this recommendation by arguing:

> Full, timely disclosure of contributions reduces the likelihood of any unduly large contributions or inappropriate contributors. Also, experience with full, systematic disclosure of contributions will establish norms of just what are appropriate levels of contributions, and what are outliers that may warrant further inquiry. Finally, transparency is indispensable to assure public confidence that there are no inappropriate levels or patterns of contributions in judicial campaigns.[51]

Yet, in the context of judicial elections, disclosure requirements actually have a destructive effect: they ensure that judges know who gave and how much was contributed. Judicial candidates, like all candidates for elected office, must sign the disclosure statements that they file and swear that the information is accurate. Judges therefore must know who contributed and how much was donated. If anything, this increases the corrupting effect of money. Under the Canons of Judicial Ethics, judges are not supposed to actually solicit contributions, but can have committees to perform that function. Disclosure laws ensure that judges know what has been raised and from whom. It makes the distinction between the judicial candidate asking and the committing soliciting quite ephemeral.

In fact, some have proposed *eliminating* disclosure requirements in judicial elections precisely so that judges would never know the identity of their donors.[52] Yet, this seems an even worse solution. Disclosure ensures that the public is aware of contributions and expenditures and can assess for itself the effect of money on a particular judge in a specific case. Without disclosure requirements, judges still could, and likely would, learn of the identity of those who spent and contributed on their behalf. Inevitably, those who donated for a candidate would find a subtle way of making sure that the beneficiary knew and how much. Eliminating disclosure requirements only serves to hide the problem from the public.

Actually, abolishing disclosure requirements would make the

50. REPORT, *supra* note 4, at 19.

51. *Id.*

52. *See, e.g.*, Hansen, *supra* note 24.

problem worse. As the American Bar Association Task Force explained, disclosure might limit the amount of spending as no one wants to seem out of line with an excessively large expenditure or contribution. Without public disclosure, there would be less reason to refrain from exceptionally large spending.

Therefore, my point definitely is not that disclosure requirements should be eliminated in judicial elections. Rather, I believe that disclosure does not substitute for expenditure limits as a way of ensuring judicial independence and the public perception of it.

A second major alternative that is suggested is recusal for judges. The American Bar Association Task Force also proposed this. The Task Force said:

> Canon 5 of the Model Code of Judicial Conduct should be amended with regard to recusal. . . . Judges subject to election shall recuse themselves, upon motion of any opposing party, if a party to the lawsuit or counsel for a party has made (a) a contribution in violation of the jurisdiction's applicable contribution limit; or (b) if contribution limits are not adopted, a contribution larger than the applicable figure set as grounds for recusal.[53]

This proposal, however, ties recusal only to contributions; expenditures, no matter how large, are never a basis for recusal. As explained earlier, large expenditures can have the same influence, or at least be perceived as having it, as contributions. If the public learns that an individual spent $1 million to get a candidate elected to the bench, even if only $500 was directly donated to the campaign, it will come to the same conclusion as if $1 million had been received as a contribution.

Some have suggested that an alternative might be to require recusal whenever a party or lawyer donated or expended so much for a judge's campaign as to raise the appearance of possible bias.[54] For example, one proposal is that a judge is disqualified from a case if a contribution is known to the judge and "by virtue of [its] source and size, [the contribution] raises questions about a judge's impartiality."[55] This, of course, could be expanded to include expenditures.

The problem, though, is the vagueness of the standard. How could a person know in advance the amount past which a donation or especially an expenditure would lead to disqualification? Without

53. REPORT, *supra* note 4, at 34.

54. *See* Michael A. Riccardi, *Judicial Campaign Funding Reform Eyed by ABA*, LEGAL INTELLIGENCER, Aug. 4, 1997, at 1.

55. *Id.*

that knowledge, spending would be chilled. Since *Buckley* expressly regards campaign expenditures as speech, the result of the vagueness would be to chill constitutionally protected expression. The Supreme Court has declared "[S]tandards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[56]

A standard that would require recusal of a judge any time a lawyer or party in the case made an expenditure would not be a less restrictive alternative and, in fact, would be counterproductive. The result would be that no lawyer or party ever would donate or spend on behalf of those that they most wanted to see on the bench. They would have a tremendous disincentive from spending for those that they regarded as likely to be the best judges because any expenditures or contributions would prevent those judges from ever hearing their cases. In fact, it would create the perverse incentive to contribute or spend for those that they perceived as the judges that they would *least* want to hear their cases. If a lawyer wanted to make sure that a particular judge was always disqualified, the lawyer would just need to contribute or spend money for that candidate. Overall, this could mean that those who would be truly the worst judges, at least as perceived by lawyers and parties, could raise large sums of money as future litigants would want the basis for disqualification. Conversely, those perceived as the likely best judges could raise little because lawyers and parties would not want to risk disqualification.

A third possibility that is raised is preventing lawyers from donating or spending money on behalf of judicial candidates.[57] Yet, this is hardly a less-restrictive alternative to contribution and expenditure limits. By definition, it is more restrictive; it would prevent all spending, whereas limits would allow spending but place a cap upon it. Also, as the American Bar Association Task Force observes: "A limit on only lawyers' contributions would unintentionally create an unfair imbalance on matters, like personal injury litigation, in which campaign contributions from one side come primarily from lawyers while the other side's come from defense interests themselves."[58]

Therefore, there is no apparent less restrictive alternative to

56. NAACP v. Button, 371 U.S. 415, 432-33 (1963).
57. *See id.*
58. REPORT, *supra* note 4, at 28.

having contribution and expenditure limits.[59] Contribution limits, endorsed by the American Bar Association's Task Force, are essential, but not sufficient. As explained earlier, large expenditures can have the same corrosive effects as large contributions. Unfortunately, the recently completed Task Force *Report* refused to consider expenditure restrictions. In a puzzling footnote, the Task Force stated:

> We do not discuss spending limits for judicial campaigns because litigation is pending to decide whether such limits are constitutional.... The 6th Circuit Court of Appeals is now reviewing a decision that struck down spending limits established by rule of the Ohio Supreme Court. With that litigation pending, we do not speak to whether the limits stricken in *Buckley* are distinguishable from limits that might be imposed on judicial races, let alone the merits of imposing such limits.[60]

It is unclear, however, why an American Bar Association Task Force felt precluded from discussing an issue in a pending case. It is troubling that the Task Force offered no consideration of expenditure limits because no alternative to such restrictions, combined with contribution limits, offers a solution to the problem of money in judicial campaigns.

There is even some precedent for imposing forms of expenditure limits. In *Austin v. Michigan Chamber of Commerce*, the Court upheld a restriction on corporate contributions or expenditures, expressly relying on the ability of the state to limit corporate speech so as to limit the distortions caused by corporate wealth.[61] A Michigan law prohibited corporations from using their revenues to contribute to candidates or to make expenditures for or against candidates. The corporations, however, could create a separate fund to solicit contributions and could spend money from this segregated fund.

Justice Marshall said that the Michigan law was directed at "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the

59. Some have suggested public funding of judicial campaigns. I would support this, however, as a successful alternative only if candidates were required to accept public funding and if this was the exclusive source of spending on judicial campaigns. Otherwise, candidates could simply supplement public funds with contributions and expenditures. Also, unless candidates were required to rely on public funds as the sole source of spending, those who were most successful in attracting other money would have the incentive to forego the public dollars and rely on the alternative sources. Five states currently have some form of public funding, but none impose such limits. *See id.* at 23 n.38.

60. *Id.* at 23 n.37 (citing Suster v. Marshall, 951 F. Supp. 693 (N.D. Ohio 1996)).

61. 494 U.S. 652 (1990).

corporation's political ideas."[62]

The Court was explicit in accepting the argument that "[c]orporate wealth can unfairly influence elections."[63] Thus, the Court concluded that the government was justified in restricting both corporate expenditures and contributions. Likewise, this paper has argued that spending in connection with judicial elections has a "corrosive and distorting effect" and that the only solution must include both contribution and expenditure limits.

CONCLUSION

Judicial elections, for better or worse, are here to stay for the foreseeable future. Despite the tremendous advantages to merit selection of judges, voters in the thirty-eight states with electoral review of judges are unlikely to disenfranchise themselves and amend their state constitutions to remove judges from the political process.

The issue then inevitably becomes how to conduct elections for judicial office in a manner that preserves an independent judiciary and public confidence that one exists. I have argued in this paper that only limits on both contributions and expenditures can succeed in this regard. I admit that expenditure restrictions limit political speech. But this is constitutional because it is the only apparent way to achieve an undoubtedly compelling interest: preserving an independent judiciary in the face of the corrosive effects of ever larger spending in judicial elections.

62. *Id.* at 660.
63. *Id.*