Judicial Recusal[1]
Justice Patience D. Roggensack
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I share the important public concern of having legal controversies decided by unbiased judicial decision-makers.

It is a concern that has arisen both when judges[2] are elected and when judges are selected by gubernatorial appointment. In Wisconsin, a judge may begin his or her office either by election or by gubernatorial appointment.

For an elected judge, concerns have been raised when a contributor is a party to a pending action or when issues important to a contributor are before the court.[3] For an appointed judge, concerns have been raised when the governor is a party to a pending action or issues important to the governor are before the court.[4]

When judges are elected, there is another often unmentioned constitutional right that exists in tandem with the constitutional right to unbiased judicial decision-makers. It is the fundamental right of each elector to cast an effective vote for the office of judge. When an unbiased judge is removed

[1] The removal of a judge from participation in a case or cases is often referred to as judicial recusal.

[2] My use of the term "judge" includes supreme court justices.

[3] See Donohoo v. Action Wis., Inc., 2008 WI 110, 314 Wis. 2d 510, 754 N.W.2d 480 (raising concerns about Justice Butler's receiving $1,225 in campaign contributions from board members of Action Wisconsin while its case was proceeding in the Wisconsin Supreme Court).

[4] See Dairyland Greyhound Park v. Doyle, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408. In this case, Justice Butler, appointed by Governor Doyle, was the fourth vote to expand Indian gaming by overturning Panzer v. Doyle, 2004 WI 52, 271 Wis. 2d 295, 680 N.W.2d 666, decided prior to his appointment. His vote raised concerns that he favored the governor who had appointed him. See Richard Moore, Guess Who's Coming to the Federal Bench in Wisconsin?, LAKELAND TIMES, Dec. 8, 2009, available *at* http://www.lakelandtimes.com/main.asp?sectionID=98SubsectionID=98ArticleID=10594 (last visited Sept. 2, 2010).

from hearing a case or cases by the operation of recusal rules, the recusal defeats the votes of the electorate that were cast for that unbiased judge.

The fundamental right to vote in Wisconsin elections for state officials is established in Article III, sec. 1 of the Wisconsin Constitution and is protected by the First Amendment of the United States Constitution, applied to Wisconsin by the Fourteenth Amendment's Due Process and Equal Protection clauses. As Supreme Court Justice William Brennan has explained, "The right to vote derives from the right of association that is at the core of the First Amendment, protected from state infringement by the Fourteenth Amendment."[5]

In addition, money spent to communicate during an election has long been held to be an element of speech, and therefore such expenditures are protected by the First Amendment as well.[6]

These principles of constitutional law have been established by the United States Supreme Court, and like them or not, we are bound to follow them when we consider state regulations that will intersect with fundamental First Amendment rights.

Because state regulations that address recusal do intersect with constitutional concerns relating to the First Amendment as well as with constitutional concerns relating to unbiased judicial decision-makers, they are complicated to construct.

In addition, because any state regulation of judicial recusal has the potential to restrict fundamental constitutional rights, they are subject to strict scrutiny.[7] Strict scrutiny requires that, in order to avoid a federal

[5] Storer v. Brown, 415 U.S. 724, 756 (1974) (Brennan, J., dissenting); see also Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665 (1966) (explaining that "the right to vote in state elections is implicit, particularly by reason of the First Amendment").

[6] Citizens United v. Fed. Election Comm'n, __ U.S. __, 130 S.Ct. 876, 898, (2010); Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978).

[7] Strict scrutiny is the test that the United States Supreme Court applies to governmental regulations that affect fundamental constitutional rights, such as the right of free speech. See R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992).

constitutional violation, state regulations must be narrowly tailored to achieve a compelling state interest. As the United States Supreme Court has explained, when the right to vote is burdened, "governmental action may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest."[8] The United States Supreme Court also has said that, "The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office."[9] Therefore, the right to speak in the political process cannot be regulated in a way that will chill the speakers' right to speak.[10]

Accordingly, judicial bias cannot be presumed solely from a lawful campaign contribution,[11] solely from a gubernatorial appointment, or solely from a lawful independent communication. No such presumption can arise because in these situations, the remedy of judicial recusal would swing too broadly to satisfy constitutional scrutiny of the regulation. Stated otherwise, judicial recusal in these circumstances would nullify the constitutional vote of the contributor, or the lawful choice of the appointer, or chill the lawful speech of those who make independent communications during the course of a campaign for judicial office.

With these guiding principles in mind, I ask the study committee to consider Supreme Court Rules 60.04(7) and (8), which address judicial recusal. They provide:

> 60.04(7) Effect of Campaign Contributions. A judge shall not be required to recuse himself or herself in a proceeding based solely on any endorsement or the judge's campaign committee's receipt of a lawful campaign contribution, including a campaign contribution from an individual or entity involved in the proceeding.

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[8] Oregon v. Mitchell, 400 U.S. 112, 238 (1970).

[9] Citizens United, 130 S.Ct. at 898 (internal quotation marks omitted).

[10] Id. at 898-99.

[11] If a candidate for judicial office were to accept a campaign contribution in exchange for the promise to vote one way or another in a case, that is not a lawful campaign contribution.

> 60.04(8) Effect of Independent Communications. A judge shall not be required to recuse himself or herself in a proceeding where such recusal would be based solely on the sponsorship of an independent expenditure or issue advocacy communication (collectively, an "independent communication") by an individual or entity involved in the proceeding or a donation to an organization that sponsors an independent communication by an individual or entity involved in the proceeding.

When the Wisconsin Supreme Court enacted SCR 60.04(7) and (8), the court responded to rules petitions that were focused on lawful campaign contributions and lawful independent communications by third parties made during the course of supreme court elections. The court addressed the importance of unbiased judicial decision-makers, and the court also addressed the potential effect that recusal rules have on First Amendment rights.

The court concluded that maintaining unbiased judicial decision-makers was a compelling state interest. The court then narrowly tailored SCR 60.04(7) and (8) to meet that compelling interest by listing lawful acts that, standing alone, were insufficient to require recusal.[12] In so doing, the court left unarticulated the types of actions, which when combined with a lawful contribution or independent communication, would require recusal.[13]

Could the court have drafted recusal rules that listed numerous acts that would always lead to a biased judicial decision-maker? Perhaps, but we

[12] When SCR 60.04(7) was enacted, $1,000 was the maximum contribution that a person or political action committee could make to the campaign committee of a supreme court justice. Wis. Stat. § 11.26(1)(am) and (cw).

Although the petitions that were before the court when SCR 60.04(7) was enacted seemed to focus on requiring recusal based on contributions from a candidate's supporters, it is equally possible that if a $1,000 contribution standing alone required recusal, opponents of the candidate could make a $1,000 campaign contribution in order to require recusal of a justice whom the contributor did not want to participate in certain cases.

[13] Independent communications have been held by the United States Supreme Court to be speech protected by the First Amendment. Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 469-70 (2007).

thought it more prudent to affirm lawful actions, that standing alone did not require recusal. We made this choice so that the upcoming judicial elections could proceed within a framework that all could rely on – the candidates, the voters and the independent communicators.

I look forward to meeting with the study committee on September 16 to further discus judicial recusal.