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Testing the limits of money in judicial elections

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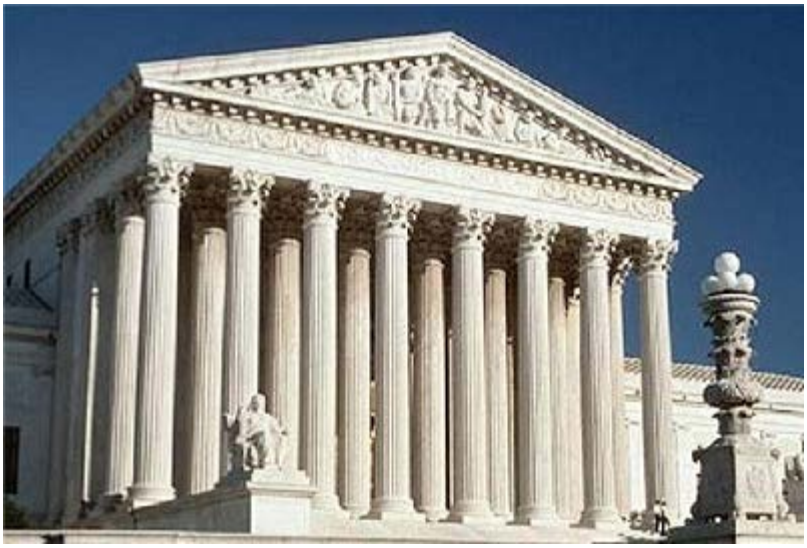
By **Sharon McCloskey** - 1/19/2015 - in Law and the Courts Print This Article



Can a state bar a judge from personally soliciting campaign contributions from individuals and organizations? Or does such a ban violate the First Amendment by impinging on the judge's freedom of speech?

Those are questions the U.S. Supreme Court will consider Tuesday morning in Williams-Yulee v. Florida State Bar , a case that has drawn considerable attention as spending in judicial elections has exploded since the court's *Citizens United* decision.

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Judges personally seeking campaign dollars, particularly from attorneys and firms likely to appear before them in court — as opposed to a separate committee doing that task — is a scenario so obviously rife with the potential for undue influence and bias that it's been banned in most places.

Of the 39 states that have some form of elections for judges, 30 prohibit judges from personally soliciting campaign contributions.

That includes Florida, where Tampa lawyer Lanell Williams-Yulee landed in hot water with the state bar after, in connection with her candidacy for a county judgeship, she sent out a mass mailing with her signature asking for contributions.

Williams-Yulee challenged the state ban, saying it violated her First Amendment freedom of speech, but the Florida Supreme Court

disagreed, saying that the prohibition was "one of a constellation of provisions designed to ensure that judges engaged in campaign activities are able to maintain their status as fair and impartial arbiters of the law."

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Courts elsewhere are split on the issue, but in North Carolina judicial candidates have plenty of room to express themselves and raise money during elections.

It's one of the nine states that allows judicial candidates to directly ask for campaign contributions from attorneys and law firms as well as other members of the public.

That's been the law here since 2003, when according to a report by the Brennan Center for Justice, the justices of the Supreme Court radically revised the rules of judicial conduct, without any input from the public:

> North Carolina not only turned the political activity regulations on their heads—changing the basic canon from "A judge should refrain from political activity inappropriate to his judicial office" to the current "A judge may engage in political activity consistent with his status as a public official"—but also eliminated the Pledge or Promise Clause and the ban on candidates' personally soliciting campaign contributions.

(The Pledge or Promise Clause prohibits judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performances of the duties of the office.")

The current judicial code of conduct allows judges to speak at political party events, personally solicit contributions, identify themselves as affiliated with a particular party and otherwise engage in activities "consistent with the judge's status as a public official."

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The 2003 revisions to the code of conduct – which came under considerable attack from judges across North Carolina at the time, as University of North Carolina Law School professor Jon McClanahan notes in this article — did more than just address judicial campaigning.

They eliminated an overarching and critical standard governing judicial behavior, the caution that a judge avoid the "appearance of impropriety" in all of his activities – making North Carolina one of only two states that lack that standard.

As revised, the code states simply that a judge must "avoid impropriety" in all of his activities.

The code also sets forth some specific examples of when a judge – if asked – should step aside in a case.

For example, a judge should excuse himself if he has a personal bias against a party in a case, if he has a financial interest in the outcome of a case, or if he has had some personal involvement in the facts giving rise to the case.

But none specifically address situations arising from the receipt of campaign contributions – and it is in that area, from the public's perception, that "appearances" matter.

The code does require a judge to disqualify himself whenever his "impartiality may reasonably be questioned." That determination, though, is problematic because it turns in large part upon a judge's own assessment of bias.

The "appearance of impropriety" standard, on the other hand, serves as a check on that judicial self-reflection by making public perception the standard a judge must apply when confronted with potential conflicts in a case.

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The *Williams-Yulee* case will be a test of how far this Supreme Court is willing to extend First Amendment rights in the campaign finance context, especially when that involves judicial candidates.

In 2002, the court ruled that Minnesota could not prohibit judicial candidates from expressing their political and legal views on disputed issues.

Retired Justice Sandra Day O'Connor, who concurred in the majority opinion by Justice Antonin Scalia in that case, has since said that she regrets joining that 5-4 decision and has become an outspoken critic of money in judicial elections.

"In too many states, judicial elections are becoming political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the Constitution," she wrote in the foreword to a 2010 Brennan Center report on judicial elections.

In 2009, though, the Supreme Court ruled in *Caperton v. A.T. Massey Coal* that a West Virginia Supreme Court justice should have recused himself from a dispute because one of the parties had spent millions of dollars on the justice's campaign.

"We conclude that there is a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent," Justice Anthony Kennedy wrote for the majority there.

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For more on the case, read the Brennan Center of Justice's summary and authorities here.

For more on how campaign contributions have impacted North Carolina courts, read the Policy Watch stories below:

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ABOUT THE AUTHOR

Sharon McCloskey

Sharon McCloskey, former *Courts, Law and Democracy Reporter* for N.C. Policy Watch, writes about the courts and decisions that impact North Carolina residents. McCloskey also wrote for *Lawyers Weekly* and practiced law for more than 20 years.

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