

TESTIMONY OF GARY S. GILDIN
BOARD MEMBER, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
PRESENTED TO THE HOUSE JUDICIARY COMMITTEE'S TASK
FORCE ON JUDICIAL CAMPAIGN FINANCING

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The Supreme Court of Pennsylvania Special Commission to Limit Campaign Expenditures adopted as one of its recommendations "that judicial campaign expenditures should be limited as follows: \$1,000,000 for Supreme Court office, \$500,000 for Superior Court and Commonwealth Court office, and \$250,000 for Court of Common Pleas office." In the brief time I have to address the House Judiciary Committee, I would like to explain why any proposal to limit expenditures in judicial elections violates the First and Fourteenth Amendments to the United States Constitution.

The Special Commission acknowledged that its proposal to limit campaign spending "may be the most controversial recommendation because of the apparent conflict with the United States Supreme Court decision in *Buckley v. Valeo*," 424 U.S. 1 (1975). In *Buckley*, the United States Supreme Court declared unconstitutional restrictions on expenditures in federal election campaigns imposed by the Federal Election Campaign Act of 1971. The key points of the Court's analysis in *Buckley* are as follows:

1. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our

or exposure of his views before the start of the campaign.” *Buckley*, 424 U.S. at 57.

c. The government’s interest in reducing the skyrocketing cost of campaigns is not compelling. “The First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive or unwise.” *Buckley*, 424 U.S. at 57.

The Special Commission suggested that the *Buckley* opinion may not extend to judicial elections and noted that the case of *Suster v. Marshall*, which at that time was pending before the United States Court of Appeals for the Sixth Circuit, was “what most scholars agree will become the test case on *Buckley*.” Subsequent to the issuance of the Report of the Special Commission, the court of appeals in *Suster* enjoined the State of Ohio Judicial Canon limiting expenditures in judicial elections because it violated the freedom of expression guaranteed by the First and Fourteenth Amendments to the United States Constitution. *Suster v. Marshall*, No. 96-4048, 1998 U.S. App. LEXIS 17455 (6th Cir. July 30, 1998).

The *Suster* court rejected the argument that the Supreme Court’s decision in *Buckley v. Valeo* was limited to federal political campaigns and would not apply to state judicial elections. Instead, the court reasoned, “an election candidate does not forego his or her First Amendment rights simply because he or she decides to seek a judicial office, rather than a non-judicial one.” *Suster*, 1998 U.S. App. LEXIS 17445 at *18. Just as the campaign spending limits struck down in *Buckley* burdened free expression, the limits on judicial spending imposed by the Ohio Judicial Canon infringed the First Amendment rights of candidates for the office of judge.

The *Suster* court then found that the State of Ohio did not have a compelling interest that would sustain the spending limitation. Like the Supreme Court in *Buckley*, the court of appeals in *Suster* found that the state's interest in preventing corruption or the appearance of corruption was not sufficient to justify the limitation, as "unlike a campaign contributor, a candidate's own money is not traded for possible political favors." *Suster*, 1998 U.S. App. LEXIS 17445 at *27. In fact, the court found that the absence of any limit on campaign expenditures could itself minimize corruption by promoting an electorate that is well informed about the candidate. The court further repudiated the argument that expenditure limits would ensure the independence of the judiciary. To the contrary, the court reasoned, "the very fact that the candidate is allowed to spend his or her own money without any restriction is, in fact, the assurance that the candidate is 'beholden to no one.'" *Id.* at *28-9.

Somewhat gilding the lily of the demise of the spending limit, the court of appeals noted that even if the state could establish a compelling interest in preventing corruption, the spending limits would still be unconstitutional because they are not the least restrictive means of satisfying the government's interest. Other avenues, such as limiting campaign contributions, could redress corruption without impinging upon the candidate's First Amendment right to expression.

In sum, it is now well settled that limits on campaign expenditures in judicial elections contravene fundamental rights guaranteed by the United States Constitution. Any argument that the reasoning of *Buckley v. Valeo* does not similarly extend to

judicial elections has been laid to rest by the opinion of the United States Court of Appeals in *Suster*. It is respectfully submitted that under this Committee's obligation to uphold the Constitution, it must reject any proposal to limit expenditures in judicial campaigns.