

THE WISCONSIN INQUISITION

CHARLES J. SYKES

Shortly before Christmas 1999, consultant George Mitchell received a fax from a newspaper reporter. Did Mitchell know that former Supreme Court candidate Walt Kelly had asked the State Elections Board to examine Mitchell's phone records, the reporter asked? Did he know that Kelly — often described in media accounts as a civil libertarian — wanted the board to investigate who Mitchell and his wife Susan might have talked to about Kelly's bid for the court?



Mitchell, [Emphasis added] the Mitchell Company, and the American Education Reform Foundation and its Council, two organizations that support and fund school-choice programs and for which Mrs. Mitchell works.”

Mitchell has never denied that he was an active volunteer on behalf of Justice Wilcox. Indeed his involvement was exceptionally public, inspired

in part by Kelly's clear signals that as a justice he would vote to overturn school choice.

The reporter sent along a copy of a three-page letter from Kelly to Kevin J. Kennedy, the executive director of the Elections Board. In it Kelly outlined his belief that there may have been a conspiracy among supporters of school choice to funnel money to the campaign of his opponent, Justice Jon Wilcox. Specifically, he suggested that the Mitchells be investigated for their alleged role in raising money for a last minute get-out-the-vote postcard paid for by an independent group called The Wisconsin Coalition for Voter Participation, Inc.

“I urge you to pursue this matter in your investigation,” wrote Kelly, “*through an examination of the telephone records of Mr. and Mrs.*

But within a month of Kelly's letter, agents of the Justice Department's Division of Criminal Investigation and White Collar Crimes Bureau would visit Mitchell at his home — unannounced — and interrogate him about his political activities.

“What's outrageous and scary,” says Mitchell, “is the rationale used by Walter Kelly, an ACLU attorney and supposed civil libertarian, in asking the state to examine my phone records. He cites a series of public,

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entirely legal activities that I undertook as a volunteer supporting Justice Wilcox and my support for school choice. Maybe his real gripe is that I and other supporters of Justice Wilcox were effective.”

In March, the Elections Board filed suit against Wilcox’s campaign and the Wisconsin Coalition for Voter Participation, alleging that the two had improperly “coordinated” the get-out-the vote mailing. Justice Wilcox was cleared of any wrongdoing and was not named in the suit; neither were George or Susan Mitchell.

By then the Mitchells had been compelled to spend tens of thousands of dollars in legal fees; key activists had been intimidated by the prospect of civil or criminal charges; and a cloud had been placed over the state’s highest court.

But Kelly’s letter — and the Elections Board’s investigation — also raise far larger questions about the relationship between the enforcement of campaign finance laws and free speech. Courts have long recognized the basic principle that citizens should not be subject to government inquisitions into their political views, activities, and associations. But now, says Mitchell, “Actions that once were equated with simple citizenship, are now cited as a pre-text for the government to examine phone records.”

Under cover of regulating campaign finances, however, politics is increasingly being criminalized. Congressional Democrats have filed civil “racketeering” charges against Representative Tom Delay for his fund-raising techniques, applying the federal RICO law to political activities. Criminalizing political activity seems designed to intimidate and suppress potential campaign donations, and inevitably has a chilling effect on political involvement.

So far, however, the media has been tone deaf to the First Amendment implications of such probes into the political speech and activities of people like Mitchell.

Great issues oftentimes arise from small occasions. In this case, the trigger was a postcard sent out shortly before the 1997 election for Wisconsin State Supreme Court.

The card read:

Please vote next Tuesday, April 1st.

Polls open 7 a.m. — 8 p.m.

Spring elections tend to see fewer people vote. But next Tuesday we will elect a Supreme Court Justice to serve us for the next 10 years!

Your choices for the Supreme Court are:

*Jon Wilcox: 5 years experience on the Wisconsin Supreme Court; 17 years as judge.

*Walt Kelly: 25 years a trial lawyer; ACLU special recognition award recipient.

Let your voice be heard!

These issues are too important to ignore. Your vote is critical.

Please remember to vote next Tuesday, April 1st.

The postcard mailing — somewhere around 354,000 cards at a cost of about \$135,000 — was sponsored by the Wisconsin Coalition for Voter Participation (WCVVP), an organization formed by activists Brent Pickens and James Wigderson in early 1997.

In the election, Wilcox trounced Kelly by a margin of 62 to 38 percent. (A margin that was strikingly similar to that of the other two incumbent justices to win re-election, Shirley Abrahamson and Diane Sykes.)

The authors of the postcard campaign had ample reason to be confident that they had not run afoul of any election laws. There was no question the content of the card was factual; and state statutes specifically exempted non-partisan get-out-the-vote efforts from elections laws. Moreover, because the card did not explicitly tell voters to vote for or against any candidate, it did not constitute “express advocacy,” which was the U.S. Supreme Court’s litmus test for speech that could be subject to government regulation.

Despite that, Kelly filed a complaint with the state Elections Board, alleging that the postcards constituted an illegal “contribution” to the Wilcox campaign. The Board voted to investigate, reasoning that while it could not regulate “expenditures” that did not contain “express advocacy” it *could* regulate “contributions”; and the cards were indeed a contribution if there was “coordination” of any kind between the WCVF and the Wilcox campaign.

For the organizers of the get-out-the-vote effort, all of this took on a decidedly a Kafkaesque quality. State law contained no standard for defining what “coordination” meant in this context. Further, their actions appeared consistent with the advice they themselves had sought from the Elections Board, the board now proposing to investigate them.

But in December 1997, the Elections Board informed Mark Block, Wilcox’s campaign manager, along with Pickens and Wigderson, that it intended to serve them with subpoenas for records of phone calls they made between January 1 through May 31, 1997; similar subpoenas were prepared for Ameritech, listing the phone numbers of the three men.

The lawyers for the Coalition argued that this sort of investigation was a violation of due process of law, because there was no clear statutory authorization for such a search. They argued vigorously that because Kelly’s complaint asked the Board to compel disclosure of information concerning political associations and speech, the Board’s investigation would constitute “an impermissible infringement on Petitioners rights of political speech and association.”

In the courts, the case became tangled in technical wrangling over the definition of

“contribution” and what constituted “coordination.” But technicalities aside, the case also raised difficult questions about rights of association, privacy, and free speech that are arguably among the most fundamental rights protected by the constitution.

Even so, on September 17, 1999, Dane County Judge C. William Foust rejected the Coalition’s attempts to block the investigation. On November 26, 1999, the Court of Appeals upheld Foust and the next month the State Supreme Court failed to muster a quorum to hear an appeal when a majority of the justices recused themselves.

Emboldened by his legal victories, Walt Kelly dropped the other shoe.

The School Choice Witchhunt

Kelly had made history before. In his campaign for the state’s highest court, he eschewed traditional judicial ethics and openly took positions on issues that either had or would certainly come before the court. A long-time liberal activist, Kelly spent an (at the time) unprecedented \$470,000 in a campaign that fea-

tured television ads touting his support for labor and the environment — more typical of a legislative campaign than a race for Supreme Court. He made no secret of his hostility toward Wisconsin’s school choice law. Endorsing his bid, WEAC, the state’s largest teachers union, declared that Kelly “supports WEAC positions on various legal issues that are not now before the court but are indicators of a candidate’s positions on education issues. *The Wisconsin Supreme Court will take up the private school voucher issue once again. We must have a justice who supports the constitutional separation of church and state and who recognizes the dangers of sending tax dollars to religious schools.*”

[Emphasis added]

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Among Kelly's loudest critics was George Mitchell, who called Kelly's campaign promises a "gross" violation of judicial ethics.

Even though Kelly was seldom called on the ethics issue by the state's media, his outspokenness did arouse supporters of school choice, who saw his election as a near-certain death knell for the state's premier education reform. Indeed, much of the cost of the postcard mailing came from school choice advocates. The American Education Reform Foundation, which was based in Indianapolis in 1997, contributed \$34,500 to the postcard effort, while foundation board members John Walton, heir to the Wal-Mart fortune and Indianapolis philanthropist Pat Rooney each donated \$25,000 to the effort. Another former board member named Robert Thompson gave \$15,000.¹ More than two years after his landslide defeat, Kelly still broods about the role of choice supporters in the election.

On December 13, 1999, Kelly asked the Elections Board to broaden its probe into the postcard issue.

At the center of Kelly's "choice" conspiracy stood George Mitchell.

In his letter to the Board's executive director, Kelly identified Mitchell as a "Milwaukee political consultant and media operative" who had provided opposition research to "media people" around the state. "He lobbied against my candidacy with editors, reporters, and columnists."

Stretching his conspiratorial web further, Kelly described Mitchell as having ties to the Milwaukee Metropolitan Association of Commerce as well as the Bradley Foundation, "which funds school-choice proponents around the country." Mitchell, moreover, "works with his wife Susan in showcasing the Milwaukee school-choice program nationally."² Because Mitchell has contacts around the country, he also charged that George and/or Susan Mitchell "likely" influenced "big-money school-choice" supporters from out of state to support Wilcox.

In one of the most revealing sections of his letter, Kelly also emphasized Mitchell's comments to the electronic media — including shows hosted by the author of this article.

"In the closing weeks of the campaign Mr. Mitchell increased his efforts to gain media access in Wisconsin for the purpose of attacking my candidacy... He was featured on Charles Sykes' radio and television programs shortly before the election. Mr. Sykes is aggressively in favor of school choice and used extensive and expensive airtime immediately preceding the election to attack my candidacy and support Justice Wilcox. Had that been paid airtime, it would have cost Justice Wilcox's campaign in excess of \$250,000.00."³

Justifying his call for Mitchell's phone records to be subpoenaed, Kelly charged: "It is likely that school-choice money got moved by WVCP in coordination with the Wilcox campaign to fund the postcards and thereby amplify the Wilcox message."

There was nothing covert about George Mitchell's support for choice or his advocacy of the Wilcox campaign, as even Kelly acknowledges by citing his extensive media presence.

Understandably, Kelly was unhappy with Mitchell's activities, inasmuch as they were quite effective in drawing attention to Kelly's record and views. But the subpoena power of the Elections Board is not intended to be used to exact revenge or to place political opponents on an inquisitorial griddle.

Supporters of greater regulation of campaigns often scoff at fears that such rules might impinge on free speech. But Kelly almost seemed to go out of his way to highlight the First Amendment implications of his request by emphasizing Mitchell's criticisms of Kelly in the news media.

Kelly's reference to Mitchell's flagrant acts of free speech on radio and television (as well as his pointed reference to my own shows on WTMJ-TV and AM620 WTMJ radio) should give special pause to media advocates of

greater political regulations. In his letter to the Elections Board, Kelly was at least indirectly suggesting that political ideas expressed by media commentators and guests are a form of political expenditure and thus (again by implication) subject to government regulation, and investigation.

Kelly's request also brings the stakes for personal privacy and the right of free association into higher relief. If the Elections Board has the right to subpoena Mitchell's phone records, why not his e-mails? Why not a print-out of the websites he has visited? Why not his credit card records or a printout of his personal travel records?

Hunting the Vast Right Wing Conspiracy

This is hardly a stretch. By suggesting that the Board begin issuing subpoenas to people who were pro-school choice, Kelly was effectively proposing a chilling new standard for investigations into political crimes.

"In seeking to establish that those who paid for the postcard mailing are school choice supporters," Mitchell noted, "Kelly applies a new test for measuring the legitimacy of a get-out-the-vote mailing: he claims the political opinions of those who finance such mailings are relevant to whether they are exempt."

Nor is this a new tack for Kelly, who has become a sort of Badger State Ahab in search of the Great Right Wing Conspiracy. As Mitchell notes, Kelly is now the president of the Institute for Wisconsin's Future, a tax-exempt organization that has aided the efforts of the Wisconsin Research Center (WRC) to gather and maintain files on political opponents and others who use "right-wing buzzwords."

In 1995, the IWF said that its mission was to "effectively confront an aggressive and intolerant conservative movement in Wisconsin... IWF works to analyze the destructive effects of the conservative political agenda."

Newsletters from Kelly's group have devoted extensive coverage to the WRC, which describes itself as serving "as an information clearinghouse on the political activities of the right-wing in Wisconsin." Other directors of the Institute for Wisconsin's Future have also served on the board of the WRC.

In effect the two groups function as the spearhead for the politics of personal attack

against political conservatives. The WRC and IWF have directed some of their more spirited attacks against the education reform group known as PRESS (Parents Raising Educational Standards in Schools) and its president, Leah Vukmir, labeling the education reform group as a "Right Wing Education Group."

Although Kelly was to indignantly complain about the failure of the Wisconsin Coalition for

Voter Participation to release its list of contributors, his own record for openness is somewhat spotty. During a 1997 campaign appearance on public radio, Vukmir asked Kelly directly about his involvement with the Institute for Wisconsin's Future. At first, Kelly denied being a director of IWF and declined, until pressed on the issue, to volunteer that he had resigned as a director only weeks before.

When Vukmir challenged him on the use of the IWF newsletter to feature the WRC attacks on her as a right wing extremist, Kelly responded — according to a transcript — by denying even knowing what the organization was. "I have no involvement in it so I can't really answer that part of it for you." As

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Mitchell notes, "This statement comes despite the fact that Kelly was a director of IWF when it regularly published WRC material" and when it shared office space with the WRC's director who *also worked part-time for the IWF*.

"Ironically," he notes, "while Kelly served as an IWF director, the group failed to file required disclosure forms with the Wisconsin Department of Regulation and Licensing for three years."

Witchhunts, With Subpoenas

Kelly's campaign to have the Elections Board investigate his opponents is in some respects merely an extension of his activities at the IWF. By Kelly's standards, the Board would be authorized to investigate any person who supported the political ideas espoused by a candidate on the off chance that they might have broken campaign laws. (Indeed, Kelly suggested that the Board extend the scope of investigation to Wisconsin Pro-Life groups, who he says may have supplied mailing lists to his opponents.) The difference, of course, is that the Elections Board — unlike the IWF or WRC — can conduct witchhunts with teeth, including the power to issue subpoenas and levy fines.

This became quite clear on the afternoon of January 12.

Mitchell was working from his home, when two agents of the state Justice Department rang his doorbell. When Mitchell opened the door, they identified themselves as Michael A. Hoell, a special agent of the Division of Criminal Investigation, and Robin E. Broeske, a special agent with the White Collar Crimes Bureau. Hoell told Mitchell they wanted to ask him questions regarding the Wisconsin Coalition for Voter Participation "matter."

In a telephone interview, the following day, the Election Board's Kevin Kennedy acknowledged that he had authorized the agents to question Mitchell. Denying that Kelly's letter itself had triggered the agents' visit, Kennedy explained that Mitchell had

been singled out because he was "very active in the campaign."

Mitchell later described himself as "stunned" by the visit. "I had not been notified of this visit, nor had I previously received any indication from any state official that I was in any way under investigation." The two agents explained to Mitchell that their visit was a "cold call," says Mitchell, "and said something to the effect that this was an approach that they sometimes found effective. I decided to get a piece of paper so I could take notes."

Mitchell describes the questioning:

"Hoell and Broeske seated themselves at my dining room table. As I sat down, I reiterated that I was 'stunned' that I would receive an unannounced visit from criminal agents. Prior to being asked any questions, I said that the first that I knew of the disputed WCVP postcard mailing was two days after the 1997 election and, therefore, I asked what basis they could possibly have for asking to speak with me.

"Hoell responded by saying 'your name came up because of your letters to the Elections Board...and because of your wife's involvement, which seems larger than yours.' I asked on two separate follow-up occasions that he confirm that the main reason he wanted to speak with me was because of my correspondence with the Elections Board. He said yes.

"Hoell explained the questions he wanted to pose to me by saying, 'We're trying to find out what your participation was in the Wilcox campaign.' I told Hoell and Broeske I had been active as a volunteer supporter of Wilcox. When I asked why that would be of any concern to the Department of Justice, Hoell said I seemed 'awfully defensive,' adding that I was asking them a lot of questions and they were the ones who wanted to do the questioning. I reiterated that if I seemed agitated it was because I was 'stunned' and 'flabbergasted' to be on the receiving end of this unannounced visit. When I inquired as to why criminal agents were involved, Hoell said:

“Because there are potential criminal violations...not against you...necessarily.”

Kennedy later denied that the investigation was, in fact, criminal. “We don’t do that,” he insisted. The Elections Board, he said, was pursuing only civil remedies. He had no explanation why the Justice Department agents had raised the specter of “criminal” charges.

The agents asked Mitchell if he knew Mark Block. “I said I had not met Block but had talked to him on several occasions during the campaign, as he was Wilcox’s campaign manager. Hoell asked me what I know of WCVP, and I said I knew that a Brent Pickens and a James Wigderson were associated with it and that Ray Taffora was their attorney. I said I had recently read a number of legal briefs involving the case, having done so in response to a number of phone calls from a reporter.

“At this point, Hoell said: ‘You have some involvement, somehow, George, you know you do.’ I said it seemed inappropriate to make such a statement without any evidence. Broeske then said, ‘If there’s nothing to hide, why don’t you put your cards on the table.’”

Despite his explicit statement that he had no involvement or knowledge of the mailing, the agents again demanded to know about his involvement in the campaign

“By this point, Hoell’s questions led me to conclude that he did not believe me. I said I did not wish to answer further questions. He asked where my wife was and I said she was at work.

“I escorted Hoell and Broeske to the front door.”

The next day, Mitchell called Kennedy at the Elections Board, and asked him whether he

or the Elections Board had any tangible evidence that Mitchell had broken any campaign laws. Says Mitchell, “He said the only basis that existed for my being questioned was that my name had frequently ‘come up’ as someone who was visible in the campaign.

“I said I found it haunting that someone would receive an unannounced visit from criminal agents when the only basis was their legal activities as a citizen.”

The Future of Speech

“Voter suppression describes using intimidation and other methods that encourage people not to vote,” *The Wall Street Journal* noted after congressional Democrats filed a civil racketeering lawsuit against Congressman Tom Delay for his fundraising practices. “Donor suppression is a new wrinkle... The real target is Mr. DeLay’s donors: with a little crude intimidation of these givers, the Democrats hope to better their odds of taking back control of the House.”

The Democrat’s suit was filed under the 1970 Racketeer Influenced and Corrupt Organization Act — known as RICO. Aimed at organized crime, it can be applied to anyone associated with a “criminal enterprise,” and holds them liable for any crimes committed under its auspices.

RICO was never intended to be applied to political activities. But as Wendy Kaminer, notes, its deployment during an election year can serve a political purpose. “The [Democratic Congressional Campaign Committee] doesn’t even have to win this suit for it to have a chilling effect on contributors to political parties and campaigns who fear becoming defendants in a federal lawsuit.”

In Wisconsin, though, the civil/criminal investigation did not center on allegations of

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corruption or extortion, but simply on an effort to disseminate information that was (a) truthful, and (b) the sort of political speech that seems to have been explicitly exempted from regulation by the United States Supreme Court.

Even granting the existence of a major push to elect Wilcox by supporters of school choice, what, ultimately, was their crime? Engaging in political speech? Checkbook activism? A flagrant act of democracy?

Or do we now regard these as inherently suspicious and corrupt?

Despite extensive coverage of “campaign finance reform,” the tactics of the Wisconsin Elections Board has received little coverage and little or no editorial criticism. But isn’t the interrogation of George Mitchell precisely the sort of intrusive government action proscribed by the Constitution? As the Court wrote in *Buckley v. Valeo*, “[B]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”

The whole point of the court’s ruling in *Buckley* was to draw a bright line that was easily identifiable for citizens engaging in political activity or issue advocacy. It was designed to sharply limit the scope of government regulation, and avoid the sort of confusion and hair-splitting that surrounds this case.

Indeed, the Supreme Court in *Buckley* had declared that: “The Constitution protects against the disclosure of political associations and beliefs. Such disclosures can seriously infringe on privacy of association and belief guaranteed by the First Amendment.

“Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”

Notes

1. Other major contributors to the postcard effort included:

- \$30,000 from Windway Capital Corp., a Sheboygan company owned by businessman Terry Kohler.
- Miller Brewing Co. executive John MacDonough and his wife, Kathleen, who donated \$1,000.
- PMA Foundation, a trust headed by Philadelphia insurance executive and longtime GOP fund-raiser Frederick Anton III, \$17,500.
- Barre Seid, a Chicago businessman, GOP contributor and major booster of proposals to help private schools compete with public schools, \$25,000.
- Pete du Pont, former governor of Delaware and unsuccessful 1988 GOP presidential candidate, \$1,000.
- Robert Schoolfield, a businessman and founder of a school-choice group in Austin, Texas, \$500.

Details of the contributions were released in March 2000 by Susan Mitchell, who now heads the foundation. She did not, however, run the organization in 1997 at the time of the contributions.

2. It should be noted that Susan Mitchell is a senior fellow of the Wisconsin Policy Research Institute, which publishes this journal. George has also done extensive research for the Institute and has been published in this journal.
3. At the time of the election Mitchell was a regular panelist on *Sunday Insight*, broadcast on WTMJ-TV in Milwaukee and hosted by the author of this piece. The weekly Sunday morning show follows *Meet the Press* on the city’s NBC affiliate and features four guests, generally with diverse ideological viewpoints. The panelists are free to express their viewpoints as they see fit, without editorial control from either the host or the station.