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Winning Ugly in Wisconsin

April 4, 2008

In Wisconsin's Supreme Court race the winner was on the side that threw the most mud.

Summary

In a Wisconsin throwdown, incumbent Supreme Court Justice Louis Butler narrowly lost his reelection bid after being hit with a barrage of deceptive attack ads. We've written about some of them in recent weeks.

Attack ads targeting the incumbent heavily outnumbered attacks aimed at the business-backed winner, Circuit Court Judge Mike Gableman. In the closing days of the campaign the ratio was roughly 2 to 1.

A misleading attack ad that ran hundreds of times implied that the incumbent overturned a murder conviction despite overwhelming evidence of the convicted man's guilt. Actually, Butler based his ruling on new DNA evidence that undercut a key part of the prosecution's case.

One of the most heavily run ads of the campaign misleadingly accused the incumbent of focusing on "needless technicalities" when, on an evidentiary question, he sided with a husband accused of poisoning his wife in the well-publicized "letter from the grave" case. In fact, the point Butler raised was a question of constitutional rights important enough for the U.S. Supreme Court to have taken on in its current term.

Butler blamed his narrow loss on heavy spending by independent groups that he said "siphoned huge amounts of money into this race" without disclosing where it came from. We can't say for sure that money or misleading attacks were decisive in this race. However, the facts are that the margin of victory was small, and most of the mud was slung by the winning side.

Analysis

Gableman's April 1 victory over incumbent Justice Louis Butler marks the first time in more than four decades that an incumbent justice has been defeated for reelection in Wisconsin. The change is expected to shift the balance of the court from liberal to conservative.

Judicial races in Wisconsin are nonpartisan, but only in a strict legal sense. As a practical matter the partisan and ideological lineup in this race was clear: Butler was named to the bench by a Democratic governor and had the support of liberal-leaning groups and labor unions representing more than 18,000 police officers, as well as the backing of more than 200 judges. Gableman was appointed to the lower court by a Republican governor and was backed by conservative and business groups, and also by a majority of the state's elected sheriffs and district attorneys.

Challenger Gableman had a clear advantage in both TV ad spending and sheer numbers of ads, according to data from the Campaign Media Analysis Group, a unit of TNS Media Intelligence which monitors political TV spots. Ads on Gableman's side ran roughly six times for every five times ads ran on the incumbent's side (6,588 versus 5,374). Gableman's supporters also tended to run their ads in more expensive time slots, and they outspent Butler's on TV ads by 45 percent (more than $2.1 million was spent on ads for the challenger versus less than $1.5 million for the incumbent), according to CMAG's estimates, which are based on each station's customary rate schedule.

The High Court Goes WWF

The race was a volley of low blows. Overall, attack ads predominated by a wide margin, 7,273 vs. 4,689 that were all or mostly positive. And it was the winner's side that slung the most mud, by far. We found that the incumbent was the target of 4,388 attack ads, while the challenger was the target of 2,885. The disparity was even more pronounced in the last stage of the campaign. In the week ending April 1, attack ads targeting the incumbent outnumbered attack ads targeting the challenger nearly two to one.

We found several of those ads to be false or misleading. We posted articles here and here describing our findings in detail. We can't say if these false and misleading attacks made the difference. But the contest was close – Gableman captured 51 percent of the vote to Butler's 49 percent – and far more nastiness had the loser in the bull's-eye than the winner.

One of the most heavily run ads of the entire campaign, for example, came from the largest business group in the state, Wisconsin Manufacturers and Commerce. The ad attacked Butler for his lone dissenting vote in the nationally watched "letter from the grave" case, which concerned a man who was convicted of poisoning his wife after the jury was shown a letter in which the victim said she suspected her husband was trying to poison her. The ad accused Butler of focusing on "technicalities" and claimed he "almost jeopardized" the prosecution. In fact, the issue raised in the case deals with a defendant's Sixth Amendment right to confront witnesses against him, which the U.S. Supreme Court is addressing in a separate case in its current term.

The "technicalities" ad appeared 1,350 times. Another ad by the same group, citing the same ruling, said Butler used a "loophole" and called him "Loophole Louie." That ad ran 1,719 times, more than any other TV spot in the entire campaign.

A third ad, which ran 526 times, claimed that the incumbent overturned a murder conviction despite overwhelming evidence of guilt. But Butler based his ruling on new DNA evidence that undercut a critical element of the prosecution's case. The ad's sponsor, a conservative group called the Coalition for America's Families, headed by a former chairman of the state Republican Party, failed to mention that Butler based his decision on new DNA evidence showing that hair on the victim's bathrobe belt didn't belong to the accused, as the jury had been told.

The most heavily criticized ad of the campaign actually ran only 106 times, but its effect was multiplied by the free air play it received by news organizations discussing its content. That ad, by Gableman's own campaign, showed the mug shot of a convicted rapist next to a photo of Butler. Both are African-American, and the effect was reminiscent of the Willie Horton ad run against Michael Dukakis in the 1988 presidential campaign. The false implication was that Butler was to blame for getting the rapist out of prison and allowing him to rape another victim. In fact, Butler was acting as a public defender and was not a judge at the time, though the ad pictured him in a judge's robes. Furthermore, he failed to win his client's release. Instead, Butler prevailed in an initial appeal of the man's conviction but lost when the case went to the state's highest court. The man remained locked up. He committed his next assault only after he'd served his sentence. Now, he's behind bars again.

"This system is broken"

In his concession speech, Butler criticized the influence of the outside groups that were responsible for most of the negative ads.

> **Butler:** I've said it throughout the race: This system is broken. Third-party issue groups who don't have to be accountable, don't have to follow campaign laws and don't have to disclose their donors siphoned huge amounts of money into this race.

We've written before about the similarities between the real-life Wisconsin race and the fictional Mississippi one portrayed in John Grisham's recent novel, "The Appeal." We can now list three more. One, the amount spent on ads by the incumbent and outside groups supporting the incumbent was exceeded by the amount spent by the other side (though to a lesser degree in Wisconsin). Two, the outside groups spent more than either candidate did.

And three: The incumbent lost the race.

– by Viveca Novak

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Judgment Day in Wisconsin

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