Opening Statement

Judicial Campaign Contributions: How Much is Too Much?

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With a high-profile case now pending before the U.S. Supreme Court, we may soon have guidance on whether, and under what circumstances, a campaign contribution to a successful judicial candidate will cause disqualification in cases involving the contributors. The Court's grant of certiorari last November in *Caperton v. A.T. Massey Coal Company, Inc.*, comes amid increasing focus on the impact of skyrocketing judicial campaign fundraising and independent campaign committee expenditures on the public's perception of judicial fairness and impartiality.

The American Bar Association's Standing Committee on Judicial Independence recently issued a draft of a report of the Judicial Disqualification Project, in which it observes that "In the past five years, disqualification has emerged as a major part of both the problem and the solution in the ongoing national effort to preserve and promote an independent judiciary." In particular, the report notes that in several highly publicized cases, judges have been severely criticized for refusing to disqualify themselves from cases "where the judge had an undisclosed financial interest in, received sizable campaign contributions from, or had a personal relationship with one of the parties."

Why the increasing concern? As the ABA report notes, "With interest groups pouring money into judicial elections, it is unsurprising that the public thinks that judges are influenced by the campaign contributions they receive." Surveys in Texas, Ohio, and Pennsylvania found that 80 to 90 percent of respondents believed judicial decisions are influenced by campaign contributions—and these surveys were taken well before the current boom in contributions.

Indeed, all you have to do to understand the concern about the public perception of judicial independence is to look at the escalating level of campaign fundraising going on in state court races throughout the country. If you live in a state where judges are elected rather than appointed—and there are 39 states in which judicial selection involves some form of election—you might reasonably conclude that, if you want to serve on the state court bench, fundraising skills are more important than legal skills.

According to *The New Politics of Judicial Elections 2006*, a report prepared by the Brennan Center for Justice at the NYU School of Law, the National Institute on Money in State Politics, and the Justice at Stake Campaign, judicial fundraising for state supreme court races set records in five states (Alabama, Georgia, Kentucky, Oregon, and Washington State) for a single court race, as well as for total fundraising by all high court candidates.

Whereas just a few years ago, campaign fundraising might have hit five figures in a state high court race, the *New Politics* report lists 10 states where fundraising reached seven figures in 2006.

The central question posed by these reports—and now pending before the U.S. Supreme Court in *Caperton*—is whether there is a point at which campaign contributions to a judicial candidate should disqualify a successful candidate from deciding cases involving the contributor either as a party or as an attorney. The issue is not merely whether the contributions cause actual bias in favor of the contributor, but also whether judges should be disqualified based upon *apparent* bias; that is, the contributions create such a perception of likely bias that public confidence in the courts is undermined. A particularly critical and related issue is who gets to make the disqualification decision.

A 1999 revision to the Model Code of Judicial Conduct attempted to answer all of these questions by requiring automatic disqualification of a judge whenever a lawyer, law firm, or party appearing before her has made aggregate contributions to the judge's campaign

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in excess of an amount that is either to be specified by each state adopting the rule or "is reasonable and appropriate for an individual or an entity." The state also would specify the number of years over which the aggregate contributions would be measured. The revision was carried over in the 2007 revision to the Model Code. Problem solved, right?

Well, not exactly. Underscoring the complexity of the issue is the fact that the 1999 revision has not been widely adopted. In fact, only two states, Mississippi and Alabama, have enacted provisions based on this standard.

So if the states are not buying this approach, are there other grounds for disqualification based on campaign contributions? The Model Code of Judicial Conduct also provides that a judge should be disqualified if the judge's "impartiality might reasonably be questioned . . ." The ABA report notes that this catch-all provision has been adopted by every jurisdiction "with the possible exceptions of Montana and Michigan." These two states have other catch-all disqualification provisions.

Against this backdrop, the U.S. Supreme Court's decision to grant certiorari in the *Caperton* case could produce guidance in the thorny area of whether or when due process requires recusal in the event of perceived prejudice stemming from campaign contributions by a litigant or a lawyer. Because the forthcoming decision may have a substantial impact on judicial candidate fundraising in many states, it is worth taking a look at the background of the case.

The dispute involves two coal companies, Harman Mining Corporation and A.T. Massey Coal Company. Harman sued Massey in the Circuit Court of Boone County, West Virginia, alleging unlawful interference with Harman's business and fraud in connection with negotiations to purchase the Harman Mine. In August 2002, the jury returned a verdict in favor of Harman for approximately $50 million in compensatory and punitive damages. For a variety of reasons, Massey's petition for discretionary review in the West Virginia Supreme Court was not filed until October 2006.

During the interim, there was a contested election for a seat on the West Virginia Supreme Court, which is the sole appellate court in a state that does not allow appeals as a matter of right. In that election, Brent Benjamin defeated the incumbent, Warren McGraw. During the campaign, the president, chief executive officer, and chairman of Massey, Don L. Blankenship, contributed $2.46 million to an organization known as And for the Sake of the Kids, an independent group that actively opposed the reelection of Justice McGraw. Blankenship also spent more than $500,000 supporting the Benjamin campaign through payments to media outlets for advertising.

Even before Massey filed its petition in the West Virginia Supreme Court, Harman filed a motion asking Justice Benjamin to recuse himself. Justice Benjamin declined, finding there was no objective evidence of bias and that the motion was based on "surmise, conjecture, and political rhetoric." Thereafter, he voted to grant review and, subsequently, with the 3-2 majority, to reverse the judgment against Massey.

While a motion for reconsideration was pending, photographs became public showing another member of the majority, Chief Justice Elliott Maynard, with Blankenship on the French Riviera during the pendency of the appeal. The chief justice and one other justice, who had been in the minority and publicly critical of Blankenship, then recused themselves from further participation in the case. Justice Benjamin, however, denied a renewed recusal motion from Harman and, as acting chief justice, appointed two new members of the court to fill in for the recused justices. He then voted to reconsider the appeal and, on reconsideration, again sided with the majority in a 3-2 decision reversing the judgment against Massey.

In its petition for certiorari, Harman noted that Blankenship's contributions (totaling approximately $3 million) represented more than 60 percent of the total amount spent to support Justice Benjamin's campaign. Harman characterized the question presented as "whether Justice Benjamin's failure to recuse himself from participation in his principal financial supporter's case violated the Due Process Clause of the Fourteenth Amendment." In its brief in opposition, Massey characterized the question as whether the Due Process Clause requires disqualification in the absence of any allegation of actual bias and where the contributions were made

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by an officer of a party—not the party itself—to an organization independent of Justice Benjamin's campaign.

Beyond its argument that Justice Benjamin's participation in the case was consistent with due process, Massey argued that a standard requiring recusal "based on the vague 'substantial' expenditure test suggested by the Petition would raise serious First Amendment concerns." In particular, Massey argued that such a standard would dissuade lawyers and parties from making campaign contributions because they would have no way to know whether the amount given would be deemed "substantial," especially if that determination is based on creating an appearance of bias rather than actual bias. Of course, if states adopted the provision included in the 1999 Model Code revision and specified an aggregate contribution limit, that uncertainty would be eliminated.

Because it considered the issue sought to be presented in *Caperton* of such critical importance, the ABA, with the support of the Section of Litigation, took the somewhat unusual step of filing an amicus curiae brief at the certiorari stage. It urged the Court to grant certiorari to determine "whether the constitutional right to due process places limits upon a judge's consideration of a legal matter in which one party was a substantial contributor to that judge's election to the bench." Citing decisions in which the Court "has recognized in a variety of contexts that the judiciary's legitimacy and efficacy derives largely from the public's confidence in its fairness and fidelity to the law," the ABA argued that "public confidence is being eroded by activities such as those at issue in this case and in other cases like it."

Thus, the challenge for the Court is to decide whether due process requires disqualification of judges when a campaign contributor appears before a successful candidate as party or advocate and, if so, how or where to draw the line. In its amicus brief, the ABA argued that:

> . . . implicit in the Model Code's Rule 2.11(A)(4) is that, at *some* contribution level, fundamental fairness concerns of actual or apparent bias are triggered. Because the Court has held that the appearance, as well as the reality, of judicial impartiality animates the Due Process Clause . . . this case presents an important opportunity for the Court to clarify the constitutional boundaries that govern the significant and recurring issue of judicial campaign contributions.

As the *New Politics* report for 2006 demonstrates, it is indisputable that judicial campaigns are attracting increasing amounts of contributions. This is not likely to change anytime soon; if anything, it is likely to accelerate as more judges and challengers raise even more private money for the honor of serving the public interest. Indeed, a recent report from Justice at Stake, *2008 Supreme Court Elections: More Money, More Nastiness*, found spending in 2008 on television advertising for state high court elections to be up 24 percent over 2006 levels.

If the issue was limited solely to the private interests of litigants and their lawyers, an actual bias standard might be worth discussing. Even then, however, because evidence of actual bias generally is not readily available, litigants moving for recusal on the basis of their opponent's campaign contributions would have to rely largely on the targeted judge to publicly acknowledge a subjective inability to be fair. Is that likely to happen?

Obviously, it depends on the judge and the facts. However, even judges of the highest integrity acting in the utmost good faith may not fully recognize or appreciate the subtle influence that large campaign contributions might have on their otherwise independent judgment. This is not intended in any way as a criticism of judges; it is simply a matter of recognizing the frailties of human nature. An objective standard for disqualification is essential, particularly when the integrity and fairness of a person who is supposed to embody both qualities is called into question. An amicus brief filed on the merits in *Caperton* by 27 former state supreme court chief justices and justices supports an objective recusal standard:

> [E]very judge is first and foremost a human being, not a detached and unemotional law machine. We are all fundamentally incapable of complete impartiality and indifference. The inescapable consequence is that there is a class of cases in which the judge incorrectly believes himself or herself to be impartial, blind to some innate or long-standing bias.

The judicial system must not only be fair, but also its processes must be seen to be fair. For that reason, the existence of apparent bias is just as damaging as actual bias. If the Supreme Court agrees with that proposition, it will have to confront how apparent bias is to be established or evaluated. Possible factors suggested in the ABA's amicus curiae brief include the size of the contribution, its relative importance to other and total contributions, the timing of the contribution relative to the pendency of the case, and the relationship of the contributor to the case.

Beyond the standard to be applied, however, it is important to consider who should make the disqualification decision. As long as it is the recipient of a substantial campaign contribution who makes the exclusive or final decision on disqualification in cases involving the contributor, the public will have reason to be skeptical. One solution is to have someone other than the assigned judge make the initial decision or to subject orders denying a recusal motion to de novo appellate review. While it may cause some delay and burden on other judges because many such motions are frivolous or filed for tactical reasons, the importance of maintaining public confidence in the courts justifies such a process.

Indeed, the ABA draft report has a series of recommendations for disqualification procedures that states should consider adopting in whole or in part. In addition to assigning such motions to judges other than the targeted judge and utilizing heightened appellate review standards, the report suggests establishment of a procedure allowing parties to challenge a judge on a peremptory basis, which already is used in some form or fashion in 19 states.

There is no perfect answer or one size that fits all states. Implementation of some or all of these recommendations, however, would enhance public confidence in the fairness and impartiality of the men and women who serve on our state court benches. ◻

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