AMERICAN COLLEGE OF TRIAL LAWYERS
WHITE PAPER ON JUDICIAL ELECTIONS

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In April, 2008, the Judiciary Committee proposed a set of Recommended Principles for Judicial Selection and Retention, adopted later that year by the Board of Regents. Of those recommended "Principles," four in number, the first three are unimpeachable, as was the fourth at the time it was adopted and recommended by the Committee. However, events since that time have combined to produce a veritable "Perfect Storm" of adverse consequences attendant upon judicial elections that strongly suggest that the College should reconsider and take a position in opposition to selection and retention of judges by contested elections under any circumstances.

The Committee's "Fourth Principle" as set forth in the 2008 Recommendations, states:

> The "appearance of impartiality" is critical to judicial independence. Nothing erodes public confidence in the judiciary more than the belief that justice is "bought and paid for" by particular lawyers, parties or interest groups. *In states where judges are selected or retained by contested elections, publicly financed elections are preferable.*

What has transpired since that principle was recommended by the Committee and the College to suggest that it is no longer supportable? At least two decisions by the United States Supreme Court which, together with an earlier decision and with two troublesome trends which were apparent even in 2008 but which have only increased since then, have given rise to a situation in which any contested election of judges virtually assures improper and deleterious influence upon the system.

Even before 2008, the College, among many other organizations and individuals, had commented repeatedly on the pernicious influence of money in contested judicial elections, a trend which had been growing for some time and which, in conjunction with the elimination of courses in what used to be called Civics or Problems of Democracy in most public school curricula, had already fed a corrosive attitude that judges were not much if at all different from other "pols." In 2002, the Supreme Court in *Republican Party of Minnesota v. White,* ruled that candidates for judicial vacancies could not be forbidden to take positions on issues that might come before them on the bench. The case involved a First Amendment attack upon a Minnesota Canon of Judicial Conduct, the so-called "announce" clause, prohibiting candidates for judicial office from "announcing [their] views on disputed legal or political issues."

In 1996, Gregory Wersal ran for associate justice of the Minnesota Supreme Court and published literature in support of his candidacy criticizing certain decisions of that court on key issues such as crime, welfare and abortion. A complaint filed against him with the Office of Lawyers Professional Responsibility was later withdrawn by the agency owing to doubts as to the clause's constitutionality, but Mr. Wersal withdrew from the race to avoid further complaints and potential damage to his practice. However, he ran for the same post again several years later and, together with certain others, filed an action against officers of the agency in federal court, seeking, among other things, a declaratory judgment that the clause was unconstitutional. He was unsuccessful in the trial

court and on appeal to the Eighth Circuit, but the Supreme Court reversed in an opinion by Justice Scalia in which Justice Sandra Day O'Connor, while concurring in the result, tellingly expressed in a separate opinion the view that "the very practice of electing judges undermines ... the state's compelling governmental interest in an actual and perceived ... impartial judiciary."

Far from being "free from any personal stake in the outcome of the cases to which they are assigned," Justice O'Connor wrote, "if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case." She went on to decry the fact that "contested elections generally entail campaigning. And campaigning for a judicial post today can require substantial funds." Moreover, unless the pool of candidates is limited to those wealthy enough to fund their own campaigns independently — "a limitation unrelated to judicial skill" — the cost of campaigning requires them to engage in fundraising which "may leave judges feeling indebted to certain parties or interest groups." She had little sympathy for Minnesota's "claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality."

> If the State has a problem with judicial impartiality, it is largely one that the State brought upon itself by continuing the practice of popularly electing judges.

Literature suggesting the extent to which money has played a disturbing part in contested judicial elections was already plentiful when Justice O'Connor wrote in 2002. Things haven't improved in the interim. In fact, during the decade 2000-2009, "fundraising by high-court candidates surged to $206.9 million, more than double the $83.3 million raised in the 1990s," according to the Brennan Center for Justice. Even more unsettling, in 2010, "heavy spending and angry TV ads spread to several states holding *retention elections,"* which as recently as 2009 had accounted for less than 1 per cent of spending in such races. In 2010 alone, high-court retention elections in a handful of states cost more than the $2.2 million raised for all retention elections in the nation during the decade 2000-2009. Yet those expenses were still far lower than in competitive election states.

The most striking example of just how bad the situation can get is provided by the facts in the notorious case of *Caperton v. A.T. Massey Coal Company.* Petitioner Caperton and others had secured a $50 million verdict against the Massey company. Don Blankenship, Chairman, CEO and President of the company, decided after the verdict but before the appeal to support an attorney, Brent Benjamin, who sought to replace Justice McGraw, then Chief Justice of the Supreme Court of Appeals of West Virginia, who was a candidate for re-election. Blankenship donated $1,000 — the statutory maximum — to Benjamin's campaign, but in addition donated nearly $2.5 *million* to a political organization opposed to McGraw and supporting Benjamin, and another $500,000 in independent expenditures for direct mailings, solicitation letters and TV and newspaper ads to support Benjamin. These expenditures amounted to more than the total amount spent by all other Benjamin supporters and was triple the amounts spent by Benjamin's own committee. Benjamin won.

In October 2006, before Massey filed its appeal, Caperton moved to disqualify Benjamin, citing conflict of interest. The motion came on for hearing before Benjamin himself who denied it, indicating that upon careful consideration he could find no "objective information" to show that he was biased, or that he had prejudged the issues or was "anything but fair and impartial." In December, Massey filed its petition and the Supreme Court granted review.

The following November, the court reversed Caperton's $50 million verdict. While conceding that Massey's conduct had warranted the type of judgment entered against it, the Court reversed on two independent procedural grounds, over the dissents of two justices who stated that the "majority's opinion [was] morally and legally wrong," misapplied the law and introduced sweeping "new law." Caperton sought rehearing and various disqualification motions were filed. Among them were a motion aimed at one of the judges in the majority, Justice Maynard, photos having come to light of the justice vacationing with Blankenship on the French Riviera while the case was pending. He granted Caperton's motion and recused himself.

One of the dissenting judges granted a disqualification motion filed by Massey based on his public criticism of Blankenship's role in the 2004 elections. He also urged Benjamin to recuse himself, describing the presence of Blankenship's money, political tactics and "friendship" as having "created a cancer in the affairs of this Court." Justice Benjamin declined his colleague's suggestion and denied Caperton's recusal motion.

The court granted rehearing, and with Benjamin now in the role of acting chief justice, selected two other justices to replace the two who recused. Again, Benjamin refused to withdraw from the case in the face of yet another disqualification motion and a public opinion poll showing that over 67% of West Virginians doubted he could be fair and impartial. Once more the Court reversed the jury verdict, again by a vote of 3 to 2, both dissenting justices drawing attention to Benjamin's failure to recuse himself. A month after Caperton filed its cert petition with the U.S. Supreme Court, Benjamin filed a concurring opinion containing a spirited defense of the majority opinion and his decision not to recuse.

The majority decision of the Supreme Court, per Justice Kennedy, to reverse the decision of the West Virginia court, was not a foregone conclusion. As a matter of law and policy, very appealing arguments were advanced by the dissent of Chief Justice Roberts in which Justice Scalia joined. But the facts of the case are striking. It may well be that Justice Benjamin could maintain an attitude of perfect objectivity despite the influences injected by Blankenship's money, tactics and "friendship." But it is difficult to imagine anyone claiming that the facts did not give rise to a "reasonable question" regarding his impartiality. And the results of the public opinion poll seem to bear out the conclusion that the public at large is more than a little disenchanted with the system when it creates such an appearance of impropriety.

The decision of the Court in the *Citizens United* case in 2009 also operates, in practice, to increase the pernicious influence of money and politics in the election of judges. *Republican Party of Minnesota* validates a judge's decision to announce in advance her views about issues and cases that may come before her and, indeed, to lobby parties and groups which might be able to generate votes; *Caperton* illustrates just how far interested parties may be willing to go if the stakes are high enough and just how responsive to such influence a judge may be — or at least *appear* to be. Now *Citizens United* confirms the right of large corporations and unions to join the fray. The results in terms of the sheer amounts of money now available to the process have already been confirmed by the spike in spending in 2010, and judges are certain to be held even more accountable to interest groups and political campaigns at the expense of their fealty to the law and the Constitution.

In the wake of these developments, three Supreme Court justices in Iowa were ousted in 2010 after interest groups, most from out of state, spent nearly a million dollars to unseat them owing to the court's unanimous ruling in a 2009 gay marriage case. Other such efforts were mounted but failed. Still, the tendency is clear and is likely only to get worse. The efforts of both parties to the collective bargaining dispute in Wisconsin to pack the state court with candidates favorable to their respective positions is reflective of many such efforts underway at present.

There may have been a time when arguments could be mounted in favor of judicial elections as distinct from other types of political races. That time has now passed, owing to the threats to the independence and impartiality of our judiciary posed by this combination of judicial rulings and political trends — compounded by minimal curricular attention accorded to civics education that, if given, would teach that judges are often charged with protecting the rights of the unpopular and are not simply another sort of elected politicians. Other methods of selection of judges are doubtless far from perfect in many instances, but they are substantially less subject to the corrupting influences of money and partisan politics than any form of contested election of judges.

The Judiciary Committee recommends that the College go on record as opposing contested elections for the selection and retention of judges. The Jury Committee and the Special Problems in the Administration of Justice Committee (U.S.) have participated as partners in this study and analysis and join in this recommendation.

In accordance with this recommendation, the Committees suggest that the Fourth Principle of the Recommended Principles for Judicial Selection and Retention be revised as follows:

> The "appearance of impartiality" is critical to judicial independence. Nothing erodes public confidence in the judiciary more than the belief that justice is "bought and paid for" by particular lawyers, parties or interest groups. *The College holds in the highest esteem elected judges who perform their duties day in and day out with integrity, courage and conviction, and without permitting the fact of judicial elections to exert any influence over their decisions. The College believes that contested judicial elections, including retention elections, create an unacceptable risk that improper and deleterious influences of money and politics will be brought to bear upon the selection and retention of judges. The College therefore opposes contested elections of judges in all instances.*

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