

BRENNAN  
CENTER  
FOR JUSTICE



January 21, 2010

Clerk of the Supreme Court  
Attn: Carrie Janto, Deputy Clerk  
Supreme Court of Wisconsin  
P.O. Box 1688  
Madison, Wisconsin 53701-1688

Re: Nos. 08-16 and 08-25,  
*In the matter of amendment of the Code of Judicial Conduct's rules on recusal*

Dear Ms. Janto:

We write on behalf of the Brennan Center for Justice at NYU School of Law<sup>1</sup> and the Justice at Stake Campaign<sup>2</sup> to comment on proposed revisions to the amendments of the Code of Judicial Conduct proposed in rule petitions 08-16 and 08-25. We understand the Court will consider the proposed revisions at an open administrative conference on Thursday, January 21, 2010. Both the Brennan Center and Justice at Stake have previously submitted extensive comments on the proposed changes to recusal practice in the Supreme Court of Wisconsin. In the interest of brevity, we do not reiterate those comments here. Instead, we respectfully submit only the following brief comments.

We are concerned that the proposed revisions to the Code of Judicial Conduct will create a presumptive safe harbor in which recusal is never warranted based on a litigant's campaign spending, even when that spending would lead an objective, unbiased observer to question a judge's impartiality. In so doing, the proposed revisions are in clear conflict with the holding

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<sup>1</sup> The Brennan Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Through the Brennan Center's Fair Courts Project we work to preserve fair and impartial courts and their role as the ultimate guarantor of equal justice in our constitutional democracy.

<sup>2</sup> Justice at Stake is a nationwide, nonpartisan partnership of more than 50 judicial, legal, and citizen organizations. Its mission is to educate the public and work for reforms to keep politics and special interests out of the courtroom — so judges can do their job protecting the Constitution, individual rights, and the rule of law. The arguments expressed in this letter do not necessarily represent the opinion of every Justice at Stake partner or board member.

of the United States Supreme Court in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). The revisions also threaten to undermine public confidence in the impartiality of Wisconsin’s judiciary, which is, and has traditionally been, accountable to the law and the U.S. and Wisconsin Constitutions, not to special interests that inject millions of dollars into campaigns for judicial office in the Badger State.

In *Caperton*, the U.S. Supreme Court made clear that it may violate the Due Process Clause for a judge to refuse to step aside from a case involving a litigant who has given extraordinary support to that judge’s election campaign. Notably, the bulk of the campaign support at issue in the *Caperton* case involved independent expenditures, not direct contributions to the candidate. The Court noted that while most questions of judicial disqualification do not give rise to constitutional concerns,<sup>3</sup> due process nonetheless requires a judge’s recusal “when the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable”<sup>4</sup> — when, that is, there is a “serious, objective risk of actual bias.”<sup>5</sup> Such a risk of bias will arise, the Court made clear, “when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”<sup>6</sup>

The proposed revisions to the Code of Judicial Conduct currently before the Court imply that a judge should never recuse himself or herself from a proceeding based on independent campaign spending by an individual or entity involved in the proceeding, regardless of the amount of spending on independent communications, the relation of that spending to the total amount spent in the judicial election, and the timing of the communications. Such a rule violates the central lesson of *Caperton*. It also threatens to undermine public trust in the courts at a time when four in five Americans believe that judges should not hear the cases of major campaign supporters.<sup>7</sup>

For these reasons, we would urge the Court to reject the proposed revisions to the Code of Judicial Conduct currently under consideration, and instead adopt a rule that acknowledges the totality of circumstances cited in *Caperton*. That includes not just the gross amount spent on contributions and independent expenditures, but also the relative size of the party’s contributions in comparison to the total amount of money contributed to the campaign; the ratio of the party’s spending to the total amount spent in the election; the apparent effect of the party’s spending on the results of the election; and whether the party’s spending occurred while the proceeding at issue was pending or imminent. At a minimum, we would strongly urge the Court to clarify in its comments to the proposed revisions that recusal is

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<sup>3</sup> *Id.* at 2269.

<sup>4</sup> *Id.* at 2257 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

<sup>5</sup> *Id.* at 2265.

<sup>6</sup> *Id.* at 2263-64.

<sup>7</sup> See *Caperton v. A.T. Massey Coal Co.*, Brief of Amici Curiae The Brennan Center for Justice, the Campaign Legal Center, and the Reform Institute (U.S. No. 08-22), available at <http://tinyurl.com/ydzo3qr>; see also Joan Biskupic, “Supreme Court case with the feel of a best seller,” *USA Today*, Feb. 16, 2009.

appropriate when the circumstances surrounding spending by an individual or entity, considered in their totality, give rise to a serious, objective risk of bias.

Because of the flaws in the revised amendments currently before the Court, we urge the Court to reject them. The Court would be well advised to commit issues of recusal to a study commission, which could offer changes to address the concerns outlined above, and could also introduce proposals for additional procedural reforms, such as requiring all recusal decisions to be made in writing and to explain the grounds for the decision.

We commend the Court for its attention to the important issue of judicial recusal, and greatly appreciate the opportunity to submit these comments.

Respectfully submitted,



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