

# IS JUSTICE FOR SALE?

## BY BERT BRANDENBERG

For more than fifteen years, special interests have poured millions of dollars into state supreme court elections. This unprecedented flood of cash has raised a troubling question: Is justice for sale?

On June 8, the U.S. Supreme Court weighed in with a historic response to that question. In certain cases, the justices said, election spending can so taint a judge's likelihood of impartiality that he or she must step aside from a case.

"There is a serious risk of actual bias when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case," said the Supreme Court's 5-4 opinion, written by Justice Anthony Kennedy. "Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the other parties' consent—a man chooses the judge in his own cause."

The case *Caperton v. Massey* has become a watershed in a growing national debate over whether runaway election spending threatens the ability of courts to provide fair, impartial justice.

Popularized by the John Grisham novel *The Appeal*, *Caperton v. Massey* has drawn widespread public attention. Articles and editorials in the nation's largest publications have cited the threat of special interests seeking to pack courts with friendly jurists.

The *Caperton* case involves a business suit between two coal companies operating in West Virginia. When a jury found that Massey Coal Co. used fraudulent business practices to destroy a competitor and awarded a \$50 million judgment against it, Massey CEO Don Blankenship swung into action.

He spent \$3 million to assist the campaign of Brent Benjamin, who was challenging then-Justice Warren McGraw. Benjamin won a hard-fought election, and many saw Blankenship's ads, mostly through an independent group called "And for the Sake of the Kids," as

essential to Benjamin's victory.

Once on the bench, Benjamin twice refused to recuse himself and cast the deciding vote in a 3-2 opinion to overturn the jury award against Blankenship's company. The losing litigant, Hugh Caperton, appealed to the U.S. Supreme Court, arguing that Benjamin's decision violated the Fourteenth Amendment's guarantee of due process by denying him a fair, impartial tribunal.

While the facts of the case are unusually stark, they are part of a broad pattern that has turned state supreme court elections into financial arms races. From 1999-2008, supreme court candidates raised \$200.4 million nationally, more than double the \$85.4 million spent in 1989-98. Much of the money was spent by competing special interests hoping to gain an upper hand in the nation's ongoing tort war.

The trend has troubled those who believe courts are different from other branches of government and must be accountable to the law, not politics or special-interest agendas.

Polls show that three in four Americans believe campaign contributions affect courtroom decisions. In February 2009, a poll by the Justice at Stake campaign showed that 85 percent of Americans believe a judge should not handle cases involving major financial supporters.

This breadth of support became clear in January, when an unprecedented array of groups submitted amicus briefs to the U.S. Supreme Court, arguing that Justice Benjamin should be forced to recuse himself from the *Caperton* case. These groups included the American Bar Association (ABA); a group of twenty-seven retired state supreme court justices; and a business organization whose cosigners included Pepsico, Wal-Mart, Intel, and Lockheed-Martin.

"The integrity of the judicial process requires that judges avoid both actual bias and the reasonable appearance of bias," the ABA brief argued. "Few actions jeopardize public trust in the judicial process

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more than a judge's failure to recuse in a case brought by or against a substantial contributor."

On March 3, oral arguments were heard, and sharp divisions within the U.S. Supreme Court were evident. While the court had periodically ordered state and local judges to recuse for constitutional reasons, the issues generally were narrow, most often involving personal financial involvement with a litigant or the case's outcome.

The court had never ordered recusal in the context of judicial elections, and the four most conservative justices said there was no objective standard for deciding when a campaign supporter's role might raise constitutional issues. "You really have no test other than probability of bias," complained Justice Antonin Scalia. "We can't run a system . . . on such a vague standard."

The court's liberal wing clearly was troubled by the *Caperton* facts. Justice John Paul Stevens said, "We have never confronted a case as extreme as this before. This fits the standard that Potter Stewart articulated [about obscenity] when he said, 'I know it when I see it.'"

Justice Kennedy expressed concerns about whether a clear standard could be articulated, but ultimately said a key goal of the Fourteenth Amendment was to "ensure confidence in our judgments."

The ruling has sparked discussion about what comes next.

Critics of the *Caperton* decision, including Chief Justice John Roberts, say the ruling will trigger waves of ill-founded recusal motions by lawyers seeking tactical advantage. And reformers say more work must be done to guarantee

courts that are truly impartial.

The ABA Standing Committee on Judicial Independence is developing model rules to guide campaign-related recusals. The rules are expected to go before the House of Delegates in 2010. And the Brennan Center for Justice, in an April 2008 report called *Fair Courts: Setting Recusal Standards*, outlines a menu of ten possible reforms to make it easier for judges to step aside when campaign conflicts occur.

But many agree that tougher recusal rules are only a partial solution to protecting courts from special-interest influence. For instance, unless states require third-party groups to reveal their funding sources, as a West Virginia law did in 2004, it can be impossible to identify when a big spender like Blankenship is seeking to sway an election.

The ABA, with vocal support from former Justice Sandra Day O'Connor, has advocated a system of nonpartisan judicial appointments as the best way to keep courts impartial. Where states hold elections, the ABA and other groups favor public financing to take judges out of the business of raising money from litigants who appear before them.

In the end, the goal is fair, impartial justice that is broadly trusted by the public. The Supreme Court's ruling made it clear that runaway spending by special interests can directly threaten that ideal.

More work must be done to protect the courts' unique role in our democracy. As ABA President H. Thomas Wells Jr. said in a statement praising the *Caperton* decision, "The standards laid out by the court must not be viewed as the final word on this issue." ■