TENNESSEE BAR
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It's a Mighty Short Drive from the Harman Mine to the Tennessee Line

On March 3, the United States Supreme Court heard arguments in the case of *Hugh M. Caperton, et al. v. A. T. Massey Coal Company Inc.* This landmark case has its roots deep in the Appalachian hills of Buchanan County, Virginia, less than an hour's drive from the Tennessee line. Hugh Caperton bought the mine in 1993, and by the end of that year the mine was yielding one million tons of high-grade metallurgical coal a year, quadruple its previous output.[1]

"A poll done by *USA Today* and Gallup in February of this year found that 89 percent of those surveyed believed the influence of campaign contributions on judges' rulings is a problem and 52 percent thought it was a 'major' problem."

But Don Blankenship, CEO of A. T. Massey Coal Company, coveted his neighbor's mine. He acquired Caperton's prime customer and bought the land surrounding the mine, leaving his competitor with no access by road or by rail. In 1998, Caperton acquiesced and agreed to sell the mine to Blankenship's company, but at the 11th hour Blankenship's company called the deal off. Suit was filed in West Virginia based on various allegations of fraud and tortuous contract interference. Caperton won a $50 million jury verdict.[2]

While the judgment was on appeal, Blankenship spent $3 million on behalf of Charleston lawyer and Supreme Court candidate Brent Benjamin. This was 60 percent of all money spent on Benjamin's campaign. Benjamin defeated a controversial incumbent for a 12-year term and that put him in a seat on the Court that would hear the appeal of the $50 million verdict. Caperton's lawyers asked Benjamin to disqualify himself. Justice Benjamin refused and cast the third and deciding vote, which reversed the trial court's judgment. The issue now before the United States Supreme Court is whether Justice Benjamin violated Caperton's Fourteenth Amendment due process rights by accepting $3 million in campaign support from Blankenship, then casting the deciding vote in the case.[3]

In our neighboring state of Alabama in 2006, the campaign for the Alabama chief justice's seat cost the two candidates $8.2 million between them, plus an estimated $1 million in special interest group money, making that race the most expensive in state history, the most expensive campaign anywhere in the nation in 2006, and the second most expensive judicial race in American history.[4] In our neighboring state of Georgia in 2006, the campaign to unseat incumbent Justice Carol Hunstein cost $4 million, $1.3 million of which was funneled into Georgia from out of state.[5]

A poll done by *USA Today* and Gallup in February of this year found that 89 percent of those surveyed believed the influence of campaign contributions on judges' rulings is a problem and 52 percent thought it was a "major" problem. More than 90 percent of those surveyed thought that judges should be removed from a case if it involves a contributor.[6] In 2002, the Justice at Stake organization released a study that concluded that even 26 percent of the judges it polled believed that campaign contributions have at least some influence on judicial decision making. Justice at Stake has also con-

continued on page 4

cluded that 70 percent of voters support selecting judges through a form of merit selection with a retention election.

These figures are consistent with a membership survey done by the TBA released in October 2008, which showed that 80.1 percent of lawyers feel that significant fundraising by appellate judges could have a corrupting influence on the judiciary and more than 70 percent of Tennessee lawyers favor selecting judges through merit selection coupled with a retention election. And while there are those in our membership who disagree on the preferred method of judicial selection, I have never heard one of our members say that our clients don't deserve a fair and impartial judiciary.

Defendants as well as plaintiffs are worried. In the *Caperton* litigation, an amicus brief was filed on behalf of Intel Corporation, Lockheed Martin, Pepsico and Wal-Mart. In that brief, those parties pointed out that "survey data indicate that business executives, as well as judges themselves and voters at large, believe that campaign contributions influenced judicial decision making. In the face of ever more expensive and politicized judicial elections, there is a need to signal to businesses and the general public that judicial decisions cannot be bought and sold." This amicus brief goes on to state, "Due process not only protects litigants, but also furthers larger societal goals. One such goal is preserving the institutional legitimacy of the judiciary, which relies on public confidence and its independence and even handedness for power."[7]

A 2007 survey done by Zogby International regarding state judicial election fundraising surveyed 200 senior executives primarily at companies with more than 500 employees. The results show that American business leaders are concerned that disproportionately large campaign contributions are influencing judges' decisions and creating an unacceptable appearance of such influence. Four of five business leaders expressed concern that "financial contributions have a major influence on decisions rendered by judges." And survey respondents were nearly unanimous in their opinion that judges should recuse themselves from cases involving contributors.[8] State-specific surveys have consistently found that voters agree. Voters overwhelmingly believe that campaign contributions influence judicial decisions.[9]

Television advertising in judicial campaigns has also increased dramatically in recent years. In 2000, television advertisements ran in less than 25 percent of the states with contested Supreme Court elections. By 2006, television advertising ran in 91 percent of the states with contested Supreme Court campaigns.[10] There has also been a proliferation of negative advertising, often by interest groups and political parties. In 2004, for example, interest groups and political parties sponsored nearly nine of ten negative ads.[11]

Simultaneously, another phenomenon has combined to make the threat to judicial independence more urgent. Judicial platforming — candidates' increasing reliance on political platforms to campaign for judicial office — is the byproduct of the United States Supreme Court's decision in *Republican Party of Minnesota v. White*.[12] In the wake of the decision in White, groups have used questionnaires to solicit candidates' views on topics such as taxation, capital punishment, abortion and gambling. In fact, in Tennessee in 2006, these questionnaires were sent to our appellate judges, most of whom declined to respond.[10]

As we go to press, the outcome of the debate over Tennessee's system for the selection of judges is unknown. It has already become clear, however, that in judicial elections, even in elections for trial court judgeships, the amounts of money raised and spent will continue to increase.[11] The number of television ads and the percentage of those ads that are attacking the opponent will likely

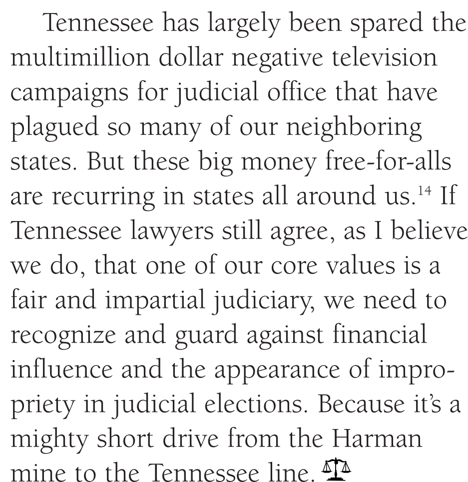
continued on page 13

 continued from page 4

increase. The use of judicial questionnaires by those who would have our judges express themselves on the legal issues of the day in advance of hearing any case or being elected or appointed will likewise proliferate.

The reality is that the service rendered by our judges is fundamentally different than the service rendered by public servants in the other two branches of government. As Justice Kennedy said in his confirmation hearings in 1987, "I think if a judge decides a case because he or she is committed to a result, it destroys confidence in the legal system.[12] Justice Souter put it this way during his confirmation hearings: "Is there anyone who has not, at some point, made up his mind on some subject and then later found reason to change or modify it? No one has failed to have that experience. No one has also failed to know that it is much easier to modify an opinion if one has not already stated it convincingly to someone else."[13]

The time may have come for Tennessee to consider more specific recusal provisions, including without limitation, the assignment of contested recusal motions to a different judge for decision, an examination of the appellate review standards for recusal decisions, and a requirement that recusal decisions include, as is now required for summary judgment motions under Rule 56, a statement of reasons for the decision. In fact, a poll by Harris Interactive for Justice at Stake and released Feb. 23, found that 81 percent of those surveyed said a separate judge should decide recusal motions. We should also carefully consider whether judicial candidates who have spoken extra-judicially through answers to a questionnaire, public speeches, or a media campaign, on an issue coming before the court, should be required to recuse themselves from any case when the outcome depends on the resolution of that same issue.



Tennessee has largely been spared the multimillion dollar negative television campaigns for judicial office that have plagued so many of our neighboring states. But these big money free-for-alls are recurring in states all around us.[14] If Tennessee lawyers still agree, as I believe we do, that one of our core values is a fair and impartial judiciary, we need to recognize and guard against financial influence and the appearance of impropriety in judicial elections. Because it's a mighty short drive from the Harman mine to the Tennessee line.

> "The time may have come for Tennessee to consider more specific recusal provisions."

Former West Virginia Justice Elliott Maynard, left, with Massey CEO Don Blankenship on the French Riviera in July 2006. Photo from the *Caperton v. Massey* file at the Supreme Court of Appeals of West Virginia.

Notes

1. Gibeaut, "Caperton's Coal," February 2009 *ABA Journal*.

2. *Id.*

3. In 2004, Justice Lloyd Karmier of Illinois refused to recuse himself in an insurance coverage case despite the fact that the insurance company's lawyers, affiliates and employees had provided more than a quarter of his $4,800,000 campaign fund. Justice Karmier cast the necessary vote overturning the $450,000,000 jury verdict. The U. S. Supreme Court declined to hear that case.

4. *Id.*

5. *Id.*.

6. "Supreme Court Case with the Feel of a Best Seller," *USA Today*, Feb. 17, 2009.

7. Quoting from *The Federalist*, No. 78.

8. See *Zogby International, Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges* (2007).

9. See, e.g., North Carolina Center for Voter Education, American Viewpoint: North Carolina Statewide Survey (June 2005)(86 percent of those polled believe campaign contributions too often lead to conflicts of interest); Commission to Promote Public Confidence in Judicial Elections, Report to the Chief Judge of the State of New York (2004)(83 percent of those polled think that contributions have at least some influence on judicial decisions); ABA Standing Committee on Judicial Independence, Public Financing of Judicial Campaigns: Report of the Commission on Public Financing of Judicial Campaigns (February 2002)(Nine out of 10 Pennsylvania voters believe large campaign contributions influence judicial decisions); Texas Supreme Court Justice Phillips, state of the judiciary address to the Seventy-sixth Legislature of the state of Texas (March 1999)(83 percent of Texans polled thought that money had an impact on judicial decisions).

10. *The New Politics of Judicial Elections* 2006, Part 1.

11. *Id.*

12. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

13. See "Judicial Surveys Vex the Bench," *National Law Journal,* Sept. 8, 2006.

14. "This campaign spending seems particularly wasteful in today's context of layoffs, furloughs, foreclosures, and state budget cuts. Tennessee's law schools, for example, are being forced to eliminate faculty positions and classes, increasing class sizes, and cutting moot court programs." Remarks by Dean Douglas Blaze, University of Tennessee College of Law, Feb. 12, 2009.

15. Quoting from Hon. Kenneth W. Starr, "Legislative Restraint in the Confirmation Process," *University of Richmond Law Review*, Vol. 38, No. 3, 2004.

16. *Id.*

17. See generally, Burnett, "A Cancer on the Republic: The Assault Upon Impartiality of State Courts and the Challenge to Judicial Selection," 34 *Fordham Urban Law Journal*.