A Heightened Recusal Standard for Elected New York Judges Presiding Over Cases, Motions or Other Proceedings Involving Their Campaign Contributors

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TABLE OF CONTENTS

A HEIGHTENED RECUSAL STANDARD FOR NEW YORK JUDGES PRESIDING OVER CASES, MOTIONS OR OTHER PROCEEDINGS INVOLVING THEIR CAMPAIGN CONTRIBUTORS

I. INTRODUCTION AND SUMMARY OF PROPOSAL

Although this report focuses on a heightened recusal standard for judges in New York State, the Fund for Modern Courts reiterates its long-held position that the adoption and public ratification of a Constitutional amendment to implement a qualification commission-based appointive system to choose judges in all courts of record in New York represents the best method of limiting the role of money and politics in the judicial selection process.

But until a Constitutional amendment is enacted, Modern Courts calls for the adoption of rules and procedures to improve the process of judicial elections in order to more effectively limit the influence of partisan politics, decrease the role of campaigning and fundraising, and help to safeguard the independence and integrity of the judiciary.

At a minimum, such reforms should consist of a judicial nomination process, which would require a meaningful evaluation of a candidate's qualifications for judicial office by an independent commission, whose members are selected by independent and diverse organizations or appointing authorities and who represent the broad diversity of the State. This commission would determine whether the candidate is "well qualified" to be nominated for judicial office. Modern Courts believes that there should be a limited number, optimally three, of candidates who are approved by the panel for nomination for each judicial vacancy.

In addition, Modern Courts believes in a public finance system which provides that judicial candidates opting into the system should be subject to contribution limits, campaign spending limits, and threshold requirements to qualify for the finance system. Candidates who meet the requirements should be provided with public matching funds to ensure adequate resources to operate a campaign, particularly in cases where an opponent has opted out of the campaign finance system. To ensure a candidate's right to free expression, the public finance system should be voluntary.

Modern Courts believes that an independent and impartial judiciary is essential. That the public *perceives* the judiciary as independent and impartial is equally essential.[1] Yet in states such as New York, where a significant number of

[1] This sentiment is a long-held belief in our legal system. The original ABA Canons of Judicial Ethics illustrate this point in Canon 4: "A judge's official conduct should be free from (…continued)

judges are elected, it is difficult to preserve the appearance, if not the reality, of an impartial judiciary. A judge running for election must raise money in order to finance her campaign. When persons who have contributed to her election campaign appear before her, either as parties or counsel, the judge's impartiality may reasonably be called into question. According to last year's Supreme Court decision in *Caperton v. A.T. Massey Coal Co.*, such an appearance of impropriety may, under certain circumstances, actually violate federal Due Process.[2]

In *Caperton*, the Court held that due process required the recusal of a state supreme court justice who received significant campaign support from a party appearing before him even though there was no determination of actual bias on the part of the justice. Rather, "the risk that [the contributing party's] influence engendered actual bias [was] sufficiently substantial that it 'must be forbidden if the guarantee of due process is to be adequately implemented.'"[3] While significant in its holding, *Caperton* was limited in scope insofar as it addressed "an extraordinary situation where the Constitution requires recusal."[4] Indeed, "[t]he *Due Process Clause* demarks only the outer boundaries of judicial disqualifications."[5] Therefore, in states that elect judges, a crucial question remains: if the judiciary is to remain elected, how can the system ensure that judges carry out—and are seen to carry out—their duties in an impartial fashion?

This question warrants considerable attention in light of another recent Supreme Court decision – *Citizens United v. Federal Election Commission* – which effectively opened the door to unlimited corporate spending in support of, or against, individual candidates for elected office. *Citizens United* involved a federal campaign finance law prohibiting corporations and unions from using

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(continued…)

impropriety and the appearance of impropriety." ABA MODEL CODE OF JUD. CONDUCT Canon 4 (1924) (emphasis added). Avoiding the appearance of impropriety is, in fact, so essential to our justice system that the Supreme Court recognized in *In re Murchison* that there could and likely would be instances in which a judge could have fairly and impartially adjudicated the case but was recused or disqualified to preserve the appearance of impropriety. 349 U.S. 133, 136 (1955) ("Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way justice must satisfy the appearance of justice." (internal citations omitted)). New York State has also chosen to codify this sentiment in Canon 2 of its Code of Judicial Conduct. N.Y. CODE OF JUD. CONDUCT Canon 2 (2008) ("A Judge should avoid *impropriety and the appearance of impropriety* in all his activities.") (emphasis added).

[2] *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

[3] *Id*. at 2255 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

[4] *Id.* at 2265.

[5] *Id.* at 2266-67.

their general treasury funds to finance television or radio advertising related to a specific candidate for office in the weeks leading up to an election. In a controversial decision, the Court struck down the law on First Amendment grounds, despite the Court's finding in an earlier campaign finance case that there is "a compelling governmental interest in preventing 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'"[6]

In a 90-page dissent, Justice Stevens underscored the extraordinary effect *Citizens United* will have, not only on elections for legislative and executive offices but on the judiciary, as well: "The majority of the States select their judges through popular elections. At a time when concerns about the conduct of judicial elections have reached a fever pitch . . . the Court today unleashes the floodgates of corporate and union general treasury spending in these races."[7] After *Citizens United*, Stevens argued, states "may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems."[8] In a world where as many as 76 percent of Republicans and 85 percent of Democrats oppose the Court's decision in *Citizens United*, states like New York must find alternative ways to preserve public confidence in an elected judiciary.[9]

In this report, we propose a solution for New York that would require only minimal reform of the current system and would in no way implicate the First Amendment right to participate in the electoral system—the introduction of a *per se* rule pursuant to which judges would be obligated to recuse themselves from hearing a case in which any party's "total contribution" to the sitting judge equals or exceeds $1,000. Under the rule, each party's "total contribution" is defined as the sum total of the contributions made during the previous three years and/or the pendency of the case to the election or reelection campaign of the sitting judge by: (1) the party or real parties in interest; (2) any holder of five percent (5%) or more of the party's stock, if the party is a corporate party; (3) any insurance carrier for

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[6] *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 903 (2010).

[7] *Id.* at 967 (Stevens, J., dissenting).

[8] *Id.*

[9] Linda Greenhouse, *Missing the Tea Party*, N.Y. TIMES, Feb. 25, 2010, *available at* http://opinionator.blogs.nytimes.com/2010/02/25/missing-the-tea-party/ (last visited Mar. 12, 2010). A February 2010 Washington Post-ABC News poll showed that 80 percent of those surveyed opposed the *Citizens United* decision, and 65 percent of respondents "strongly" opposed the ruling. *See* Washington Post-ABC News poll, Feb. 2010, *available at* http://www.washingtonpost.com/wp-srv/politics/polls/postpoll_021010.html (last visited Mar. 17, 2010).

the party which is potentially liable for the party's exposure in the case; and (4) the attorney or attorneys and/or law firm or firms *of record* for the party (note that this category specifically excludes contributions made by members of the firm or firms of record who are not themselves attorneys of record for the party).

The $1,000 threshold is designed to capture only those contributions that are most likely to create a perception of bias, while not depriving judicial candidates the funds necessary to wage a viable campaign. In New York State, where appellate-level judges are appointed, the overwhelming majority of judicial campaign contributions for trial court races are for amounts under $1,000.[10] Thus, a $1000 threshold will target the small percentage of large contributions, while leaving alone the overwhelming majority of small contributions. Doing so will not only ensure that candidates of varying personal financial means will have an opportunity to compete, but it will also avoid the potential administrative burden placed on the court system of vastly increasing the numbers of judges that would have to disqualify themselves if the threshold were lower.

The rule places the burden of disclosing the relevant campaign contributions on the parties rather than the judge, and permits any party whose "total contribution" is less than that of other parties who are adverse to it to file a waiver permitting the judge—who would otherwise be obligated to disqualify herself pursuant to the rule—to preside over the case. The text of our proposed rule follows.

A. Proposed Disqualification Rule for Elected Judges Presiding Over Cases Involving Contributors to Their Campaigns

(A) Disclosure obligations:

(1) Within 28 days of notice of the identity of the judge presiding on the case, motion or other proceeding (the "sitting judge"), attorneys for all parties shall file certificates of disclosure with the court, and serve certificates of disclosure on all attorneys of record before the court. Each party's certificate shall state either:

(a) that the party's total contribution is less than $1,000;

or

[10] In the contested general election races for the Ninth District Supreme Court, 8.9 percent, 8.5 percent and 11.1 percent of donations to candidates were $1,000 or higher in 2005, 2006 and 2007 respectively, while 18.0 percent, 22.1 percent and 26.6 percent were $500 or higher. *See* Graham Porell, Judicial Elections, the Influence of Money, and Judicial Independence in New York State 28 (May 6, 2008) (unpublished Masters dissertation, New School for Management and Urban Policy) (on file with Fund for Modern Courts). In the contested Rockland and Westchester County Court elections, 2.8 percent, 2.3 percent and 0.5 percent of donations to candidates were $1,000 or higher in 2005, 2006 and 2007 respectively, while 6.8 percent 7.9 percent, and 8.0 percent were $500 or higher. *Id.* at 30.

(b) that the party's total contribution is equal to X dollars, where "X" is a dollar amount that equals or exceeds $1,000.

(2) A party's "total contribution" is defined as the sum total of the dollar amounts that were contributed to the election and/or reelection campaign(s) of the sitting judge by:

(a) the party or real parties in interest;

(b) any holder of five percent (5%) or more of a corporate party's stock;

(c) any insurance carrier for the party which is potentially liable for the party's exposure in the case; and

(d) the attorney or attorneys and/or law firm or firms of record for the party (this does not include contributions made by members of the firm of record who are not themselves an attorney of record for the party);

during the three years prior to the date on which the parties are notified of the identity of the judge sitting on the case and the pendency of the case before the sitting judge.

(3) If, during the pendency of the case, contributions are made to the sitting judge's election or reelection campaign such that a party's total contribution (which, at the time the party filed its initial certificate of disclosure, was less than $1,000) equals or exceeds $1,000, that party must file with the court an amended certificate of disclosure, within 28 days of learning of the excession, stating the amount of its total contribution, and serve such an amended certificate of disclosure on all attorneys of record in the case.

(4) The failure to file the certificates of disclosure within the time frames set forth above, or the failure to file amended certificates of disclosure as necessary during the pendency of the case, shall not affect the validity of the claims asserted in the filing, but the court may impose sanctions for the failure of the party to comply with this section.

(B) Disqualification requirement:

(1) Once an action, motion or other proceeding is assigned to a judge and certificates of disclosure have been filed and served, if any of the certificates of disclosure reveal that any party's total contribution equals or exceeds $1,000, then the judge must recuse herself or himself within 14 days <u>unless</u> within 14 days a waiver is filed by each party who is entitled to file a waiver indicating that they consent to having the judge preside over the action.

(2) If one party's total contribution is greater than the other, the party with the lower total contribution is entitled to a waiver; otherwise, both parties are entitled to a waiver.

(C) If there are multiple defendants and/or multiple plaintiffs, then:

(1) the contributions of all defendants or all plaintiffs will be aggregated to determine whether the $1,000 recusal threshold is met, unless the parties

on the same side object to aggregation of their contributions on the grounds that their interests in the litigation are in conflict;
(2) if there is any dispute about the existence of such conflict of interest among parties on the same side of the litigation, that dispute will be resolved by the sitting judge;
(3) in the event that the parties (or the judge in the event of a dispute) determine that their contributions should not be aggregated, the contributions of only parties on the same side who exhibit a unity of interests will be aggregated for the purposes of determining whether the threshold has been met.
(4) Parties entitled to a waiver:

(a) If there is no objection to the aggregation of each side's contributions, then the side which contributed less in aggregate is entitled to a waiver if the two sides contributed different amounts. If both sides contributed the same amount in aggregate then both sides are entitled to a waiver.
(b) If there is an objection to aggregation of either side's contributions, then all groups of plaintiffs or defendants who exhibit the necessary unity of interests and who have contributed in aggregate less than the aggregate amount contributed by at least one other group of plaintiffs or defendants are entitled to a waiver. If all groups contributed the same amount in aggregate then all groups are entitled to a waiver.

(5) A group of parties can exercise its waiver only if all members of the group agree to its exercise.

(D) Rule of Necessity:

(1) If recusal of the sitting judge pursuant to this rule would leave the parties with no other judge to hear their case whose court is located:

(a) within the jurisdiction of the sitting judge; or
(b) within 100 miles of the court of the sitting judge;

then the rule of necessity applies, and recusal of the sitting judge is not required.

B. Explanation of Features of Proposed Rule

Four features of the proposed rule should be emphasized:

Burden of disclosure: The burden of disclosure is placed on the parties rather than the judge. Within 28 days of being notified of the identity of the judge, each party must file and serve a certificate of disclosure detailing its "total contribution" (as defined by the statute) to the judge's election campaigns over the past three years, or during the pendency of the case.[11]

[11] Sample disclosure certificates are attached as Exhibit A.

Mechanics of Disqualification: When there is a single plaintiff and single defendant, disqualification is automatic whenever either party's "total contribution" to the judge's election or reelection campaign made over the past three years and during the pendency of the case is equal to $1,000 or more. However, a party whose aggregate contributions are lower than those of his opponent may submit a waiver indicating that he consents to having the judge preside over the case. If both parties contributed the same amount in excess of $1,000, the judge is disqualified unless both parties file a waiver.

Multiple Litigants: When there are multiple parties on each side, the rule treats all parties on either side as a single party, aggregating the contributions of all defendants and all plaintiffs in order to determine whether the threshold has been reached, unless there is a conflict of interest between any of the parties on the same side. If there is such a conflict of interest, the contributions of only those plaintiffs (or defendants) who exhibit a unity of interest are aggregated. Waivers are allocated to groups of parties who exhibit the necessary unity of interest, and in the event that there are more than two such groups (because there is a conflict of interest among some of the plaintiffs and/or some of the defendants) then all groups except for the group who has made the highest aggregate contribution are entitled to a waiver. All members of a group entitled to a waiver must agree to exercise the waiver for the group to be deemed to have waived its right to have the judge disqualified.

Example: A and B sue X, Y and Z. There is a unity of interest between A and B and between X and Y, but not between X, Y and Z. Thus, A and B are treated as a group, {A, B}, X and Y are treated as a group, {X, Y}, and Z is treated as a group. The certificates of disclosure reveal that A contributed $500, B $600, X $400, Y $800, and Z $500. Thus, {A, B} contributed $1,100, {X, Y} contributed $1,200 and Z $500. The threshold has therefore been exceeded by {A, B} and {X, Y}. Z and {A, B} are entitled to waiver. Therefore, Z, A, and B must all agree to waive their right to have the judge disqualified for the judge to be relieved of his obligation to disqualify himself.

Rule of Necessity: The Rule of Necessity operates to eliminate the possibility that judicial recusal under the proposed rule would result in the parties being left without a judge to hear their case. In addition, the proposed addition of a 100 mile "bulge rule" (similar to Rule 45 of the Federal Rules of Civil Procedure)[12] attempts to eliminate the possibility that the heightened recusal standard would be undermined in jurisdictions with only a single judge, by mandating that—in

[12] "[A] subpoena may be served at any place . . . outside that district but within 100 miles of the place specified for the deposition, hearing trial, production or inspection." Fed. R. Civ. P. 45(b)(2)(B).

instances where the sole judge of the jurisdiction is subject to recusal—the parties should instead appear before a judge in another jurisdiction, provided that the additional travel entailed by this change of venue does not exceed 100 miles.

In the event, however, that there is no judge not subject to recusal whose court is located either: (a) within the jurisdiction of the originally designated judge or (b) within 100 miles of the court of the originally designated judge, the Rule of Necessity applies, and recusal of the sitting judge is not mandated even in an instance where recusal would be otherwise mandated pursuant to the rule.

II. "EMERGING CONSENSUS" IN FAVOR OF HEIGHTENED RECUSAL STANDARDS WHERE CAMPAIGN CONTRIBUTIONS ARE INVOLVED

There is a growing recognition of the need for clearer legal standards requiring judges to recuse themselves when their financial supporters appear before them as parties or lawyers. A broad consensus in favor of heightened recusal standards among scholars and public interest groups has emerged. Although many within the judiciary have expressed skepticism about the need for judges to recuse themselves when hearing cases involving campaign contributors, many others disagree, and last year, the Supreme Court held what several state supreme courts had held previously: that the receipt of campaign support from parties or their lawyers may require disqualification in certain circumstances. And while in *Caperton v. A.T. Massey Coal Co.*, the Supreme Court addressed "an extraordinary situation where the Constitution requires recusal," the Court reiterated that "'[t]he Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today.'"[13]

A. The American Bar Association

Since 1999, the ABA disqualification rules have required a judge's recusal in every instance in which a party or party's lawyer has contributed at least a threshold amount to the judge's campaign. Canon 3E of the Model Code of Judicial Conduct provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where the judge knows or learns by means of a timely motion that a party or a party's lawyer has within the previous [insert # of years] years made aggregate contributions to the judge's campaign in an amount that [is greater than $[insert amount] for an individual or $[insert amount] for an entity] [is reasonable and appropriate for an individual or entity]."[14]

Prior to the adoption of this new rule in 1999, the ABA Model Code of Judicial Conduct regulated the disqualification of judges through its general disqualification standard requiring that a judge disqualify himself "in a proceeding in which his partiality might reasonably be questioned."[15] This provision, though not specifically targeted at campaign contributions, ought to preclude a judge from deciding a case in which one party or an affiliate of that

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[13] *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2265, 2267 (2009) (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986)).

[14] ABA MODEL CODE OF JUD. CONDUCT Canon 3(E)(1)(e) (2007).

[15] *Id.* Canon 3(C) (1972).

party contributed a significant amount to the judge's campaign, since in such a case, the judge's partiality might reasonably be questioned. However, following an investigation conducted in 1998 by the ABA's Task Force on Lawyers' Political Contributions, the ABA drafted and adopted Canon 3(E)(1)(e) because the Task Force concluded that "it is imperative to adopt a system for recusal in connection with campaign contributions."[16] The Task Force discovered that "the bench and bar face unblinkable evidence that campaign contributions severely erode public confidence in courts. [And] [t]o ignore this challenge is, we submit, to say that public confidence in courts does not matter."[17] Thus, the ABA concluded that a specific rule directly targeting the problem of party and lawyer campaign contributions was required.[18]

Though this rule has not been adopted verbatim in any jurisdiction, two states have enacted comparable rules requiring judicial recusal in the face of campaign contributions.[19] The ABA retained this rule in the 2007 update of the Model Code.

B. Academics and Public Interest Groups

A number of scholars and public interest groups have advocated heightened recusal standards. Professor Peter Joy has argued that "[b]y adopting and enforcing better recusal standards, high courts can take a positive step toward improving the image of the elected judges by fully embracing the spirit of ethical rules prohibiting the appearance of impropriety and guaranteeing fairness and impartiality."[20] Several scholars have proposed the introduction of a *per se* rule for campaign contributors that, like the rule we propose herein, would allow for or mandate disqualification of a judge when a party or lawyer who has contributed over a threshold amount to his campaign comes before him.[21] Finally, New York

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[16] ABA, REPORT AND RECOMMENDATION OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, PART 2, 37 (1998).

[17] *Id.*

[18] A more specific rule regarding the recusal of a judge facing any litigants that have contributed to their campaigns is needed because motions made on this basis under the general "might reasonably be questioned" rule "hardly ever succeed." John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69, 87 (2003). *See also infra* Part III.B.1.

[19] *See* ALA. CODE § 12-24-1 (Supp. 2000) and MISS. CODE OF JUD. CONDUCT Cannon 3E(2) (2002).

[20] Peter A. Joy, *A Professionalism Creed for Judges: Leading by Example*, 52 S.C. L. REV. 667, 695 (2001).

[21] Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L. J. 503, 528-30 (2007); James Sample & (…continued)

University School of Law's Brennan Center for Justice has urged states to adopt heightened recusal standards, including a *per se* rule for campaign contributors along the lines suggested by the ABA.[22]

C. In Their Own Words: Justices and Judges

1. Justice Kennedy's Concurrence in White

Judicial behavior during election campaigns has been regulated in an attempt to prevent the political imperatives generated by elections from undermining the perception and reality of an impartial and independent judiciary. In *Republican Party of Minnesota v. White*, the Supreme Court scaled back the regulation of such judicial conduct in order to comport with the First Amendment.[23] The Justices held that Minnesota's "announce clause" that prohibited judicial candidates from publicizing their political views failed the strict scrutiny review applied to restrictions on the freedom of speech.[24] Though this undermines the power of the State Codes of Judicial Conduct to regulate the political speech of judges, Justice Kennedy suggested in his concurrence that the Codes could compensate by regulating judicial behavior more strictly on other dimensions that do not present First Amendment concerns. Specifically, he suggested that more rigorous recusal standards along with provisions for censuring judges who violate these standards would constitute an acceptable manner in which to regulate judicial campaign behavior.[25] Therefore, though *White* requires deregulation of certain pre-election activity, it also supports in dicta more stringent regulation of judicial activity at the trial stage.

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David E. Pozen, *Making Judicial Recusal More Rigorous*, 46 THE JUDGES' JOURNAL 17, 22 (2007); Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 478-89 (1988); Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMPORARY PROBLEMS 79, 115-16 (1998); John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, HARV. J. ON LEGIS. 69, 87-91 (2000). *See also* Bradley A. Siciliano, *Attorney Contributions in Judicial Campaigns*, 20 HOFSTRA L. REV. 217, 232-38 (1991) (arguing that disqualification should be allowed upon motion of a non-contributing party, if the opposing lawyer gave *any* amount to the judge's election campaign).

[22] James Sample, David Pozen & Michael Young, BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, *Fair Courts: Setting Recusal Standards* (2008).

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

[24] *Id.*

[25] *Id.* at 794 (Kennedy, J., concurring).

2. Changing Landscape: Citizens United *and* Caperton

Two things have happened in Supreme Court jurisprudence since Justice Kennedy's concurrence in *White* that are highly relevant to the issue of judicial recusal. In January, the Court struck down a provision of the McCain-Feingold campaign finance law on First Amendment grounds, arguably paving the way for an extraordinary increase in corporate spending on elections for public office.[26] The *Citizens United* decision unleashed a hail of criticism from those concerned about the effect it could have on the financing of election campaigns.[27] Less than a year ago, however, the Court made clear that federal Due Process may require elected judges to recuse themselves in cases where outsized campaign contributions by parties or lawyers appearing before them give rise to even the appearance of impropriety.[28] Together, these two decisions make clear that while the Constitution may protect the right to make contributions in support of judges' election campaigns in certain circumstances, it may also require judges who receive those contributions to step aside when their impartiality may reasonably be questioned.

3. Judges Generally

Though it appears that judges are reticent to recuse themselves when their impartiality is questioned, many judges understand the importance of rules that mandate disqualification of a judge when his campaign contributors come before him. According to a 2002 national survey of 2,428 state lower, appellate and supreme court judges, 46 percent of respondents said that contributions have at least a little influence on judicial decisions, and more than 50 percent agreed that "judges should be prohibited from presiding over and ruling in cases where one of the sides has given money to their campaign."[29]

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[26] *See Citizens United*, 130 S. Ct. at 913.

[27] *See, e.g.*, Nathan Koppel, *States Weigh Judicial Recusals*, WALL ST. J., Jan. 26, 2010, at A8 (quoting J. Adam Skaggs, an attorney with the Brennan Center for Justice, suggesting that the *Citizens United* ruling "will only exacerbate the trend of escalating, arms-race spending in judicial elections as corporations, unions and special interests seek to buy control of the bench"); Editorial, *The Court's Blow of Democracy*, N.Y. TIMES, Jan. 22, 2010, at A30 ("Disingenuously waving the flag of the First Amendment, the court's conservative majority has paved the way for corporations to use their vast treasuries to overwhelm elections and intimidate elected officials into doing their bidding").

[28] *See Caperton*, 129 S. Ct. at 2256.

[29] Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Ruling*, N.Y. TIMES, Oct. 1, 2006, at A1 (citing State Judges Frequency Questionnaire 5, *Justice at Stake* (2002)).

In 2004, the Commission to Promote Public Confidence in Judicial Elections assembled by Chief Judge Kaye proposed reforms to New York's judicial election practices targeted at campaign finance. These suggested reforms included retention elections which the Commission believed would "reduce the need for sitting judges to engage in campaign fundraising, lessen their dependence on the support of local political party leaders . . . and minimize the likelihood of situations in which their impartiality would be called into question, such as deciding cases involving lawyers who have contributed to their campaign."[30] The Commission also supported more extensive and more accessible campaign contribution disclosure, such as on the Internet, in order to render these campaigns more transparent and to counter public sentiment regarding the impartiality of judges.[31]

Other New York state judges have expressed support for heightened recusal standards when the reality or perception of judicial impartiality is compromised. In an unsolicited explanation for his voluntary recusal, Judge Liotti explained that "[u]nfortunately, there are too many instances of litigants or lawyers trying to 'fix' a case. Efforts to reach Judges by going behind closed doors, by going to side bar without an adversary or by making campaign contributions to judges seeking election, may be nothing more than a thinly veiled attempt to reach a judge so that he or she will rule in favor of the person making the *ex parte* contact."[32]

D. Mandatory Recusal in Other States

Two states, Alabama and Mississippi, have adopted heightened recusal standards requiring judges to disqualify themselves from hearing cases involving parties or lawyers who have made significant contributions to their election campaigns. In addition, the legislature of a third state, Georgia, has considered a heightened recusal standard similar to the one proposed here during both the 2007-08 and 2009-10 sessions, though no action was (or has been, thus far) taken on either.[33] Other states hold that a campaign contribution from a party or lawyer before a judge is an important factor that should be weighed by the judge when he decides whether or not to recuse himself. In the wake of the Supreme Court's

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[30] COMMISSION TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, FINAL REPORT TO THE CHIEF JUDGE OF NEW YORK (2007).

[31] *Id.*

[32] *People v. Lester*, Nos. 01112040.1-9, 01112041.9, 2002 WL 553844, at *2 (N.Y. Just. Ct., Mar. 22, 2002).

[33] H.R. 97, 149th Gen. Assem., Reg. Sess. (Ga. 2007); H.B. 601, 150th Gen. Assem., Reg. Sess. (Ga. 2009).

decision in *Caperton*, some states have considered proposed laws that would require judges to disqualify themselves in cases involving parties or attorneys whose contributions exceeded certain specified levels, although none have passed to date.[34]

1. Alabama and Mississippi

The ABA's Model Code provision provides states with the option of choosing either a rule that mandates disqualification when persons before the judge have contributed over a threshold amount to his campaign or a standard under which disqualification is triggered whenever contributions exceed an amount that is "reasonable and appropriate" for the contributing individual or entity.[35] Mississippi adopted an amended version using a more standard-like test while Alabama chose to adopt an amended version of this rule using the threshold test for contributions.

Canon 3E(2) of the Mississippi Code of Judicial Conduct precludes its state court judges from presiding over a matter to which a "major donor" to their campaign is a party.[36] This canon provides that "a party may file a motion to recuse a judge based on the fact that an opposing party or counsel for that party is a *major donor* to the election campaign of such judge."[37] The adoption of this rule signifies Mississippi's recognition that campaign contributions can influence or can appear to influence judicial determinations, and Mississippi's attempt to preserve public confidence in its elected judges.

In adopting its threshold disqualification rule, the Alabama legislature's stated purpose was to ensure the "recusal of a justice or judge from hearing a case in which there may be an appearance of impropriety because as a candidate the justice or judge received a substantial contribution from a party to the case, including attorneys for the party."[38] The law provides, in pertinent part:

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[34] *See* Brennan Center for Justice, Recusal Reform in the States: 2009 Trends and Initiatives (*available at* http://www.brennancenter.org/page/-/2009DISQUALIFICATIONREFORMINSTATES.pdf) (last visited Mar. 16, 2010); *see also* Koppel, *supra* note 27 (reporting that approximately "10 states, including California and Texas, have proposed new judicial-disqualification rules in the wake of [*Caperton*]").

[35] *See* ABA MODEL CODE OF JUD. CONDUCT Canon 3(E)(1)(e) (2007).

[36] MISS. CODE OF JUD. CONDUCT Canon 3E(2) (2002).

[37] *Id.* (emphasis added).

[38] ALA. CODE § 12-24-1 (Supp. 2000).

> If the action is assigned to a justice or judge of an appellate court who has received more than four thousand dollars ($4000) based on the information set forth in any one certificate of disclosure, or to a circuit judge who has received more than two thousand dollars ($2000) based on the information set forth in any one certificate of disclosure, then, within 14 days after all parties have filed a certificate of disclosure, any party who has filed a certificate of disclosure setting out an amount . . . below the limit applicable to the justice or judge, or an amount above the applicable limit but less than that of any opposing party, shall file a written notice requiring recusal of the justice or judge or else such party shall be deemed to have waived such right to recusal.[39]

The Alabama statute places the burden of disclosing a campaign donation on the contributing party, who must file a certificate of disclosure stating the amount of campaign contributions by the respective individual donor or entity to any judge of an appellate court or presiding trial judge where the case is pending

> made in the last election by the party or real parties in interest, any holder of five percent (5%) or more of a corporate party's stock, any employees of the party acting under that party's direction, any insurance carrier for the party which is potentially liable for the party's exposure in the case, the attorney for the party, other lawyers in practice with the attorney, and any employees acting under the direction of the attorney or acting under the direction of those in practice with the attorney.[40]

Judges are only required to file a statement of contributions with the Secretary of State disclosing the names and addresses of campaign contributors and the amount of each contribution made to him in the election immediately preceding his new term in office.[41] In this way, the burden of disclosure is placed on the

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[39] *Id.* § 12-24-2(c).

[40] *Id.* § 12-24-2.

[41] *Id.* § 12-24-2(a).

party who can most easily carry the burden and carry it in the most cost-effective way.[42]

2. Georgia

In January 2007, a bill was introduced[43] in the Georgia House of Representatives entitled in part "An Act…to disqualify certain judges and Justices from hearing certain matters under certain circumstances." One such circumstance identified in the bill is "when in the last previous or present election cycle such judge has accepted a campaign contribution in the amount of more than $500.00 from a party interested in the result of the case or matter or a counsel for such party."[44] The 2007 Georgia bill places the burden on the parties "to provide notice, as soon as practical, to opposing counsel that such party or counsel for such party was a contributor to the judge." The bill provides that a party receiving such notice has ten days to file an objection with the presiding judge. Should such an objection be filed, the bill requires automatic recusal, but if no objection is filed, or if the potential conflict is waived by the non-disclosing party, recusal is not required. The bill is silent on the issue of aggregation, and fails to acknowledge the potential problems addressed in section (d) of our proposed rule (the Rule of Necessity).

A similar bill was introduced in the Georgia House of Representatives in February 2009.[45] This second attempt to enact mandatory recusal standards provides that "[a] judge or Justice of any court that is elected to such office shall recuse himself or herself from any case before his or her court . . . [i]nvolving a party or his or her attorney that has made an influential action concerning a campaign of the judge presiding over the party's case during the election of such judge."[46] The bill defines an "influential action" as any "[c]umulative amount of contributions to a judicial candidate, campaign committee, or independent committee, that collectively total an amount greater than" the individual contribution limits established for statewide elected office in Georgia (e.g., $5,000

[42] *Ex parte Kenneth D. McLeod, Sr., Family Ltd. P'ship XV*, 725 So. 2d 271, 274 (Ala. 1998).

[43] The bill was not acted on after being referred to the House Committee on Governmental Affairs, 2007 Bill Tracking GA H.B. 97 (LEXIS), and expired at the end of the Georgia General Assembly's 2007-08 session.

[44] H.R. 97, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

[45] H.B. 601, 150th Gen. Assem., Reg. Sess. (Ga. 2009). The bill was not acted on after being referred to the House Committee on Judiciary, 2009 Bill Tracking GA H.B. 601 (LEXIS).

[46] H.B. 601, 150th Gen. Assem., Reg. Sess. (Ga. 2009).

for a primary election).[47] The 2009 bill contains similar language to the 2007 bill regarding the duty of the party that has made the "influential action" to provide notice to the opposing party, and also provides ten days to the opposing party to move to recuse the judge from the case. The 2009 bill notes that nothing in the law "shall be interpreted to prevent a judge presiding over a case where an influential action has been made from recusing himself or herself from the case."[48]

Interestingly, while the 2007 bill limited its proposed recusal requirement to situations where a campaign contribution was made in the "last previous or present election cycle," the 2009 bill proposes a set timeframe of "within two years after the presiding judge has taken office for his or her current term." The fluctuating guideline in the 2007 bill stands in marked contrast with the temporally static reach of our proposal, which encompasses all contributions made in the previous three years, irrespective of the election cycle. And while the 2009 bill applies to a fixed time frame, it only applies to contributions made during the judge's *current term.* Admittedly, a strong argument can be made for tying the recusal requirement to the election cycle. After all, contributions to a judge's most recent (or current) campaign are sure to be fresher in that judge's mind—and therefore of greater concern to a party opposing the contributor—than contributions to an earlier campaign effort. However, anecdotal evidence suggests that past attempts to introduce a heightened recusal standard to the New York judiciary failed to garner support in part due to a perception among the judges that application of the rule would be complex and confusing.[49] Simplicity and ease of application being, therefore, of primary concern to us as we crafted the current proposal, we opted for a 'flat' time restriction that is applied in exactly the same manner to all judges and in all possible scenarios.

3. Other States

Other states have indicated that recusal may be warranted when judges preside over cases in which parties or their lawyers have made contributions to their election campaigns, though they have not yet gone so far as adopting *per se* rules. For example, the Supreme Court of Oklahoma has held that due process must include the right to a trial without the appearance of judicial partiality arising from counsel's campaign contributions and solicitation of campaign contributions on behalf of a judge during a case pending before that judge.[50]

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[47] *Id.*

[48] *Id.*

[49] Phone conversation with M. Sweeney on Sept. 18, 2008.

[50] *Pierce v. Pierce*, 39 P.3d 791, 799 (Okla. 2001).

Although it rejected the notion that due process required disqualification of a judge whenever a contributor to his campaign comes before him, the court held that due process may require disqualification in an individual case.[51] Thus, for instance, disqualification is required when a lawyer makes a campaign contribution to the judge in the maximum amount allowed by statute, a member of the lawyer's immediate family makes a comparable maximum contribution, and the lawyer further assists the judge's campaign by soliciting funds on behalf of the judge.[52]

Although it ultimately overruled the lower court's holding that receipt of a campaign contribution from a party or lawyer could alone require disqualification, the Florida Supreme Court noted that such a contribution, in conjunction with some other factor, could constitute legally sufficient grounds for disqualification upon motion.[53] Furthermore, part of its rationale for refusing to hold that a $500 campaign contribution was a legally sufficient ground for recusal was the fact that $500 was below the statutory limitation on contributions.[54] The court noted: "There may well come a point where a political contribution is substantial enough that it would create a well-founded fear of bias or prejudice. We need not decide where that point is, however, for the legislature has declared that a contribution of $1000 or less to a candidate for circuit or county judge, $2000 or less for a judge of a district court of appeal, and $3000 or less to a justice of the supreme court are the permissible limits for contributions. These caps establish reasonable limits which are not so high as to create a fear of undue influence."[55]

Finally, several states' codes of judicial conduct note that although campaign contributions of which a judge has knowledge made by lawyers who appear before him are not prohibited, they may be relevant to recusal nonetheless.[56]

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[51] *Id.*

[52] *Id.* at 798.

[53] *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1338 & n.5 (Fl. 1990).

[54] *See id.* at 1335 ("Our conclusion is based upon the interplay of our state constitution, code of judicial conduct, and campaign statutes."); *id.* at 1337 ("The statutory limitation upon contributions does, however, reduce the possibility of a quid pro quo arrangement between the candidate and the contributor and also acts to eliminate any appearance of impropriety.").

[55] *Id.* at 1337 n.4.

[56] W. VA. CODE OF JUD. CONDUCT Canon 5(C)(2) cmt. (1995); N.D. CODE OF JUD. CONDUCT Canon 5(C)(2) cmt. (1998); WASH. CODE OF JUD. CONDUCT Canon 7(B)(2) cmt. (1995).

III. THEORETICAL JUSTIFICATION FOR PROPOSED RULE

A. The Problem

Judicial elections increasingly resemble ordinary political campaigns. Running for judicial office is expensive, and media advertising is an important component of judicial campaigns. Thus, judges are increasingly hearing cases involving significant contributors to their campaigns. Since, in practice, New York judges know who many of their contributors are, their impartiality is increasingly being called into question when they preside over cases involving their contributors.

1. The Increasing Role of Money

Judicial campaigns are increasingly expensive, and evidence suggests that money is a significant factor in winning judicial elections.[57] Moreover, much of the financing for judicial campaigns comes from lawyers and other repeat players, who have a strong incentive to try to influence the outcome of cases in which they are involved. In 2006, for example, 44 percent of all campaign funds donated were donated by business interests, and 21 percent of campaign funds donated were donated by lawyers.[58]

The Brennan Center for Justice at New York University School of Law tracks expenditures in state top appellate court races. According to their figures, candidates in these races have raised over $123 million between 2000 and 2004, 67 percent more than the $73.5 million raised by candidates between 1994 and 1998.[59] A total of $34.3 million was raised by candidates in the 2005-06 cycle during which there were 27 contested races.[60] In the 2003-04 cycle, there were 33 contested races, and $46.8 million was raised.[61] The median amount raised by a

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[57] Banner, *supra* note 21, at 452-58.

[58] JAMES SAMPLE, LAUREN JONES & RACHEL WEISS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006, at 3 (2007), *available at* http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006_D2A2449B77CDA.pdf (last visited Mar. 16, 2010).

[59] DEBORAH GOLDBERG, SARAH SAMIS, EDWIN BENDER & RACHEL WEISS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, at 13 (2005), *available at* http://brennan.3cdn.net/dd00e9b682e3ca2f17_xdm6io68k.pdf (last visited March 12, 2010).

[60] SAMPLE ET AL., *supra* note 58, at 15 & n.10.

[61] *Id.*

2006 candidate was $243,910, up from $201,623 in the 2004 election cycle.[62] The Justice at Stake Campaign tracked candidate fundraising figures in state supreme court races from 2000 to 2008. According to their figures, candidates for the Alabama Supreme Court raised a total of nearly $41 million over five races during those years, while candidates for those offices in Ohio, Illinois and Texas collectively raised between $18 million and $21 million over the same number of races.[63] While these figures demonstrate the increasing role of money only in top appellate court races, witnesses tracking national trends interviewed by New York's Commission to Promote Public Confidence in Judicial Elections confirm that trial courts nationwide are experiencing the same trends.[64] In New York judicial districts where judicial contests are contested, total campaign expenditures can reach nearly $500,000 in one race.[65] From 1999 to 2001, the highest amount of money raised by a candidate for Supreme Court was $223,182 and the 10th highest amount was $154,313.[66] In one Fall 2003 Erie County Surrogate race, one candidate spent approximately $306,885 and another candidate spent $95,215.[67]

These large injections of money are also changing the character of judicial elections. Increasingly, judicial elections resemble regular political campaigns with a multitude of interest groups raising substantial funds for their preferred candidates and television advertising playing an increasing role.[68] The Supreme Court's decision to strike down Minnesota's Announce Clause in *Republican Party of Minnesota v. White* has paved the way for further politicization of judicial election campaigns. States are no longer allowed to prohibit candidates

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[62] *Id.* Median amounts refer to the median amounts raised by candidates for state Supreme Court seats who raised any money in their election campaign. *Id.* at 17.

[63] Justice at Stake, CANDIDATE FUND-RAISING IN SUPREME COURT RACES BY STATE, 2000-2008, *available at* http://www.justiceatstake.org/media/cms/JAS_20002008CourtCampaignExpenditur_BB93716C120D2.pdf (last visited Mar. 17, 2010).

[64] COMMISSION TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, *supra* note 30, at 21 & n.18.

[65] COMMISSION TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, Working Paper on Judicial Campaign Finance Expenditures, Appendix G-3, at 1, *available at* http://www.courts.state.ny.us/reports/JudicialElectionsReportAppendices.pdf (last visited Mar. 18, 2010).

[66] *Id.*

[67] *Id.* at 1 n.1.

[68] Sample & Posen, *supra* note 21, at 18.

for judicial office from announcing their views on controversial issues.[69] The role of television advertising and the proliferation of surveys that ask judicial candidates to indicate their views on controversial matters mean that candidates now feel intense pressure to exercise their newfound freedom to offer their opinions on issues that voters want to hear discussed.[70] "As a result, judges will face more and more cases in which they have already suggested a preference for, if not a commitment to, a particular outcome, and in which they have received significant campaign contributions from one or more litigants."[71]

There is no reason to believe that New York represents an exception to these nationwide trends. Although New York uses an appointive system to select judges for the Appellate Division of the Supreme Court and the Court of Appeals, by and large New York's judges are selected through popular elections. According to 2006 figures, 73 percent of the State's 1,143 full-time judges are elected, as are most of the 2,164 Town and Village justices.[72] Furthermore, as New York's Commission to Promote Confidence in Judicial Elections has noted, "[p]rimary races in New York State's courts of general jurisdiction would likely attract as much or greater amounts in contributions than trial courts in other states because of the importance and complexity of litigation that takes place here."[73] In addition, media costs in New York are among the highest in the nation.[74]

As for the impact of *White* on New York's codes of conduct, the New York Rules do not have an "Announce Clause" analogous to that struck down in *White*. Furthermore, the Court of Appeals has upheld the New York Rules in the face of challenges to their constitutionality in the wake of *White*. First, it upheld the rules restricting judges' ancillary political activity—such as participating in other candidates' campaigns, publicly endorsing other candidates or publicly opposing any candidate other than an opponent for judicial office, making

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

[70] Sample & Pozen, *supra* note 21, at 19. *See also* Goldberg et al., *supra* note 21, at 506 ("The impact [of *White*] on the conduct of campaigns was immediate and unmistakable. Candidates in many states received questionnaires soliciting their positions on controversial topics . . . Although the candidates had a legal right not to answer, without any canon enforcing common ethical standards, the competitive pressure of campaigns made it exceedingly difficult to refuse.").

[71] Sample & Pozen, *supra* note 21, at 19.

[72] COMMISSION TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, *supra* note 30, at 5-6.

[73] *Id.* at 21.

[74] *Id.* at 16.

speeches on behalf of political organizations or other candidates, or making contributions to political organizations that support other candidates or general party objectives—distinguishing between conduct integral to a judicial candidate's own campaign and activity in support of other candidates or party objectives.[75] Second, it upheld New York's "Pledges or Promises" rule, according to which a judge "shall not make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office,"[76] arguing that it was distinguishable from the Announce Clause because it is "not a blanket ban on pledges or promises" as it allows a promise of future conduct provided such conduct is not inconsistent with a judge's official duties.[77] However, other states have reached opposite conclusions about the constitutionality of "pledges or promises" clauses,[78] and thus, the constitutionality of the latter rule remains in doubt. Furthermore, *White* means that New York is deprived of an avenue of reform that would restrain the political activity of judges during their campaigns more vigorously than its current rules permit.

2. Awareness of Judicial Candidates of Identities of Contributors

These trends would be of little concern if candidates for judicial office did not know who their contributors are. At first glance, this would appear to be the case. Under the New York Rules of Judicial Conduct (as under the rules of other states), a candidate for judicial office, including an incumbent judge, may not directly solicit or accept campaign contributions but may instead establish a campaign committee to solicit and accept contributions on his behalf.[79] In addition, the identities of the contributors are supposed to be kept secret from a candidate and a candidate is not supposed to seek to learn the identity of contributors to his campaign or that of his opponent.[80] Ideally, these rules allow

[75] *In re RAAB*, 100 N.Y.2d 305, 315 (NY 2003).

[76] 22 NYCRR 100.5(A)(4)(d)(i).

[77] *In re William Watson*, 100 N.Y.2d 290, 301 (2003).

[78] *See* Goldberg et al., *supra* note 21, at 507 & n.22 (citing examples).

[79] The rule provides, in pertinent part: "A judge or candidate for public election to judicial office shall not personally solicit or accept campaign contributions, but may establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law." 22 NYCRR 100.5(A)(5). The New York requirement mirrors Canon 5C(2) of the Model Code of Judicial Conduct. ABA MODEL CODE OF JUD. CONDUCT Canon 5(C)(2) (2007).

[80] NEW YORK STATE ADVISORY COMMITTEE ON JUDICIAL ETHICS, JUDICIAL CAMPAIGN ETHICS HANDBOOK 8 (2008).

for judges both to raise funds and remain unbiased by insulating candidates from personal contact with contributors.[81]

However, it would be naïve to suppose that these rules prevent judges from learning the identity of their contributors. First, judicial candidates are permitted to attend their own fundraising events and to meet and acknowledge individuals in attendance.[82] Second, campaigns typically rely on volunteers, who often also contribute cash, and it is unrealistic to expect that candidates do not know who is helping to run their campaigns.[83] Third, state rules imposed by the New York Board of Elections that require disclosure of campaign contributions and the names of contributors whose donations exceed specified amounts directly undermine the policy of keeping contributors' identities from judges' attention.[84] Fourth, 68 percent of responding New York judges believe judicial candidates know who "all" or at least "some" of their campaign contributors are.[85] As one commentator put it, discussing patterns of under-enforcement of equivalent provisions nationwide: "[t]he provision is rarely enforced for one simple reason—campaign finance reporting requirements."[86] In short, then, contributor anonymity is "nearly impossible to enforce."[87]

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[81] Siciliano, *supra* note 21, at 220. Banner, *supra* note 21, at 470.

[82] NEW YORK STATE ADVISORY COMMITTEE ON JUDICIAL ETHICS, *supra* note 80, at 8; *see also* Jason Boog, *Guardianship Juggling Act*, JUDICIAL REPORTS, June 8, 2007, *available at* www.judicialreports.com/2007/06/guardianship_juggling_act.php (last visited Mar. 12, 2010) (noting that judges are often aware of the identity of their contributors, despite the existence of safeguards meant to shield judges from such knowledge).

[83] Banner, *supra* note 21, at 472.

[84] Current New York rules require judicial candidates to make itemized reports providing details of all expenditures of and contributions to their campaigns so long as total campaign receipts or expenditures exceed $1,000. Specifically, these rules require candidates or their committees to file three reports for each primary and general election, one 32 days prior to the election, one 11 days prior to the election and one 10 days after the election if the election is a primary election or 27 days after the election if the election is a general election. New York State Board of Elections, Campaign Finance Candidate, http://www.elections.state.ny.us/Candidate.html#WhenFiled (last visited Mar. 12, 2010); New York State Board of Elections, Campaign Finance Candidates and Committees, http://www.elections.state.ny.us/CandidateCommittee.html (last visited Mar. 12, 2010). *See also* Siciliano, *supra* note 21, at 220-21.

[85] COMMISSION TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, *supra* note 30, at App. E, Q5.

[86] Banner, *supra* note 21, at 471.

[87] Mark Andrew Grannis, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382, 385 (1987).

Indeed, we need look no further than Manhattan's 2008 judicial elections to find an example of an apparent breach in the supposed wall between judicial candidate and campaign contributor. In December 2008, the Manhattan D.A.'s Office issued indictments against a candidate for a position on the Manhattan Surrogate's Court and one of her political supporters, alleging, *inter alia*, that the two individuals "knowingly and willfully contributed, accepted and aided and participated in the acceptance of a contribution in an amount exceeding an applicable maximum specified in the Election law" in violation of Election Law §14-126(3).[88] In that case, the prosecutor argued that the $250,000 that the political supporter, Seth Rubenstein, transferred into Surrogate Nora Anderson's personal account in the month leading up to the primary election (money that Surrogate Anderson then donated or loaned to her own campaign) was effectively a campaign contribution that exceeded contribution limits.[89] However, on April 1, 2010, a jury acquitted Rubenstein and Surrogate Anderson, finding the evidence insufficient to prove beyond a reasonable doubt that the judge had lied in campaign filings about the source of the $250,000 – a result that one election law expert says "essentially eliminates the limits on the amount of money individuals may make to candidates" in New York State.[90]

If it is true that the Surrogate Anderson case has effectively created a loophole in the Election Law such that gifts, so long as they are not explicitly ear-marked for campaign purposes, may be provided to judicial candidates in unlimited sums, there is nothing stopping the escalation in size of such "gifts" and likewise, nothing preventing candidates from knowing the identity of their major supporters.

Further support for the proposition that judges are often aware of the identities of their contributors can be found in two determinations by the State of New York Commission on Judicial Conduct. In a case that may now be seriously undermined by the jury verdict in the Surrogate Anderson case, the Commission recommended that an elected Supreme Court Justice be removed from office for deceptive financial dealings after finding that he accepted a $250,000 loan for his

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[88] Indictment, *The People of the State of New York against Nora Anderson and Seth Rubinstein*, 2008 WL 5410407 (N.Y. Sup. Ct. filed Dec. 10, 2008).

[89] Daniel Wise, *Surrogate Acquitted in Election Law Case*, N.Y. LAW J., Apr. 2, 2010, at 1.

[90] *Id.* ("Henry T. Berger, an election law expert, said the verdict 'effectively means there are no campaign limits. Anyone who wants to can evade the limits by making a gift to the candidate, as long as they pay the gift tax and don't require that the money be spent in the campaign.'"); *see also* John Eligon, *Manhattan Surrogate's Court Judge is Acquitted*, N.Y. TIMES, Apr. 2, 2010, at A18.

campaign from a political backer during his campaign for Westchester County Court judge. In an effort to disguise the contribution, which would have been a violation of the campaign contribution limits under the Election Law if not repaid by Election Day, the judge personally assumed the campaign debt and failed to repay the loan until litigation and the Commission's investigation commenced.[91] In the second instance, the Commission admonished a Rochester City Court judge for soliciting campaign support from an attorney for a run for Supreme Court. Of particular note is that the solicitation was made right from the bench, moments before the judge presided over a case involving the attorney's client.[92]

These three cases, all of which concern New York judges, and all of which address conduct within the last few years, lend empirical support to the proposition that—despite the rules currently in place that are meant to insulate New York's judicial candidates from their contributors—the candidates are, at least in some instances, keenly aware of the identities of those offering financial support to their campaigns.

[91] *In re Allesandro* (State of N.Y. Comm'n on Judicial Conduct Feb. 11, 2009) (determination).

[92] *In re Yacknin* (State of N.Y. Comm'n on Judicial Conduct Dec. 29, 2008) (determination).

3. Consequences of Growing Influence of Campaign Contributions

(a) Perceptions of Bias

Considerable evidence suggests that these trends are significantly undermining public confidence in the judiciary. For a long time, judges and lawyers have expressed unease with the role of money in judicial elections, suggesting that the system puts pressure on lawyers to contribute to the election campaigns of likely candidates and that, at the very minimum, attorney campaign contributions undermine perceptions of judicial impartiality.[93] The comments of a former justice of the Washington Supreme Court are typical: "'[F]inancial pressures caused by campaign contribution requests can be serious. . . . The reaction of a victor in a campaign varies—some judges are gracious to all who appear before them in court, while others are highly critical of lawyers who have actively supported an opponent. In any event, the lawyer who supported the victor's opponent, and perhaps to a greater extent that lawyer's client, often will wonder whether his case would have been treated more favorably by the court if the lawyer had supported the judge who heard the case.'"[94]

Judges have also noted the personal stress they experience when dealing with contributors to their campaign in court while trying to uphold the professional standards of impartiality.[95] For example, Paul E. Pfeifer, a current member of the Ohio Supreme Court commented: "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race. Everyone interested in contributing has very specific interests. They mean to be buying a vote. Whether they succeed or not, it's hard to say."[96] According to Richard Neely, a retired chief justice in the West Virginia Supreme Court of Appeals, "[i]t's pretty hard in big-money races not to take care of your friends. It's very hard not to dance with the one who brung you."[97]

Recent surveys reinforce the idea that perceptions of impartiality are being eroded nationwide by the role that money plays in judicial election campaigns. A USA TODAY/Gallup Poll conducted in February 2009 found that "89% of those surveyed believe the influence of campaign contributions on judges' rulings is a

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[93] Banner, *supra* note 21, at 463-65.

[94] *Id.* at 463-64 (citing Utter, *Selection and Retention—A Judge's Perspective*, 48 WASH. L. REV. 839, 843 (1973)).

[95] Banner, *supra* note 21, at 464.

[96] Liptak & Roberts, *supra* note 29.

[97] *Id.*

problem," with a full 52 percent of respondents characterizing the issue as a "major problem."[98] Of particular significance to the issues discussed in this paper is the survey's revelation of a near-unanimity amongst those surveyed on the issue of recusal in instances where the judge has received contributions from a party. The survey revealed that "[m]ore than 90% of the 1,027 adults surveyed said judges should be removed from a case if it involves an individual or group that contributed to the judge's election campaign."[99]

Individual citizens are not alone in believing that money in judicial election campaigns poses a threat to the administration of evenhanded justice. Indeed, business organizations and corporations that may not only appear before elected judges, but also have the financial means to contribute significant sums to those judges' campaigns, share in the belief that doing so will perpetuate a harmful race to the bottom. In *Caperton v. A.T. Massey Coal Co.*, a case that called into question the constitutionality of a state supreme court judge presiding over a case in which one of the parties had contributed considerable sums of money to support the judge's election to the bench, members of the business community weighed in heavily in favor of recusal. At the merits stage before the Supreme Court, a group of concerned corporations and business groups that included Intel Corporation, Lockheed Martin Corporation, Pepsico and Wal-Mart Stores, Inc. filed an amicus brief in support of the Petitioners, arguing that by not recusing himself, the judge in question had "created an appearance of bias that would diminish the integrity of the judicial process in the eyes of any reasonable person."[100] Erosion of public confidence in the judicial system, this group argued, stymies economic growth insofar as "an expectation of impartiality in judicial decisionmaking" lowers transaction costs and increases overall productivity.[101]

Additional studies conducted within the last decade have found that 76 percent of Americans and 46 percent of state court judges believe that campaign contributions influence judicial decisions,[102] and that only five percent of the public believe that campaign contributions have no influence.[103] Based on this

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[98] Joan Biskupic, *Supreme Court Case With the Feel of a Best Seller*, USA TODAY, Feb. 16, 2009, *available at* http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm?POE=click-refer (last visited Mar. 12, 2010).

[99] *Id.*

[100] Brief for Committee for Economic Development et al. as Amici Curiae Supporting Petitioners, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22), 2008 U.S. Briefs 22, 5-6.

[101] *Id.* at 13.

[102] James Sample, Editorial, *Justice For Sale*, WALL ST. J., Mar. 22, 2008, at A24.

[103] Sample & Pozen, *supra* note 21, at 18.

growing body of empirical evidence, it is reasonable to conclude—and indeed, increasingly difficult to deny—that "the ideal of due process is giving way to a perception of pay-to-play justice."[104]

The erosion of respect for the judiciary in the eyes of the American public has been accelerated in recent years as a result of the extensive media coverage dedicated to the subject of judicial campaign finance. Recent coverage in the wake of the *Caperton* and *Citizens United* decisions highlights this point. Below is a representative sampling of such coverage within the last three years:

- An article in the *Pittsburgh Post-Gazette* quotes one proponent of recusal reform as stating: "Where outside judicial contributions . . . create the perception that legal outcomes can be purchased, economic actors will lose confidence in the judicial system, markets will operate less efficiently and American enterprise will suffer."[105]
- A *New York Times* article notes, "As the amounts [that judges raise during election campaigns] rise, questions about whether money is polluting the independence of the judiciary are being fiercely debated across the nation."[106]
- Another article in the *New York Times* asserts, "Judges seldom recuse themselves from cases involving their contributors. Although many judges acknowledge that large majorities in public opinion surveys believe that campaign contributions influence judicial decisions, almost all judges insist that their decisions are independent and impartial."[107]
- The *St. Louis Post-Dispatch* published an editorial whose author complains: "Illinois' system of electing judges in partisan campaigns has thrown the impartiality of its courts into serious question. There are no limits on who can contribute to judges' campaigns or how much contributors can give . . . . Judges smiling down from the bench at their campaign contributors mock the public's confidence in even-handed justice."[108]

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[104] Sample, *supra* note 102.

[105] Len Boselovic, *Are Campaign Contributors Buying Justice?*, PITTSBURGH POST-GAZETTE, Sept. 21, 2008, at A1.

[106] Liptak & Roberts, *supra* note 29.

[107] Adam Liptak, *Judges Can Solicit Election Funds, Court Rules*, N.Y. TIMES, Oct. 12, 2006, at A4.

[108] Editorial, *Ethics? Ethics? Now Where Did We Put Those . . .* , ST. LOUIS POST-DISPATCH, Mar. 11, 2006, at A4-5.

- An editorial in the *Wall Street Journal* notes that "with record sums pouring into judicial elections, the ideal of due process is giving way to a perception of pay-to-play justice."[109]
- A recent article in the *Wall Street Journal* reported that Andrea Kaminski, executive director of the League of Women Voters of Wisconsin, said that a recent rebuff by the Wisconsin Supreme Court to adopt stricter recusal standards will "further erode the public's confidence in the courts."[110]
- Last year, the *Milwaukee Journal Sentinel* published an opinion by Ms. Kaminski who argued that "campaign donations severely erode public trust, even when a judge is acting fairly" and noted that a "2008 report by the Justice at Stake Campaign . . . showed that 78% of Wisconsin voters believe that campaign contributions are likely to bias a judge's decision."[111]
- The *Tampa Tribune* reports that a survey by the Annenberg Public Policy Center at the University of Pennsylvania found that a whopping "70 percent of the public think campaign contributions affect judges' rulings."[112]
- An editorial in the *Seattle Post-Intelligencer* opens with the following hypothetical: "If someone gave you $2,000 to help get a job, would you feel obligated to them—or at least would you worry that other people thought you might be obligated to them?" The author, a judge on the North Carolina Court of Appeals, responds, "While I believe a judge who actually makes a decision based on campaign contributors' interests is rare, *the appearance of influence* damages the health of the judiciary."[113]
- An *American Bar Association Journal* article reports on an interview with retired Justice Sandra Day O'Connor, who called "the appearance of influence and the erosion of public confidence caused by contested judicial elections funded by millions of dollars in contributions . . . 'really frightening.'"[114]

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[109] James Sample, Editorial, *Justice For Sale*, WALL ST. J., Mar. 22, 2008, at A24.

[110] Koppel, *supra* note 27.

[111] Andrea Kaminski, *Time to Get Money Out of Justice*, JSONLINE, June 13, 2009, *available at* http://www.jsonline.com/news/opinion/47954381.html (last visited Mar. 17, 2010).

[112] Elaine Silvestrini, *Public Thinks Campaign Cash Sways Judges*, TAMPA TRIBUNE, Nov. 4, 2006, at Nation/World p.1.

[113] Wanda Bryant, Editorial, *Publicly Finance Judicial Elections*, SEATTLE POST-INTELLIGENCER, Mar. 19, 2007, at Opinion.

[114] Debra Cassens Weiss, *O'Connor: Want a Qualified, Impartial Judiciary? Don't Use Contested Elections*, A.B.A. J., Dec. 10, 2009, *available at* http://www.abajournal.com/news/article/oconnor_want_a_qualified_impartial_judiciary_dont_use_contested_elections/ (last visited Mar. 17, 2010).

There is no reason to believe that New York presents an exception to what is an issue of concern throughout the country; in fact, all available evidence points to the opposite conclusion. An article published by Long Island's own *Newsday* reported, "The New York State Commission on Government Integrity in 2003 concluded that judicial campaign fundraising and spending practices are seriously eroding public confidence in the integrity and impartiality of judges."[115] Consistent with those findings, the Commission to Promote Public Confidence in Judicial Elections found in a 2003 poll that more than 80 percent of registered voters surveyed believe that campaign contributions have some or a great deal of influence on judicial decisions and that judges should not hear or rule in a case involving a campaign contributor.[116] Likewise, approximately 60 percent of New York's sitting judges believe that campaign contributions raise a reasonable question about a judge's impartiality.[117] New York's residents, it can safely be assumed, harbor many of the same suspicions regarding campaign contributions to judges as their fellow citizens throughout the country.

(b) Evidence that Money Influences Case Outcomes

While perceptions of judicial bias themselves pose a serious threat to our system of justice, there is also statistical evidence suggesting that campaign contributions do in fact influence judges' decisions. Empirical studies of Alabama and Ohio Supreme Court decisions reveal that justices vote in line with the source of their campaign funds significantly more than half the time. The study of the Alabama Supreme Court found that in arbitration cases from January 1995 to July 1999, justices whose election campaigns were funded by business interests voted in favor of a holding that an arbitration agreement had been formed 71 percent of the time, while justices funded by plaintiffs' lawyers only voted in favor of arbitration 9 percent of the time.[118] The New York Times' study of the Ohio Supreme Court, which analyzed 1,500 decisions made over a twelve-year period, found that justices voted in favor of contributors 70 percent of the time, with one justice, Justice O'Donnell, voting in favor of his contributors 91

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[115] Sid Cassese, *Ties to Magistrate Questioned: Man Asks Surrogate Court Judge to Recuse Himself, as Rival Lawyer Had Donated $29G to His Election Campaign*, NEWSDAY, Oct. 27, 2006, at A42.

[116] COMMISSION TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, PUBLIC OPINION AND JUDICIAL ELECTIONS: A SURVEY OF NEW YORK STATE REGISTERED VOTERS (2003).

[117] COMMISSION TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, NEW YORK STATE JUDGES: MAIL SURVEY RESULTS (2004).

[118] Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583, 602 (2002).

percent of the time.[119] While we should be wary of inferring causation from correlation, these figures are nonetheless suggestive.

(c) Cases Involving Large Campaign Contributors and Suspicions of Judicial Bias

In addition to the suggestive statistical evidence described above, there have been several high profile cases in recent years in which large campaign contributions have appeared to corrupt the judicial process by producing outcomes that favored the contributing party.

In *Caperton*, the West Virginia Supreme Court, in the wake of the election of a new, more conservative justice, overturned a $50 million jury verdict against Massey Energy Company.[120] Massey Energy's CEO, Don Blankenship, had spent over $3 million in support of the election of the new justice, Brent Benjamin (including $2.5 million in donations to a political organization that ran a media campaign supporting Benjamin and opposing the incumbent), who then cast the deciding vote in its favor.[121] Outcry over the influence of the campaign support in this case came from the bench itself. In his strong dissent, Justice Starcher wrote: "I am the one judge voting on this case who can say I owe nothing to Mr. Blankenship one way or another . . . fortunately, the public can see through this kind of transparent foolishness."[122] Starcher then voluntarily recused himself from the rehearing due to statements he made about the CEO of Massey Energy and called for similar action from the subject justices who had received campaign contributions from Massey.[123]

In response to the court's decision to overturn the verdict against Massey Energy, Caperton filed a petition for a writ of certiorari, asking the Supreme Court to decide whether the Due Process Clause requires Justice Benjamin to

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[119] Liptak & Roberts, *supra* note 29, at A1.

[120] Opinion Superseded by Rehearing En Banc, *Caperton v. A.T. Massey Coal Co.*, No. 33350, 2008 WL 918444 (W. Va. Apr. 3, 2008).

[121] *See* Lawrence Messina, *Court Overturns Judgment Against Massey*, CHARLESTON GAZETTE, Nov. 22, 2007, at 13A; Jake Stump, *Plaintiffs Fight to Get Benjamin off Appeal: Justice has Refused to Recuse Himself from Case Involving Massey Energy*, CHARLESTON DAILY MAIL, Aug. 21, 2006, at 1A.

[122] Opinion Superseded by Rehearing En Banc, *Caperton v. A.T. Massey Coal Co.*, No. 33350, 2008 WL 918444 (W. Va. 2008).

[123] Notice of Voluntary Disqualification of the Hon. Larry V. Starcher, Justice of the Supreme Court of Appeals of West Virginia, *A.T. Massey Coal Co. v. Caperton*, (2008) (No. 33350).

recuse himself as a result of the financial support he received from Blankenship.[124] The Supreme Court's decision to grant Caperton's petition garnered significant media attention, as did the Court's ultimate decision in favor of recusal.[125]

The Supreme Court's decision in favor of Petitioners in *Caperton* rested on its determination that "there is a serious risk of actual bias—based on objective and reasonable perceptions—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."[126] The Court noted that Blankenship's expenditures on Judge Benjamin's campaign "eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee" and even in the absence of evidence of actual bias or *quid pro quo* agreement, "there was [in *Caperton*] a serious, objective risk of actual bias that required Justice Benjamin's recusal."[127]

Judge Karmeier of the Illinois Supreme Court was elected to the bench under similar circumstances prior to *Avery v. State Farm Mutual Insurance Company* 216 Ill. 2d 100 (Ill. 2005), a case that eroded the public's confidence in its judges.[128] After receiving millions of dollars in campaign contributions from

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[124] *Caperton v. A.T. Massey Coal Co.*, No. 33350 (W. Va. Apr. 3, 2008), *petition for cert. filed* (U.S. July 2, 2008) (No. 08-22). A bevy of legal organizations filed amicus briefs in support of the Petitioners, including the Brennan Center for Justice - Campaign Legal Center & Reform Institute, the American Bar Association, the Committee for Economic Development, the Washington Appellate Lawyer's Association and the Public Citizen.

[125] *See, e.g.*, Boselovic, *supra* note 105; Sample, *supra* note 109; Dorothy Samuels, Editorial, *The Selling of the Judiciary: Campaign Cash in the Courtroom*, N.Y. TIMES, Apr. 15, 2008, at Opinion; Editorial, *Too Generous*, N.Y. TIMES, Sept. 7, 2008, at WK8. For a sampling of press coverage of the case before it was decided, *see, e.g.*, Biskupic, *supra* note 98; Adam Liptak, *Case May Alter Judge Elections Across Country*, N.Y. TIMES, Feb. 14, 2009, at A29; David G. Savage, *High Court to Tackle Judicial Bias*, L.A. TIMES, Feb. 23, 2009, at A8; Jess Bravin, *High Court Split Over Case on Judicial Ethics*, WALL ST. J., Mar. 3, 2009; Adam Liptak, *Justices Hear Arguments on Money-Court Nexus*, N.Y. TIMES, Mar. 3, 2009, at A18; and after the decision came down, *see, e.g.*, James Vicini, *U.S. Court: Recusal Required in Massey Energy Case*, REUTERS, June 8, 2009, *available at* http://www.reuters.com/article/idUSTRE5573RU20090608 (last visited March 18, 2010); Adam Liptak, *Justices Issue a Rule of Recusal In Cases of Judges' Big Donors*, N.Y. TIMES, June 9, 2009, at A1; Jess Bravin and Kris Maher, *Justices Set New Standards for Recusals*, WALL ST. J., June 9, 2009, at 3.

[126] *Caperton*, 129 S. Ct. at 2255.

[127] *Id.* at 2256.

[128] *See e.g.*, Editorial, *Illinois Judges: Buying Justice?*, ST. LOUIS POST-DISPATCH, Dec. 20, 2005, at B8 ("The juxtaposition of gigantic campaign contributions and favorable judgments (…continued)

entities closely associated with the defendant, State Farm Mutual Insurance Company, (including at least $350,000 in direct contributions from State Farm's own employees and lawyers), Karmeier denied the plaintiffs' motion for recusal (since the subject judge decides his own recusal motions in Illinois just like in New York) and then cast the deciding vote to overturn the plaintiffs award of over $450 million won in the trial below.[129] The Supreme Court of the United States denied cert demonstrating that the states must be the ones responsible for strengthening their own recusal/disqualification procedures in order to avoid such instances of apparent injustice.

Another highly publicized—and criticized—pattern of events that further undermined perceptions of judicial impartiality occurred in Wisconsin when Annette Ziegler repeatedly decided cases in which she or her spouse had a financial interest including a case involving a party that had spent more than $2 million in independent expenditures in support of her election campaign.[130] Ziegler's actions in 2007-08 evidently lessened the public's confidence in the bench.[131] These actions, and the attendant erosion of public confidence in the judiciary, could have been avoided had a rule such as the rule proposed herein been in place regulating the Wisconsin judiciary. Unfortunately, such a rule was not only rejected, but turned on its head recently in Wisconsin, when a 4-3 majority of the state Supreme Court that included Justice Ziegler rejected two different recusal proposals and instead voted to adopt rules under which no amount of campaign spending can provide the sole basis for a justice's recusal.[132] Justice Ziegler voted in favor of the two petitions that were adopted by the court, one of which was submitted by Wisconsin Manufacturers and Commerce (WMC),

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(continued…)

for contributors creates a haze of suspicion over the highest court in Illinois . . . Although Karmeier is an intelligent and no doubt honest man, the manner of his election will cast doubt over every vote he casts in a business case. This shakes public respect for the courts and the law—which is a foundation of our democracy.").

[129] Petition for Writ of Certiorari 8, *Avery*, 126 S. Ct. 1470 (2006) (No. 05-842).

[130] Patrick Marley and Avrum D. Lank, *Ziegler to Hear Tax Case Funded by Election Supporter*, MILWAUKEE JOURNAL SENTINEL, Nov. 27, 2007.

[131] Editorial, *Ziegler Should Quit the Bench*, THE CAPITAL TIMES (MADISON), Nov. 30, 2007 ("To try to pretend that Ziegler is not doing severe damage to the reputation of the state's highest court, and more broadly to the rule of law, is at this point untenable for anyone who has sworn a solemn oath to 'support the Constitution of the United States and the Constitution of Wisconsin' and to 'faithfully and impartially discharge the duties of said office.'").

[132] Jonathan Blitzer, BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, *Vanishing Recusal Prospects in Wisconsin*, Jan. 26, 2010, *available at* http://www.brennancenter.org/blog/archives/vanishing_recusal_prospects_in_wisconsin/ (last visited April 14, 2010).

a huge financial supporter of Ziegler's.[133] These recent events in Wisconsin only underscore the need for objective recusal standards, particularly in the face of escalating campaign-related spending.[134]

The impropriety of judges presiding over campaign contributors can be seen in cases across the nation, including New York. Brooklyn's Surrogate Court Judge Michael Feinberg was "thrown out of office by the Court of Appeals" for a number of decisions that directly benefitted "politically connected attorneys" to the detriment of unknowing litigants.[135] These decisions included awarding excessive fees totaling more than $2 million to one of his own campaign contributors.[136] Though these types of million-dollar cases are not common, they have a significant impact on public perception and they signal that similar instances of partiality might be occurring much more frequently on a smaller dollar scale where judges have less reason to fear the media spotlight.

For example, New York Supreme Court Justice Barbara Panepinto was responsible for assigning lucrative law guardianships, and since 2003 every one of her assignments went to a campaign contributor to her 2006 reelection fund.[137] Not only did Panepinto assign guardianships to her campaign contributors, but out of the $136,000 fees to law guardians whom Supreme Court Justice Amy Adams appointed, $116,600 of those fees were assigned to attorneys who had contributed to her colleague Panepinto's campaign.[138] Relative to the multi-million dollar cases garnering press attention, these smaller amounts seem insignificant, but it is the impact on the public's confidence in the judiciary with which we need be particularly concerned, and this confidence is undermined every time such favoritism or bias is unearthed.

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[133] *Id.*

[134] *Id.* ("The timing of the Supreme Court's decision in *Citizens United* makes the Wisconsin Supreme Court's recent vote all the more egregious. The judiciary should be above the suspicion of influence peddling. And without recusal standards that are responsive to the flood of campaign money propping up state high court judgeships, the public in Wisconsin has virtually no bulwark standing between its courts and perceptions that justice can be bought.").

[135] Editorial, *A Stark View of NY's Judicial Selection Process*, BROOKLYN DAILY EAGLE, July 2, 2008.

[136] Zach Haberman and Dareh Gregorian, *Bench Judge: Panel*, N. Y. POST, Feb. 15, 2005.

[137] Boog, *supra* note 82.

[138] *Id.*

B. Why Our Proposed Rule Represents an Improvement Over the Status Quo

The current recusal regime is systematically underused and underenforced and therefore cannot adequately deal with the threat to judicial impartiality that is posed by contributions to judicial election campaigns. Thus, the system is in need of reform. We believe that our proposed rule will significantly strengthen the current system's ability to deal with problems associated with judicial campaign contributions by avoiding the multitude of problems that deprive the current regime of its effectiveness.

1. The Current Recusal Regime

There are many reasons to believe that the system of rules regulating judicial disqualification across the states is systematically underused and underenforced. These problems derive primarily from a lack of specificity.[139] Once again, there is no reason to suppose that New York is any exception.

New York's current disqualification provision, like those of most other states, provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."[140] It goes on to provide a non-exhaustive list of situations in which disqualification is required, which includes instances where the judge has "a personal bias or prejudice concerning a party,"[141] the judge knows that the judge or his spouse or child has an economic interest in the matter or in a party,[142] the judge knows that the judge, the judge's spouse or a relative has "an interest that could be substantially affected by the proceeding,"[143] or the judge "has made a pledge or promise of conduct in office that is inconsistent with the impartial performance" of his judicial duties.[144] Elected judges are also subject to New York Judiciary Law §14.[145] This provision similarly requires disqualification when a judge "is interested" in the parties or case before him.[146] However, aside from a waiver requirement when a judge owns stock or securities in a corporate litigant, this rule

[139] Goldberg et al., *supra* note 21, at 524.

[140] 22 NYCRR 100.3(E); Goldberg et al, *supra* note 21, at 518.

[141] 22 NYCRR 100.3(E)(a)(i).

[142] *Id.* 100.3(E)(c).

[143] *Id.* 100.3(E)(d)(iii).

[144] *Id.* 100.3(E)(f).

[145] N.Y. JUDICIARY LAW Ch. 30, Art. 2, § 14.

[146] *Id.*

provides no further guidance on what is sufficient to prove judicial "interest" in a case.[147]

Although these provisions appear to deal with problems of real or apparent judicial bias, there is good reason to believe that they are underenforced. Absent a demonstrated violation of one of the mandatory grounds for recusal set forth in the statute, the challenged judge himself is usually the sole arbiter of whether any bias or appearance of bias requires recusal.[148] Thus, the party must persuade the very person who he is accusing of bias to disqualify himself. Yet judges will be prone to underestimate the extent to which they are biased: considerable social psychological evidence shows that people tend to underestimate and undercompensate for their own prejudices and conflicts of interest.[149]

Furthermore, judges may have personal reasons to disfavor such motions. Because judges are supposed to recuse themselves *sua sponte* if there is a reasonable apprehension of bias,[150] a judge granting a recusal motion implicitly admits that he failed to adhere to statutory and ethical requirements in the first instance.[151] In addition, judges may be worried about sending a signal that they are biased, even if they are not. [152] Finally, judges need not be greatly concerned about being overturned on appeal. As in most other jurisdictions, New York's appellate division will overturn a lower court's disqualification decision only for an "abuse of discretion."[153] Moreover, New York State does not require its judges to publish or record the reasons for their decision in response to a motion for recusal or disqualification.[154] Thus, even if the facts are such that an appellate court ought to find that a judge abused his discretion by not disqualifying himself, without such a record from the court below, an appellate court is unlikely to have the materials necessary to enable it to do so.

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[147] *See Id.*

[148] RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 28.34 (2d ed. 2007).

[149] Goldberg et al., *supra* note 21, at 525.

[150] *People v. Ventura*, 851 N.Y.S.2d 73 (2007).

[151] Sample & Pozen, *supra* note 21, at 19-20.

[152] *Id.* at 20.

[153] *People v. Moreno*, 70 N.Y.2d 403, 406 (1987) ("A court's decision in this respect may not be overturned unless it was an abuse of discretion.").

[154] *Washington Mut. Bank v. 334 Marcus Garvey Blvd. Corp.*, 859 N.Y.S. 2d 900 (2008) (". . . a judge does not have to give a reason or reasons for his or her recusal").

There is also good reason to believe that motions for disqualification are underused by parties. First, litigants, especially repeat players, may be afraid to bring recusal motions for fear of angering the judge.[155] Second, the underenforcement problem identified above means that the odds of success are lower than they ought to be. Moreover, the odds of success are low because of the heavy evidentiary and persuasive burden that the party moving for disqualification must meet.[156] "The law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea. As a result of this presumption of honesty and integrity, a moving party has the burden of proving that the judge is unqualified, actually biased and prejudiced, or appears to be partial."[157] Furthermore, since decisions are reviewed only for an "abuse of discretion," rather than the more rigorous *de novo* review applied in some states, the odds of success on appeal are even worse. In New York, absent mandatory statutory grounds for legal disqualification under Judiciary Law § 14, there must be a demonstration of bias and prejudice unconnected with a statutory interest for a judge to be obligated to recuse himself.[158] Otherwise, the trial judge is the sole arbiter of recusal, which means that the discretionary decision is within the "personal conscience of the court."[159] Finally, parties may not be willing to incur the additional litigation costs, especially given the low prospects of success.[160]

These problems are likely to be self-reinforcing. Because recusal motions are underused, there exists little opportunity for courts to elaborate on the standards applied to them. This, in turn, increases the uncertainty surrounding the provisions, which further deters parties from making such motions.

New York judges themselves have criticized the current recusal regime: "The law in New York and federally still requires that parties or attorneys seeking recusal must do so before the very judge before whom recusal is sought. This absurd requirement causes attorneys to have to second guess themselves and decide whether they wish to make an application thereby incurring the judge's wrath and possibly tainting the remainder of the proceedings with a judge who harbors animosity because an attorney or litigant dared to suggest even the

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[155] Sample & Pozen, *supra* note 21, at 19; Siciliano, *supra* note 21, at 230.

[156] Goldberg et al., *supra* note 21, at 524.

[157] *Hurrell-Harring v. State*, 2008 N.Y. Slip Op. 51276U, at *3 (Sup. Ct. NY Albany May 16, 2008).

[158] *See Schrager v. New York University*, 227 A.D.3d 189, 190-91 (N.Y. 1996).

[159] *People v. Moreno*, 70 N.Y.2d 403, 405 (1987).

[160] Goldberg et al., *supra* note 21, at 525.

potential of unfairness on the part of the judge."[161] The recusal standard proposed herein would aid both judges and attorneys in their ethical and strategic decisions about the relevant proceeding; it would remove both any "second guess[ing]" as well as any "animosity" between judges and lawyers or their clients.

2. Our Proposed Rule

We believe that our bright-line rule will avoid many of these problems. First, because disqualification is automatic when contributions exceed the threshold amount (subject to the waiver), there is no difficult evidentiary or persuasive burden that needs to be overcome in order to secure disqualification of the judge in these circumstances. Since it is quick and easy to determine whether the rule has been satisfied, adjudication of the rule will not burden parties with additional litigation costs. For the same reason, the bright-line nature of the rule eliminates the possibility that when determining whether to disqualify himself when assigned to cases involving his campaign contributors, a judge will be swayed by self-interest or a psychological tendency to underestimate the likelihood of bias. Moreover, it will be straightforward to determine whether the judge has abused his discretion (by failing to recuse himself) on appeal.

Second, since the judge must disqualify himself *sua sponte* when the contribution threshold is exceeded, subject to the non-contributing party's waiver, there is less concern that disqualification will be underused because of the non-contributing party's fear of angering the judge. There remains some concern that parties and their lawyers may feel pressured into using their waiver in order to appease the judge. However, we believe that the perceived threat of retribution will be much weaker when the system grants parties a *right* that they may subsequently waive, than when parties must initiate proceedings in order to establish that they have such a right. Disqualification under our system is established as the norm rather than the exception.

Third, judges have no reason to fear that when they disqualify themselves pursuant to our proposed rule that they will send a signal that they are unable to be impartial. Our proposed rule is a bright-line rule designed to eliminate bias and the perception of bias by disqualifying judges in *every situation* in which campaign contributions exceed the threshold. Since it is undoubtedly the case that many judges can preside over cases involving their contributors and remain impartial, the rule is inevitably overinclusive. However, this means that when a judge disqualifies himself pursuant to the rule, he is not signaling to litigants and the public at large that there is any special reason to believe that *he* is unable to be independent and impartial. He simply indicates that the threshold has been

[161] *People v. Ventura*, 851 N.Y.S.2d 73 (2007).

reached and that he therefore must recuse himself as must all other judges who find themselves in the same position so as to preserve the appearance of an impartial and independent judiciary.

Furthermore, as indicated by several recent national- and state-level polls and surveys,[162] the truth—uncomfortable and distasteful though it may be to the judiciary—is that the public *already* "takes it for granted that campaign investments pay juridical dividends."[163] Fears articulated by judges that a heightened recusal standard would have the effect of engendering suspicion of judicial bias are—sadly—moot; that suspicion has long since existed.

Far from being the *cause* of the problem, the heightened recusal standard suggested here is perhaps the best way to *remedy* the attitude of mistrust that has been festering among the People for years. The image of the judiciary as fair and impartial has been tarnished. Imposition of a heightened recusal standard would constitute a significant step toward a restoration of its former luster in the eyes of the citizenry. Armed with the ammunition provided by the bright-line rule proposed here, the judiciary would have a cogent rejoinder to the charges of bias that have gone unanswered.

Since our proposal is an *ex post* remedy tailored to a specific factual situation, it will not trigger the same First Amendment problems as canons that limit political speech or activity *ex ante*.[164] The Supreme Court's decision in *White* undermined alternative strategies of reform focused on strengthening *ex ante* regulation of judge's campaign activities, and the Court's recent decision in *Citizens United* lifted significant restrictions on third-party expenditures on judicial (and other) campaigns. Not only may states no longer prohibit judicial candidates from announcing their views on disputed legal or political issues, in addition, the constitutionality of many other judicial campaign speech canons designed to ensure impartiality, as well as canons prohibiting candidates from directly soliciting contributions or engaging in partisan activities has been called

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[162] *See, e.g.*, JUSTICE AT STAKE, NATIONAL SURVEYS OF AMERICAN VOTERS AND STATE JUDGES (2002), *available at* http://www.gavelgrab.org/wp-content/resources/polls/PollingsummaryFINAL.pdf (last visited Mar. 16, 2010) (concluding that 76 percent of voters believe that campaign contributions made to judges have at least some influence on their decisions); NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY (1999), *available at* http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf (last visited Mar. 12, 2010) (finding that 34 percent of the population "strongly agree" and 44 percent "somewhat agree" that elected judges are influenced by the necessity of raising campaign funds).

[163] James Gill, Editorial, *No Recuse for Conflict of Interest*, TIMES-PICAYUNE (NEW ORLEANS), Apr. 7, 2006, Metro-Editorial.

[164] Sample & Pozen, *supra* note 21, at 19.

into doubt.[165] Moreover, corporations and unions will now be constitutionally permitted to spend vast sums of money in an effort to influence the outcome of election campaigns.

A recusal rule like the one we propose addresses the perceptions created by campaign spending; it in no way diminishes spending, nor does it infringe on the rights of contributors to participate in the electoral process. Rather, this rule necessarily balances the right to free speech with the right to due process by providing a crucial check on the actual and perceived influence of unfettered campaign spending without limiting the right to spend.

Finally, it is important to note that our proposal requires only incremental reform of the current system, and is well-tailored to the problems of perceived and apparent bias that arise out of party and lawyer contributions to judicial election campaigns. A minority of states have adopted statutes or court rules that permit a party to seek judicial disqualification on a preemptory basis.[166] Although such provisions permit parties to disqualify judges without making a showing of partiality, such provisions may be invoked for reasons unrelated to the goal of ensuring the actuality or appearance of a fair trial and so create opportunities for judge shopping.[167] Thus, introducing a preemptory strike in New York threatens to create administrative problems for the court without necessarily addressing problems of actual and perceived bias arising from campaign contributions.

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[165] *Id.* at 18. *See also supra* note 70 and accompanying text.

[166] FLAMM, *supra* note 148, at 753.

[167] *Id.* at 755-56.

IV. JUSTIFYING THE SPECIFICS OF OUR PROPOSED RULE

In this section, we discuss the specifics of our proposal. First, we explain why it is preferable to place the necessary disclosure obligations on parties and their lawyers, as opposed to judges. Second, we explain why the rule only focuses on contributions made during the past three years. Third, we explain why making disqualification subject to a waiver by non-contributing parties prevents an undesirable form of gamesmanship. Fourth, we explain why our proposed rule will not greatly increase the administrative burden on the court system. Finally, we explain why $1,000 is an appropriate threshold level of contributions beyond which a judge should recuse himself in New York.

A. Disclosure Requirements

Disclosure of campaign contributions is an essential element of any *per se* recusal rule directed at campaign contributions by parties or their lawyers. If we do not know how much parties and their lawyers have contributed to the judge's election campaigns, we do not know whether the judge should be disqualified on account of receiving contributions from them that exceed the threshold amount. The burden of disclosure could either be placed on the judge or the parties and their lawyers. It is preferable to place the burden of disclosure on the party who can most easily carry the burden and carry it most cost-effectively. We follow Alabama's lead by placing the burden of disclosure of relevant campaign contributions on the parties and their lawyers.

Under current law, judges or their committees must file statements of campaign contributions received in the election immediately preceding their current term of office with the New York State Board of Elections, the County Board of Elections or the Village Board of elections depending on which judicial seat the candidate is running for.[168] However, it does not follow that it will be easier for a judge to determine how much the parties and the lawyers standing before him in a particular case contributed to his most recent past or current election campaign. First, since judges are required to make disclosures of campaign contributions only at certain specified times during an election campaign,[169] fulfillment of his disclosure obligations will not necessarily mean that at any given time he has disclosed all contributions to his current election campaign, but the recusal rule should encompass all such contributions. Second,

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[168] New York State Board of Elections, Campaign Finance Candidate, http://www.elections.state.ny.us/Candidate.html#WhenFiled (last visited Mar. 12, 2010); New York State Board of Elections, Campaign Finance Candidates and Committees, http://www.elections.state.ny.us/CandidateCommittee.html (last visited Mar. 12, 2010).

[169] *See supra* note 84 and accompanying text.

it may be difficult for him to identify all the relevant contributors since these include not just the parties and the parties' attorneys,[170] but also holders of 5 percent or more of a corporate party's stock, employees of the party acting under the party's direction, any insurance carrier for the party which is potentially liable for the party's exposure in the case, and any employees acting under the direction of the attorneys. Thus, like the Alabama Supreme Court, we believe that the parties can most easily carry the burden of disclosing all relevant campaign contributions and will be able to carry it at least cost.[171]

B. Restriction to Contributions Made in the Past Three Years or the Pendency of the Case

The rule we propose requires disqualification only for parties whose "total contributions" equal $1,000 or more over the past three years (or during the pendency of the case). The greater the number of election cycles that are covered by the rule, the more burdensome the disclosure obligations become. Since it is reasonable to suppose that a judge's gratitude for a past favor—and consequently the risk of real and apparent bias—diminishes with the passage of time, it makes sense to restrict the rule only to campaign contributions made in the past three years and/or the pendency of the case.[172]

C. Waiver Option Will Minimize Gamesmanship

If disqualification occurs only upon motion by the non-contributing party, the risk that the provision will be underused because of lawyers' fears of angering the judge may remain. However, if a judge must disqualify himself automatically, then lawyers have an incentive to game the system, by contributing to the campaigns of judges that they do not like to prevent the judges from hearing cases involving their clients.[173] Not only does this result in an undesirable form of "judge shopping," but, in addition to the extent that lawyers end up contributing to the campaigns of incompetent or capricious judges in order to avoid having to appear before them, it reduces the likelihood that judicial elections will select the most qualified judges.

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[170] Note that this category specifically *excludes* contributions made by members of the firm or firms of record who are not themselves attorneys of record for the party.

[171] *Ex parte Kenneth D. McLeod, Sr., Family Ltd. P'ship XV*, 725 So. 2d 271, 274 (Ala. 1998).

[172] Banner, *supra* note 21, at 488.

[173] Banner, *supra* note 21, at 488.

Incentives for such gaming of the system could be mitigated either by limiting the rule to allow disqualification only upon motion of the non-contributing party,[174] or by giving the non-contributing party the opportunity to waive disqualification.[175] We believe that the waiver limitation is the better option since, as discussed in Part III.B.2, parties are less likely to be influenced by their fears of angering the judge when making the decision whether or not to waive disqualification than they are when making a decision whether to take affirmative action to initiate disqualification of the judge in the first instance.

D. The Rule Will Not Greatly Increase Administration Costs

Our proposal has been designed with a view to minimizing the additional administrative burden that will result from having judges recuse themselves from more cases. As noted above, the rule is inevitably over-inclusive in the first instance, since judges will have to disqualify themselves even though many of them would have been able to remain unbiased in cases involving their campaign contributors. However, giving non-contributing parties a waiver helps to mitigate this problem by allowing suits to proceed where there is no actual danger of bias even when the threshold has been exceeded. If the non-contributing party waives his right to have the judge disqualified, that likely means that he has good reason to believe that the judge will be fair and impartial regardless of the fact that contributors to his campaign are involved. Thus, the waiver serves the interests of judicial economy.

It is also important to note that the rule will provide lawyers with an incentive to reduce their contributions to judges that they like so that those judges will not have to disqualify themselves when those lawyers come before them. This will reduce the number of situations in which judges must recuse themselves pursuant to the rule, which further promotes the interests of judicial economy. And, since our rule is a bright-line rule, disputes about its operation should be easy to resolve, which will mean that litigation costs will be kept to a minimum.

Finally, and perhaps most importantly, this recusal rule will not have the drastic impact on court resources and dockets that its critics might attribute to it, because of the integration of the common law doctrine of the "Rule of Necessity." Opponents of this mandatory recusal standard believe that implementing such a rule will result in backlogs on judges' calendars due to the frequent replacement of judges, and possibly even cases in which no judge would be available and allowed to preside.

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[174] *Id.*

[175] Goldberg et al., *supra* note 21, at 529.

This outcome, though unlikely to occur, is adequately addressed by the "Rule of Necessity" explained by the Supreme Court in *United States v. Will*.[176] The Rule of Necessity precludes the occurrence of a case in which all available judges have been disqualified due to personal interest because "according to the Rule of Necessity, the personal interest of a judge in the matter at issue will not result in disqualification if the case cannot be heard otherwise."[177]

The proposed rule incorporates the Rule of Necessity by contemplating a two-step process. First, in the event that there is no other judge available in the district or county to hear the case who is not otherwise obligated to recuse herself, the rule provides that the case be referred to any eligible judge whose court is located within 100 miles of the court of the judge originally assigned to the case. Second, the rule provides that if no eligible judges are to be found within the 100-mile radius described above, the Rule of Necessity operates to override the recusal required by the rule, and permits the case to remain with the originally designated judge, who may—and indeed must—preside over the case. The Rule of Necessity thus guarantees that a party will never, as a result of the proposed rule, be left without a forum in which his or her dispute may be heard.

E. Why $1,000?

By requiring a judge to recuse himself when aggregate contributions from a party, his lawyer and persons associated with the party exceed a certain threshold, a *per se* rule for campaign contributors eliminates any incentives that a lawyer might have to make large contributions to a judge's campaign in the hope of influencing the outcome of cases in which they appear before him.[178] The likely result will be a decrease in large lawyer contributions to judicial campaigns. Thus, a potential problem with a *per se* rule for campaign contributors is that it will make it harder for judges to raise the funds they require to run an effective election campaign. If enough contributors are deterred, judges may be forced to self-finance to make their candidacies viable, which could have the unfortunate effect of confining the ability to win contested judicial elections to the most affluent.[179] Furthermore, the *per se* rule will disproportionately deter lawyers—

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[176] 449 U.S. 200, 213 (1980) ("although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise.").

[177] *Larabee v. Governor of the State of New York*, 860 N.Y.S.2d 886 (2008).

[178] Sample & Pozen, *supra* note 21, at 22.

[179] *See* Banner, *supra* note 21, at 466-67 (describing effect of Canon 32, which effectively prevented judicial candidates from receiving even the smallest campaign contribution that would create the appearance of impropriety).

the group most knowledgeable about the quality of judges—from making large contributions to judicial election campaigns.[180] This will increase the influence of special interest groups—who typically seek judges that will promote certain political objectives as opposed to influence over outcomes in particular cases—over judicial electoral outcomes. Evidently, a balance needs to be struck between eliminating egregious cases of real and apparent judicial bias, and enabling judicial candidates to raise funds from the section of the electorate that is best able to evaluate judicial competence.

There are at least two further reasons to be concerned about the threshold being too low. First, lowering the threshold increases the numbers of judges that will have to disqualify themselves in the first instance, which will tend to increase the administrative burden placed on the court system. Second, lowering the threshold makes it cheaper for lawyers to attempt to game the system by contributing above the threshold amount to judges in front of whom they would prefer not to appear as described in Part IV.C. If the threshold is very low, it may be worthwhile for lawyers to contribute above the threshold amount to the campaigns of judges in front of whom they do not wish to appear. Even though the other party may waive its right to have the judge disqualified, the probability that the party does not exercise the waiver may still provide enough of an incentive to engage in such gamesmanship when the threshold is sufficiently low.

We believe that the $1,000 threshold strikes the appropriate balance between these competing considerations. By encouraging many small lawyer contributions and deterring large contributions, the rule will largely deal with the problem of perceived bias. The perception of impartiality is not seriously compromised when judges oversee cases involving small contributors. As one commentator noted, in justifying a *per se* rule with a $1,000 threshold: "If we are concerned with eliminating the appearance of bias, it is far better to have twenty lawyers contributing $999 than nineteen contributing $999 and one contributing $20,000."[181]

To provide some context, in the contested general election races for the Ninth District Supreme Court, 8.9 percent, 8.5 percent and 11.1 percent of donations to candidates were $1,000 or higher in 2005, 2006 and 2007 respectively, while 18.0 percent, 22.1 percent and 26.6 percent were $500 or higher.[182] In the contested Rockland and Westchester County Court elections, 2.8

[180] Goldberg et al., *supra* note 21, at 529.

[181] Banner, *supra* note 21, at 482.

[182] Porell, *supra* note 10. In 2005, ten candidates were running for four open seats; in 2006, four candidates were running for two open seats; and in 2007, eight candidates were running for three open seats. *Id.* at 27.

percent, 2.3 percent and 0.5 percent of donations to candidates were $1,000 or higher in 2005, 2006 and 2007 respectively, while 6.8 percent 7.9 percent, and 8.0 percent were $500 or higher.[183] Thus, a $1000 threshold will target the small percentage of exceptionally large contributions, while leaving alone the overwhelming majority of small contributions. These figures also suggest that it may be appropriate to institute a lower threshold of, say, $500 for County Court races, where contributions over $500 are relatively unusual.

[183] *Id.* at 30.