File name Caperton v. Massey

Legally Speaking

Judicial Campaign Contributions and the Appearance of Impropriety

We elect judges in Ohio. So do most states. Why do we do this? Because the Ohio constitution provides for the election of all of our judges for six year terms. This provision was added to our Constitution in 1851.

It takes money to get elected. We all know how many campaign contribution requests we receive. Is there something different about judicial elections and money? Something more unseemly than other kinds of elections?

Ohio's Chief Justice Tom Moyer has long been concerned about this problem. In the mid 1990's Moyer commissioned a poll, which was done by pollsters from the University of Cincinnati. Ninety percent of those responding believed judicial decisions were influenced by campaign contributions at least some of the time. Current surveys done other places have shown the same thing. This is a very sobering finding. It calls into question impartiality, the hallmark of the judiciary.

Moyer also established a commission in the 90's to study this problem, which recommended contribution limits in judicial races. The Ohio Supreme Court, however, decided that contribution limits alone did not fully address the problem, so it also adopted spending limits for judicial races. But the spending limits requirement did not jibe with U.S. Supreme Court precedent, which had long equated money with speech. So the spending limits reform didn't take effect, but contribution limits remain in place for Ohio judicial candidates today.

Still, where there's a will there's a way. Money began to pour into judicial races, not just to the candidates' own campaigns, but into the coffers of independent groups with their own agendas. In times past state supreme court races didn't attract all that much attention. But in recent years, various interest groups have more fully realized that courts have a very significant role to play in public policy issues, and have begun spending large sums of money to help get justices who share the same philosophies elected to the highest state courts. The 2002 Ohio Supreme Court election was one of the most expensive ever, and one of the sleaziest.

On March 3 the United States Supreme Court heard oral arguments in a case that could have ramifications for all states that elect judges. It involves judicial elections, cash, and politics in West Virginia. Here's the background.

A man named Hugh Caperton owned a small mining company in West Virginia. He filed a lawsuit against the Massey Coal Company, accusing Massey of fraud, and essentially, of wrongfully trying to put his company out of business. In 2002, a jury awarded Caperton fifty million dollars. In West Virginia, appeals go straight to the highest court, the Supreme Court of Appeals of West Virginia.

Don Blankenship is the CEO of Massey. He announced his intention to appeal the verdict. Apparently, Blankenship also decided to try a solution through the judicial election process.

Like Ohio, West Virginia elects its judges. There was a supreme court election in 2004. Blankenship personally gave $3 million to support challenger Brett Benjamin against incumbent justice Warren McGraw. Much of that money went to an independent expenditure organization called "And For the Sake of the Kids", to buy TV ads accusing Justice McGraw of releasing a child molester and letting him work in a high

school. According to court papers filed on behalf of Caperton, Blankenship's $3 million contribution was "more than the total amount spent by all other Benjamin supporters combined, and was likely more than any other individual spent on a judicial election that year."

All of this is just the backdrop. McGraw was defeated; Benjamin was elected. Massey's jury verdict came before the West Virginia Supreme Court. Caperton's side asked Justice Benjamin to disqualify himself from the case because of the appearance of bias due to the large campaign contribution. He refused. By a vote of 3-2 the West Virginia high court threw out the jury verdict, siding with Massey.

There's more. Elliot Maynard was also a justice on the West Virginia high court. He was Chief Justice at the time of the Massey appeal. While the appeal was pending, he was photographed vacationing in Monte Carlo with Massey CEO Don Blankenship. He sat on the appeal, too, and favored Massey's side. He later had second thoughts, and recused himself after the 3-2 decision came out. And another justice, Larry Starcher, took himself off the case because of his outspoken criticism of Massey CEO Don Blankenship. Starcher had voted to uphold the jury's verdict.

The West Virginia high court, with two "subs" sitting for Justices Maynard and Starcher, re-heard the case. Justice Benjamin was the acting Chief Justice and he got to pick the two subs. Benjamin was again asked to disqualify himself; he refused again. The case came out the same as before, 3-2, to throw out the jury verdict.

All of this is a witch's brew demonstrating in an extreme fashion the problem with electing judges. The issue before the U.S. Supreme Court was framed like this: "whether Justice Benjamin's failure to recuse himself from participation in his principal financial supporter's case violated the Due Process Clause of the Fourteenth Amendment." More simply put, is the appearance of bias enough to disqualify a judge from a case?

If you think all of this sounds familiar, perhaps you have read John Grisham's novel, The Appeal. Life imitates art? Or is it the other way around?