Justice at Stake
campaign

Testimony in the Matter of Amendment of the Code of Judicial Conduct's Rules on Recusal

Re: Nos. 08-16 and 08-25
Submitted October 9, 2009

My name is John Robinson and I am the Director of State Affairs for Justice at Stake. We are a nonpartisan campaign working to keep our courts fair and impartial. We are part of a national coalition of concerned civic and legal leaders promoting substantive and procedural reforms, seeking in particular to reduce situations where judicial campaign conduct, campaign cash, or special interest pressure could cast the impartiality of judges into doubt. We have more than 50 partner organizations from across America and across the political spectrum, and our board consists of judges, academics, business and political leaders, Democrats and Republicans. We do not endorse candidates for judicial office, or any one system of selecting judges, but we do educate the public and work for reforms to keep politics and special interests out of the courtroom—so judges can do their job protecting our Constitution, our rights and the rule of law. I should also note my views do not necessarily reflect the positions of all Justice at Stake partner organizations.

Justice at Stake has been active in urging states to adopt recusal reforms in the aftermath of the U.S. Supreme Court case of *Caperton v. A.T. Massey Coal Co.*, in which our organization filed an amicus brief. As the Court observed, the requirements of constitutional due process set "only the outer boundaries of judicial disqualifications," and many states have gone further and implemented judicial reforms to eliminate "even the appearance of partiality."

We have urged states to adopt recusal standards that will reassure citizens that their courts will be fair and impartial, in fact and in appearance. I am not here today to focus on the details of the recusal reform petitions submitted by the League of Women Voters of Wisconsin Education Fund and the Wisconsin Realtors Association, Inc. Rather, we are here to applaud the Court for being proactive in addressing this issue, and to urge your honors take affirmative steps to strengthen its Judicial Code in regards to recusal rules.

Strong recusal rules protect the courts and build public trust by removing even the appearance that justice might be for sale. As the Conference of Chief Judges noted in its *Caperton* amicus brief when it said, "as judicial election campaigns become costlier and more politicized, public confidence in the fairness and integrity of the nation's elected judges may be imperiled. Disqualification is an increasingly important tool for assuring

litigants that they will receive a fair hearing before an impartial tribunal." And as the American Bar Association noted in its amicus brief in *Caperton*, "few actions jeopardize public trust in the judicial process more than a judge's failure to recuse in a case brought by or against a substantial contributor."

These sentiments are widely shared by Americans. In February 2009, we commissioned a poll by Harris Interactive that revealed that more than 80 percent of the public believes judges should avoid cases involving major campaign supporters.

You are hearing many good arguments on behalf of strengthening recusal and disqualification standards. I will highlight a few points that deserve extra attention.

First, a variety of claims have been made about the proper application of the First Amendment in setting recusal standards. As your Honors are well aware, the First Amendment protects many things, but there is no First Amendment right to a judge of one's choice. The proper balance of the First Amendment with the Constitution's Due Process Clause need not interfere with a strong system of rules regarding recusal.

Second, since the *Caperton* case, contrary to the predictions made at the time, there has not been a flood of recusal requests made on the basis of campaign contributions or expenditures of third party groups.

Third, in concert with recusal rules related to campaign contributions of judicial candidates, strengthening recusal rules in regards to third party independent groups will help ensure that the Wisconsin courts avoid the appearance of partiality that the Supreme Court described in *Caperton.* This could be accomplished by constructing rules that urge judges to disqualify themselves in cases where major campaign contributors or third-party groups advocate for the election or defeat of that judge. In its brief, the Conference of Chief Judges laid out a seven-part test to use when deciding whether campaign support was egregious enough to "jeopardize a litigant's due process right to a fair hearing." These criteria include considering: the size of the expenditure, the nature of the support, the timing of the support, the effectiveness of the support, the nature of the supporter's prior political activities, and the nature of the supporter's pre-existing relationship with the judge.

Fourth, we would urge the court to institute a process in which a neutral judge or panel of judges reviews recusal motions. In the Harris poll we commissioned, 81 percent of the public favored a disinterested judge having the last word on recusal motions, not the judge whose objectivity is being challenged.

Fifth, we would urge the Court to consider implementing recusal rules, in the interest of transparency, that would make litigants and their lawyers aware of potential conflicts that might warrant recusal. One such reform, which is being considered in the state of Michigan, would require all litigants and their attorneys to file an affidavit at the outset of litigation disclosing specific information relevant to a disqualification decision, including information about campaign contributions and independent expenditures. Another

approach would require judges to disclose any facts at the outset of a case or an appeal relating to their personal and fiduciary economic interests, campaign statements, and campaign contributions that might plausibly be construed as bearing on their impartiality to hear the matter.

We applaud the court for working to address the effects of the judicial election arms race on Wisconsin's judiciary, and urge the court to institute serious recusal reforms to ensure that your citizens can have confidence that their courts will be accountable to the law and the constitution rather than special interest pressure.