

FILED

APR 12 2017

STATE OF WISCONSIN      CLERK OF SUPREME COURT      IN THE SUPREME COURT  
Petition 17-01 In re: Rule for Recusal      OF WISCONSIN      PETITIONERS' RESPONSE TO  
PUBLIC COMMENTS

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Thank you for the opportunity to respond to the public comments filed about this petition. We are authorized to state that retired Wisconsin judges Fred Hazelwood and Michael Sullivan are joining the 54 other judicial officials petitioning for this rule change.

We are gratified by the overwhelmingly positive response to the petition, but would like to respond to several points made by the three primary commenters who oppose the petition: eleven retired members of the judiciary, Wisconsin Institute for Law & Liberty (WILL) and Wisconsin Bankers Association.

The first and most important point we want to make is that the proposed recusal rule would not infringe on First Amendment rights. Our petition proposes no limits on contributions to or on behalf of judicial candidates. No individual's right to financially support a candidate for judicial office is reduced or limited by the proposed recusal rules. If and when that contributor appears as a party or lawyer before a court, his or her right, and that of other litigants in the case, is the right to a fair tribunal. This right is guaranteed by Due Process. In *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, both the majority and the dissent recognized the right and duty of states to enact recusal requirements relating to campaign contributions to protect the reality and appearance of an unbiased judiciary, without noting any related concerns about the First Amendment.

The majority wrote:

. . . States may choose to "adopt recusal standards more rigorous than due process requires." *Id.* at 794; see also *Bracy v. Gramley*, 520 U. S. 899, 904 (1997) (distinguishing the "constitutional floor" from the ceiling set "by common law, statute, or the professional standards of the bench and bar").

The 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.' *Lavoie*, 475 U. S., at 828. Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances.

556 U.S. at 889-890.

Justice Roberts, dissenting, wrote:

States are, of course, free to adopt broader recusal rules than the Constitution requires — and every State has — but these developments are not continuously incorporated into the Due Process Clause.

556 U.S. at 893.

Surely the Supreme Court Justices in *Caperton*, both those in the majority and those who dissented, would not have invited states to adopt broad recusal rules if such rules would violate First Amendment rights. None of the cases relied upon by WILL held that judicial recusal requirements violate a campaign donor's First Amendment rights.

Curiously, WILL cites *Duwe v. Alexander*, 490 F. Supp. 2d 968, (W.D.Wis. 2007), in support of the proposition that a litigant's First Amendment rights are compromised if a judge to whom large amounts of money were given must recuse. *Duwe* is concerned with a judge or judicial candidate's First Amendment speech rights, not those of a campaign donor. However, it is instructive in differentiating between speech rights and a judge's duty to recuse. The court was considering the First Amendment right of a judicial candidate to voice opinions about issues that might come before the judge, and a corresponding requirement that if a candidate made, or appeared to have made, a commitment to ruling in a particular manner that the judge must recuse himself. In differentiating between the candidate's First Amendment Right and the judge's requirement to provide an apparently fair tribunal Judge Shabaz wrote: "It would not be irrational to permit a judge to speak, but to require recusal in the event the issue came before him or her." In fact, the decision upheld the facial constitutionality of Wisconsin SCR 60.06(3)(b) which restricts the speech of a judge, judge-elect, or candidate for judicial office with respect to promises to rule in a particular way in cases, controversies, or issues that are likely to come before the court.<sup>1</sup> We point out that WILL has cited to no case or holding that a litigant's First Amendment protections are compromised by judicial recusal. That is because no such case exists. This is about and only about litigants appearing before the court.

In fact, in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), the Supreme Court held that mandatory recusal rules *do not* abridge First Amendment rights. The court said:

*Caperton v. A. T. Massey Coal Co.*, 556 U. S. \_\_\_ (2009), is not to the contrary. *Caperton* held that a judge was required to recuse himself "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." *Id.*, at \_\_\_ (slip op., at 14). The remedy of recusal was based on a litigant's due process right to a fair trial before an unbiased judge. See *Withrow v. Larkin*, 421 U. S. 35, 46 (1975). *Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.

U. S. Supreme Court precedent lends support to our request for the recusal rule, and throws up no constitutional obstacles to its adoption.

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<sup>1</sup> The decision enjoined enforcement of SCR 60.06(3)(b) against judicial candidates based on their having responded to the questions of Wisconsin Right to Life, Inc.'s survey.

Inexplicably, WILL claims that the petitioners oppose an elected judiciary in Wisconsin. The petitioners propose nothing of the kind. To the contrary, the requests we make embrace Wisconsin's long tradition of an elected judiciary while ensuring due process by creating objective standards for recusal and a system for review of recusal decisions.

Several of the petition's opponents claim that nothing has changed since adoption of the 2010 recusal rule to require consideration of a new rule. This is patently untrue. The decision of the Wisconsin Supreme Court in *State ex rel. Three Unnamed Petitioners v. Peterson*, 2015 WI 85, mot. for recon. den. 2015 WI 103 unleashed a tsunami of unregulated money on the Wisconsin election scene. Nothing in that decision exempts judicial campaigns from the now legal ability to coordinate with independent expenditure and issue advocacy groups. Previously, contributions by individuals to the campaigns of candidates were limited in amount by state law, and the campaigns themselves were prohibited from coordinating with independent expenditure groups which engage in issue advocacy. Though contributions to independent expenditure groups were not limited in amount and not subject to reporting requirements, the ban on coordination went a long way in shielding elected officials from the influence of unlimited campaign spending.

The Buckley Court explained that the potential for quid pro quo corruption distinguished direct contributions to candidates from independent expenditures. The Court emphasized that "the independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process," *id.*, at 47-48, because "[t]he absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate," *id.*, at 47.

*Citizens United*, 588 U.S. at 41.

In contrast to Wisconsin case law, coordination between a candidate's campaign and independent expenditures is still prohibited in elections covered by federal election law. See 52 U.S. Code § 30101 (17).

WILL suggests that there is no evidence that a judge cannot be impartial when large contributors appear before the court. When the incentive is low, the temptation to lean in favor of a supporter is weak. But as the financial incentive grows, judges, like all human beings, might be tempted to tip the scales of justice in favor of those whose financial contributions secured their election. This will be extremely rare. We agree with WILL that the instances of individual contributions exceeding our proposed limits in Wisconsin elections have been very low in number. However, the same is not true for independent expenditures. In recent Wisconsin history the amount of money spent on independent expenditures has exceeded individual campaign limits by one hundred fold. There is no question that in these cases a "reasonable person" will question whether the judge or justice can be impartial. The appearance of impartiality is erased. Confidence in the courts is severely threatened. We feel strongly that respect for the rule of law that is so fundamental to American democracy cannot survive without reasonable recusal rules like we are suggesting. One need only look at the many positive responses to the petition and editorial support around the state to understand that the public

wants, and needs, a rule that a litigant who has made a very large campaign contribution does not have a right to have the contributor's case heard by the judge for whose benefit the funds were expended.

WILL also suggests the rule is unnecessary because litigants have a right to file for substitution of assigned judges in Wisconsin. There are two flaws with that argument. First, this right only applies to trial courts, not appellate courts. Second, the right to substitute cannot cure the problem of bias from large campaign contributions unless the existence of those donations is known. Though it is possible to search data bases to find out about contributions by individuals in judicial campaigns, the same is not true for contributions made through independent expenditure groups. The right of substitution is not a replacement for the robust recusal rule we propose.

We respond briefly to a concern raised by the Wisconsin Bankers Association. The proposed definition of "party" and "lawyer" would not include an organization that chose to file an amicus brief in a matter.

We attempt here to respond succinctly to the primary arguments raised in opposition to the petition. To the extent we do not respond to any particular argument, we do not intend to concede the point. The petition and this response should be read together as proposing an objective standard that will provide for recusal of judges who have benefitted from campaign contributions from a litigant or the litigant's attorney when, in the words of SCR 60.04(4), "reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system . . . would reasonably question the judge's ability to be impartial."

Finally, we ask the Court to schedule a public hearing on this petition. Given the multiple comments, it is clearly a matter of great statewide interest. While WILL wants the Court to quietly shut the door on this petition without a hearing, that would unduly depreciate the significance of the important constitutional issues raised by this petition. A vigorous public debate would go a long way to restoring confidence in the Wisconsin court system by showing the importance we place on issues of constitutional rights.

Respectfully Submitted on behalf of 56 Petitioners,

Hon. Sarah B. O'Brien

Hon. Michael J. Skwierawski,