

BRENNAN  
CENTER  
FOR JUSTICE

Brennan Center for Justice  
at New York University School of Law

161 Avenue of the Americas  
12th Floor  
New York, New York 10013  
212.998.6730 Fax 212.995.4550  
www.brennancenter.org

October 4, 2010

Honorable Jonathan Lippman  
Chief Judge  
New York Court of Appeals  
Court of Appeals Hall  
20 Eagle Street  
Albany, New York 12207-1095

Re: *Fund for Modern Courts' Proposal for Recusal Rule on Campaign Contributors*

Dear Chief Judge Lippman:

We write on behalf of the Brennan Center for Justice at NYU Law School<sup>1</sup> to comment on the proposal for a heightened recusal standard recently submitted by the Fund for Modern Courts,<sup>2</sup> which would apply to elected New York judges hearing cases involving their campaign contributors. The Brennan Center commends the Fund for Modern Courts for its rigorous study of the impact that campaign contributions have on perceptions of the judiciary. We urge the Court to give serious consideration to its proposal, which represents an important approach to a crucial public policy concern.

The Brennan Center has consistently advocated adoption of substantive and procedural recusal rules to protect due process and reassure citizens that their courts are fair and free of actual or apparent partiality. In New York and other states that hold judicial elections,

---

<sup>1</sup> The Brennan Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Center's Fair Courts Project works to preserve fair and impartial courts and their role as the ultimate guarantor of equal justice in the country's constitutional democracy. Our research, public education, and advocacy in this area focus on improving selection systems, increasing diversity on the bench, promoting appropriate measures of accountability, and keeping courts in balance with other governmental branches.

<sup>2</sup> See Amelia T.R. Starr *et al.*, *A Heightened Recusal Standard for Elected New York Judges Presiding Over Cases, Motions or Other Proceedings Involving Their Campaign Contributors* (Fund for Modern Courts 2010), available at [http://moderncourts.org/documents/april\\_2010\\_recusal.pdf](http://moderncourts.org/documents/april_2010_recusal.pdf) ("*Fund for Modern Courts Report*").

judges are forced to raise substantial amounts of money for their campaigns.<sup>3</sup> To run competitive campaigns, judicial candidates have increasingly accepted contributions from partisan and special-interest groups.<sup>4</sup> When these donors appear before a judge to whom they made a contribution, it has the potential to raise reasonable questions regarding the judge's objectivity.

The United States Supreme Court recently recognized the potential effects that campaign spending has on judicial impartiality in *Caperton v. A.T. Massey Coal Co.*<sup>5</sup> In that case, the Supreme Court held that, under certain circumstances, even the appearance of impropriety may violate a litigant's due process rights.<sup>6</sup> The Court held that a state supreme court justice who received a sizeable campaign contribution from a party appearing before him was compelled to recuse because the "probability of actual bias on the part of the judge or decision-maker [was] too high to be constitutionally tolerable."<sup>7</sup> While the Court recognized that the facts at issue in *Caperton* were extraordinary, it also made clear that "[s]tates may choose to 'adopt recusal standards more rigorous than due process requires,'"<sup>8</sup> and emphasized that robust judicial disqualification standards help prevent the erosion of respect for legal decisions.<sup>9</sup> Adopting disqualification rules which govern the wide range of circumstances that fall within constitutional limits is important to protect litigants' rights to fair and impartial tribunals, and is crucial to ensuring that the public retains confidence in the courts.

National and state surveys and polling demonstrate that the public is wary of the role money plays in judicial elections and believes that campaign contributions may contribute to more favorable legal outcomes for donors.<sup>10</sup> Polling undertaken in 2003 on behalf of New York's Commission To Promote Public Confidence In Judicial Elections, for example, found that 80% of registered New York voters believed that campaign contributions influenced judicial decision making, and that judges should not rule on cases that involve their campaign contributors.<sup>11</sup> New Yorkers' views are shared across the nation: a recent national survey

---

<sup>3</sup> See generally James Sample et al., *The New Politics of Judicial Elections 2000-2009: Decade of Change* (Charles Hall, ed. 2010) ("New Politics 2000-2009"), available at <http://tinyurl.com/2ew7aja>; see also Editorial, *Fair Courts at Risk*, N.Y. Times, Sept. 9, 2010, at A28.

<sup>4</sup> See generally *New Politics 2000-2009*.

<sup>5</sup> 129 S. Ct. 2252 (2009).

<sup>6</sup> *Id.* at 2252, 2265 (2009) ("[O]bjective standards may . . . require recusal whether or not actual bias exists or can be proved.>").

<sup>7</sup> *Id.* at 2257 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

<sup>8</sup> *Id.* at 2267 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (200) (Kennedy, J., concurring)).

<sup>9</sup> *Id.* at 2266.

<sup>10</sup> See, e.g., Adam Skaggs, *Buying Justice: The Impact of Citizens United on Judicial Elections*, (Brennan Center 2010) (collecting survey data on national and state level data demonstrating that Americans believe, by significant margins, that campaign spending has an impact on judicial decision-making), at <http://www.brennancenter.org/page/-/publications/BCReportBuyingJustice.pdf?nocdn=1>.

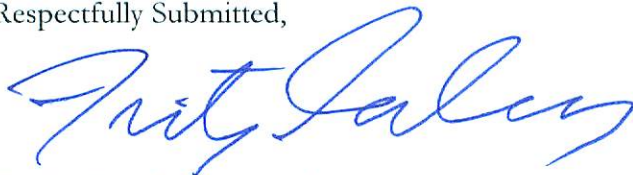
<sup>11</sup> Commission to Promote Public Confidence in Judicial Elections, *Public Opinion and Judicial Elections: A Survey of New York State Registered Voters* (2003).

conducted by Harris Interactive, for example, showed substantial bipartisan concerns about the escalating influence of money in judicial elections and its potential to erode impartiality.<sup>12</sup> If the public continues to lack confidence in the judiciary's ability to render fair and impartial decisions, it will greatly undermine the judiciary's reputation as well as public perception of the rule of law.

For all the foregoing reasons, we commend the Fund for Modern Courts for their comprehensive study of campaign spending and elected judges in New York State. And we endorse the Fund's proposal to establish a workable recusal standard for elected judges in New York. The rule would establish an effective, practical disclosure rule so that judges faced with recusal requests would have access to accurate data on campaign contributions by parties or their lawyers. It contains an important waiver mechanism which would prevent gamesmanship by parties attempting to exploit the rule for purposes of judge shopping. The rule would not increase the administrative burdens on New York Court's system. Rather, it would set the trigger for recusal at \$1,000, a figure that strikes an appropriate balance that will encourage contributions from small donors; discourage large contributions; and affect only the fraction of cases involving supporters who gave judicial candidates exceptionally large donations.

We endorse the Fund for Modern Courts' proposal for an effective recusal rule for elected judges, and urge the Court to give it serious consideration. We believe the proposed rule represents an important step in restoring the perception and reality of a fair and independent judiciary, and are grateful for the opportunity to submit these comments.

Respectfully Submitted,



Frederick A.O. Schwarz, Jr.  
Chief Counsel



J. Adam Skaggs  
Counsel

---

<sup>12</sup> See Press Release, Justice at Stake, *Solid Bipartisan Majorities Believe Judges Influenced by Campaign Contributions* (Sept. 8, 2010), available at <http://tinyurl.com/2c422fs>. The survey also found that business leaders hold views similar to those held by the general public. See *id.*