



June 24, 2009

The Honorable Mark Meadows, Chairman
House Judiciary Committee

RE: Michigan Supreme Court Recusal Standards

Chairman Meadows and Judiciary Committee Members:

Thank you for giving me the opportunity to comment on recusal standards for the Michigan Supreme Court.

I note that the text of House Joint Resolution P tracks closely with the Disqualification rule from the American Bar Association's Model Code of Judicial Conduct. I am very encouraged by that fact. If the Michigan electorate is to vote on a constitutional amendment to establish disqualification standards for the Michigan Supreme Court, the ABA Model Code offers a sound example.

However, I come to you today seeing a glass half empty. HJR P does not contemplate *the* compelling recusal issue of our time: extraordinary campaign spending as a threat to due process rights of participants in Supreme Court cases. Perhaps this issue should not be addressed in the Michigan Constitution, but it is an issue that must be addressed for the sake of public trust and confidence in our judiciary.

Let me provide a little background. The U.S. Supreme Court ruled two weeks ago in *Caperton v. Massey Coal Company* (USSC Docket No. 08-22) that it is unconstitutional for a state Supreme Court justice to sit on a case involving that justice's extraordinary campaign finance supporter. The Court found an unacceptable probability of bias that violated the due process rights of the campaign supporter's legal opponent.

In the syllabus preceding the opinion, Justice Anthony Kennedy noted, "...because the States may have codes with more rigorous recusal standards than due process requires, most recusal disputes will be resolved without resort to the Constitution, making the constitutional standard's application rare."

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I believe that the Michigan Supreme Court is engaged in a process that will create the more rigorous recusal standards that Justice Kennedy envisioned. But there is a problem. Over the last decade it has become standard practice to fund major portions of Michigan Supreme Court election campaigns through third parties that purchase candidate-focused issue advertisements. In the \$7.5 million Supreme Court campaign of 2008, \$3.8 million paid for candidate-focused television issue advertisements. Those communications, which seek to define the candidates' character and suitability for office without explicitly exhorting a vote for or against a candidate, are not considered to be campaign expenditures under the prevailing interpretation of the Michigan Campaign Finance Act. Therefore, the underlying sources of the money used by the major political parties and the Michigan Chamber of Commerce to pay the majority of campaign expenses are unknown. As a result, participants in future Michigan Supreme Court cases will not know when a disqualification motion may be justified.

The fact that the sources of a majority of Supreme Court campaign funds are unknown brings this discussion to the role of the Legislature. If we seek to have truly effective disqualification standards for the Michigan Supreme Court, the Legislature should amend the Campaign Finance Act to require disclosure of the contributions to groups whose names appear on the disclaimers of candidate-focused issue advertisements. If you fail to act and perpetuate this state's 'don't ask, don't tell' policy, the most significant sources of campaign cash will continue to be off the books and violations of due process rights will continue to be covered up.

I would like to reinforce the rationale of this argument with a few points of public opinion. In March of this year my organization commissioned a poll of 600 randomly selected Michigan voters. Here are some of the findings:

- **Ninety-three percent** of respondents said that it is important that judges are independent of influence from contributors to their election campaigns.
- By a **three-to-one** margin, Michigan voters doubt a judge's ability to be fair and impartial in a court case where one of the opposing parties spent **\$50,000** to support the judge's election.
- By a **five-to-one** margin, Michigan voters doubt a judge's ability to be fair and impartial in a court case where one of the opposing parties spent **\$1,000,000** to support the judge's election.
- If one of the opposing parties in a court case spent **\$50,000** to support the judge's election, **85 percent** of respondents said that the beneficiary judge should ask another judge to hear the case. Ten percent said the beneficiary judge should be allowed to hear the case.
- **Ninety-six percent** of respondents said it is important that all sources of spending for judicial elections are publicly disclosed.

Thank you,



Richard L. Robinson