January 14, 2010

TADC LEGISLATIVE COMMITTEE ANALYSIS

Charge #6 – House Committee on the Judiciary and Civil Jurisprudence

BACKGROUND

The Texas House Committee on Judiciary and Civil Jurisprudence has been charged, via interim charge #6, with reviewing Texas campaign finance law with regard to judicial races, specifically whether Texas should regulate by statute the 2009 US Supreme Court decision in *Caperton v. Massey Coal Co.*, 129 S.Ct. 2252 (2009). This is the case where the CEO of Massey, Don Blankenship, became deeply involved in the election of a West Virginia Supreme Court Justice, Brent Benjamin. Apparently, Blankenship through a non-profit corporation he created, contributed over $3 million to Benjamin's campaign. This amount was more than the total amount spent by all of the other Benjamin supporters and Benjamin's own campaign committee. Before the election, Blankenship's company had been found liable in a civil trial for $50 million. By the time the case reached the West Virginia Supreme Court, Benjamin had been elected and was a sitting justice. The Plaintiff Caperton petitioned Justice Benjamin to recuse himself and he refused. Benjamin was part of the 3 - 2 majority that overturned the verdict.

Caperton sought rehearing and the parties moved for disqualification of three of the five justices who decided the appeal. Photos had surfaced of Justice Maynard (who had voted in the majority for reversal) vacationing with Blankenship in the French Riviera while the case was pending before the Court. Justice Maynard granted Caperton's recusal motion. On the other side, Justice Starcher (who had voted in the minority to affirm the verdict) granted Massey's recusal motion, apparently based on his public criticism of Blankenship's role in the 2004 judicial election. In his recusal memorandum, Justice Starcher urged Justice Benjamin to recuse himself as well, noting that Blankenship's involvement in the 2004 judicial elections had created a cancer in the affairs of the West Virginia Supreme Court. Justice Benjamin, for the second time, denied Caperton's recusal motion.

The court granted rehearing. Justice Benjamin, now in the capacity of acting chief justice, selected Judges Cookman and Fox to replace the two recused justices. Caperton moved for a third time for disqualification of Justice Benjamin, arguing that Justice Benjamin had failed to apply the correct standard under the West Virginia law in deciding against the prior recusal motions. Justice Benjamin, for a third time, denied the recusal motion.

In April 2008, a divided court again reversed the jury verdict and again it was a 3-2 decision, with Justice Benjamin again in the majority, joined by Justice Davis (who had been on the first panel and had voted to reverse the verdict) and Justice Fox, who acting Chief Justice Benjamin had selected to be on the new panel. Justice Albright, joined by Justice Cookman, dissented, writing that the majority opinion was not only unsupported by the facts and existing law, but was also fundamentally unfair due to Justice Benjamin's failure to recuse himself.

The United States Supreme Court reversed. Justice Kennedy, writing for the majority, called the appearance of conflict of interest so extreme that Benjamin's failure to recuse himself constituted a threat to the Plaintiff's constitutional rights. The opinion also said that not every campaign contribution by a litigant or attorney creates a probability of bias that requires recusal, but that this was an exceptional case. In fact, the majority opinion stressed multiple times that the Court was presented with extreme, exceptional facts.On these extreme facts the "probability of actual bias" rises to an unconstitutional level. Justice Roberts in his dissent said that the new "probability of bias" standard was vague and discretionary. Justice Scalia also dissented saying this new standard raised the potential of judicial bias in all litigated cases in the 39 states that elect judges.

ANALYSIS

Current Texas law affords two levels of protection from such campaign finance abuse. First, the Judicial Campaign Fairness Act places monetary limits on the campaign donations received from individuals, law firms, and political action committees. For example, candidates for Texas Supreme Court can receive a maximum donation of $300,000 from a political action committee. While a candidate for judicial office can elect not to be bound by these limits, the candidate must file a declaration of intent to exceed the limits. A complying candidate is entitled to state on political advertising that the candidate complies with the Judicial Campaign Fairness Act, while a non-complying candidate is not entitled to that benefit. A check with the Texas Ethics Commission has found that the vast majority of judicial candidates elect to be bound by the limits on contributions and expenditures contained in the Judicial Campaign Fairness Act.

Secondly, unlike West Virginia, Texas has a set of recusal rules by which the judge being challenged is not the last word in deciding his own recusal. If a trial court judge does not recuse himself/herself in response to a motion to recuse, the matter is referred to the presiding judge of the judicial district who must either hear the motion or assign a different judge to hear the motion. With respect to appellate court justices, the justice challenged by recusal motion must recuse himself/herself or certify the matter to the entire court, which decides the motion by a majority of the remaining justices. In either case, a denial of the motion to recuse is reviewable, while granting the motion is not.

CONCLUSION

Current Texas law provides appropriate protection from potential judicial campaign finance abuse, both in terms of campaign finance limits and the process of recusal.