SUPREME COURT
STATE OF WISCONSIN
STATE CAPITOL
P. O. BOX 1688
MADISON, WISCONSIN 53701

CHAMBERS OF
ANN WALSH BRADLEY, JUSTICE

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Remarks of Justice Ann Walsh Bradley
Before the
Special Committee on Judicial Discipline and Recusal
September 16, 2010
9:00 a.m.

Justice Bradley's remarks will reference her dissent to the order on Rules Petitions 08-16, 08-25, 09-10, 09-11, which was issued on July 7, 2010, as set forth below.

¶1 ANN WALSH BRADLEY, J. *(dissenting)*. The concurrence attempts to justify the need for the rule change as preserving the right of Wisconsin citizens to vote. The voting rights cases it cites, however, are totally unrelated to the issue of judicial recusal. These cases address laws that regulate voting itself. For instance, they address the constitutionality of a poll tax, a run-off election procedure, and a law that fixes the minimum age of electors at 18.[1]

[1] Harper v. Va. Board of Elections, 383 U.S. 663 (1966) (declaring a poll tax unconstitutional); State ex rel. Frederick v. Zimmerman, 254 Wis. 600, 37 N.W.2d 473 (1949) (addressing the constitutionality of a run-off election procedure); Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding amendments to the Voting Rights Act that permitted 18 year olds to vote and abolished literacy tests and durational residency requirements).

¶2 Judicial recusal is unrelated to casting a vote. No case cited by the concurrence equates the right to vote or the right to give financial support to a judicial candidate with the right to have a particular elected judge participate over a particular case or decide an individual "issue" of law.[2]

Additional cases cited by the concurrence in support of its voting rights argument are: Dunn v. Blumstein, 405 U.S. 330 (1972) (addressing a state law that required citizens to reside in Tennessee for one year prior to being eligible to vote); McNally v. Tollander, 100 Wis. 2d 490, 302 N.W.2d 440 (1981) (declaring an election invalid when ballots were not provided to 40 percent of the voters); Reynolds v. Sims, 377 U.S. 533 (1964) (holding unconstitutional the discriminatory apportionment of electoral districts); Clingman v. Beaver, 544 U.S. 581 (2005) (concluding that Oklahoma's semi-closed primary system did not impermissibly burden the right to freedom of political association); Storer v. Brown, 415 U.S. 724 (1974) (evaluating a California statute that required "independent" candidates to be politically disaffiliated for one year prior to an election); Yick Wo v. Hopkins, 118 U.S. 356, 371 (1886) ("legislation establishing means for ascertaining the qualifications of those entitled to vote"); Williams v. Rhodes, 393 U.S. 23 (1968) (addressing an Ohio statute that required political parties other than the Democratic and Republican parties to meet special requirements before their candidates would be listed on the ballot); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (evaluating a Massachusetts statute that prohibited business corporations from making contributions to certain political causes).

[2] The recent United States Supreme Court case Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010), indicates that mandatory recusal rules do not abridge First Amendment rights. Stating that its holding was not at odds with Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, which mandates recusal in some cases based on campaign contributions, the Court explained: "Caperton's holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned." Citizens United, 130 S. Ct. at 910.

¶3 I view the voting rights concerns stated by the concurrence as a red herring. So do others.

¶4 After being subjected to unfavorable media reports and criticism from editorial boards across the state (see ¶16, infra), a member of the majority took the unprecedented step of writing guest editorials in several newspapers to explain the vote: "The protection of every voter's First Amendment right to have his or her vote counted . . . was the driving force behind the decision." See, e.g., Justice Patience Drake Roggensack, Guest Editorial, Rule Upheld First Amendment Rights of Voters, Wisconsin State Journal, Dec. 3, 2009.

¶5 In response to the voting rights argument, an editorial board countered: "The issue isn't the public's ability to participate in the election of justices. Voters do that mostly by voting." Editorial, Voters Are Not Fools, Milwaukee Journal Sentinel, Jan. 19, 2010. Rather, the editorial board asserted that at issue is the public perception of the judiciary: "The issue is whether Supreme Court justices [and other judges in the state] will be perceived as just your common ordinary politician . . . " affected by big money. Id.

¶6 Unlike the majority, I conclude that the purpose of a recusal rule is to maintain a fair, neutral, and impartial judiciary. A fundamental principle of our democracy is that judges must be perceived as beyond price.

¶7 When litigants go to court, they want a judge who will decide the case based on the facts and the law. They do not want the umpire calling balls and strikes before the game has

begun. Yet under the majority's new rules, which mark a substantial departure from our current practice, judges' campaign committees and perhaps someday even judges themselves[3] will be able to ask for and receive contributions from litigants before the trial has begun and before the judge makes a decision in their case.

¶8 How, one may ask, can such a thing happen in a state like Wisconsin which in the past has been heralded as an example of clean government?

¶9 The answer is that it can happen when a majority of the court adopts word-for-word the script of special interests that may want to sway the results of future judicial campaigns. It can happen when a majority of the court refuses to allow for study, discussion, or further input on the petitions. And, when it happens, it subverts the integrity of the court and undermines the public trust and confidence that judges will be impartial.

I

¶10 Make no mistake, the new rules passed by the majority signify a dramatic change to our judicial code of ethics.

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[3] In Siefert v. Alexander, No. 09-1713, slip op. at 27 (7th Cir., June 14, 2010), the Seventh Circuit reversed a federal district court's determination that SCR 60.06(4) unconstitutionally limits judges themselves from directly soliciting and receiving campaign contributions. Siefert is challenging the decision and has petitioned the Seventh Circuit for rehearing en banc. See Petition for Rehearing and Petition for Rehearing en banc by Appellee John Siefert, filed 6/28/10.

¶11 It has been the long-standing practice in Wisconsin that committees were prohibited from knowingly soliciting or accepting contributions from litigants with a case pending before the court.[4] The amended rule adopted by the majority on

[4] The concurrence asserts that the rule adopted by the majority "codifies what we decided" in Donohoo v. Action Wis., Inc, 2008 WI 110, 314 Wis. 2d 510, 754 N.W.2d 480. Concurrence, ¶14. Yet, because Donohoo did not address a campaign contribution from a litigant with a case pending before the court, the concurrence's assertion misses the mark. In Donohoo, we emphasized: "There were no contributions from any litigants in cases before the court, but rather two board members out of twelve made personal donations as did an attorney." 314 Wis. 2d 510, ¶19. The concurrence's discussion of Donohoo omits this critical sentence.

The prohibition on contributions by litigants is one of long standing. The Commission on Judicial Elections and Ethics was created by this court to recommend changes to our Code of Judicial Conduct addressing political and campaign activity of judges and candidates for judicial office. See fn. 16, infra. In its 1999 submission to this court, it proposed that the solicitation and acceptance of contributions from current litigants be prohibited. It stated that such a prohibition "reflects long-standing practice in Wisconsin." Charles D. Clausen, The Long and Winding Road: Political and Campaign Ethics Rules for Wisconsin Judges, 83 Marq. L. Rev. 1, 78 (App. A). The Commission opined that "[b]oth the solicitation and acceptance of contributions from current litigants would be at best unseemly." Id. at 89 (App. B).

The Commission also recommended that the court specifically allow for contributions from lawyers, which was considered another practice of long standing. Ultimately the court decided to amend SCR 60.06(4) to reflect that a candidate's committee "is not prohibited from soliciting and accepting campaign contributions from lawyers." However, the court concluded that the existing rules, including the recusal rule, already covered contributions from current litigants. The court added a final sentence to SCR 60.06(4) referencing the existing SCR 60.03 (avoiding impropriety and the appearance of impropriety) and SCR 60.04(4) (the recusal rule).

January 21, 2010, heads in the opposite direction. It provides that the candidate's committee "is not prohibited from soliciting and accepting lawful campaign contributions from lawyers, other individuals, or entities even though the contributor may be involved in a proceeding in which the judge, candidate for judicial office, or judge-elect is likely to participate." (Emphasis reflects new language adopted by the majority.)

¶12 It is not clear from the text of this amendment whether the term "individuals" includes litigants and whether the phrase "is likely to participate" includes participation in a case currently pending before the judge.[5] Justice Prosser clarified at the January 21, 2010, open administrative conference that indeed the intent is to allow for the

[5] Although in this dissent I address only the amendments to SCR 60.04(4), parts of the newly created SCR 60.04(7) and 60.04(8) are also unclear. At the January 21, 2010, open administrative conference, Chief Justice Abrahamson asked that certain terms be defined to provide clarity. The majority refused her request. The majority's failure to define and differentiate between critical terms renders the meaning of parts of these new rules uncertain.

solicitation and receipt of a contribution from a litigant with a case currently pending before the judge.[6]

¶13 In a letter to the court, the Brennan Center for Justice[7] forecasts the new reality for Wisconsin under the revised rules adopted by the majority. It predicts that the revisions "threaten to undermine public confidence in the

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[6] It is not clear that the members of the majority are in agreement about the meaning and effect of this new rule. At the January 21, 2010, open administrative conference, Justice Prosser recognized that under some circumstances, receipt of a lawful campaign contribution could require a judge's recusal: "Now, for example, if . . . a judge personally solicited and personally received a substantial though lawful contribution . . . , if for example there is a case pending before the court and at that point the judge's committee goes out and solicits . . . a contribution, that is something that's going to have to be factored in."

However, it appears from Justice Gableman's comments that he believes a lawful campaign contribution may never require recusal: "The idea that rules ought to be put in place which would hinder individual citizens from voting for candidates of their choosing by allowing lawful campaign contributions to block [that judge's] work on the bench . . . I think that this new draft is supportive of the individual citizen's right to vote for and support the judicial candidates of their choosing."

Likewise, Justice Roggensack appears to believe that mandatory recusal based on a campaign contribution cannot be required because she sees it as violative of a citizen's right to vote. See Wisconsin Supreme Court, Open Administrative Hearing on Rules Petitions 08-16, 08-25, 09-10, and 09-11, relating to amendments to the Code of Judicial Conduct's rules on recusal and campaign contributions, January 21, 2010 (available at http://www.wiseye.org/wisEye_programming/wisEye_VideoArchive_10.html).

[7] The Brennan Center for Justice is a non-partisan public policy and law institute at the New York University School of Law.

impartiality of Wisconsin's judiciary, which is, and has traditionally been, accountable to the law and the U.S. and Wisconsin Constitutions, not to special interests that inject millions of dollars into campaigns for judicial office in the Badger State."

¶14 Additionally, it expresses concern that the revised rules may be in direct conflict with the United States Supreme Court's recent ruling that due process requires a judge's recusal "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." Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263-64 (2009).

¶15 There can be no doubt that the actions of the majority have substantially undermined the public trust and confidence in the judiciary's impartiality. Yet, members of the majority appear to be unmoored from this reality. Instead they blame their critics, watchdog organizations, and the media for undermining the public's confidence in the integrity of the courts.[8]

[8] In response, one editorial observed that the majority's finger pointing is misdirected. It emphasized that it is the action of the majority that undermines the public's confidence, not the actions of watchdog organizations or the media. Editorial, Court Should Heed Words of Own Justice, Appleton Post Crescent, Jan. 21, 2010.

¶16 The perception that the majority's new rules subvert the integrity of the court has been widely disseminated in editorials around the state:

- Racine Journal Times: **"Supreme Court recusal rule is disgrace to state."** (November 2, 2009)
- Eau Claire Leader Telegram: **"High court in session; bring your wallet."** (November 1, 2009)
- Appleton Post-Crescent: **"Supreme Court rule robs public trust."** (November 9, 2009)
- Sheboygan Press: **"Is justice for sale in Wisconsin?"** (November 2, 2009)
- Capital Times: **"Once again, big money wins."** (November 4, 2009)
- Oshkosh Northwestern: **"Supreme Court fails to clean blemished image."** (October 30, 2009)
- Green Bay Press Gazette: **"Big money always finds a loophole."** (November 5, 2009)
- Milwaukee Journal Sentinel: **"A breach in reality. In a 4-3 vote, justices thumb their noses at the perception of connections between large campaign contributions and the court's integrity, objectivity and credibility."** (October 29, 2009)

II

¶17 The public reaction may be related in part to the ramrod manner by which these rules were adopted. The concurrence does not attempt to justify the majority's

unprecedented actions—perhaps because there is no acceptable justification.

¶18 On October 28, 2009, the majority voted to adopt the petitions of the Wisconsin Manufacturers & Commerce (WMC)[9] (09-10) and the Wisconsin Realtors Association, Inc. (the Realtors) (08-25), relating to campaign contributions and endorsements. The majority refused to allow for study, discussion, or further input. Instead, it voted to adopt the petitions verbatim—word-for-word as proposed by the special interest groups—without any comments.

> Chief Justice Abrahamson (stating the question): "Those in favor of the . . . substitute motion,[10] which is to adopt 8-25 and 9-10 verbatim, no comments,

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[9] The Wisconsin Democracy Campaign reports that WMC spent $2.2 million on the 2007 election and $1.8 million on the 2008 election. Wisconsin Democracy Campaign, Wisconsin Supreme Court Campaign Finance Summaries, http://wisdc.org/wdc_supreme_fin_summary.php.

[10] At the October 28, 2009, open administrative conference, Justice Crooks moved that the court appoint a commission to study the four recusal petitions and report back to the court no later than February 1, 2010. Justice Prosser offered a substitute motion to adopt the petitions of WMC and the Realtors without further study. See Wisconsin Supreme Court, Open Administrative Hearing on Rules Petitions 08-16, 08-25, 09-10, and 09-11, relating to amendments to the Code of Judicial Conduct's rules on recusal and campaign contributions, October 28, 2009 (available at http://www.wiseye.org/wisEye_programming/wisEye_VideoArchive_09.html).

correct? And deny 8-16 and 9-11.[11] I'll call the roll. Ann Walsh Bradley?

Justice Bradley: No.

Chief Justice Abrahamson: Pat Crooks?

Justice Crooks: No.

Chief Justice Abrahamson: Dave Prosser?

Justice Prosser: Yes.

Chief Justice Abrahamson: Pat Roggensack?

Justice Roggensack: Yes.

Chief Justice Abrahamson: Annette Ziegler?

Justice Ziegler: Yes.

Chief Justice Abrahamson: Mike Gableman?

Justice Gableman: Yes.

Chief Justice Abrahamson: I would vote no. The ayes have it. It is adopted.

¶19 Probably much to the embarrassment of the majority which had just adopted the petitions verbatim, the court was advised by letter dated November 24, 2009, from counsel for WMC

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[11] Although the majority voted to not add written comments at the October 28, 2009, administrative conference, Justice Prosser drafted written comments for the January 21, 2010, open administrative conference. Written comments are not adopted by this court, however, and Justice Prosser's comments have not been adopted by the majority here. As explained in the preamble to the Code of Judicial Conduct, "The rules of the Code of Judicial Conduct are authoritative. . . . The commentary is not intended as a statement of additional rules." SCR Ch. 60, Preamble.

Petition 08-16 was submitted by the League of Women Voters. Petition 09-11 was submitted by Retired Justice William A. Bablitch.

and the Realtors that there was a problem with adopting the two petitions word-for-word—the language in the petitions was inconsistent. "We write to note an inconsistency in the two rule petitions."[12]

¶20 WMC and the Realtors proposed new language that would resolve the inconsistency. At an open administrative conference on January 21, 2010, the majority voted to adopt the amended language—again, word-for-word as proposed by WMC and the Realtors. And again, without allowing for any further study, discussion, or input.

¶21 At the January 21, 2010, conference, Justice Crooks renewed his request that there be further study of the petitions. He also requested to place a hold on the vote so that the court could get input from the other elected judges across this state who are also affected by these petitions but who had not received notice of the administrative hearing or conferences that addressed the petitions. The request for a hold was not honored. Instead, the majority raced past several

[12] Letter from counsel for WMC and the Realtors (Nov. 24, 2009) (on file with the clerk of the Wisconsin Supreme Court).

off ramps to reach its desired destination of passing the petitions as proposed by the special interest groups.[13]

¶22 For the almost fifteen years that I have been on this court, there has never been a major rules petition that has been adopted without study, discussion, or further input.[14] Never, until now.

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[13] Some members of the majority appeared to attempt to obscure the authorship of the new rules by referring to "Justice Prosser's petition" at the January 21, 2010, open administrative conference. Justice Prosser, however, acknowledged that essentially, the changes he made to the WMC and Realtors' petitions affected four words in SCR 60.06(4). In one place, he inserted the phrase "or judge-elect." This phrase appeared in another place in the petition and was apparently inadvertently omitted. Additionally, he omitted the word "presiding." When asked whether, with the exception of those two changes, the text was verbatim the recommendation of WMC and the Realtors, he responded, "That's essentially correct." See Wisconsin Supreme Court, Open Administrative Hearing on Rules Petitions 08-16, 08-25, 09-10, and 09-11, relating to amendments to the Code of Judicial Conduct's rules on recusal and campaign contributions, January 21, 2010 (available at http://www.wiseye.org/wisEye_programming/wisEye_VideoArchive_10.html).

[14] Both the majority's refusal of further study and its promotion of soliciting and accepting campaign contributions from litigants with cases pending before the court are in stark contrast with this court's prior experience. In the past, we sought further study and appointed a Commission on Judicial Elections and Ethics, which we charged with recommending ethics provisions "addressing political and campaign activity of judges and candidates for judicial office." See Final Report of the Commission on Judicial Elections and Ethics 2 (1999), available at http://www.wicourts.gov/about/committees/docs/judeefinal.pdf.

¶23 It is unclear why the majority was in such a rush to pass these petitions. What is clear, however, is that without any study or discussion, and without input from elected judges at all levels across the state, we end up with rules that are not carefully worded and concepts that are not fully considered and tested.

¶24 That is why the Board of Governors of the State Bar of Wisconsin adopted a resolution requesting that the court submit the petitions for further study. That is likely why former Justices Wilcox, Geske, and Bablitch all supported a study, discussion, and further input on the petitions.[15] In fact, former Justice Bablitch warned that passing the petitions of the special interest groups verbatim and without further study and discussion "was one of the worst things that [the court] could do." Unfortunately for the institution of the court and the citizens of this state, the majority did not heed that warning.

III

The Commission was comprised of a bipartisan group of legislators, business leaders, labor interests, law professors, judges, and other community leaders. After study, discussion, and input from a cross section of Wisconsin citizens, the Commission recommended that judges and their committees be prohibited from soliciting and accepting campaign contributions from litigants with pending cases.

[15] Steven Elbow, Nasty Debate over Money in Court Races Shows Supreme Court's Political Divide, Capital Times, Dec. 17, 2009; Legally Speaking with Steven Walters: Judicial Recusals (Wisconsin Eye broadcast Nov. 24, 2009), available at http://www.wiseye.org/wisEye_programming/ARCHIVES-legallyspeaking.html.

¶25 We have long held that the adoption of a "strong code of ethics" is essential "to keep [our] own house in order so as to better assure the effective, fair and impartial administration of justice in our Wisconsin state courts." In re Hon. Charles E. Kading, 70 Wis. 2d 508, 524-25, 235 N.W.2d 409 (1975).

¶26 Indeed, strong recusal rules that preserve the public confidence in the judiciary are all the more essential now in light of a case that was decided by the United States Supreme Court on the very day the majority voted to adopt its new rules. In Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010), the Court determined that federal campaign laws prohibiting corporate independent expenditures unconstitutionally burden a corporation's right to political speech.

¶27 The Citizens United decision opens wide the potential floodgates of unlimited corporate campaign contributions in judicial elections. If campaign contributions are subject to less regulation (and therefore, more and more contributions are "lawful"), we should be adopting stronger standards for recusal rather than neutering our existing recusal rules.

¶28 I hope that those who have not yet had or taken the opportunity to weigh in on the issue of judicial recusal will do so now, and after further study consider petitioning the court for change. I urge the legislature to engage in further study of judicial recusal, as suggested by Justice Crooks in a recent

letter to the Joint Legislative Council.[16] If this court is unwilling or unable to keep its own house in order, perhaps it will require action by others to step in and assist in maintaining the integrity of the court and preserving the public trust and confidence that Wisconsin judges will be impartial.

¶29 Accordingly, I respectfully dissent.

¶30 I am authorized to state that Chief Justice SHIRLEY S. ABRAHAMSON and Justice N. PATRICK CROOKS join this dissent.

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[16] See Letter of Justice Crooks to the Co-Chairs of the Joint Legislative Council (Jan. 27, 2010), which urges the adoption of a new subsection to the current statute on judicial recusal: "I am writing to urge that the Joint Legislative Council consider the addition of a subsection to § 757.19(2) . . . . I suggest that the new subsection be patterned after 28 U.S.C. § 455(a), which sets forth an objective standard in regard to a judge's recusal." (on file with the clerk of the Wisconsin Supreme Court).

Section 28 U.S.C. § 455(a) states as follows: "Any justice, judge, or magistrate judge of the Unites States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."