Peg Lautenschlager: Op-ed misconstrues Supreme Court's ruling on judicial campaign cash

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Rick Esenberg's recent op-ed in the Milwaukee Journal Sentinel, "State Supreme Court was Right to Reject Change in Recusal Rules," argues that judges' campaign donors essentially have a right to have their cases heard by judges to whom they've contributed. He argues that recusal requirements triggered by campaign donations would interfere with donors' First Amendment speech rights. The op-ed praised the state's high court for rejecting even a public hearing on a petition from 56 retired judges, who wanted the court to revisit its current rules allowing judges to hear cases involving their biggest campaign funders.

Esenberg claims that, under the proposed rules, campaign contributors who "exercise the constitutional right to make a legal contribution" to judges would "pay a penalty" because those judges to whose campaigns they donated could not rule in the doner/litigants' cases.

This argument is a dramatic expansion of the free speech principles defined in cases like Citizens United and it misapplies and misconstrues U.S. Supreme Court precedent regarding conflicts and recusals articulated in cases like Caperton.

In 2009, the U.S. Supreme Court ruled in Caperton that the Due Process Clause was violated when a West Virginia Supreme Court justice refused to recuse himself in a case involving a coal company whose CEO independently spent $3 million to elect

him. The Court said that states could “adopt recusal standards more rigorous than due process requires.” It further stated that some situations, like the matter at bar, could require recusal even though no specific state recusal rules would apply. The Court held that common law principles of recusal would apply in such “extreme” cases. Never did the Court hold, as Esenberg states, that recusal is appropriate only in “extreme” cases.

Fundamental to our democracy is an independent and impartial judiciary. So important is this concept that our jurisprudence recognizes the need to avoid both actual and perceived conflicts of interest in our courts. Indeed, in Caperton and other cases, the U.S. Supreme Court acknowledged the validity of many state-promulgated recusal requirements—no different than those proposed by the 56 retired Wisconsin judges.

At a time when public confidence in our Wisconsin Supreme Court has been eroded by the role of dark money and outrageous campaign expenditures in its elections, the court missed an opportunity to reassure voters that its fidelity is to the citizens of our state and not its well-heeled donors.

— Lautenschlager chaired the Wisconsin Ethics Commission from 2016 to April 2017 and served as the Attorney General of Wisconsin from 2003 to 2007.