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Point of view

The Newby wink: Weighing effects of generous campaign donations and judicial gratitude

By Gene Nichol

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The constitutional pronouncements of the U.S. Supreme Court sometimes present remarkable, and even proximate, contradictions and inconsistencies. One of the more notable incongruities arises when comparing the 2009 decision in *Caperton v. Massey Coal* with the opinion, a year later, in *Citizens United v. FEC*.

In *Caperton*, the court ruled due process had been violated by a state supreme court justice's refusal to disqualify himself from hearing a case involving someone who had made over \$3 million in "independent" expenditures on behalf of the justice's election. The high court found that the litigant's "significant and disproportionate influence – coupled with the temporal relationship between the election and the pending case – offer a possible temptation to the average judge to lead him not to hold the balance ... clean and true." Sensible enough.

A few months later, in Citizens United, the same court invalidated restrictions on the use of corporate funds to make independent expenditures in electoral campaigns. There the judges held that “independent expenditure ceilings fail to serve any substantial government interest in stemming the reality or the appearance of corruption.” The “absence of prearrangement and coordination alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.” Say what?

So spending \$3 million independently will unacceptably “offer possible temptation to the average judge” to favor a litigant, but Sheldon Adelson’s \$20 million expenditure on Newt Gingrich’s behalf presents “no danger ... of improper commitments from the candidate”? Such are the mysteries, and horrors, of the Roberts court’s money and politics decisions.

The Caperton/Citizens United contradiction is more than just theoretical in North Carolina. Supreme Court Justice Paul Newby embodies it, literally.

Most will remember the 2012 Paul Newby-Sam Ervin race. As Election Day approached, Newby trailed Ervin significantly in the polls. Although judicial races are technically nonpartisan, Newby is a Republican and Ervin is a Democrat. Given that redistricting litigation was pending and with a 4-3 split on the court, both parties showed intense interest in the race’s outcome.

A super PAC called the North Carolina Judicial Coalition and a counterpart named, without irony, Justice For All NC sprung into action. Much of the funding came from the Republican State Leadership Committee in Washington. Folksy ads involving bloodhounds and banjo pickers pervasively appeared. Reportedly, about \$3 million in out of state money poured in to help Newby, with roughly \$300,000 for Ervin. The tide turned swiftly. Newby got 52 percent of the vote.

In various stages of the 2012 and 2013 redistricting litigation, plaintiffs challenging the Republican-drawn districts twice sought to force Justice Newby’s recusal. They asserted that the Washington-based Republican group, supporting Newby’s candidacy to the tune of \$1,165,000 during the election, was also heavily involved in the redistricting effort. Thus, “unless Newby recuses himself, he will rule on the validity of plans that were drawn, endorsed and embraced by the principal funder of a committee supporting his campaign for re-election.” Shades of Caperton.

Both Newby and the Republican-dominated N.C. Supreme Court denied the recusal requests without explanation. It’s what I think of as the Newby wink.

Is it really plausible to think Newby feels no “possible temptation to hold the balance” in favor of his generous Republican benefactors? Achieving, somehow, a state of perfect ingratitude? Ingratitude for his good fortune in re-securing the job that is likely the most important platform of his professional life and that he surely believes he’s ideally suited for. Must law be this purposefully blind?

Isn’t it more likely that Newby, or anyone in his position, feels that he couldn’t conceivably deny to his ample and outcome-determinative donors the thing they most singularly covet – Republican-leaning legislative and congressional districts? Can we even imagine the retribution Newby would face from his former friends if he were to cast a deciding vote for the Democrats? Do we think intense partisans invest this heavily in pursuit of a leveled electoral playing field? On what planet?

Four of the seven members of our high court will be elected, or re-elected, in November. Perhaps the partisan funders will not be as actively engaged this time around – the battle having been largely won. Perhaps some of our judicial candidates will more meaningfully distance their campaigns from those of the super PACs. But if we continue to accept cash register politics, we embrace the demoralizing deceptions that go with it. Will our new court have five members employing the Newby wink?

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