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A New, Uglier Era for Supreme Court Elections

By John Ruhl

No matter who wins the Supreme Court races this fall - this column was written before the September 19 primary election - it is the end of innocence for Washington Supreme Court elections. We have entered a new and uglier era.

Washington now has joined the ranks of other states in which Supreme Court races are shaped and heavily influenced - and often controlled - by major "independent expenditures," that is, money spent by entities other than the candidates' own campaigns.

Perhaps the most ominous sign of this new era is the invasion of big-money special-interest groups from other states, which has been accompanied by a sharp increase in so-called "attack ads" against judicial candidates.¹

For example, on August 23 an Alexandria, Virginia political action committee, calling itself "Americans Tired of Lawsuit Abuse WA PAC," registered with the Washington Public Disclosure Commission. As of September 13, it had filed interim reports indicating that it had spent \$357,500 for and against certain Supreme Court candidates. Approximately \$268,000 of that amount was devoted to negative advertising against one Supreme Court candidate.²

Similarly, as of mid-August, another PAC, "United for Washington," had reported collecting thousands of dollars from Phillip Morris USA, Inc. of Virginia; Wal-Mart Stores, Inc. of Arkansas; PHRMA of Washington, D.C.; and Tyson Foods, Inc. of Arkansas.³

One might wonder what motivates executives of foreign corporations and other faraway entities to "Unite for Washington" and invest hard-earned profits to enlighten Washington voters about their local judicial candidates. Regardless of one's response, this huge influx of out-of-

state money does not bode well for the future of judicial elections in this state.

Another disheartening sign of the new era is the proliferation of in-state PACs. One of the accompanying charts shows that as of September 12, a single organization, the Building Industry Association of Washington (BIAW), had funneled at least \$848,000 through at least two other ostensibly independent organizations to benefit certain Supreme Court campaigns. But for the use of the same address for all of the organizations, their ties to the BIAW and each other would be invisible to outsiders.⁴

The chart also illustrates another sign of this new era: the instant ascendance of "intermediary" (read "laundering") PACs, which receive large, round, lump sums from in-state and out-of-state sources, and then mete out the cash to other PACs, which in turn spend the money for and against judicial candidates. The process provides an onion-like layer of secrecy for the actual funding sources. The secrecy also is misleading. Voters who see or hear an ad on TV or radio are not told who are the "top five contributors" for the ad,⁵ but instead the ad merely announces that it has been paid for by a single entity with a plucky name such as "It's Time for a Change PAC."

In reaction to these PACs, opposing PACs have been formed. The second chart shows the 20 largest contributors to "Citizens to Uphold the Constitution," a Washington PAC organized by various labor unions, law firms and others. By early September, that group had raised more than \$550,000. There is no doubt that the final fundraising figures for that group will be substantially higher.

Almost all of this year's Supreme Court candidates are benefiting to some extent from PAC funds collected by and from these various coalitions comprising businesses, labor groups, environmental groups and attorneys. Unfortunately, that is not likely to change. Special-interest PAC money is a political reality that all viable Supreme Court candidates will have to reckon with from now on.

Recent studies show that a strong majority of voters believe that campaign contributions influence elected judges' decisions.⁶ If the public believes that money talks loudly to judges, and if Supreme Court candidates are swept into office on tidal waves of special-interest money, then the inevitable consequences will be a loss of public

confidence in the courts, and the consequent weakening of the courts' ability to act as a realistic check and balance on the other two branches of government.

Stating it another way, in this new era no future Supreme Court candidate (whether a challenger or an incumbent) will have any hope of running a successful campaign without courting the approval of these formidable special-interest "constituencies" - including out-of-state PACs - that dangle the prospect of six- and seven-figure independent expenditures.

Our nonpartisan, populist, judicial election system has been stood on its head. The name of the "It's Time for a Change" PAC is prophetic: It is indeed time for a change, but the change should involve re-examining the process for selecting our judges. n

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¹ A 2005 analysis by the Brennan Center and Justice at Stake shows that in 2004, 58 percent of the television attack ads in state Supreme Court campaigns nationwide were sponsored by outside groups. See "Washington State Supreme Court Races Getting Uglier," Justice at Stake Campaign, <http://www.justiceatstake.org>, September 11, 2006.

² Interim campaign contribution and spending figures are taken from www.votingforjudges.org, September 14, 2006.

³ Interim campaign contribution and spending figures are taken from www.votingforjudges.org, September 14, 2006.

⁴ For more details, see www.votingforjudges.org.

⁵ See RCW 42.17.510, RCW 42.17.020(43).

⁶ At the November 2005 Summit on Judicial Selection and Judicial Independence at Seattle University School of Law, Washington State University Professor David Brody presented figures indicating that approximately 80 percent of voters believe that elected judges' decisions are influenced by campaign contributions. His presentation is posted at <http://www.kcba.org/Archives/ScriptContent/KCBA/judicial/selection/summit.cfm>. Similarly, the Brennan Center at New York University Law School reported that a March 2004 nationwide survey of 1,204 American voters found that 71 percent believe that campaign

contributions from interest groups affect judges' courtroom decisions.
See <http://faircourts.org/files/ZogbyPollFactSheet.pdf>.