

The Selling of the Judiciary: Campaign Cash ‘in the Courtroom’

By DOROTHY SAMUELS, The New York Times 4/15/08

“We put cash in the courtrooms, and it’s just wrong,” Sandra Day O’Connor, the former Supreme Court justice, declared at the start of a conference in New York last week on a growing threat to judicial independence and integrity: the escalating millions that special interests are pouring into state judicial elections in an effort to buy favorable rulings.

The substance of her remarks was no surprise. Since retiring in 2006, Justice O’Connor has devoted herself to spreading the word about assaults on judicial independence and the bedrock principle of impartial justice — including from big-money state judicial campaigns. Still, it was startling to hear a former member of the nation’s highest court speak about the problem in such stark terms. No question, her alarm is well-founded.

Thirty-nine states elect at least some of their judges. On top of the inappropriate judicial involvement in partisan politics, recent years have seen the dawn of a grubby new era of multimillion-dollar campaigns for important state judgeships. They include 15- and 30-second attack ads, a staple of competitive races for top executive and legislative posts. These slugfests are largely underwritten by well-heeled interest groups — including insurance companies, tobacco firms, the building and health

care industries, unions and trial lawyers — that have seized upon judicial contests as a promising avenue for influence-peddling.

The implications for the nation’s justice system are enormous. About 95 percent of cases are handled by state courts rather than appointed federal judges, notes Justice Stephen Breyer, who appeared at the Fordham Law School conference with his former colleague. Experts expect that 2008 will be another banner year for raucous and expensive judicial races.

The perception that money is corrupting the courts would be damaging enough. But often, it seems, special interests are finding that buying up judges likely to side with them in big-dollar cases is a good investment — the real-life grist for John Grisham’s new fictional legal thriller, “The Appeal.”

Events this month in Wisconsin and West Virginia only deepen these concerns. On April 1, the first and only African-American member of the Wisconsin Supreme Court, Louis Butler, lost his seat after a nasty, racially charged campaign in which his opponent, Michael Gableman, was aided by a barrage of TV advertising, paid for by the state’s largest business lobby.

In West Virginia, meanwhile, the State Supreme Court’s handling of a case

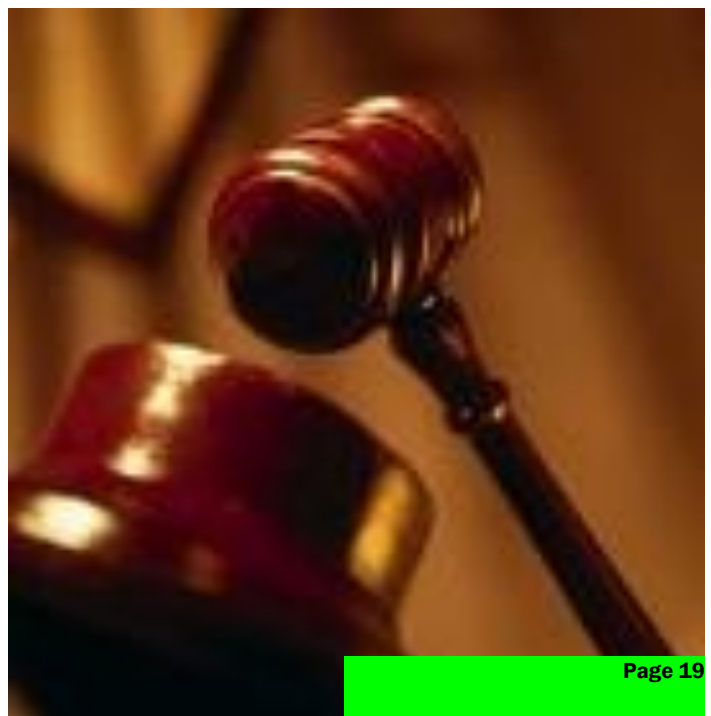
involving a large coal company, Massey Energy, took on a decidedly farcical flavor. For the second time, the appellate court threw out a \$50 million verdict against Massey.

The court decided to rehear the case after photographs publicly surfaced of its chief justice, Elliott Maynard, vacationing in Monte Carlo with Massey’s chief executive, Don Blankenship, in 2006, while the matter was pending in the Supreme Court. The chief justice disqualified himself from the rehearing. So did another justice, Larry Starcher, because he had publicly criticized Blankenship and his company. The 3-to-2 outcome in favor of Massey was unchanged from the first round, which might not have been noteworthy except that the deciding vote was cast once again by Justice Brent Benjamin, who declined to recuse himself despite owing his election to the court to more than \$3 million spent by Mr. Blankenship.

In response to such travesties, judicial reformers have stepped up their call for public financing and strict fundraising rules for state judicial contests or a switch to a nonelective merit selection system.

But with states in no rush to make these changes, a new report from the Brennan Center for Justice smartly focuses on an effective if less sweeping antidote that would be more achievable in the short-term: persuading jurisdictions to strengthen their recusal rules.

Surely special interests would be less inclined to invest so heavily in judicial elections if they knew the recipients of their largess likely would be barred from sitting on their cases.



In Justice Shift, Corporate Deals Replace Trials

ERIC LICHTBLAU, The New York Times (4/9/08)

WASHINGTON — In 2005, federal authorities concluded that a [Monsanto](#) consultant had visited the home of an Indonesian official and, with the approval of a senior company executive, handed over an envelope stuffed with hundred-dollar bills. The money was meant as a bribe to win looser environmental regulations for Monsanto's cotton crops, according to a court document. Monsanto was also caught concealing the bribe with fake invoices.

A few years earlier, in the age of Enron, these kinds of charges would probably have resulted in a criminal indictment. Instead, Monsanto was allowed to pay \$1 million and avoid criminal prosecution by entering into a monitoring agreement with the Justice Department.

In a major shift of policy, the Justice Department, once known for taking down giant corporations, including the accounting firm Arthur Andersen, has put off prosecuting more than 50 companies suspected of wrongdoing over the last three years.

Instead, many companies, from boutique outfits to immense corporations like [American Express](#), have avoided the cost and stigma of defending themselves against criminal charges with a so-called deferred prosecution agreement, which allows the government to collect fines and appoint an outside monitor to impose internal reforms without going through a trial. In many cases, the name of the monitor and the details of the agreement are kept secret.

Deferred prosecutions have become a favorite tool of the Bush administration. But some legal experts now wonder if the policy shift has led companies, in particular financial institutions now under investigation for their roles in the subprime mortgage debacle, to test the limits of corporate anti-fraud laws.

Firms have readily agreed to the deferred prosecutions, said Vikramaditya S. Khanna, a law professor at the [University of Michigan](#) who has studied their use, because "clearly it avoids a bigger headache for them."

Some lawyers suggest that companies may be willing to take more risks because they know that, if they are caught, the chances of getting a deferred prosecution are good. "Some companies may bear the risk" of legally questionable business practices if they believe they can cut a deal to defer their prosecution indefinitely, Mr. Khanna said.

Legal experts say the tactic may have sent the wrong signal to corporations — the promise, in effect, of a get-out-of-jail-free card. The growing use of deferred prosecutions also suggests one road map the Justice Department might follow in the subprime mortgage investigations.

Deferred prosecution agreements, or D.P.A.'s, have become controversial because of a medical supply company's agree-

ment to pay up to \$52 million to the consulting firm of [John Ashcroft](#), the former attorney general, as an outside monitor to avoid criminal prosecution. That agreement has prompted Congressional inquiries and calls for stricter guidelines.

Defenders of deferred prosecutions say that they have been too harshly criticized lately and that they play a crucial role in allowing the government to secure the cooperation of a company while avoiding the time, expense and uncertainty of a trial. The agreements, government officials say, also avoid the type of company-wide havoc seen most acutely in the case of Arthur Andersen, the accounting firm that was shuttered in 2002 after being indicted in the Enron scandal. The firm's collapse threw 28,000 employees out of work.

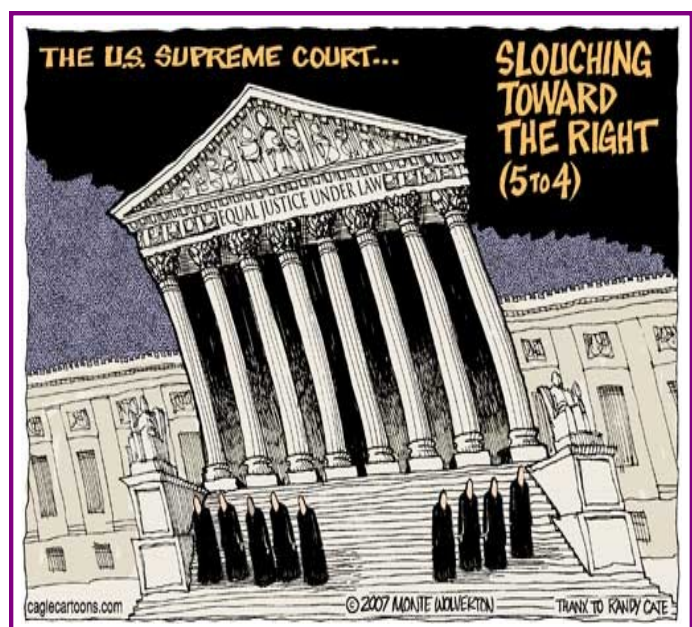
At a Congressional hearing last month, Mr. Ashcroft defended the agreements, saying that they avoided "destroying entire corporations" through criminal in-

dictments. "Prosecutors understand that a corporate indictment can be a corporate death sentence," he said. "A deferred prosecution can avoid the catastrophic collateral consequences and costs that are associated with corporate conviction."

Paul J. McNulty, a former deputy attorney general who put new guidelines in place in 2006 for corporate investigations at the Justice Department, said in an interview, "There's a fundamental misapprehension with D.P.A.'s to think that they're a break for the company."

With the imposition of fines and an outside monitor, "the reality is that for the government, it gets pretty much everything without the difficulty of going forward with an indictment," said Mr. McNulty, who is now in private practice. "I think companies are beginning to wonder whether they ought to fight more, because they are pretty burdensome."

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In this age of corporate rule, companies are extended far greater privileges than are individuals.

In 2007, instead of prosecuting companies, the Justice Department cut juicy deferred deals with 35 companies for crimes ranging from obscenity and illegal environmental violations to Medicare/Medicaid fraud and illegal kickbacks.

In these deals, companies generally must acknowledge wrongdoing but don't have to admit guilt. And, here's the kicker... in two or three years, the charges are permanently dismissed.

But critics of the agreements question that assertion. Charles Intriago, a former federal prosecutor in Miami who specializes in money-laundering issues, said that huge penalties, like the \$65 million fine for American Express Bank International in 2007, were “peanuts” compared with the damage posed by a criminal conviction. The company was accused of failing to enact internal controls to guard against laundering of drug money and other reporting problems.

The agreements were once rare, but their use has skyrocketed in the current administration, with 35 deals last year alone by the Justice Department, lawyers who follow the trend said. Banks, financial service companies and auditors have frequently entered into such agreements, including recent ones involving [Merrill Lynch](#), the [Bank of New York](#), AmSouth Bank, KPMG and others. Beyond financial crimes, deferred agreements have been used in lieu of prosecuting companies — though not individuals — for export control violations, obscenity violations, [Medicare](#) and [Medicaid](#) fraud, kickbacks and environmental violations.

In general, such agreements result in companies acknowledging wrongdoing by not contesting criminal charges, but without formally admitting guilt. Most agreements end after two or three years with the charges permanently dismissed.

Monsanto, for example, while not admitting guilt, agreed to abstain from further violations of bribery

laws. In an e-mail message, Lori Fisher, a spokeswoman, said that Monsanto had cooperated with the Justice Department and fully complied with the agreement, leading to deferred charges being permanently dismissed in early March.

The trend has led to increased speculation about how the Justice Department might use the agreements in investigations against financial companies in the mortgage lending scandal, which has become a top law enforcement priority for the department as the economy has withered.

The [Federal Bureau of Investigation](#) has 17 open inquiries into accusations of corporate fraud in connection with the subprime scandal, and Neil Power, who leads the bureau's economics crime unit, said in an interview that the number was certain to grow. The F.B.I. has publicly identified only one target — the Doral Financial Corporation, a mortgage company based in Puerto Rico whose former treasurer has already been indicted — but major companies like [Countrywide Financial](#), once the nation's biggest mortgage lender, have also been reported to be under criminal investigation.

Mr. Power said the investigations were a reflection of the “environment of greed” that allowed companies to package mortgages into securities they sold to investors without sufficient documentation of the borrower's ability to repay. One line of criminal inquiry focuses on whether bond companies gave accurate information to investors.

“What we're looking at,” he said, “is the fact that they may be performing accounting fraud.”

Justice Department officials would not discuss the role that deferred prosecution agreements may play in their ultimate handling of the mortgage investigations. One official said it was “way too early” to begin speculating about such possibilities.

But the prospect already has some experts in the field worried.

Michael McDonald, a former [Internal Revenue Service](#) investigator in Miami who is a private consultant and has given seminars on deferred prosecutions, said such deals “should not be on the board” in the subprime mortgage investigations.

“In light of what this did to our economy, people shouldn't just be able to write a check and walk away,” Mr. McDonald said. “People should be prosecuted for it and go to jail.”

Timothy Dickinson, a lawyer in Washington who was the outside monitor for Monsanto, agreed. Corporate lenders caught up in the mortgage scandals should not assume they will be given the chance for a deferred prosecution, Mr. Dickinson said, and the Justice Department should “insist on a guilty plea” rather than offering a deal.

“It's a tool that will remain to be used by prosecutors in appropriate circumstances, but not every circumstance,” he said. “It depends how egregious the conduct is.”