

**Campaign Support, Conflicts of Interest, and Judicial Impartiality:
Can the Legitimacy of Courts Be Rescued by Recusals?***

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ABSTRACT

Many legal scholars and observers perceive elected state courts in the U.S. as under siege by the politicization of judicial elections – by candidates for judicial office making policy pronouncements and promises, using ads attacking their opponents (often scurrilously), and, most important, by accepting campaign contributions and support from organizations litigating before the very judges these organizations helped elect. Since no form of political capital is more valuable to courts than institutional legitimacy, the hypothesis that campaign activities undermine judicial legitimacy must be taken very seriously.

Our purpose in this paper is to investigate citizen attitudes toward the impartiality and legitimacy of courts. We focus on the residents of West Virginia, because that state has recently been a battleground for intense conflict over campaign support and perceived conflicts of interest and loss of impartiality. We employ an experimental vignette embedded within a representative sample of West Virginians to test hypotheses about several factors that might affect perceived judicial impartiality: (1) campaign contributions and support; (2) the size of such support; (3) whether the judge accused of holding a conflict of interest withdraws from the case; and (4A) if not, whether that judge's vote was crucial to the outcome, and (4B) if so, whether the party providing the campaign support wins or loses the lawsuit. Our theoretical objectives in this paper are to assess the determinants of citizens' views of judicial impartiality, following earlier research on how campaigning affects such perceptions. More practically, we test the hypothesis that recusals can rehabilitate a judge and/or court from perceptions of a conflict of interest. Because this research is conducted within a context in which the conflict-of-interest dispute is highly realistic and salient to the constituents of the court, we are entitled to uncommon confidence in both the external and internal validity of our findings. In almost every respect, our findings are not as expected. Perhaps most important, contributions offered but rejected have similar effects to contributions offered and accepted, and, while recusal can rehabilitate a court/judge to some degree, the effect of recusal is not to restore completely the impartiality and legitimacy of the institution. The processes by which citizens form and update their opinions of judges and courts are complicated, but seem to involve pre-existing attitudes, expectations of judges, and perceptions of contextual factors.

For the elected high courts of the American states, the issue of the relationship between candidates for judicial office and campaign contributions from litigants and groups is a matter of great concern. The specific problem is whether campaign contributions by litigants and groups create the appearance of bias and partiality, thereby undermining the institutional legitimacy of courts. Campaign contributions may foster the appearance (at least) of a *quid pro quo* relationship between the donor and the recipient; that relationship makes fair and impartial decision making seem to be impossible; thereby undermining legitimacy and support. Of course, these concerns about campaign contributions attach to all political offices, not just the judiciary. Yet, the problem is especially pungent for courts because decisions are made in individual cases by individual judges, and because courts are unusually reliant upon their institutional legitimacy as their principal store of political capital.

Two complicating factors exacerbate this problem of contributions and judicial legitimacy. First, even if campaign contributions to candidates can be controlled by public policy, regulation of third-party involvement in judicial elections seems nearly impossible under the existing constitutional regime. Second, the presumed solution to conflicts of interest – the conflicted judge recusing¹ from the case – turns out to be voluntary and discretionary under virtually all circumstances. If a judge with a seeming conflict of interest does not recuse, for whatever reason, few alternatives are available.

Moreover, no research of which we are aware addresses the question of whether recusals successfully rehabilitate the judgment in the instant case, the judge who recused, and/or the institution itself. Do citizens accept that the public withdrawal of a judge from a case renders the votes of the remaining judges as fair and impartial? Do citizens believe that a judge with an obvious and acknowledged conflict of interest can be fair and impartial in other cases in which the conflict is not obvious? And do recusals taint an entire court, especially if recusals become commonplace and

¹To recuse is “to withdraw from a position of judging so as to avoid any semblance of partiality or bias.” <http://dictionary.reference.com/browse/recusing> [accessed 2/5/2009].

widespread among the members of a court? The traditional assumption is that conflicts of interests can be neutralized by recusals, and that such recusals have no lasting debilitating effects on the decision, the judges, or the court. We know of no empirical literature, however, buttressing those assumptions.

In the scheme of judicial politics, recusals may seem to be a small issue. Campaign contributions are not. Although the literature is certainly fragmentary, a handful of recent studies has demonstrated the quite negative consequences of campaign contributions in general for the institutional legitimacy of courts (e.g., Gibson 2008a, 2008b, 2009). The American people seem not to be bothered by policy talk and even policy promises by judicial candidates, nor by the use of advertisements attacking opponents. But campaign contributions are another matter. *Without* arguing that the issue is peculiar to the judiciary, a strong case can be made that the most alarming threats to perceived impartiality and fairness are the contributions and support given to candidates for judicial offices by groups and those who litigate before the courts they seek to shape.

From a more theoretical vantage, the campaign contributions and support crisis presents a fecund opportunity for understanding how citizens form their impressions of the political and legal institution that govern them. Much is known about judicial legitimacy in general (e.g., see the voluminous writings of Gibson and Caldeira, as in their 2009a book), but little is known about how citizens update their views in response to judicial decisions and controversies.² Indeed, extant research on citizen attitudes toward courts is overwhelmingly static in design; the malleability of attitudes is rarely investigated.

The purpose of this paper is therefore to determine how citizen perceptions of judicial

²An exception to this assertion concerns the literature on public reactions to *Bush v. Gore*. In a comparison of data from a survey conducted at the height of the controversy with survey data from 1995 and 1987, Gibson, Caldeira, and Spence (2003a) found no evidence whatsoever that the court's legitimacy took a dip owing to its decision. Other scholars report similar findings; for instance, Price and Romantan (2004, 953, emphasis added) draw the following conclusion from their research: "On the whole our findings are consistent with the hypothesis that the election — even with the vituperative disputes in its wake — served to *boost* public attachment to American political institutions." Others (e.g., Yates and Whitford 2002, Kritzer 2001, Gillman 2001, and Nicholson and Howard 2003) reach a similar conclusion.

impartiality and fairness are formed and updated. The context for the analysis is that of an experiment embedded within a survey of a representative sample of the residents of West Virginia, conducted in 2009. Employing the methodology of experimental vignettes (short stories) incorporated within a representative sample, this study profits substantially from both internal validity (causal inference) and external validity (generalizability). The experiment abstracts from and manipulates aspects of an actual dispute over judicial impartiality in the West Virginia Supreme Court of Appeal. Centering on *Caperton v. Massey* (2009), the lawsuit concerns whether a judge should be forced to withdraw from deciding a case involving a party that expended considerable resources in getting that judge elected to the bench. By stylizing that case as a formal experiment, we are able to examine how different aspects of the controversy affect citizens' judgments of fairness and impartiality. We also investigate the conditional effects on the experiment, testing hypotheses about how the hypotheses perform under conditions of knowledge of the actual case, pre-existing attitudes toward the West Virginia Supreme Court, and other factors. The most general conclusion from our analysis is that perceptions of conflicts of interest are not as simple as they might seem, and that recusal is only a weak palliative for conflicts when perceived. We begin by situating this study in the literatures on campaigns and the legitimacy of courts.

Campaign Activity and the Legitimacy of Courts

Legions of commentators complain about the impact of campaign activity on the perceived impartiality and hence legitimacy of elected state courts.³ Few of these complaints, however, cite empirical evidence

³For instance, Iyengar (2002, 697) opines that: "The spread of negative campaigning in judicial races is likely to have adverse consequences for the court system. The motives of judicial candidates will be cast into doubt, and public esteem for the judiciary will suffer. Not only will candidates for judicial office be equated with ordinary politicians, but the impartiality, independence, and professionalism of the judiciary will also be called into question. Large-scale advertising in state judicial elections will further politicize state courts in the eyes of the public."

because practically no such evidence exists. Even the research on campaign effects on citizen attitudes in other institutional contexts has little to say about this issue since legitimacy is rarely one of the consequences receiving scholarly attention.⁴

Indeed, most research testing Legitimacy Theory⁵ hypotheses is static, making it difficult to determine how campaign activities affect popular attitudes (for an exception see Gibson et al. 2008). Conversely, the limited extant research adopting a dynamic framework largely ignores campaign activity, either because it focuses on federal courts or because it was conducted in an era before judicial campaigns became politically significant. For example, scholars have analyzed aggregate time series (e.g., Caldeira 1986; Marshall 1989; Mondak and Smithey 1997); generational or cohort change (e.g., Gibson and Caldeira 1992); change in response to major court decisions (Gibson, Caldeira, and Spence 2003a; Franklin and Kosaki 1989; Kritzer 2001); a few true panel studies have been conducted (e.g., Murphy and Tanenhaus 1990; Hoekstra 2000, 2003); some recent work has tried to develop a formal model of opinion change (e.g., Mondak and Smithey 1997); and of course several scholars have attempted to induce change in the experimental laboratory (most notably, Mondak – e.g., 1993, and Hoekstra 1995). Unfortunately, many of these efforts are seriously hampered by the lack of valid measures of court legitimacy extending over time (see Gibson, Caldeira, and Spence 2003b on the deficiencies of the readily available "confidence" measure), and by research designs that do not allow the assessment of individual-level change in attitudes. Extant theory and data sources are simply not up to the task of providing many useful insights into how legitimacy is formed or acquired and how it is reinforced or eroded. Much more research, especially based on longitudinal data, is essential. Many fear that campaign activities are an important source of change in citizen attitudes, but not much rigorous

⁴Instead, researchers are more likely to consider vote intentions and perceptions of candidates and parties. For an exception, focusing on trust in government, see Geer 2006, Chapter 7.

⁵For an exposition of legitimacy theory see Gibson and Caldeira 2009a, and Tyler 2006.

analysis of this hypothesis has been reported.

Can Campaign Activity Change Citizens' Views of Judicial Impartiality and the Legitimacy of Courts?

Precious few studies have investigated the question that defines this section of this paper. Indeed, so far as we are aware, only a handful of studies has ever addressed campaign effects with rigorous data. Those studies have generated a mix of findings, including some disconcerting ones.

Gibson and Caldeira (2006) examined the impact of the ad campaigns mounted in support of or opposition to the nomination of Samuel Alito to the U.S. Supreme Court. Perhaps the most important finding of that research is that the campaigns by interest groups favoring and opposing the confirmation of Alito seemed to have undermined the legitimacy of the Court itself. The campaigns were politicized and taught the lesson that the Court is just another political institution, and as such, is not worthy of high esteem. Since that study is based on a three-wave panel design, allowing the measurement of change in attitudes toward the Supreme Court, its findings are uncommonly persuasive.

On the other hand, other research has shown that public attitudes toward the U.S. Supreme Court are remarkably resistant to alteration by the decisions of the Court. We know, for instance, that the Court's controversial ruling in *Bush v. Gore* did not undermine the legitimacy of the institution (Gibson, Caldeira, and Spence 2003a, Kritzer 2001, Nicholson and Howard 2003, and Yates and Whitford 2002); indeed, it may have even enhanced it (Gibson 2007). Although not based on panel data, that research suggests that even controversial decisions need not necessarily detract from the legitimacy of the U.S. Supreme Court.

Of course, the entire question of whether studies of attitudes toward the U.S. Supreme Court can

be generalized to the state judiciaries is open.⁶ State courts of last resort are obviously far less salient than the U.S. Supreme Court, with the likely consequence that institutional attitudes at the state level may be more malleable. It is simply unclear whether findings drawn from research on the U.S. Supreme Court apply to the state courts. Perhaps campaign activities uniquely shape state court attitudes.

One study of campaign activity in state court races is relevant to the question of whether judicial campaigns undermine legitimacy. In a recent article, Gibson (2008a) utilizes an experimental "vignette" that exposes the respondents to different types of campaign activities, including policy speech (i.e., in the post-*Republican Party of Minnesota v. White* era). His analysis indicates that the alarmists are most likely wrong in their concern about judicial legitimacy being undermined. When citizens hear issue-based speech from candidates for judicial office, court legitimacy does not suffer. It seems that many Americans are not at all uncomfortable when candidates for the bench tell them how they feel about the sort of socio-political issues coming before courts these days. Policy talk in particular does not undermine institutional legitimacy.

Gibson's research indicates that policy speech during campaigns may not be damaging to institutional legitimacy. However, that research also found that the receipt of campaign contributions can threaten legitimacy. Contributions to candidates for judicial office imply for many a conflict of interest, even a quid pro quo relationship between the donor and the judge, which undermines perceived impartiality and legitimacy. These conclusions from Kentucky have been subsequently replicated in a national survey (see Gibson 2009). But it is important to note that there is nothing distinctive about the judiciary on this score: Gibson finds that campaign contributions to candidates for the state legislature also imply a conflict of interest and therefore can detract from the legitimacy of legislatures as well.

⁶Although scholars typically recognize the importance of state courts as makers of public policy, only a handful of studies of the legitimacy of these courts exists – see for examples, Walker 1977, Lehne and Reynolds 1978, Fagan 1981, Flanagan, McGarrell, and Brown 1985, Olsen and Huth 1998, Wenzel, Bowler, and Lanoue 2003, Overby et al. 2004, Benesh 2006, and Cann and Yates (forthcoming).

The experiment also reveals that attack ads undermine judicial and legislative legitimacy. The effect is not as great as that observed for campaign contributions, but citizens exposed to such negative advertisements during campaigns extend less legitimacy to the political and legal institutions involved.

Thus, as far as threats to the perceived impartiality and legitimacy of courts are concerned, campaign contributions are the culprit.⁷ And it should be noted that this conclusion applies with equal force to courts and legislatures, so little is unique about the judiciary.

Theory: Individual Differences

How can we understand the variability in the judgments citizens reach about whether judges can make fair and impartial decisions? Although a full-blown theory has not been developed yet, we believe we understand some of the basics of the process.

Citizens' assessments of institutions begin with the expectations they hold of those institutions and their incumbents, and citizens vary in the nature of the expectations they embrace (e.g., Gibson 2009b). For example, one's assessment of the performance of President Bush is contingent upon whether one expects that the president will take all necessary actions – without regard for strict legality – to protect the safety of the nation. Others, however, may expect the president to conduct all of his actions strictly with regard to what the president is legally authorized to do. Expectations may come from many sources, including social learning. With regard to the judiciary, many Americans seem to learn that, although the judiciary is one of the three branches of government, it is in some sense different from the

⁷We find no shortage of interest groups complaining about the ubiquity of campaign contributions. Rarer are those who acknowledge salutary effects of such contributions. Hall and Bonneau (2007), for instance, argue that campaign spending has the valuable effect of providing voters more information about judicial candidates, thereby increasing the number of voters who actually cast their ballots in judicial races (e.g., roll-off is reduced). They further speculate that institutional legitimacy may be enhanced because elections provide voters “with a greater sense of ownership in the outcomes of these races.” See Gibson et al. 2008 for evidence in support of this speculation. At the same time, however, there is little reason to expect that all actors understand and react to campaign contributions in the same fashion.

other branches. This makes expectations of judges distinctive, for at least some citizens.

The performance of institutions is judged according to the expectations of the citizen. The satisfaction of expectations over time gives rise to a more general loyalty to the institution. Just as with interpersonal friendships, citizens may come to trust an institution, to be willing to extend the benefit of the doubt to it. Some refer to this as the development of a “running tally” (e.g., Taber, Glather, and Lodge 2001), which suggests a process of incrementing and decrement some sort of favorability counter according to experience. The key point here is that these orientations toward an institution represent the accumulated residue of past experiences and therefore are to a considerable degree stable, at least for most citizens.

Loyalty toward an institution, in turn, frames how citizens evaluate the future performance of the institution – these general commitments to the institution affect how citizens perceive and judge individual actions and decisions (e.g., Gibson and Caldeira 2009b).⁸ Each new opportunity for updating attitudes is therefore twice dependent upon existing orientations toward the institution: First, in the sense of framing processes, and second in the sense of incrementalism. New experiences are therefore neither judged independently of the past, nor uniformly by different citizens.

It is easy to see why Easton (1975) refers to this sort of institutional support as a reservoir of goodwill, and also why such a reservoir is crucial to institutional efficacy. Institutions that must please citizens with every encounter are institutions with limited degrees of freedom and uncertain stability. All constituents of an institution cannot always be pleased; there are winners and losers in all policy debates, and, on occasion, institutions must adopt positions that are unwelcomed even by the majority of the citizenry. This is especially true of courts, which are tasked in the American system with a counter-majoritarian function. Without some degree of loyalty toward the institution, no means of cushioning the

⁸Extant research on framing effects is large and includes: Druckman (2004), Entman (2004) and Chong and Druckman (2007a). For a review of the literature, see Chong and Druckman (2007b).

impact of adverse decisions and actions is available.

According to this theory, the expectations citizens hold of courts interact with both perceptions of events and decisions and with pre-existing institutional loyalty. Applying this theory to individual events, cases, or decisions, citizens' pre-existing attitudes toward courts determine in part their perceptions of reality. In order to arrive at a judgment, these perceptions are juxtaposed with expectations. Whether a particular judicial behavior constitutes some sort of conflict of interest that undermines the expected process of decision making can only be assessed by knowing something about the behavior, the expectations a citizen holds, and the pre-existing level of support the individual extends to the institution.

Thus, this theory posits that pre-existing attitudes interact with contextual factors in determining citizens' perceptions of whether judges' actions are fair and impartial. Contextual factors can be readily modeled via experimental vignettes.

The Experimental Vignette and Its Associated Hypotheses

We have attempted to model the contextual elements of the campaign contribution controversy within an experimental vignette embedded within a representative survey.⁹ We begin with a discussion of the methodological desiderata associated with constructing the vignettes.

Realism and Experimental Vignettes

The vignette we employ in this research is modeled upon the dispute in West Virginia over whether

⁹ Vignettes are a particularly useful means of incorporating the context of judicial campaigns within survey research. These short stories can reveal processes of reasoning perhaps not even directly accessible to the respondents themselves (Robinson and Darley 1998, 417) and have been used widely in the past (e.g., Gibson and Gouws 1999, Gibson 2008a, 2009a). For the purposes of the questions addressed in this paper, experimental vignettes—especially when embedded in representative surveys—provide an optimal methodology (on experimentation in political science, see Kinder and Palfrey 1993).

Justice Brent Benjamin ought to recuse himself from deciding a case in which a private individual associated with one of the parties (Don L. Blankenship, the CEO of A. T. Massey Coal Co., but acting in his private capacity) spent a great deal of money (more than \$3 million) in an effort (successful) to get Benjamin elected to the West Virginia Court of Appeals. An important advantage of using the vignette methodology is that the context of a dispute can be disassembled and investigated individually through manipulations of elements of the vignette. For example, one manipulation in this experiment concerns whether the judge recuses himself (yes or no). In this fashion, one can test hypotheses about the degree to which various factors influence assessments of the impartiality of judges and the legitimacy of courts.

In order for a vignette to be meaningful to respondents (which is sometimes called mundane realism¹⁰), the stories must incorporate some degree of realism (see Druckman and Lupia 2006). Grounding the vignettes in actual events provides verisimilitude, therefore increasing the chances of reliable and meaningful replies from the respondents. To ask questions about a totally fanciful set of circumstances (or, worse, about obvious counter-factuals) is unlikely to elicit meaningful replies from survey respondents.

At the same time, too much realism in the vignettes is worrisome because the stories may stimulate respondents – or, worse, some respondents – to remember real-world events and incorporate those into their responses. In this sense, the investigators can lose control over the stimuli (see Gaines, Kuklinski, and Quirk 2006 for a discussion of this and other issues involved in experimentation). Of course, there is always a tradeoff involved: As Gaines, Kuklinski, and Quirk put it (2006, 12): “Put simply, either there is a likelihood of contamination from real-world experience or the survey experiment explores a nonexistent or politically irrelevant phenomenon.”

¹⁰Aronson et al. (1990) distinguish between experimental realism (the content of the experiment being realistic to the subjects so that they take the task seriously) and mundane realism (the similarity of the experimental context and stimuli to events likely to occur in the real world — in short, verisimilitude). Because the issue of campaign finance is quite salient to the American people, this experiment has a great deal of both types of realism.

We have unabashedly cast our lot in this experiment with verisimilitude and therefore model the vignette after the actual conflict. Some of the facts of the case are altered, including the name of the judge, the names of the companies involved in the litigation, and the size of the judgment against the company appealing the lower court decision. And, of course, some of the “facts” presented in the vignette are directly at odds with the actual case – for example, in one version of the vignette, Judge Anderson does in fact recuse. Finally, after presenting the experimental findings themselves, we also report the results of controlling for the respondent’s awareness of the actual dispute, as well as other conditional variables. Because those aware and not aware of the actual controversy do not differ in their reactions to the vignette (see the analysis below), the experimental results warrant considerable confidence.

The Dependent Variable and Hypotheses

The dependent variable for our analyses is whether the respondent believes that the recipient of the campaign support¹¹ can serve as a fair and impartial judge and whether the Supreme Court itself is a legitimate institution. Our most general hypothesis is that perceptions of fairness, impartiality, and legitimacy are influenced by the actions of supporters and judges in instances in which there is at least the appearance of a conflict of interest brought about by campaign support. The factors we hypothesize will influence citizens’ perceptions follow.

Type of Campaign Support. From the point-of-view of constitutional and statutory law, vast differences exist between independent expenditures in campaigns and direct campaign contributions. The former are more difficult to regulate; the latter, less difficult. We opened the vignette with the following assertion:

¹¹In the actual dispute, CEO Massey provided minimal direct contributions to Judge Benjamin’s campaign. The issue of recusal concerns not so much the direct contributions as the money Massey spent as an independent organization (“And For the Sake of the Kids”). In the experiment, we manipulate the nature of the contribution. In general, we will use the term “support” to refer to contributions and independent expenditures on behalf of helping a candidate win an election.

“A few years ago, Justice Anderson was elected to the West Virginia Supreme Court by the voters of West Virginia. The Court is located in Charleston.” The respondents were then randomly assigned to one of three campaign support conditions:

1A. In that election, Anderson was supported by the head of the Acme Insurance Company, who gave campaign contributions which allowed Anderson to pay for TV ads urging voters to elect him.

1B. In that election, Anderson was supported by the head of the Acme Insurance Company, who independently paid for TV ads urging voters to elect Justice Anderson. However, Anderson had nothing to do with the ads and did not directly receive campaign contributions from the head of the company.

1C. In that election, Anderson was supported by the head of the Acme Insurance Company, who offered to give him campaign contributions so that Justice Anderson could pay for TV ads urging voters to elect him. However, Justice Anderson decided NOT to accept the campaign contributions from the head of the company.

We hypothesize that the conflict of interest – and hence perceptions of partiality and illegitimacy – is greatest with direct campaign contributions, least when the judge explicitly rejects the contribution, with the independent campaign support condition lying between the two extremes.

Size of the Contribution. Much has been in the Massey case of the size of Massey’s support for Judge Benjamin. We are doubtful that the size of the contribution has much impact on citizen perceptions¹², but nonetheless incorporated the following manipulation within the vignette:

2A. The [support/contributions] [provided/offered] by the head of Acme Insurance

¹²The interest group Justice at Stake conducted a nationally representative “Financial Limit Survey” of those claiming to be registered voters from February 12-15, 2009. We purchased a copy of the data set and have conducted our own analysis of the survey results. Their data also indicate that the size of the contribution has little influence on citizens’ perceptions of conflicts of interest.

[was/were] relatively small and therefore unlikely to have had much impact on the outcome of the election.

2B. The [support/contributions] [provided/offered] by the head of Acme Insurance [was/were] quite large and therefore likely to have had some impact on the outcome of the election.

Thus, rather than focusing on a particular dollar amount, we framed this variable in terms of the likelihood the campaign support would influence the outcome of the election. We hypothesize both a direct effect of the likely efficacy of the support as well as an interaction with the nature of the support.¹³

Recusal. We modeled the crucial process of recusal with the following elements of the vignette:

3A. As a result of the [support/contributions] by the head of Acme, Justice Anderson was asked to step aside and not be involved in the Court's decision on this case. Justice Anderson agreed, and did not participate or vote in the case.

3B. As a result of the [support/contributions] by the head of Acme, Justice Anderson was asked to step aside and not be involved in the Court's decision on this case. Justice Anderson disagreed and cast his vote on the case anyway.

Of course, we hypothesize that the effects of recusal are dependent upon the degree to which a conflict of interest is perceived to exist by virtue of the campaign support provided by the head of the company. The simple hypothesis is that where a conflict of interest exists by virtue of campaign contributions, recusal will rescue the legitimacy of the court.¹⁴ Numerous interactive and conditional hypotheses are explored below.

¹³As will become clear below, we test for a wide variety of interactive effects among the manipulations.

¹⁴On the basis of a belief in the accuracy of this hypothesis, interest groups such as the Brennan Center at NYU are promoting strict recusal standards. See, for example, Sample, Pozen, and Young 2008.

Case Outcomes. We also hypothesize that the impartiality of the decision and the legitimacy of the institution are little affected by who wins the lawsuit. This is a classic procedural justice hypothesis (e.g., Tyler and Huo 2002) in the sense that legitimacy is hypothesized to be dependent upon processes of decision making rather than outcomes. As in reality, this manipulation is dependent on what happens in the recusal condition. If the judge withdraws from the case, the respondents are told one of the following stories:

4A.1. Without Anderson participating, the remaining justices on the West Virginia Supreme Court decided that Acme must pay forty million dollars to the other company.

4A.2. Without Anderson participating, the remaining justices on the West Virginia Supreme Court decided that Acme does not have to pay forty million dollars to Zenith.

We hypothesize that who wins has no impact on perceived impartiality and legitimacy.

Under the condition in which the judge does not recuse, we assigned the respondents to one of the following vignette versions concerning whether the judge's vote was dispositive in the case:

4B.1. The Court's decision is that Acme Insurance does not have to pay forty million dollars to Zenith. Justice Anderson cast the deciding vote on the decision.

4B.2. The Court's decision is that Acme Insurance does not have to pay forty million dollars to Zenith. Justice Anderson's vote on the decision was not crucial since nearly all of the other justices voted that the Acme does not have to pay Zenith.

The obvious hypothesis is that if the suspect judge's vote is determinative of the outcome, that outcome will be tainted and perceived impartiality and institutional legitimacy will suffer.

Summary. The experiment is therefore a 3x2x2x2 design, with respondents assigned to hear one of 24 vignette versions. The version hypothesized to generate the highest level of illegitimacy is the one in

which large campaign contributions are given, but the judge does not recuse, and his vote is dispositive¹⁵:

A few years ago, Justice Anderson was elected to the West Virginia Supreme Court by the voters of West Virginia. The Court is located in Charleston. In that election, Anderson was supported by the head of the Acme Insurance Company, who gave campaign contributions which allowed Anderson to pay for TV ads urging voters to elect him. The contributions provided by the head of Acme Insurance were quite large and therefore likely to have had some impact on the outcome of the election. Some years after that election, a lawsuit between the Acme and Zenith insurance companies came before the West Virginia Supreme Court. Acme Insurance was asking the Court to decide that it did not have to pay Zenith forty million dollars. As a result of the contributions by the head of Acme, Justice Anderson was asked to step aside and not be involved in the Court's decision on this case. Justice Anderson disagreed and cast his vote on the case anyway. The Court's decision is that Acme Insurance does not have to pay forty million dollars to Zenith.

Justice Anderson cast the deciding vote on the decision.

The version hypothesized to be least threatening to judicial legitimacy is:

A few years ago, Justice Anderson was elected to the West Virginia Supreme Court by the voters of West Virginia. The Court is located in Charleston. In that election, Anderson was supported by the head of the Acme Insurance Company, who offered to give him campaign contributions so that Justice Anderson could pay for TV ads urging voters to elect him. However, Justice Anderson decided NOT to accept the campaign contributions from the head of the company. The contributions offered by the head of Acme Insurance were relatively small and therefore unlikely to have had much impact on the outcome of the election. Some years after that election, a lawsuit between the Acme and Zenith insurance companies came before the West Virginia Supreme

¹⁵We consider below the specific vignette version that most closely represents the case of *Caperton v. Massey* (2009).

Court. Acme Insurance was asking the Court to decide that it did not have to pay Zenith forty million dollars. As a result of the contributions by the head of Acme, Justice Anderson was asked to step aside and not be involved in the Court's decision on this case. Justice Anderson agreed, and did not participate or vote in the case. Without Anderson participating, the remaining justices on the West Virginia Supreme Court decided that Acme must pay forty million dollars to the other company.

Table 1 reports the various elements of the experiment vignette.

[PLACE TABLE 1 ABOUT HERE]

RESEARCH DESIGN

This research is based on an experiment embedded within a representative survey of the residents of West Virginia, conducted in February/March 2009.¹⁶ The larger purpose of the National Science Foundation-funded project is to examine the consequences of election activity on state supreme court legitimacy. The survey under analysis here is the first interview in a multi-wave panel study. The initial questionnaire was subjected to a formal evaluation, and on the basis of the results of the pretest, was significantly revised. The survey was conducted by Schulman, Ronca, and Bucuvalas, Inc. (SRBI), using Computer Assisted Telephone Interviewing (CATI). Within households, the respondents were selected randomly. The interviews averaged just under 17 minutes. A total of 12,271 telephone numbers was used in the survey, with a resulting American Association for Public Opinion Research (AAPOR) Cooperation Rate #3 of 40.5 % and an AAPOR Response Rate # 3 of 28.6 % (see AAPOR 2000). The final data set was subjected to some relatively minor post-stratification and was also weighted by the size of the respondent's household.

¹⁶The fieldwork was conducted from 2/13/2009 through 3/2/2009.

The last vignette was administered on February 25, 2009, about a week before oral argument was heard by the U.S. Supreme Court in *Caperton v. Massey* (2009). To assess whether the timing of the interview had any impact on our results, we examined the relationship between the interview date and knowledge of the *Caperton v. Massey* case.¹⁷ Knowledge is not significantly related to time ($p > .05$) and the correlation between date of interview and knowledge is only .02. Especially when the very short fieldwork period is noted, we feel justified in not controlling for the date of interview in any of the analysis that follows.

Why West Virginia and what limits on generalizability flow from this research design? We must acknowledge that we cannot claim that our findings from a single state – any state, but perhaps especially West Virginia – can be generalized to the rest of the American states. West Virginia uses partisan elections (statewide) to select the five justices of the Supreme Court of Appeals for 12 year terms, and judicial contests have in the past been fierce. Only a handful of American states uses partisan elections to select their judges. So while we do not argue that state politics are idiosyncratic to each of the fifty American states, we are aware that we are not entitled to claim the right to generalize our findings beyond the context of West Virginia.¹⁸

¹⁷The question asked as the last query in the survey read: “There have recently been some reports in the news about conflict on the West Virginia Supreme Court. The dispute is about Don Blankenship, the head of the Massey Coal Company, and some money he spent to help elect Brent Benjamin to the West Virginia Supreme Court. Some have suggested that Justice Benjamin should remove himself from deciding cases involving Massey Coal. Before just now, have you heard anything about this issue?”

¹⁸While we acknowledge that West Virginia and Kentucky differ in many important ways, we nonetheless note that Gibson was able to replicate most of his Kentucky findings (2008a) within a nationally representative survey (2009a).

ANALYSIS

Manipulation Checks

It is axiomatic in experimental research that respondents do not always perceive experimental manipulations in the way in which they are intended. Consequently, it is necessary to determine whether the elements of the vignette were accurately perceived. The question stem used in assessing the respondents' understandings of the vignette read as follows: "Based on what you can recall from the story, using a score of 1-10 where 1 means NOT certain at all and 10 means VERY certain and choosing any number in between, please tell me how certain you feel about the following statements about Justice Anderson."

The respondents fairly accurately perceived the contributions/support of the company, with a highly significant ($p < .000$; $\eta = .36$; $r = -.36$) difference across the three conditions in the degree of certainty about whether contributions/support were provided for Judge Anderson. When the certainty scale is collapsed – with scores of 6 or higher indicating relative certainty – we find that 72.4 % of the respondents given the contributions treatment were fairly certain about the stimulus. Certainty under the support condition was lower (52.0 %).¹⁹ For the treatment in which the judge refused the contributions, 58.4 % were relatively certain that contributions were not received.

Although not technically a manipulation check, we also the respondents how certain they were that the judge "had a conflict of interest in the lawsuit." As expected, perceptions of a conflict were highest under the condition of campaign contributions ($\bar{x} = 7.80$, $s = 3.10$). However, perhaps not as expected, relatively high conflict was perceived under the campaign support condition ($\bar{x} = 6.86$, $s =$

¹⁹For reasons of conserving space in the questionnaire, those respondents told that the judge rejected the campaign contributions were asked the question about how certain they are that the judge accepted the contributions. We assume that low certainty of acceptance is the same as high certainty of rejection of the contributions. Such an assumption obviously introduces a small amount of measurement error.

3.16), and even under the condition under which the contribution was refused ($\bar{x} = 5.97$, $s = 3.36$). The percentages of respondents fairly certain (scale score greater than 5) that a conflict existed are 74.6, 62.0, and 49.4, for contributions, support, and contributions rejected, respectively. The medians for the three conditions are 10.0, 8.0, and 5.5, respectively. Thus, for nearly one-half of the respondents, a *rejected* campaign contribution nonetheless creates some degree of conflict of interest between the contributor and the judge.

Large differences are observed in the degree of certainty that the contributions/support received (or offered) were substantial ($p < .000$; $\eta = .32$). Using the categorized version of the certainty scale, nearly twice as many respondents in the large contributions condition judged the contributions to be substantial (66.7 % versus 37.5 %).

Similarly, most respondents understood the recusal manipulation ($p < .000$; $\eta = .35$), with 61.8 % of those told that Anderson did not withdraw from the case being certain that he actually voted on the decision, compared to 30.6 % of those hearing the story of recusal. Among the former, whether the judge's vote was crucial to the outcome in the lawsuit was accurately perceived ($p < .000$; $\eta = .36$); among the latter, the respondents correctly perceived how the court without Anderson decided the lawsuit ($p < .000$; $\eta = .28$).

Generally speaking, the manipulations were accurately perceived by the respondents, even if some ambiguity on this point is created by the use of ten-point response sets for the checking questions. Across all of the manipulations, using a score of 6 or higher on the certainty scale as a measure of the accuracy of the perception, we find that the mean number of correct perceptions (of four) is 2.47 (median = 3.0). These results suggest that the details of the story were relatively easy for most respondents to comprehend.²⁰

²⁰Those who claim to have previously heard of the Caperton dispute were slightly more accurate in their perceptions of the manipulations ($p = .010$). The relationship is not at all strong, however ($\eta = .08$).

The Basic Vignette Results

As we have noted, the various components of the manipulations combine to produce 24 versions of the vignettes. The respondents were randomly assigned to hear only a single version of the vignette. Slight (and inevitable) imperfections in the CATI assignments to vignette version result in cell sizes for the vignette versions that range from 41 to 45 respondents. In terms of the simple assessments of whether the judge can serve as a fair and impartial judge for West Virginia (see the text of the question reported in the next paragraph), the percentages believing so range from 22.9 % to 86.8 %, which is substantial variation indeed. Clearly, the judgments of the respondents regarding fair and impartial judging are terribly sensitive to the contextual factors represented in the experiment.

For explicating the analysis that follows, we will rely in part on this simple measure of perceived impartiality and fairness of the judge because the responses to this question are easily understood. For analytical purposes, however, we employ an index that summarizes the responses to the fairness question and two other queries measuring the legitimacy of the court and institution. Following earlier research (e.g., Gibson 2008a, 2009b), we have measured perceptions of impartiality and judicial legitimacy via a three-item index. The respondents were asked to react to the following statements after hearing the vignettes (but before the manipulation checks).

- Do you strongly believe Justice Anderson can serve as a fair and impartial judge for West Virginia, somewhat believe he can be fair and impartial, somewhat believe he cannot be fair and impartial, or strongly believe he cannot be fair and impartial?
- Assume for the moment that all judges on the West Virginia Supreme Court were selected in the same circumstances as Justice Anderson. Would you consider the West Virginia Supreme Court as a very legitimate institution, a somewhat legitimate institution, not a very legitimate institution, or not legitimate at all?
- How likely are you to accept decisions made by Justice Anderson as impartial, fair,

and legitimate? Are you very likely, somewhat likely, not too likely, or not at all likely to accept decisions made by Justice Anderson as impartial, fair, and legitimate?

These three items are strongly intercorrelated, as indicated by an excellent Cronbach's alpha of .76 (mean inter-item correlation = .52). When factor analyzed, a single, strongly dominant factor emerges (the eigenvalues of the first two extracted factors are 2.04 and .57, respectively). For purposes of ease of interpretation, we scaled this index from 0 to 1, with higher scores indicating greater impartiality and legitimacy. To reiterate, for expository purposes only, we use the single-item indicator of perceived impartiality, whereas for purposes of hypothesis testing, we employ the continuous index as the dependent variable.

The *Caperton v. Massey* Version of the Vignette

Our vignette is modeled after the dispute between Caperton, Massey, and Justice Benjamin, but of course we vary the attributes of the case to determine the causal influence of various factors on perceived impartiality and legitimacy. Nonetheless, one of our vignette versions very closely parallels that actual lawsuit. In the real dispute, independent support, but only minimal direct campaign contributions, was provided by Massey in his effort to get Benjamin elected. The support was large (more than three million dollars), and most believe that Massey's advertisements had some impact on the outcome of the election. Obviously, Justice Benjamin did not recuse himself (hence the appeal to the U.S. Supreme Court), even though his vote was crucial to the outcome (the decision overturning the verdict against Massey Coal was decided on a 3-2 vote, with Benjamin serving as the Chief Justice in the case and casting his vote in favor of Massey Coal). This fact pattern is represented in vignette version 7. The average perception of impartiality and legitimacy for this version is .50 (on the scale ranging from 0 through 1). This is not the most damaging scenario in the set of vignettes: the index means range across the 24 versions from .32 to .71. Indeed, 56.8 % of the respondents assigned to the "*Caperton v. Massey*" version of the vignette

asserted that they believed the judge could serve as a fair and impartial arbiter.

The Simple Effects of the Manipulations

The first hypothesis we test is that different types of campaign support produce differing perceptions of impartiality and legitimacy. In fact, the data strongly support the hypothesis: $r = -.23, p < .000$. Figure 1 reports the relationship between the type of support and perceptions of fairness and impartiality.

[PLACE FIGURE 1 ABOUT HERE]

The data in the figure clearly demonstrate the negative consequences campaign contributions have for perceptions of judicial fairness and impartiality. Under the condition of campaign contributions, less than a majority of the respondents (41.4 %) perceive impartiality; this figure climbs to 66.4 % under the condition in which the judge rejects the campaign contributions.²¹ As expected, the effect of campaign support that is independent of the judge and his wishes is to diminish perceived impartiality, but only slightly (declining from 66.4 % to 58.5 %; the difference on the continuous index across these two conditions is, however, weakly statistically significant: $p = .002, r = .12$). This is an important finding: Independent electoral support, irrespective of the wishes of the judge, undermines institutional legitimacy to at least a slight degree. Of course, other things are going on in the vignettes so the only conclusion that should be drawn at this phase of the analysis is that campaign contributions do indeed pose a threat to the impartiality, fairness, and legitimacy of elected state courts and judges.

One remedy for the conflicts of interest created by campaign contributions is the withdrawal of the conflicted judge from the case. In the experiment, the simple direct effect of the judge withdrawing from the case is to increase perceived impartiality ($p < .000, r = .18$). However, the substantive implications of recusals can best be understood within the context of the degree to which the campaign

²¹This finding is quite similar to Gibson's findings in both Kentucky (2008a) and in a nationally representative sample (2009a).

activity created a conflict of interest. These data are reported for the index in Table 2.

[PLACE TABLE 2 ABOUT HERE]

This table reports the mean legitimacy score for the conditions resulting from the interaction of campaign support and recusal. The question these data are designed to answer is whether recusals are a viable means of remedying conflicts of interest. Within each level of campaign support, we test the hypothesis that recusals enhance the legitimacy of the court.

The simplest scenario is the one in which a recusal is not really required, inasmuch as the candidate for office refused the campaign contribution. Under that condition, the recusal nonetheless increases legitimacy, and substantially so ($p < .000$, $r = .24$). When the judge refuses the contribution and withdraws from the case, the highest level of perceived legitimacy of any condition in the table is observed ($\bar{x} = .69$). Indeed, the statistical effect of the recusal is greatest under this condition of refusing the campaign contributions.

The effect of withdrawal when a contributions conflict clearly exists is also fairly substantial ($p < .000$, $r = .21$), with recusing associated with higher levels of legitimacy. It is noteworthy, however, that the increase in perceived impartiality, while significant, is only to a modest level ($\bar{x} = .51$), which is lower than the mean in any other condition in which the judge withdraws from the case, and is about equivalent to the level of legitimacy when support is given, but the judge does not recuse. Thus, recusal rehabilitates legitimacy, but it does not seem to restore it to the level existing when no conflict of interest exists.

We observe the weakest effect of recusal under the condition of independent support from the third-party group: $p = .012$; $r = .14$. Because the judge had little to do with the campaign activity by the independent group, failure to recuse depresses perceived legitimacy and impartiality only weakly. Under the failure to recuse condition, the difference between support and refused contributions is not statistically significant at ($p > .05$), although the difference when the judge withdraws is significant ($p <$

.000).

In terms of the percentages of respondents accepting the judge as a fair and impartial decision maker, the effect of recusing when campaign contributions are given is to raise the figure from 33.7 % to 48.6 %. This increase is, as we noted, statistically significant. Nonetheless, only about one-half of the respondents accept the judge as fair even when he withdraws from the case. In this sense, recusal does not unequivocally rehabilitate the judge with the conflict of interest. At the other extreme, fully one-third of the respondents do not question the judge's impartiality when contributions are given but the judge does not recuse. This is, not surprisingly, the smallest percentage perceiving impartiality of these conditions; nonetheless, we find it surprising that such a large proportion of citizens fail to question judicial impartiality when the judge refuses to withdraw from a case involving a seeming conflict of interest due to campaign contributions.

In collegial courts, judges who fail to withdraw from a case do not necessarily affect the outcome of the case, and our experiment therefore manipulated whether Judge Anderson's vote was crucial to the outcome of the case. We hypothesize that the damage to perceived impartiality and legitimacy is exacerbated when the judge's vote determines the outcome of the case. This manipulation, of course, only pertains to the vignette versions in which the judge refuses to recuse and therefore participated in the Court's decision.

The effect of Judge Anderson's vote is statistically significant, but only at $p = .047$ ($r = .09$). Not surprisingly, the mean legitimacy scores for these two conditions (crucial versus not) are significantly lower than the score for the condition under which the judge recuses. Whether the conflicted judge's vote determines the outcome has influence on public perceptions, but not a great deal of influence, and perceived impartiality does not fully recover simply because the conflicted judge's vote has no actual influence on the case's outcome. However, the effect of this variable is dependent upon the type of campaign support the judge received during the election campaign. When campaign contributions are

given and the judge's vote is decisive, perceptions of impartiality and legitimacy plummet. Under no other condition is the effect of the vote's impact statistically significant.

Does the efficacy of the campaign support affect these relationships? Across all vignette versions, the size of the support has little impact on perceived legitimacy ($p > .05$). Even within each type of campaign support, whether the contribution is likely to influence the outcome of the election has nothing to do with perceptions of impartiality and legitimacy. Nor is this variable influential under the different conditions of campaign support and recusal. The only hint of a relationship is under the condition of the judge receiving support via independent expenditures and not stepping aside in the case. Here, perceived impartiality and legitimacy is weakened, although the effect does not achieve statistical significance, and a comparable effect is not observed when campaign contributions (instead of mere support) are given to the candidate. Whether the support is likely to influence the outcome of the election is not a crucial variable for most West Virginians when they form their impression of their state judiciary.²² Outcomes seem to matter less than process.

The next hypothesis we consider has to do with the outcome of the case. In some versions of the vignette, the company associated with the campaign support wins; in other versions, it loses.²³ We hypothesize that when the company wins, judicial impartiality and legitimacy lose.

When the company wins the lawsuit, judicial legitimacy suffers ($p = .003$; $r = .10$). However, this effect is dependent upon the nature of the campaign support, with the effect being strongest ($r = .14$) when the company is said to have given campaign contributions. Under the conditions of campaign support, the effect of winning is not significant ($p > .05$), and when the judge refuses the contributions, who wins the lawsuit also makes little difference ($p = .060$). Thus, the outcome of the case has some

²²A survey commissioned by the interest group Justice at Stake supports the same conclusion.

²³As will become clear below, the company can win with or without the vote of the conflicted judge. We consider this variability in our analysis below.

impact on perceived legitimacy, but the effect is not enormous.

Table 3 reports a single integrated equation that estimates the direct effects of each of the manipulations. To reiterate, the dependent variable – perceptions of impartiality and legitimacy – varies from 0 to 1. For the contributions manipulation, the omitted category is the condition under which the judge rejects the contributions. For the influence of the judge on the outcome in the case, the omitted condition is recusal by the judge. The intercept therefore reflects the legitimacy score under the conditions of: (1) the judge rejecting the contributions, (2) which were too small to influence the outcome of the election, and (3) the company associated with the contributions loses, (4) while the conflicted judge recuses. Thus, this condition is most beneficial for impartiality and legitimacy and it is fitting therefore that the intercept is quite large (.68). The effects of the manipulations are typically to subtract from this relatively high level of legitimacy.

[PLACE TABLE 3 ABOUT HERE]

The strongest influence on institutional legitimacy (as reflected in the largest standardized and unstandardized regression coefficients) is associated with the acceptance of campaign contributions ($b = -.17$). Almost as substantial is the impact (as compared to the condition of recusal) of the judge's vote being crucial to the outcome of the case ($b = -.15$). Lesser effects are observed for non-crucial participation in the case ($b = -.09$) and for independent campaign support ($b = -.07$). Whether the company won the lawsuit and whether the campaign support was likely to have affected the outcome of the election have no impact on perceived impartiality and legitimacy.

The effects reported in Table 3 are direct effects. Some of the interesting hypotheses, however, go to the interactive influences of the various elements of the experiment. The most obvious such hypothesis is that the influence of these factors on perceived legitimacy is contingent upon the nature of the campaign contribution given. Table 4 reports these relationships.

[PLACE TABLE 4 ABOUT HERE]

The coefficients in this table confirm many of the conclusions from the analyses above. For instance, irrespective of the type of contribution or support (or no support), the size/efficacy of the contribution has no impact on perceptions of impartiality and legitimacy. Neither does the outcome in the lawsuit (whether the contributing company won) affect citizens' judgments.

Perhaps the most interesting finding from Table 4 concerns the impact of whether the judge's vote was crucial to the outcome. The strongest negative effect of not recusing and being the deciding vote in the case is associated with the vignettes in which the judge is offered support, but rejects it. From the data in Table 4, it seems that the offer of support is sufficient to contaminate the judge. If a judge who accepts contributions is required to withdraw from the case owing to public perceptions, then these data suggest that judges who are merely offered such support should also withdraw. Roughly similar conclusions pertain, but with lesser impact, when the judge does not recuse but also does not cast the deciding vote in the case. Our original hypothesis was that the effect of campaign support would increase monotonically from rejecting support to accepting contributions. Table 4 indicates that the hypothesis must be rejected: Independent campaign support has only weak deleterious effects; being close enough to a corporation to be offered campaign support, whether it is accepted or not, threatens judicial impartiality and legitimacy.²⁴

Conditional Effects

We hypothesize that the vignette has different consequences for different types of respondents. In

²⁴We have tested for interactive effects using a single integrated equation that includes both the linear influences of the variables and all of the interactions. In the saturated model of two-way interactions, the statistical test for the increase in R^2 indicates no significant increase associated with the interaction terms as a set. Only a single interaction term – that between independent campaign support and the vote of the judge being critical to the outcome – even approaches statistical significance ($p = .08$, $b = .11$), and, with that single exception, no regression coefficient exceeds .10. When different interactions terms and/or sets are entered individually into the equation, none of the Part Coefficients is statistically significant. Two-way interactions can therefore be safely ignored in the analysis that follows.

particular, we posit that the effects of the vignettes are conditional upon (1) knowledge of the actual controversy, (2) more general political and judicial knowledge; (3) general and diffuse support for the West Virginia Supreme Court; and (4) the nature of the expectations the respondent holds for the West Virginia judiciary.

The Conditional Effect of Knowledge. As the last question in the survey, we put the following query to the respondents:

There have recently been some reports in the news about conflict on the West Virginia Supreme Court. The dispute is about Don Blankenship, the head of the Massey Coal Company, and some money he spent to help elect Brent Benjamin to the West Virginia Supreme Court. Some have suggested that Justice Benjamin should remove himself from deciding cases involving Massey Coal. Before just now, have you heard anything about this issue?

As it turns out, 47.1 % of the respondents claimed to be aware of the dispute. We hypothesize that awareness exacerbates the effects of the various experimental stimuli.

When the knowledge dichotomy and the associated interactions terms are entered into the basic equation (shown in Table 3 above), the increment in R^2 does achieve statistical significance – the full equation is able to account for a little more than two additional percent of the variance in perceptions of impartiality and legitimacy. However, none of the individual regression coefficients for the interaction terms achieves statistical significant ($p > .05$). The only coefficient approaching significance – the interaction of knowledge and whether the judge’s vote was not crucial to the outcome – indicates that among those knowledgeable of the case, the effect of the judge’s non-determinative vote is to reduce perceived impartiality and legitimacy (as compared to recusal) more than among those not knowledgeable ($p = .07$). This effect is not great, but perhaps can be understood as indicating that awareness of the case and its context make the judge’s participation more damaging irrespective of

whether it determines the outcome of the case. The less knowledgeable perhaps assume that not being crucial to the outcome of the case renders any conflict of interest unimportant. Still, we should emphasize that the effect is weak and not statistically significant, and, of course, it does not pertain to the more extreme scenario modeled by the interaction between knowledge and the judge's vote being determinative of the outcome in the case.

We also included several measures of more general knowledge of the West Virginia judiciary, including:

knowledge that the Court is elected – 42.4 % answered correctly

that the justices serve fixed, not life, terms – 50.7 % answered correctly

that the Supreme Court has the “last say” on the meaning of the West Virginia constitution – 42.2 % answered correctly

Overall, 25.1 % of the respondents got none of the three questions correct; 17.4 % answered all three correctly. The average number of correct responses is 1.35 (standard deviation = 1.04). Again, we hypothesize that the effect of judicial knowledge is to exacerbate the damaging effects of the conflict of interest.

Once more, the analysis reveals no interactive effects with general judicial knowledge. The increment in R^2 is not statistically significant, and none of the individual coefficients even approaches significance.

These findings about knowledge and information can be understood in two ways. First, they seem to indicate something about the validity of the vignette itself. That completely uninformed respondents would react to the stimuli in the same way as the knowledgeable suggests that sufficient information was provided in the vignette to enable the respondents to understand the circumstances and context.

More substantively, those more knowledgeable about judicial affairs are, generally, no less or

more offended by the seeming conflict of interest in this dispute. This may indicate that knowledge is not closely connected to the expectations one holds of judges, although this hypothesis is addressed more directly below. In any event, the less knowledgeable react to the vignette in much the same way as the more knowledgeable, and/or that knowledgeable respondents were not mobilizing and relying upon information about the case that was not presented in the vignette.

Diffuse Support for the West Virginia Supreme Court. A well-established literature exists on the importance of citizen support for courts (e.g., Gibson and Caldeira 2009a) and how that support ought to be measured (e.g., Gibson, Caldeira, and Spence 2003b). Following that literature, we measured support for the West Virginia Supreme Court with seven statements:

If the West Virginia Supreme Court started making a lot of decisions that most people disagree with, it might be better to do away with the Supreme Court altogether.

The right of the West Virginia Supreme Court to decide certain types of controversial issues should be reduced.

The West Virginia Supreme Court can usually be trusted to make decisions that are right for the state as a whole.

Judges of the West Virginia Supreme Court who consistently make decisions at odds with what a majority of the people in the state want should be removed from their position as judge.

The West Virginia Supreme Court gets too mixed up in politics.

The West Virginia Supreme Court ought to be made less independent so that it listens a lot more to what the people want.

The West Virginia Supreme Court may not always make decisions I agree with, but I trust it much more than most other political institutions in our state.

We have constructed an index of institutional support as simply the number of supportive replies given in response to these questions. Support for the Court is directly correlated with perceptions of impartiality and legitimacy at .24.

When court support and its interaction terms are entered into the basic equation, one statistically significant interaction effect is observed: As support for the Court increases, the effect of receiving the campaign contributions diminishes. Over the range of the support index (0 through 7), the effect on perceptions of impartiality of accepting the campaign contributions ranges from -.258 to -.048, with the latter coefficient being indistinguishable from zero.²⁵ Holding supportive attitudes of the Court seems to inoculate the respondent from the deleterious effects of campaign contributions. To the extent that court support implies trust and a willingness to give the institution and its justices the benefit of the doubt, it seems that supportive citizens believe that judges will judge fairly, irrespective of any contributions they may have received.²⁶

Expectation of the Judiciary. Following the work of Gibson (2009b) and Gibson and Caldeira (2009a), we have measured the expectations citizens hold of the West Virginia Supreme Court of Appeal. Table 5 reports the replies of our respondents.

[PLACE TABLE 5 ABOUT HERE]

As we have seen in earlier surveys, the expectations citizens hold of the judiciary vary. On some matters, there is widespread agreement – large majorities expect courts to protect those without power

²⁵These calculations are based on an observed regression coefficient of .030 when only the contributions interaction term is entered into the equations. When all of the court support interaction terms are entered, the coefficient for receiving contributions is .037, which of course means that the negative effects of receiving campaign contributions are reduced even further among those most supportive of the court.

²⁶One of our questions asked the respondents about whether judges ought to be believed when they state that they are capable of making fair and impartial decisions. The correlation of the responses to this statement and court support is .24.

and strictly follow the law; a small minority wants their judges to base their decisions on their party affiliations – but on other items, such as whether to refuse campaign contributions, the respondents are split. Indeed, on five of the attributes on which we questioned the respondents considerable disagreement can be found. And, it is clear that a sizeable constituency exists in West Virginia in favor of a fairly politicized model of judging.

Our interest in this analysis is on one expectation in particular: whether judges should refuse to accept campaign contributions. We hypothesize that the vignette will be evaluated quite differently by those viewing the acceptance of campaign contributions as inappropriate. We therefore entered this variable (dichotomized) and the associated interaction terms in the basic equation modeling the experiment.

The addition of the expectation variable to the equation increases R^2 significantly, and an additional 3.7 % of the variance in perceived impartiality and legitimacy is explained. When the interaction of expectations and the vignette condition under which the campaign contributions are accepted is entered, R^2 also increases significantly, with a change of .014. Finally, none of the interactions between the other elements of the experiment (including the receipt of independent contributions) and expectations achieves statistical significance (and the change in R^2 when these variables are entered as set is not significant).

Expectations of judges matter directly for perceived impartiality ($\beta = -.11$), with those expecting judges to reject contributions ascribing less impartiality, irrespective of the version of the vignette. The conditional effect demonstrates how expectations interact with reality. When the citizen expects that judges not accept campaign contributions, but then are told in the vignette that the judge does accept the contribution, the additional knock on perceived legitimacy is $-.15$ ($\beta = -.18$), which is high statistically significant. Contributions affect all citizens, but their impact substantially interacts with citizen expectations.

DISCUSSION AND CONCLUDING COMMENTS

This initial foray into the vignette data supports at least three types of conclusions: methodological, theoretical, and policy-oriented. We begin our discussion with the theory.

We distinguish in this research between general orientations toward judicial institutions – which we often refer to as “institutional loyalty,” but which is synonymous with “diffuse support” and which is very similar to traditional conceptualizations of “legitimacy” – and evaluations of specific courts and institutions. The latter we have hypothesized are influenced by a variety of contextual factors, such as whether the judge is offered campaign support by a party litigating before that judge. The former may be more stable, but ultimately we can easily imagine a feedback loop through which general attitudes are shaped over time by accumulated experiences. Finally, our model of attitude updating and change posits framing effects in which citizens’ pre-existing attitudes toward courts interact with and shape assessments of individual events.

Our primary focus in this paper has been on testing hypotheses about how events and contexts affect citizens’ judgments that a judge and/or a court can make fair and impartial decisions, that, because they are made in a procedurally correct fashion, are legitimate and worthy of being accepted and acquiesced to. We suspected that citizens’ perceptions of impartiality and legitimacy are indeed shaped by contextual factors, and we were correct. The vignette we designed to model various contextual influences was successful: We observed wide variability in fairness judgments across the 24 versions of the vignette.

The vignette was effective in shaping citizens’ opinions in part because of verisimilitude: The vignette captured and effectively represented key aspects of empirical reality. We are indebted to all of the participants in *Caperton v. Massey* for providing a lawsuit with such a rich set of contextual factors. Our analysis demonstrates that many of the elements of this case can be abstracted and manipulated and that when we do so, citizens’ assessments are affected.

We are pleased to find that the vignette, while grounded in a live dispute, is not overly contaminated by reality. Respondents who had heard of the legal controversy reacted to the vignette in much the same way as those oblivious to the case. The vignette was real enough to make sense to the respondents, but not real enough for the respondents to mobilize individual information from their memories and rely on that information in forming their judgments. This, we believe, enhances the validity of the experiment by providing greater control over the experimental stimuli.

Many specific empirical findings emerge from this analysis, although perhaps the most important has to do with our basic understanding of the threats to judicial legitimacy from different types of campaign contributions and support. In all of our analysis, we have posited that the “baseline” condition is one in which the judge refuses support from the contributor. In many important respects, that turns out to be an erroneous assumption. The failure to recuse from a case has the greatest impact on perceived impartiality under the condition of offered but rejected campaign support (although we acknowledge that, while the coefficient is larger than the coefficient for accepted support, the difference between coefficients fails to achieve statistical significance – this finding is equally important if it is cast in terms of offered but rejected support being *no different from* offered and accepted support). We do not entirely understand the processes undergirding this finding. It may well be that respondents assume some sort of relationship between the judge and the donor is necessary in order for the contribution to be offered. Of the three campaign support scenarios we present to the respondents, the effect of failing to recuse is actually least pronounced under the independent support condition (the Massey condition) and, indeed, the effect under that scenario of the judge refusing to withdraw from the case is actually surprisingly small. Perhaps what we have found is the effect of a different sort of variable – having a relationship with a company versus being independent of it – that is an important variant of the contributions/support manipulations. And this speculation is reinforced, by the way, by the failure of the efficacy of the contribution to have any impact on assessments of the impartiality of the judge. Citizens seem to be

making inferences about whether the judge is capable of making a principled decision or not.

Contributions, *ipso facto*, do not necessarily undermine the integrity of the judiciary.²⁷

We are also impressed by the proportion of the population that does not perceive a threat to impartiality and legitimacy even under the most compromising combination of events. In none of the 24 vignettes does the perception of impartiality fall much below one-third of the respondents. This too is a somewhat surprising finding – *Caperton v. Massey* is assumed by many to represent the “Perfect Storm” of judicial conflicts of interest, yet one-third of our respondent are unfazed by circumstances even more extreme than *Caperton*.

A portion of this finding can be attributed to the prophylactic effects of pre-existing support for the court. Citizens high in institutional support seem to interpret the elements of the vignette in ways that discount the conflict of interest and leave in tact the belief that the judge can serve as a fair and impartial arbiter. We suspect that many who strongly support courts are prepared to believe that judges have a great deal of integrity and that by virtue of their training and other factors, are capable of putting aside incidental factors and making decisions entirely on the merits of the lawsuit. We believe we observed that same phenomenon in public reactions to the U.S. Supreme Court decision in *Bush v. Gore*. Much additional research is required to develop a more complete understanding of how institutional support frames perceptions of judicial activity.

Expectations are an important part of the framing process. Our analysis has not yet unraveled all of the interconnections of institutional support, political knowledge, expectations, and judgments of fairness and impartiality, but we have shown that the same judicial activity has a different effect on citizens holding different expectations of judges. Since this and other research has shown unexpectedly broad support for a relatively politicized view of judging – or least for a model of judging that includes

²⁷We note in passing that Judge Benjamin claims to have voted *against* Massey Coal in a majority of the cases in which Massey had an appeal before the high court.

more parts of accountability than of independence – we are convinced that the effects of few judicial actions can be judged *a priori* to undermine impartiality and legitimacy. The expectations model is not very complicated, nor even innovative, but it does stand as an important corrective to the assumption of uniform consequences of judicial actions.

Recusal is thought by many to be a palliative for the ills of conflicts of interests. Our research indicates that recusals can elevate judicial legitimacy, but that the effect of recusals is not to restore the court/judge to the level of support that exists when no conflict of interest is present. Perhaps this is not an entirely surprising finding – perhaps recusal is no more than the best available action under the circumstances – but our research implies that even when conflicts are mitigated by recusal, impartiality and legitimacy suffer. We suspect that this negative effect is exacerbated when many judges recuse and when recusals are commonplace, because citizens draw larger conclusions about the relationships between public office holders and corporations.

This analysis has only scratched the surface of the solution to the puzzle of perceptions of impartiality and legitimacy. We posit that pre-existing support for a court gives rise to both perceptions and expectations, and that various feedback effects exist, but this understanding is simplistic and fails to say very much about why and how citizens make inferences about the impartiality of public office holders. We suspect that in an era of strategic decision making in politics (i.e., insincere decisions) citizens are often wary of surface appearances. Judges are more likely than other politicians to profit from the benefit of the doubt, but citizens no doubt expect – indeed, demand – that judges act sincerely. We doubt much of this has anything to do with pre-judgments and theories of open-mindedness. Instead, the bigger issue is whether a surreptitious relationship exists between the decision maker and private interests. A great deal more research is necessary in order to understand these complicated processes.

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Table 1. Vignette Manipulations and Versions

Campaign Contributions

Strong conflict –
Contributions from litigants

A few years ago, Justice Anderson was elected to the West Virginia Supreme Court by the voters of West Virginia. The Court is located in Charleston. In that election, Anderson was supported by the head of the Acme Insurance Company, who gave campaign contributions which allowed Anderson to pay for TV ads urging voters to elect him.

Moderate conflict –
Campaign Support

A few years ago, Justice Anderson was elected to the West Virginia Supreme Court by the voters of West Virginia. The Court is located in Charleston. In that election, Anderson was supported by the head of the Acme Insurance Company, who independently paid for TV ads urging voters to elect Justice Anderson. However, Anderson had nothing to do with the ads and did not directly receive campaign contributions from the head of the company.

No conflict –
Refused contributions

A few years ago, Justice Anderson was elected to the West Virginia Supreme Court by the voters of West Virginia. The Court is located in Charleston. In that election, Anderson was supported by the head of the Acme Insurance Company, who offered to give him campaign contributions so that Justice Anderson could pay for TV ads urging voters to elect him. However, Justice Anderson decided NOT to accept the campaign contributions from the head of the company.

Efficacy of the Contribution

Little Effect on Outcome

The support provided by the head of Acme Insurance was relatively small and therefore unlikely to have had much impact on the outcome of the election.

Effect on Outcome

The contributions offered by the head of Acme Insurance were quite large and therefore likely to have had some impact on the outcome of the election.

Recusal

Refuses to Step Aside

Some years after that election, a lawsuit between the Acme and Zenith insurance companies came before the West Virginia Supreme Court. Acme Insurance was asking the Court to decide that it did not have to pay Zenith forty million dollars. As a result of the support by the head of Acme, Justice Anderson was asked to step aside and not be involved in the Court's decision on this case. Justice Anderson disagreed and cast his vote on the case anyway

Agrees to Step Aside

Some years after that election, a lawsuit between the Acme and Zenith insurance companies came before the West Virginia Supreme Court. Acme Insurance was asking the Court to decide that it did not have to pay Zenith forty million dollars. As a result of the contributions by the head of Acme, Justice Anderson was asked to step aside and not be involved in the Court's decision on this case. Justice Anderson agreed, and did not participate or vote in the case.

No Recusal, Whether Vote is Crucial

Not Crucial

The Court's decision is that the Acme Insurance does not have to pay forty million dollars to Zenith. Justice Anderson's vote on the decision was not crucial since nearly all of the other justices voted that Acme does not have to pay Zenith.

Crucial

The Court's decision is that Acme Insurance does not have to pay forty million dollars to Zenith. Justice Anderson cast the deciding vote on the decision.

Recusal, Decision by the Court

Company Wins, Not Pay

Without Anderson participating, the remaining justices on the West Virginia Supreme Court decided that Acme does not have to pay forty million dollars to Zenith.

Company Loses, Must Pay

Without Anderson participating, the remaining justices on the West Virginia Supreme Court decided that Acme must pay forty million dollars to the other company.

Table 2. The Impact of Recusal Under Varying Types of Campaign Support

Campaign Support/Recusal	Impartiality & Legitimacy		
	Mean	Std. Dev.	N
<i>Contributions^a</i>			
Doesn't Recuse	.38	.29	163
Steps Aside	.51	.31	175
<i>Support^b</i>			
Doesn't Recuse	.51	.31	165
Steps Aside	.59	.25	176
<i>Refused Contributions^c</i>			
Doesn't Recuse	.56	.30	165
Steps Aside	.69	.24	162

^a $r = .21; p < .000$.

^b $r = .14; p = .012$.

^c $r = .24; p < .000$.

Table 3. The Effects of the Manipulations on Perceptions of Impartiality and Legitimacy

Manipulation/Condition	r	Regression Results		
		b	s.e.	β
<i>Campaign Support^a</i>				
Independent Support	.03	-.07	.02	-.11 **
Accepts Contributions	-.22	-.17	.02	-.28 ***
Efficacy of Contribution	-.03	-.01	.02	-.02
<i>Influence of the Judge on the Outcome^b</i>				
Voted, vote was crucial	-.16	-.15	.03	-.21 ***
Voted, vote was not crucial	-.06	-.09	.03	-.13 ***
Outcome in the Lawsuit	-.10	.01	.03	.02
<i>Equation</i>				
Intercept		.68	.02	
Standard Deviation – Dependent Variable		.30		
Standard Error of Estimate		.28		
R ²				.09 ***
N		1007		

^a The excluded category is: The judge refuses to accept the contributions.

^b The excluded category is: The judge recused (did not participate in the decision).

Significance of standardized regression coefficients: *** $p < .001$ ** $p < .01$ * $p < .05$

Table 4. The Conditional Effects of Campaign Contributions

Manipulation/Condition	Rejects Contributions			Independent Support			Accepts Contributions		
	b	s.e.	β	b	s.e.	β	b	s.e.	β
Efficacy of Contribution	-.00	.03	-.00	-.02	.03	-.04	-.02	.03	-.03
<i>Influence of the Judge on the Outcome^b</i>									
Voted, vote was crucial	-.19	.04	-.30 ***	-.08	.04	-.12	-.17	.05	-.23 ***
Voted, vote was not crucial	-.10	.04	-.16 *	-.10	.04	-.15 *	-.06	.05	-.09
Outcome in the Lawsuit	.03	.04	.05	.03	.04	.04	-.03	.05	-.04
<i>Equation</i>									
Intercept	.67	.03		.59	.03		.53	.04	
Standard Deviation – Dependent Variable	.28			.28			.31		
Standard Error of Estimate	.27			.28			.30		
R ²			.07 ***			.02			.06 ***
N	327			342			338		
Significance of standardized regression coefficients: *** $p < .001$ ** $p < .01$ * $p < .05$									

Table 5. Expectations of the Characteristics of a Good Supreme Court Justice, West Virginia 2009

Characteristic	% Rating It Very Important	Mean ^a	Std. Dev.	N
Protect people without power	77.2	3.67	.72	1413
Strictly follow the law	74.1	3.64	.72	1408
Respect existing decisions	49.0	3.26	.92	1408
Stay as far away from politics as possible	49.2	3.20	.96	1413
Refuse to accept campaign contributions	49.2	3.17	.99	1410
Refuse to state policy positions during campaigns	50.1	3.15	1.06	1409
Represent the majority	45.1	3.04	1.08	1410
Base decisions on party affiliations	18.9	2.02	1.18	1410

The items read:

“Now I would like you to focus on thinking about the characteristics of a good Supreme Court judge, that is, what a good judge ought to be like. First, how important would you say it is for a good West Virginia Supreme Court judge to . . .

Be especially concerned about protecting people without power from people and groups with power.

Strictly follow the law no matter what people in the country may want.

Respect existing West Virginia Supreme Court decisions by changing the law as little as possible.

Stay as far away from politics as possible.

Refuse to accept any campaign contributions from anyone — individuals, groups, and political parties.

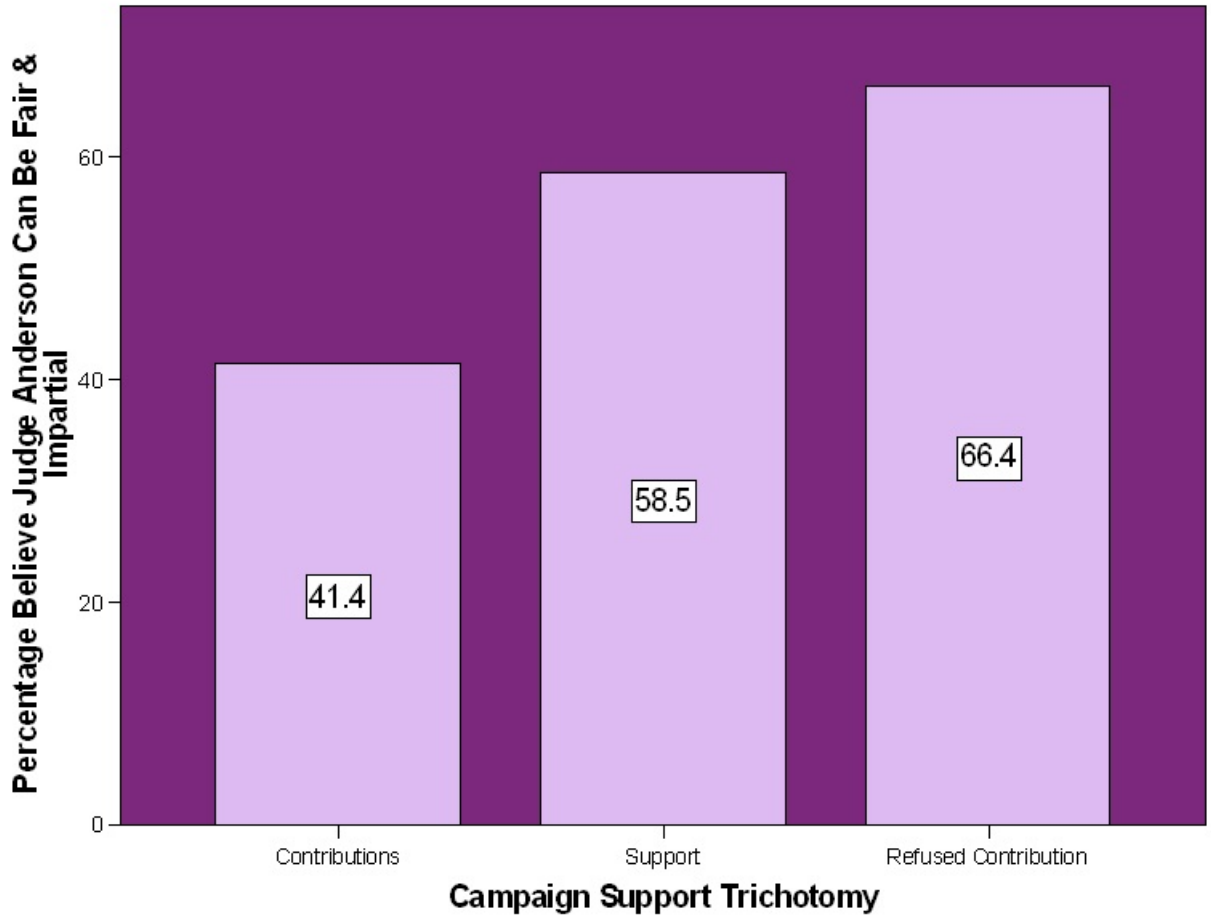
Refuse to state how they stand on important legal and political issues as par of their campaigning for a position on the West Virginia Supreme Court.

Be involved in politics, since ultimately they should represent the majority.

Base their decisions on whether they are a Republican or a Democrat.”

^a The response varies from (1) Not at all important/Don’t know to (4) Very important. Thus, higher mean scores indicate greater ascribed importance to the characteristic.

Figure 1. The Impact of Campaign Contributions on Perceptions of Judicial Fairness and Impartiality



Note: N = 1007