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Office of Bar Counsel

Board on Professional Responsibility
District of Columbia Court of Appeals
515 5th Street NW
Building A, Suite 117
Washington, DC 20001

Re: Justice Clarence Thomas

SUPPLEMENT TO BAR COMPLAINT

On February 8, 2011, we filed a bar complaint against Clarence Thomas for various crimes and ethical violations including conflicts of interests. We are now supplementing that complaint with additional information that came to our attention subsequently.

Justice Thomas sat in judgment of the case Citizens United v Federal Election Commission, 130 S.Ct. 876 (2010), and cast the deciding vote in the five to four decision favoring Citizens United. This case overturned a hundred years of established campaign finance law. However, Justice Thomas hid the fact that Citizens United Foundation had supported his nomination and spent at least \$100,000 on commercials attacking several Senators opposed to the nomination. "The commercials, shown only in Washington at a cost of about \$100,000, have reaped millions of dollars' worth of free publicity through network television and print-media reproductions that have accompanied news stories about the flap. That probably was the intent all along."

<http://www.time.com/time/magazine/article/0,9171,973826,00.html#ixzz1DzuvQ4Rz>

Exhibit A. See also "The Citizens United Foundation, a group that ran commercials in 1991 supporting the nomination of Clarence Thomas to the Supreme Court"

<http://www.nytimes.com/2003/03/13/business/media/13ADCO.html> Exhibit B.

The Decision In Caperton v Massey Required Justice Thomas To Recuse Himself

In June 2009, the Supreme Court decided the case of Caperton v. AT Massey Coal Co., Inc., 129 S. Ct. 2252 (2009), with facts eerily similar to the situation facing Justice Thomas in Citizens United. In 1998, Harman Mining Company president Hugh Caperton filed a lawsuit against A.T. Massey Coal Company alleging that Massey fraudulently

canceled a coal supply contract with Harman Mining, resulting in its going out of business. In August 2002, a Boone County, West Virginia jury found in favor of Caperton and awarded \$50 million in damages.

While the case was awaiting hearing in the West Virginia Supreme Court of Appeals, A.T. Massey's Chief Executive Officer, Don Blankenship, became involved in the election campaign pitting incumbent Supreme Court Justice Warren McGraw against Charleston lawyer Brent Benjamin. Blankenship created a non-profit corporation called "And for the Sake of the Kids" through which he contributed over \$3 million dollars in Benjamin's behalf. This amounted to more than the total amount spent by all other Benjamin supporters and Benjamin's own campaign committee. *Much of the money went to an advertising campaign aimed at questioning McGraw's impartiality.*

In 2007, when the case came before the West Virginia Supreme Court, Caperton petitioned for Justice Benjamin to recuse himself because of Blankenship's contributions during the campaign. Benjamin declined and was ultimately part of the 3 to 2 majority that overturned the \$50 million verdict.

Caperton filed a petition with the United States Supreme Court arguing that Blankenship's 2004 campaign expenditures on behalf of Benjamin's election raised an appearance of partiality on Benjamin's part, which required him to disqualify and, in the absence of that, denied Harman Mining due process of law. Justice Benjamin countered that he was not biased and that because there was no direct financial or other connection between him and Blankenship, there was no obligation for him to recuse himself.

The United States Supreme Court heard oral arguments in March 2009. In June 2009, the Court found for Caperton and Harman Mining, remanding the case back to the West Virginia Supreme Court. Justice Anthony M. Kennedy wrote for the majority, joined by Justices Stevens, Souter, Ginsburg, and Breyer. Chief Justice John G. Roberts wrote the dissent and was joined by Justices Scalia, Thomas, and Alito. Justice Scalia also filed a separate dissenting opinion.

Justice Kennedy called the appearance of conflict of interest so "extreme" that Benjamin's failure to recuse himself constituted a threat to the plaintiff's constitutional right to due process under the Fourteenth Amendment. The Court also noted, "Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case. We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." "The inquiry," Justice Kennedy wrote, "centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election."

Applying that test, Justice Kennedy ruled for the Court; "Blankenship's significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—" "offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." "On these extreme facts the probability of actual bias rises to an unconstitutional level."

Justice Kennedy, in holding Justice Benjamin's participation a violation of due process, made no finding of actual bias by Benjamin: "In other words, based on the facts presented by Caperton, Justice Benjamin conducted a probing search into his actual motives and inclinations; and he found none to be improper. We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias."

Conclusion

Applying Caperton to Citizens United, it is clear that Justice Thomas, after having been supported by an effective advertising campaign that reaped millions in free media time, labored under an actual conflict of interest that denied the FEC due process. Justice Thomas owed his spot on the Court to Citizens United Foundation. That fact undermined his ability to put aside his bias in favor of Citizens United.

Justice Thomas was required to disclose his relationship with Citizens United and sua sponte recuse himself from the case. Instead, he hid that relationship and cast the deciding vote in favor of Citizens United. This corrupted the administration of justice and violated D.C. Rules of Professional Conduct Rule 8.4—**Misconduct**, which states in pertinent part:

"It is professional misconduct for a lawyer to:

- (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;*
- (c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;*
- (d) Engage in conduct that seriously interferes with the administration of justice;"*

Sincerely,



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