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Potential Judicial Reform in the Wake of Caperton

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Former Chief Justice Harlan Stone once observed that “The law itself is on trial in every case.” In few cases has this maxim been more apparent than in the United States Supreme Court’s recent decision in *Caperton v. A.T. Massey Coal Co.* On June 8, the Court ruled that West Virginia Supreme Court of Appeals Justice Brent Benjamin’s failure to recuse himself from a case involving Massey Coal Company was a violation of the Constitution’s Due Process Clause.

Massey’s chief executive, Don Blankenship, donated over \$3 million to two independent groups that had targeted the defeat of West Virginia Supreme Court incumbent Warren McGraw (Benjamin’s opponent in the general election.) Looming in the background was the fact that the Supreme Court would soon hear an appeal on a case in which Massey had been dealt a \$50 million adverse verdict. After Benjamin’s victory, he twice voted with the 3-2 majority in favor of Massey in overturning that verdict.

Caperton appealed to the U.S. Supreme Court, arguing that the Benjamin campaign’s indirect benefit from Blankenship’s contributions should have caused him to excuse himself from the case. The Court agreed, finding that Blankenship’s contributions presented an objective risk of actual bias that required Benjamin’s recusal.

In dissent, Justice Roberts asserted that the majority’s opinion will lead to a flood of recusal motions and that the decision departs from longstanding constitutional principals. Justice Scalia stated that the decision will add “to the vast arsenal of lawyerly gambits what will come to be known as the *Caperton* claim.”

Justice Kennedy, writing for the majority, suggested that most states have other means of curbing judicial abuses short of the constitutional level, such as state codes of judicial conduct. In fact, Justice Kennedy’s opinion may be read to invite changes to state judiciary codes rather than application of the Due Process Clause.

What reforms might states adopt regarding judicial selection and judicial recusal rules as a result of *Caperton*? Will these reforms curb the flood of *Caperton* claims anticipated by the dissenting justices?

On June 15, Governor Manchin announced that his Independent Commission on Judicial Reform would include retired U.S. Supreme Court Justice Sandra Day O'Connor as its Honorary Chairwoman. The commission will study potential benefits of various judicial reforms (likely including a merit-based system of judicial selection and judicial campaign finance reforms) in West Virginia.

Judicial elections first surfaced in the early nineteenth century in an attempt to make the judiciary more democratic and accountable. Currently, 39 states elect some of their judges, with 21 of those states allowing competitive elections for Supreme Court justices. Of the 21 states that hold elections for judges of their courts of last resort, 13 hold non-partisan elections, while eight (including West Virginia) hold partisan elections. Recent judicial elections have seen an explosion in private campaign financing.

Many states, however, have been reluctant to convert to a merit-based system of judicial selection – a major overhaul usually requiring an amendment to the state's constitution. Recognizing the reluctance of states to take on such a massive renovation of their judiciaries, many reformists have pushed for a simpler alternative – recusal reform. This movement seeks to change the manner in which judges are removed from cases in which they may appear to be biased.

According to a USA Today/Gallup poll, more than 90 percent of voters nationwide believe judges should recuse themselves from cases involving individuals or groups that contributed to their campaigns. Yet only in Alabama and Mississippi are judges specifically required to do so. Most other states, including West Virginia, rely on the more general standard that a judge should avoid impropriety and the appearance of impropriety.

Reformists concerned about the bias campaign contributions may impose have called for a more specific standard, such as the American Bar Association's Model Code, which mandates the disqualification of any judge who accepts campaign contributions over a specified threshold amount from a party appearing before him or her.

In addition to a clear disqualification rule, some reformists also seek a peremptory disqualification system, already used in some form in 19 states, where counsel may strike one judge from presiding over a matter per proceeding.

A less controversial reform simply seeks independent adjudication of a party's recusal motion. In many states, such as West Virginia, the judge being asked to recuse him or herself decides whether recusal is appropriate. This reform would allow an independent decision-maker to decide whether disqualification is necessary.

Whether the adoption of any of the judicial reforms noted in this article can truly avoid the anticipated use of *Caperton* claims, as predicted by the dissenting justices, is unclear. But the debate itself indicates that the judiciary, the bar, and elected officials recognize the public concern with judicial impartiality and that reasonable solutions are being considered.

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