THE PRICE OF JUSTICE: HOW THE CAPERTON STANDARD FOR JUDICIAL RECUSAL FELL SHORT, BUT OPENED THE DOOR FOR REFORM OF THE RECUSAL STANDARDS ANYWAY

Student Note

Marisa McGarvey

"It appears that justice is indeed for sale." -- Hugh M. Caperton[1]

"Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when – without the consent of the other parties – a man *chooses* the judge in his own cause."[2]

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[1] Hugh M. Caperton, Address at the National Judicial College's "Electing Nevada's Judges: Protecting Impartiality and Ensuring Accountability (Oct. 18, 2010), *in* 48 DUQ. L. REV. 727, 732 (2010). Mr. Caperton further stated, "I am a citizen that has experienced firsthand the devastation and destruction that big money campaign donations are causing in judicial elections and ultimately in our courts." *Id.*

[2] Caperton v. Massey Coal Co., 129 S. Ct. 2252, 2265 (2009) (emphasis added).

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INTRODUCTION

The role of a judge and his or her resulting discretion over a given case form a powerful and central feature of the legal system in the United States. While it is true that a case is "decided" by a jury, the judge who hears the matter still wields a substantial degree of control over the proceedings, including often having the final say over sentencing.[3] Therefore, the mode in which a judge comes to exercise this type of influence is similarly important. In fact, "the question of how we choose our

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[3] Matthew J. Streb, *The Study of Judicial Elections*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 3-4 (Matthew J. Streb ed., 2009), *available at* http://www.nyupress.org/webchapters/0814740340chapt1.pdf.

judges, whom we entrust to uphold and interpret our laws, speaks to foundational principles of our judicial branch . . . and our nation as a whole."[4]

In "the vast majority of states," the preferred mode of selection for at least some judgeships is by way of judicial elections.[5] However, the common law rule only dictated that a judge's recusal from a matter be mandatory when said judge had a direct, personal, and/or pecuniary interest *in the matter before him*.[6] It may be that the common law at the time did not contemplate an era when corporations would be permitted to contribute staggering amounts of money toward judicial elections, and thereafter be called to appear in court before a judge who is aware of the "debt of gratitude"[7] he now owes to the corporation for facilitating his elevation to the bench.

The reader may wonder how it is that the Constitution could tolerate such an appearance of bias, whether the bias be real or not, and the Supreme Court ultimately addressed the issue in 2009, in *Caperton v. Massey Coal Co.*[8] While said decision did not explicitly overrule any precedent, it also clearly represented a shift in the law with respect to when recusal becomes mandatory, rather than merely discretionary. This shift is two-fold, as the Court both expanded the factual reach of the due process requirement for recusal and clarified this recusal standard as being objective, rather than subjective as under the common law. These two developments now permit constitutional law to address certain circumstances where the "interest" of the judge at issue cannot be directly tied to the case at hand, in order to reach situations where there is a substantial

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[4] Justice Sandra Day O'Connor, Keynote Address at the Seattle University School of Law Symposium, State Judicial Independence – A National Concern (Sept. 14, 2009), *in* 33 SEATTLE U. L. REV. 559, 561 (2010).

[5] *See* Streb, *supra* note 3, at 7. In fact, "[a]lmost 90 percent of all state judges must face voters" at some point in order to remain seated on the bench. *Id.*

[6] *Caperton*, 129 S. Ct. at 2255.

[7] *See id.* at 2262.

[8] *Id.* at 2252.

probability that a reasonable person would in fact be biased, "directness" of the connection with the case notwithstanding.

The following note shall attempt to analyze and clarify the various standards for recusal, including the constitutional minimum standard when a litigant has contributed financially to the campaign of the judge assigned to the contributor's case, as set forth by the Court in *Caperton.*[9] In Part I, this note will briefly detail the history of judicial elections in this country, provide an overview of some current practices in this area, and then relate a more detailed description of the facts in the *Caperton* case itself. In Part II, this note shall examine and evaluate the proposed and actual standards that have been used in order to regulate judicial recusal in the past and present, to wit: the old "actual bias" standard; the somewhat confusing "probability of bias" standard enacted via *Caperton*; and the "mere appearance of bias" standard used by many states and recommended by the American Bar Association, among others. Lastly, in Part III, this note will look at certain proposed solutions that may function to better protect against corruption than judicial election methods as presently employed.

PART I: THE FACTS – JUDICIAL ELECTIONS IN THE PAST, PRESENT, AND *CAPERTON*

A. A BRIEF HISTORY OF JUDICIAL ELECTIONS IN THE UNITED STATES

Criticism of judicial elections is not a new phenomenon. Alexander Hamilton clearly vocalized the concern of many of the Founding Fathers that such a system of selection plainly jeopardized the judiciary's ability to remain independent and impartial.[10] This risk was highlighted by what America had learned from the example of England and the contentious interplay between an independent judiciary and a royal sovereign.[11] Such concern, evidently still relevant today, formed

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[9] *Id.*

[10] Streb, *supra* note 3, at 8.

[11] *Id.*

the basis of the Founders' implementation of the federal system of executive appointment of judges, subject to legislative confirmation, for lifetime terms.[12] In addition, all thirteen original colonies also adopted systems of judicial appointment rather than election.[13]

During the mid-1800s, however, the country experienced a relatively rapid shift in the years leading up to the Civil War, and more and more states chose to switch to an election process to select the judiciary.[14] In fact, by the time of the Civil War, out of thirty-four states in the Union, twenty-four states had made the switch and turned away from judicial appointment.[15] There have been a myriad of reasons offered by scholars for this dramatic shift in the political process, but most of the explanations offered are rooted in the general attitude of the American people. This was a time now known by the advent of Jacksonian democracy, an era that was marked by a surge in support for popular participation in government, which included expansion of the voting pool to include more of the public.[16] This increase in public participation was at least in part based upon popular resentment for the land-owning class,

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[12] *Id.*

[13] *Id.* Seven of the original thirteen states utilized legislative appointment, while five adopted gubernatorial appointments, subject to approval by special legislative committees. *Id.* at 8-9. Lastly, Delaware copied the federal model, gubernatorial appointment with legislative confirmation. Streb, *supra* note 3, at 9.

[14] *Id.* at 9. Mississippi was the first such state, amending the state constitution in 1832 to reflect the new requirement of popular election as to all state judges. *Id.* New York was the second state to do so in 1846, and thereafter the floodgates opened, such that by 1850, seven states had switched to judicial elections in that year alone. *Id.* In stark contrast to the states that joined the Union pre-1830, the remainder of states who were admitted to the Union from 1846 until Alaska in 1959, all provided for judicial elections at least in some respects. *Id.*

[15] *Id.*

[16] Streb, *supra* note 3, at 9.

who were thought to be in control of the judiciary, and a corresponding rise in efforts to end class-based privileges.[17]

The early 1900s brought a new wave of criticism of judicial selection methods, specifically as to popular elections, from new political groups such as the Progressives, joined by the American Bar Association, still aimed at eliminating corruption on the bench.[18] The subsequent outcry led to the introduction of non-partisan elections in certain states, where ballots only contained candidates' names and did not list his or her associated political party.[19] This was seen as a compromise between attempts to eliminate the rampant corruption present in most big-city politics at the time, while still maintaining judicial accountability directly to the voting public.[20] In 1927, non-partisan elections were being utilized for judicial selection in twelve of the forty-eight states.[21] However, these states were to quickly learn by example that this did not provide the much-needed panacea for political malfeasance on the bench.

Non-partisan elections did not appear to be the solution, as demonstrated by the three states that adopted and then quickly abandoned the process in 1927 in favor of switching back to partisan elections.[22] A main concern that led to this switch was

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[17] Larry C. Berkson, *Judicial Selection in the United States: A Special Report,* AM. JUDICATURE SOC'Y, http://www.judicialselection.us/uploads/documents/Berkson_1196091951709.pdf (last visited Mar. 21, 2012) (updated by Rachel Caufield and Malia Reddick).

[18] *Id.* Such criticism of the popular election method was voiced as early as 1853 at the Massachusetts Constitutional Convention, where delegates deemed the method a failure as implemented in New York, and refused to adopt the same. *Id.*

[19] Streb, *supra* note 3, at 10. It is worth noting that the first nonpartisan judicial election was held in 1873, in Cook County, Illinois. *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* The three states that had abandoned judicial elections by 1927 were: Iowa, Kansas, and Pennsylvania (note that they are not included as part of the twelve states who were using judicial elections by 1927). Berkson, *supra* note 17, at 2.

the lack of an informed electorate, as political party leaders still controlled the selection of candidates, who were "thrust upon an unknowledgeable electorate, which, without the guidance of party labels, was not able to make reasoned choices."[23] In response, the American Judicature Society proposed a new process: the retention election.[24] Exactly what it sounds like, a retention election simply posed to the voting public the issue of whether or not a certain judge should remain on the bench after his or her first allotted term had run.[25] Retention elections were to take place after a probationary period, with the judiciary initially being chosen via a merit selection plan, which openly acknowledged that the judicial candidate pool would be expanded so as to preclude consideration of "inappropriate partisan factors such as an individual's party affiliation, party service, or friendship with an appointing executive."[26]

The advent of retention elections still represented efforts to balance the goal of having an independent judiciary while preserving judicial accountability to the people.[27] This system was first utilized in Missouri in 1940 and is the most common method used in the United States today although, of course, there are many variations thereof.[28] However, most modern retention election systems do have certain features in common, such as a non-partisan committee that recruits and screens potential candidates and thereafter submits to the appointing executive a short list, usually three to five candidates, from

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[23] Berkson, *supra* note 17, at 2.

[24] Streb, *supra* note 3, at 10.

[25] *Id.* at 10-11.

[26] Berkson, *supra* note 17, at 2.

[27] Streb, *supra* note 3, at 10-11.

[28] *Id.* at 11. California was actually the first to utilize a merit selection plan in 1934; however, Missouri was the first to use this method as it is now known today in 1940, leading to its popular nickname, the "Missouri Plan." *Id.* It is still the mostly commonly used method, although there are differences that vary from state to state. *Id.*

which to choose, followed by an unopposed retention election a year or two after appointment.[29]

B. THE CURRENT STATE OF THE NATION

In the United States, the only country in the world that elects judges, there are at least thirty-six states that utilize at least some form of judicial elections in their court systems.[30] This is obviously more than a majority, and therefore, deserves some measure of scrutiny at least equal to that which is applied toward any potential for bias in legislative or executive branch elections. The commonality of the practice is much more troubling in light of the growing involvement of corporate money with respect to judicial elections in particular. Corporate entities have become more free to exercise their "First Amendment rights" pursuant to recent Supreme Court decisions such as *Citizens United v. Federal Election Commission*[31] and have seized upon their newfound opportunity in order to influence American politics in another, more hidden manner than the customary lobbying efforts directed toward legislatures.[32] In fact, the amount of contributions made toward judicial campaigns in the past ten years is estimated to be in excess of $206 million, as compared with the mere $83 million in contributions raised during the 1990s.[33] Moreover, these

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[29] Berkson, *supra* note 17, at 2.

[30] *Id.* "Eight states elect all of their judges in partisan elections, and seven states use partisan elections to elect some of their judges. Thirteen states use nonpartisan elections to select all of their judges . . . [and] eight states use nonpartisan elections to select some of their judges." *Id.*

[31] 130 S. Ct. 876 (2010).

[32] "Politics makes strange bedfellows and is often a seedy, if not downright ugly, process." Keith R. Fisher, *Selva Oscura: Judicial Campaign Contributions, Disqualification, and Due Process,* 48 DUQ. L. REV. 767, 812 (2010).

[33] David L. Baker, *Foreword,* 58 DRAKE L. REV. 657, 658 (2010) (citing Matthew Mosk, *Study Shows Money Flooding into Campaigns for State Judgeships,* ABC NEWS (Mar. 17, 2010), http://abcnews.go.com/Blotter/study-shows-money-flooding-campaigns-state-judgeships/story?id=10120048).

figures appear to only represent so-called direct campaign contributions and do not take into account the independent expenditures made by corporate CEOs and the like.[34]

Looking at such extreme numbers begs the question, how can the American people ensure that their judicial system is functioning properly as an independent branch of government, governed solely by the federal and state constitutions, statutes, and common law? How can the public be assured that judges are not falling into the common trap laid for legislators, that of being swung by money and special interest groups far away from the truth, at the price of justice itself?[35]

It seems almost too obvious that "[t]he advent of more money presents more potential for [judicial] recusals and an even greater need for standards for ensuring judicial independence, impartiality, and integrity."[36] However, it is common for states to provide for *subjective* levels of inquiry to determine whether a judge will choose to recuse himself, historically making it "largely a personal decision for judges."[37] An example of one such subjective standard is the pre-*Caperton* standard for West Virginia courts, wherein recusal was mandated whenever a judge determined that his impartiality "might reasonably be questioned."[38] While this standard sounded strict in theory, one was left to wonder what it actually looked like in practice, as generally only the judge himself was left to make and review the decision as to whether or not to recuse himself, based upon his own ability to be impartial. This

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[34] James Sample, *Court Reform Enters the Post-*Caperton *Era*, 58 DRAKE L. REV. 787, 791-92 (2010).

[35] To continue on with the theme of rhetorical questions, as one author so eloquently phrased the struggle that the *Caperton* Court faced, "in the face of well-documented public mistrust of judges continuing to sit and hear cases in such circumstances, as part of more widespread public concerns about the fairness and impartiality of our courts, would applying due process limitations allay those concerns or exacerbate them?" Fisher, *supra* note 32, at 790-91.

[36] Baker, *supra* note 33, at 658.

[37] *Id.*

[38] W. Va. Code of Judicial Conduct Canon 3E(1) (1993).

circular logic has been accused of rendering "useless the ability of the court to act in any way that resemble[s] a fair tribunal."[39]

How have standards, such as the foregoing, fared insofar as their effectiveness in achieving recusal is concerned, in cases where a potential for bias arises? One example of this type of standard in play occurred in Wisconsin in 2007, where a judicial run-off resulted in the election of Annette Ziegler. Ziegler received in excess of two million dollars from the lobbying group Wisconsin Manufacturers & Commerce ("WMC"), which by itself was greater than the sum total of her official campaign monies.[40] WMC then expended their corporate funds on financing an appeal for, and writing an *amicus* brief in support of, a tax refund case worth $350 million, in which Ziegler subsequently wrote the 4-3 decision, cast in favor of WMC's position.[41] The only surprise in this case was that Ziegler was previously disciplined while serving as a lower court judge, for failing to recuse herself on eleven different cases that concerned a bank where her husband happened to be a director.[42] Apparently, this prior impropriety did not prove to be an impediment to her later election to the high court. In the words of the now-famous plaintiff Hugh Caperton, "so much for due process."[43]

If only the 2007 Wisconsin election was the exception instead of the rule; however, developments in other areas of the country undermine that naïve hope. By way of example, in a 2004 election in Illinois, Lloyd Karmeier went on to win the so-called 'tort wars' after receiving over a million dollars in contributions stemming from connections to State Farm Insurance Company, in a heated race between the US Chamber of Commerce-backed Karmeier, and Gordon Maag, supported

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[39] Caperton, *supra* note 1, at 731.

[40] Sample, *supra* note 34, at 795.

[41] *Id.* at 796.

[42] *Id.* at 795-96.

[43] Caperton, *supra* note 1, at 731.

by trial lawyer groups.[44] Approximately ten million dollars were spent overall between the two candidates.[45] Upon his win, Karmeier thereafter cast the deciding vote in State Farm's appeal of a $450 million damage award, saving the company roughly half of a *billion* dollars, which some presume to have constituted the *quid pro quo* between them.[46]

An enlightened Alabama rule now acknowledges the reality of the seeming inability of states to maintain a judicial election system that somehow addresses the very real danger of campaigns and the corresponding necessary funding, which can easily overcome the impartiality of the judiciary. The Alabama law requires, by way of motion, the automatic recusal of its circuit court judges in any case in which a party or his counsel contributed greater than $2,000 to the judge's campaign.[47] This rule certainly seems to make sense and likely contributes to upholding public confidence in that state's courts. This is so because, even as to those judges who were not improperly influenced by their campaign contributors, the appearance of impropriety may still be conveyed to the public in many instances. A large part of the populace already cynically views our present day government as being controlled by "big money," and in recent years this criticism has reached the judicial system as well.[48] Without the full confidence of the public at large, our legal system lacks any meaningful ability to enforce the law,[49]

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[44] Adam Skaggs, *Judging for Dollars*, THE NEW REPUBLIC (April 3, 2010, 12:00 AM), http://www.tnr.com/article/politics/judging-dollars.

[45] Streb, *supra* note 3, at 1.

[46] Skaggs, *supra* note 44.

[47] William E. Raftery, *"The Legislature Must Save the Court from Itself"?: Recusal, Separation of Powers, and the Post-*Caperton *World,* 58 DRAKE L. REV. 765, 768 (2010).

[48] *See, e.g.* Baker, *supra* note 33, at 660; Fisher, *supra* note 32, at 778 (discussing the "already widespread public perception that justice is for sale and that only the wealthy can expect to receive it."); and Bert Brandenburg, *Big Money and Impartial Justice: Can They Live Together?*, 52 Ariz. L. Rev. 207, 207 (2010) (discussing his concern that "[m]any Americans believe that justice is for sale.").

and according to the plaintiff in *Caperton*, "[o]ur citizens have lost faith in our courts."[50]

The state of the nation's judicial electoral systems has become such a concern that many members of the judiciary have voiced their aversion to the widely-felt and significant influence of corporate money. The Chief Justice of the Oregon Supreme Court, Paul J. De Muniz, has stated that the reforms currently being proposed are not adequate to stem what he predicts to be the coming tide of "ugliness," as he refers to "big money, partisanship, attack ads, etc."[51] These were his remarks at a conference that was *celebrating* that particular court's 150th anniversary; hence, it is clearly a matter of great importance to him. In fact, the advice he gave "for the Oregon judiciary of the future" is to "add merit selection of judges to the discussion," adding that this is a "public discussion that needs to begin now."[52]

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[49] This holds true regardless of the legitimacy and/or legal accuracy of a specific ruling or case. With respect to *Caperton*, one scholar noted, "[N]o matter whether the decision on the merits was right on the mark, nothing would shake the public perception that justice in West Virginia was for sale." Fisher, *supra* note 32, at 815. As to the topic generally, he went on to state that:

> "[e]ven a biased judge can render a correct decision. Doing so, however, diminishes public confidence not only in the correctness of that particular decision but in the legitimacy of judicial decisionmaking in general. . . With so many fine legal minds misunderstanding the overriding importance of public perceptions of fairness and impartiality to the legitimacy of the judiciary itself, it is small wonder that recusal and disqualification law is in such disarray."

Id. at 815-16.

[50] Caperton, *supra* note 1, at 731. In other words, "[m]oney is money, and it's all about the appearance." Fisher, *supra* note 32, at 814.

[51] Paul J. De Muniz, Chief Justice, Oregon Supreme Court, Past is Prologue: The Future of the Oregon Supreme Court (Oct. 9, 2009), *in* 46 WILLAMETTE L. REV. 415, 441 (2010).

[52] *Id.* at 442.

C. THE *CAPERTON* DECISION

Perhaps the aforesaid elections were surprising because they took place in the *United States of America*, and not in some remote and isolated country where rampant corruption in the courtroom might unfortunately be expected. After all, our Constitution guarantees due process to all, not to "some citizens, or citizens with lots of money, or citizens who support special interest groups that are spending millions on judicial elections; it says every citizen."[53] In June of 2009, the Supreme Court agreed to hear a noteworthy case relating to judicial elections, in order to finally set some sort of national standard. Whether that standard will actually be efficient in halting the type of implicit bias resulting from large special-interest donations in support of judicial election campaigns is a question that will be addressed in Part II. As to the "extraordinary situation where the Constitution require[d] recusal"[54] that mandated this intervention by the highest Court in the land, the story begins at the Upper Big Branch Mine in West Virginia.

This mine set the scene for a verdict of liability for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations against the A.T. Massey Coal Company and affiliates (collectively, "Massey"), who had, according to the jury findings, intentionally driven another company out of business.[55] This finding was rendered in 2002 by a West Virginia jury that awarded $50 million in compensatory and punitive damages against Massey. All of defendant's post-trial motions disputing the verdict and the monetary award were denied by the trial court, which found that Massey had acted intentionally and with "utter disregard" for the rights of plaintiffs.[56]

Conveniently, subsequent to this disastrous verdict for Massey, but prior to the lapsing of the permissible time for an appeal, the 2004 elections for the West Virginia Supreme Court

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[53] Caperton, *supra* note 1, at 727.

[54] *Caperton,* 129 S. Ct. at 2265.

[55] *Id.* at 2257.

[56] *Id.*

of Appeals occurred.[57] This is, of course, the same court in front of which Massey's appeal ultimately landed. In hindsight, one can see how Massey's chairman/CEO/president, Don Blankenship, decided that the most efficient course of action was to support the campaign of Brent Benjamin, who was running against the incumbent Justice McGraw.[58] Naturally, Blankenship did not stop with his $1,000 donation to Benjamin's campaign committee, an amount which is equal to the maximum allowable donation by statute. He additionally contributed approximately two and a half million dollars to a lobbying organization entitled "And For the Sake Of the Kids." Notwithstanding the nature of such a benign name being given to what could be termed a morally ambiguous cause, what can be proven by the facts is that Blankenship alone contributed more than two-thirds of the total monies raised by this group.[59] Lastly, Blankenship also spent in excess of half of a million dollars relative to independent expenditures such as direct mailings, television advertisements, etc.[60]

Benjamin went on to win the election with 53.3% of the vote, and one can only assume at least in part due to the roughly three million dollars spent by Blankenship alone, which was "more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee."[61] Despite any negative implications the public may have drawn from these excessive donations, Justice Benjamin denied plaintiffs' motion to disqualify himself based on the alleged conflict in April of 2006.[62] Thereafter, in December 2006, Massey filed a petition to appeal the jury verdict, and the case was granted review by Supreme Court of Appeals.[63] In light

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Caperton,* 129 S. Ct. at 2257.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 2258.

of the surrounding circumstances, it is perhaps not a surprise to learn that in November of 2007 the fifty million dollar verdict was reversed. It was a surprise to the plaintiff, Hugh Caperton, though, who has stated, "after nine years of delays, motions, pretrial hearings, depositions, and a trial that lasted over seven weeks . . . you are now finally sitting in front of the West Virginia Supreme Court of Appeals hoping, that after all these years, justice will finally be served."[64] Alas, there would be no justice for Mr. Caperton, who alleged that his business had been completely destroyed by defendant Massey, and said that his feeling about the case "can only be described in one word -- sickening."[65]

The state Supreme Court's reversal was accompanied by an opinion (joined by Justice Benjamin) that openly admitted that the defendants' actions had "warranted the type of judgment rendered"[66] by the jury. Yet regardless of such an admission, the West Virginia Court still reversed the damage award, based upon certain vague procedural niceties, such as a contractual forum selection clause.[67] Notwithstanding any legal validity the majority may have seen, "[i]t was the first time in the 147 year history of West Virginia that a jury award had been overturned on the grounds of forum selection,"[68] and therefore it was clearly an extraordinary decision. The dissent blatantly accused the majority's opinion of being "morally and legally wrong."[69]

After the stunning reversal, plaintiffs again looked to disqualify certain justices hearing the matter, and one such

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[64] Caperton, *supra* note 1, at 728.

[65] *Id.* at 727-29. Mr. Caperton's actual remarks with respect to the collapse of his business were as follows: "[I]magine all of your hard work being destroyed by one of the nation's largest coal companies, who coveted the business that you had worked so hard to build, not by using ethical competitive business practices, but by engaging in an illegal and fraudulent scheme that they had planned for years." *Id.* at 727-28.

[66] *Caperton,* 129 S. Ct. at 2258.

[67] *Id.*

[68] Caperton, *supra* note 1, at 729-30.

[69] *Caperton*, 129 S. Ct. at 2258.

application was granted. Justice Maynard recused himself after photographs of his vacation taken with none other than Don Blankenship were made public, a vacation which took place on the French Riviera, during the pendency of the case.[70] Similarly, on the other side, Justice Starcher recused himself pursuant to the defendants' request, which was apparently based upon Starcher's "public criticism of Blankenship's role in the 2004 elections."[71] In fact, Justice Starcher even went so far in his recusal memorandum as to urge Justice Benjamin to disqualify himself as well, but his colleague's suggestion went unheeded.[72] Thus, it came to be that Justice Benjamin was then acting as the Chief Justice with respect to the rehearing that the case was granted.

In his capacity as such, Justice Benjamin denied plaintiffs' third motion for his disqualification, which was this time accompanied by a popular poll showing that over sixty-seven percent of West Virginia citizens doubted his ability to remain fair and impartial.[73] He then once again presided over a divided court that reversed the damages award. This time the dissent went even further, calling the majority opinion "fundamentally unfair" and acknowledging that Justice Benjamin's failure to recuse himself had led to "genuine due process implications arising under federal law."[74] This in conjunction with the accusation that "justice was neither honored nor served,"[75] may perhaps have influenced the Supreme Court's decision to grant *certiorari* in this matter, which they later characterized as a set of "extreme facts" leading to a situation where the "probability of bias…[rose] to an unconstitutional level."[76] Such a characterization constitutes a euphemism for what a

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[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at 2258-59.

[75] *Caperton,* 129 S. Ct. at 2258.

[76] *Id.* at 2265.

"reasonable" citizen might have called this situation, and what the plaintiff in the case did call it – "a black eye on the judicial system."[77]

PART II: THE LAW – THE VARYING STANDARDS FOR JUDICIAL RECUSAL

A. THE PAST: THE ACTUAL BIAS STANDARD

According to the *Caperton* Court, precedent with respect to judicial recusal mandated judicial recusal based on the notion of the "traditional common law prohibition on direct pecuniary interest . . . [and] a more general concept of interests that tempt adjudicators to disregard neutrality."[78] Prior to *Caperton*, a seminal case on this issue was *Tumey v. Ohio*,[79] where the Court held that due process only requires recusal in those instances where the common law rule - "a direct, personal, substantial, pecuniary interest"[80] - was triggered. Such was the case in *Tumey*, where a mayor, who doubled as a judge, received supplemental compensation for convicting and prosecuting any violations of the state liquor trafficking prohibition.[81] The Court stated that the general rule provided for disqualification was "an interest in the controversy," but noted that the law was uncertain relative to "what the degree or nature of the interest must be."[82] However, the mayor's "direct personal pecuniary interest in convicting the defendant who came before him for

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[77] Caperton, *supra* note 1, at 731.

[78] *Id.* at 2260.

[79] 273 U.S. 510 (1927).

[80] *Id.* at 523.

[81] *Id.* at 518. The municipal regulation provided for this by permitting the mayor, deputy marshal, and certain others involved in the prosecution, to retain the amount of fees and costs that were to be paid by the defendant. *Id.* Therefore, if the defendant was not convicted and ordered to pay, there were no funds from which to additionally compensate the mayor *et al.*

[82] *Id.* at 522.

trial, in the $12 of costs imposed in his behalf" was found to be sufficient as a violation of the constitutional guarantee of due process.[83] Unfortunately, the Court did not provide future litigators with much specificity as to that requisite degree or nature of the interest; however, they did distinguish a situation where the "[i]nterest is so remote, trifling, and insignificant that it may fairly be supposed to be incapable of affecting the judgment of . . . an individual."[84] Beyond these remote interests, it was held to deprive a criminal defendant of due process "to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him."[85] The linchpin of the analysis was that the interest be "direct." Otherwise, ruled the *Tumey* Court, mandatory judicial recusal was left solely up to the discretion of state legislatures relative to "mere" issues such as "kinship, personal bias, state policy, [and] remoteness of interest."[86]

In the same vein, mere personal bias or prejudice were consistently deemed to be insufficient so as to require recusal as a matter of due process, inasmuch as "the traditional common-law rule was that disqualification for bias or prejudice was not permitted," based upon a circular legal presumption that judges were impartial due to their sworn oath to be impartial.[87] In fact, those types of cases were stated as being exclusively within the purview of state legislative discretion.[88] By way of example, in *Lavoie,* a state justice was required to recuse himself due to his standing as a lead plaintiff in a lawsuit pending before the trial court where the facts were substantially the same as those in the

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[83] *Id.* at 523.

[84] *Tumey,* 273 U.S. at 523 (quoting Thomas M. Cooley & Victor H. Lane, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS, 594 (7th ed. 1903)).

[85] *Id.*

[86] *Id.*

[87] Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 820 (1986).

[88] *Id.* at 821 (citing Patterson v. New York, 432 U.S. 197, 201-02 (1977)).

appellate matter in which he cast the deciding vote.[89] Conversely, in addressing appellant's other claim, the Court did not require recusal with regard to the other justices in that case, who were presumed to have "a slight pecuniary interest" in the case, as potential litigants in a class-action suit that could have resulted from the case at issue.[90] However, the Court distinguished the hypothetical instance as not mandating recusal because that interest was "too remote and insubstantial to violate the constitutional constraints."[91]

Lavoie is noteworthy as an intermediary case between *Tumey* and *Caperton* because a careful reading of the matter shows the seeds out of which *Caperton* will grow. Although the *Lavoie* Court states that the decision does not address "whether allegations of bias or prejudice by a judge . . . would ever be sufficient under the Due Process Clause to force recusal," in the next breath it is acknowledged that in "the most extreme of cases" presenting an issue of bias, disqualification would in fact be constitutionally required.[92] Of course, the *Lavoie* Court quickly went on to note that the case at hand fell "well below that level" and held that the basis of the decision was not "mere

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[89] *Id.* at 813-14. The defendant insurance company was sued for a bad faith refusal to pay a claim, and the verdict of three and a half million dollars in punitive damages awarded against them (the largest such punitive award ever in Alabama) was affirmed on appeal in an opinion authored by the justice at issue in *Lavoie*. *Id.* at 813. The company later learned, while the case had been pending, that the justice had filed two suits of his own against insurance companies for bad faith refusals to pay claims, also seeking punitive damages. *Id.* Therefore, the Supreme Court held that his affirmance in the underlying *Lavoie* matter "had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case." *Id.* at 814.

[90] *Lavoie*, 475 U.S. at 814. The other justices were seen as potential litigants in a class-action suit filed by the later-disqualified justice inasmuch as the action was on behalf of all state employees insured under the group insurance plan. However, the Supreme Court deemed this to be "highly speculative and contingent" because the court hearing the class action suit had not yet even certified a class, "let alone awarded any class relief of a pecuniary nature." *Id.*

[91] *Id.* at 825-26.

[92] *Id.* at 821.

allegations of bias and prejudice," but rather, the Justice's "more direct stake in the outcome."[93] Still, the door was certainly left open for future cases where the allegations of bias and prejudice could be held sufficient to establish a violation of due process.

In sum, to use the oft-quoted language by which the twentieth-century Supreme Court tested whether recusal is required, recusal was required in any situation that would "offer a possible temptation to the average man as a judge to forget the burden of proof . . . or which might lead him not to hold the balance nice, clear and true . . . ."[94] Yet, it is still a frequent practice to permit the judge who has been asked to recuse himself to exercise total discretion over whether this standard has been triggered. Twenty-four states either explicitly permit a trial judge to hear his own recusal motion or are silent on the subject and therefore implicitly permit it.[95] Only fifteen states require another judge to hear the matter either initially or at least in the event that the hearing judge declines to recuse himself.[96] The law is even more lenient for appellate judges, and at least seven states do not overtly apply the trial court recusal rules to their appellate courts.[97] Thus one may conclude that while in the past the Supreme Court used strong language to

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[93] *Id.* It may be of interest to the reader that prior to the Supreme Court's hearing of this case, the Alabama justice at issue "retired from the court for health reasons." *Id.* at 823 n.2.

[94] *Tumey*, 273 U.S. at 532.

[95] Raftery, *supra* note 47, at 767-68. Missouri and Oklahoma expressly permit the practice, while the laws of Alabama, Arizona, Connecticut, Georgia, Hawaii, Indiana, Iowa, Kentucky, Minnesota, Mississippi, Nebraska, New Hampshire, New York, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming are all silent on this issue. *Id.* at nn.5-6.

[96] *Id.* at 768. The states that require another judge to hear the matter (either initially or upon the hearing judge's declining to recuse himself) are Alaska, Arkansas, California, Colorado, Florida, Illinois, Louisiana, Montana, Nevada, North Dakota, Oregon, South Dakota, Texas, Virginia, and Washington. *Id.* at n.7.

[97] *Id.* at 768. The following states have laws that do not expressly state that trial judge recusal rules also apply to appellate judges: Illinois, Kansas, Nevada, North Carolina, Ohio, South Dakota, and Washington. *Id.* at n.16.

discuss the issue of judicial recusal, the actual standards that were set forth, for the most part, lacked the teeth for effective enforcement.

B. THE PRESENT: THE *CAPERTON* STANDARD

The Court achieved a subtle shift in the way one can interpret precedent for mandatory recusal through the holding of *Caperton*. While the standard enacted therein is still objective, and the Court effected this shift without the outright overruling of any cases, *Caperton* noted that the Court has identified since *Tumey* "additional instances, which, as an objective matter, require recusal."[98] The shift in the standard is termed subtle because whereas prior to this decision, language was employed to imply the requirement of actual bias, as under the common law, the *Caperton* court re-framed the inquiry, to examine whether under the circumstances, "experience teaches that the *probability of actual bias* on the part of the judge or decisionmaker is too high to be constitutionally tolerable."[99] Seemingly for the first time, the Court boldly held that under its objective standard, recusal may still be constitutionally required in some instances "whether or not actual bias exists or can be proved."[100] Some have posited that the novelty of the decision stems partly from the Court's allowance of solely the past connection between Justices Benjamin and Blankenship "to serve to create an assumption of bias" despite the fact that there was "no present or future effect on the judge."[101]

The *Caperton* Court further went on to specifically point out that even though Justice Benjamin of West Virginia "did undertake an extensive search for actual bias," the inquiry did not stop there.[102] While still treading lightly, the Court did at

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[98] Caperton v. Massey Coal Co., 129 S. Ct. 2252, 2259 (2009).

[99] *Id.* (citing Withrow v. Larkin, 421 U.S. 35, 47 (1975)) (emphasis added).

[100] *Id.* at 2265.

[101] Gerard J. Clark, Caperton*'s New Right to Independence in Judges*, 58 DRAKE L. REV. 661, 704-05 (2010).

[102] *Caperton*, 129 S. Ct. at 2265.

least acknowledge the complexity of a system that essentially relies on self-policing. "The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules."[103] This so-called private inquiry, reasoned the Court, was so difficult partially because it was possible for a judge who did not recuse himself to have "conducted a probing search into his actual motives and inclinations," without finding anything to be improper," although the Due Process Clause may have mandated otherwise.[104] The *Caperton* Court was careful to point out that there had been no claim of any overt *quid pro quo* arrangement, but in the same breath, they also recognized Blankenship had made "extraordinary" donations to a judicial campaign while having "a vested stake" in a case pending before the same judiciary.[105] Therefore, in the eyes of some commentators, the case was "purely circumstantial, relying on inference and supposition,"[106] but to others, such as this author, and perhaps the Court, the inference of bias was the only logical conclusion to be drawn from the facts.

An important detail in the *Caperton* decision was the Court's holding regarding what was *not* relevant to recusal, i.e. "whether Blankenship's campaign contributions were a necessary and sufficient cause of Benjamin's victory."[107] Taking this to its logical conclusion, it seems as though in the future it will not be incumbent upon the party seeking recusal to have to prove any actual connection between the judicial win in the election and the financial contributions from an adverse party. This is another way in which the Court seems to speak in more relaxed language regarding the circumstances where judicial recusal must be required, by easing the burden of proof to that of a realistic level, inasmuch as the aforesaid connection between the victory and the money would likely be extremely difficult to demonstrate.

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[103] *Id.* at 2263.

[104] *Id.*

[105] *Id.* at 2265.

[106] Clark, *supra* note 101, at 705.

[107] *Caperton*, 129 S. Ct. at 2264.

Moreover, the *Caperton* court provided a list of factors for assistance in evaluating the new standard, and such factors are as follows: "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."[108] Again, this is a subtle but distinct shift away from the previous decisions, which spoke harshly of needing to prove an actual pecuniary interest of the judge was involved before he would be forced to recuse himself. In *Caperton,* by contrast, the Court highlights certain aspects that make the case ripe for recusal, which will surely provide guidance to future litigators and the judiciary themselves. "The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical," said the Court, emphasizing the reasonable foreseeability that the *Caperton* appeal would land in front of the new justice, which existed at the time the contributions were being made.[109]

Of course, the *Caperton* Court also addressed concerns that had been raised over the potential flood of litigation involving judicial recusal that could have resulted from the decision. Several times it was noted how rare the circumstances that had presented themselves in *Caperton* really were: "[n]ot 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."[110] An attempt was made to create a definite bright-line around constitutionally-required recusal, as opposed to recusal which may be called for merely by the standards of professional ethics, by citing to precedent indicating that such constitutionally-required recusal was only mandated in those extremely atypical cases where "the probability of actual bias is too high to be constitutionally tolerable."[111]

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[108] *Id.*

[109] *Id.* at 2264-65.

[110] *Id.* at 2263.

[111] *Id.* at 2257 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

Nevertheless, despite the limitations that were placed around its holding, *Caperton* was a significant case because, as the Court itself stated, for the first time they were looking at the framework previously set up specifically in the "context of judicial elections" and not necessarily as presented "in the precedents we have reviewed and discussed."[112] In addition, for the first time something other than "a direct pecuniary interest" was held to be sufficiently influential so as to require a judge to recuse himself pursuant to the federal Constitution, and not merely vis-à-vis a state's judiciary code or rules of professional responsibility. "Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected."[113] This phrase will surely be used in future litigation as symbolic of the many indirect ways in which a judge can be biased toward a case besides having a "direct" monetary stake in the case's outcome.

In sum, while previously the Court had spoken of "an objective standard," it was not until *Caperton* that the common-law burden of needing to show actual bias on the part of the judge was eliminated. The *Caperton* court clarified that from now on, the reviewing court must not look into the subjective existence of bias, but rather the objective likelihood of bias in that particular situation or whether there is an unconstitutional "potential for bias."[114] In particular, when the issue arises with respect to campaign contributions by a party, the court must look to see if there is a "serious risk of actual bias . . . 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."[115]

Despite the progress that was made in *Caperton*, it is still the law that the Constitution only requires judicial recusal under an

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[112] *Id.* at 2262.

[113] *Caperton*, 129 S. Ct. at 2262.

[114] *Id.*

[115] *Id.* at 2263-64.

extraordinary factual scenario, begging the question "what good a precedent on an extreme case does for the more run-of-the-mill cases with unjust results springing from judicial bias."[116] Yet the very same opinion also urges state governments to enact broader rules, requiring recusal in many more situations. The *Caperton* court explicitly advised states to do so based upon their vital state interest in maintaining public confidence in courts, and the importance of the same is demonstrated by way of a June 2010 poll done by the organization Justice at Stake, which revealed that eighty-one percent of Americans felt that a judge must not hear the case of anyone who contributed more than $10,000 to his campaign.[117]

If this is the case, some commentators have wondered why the Supreme Court only went so far as to set this constitutional floor, expecting states to do the rest, instead of making the federal Constitution demand more as part of the guarantee of due process. Perhaps it is because "*Caperton* points out, in stark relief, the incompatibility of elected judges and the ideal of an independent judiciary," and it may even be said more dramatically that "*Caperton* is at war with judicial elections."[118] It may be that the Supreme Court, sensing this inevitability that "[j]udges concerned about their reelection will not be independent . . . [and] will sacrifice justice and the rule of law to public opinion,"[119] was hesitant to go any further in essentially condemning what is the preferred practice for judicial selection in a majority of states.

C. THE FUTURE: THE APPEARANCE OF BIAS STANDARD

Despite the Supreme Court's failure to expressly implement the mere appearance of bias as the *constitutional* standard for judicial recusal, the *Caperton* decision certainly paves the way for such a standard in the future. The Court acknowledged in the decision that almost every state, including West Virginia, has

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[116] Clark, *supra* note 101, at 706.

[117] Caperton, *supra* note 1, at 734.

[118] Clark, *supra* note 101, at 705-06.

[119] *Id.* at 706.

adopted the American Bar Association's objective standard for recusal, and they urge the states to go further than the constitutional floor set in *Caperton*, presumably by strictly applying the ABA standard.[120] That standard is contained in the Model Code of Judicial Conduct, and states that "[a] judge shall avoid impropriety and the *appearance* of impropriety."[121] The comment to the 1990 Code further sets forth a test, "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."[122]

While in theory this standard sounds as though it should be more than sufficient to redress concerns over an elected judiciary's impartiality, apparently in practice it has not served this function, based upon instances such as those discussed in Part I. Perhaps this is because the language of this standard, similar to other recusal standards, is highly vague. After all, "[q]uestions about 'impartiality' or 'public perception' or 'the average man as judge' lack precision. The Supreme Court calls these standards 'objective,' but they are not. Imprecise standards provide uncertain guidance and invite disputes."[123]

This formed part of the concern for the *Caperton* dissent who argued that the majority decision was likely to lead to a flood of litigation. The dissent pointed out many seemingly benign situations that, according to them, might constitute a probability of bias under the *Caperton* standard. Clearly positing a slippery slope argument, the dissent stated that the following "could give rise to a 'probability' . . . of bias: friendship with a party or lawyer, prior employment experience, membership in clubs or associations, prior speeches and writings, religious affiliation, and countless other considerations."[124] The dissenting opinion, written by Chief Justice Roberts, also came up with forty difficult and complex

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[120] *Caperton*, 129 S. Ct. at 2266.

[121] MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2011) (emphasis added).

[122] MODEL CODE OF JUDICIAL CONDUCT Canon 2A cmt. (1990).

[123] Clark, *supra* note 101, at 702.

[124] *Caperton*, 129 S. Ct. at 2268 (Roberts, J., dissenting).

questions, regarding the meaning and scope of the majority decision's language, that courts will now be forced to consider "[w]ith little help from the majority."[125] Of course, it is likely that a similar list of questions concerning the specifics of the rule could be formulated for almost any important Supreme Court decision; however, this irony is lost on the *Caperton* dissent. Furthermore, courts engage in complicated analyses to decide cases on a regular basis, and there is no reason why they should not have to do so relative to the extremely important issue of judicial recusal. The issue is so important because it has the potential to undermine the fundamental basis of our legal system: that of free and fair access to the courts by any citizen.

While the dissent may have legitimate concerns and while the majority may have only imposed the absolute bare minimum as a constitutional standard, there is still hope for the future. In

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[125] *Id.* at 2269-72. By way of example, question number nine asks:

> What if the case involves a social or ideological issue rather than a financial one? Must a judge recuse from cases involving, say, abortion rights if he has received 'disproportionate' support from individuals who feel strongly about either side of that issue? If the support wants to help elect judges who are 'tough on crime,' must the judge recuse in all criminal cases?

Id. at 2269.

Question number thirty-three queries:

> What procedures must be followed to challenge a state judge's failure to recuse? May *Caperton* claims only be raised on direct review? Or may such claims also be brought in federal district court under 42 U.S.C. § 1983, which allows a person deprived of a federal right by a state official to sue for damages? If § 1983 claims are available, who are the proper defendants? The judge? The whole court? The clerk of court?

Id. at 2271.

The remaining thirty-eight questions are similarly cumbersome. In fact, one scholar even inquired as to "whether some makeweight questions were included in order to yield the magic total of forty?" Fisher, *supra* note 32, at 817.

light of *Caperton*, courts and scholars across the country are reviewing and discussing both the federal constitutional floor and the standards of individual states. The renewed interest in the topic has already generated feedback and public commentary on both sides of the issue, and same can certainly be viewed as a step in the right direction. The ABA's Standing Committee on Judicial Independence, as part of its Judicial Disqualification Project launched in 2007, has taken initiative and issued a new set of recommendations in the summer of 2009 in response to the *Caperton* decision.[126] Such recommendations provide much of the necessary detail and clarity in how to evaluate the "mere appearance of bias" standard by setting forth specific procedures and rules that need to be adopted as well as suggesting specific data that should be gathered in order to help judges make better decisions relative to recusal.[127] Some of the ABA recommendations include:

> "assigning contested disqualification motions to a different judge," "adopting a de novo standard of appellate review in matters in which judges' decisions not to disqualify themselves are challenged," "establishing procedures for review of [decisions by appellate court judges to deny recusal motions] by the remainder of the court, by a specially constituted court, or by an advisory board," "adopting judicial substitution or peremptory challenge procedures for trial judges," "disseminating data about judicial disqualification within their jurisdictions," "encouraging judges to explain the reasons for their judicial disqualification decisions," and "providing more systematic guidance to the judiciary about when a

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[126] Joan C. Rogers, *Draft ABA Report Reviews Rules and Processes for Judicial Recusal, Recommends Improvements*, 77 U.S.L.W. 1782 (2009), *available at* http://www.americanbar.org/content/dam/aba/images/judicial_independence/lawweek_case_focus.pdf.

[127] *Id.*

> judge's impartiality might reasonably be questioned."[128]

Moreover, the ABA also provided special guidance for states that utilize judicial elections, by setting forth a list of factors to be considered when a judge's impartiality has been, or may reasonably be, questioned due to campaign contributions. These factors are as follows:

> "[t]he level of support," "any distinction between the direct contributions or independent expenditures," "[t]he timing of the support in relation to the case for which disqualification is sought," and "the relationship, if any, between the supporter and (i) any of the litigants, (ii) the issue before the court, (iii) the judicial candidate, and (iv) the total support received by the judicial candidate and the total support received by all candidates for that judgeship."[129]

Thus, despite the Supreme Court's reluctance to crack down on mandatory judicial recusal, the fact that they addressed the issue at all has already led to some noticeable effects. For those champions of the Constitution who agree with the Court that recusal can be mandated by the guarantee of due process, these effects are both beneficial and welcome changes. More than half of the states have been revising their judicial conduct codes based upon the 2007 ABA Model Code, and a few have already adopted a new code.[130] Arizona changed its code to now reflect the ABA's revisions, including a new rule that makes recusal mandatory when a judge is made aware that a party and/or his counsel have contributed a sum total within the prior four years that exceeds a certain amount.[131] Even Hugh Caperton, while

[128] Clark, *supra* note 101, at 699 (quoting Standing Comm. on Judicial Independence, ABA, REPORT TO THE HOUSE OF DELEGATES 2-3 (2009)).

[129] *Id.* at 700 (quoting Standing Comm. on Judicial Independence, ABA, REPORT TO THE HOUSE OF DELEGATES 3 (2009)).

[130] Rogers, *supra* note 126, at 4.

[131] *Id.*

acknowledging that the Supreme Court's decision ultimately did not change the result in his situation, recognized the case's "tremendous impact on our judicial system," insofar as it gave "judges a standard in which to follow with respect to their recusal from cases involving large contributors."[132] While the opinion by itself only provided a vague framework for judicial recusal in atypical cases, by expanding the reach of the federal Constitution at least beyond the common law, it left the door wide open for states to reform their own standards, and sparked much-needed discussion on the issue. This dialogue is the hidden treasure of the opinion, and the true legacy of *Caperton*.

PART III: SOLUTIONS

Former Supreme Court Justice Sandra Day O'Connor has tirelessly worked since her retirement from the Court to educate and reform the negative public perceptions that have come to be associated with judicial elections and the supposed unfairness of the legal system.[133] The current system being utilized in Arizona, her home state, is offered as an example of how to mitigate the dangers associated with traditional political elections, in order to preserve the appearance of an independent judiciary. Arizona maintains nonpartisan judicial nominating committees, made up of both attorneys and non-attorneys, that are tasked with reviewing all applications for a vacant seat on

[132] Caperton, *supra* note 1, at 733.

[133] Fisher, *supra* note 32, at 791. Fisher wrote:

> [T]he selfless and nonpartisan labor of many people, including retired Justice Sandra Day O'Connor and countless others for whom the health, and indeed the survival, of an independent judiciary – the bulwark erected by the Founders against self-aggrandizement and abuse of power by the political branches – is of paramount importance to the welfare of our democracy. That health, and that survival, are being challenged by a significant diminution in public trust and confidence in the judiciary, particularly at the state level.

Id. at 791-92.

both the superior and appellate level courts.[134] Upon completing said review, the committee then submits a list of the three most qualified candidates, of which no more than two may be from the same political party, to the governor for a final appointment decision.[135] The committee has a set of qualifications to be considered in their review, for the most part based upon the candidate's meritorious qualities, as well as the geographic diversity of the jurisdiction.[136] The judge then serves for a term certain, and thereafter in an uncontested retention election, the public can vote yes or no in order to keep or remove the judge.[137] If so removed, the committee begins the process again to fill the vacancy, while the electorate is benefitted by virtue of another commission tasked with rendering judicial performance reviews, which are made publically available.[138]

Justice O'Connor herself has stated when speaking in the context of Arizona's system, "I would love it if more states would move toward some kind of a selection system with appointments recommended by a commission and retention elections."[139] Beyond any drastic changes in a state's overall method, she also offers more minor suggestions that could be easily implemented. Longer judicial terms once elected is one such suggestion.[140] She further recommends increasing public awareness by way of disseminating "voter guides" that contain "performance

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[134] Rebecca White Berch, *A History of the Arizona Courts,* 3 PHOENIX L. REV. 11, 32 (2010). Note that in counties with populations of less than 250,000, the superior court judges may be chosen via the merit selection committees, or via nonpartisan elections, at the discretion of each such county. Streb, *supra* note 3, at 8; Berch, *supra* note 134, at 33-34.

[135] Berch, *supra* note 134, at 32.

[136] *Id.* at 33-34.

[137] *Id.* at 32-33. As to the length of the term, superior court judges remain on the bench for four-year intervals. Appellate judges are initially appointed for two years, then face a retention election, and thereafter remain for six-year intervals. *Id.* at 32.

[138] *Id.* at 34.

[139] O'Connor, *supra* note 4, at 565.

[140] *Id.*

evaluations" of the incumbent judges in order to foster more-educated voting decisions.[141] Finally, she also advises that our governments reconsider laws surrounding judicial recusal and election funding,[142] two issues that are obviously closely intertwined.

With respect to other ways in which the judicial selection process can be improved in those states that utilize elections in some form or another, there is a quite simple solution that may negate some of the perceived injustice. All states should amend their judicial conduct codes to include a provision requiring that any denial of a motion to disqualify must be accompanied by an explanation in writing, on the record.[143] Along the same lines, some scholars have recommended that states should also implement a requirement of a sworn affidavit executed by counsel for the party requesting disqualification, stating the exact facts that necessitate the recusal.[144] The judge would then be required to accept as true all facts that were stated therein.[145] This would eliminate prolonged and contested disputes between the party and the judge over the veracity of such facts. That is so because even if the judge is forced to recuse himself when he does not believe the facts contained in the affidavit are true, he will still have a remedy by way of a complaint to the bar association relative to the attorney who swore to those facts.[146]

States also need to reconsider current disclosure requirements with respect to judicial campaigning; however,

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[141] *Id.* at 565-66.

[142] *Id.* at 566.

[143] Fisher, *supra* note 32, at 837. Having an explanation of the denial of the recusal motion in writing would certainly assist the parties themselves in proceeding with their dispute, but in addition, "[s]uch written explanations would not only enrich the law of judicial disqualification, but, more importantly, would over time provide firmer guidance to judges who have to apply disqualification rules to novel factual settings," thereby creating a set of precedents for judicial recusal to clarify the standards that have been accused of being vague. *Id.*

[144] *Id.* at 836.

[145] *Id.*

[146] *Id.* at 836-37.

disclosure is an issue that needs to be explored and revamped on both sides of the coin. That means that the public is entitled to more stringent rules regarding both better access to campaign financing and donation information, and the obligation of judges to disclose on the record "information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification."[147] The author makes reference to the "coin" inasmuch as the judiciary will also need better access to information and more disclosure in order to properly assess their own impartiality or lack thereof. Due in large part to the *Citizens United* decision, it may be difficult presently for a judge to ascertain the exact source from which his campaign funding may have come. Therefore, the judiciary must be well apprised as to these sources in order to make an appropriate decision regarding recusal. Some examples of disclosures that should be made available to judges are subjects such as "corporate affiliations, support for filing of briefs amicus curiae, etc."[148]

Another important area ripe for reform is the review process that is applied to denied motions for disqualification. The law is somewhat complicated on the issue presently, inasmuch as it not only varies from state to state, but also varies from court to court, depending on whether the recusal is requested at the trial court or appellate level. All states should work toward improving such processes by specifying (or clarifying, if such a procedure already purports to be in place), the procedure by which an interlocutory appeal of a refusal to recuse can be obtained quickly yet fairly.[149] Of course, as noted above, such an appellate decision, either affirming or reversing the trial judge's decision, should be accompanied by a full statement of reasons, made available in writing.

Moreover, relative to appellate judges in particular, states must work toward revision of the rules in order to eliminate from "the subject justice . . . [the] sole authority to decide such

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[147] *Id.* at 830.

[148] Fisher, *supra* note 32, at 833.

[149] *Id.* at 831.

motions."[150] These issues are not as salient with regard to trial court judges, inasmuch as a refusal to recuse at that level is usually subject to some sort of appellate review; however, "where the recusal decision is vouchsafed to the sole discretion of a state high court judge . . . due process concerns are heightened."[151] Michigan has come up with a solution to this conundrum, by permitting a denial of a recusal motion by the judge in question to be reviewed by the balance of the court.[152] Another proposed solution is to empanel a special committee of retired members of the judiciary to review such denials.[153]

This author does caution that any of the foregoing solutions alone will certainly not be sufficient to stem the tide of perceived injustice in the eyes of the public. Furthermore, any such revisions to state judicial codes must be accompanied by a stated standard for recusal on "the mere appearance of impropriety." This standard as written must also be strictly applied in order to both reassure the public and develop a body of case law that interprets the aforementioned objective standard. Such a standard, and strict application and enforcement thereof, must be used in conjunction with a modified selection process such as the above-noted appointment and retention election procedure in Arizona. The duality of this burden thrust upon states to review and revise the rules of judicial conduct is imperative in order to safeguard the public's constitutional right to an impartial judiciary, because "the spectacle of large expenditures to support judicial election campaigns creates a spectre of partiality and impropriety that is profoundly injurious to public perception of the judiciary."[154]

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[150] *Id.* at 811.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] Fisher, *supra* note 32, at 799.

CONCLUSION

The functions and responsibilities of the judicial system in this country are a fundamental basis underlying much of our legal system, and thereby this role as viewed by the public serves to give to the system its legitimacy, or lack thereof, in the eyes of its citizenry. However, the rules in place that govern judges stemming from the common law are inadequate to address this issue in light of the initial advent of an elected judiciary in the majority of the several States, and the more recent introduction of corporate money and special interest groups into the mix. As has happened in many other instances involving public policy issues in the past, the law has been slow to catch up with the real world. Therein lies the importance of *Caperton v. Massey Coal Co. Inc.*

In *Caperton*, the Supreme Court actually took a giant step away from the common law rule that a judge's recusal from a matter was only mandatory when said judge had a direct, personal, and/or pecuniary interest in the matter at hand. As discussed in detail above, while *Caperton* did not purport to outright overrule any prior law, it also clearly represented a transformation in the way in which attorneys, judges, and citizens will approach the subject of judicial recusal in the future. Such a transformation was achieved firstly by factually going beyond the common law to recognize that "mere" bias or prejudice can also lead to a constitutionally-mandated recusal, rather than forcing a litigant to show a "direct interest" in his particular matter. Secondly, the Court also made clear that this recusal standard is objective and to be examined in light of what a reasonable person would think constitutes a probability of bias, helping to eliminate the subjective type of soul-searching for "actual bias" done by individuals such as Justice Benjamin in *Caperton*, which was previously deemed to be sufficient.

In sum, in Part I, this note looked at the history of judicial elections in United States and how they came to resemble what they do today, looked at some specific examples of disputed and arguably corrupt judicial elections and corresponding results, and went through the facts of *Caperton* in greater detail. Part II dealt with the varying standards for judicial recusal, both those currently in use and some proposed standards, including in relevant part: the "actual bias" standard; the "probability of bias" standard resulting from *Caperton*; and the "mere

appearance of bias" standard. Finally, Part III was a brief and woefully inadequate attempt to suggest certain reforms to state judiciary codes in order for the legal system to help regain the support and trust of the American people.

While the preceding statement may sound dramatic, a reform of the ways in which judges are selected and disqualified from hearing cases is absolutely essential to the health of our nation.[155] Big money and politics have no place in an individual's matter that has come before a court. The very essence of an independent judiciary excludes the notion that a citizen would not be allowed redress when he has legitimate concerns over the alleged bias of the judge in his case. To summarize this lack of redress in the words of Mr. Caperton himself, "[i]t is a feeling that no citizen should ever have to endure in any court in this country."[156]

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[155] "A substantial majority of the public – often 80% or higher – believes that monetary campaign support influences judicial decisions, according to a variety of surveys conducted at both the national and state levels." Fisher, *supra* note 32, at 767 n.106.

[156] Caperton, *supra* note 1, at 729.