

# BRENNAN CENTER FOR JUSTICE

## Setting Recusal Standards after *Caperton v. A.T. Massey Coal Company*

As the only branch of government with the power to declare acts of the political branches unconstitutional, the judiciary plays a vital role in our constitutional democracy. To carry out this role effectively and to maintain public confidence, courts must keep the promise of dispensing fair and impartial justice, and must decide controversies without bias. Over the last decade, however, the growing influence of money in judicial elections has undermined public confidence in the judiciary.

Fortunately, the U.S. Supreme Court's recent decision in *Caperton v. A.T. Massey Coal Co.*<sup>1</sup> sends a clear signal that that the time is right for states to shore up the foundations of the impartial judiciary. As explained below, after *Caperton*, individual states should adopt judicial recusal reforms that will ensure the appearance, and reality, of fair and impartial justice.

### *Caperton v. A.T. Massey Coal Company*

*Caperton* involved a dispute in West Virginia between two coal companies. In 2002, Hugh Caperton, the CEO of a small mining company, won a \$50 million judgment against the A.T. Massey Coal Co. and its affiliates (collectively, "Massey"), the country's fourth-largest mining conglomerate. Massey appealed the \$50 million judgment.<sup>2</sup>

After the verdict but before the appeal to the Supreme Court of Appeals of West Virginia, West Virginia held its 2004 judicial elections. Given the stakes, Massey's chief executive, Don Blankenship, took a keen interest in who would fill an open seat on the Supreme Court of Appeals — and spent lavishly to ensure that his preferred candidate, Brent Benjamin, would be the one to take the bench. All told, Blankenship spent on the order of \$3 million in support of Benjamin — including a \$1,000 direct contribution to Benjamin's campaign; just over a half million dollars on direct mailings, TV and print advertising supporting Benjamin; and nearly \$2.5 million in donations to a group called "And for the Sake of Kids" that actively opposed Benjamin's opponent, Warren McGraw.<sup>3</sup> Blankenship's spending amounted to more than all other expenditures in support of Benjamin *combined* and more than 60 percent of the total spent to promote Benjamin's election.<sup>4</sup> Blankenship's

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<sup>1</sup> 129 S. Ct. 2252 (2009).

<sup>2</sup> *Id.* at 2257.

<sup>3</sup> *Id.*

<sup>4</sup> Brief for Petitioners at 2, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22).

investment paid off: Benjamin was elected, and took his place on the Supreme Court of Appeals.<sup>5</sup>

In October 2005, before Massey filed its petition for appeal, Caperton moved to disqualify now-Justice Benjamin from hearing the appeal in light of the conflict created by Blankenship's involvement in Benjamin's campaign.<sup>6</sup> Justice Benjamin denied the motion, concluding that after a careful examination he found "no objective information . . . to show that this Justice has a bias for or against any litigant . . . or that this Justice will be anything but fair and impartial."<sup>7</sup> Then, in November 2007, the Supreme Court of Appeals reversed the \$50 million jury verdict. Caperton sought rehearing and moved once more, unsuccessfully, for Justice Benjamin's disqualification. The court granted rehearing, and Caperton moved a third time for disqualification — again, to no avail. In April 2008, Justice Benjamin cast the tie-breaking vote in the court's 3-2 decision to throw out the multi-million dollar award against Blankenship's company.<sup>8</sup>

Caperton petitioned the U.S. Supreme Court, asking the Court to address whether Justice Benjamin's refusal to recuse himself from his principal financial supporter's case violated the Due Process Clause of the Fourteenth Amendment.<sup>9</sup> The Supreme Court agreed to hear the case, and in an opinion issued on June 8, 2009, the Court answered that question in the affirmative.

In a majority opinion delivered by Justice Anthony Kennedy, the Court observed that most matters pertaining to judicial disqualification do not implicate constitutional concerns,<sup>10</sup> but held that due process nonetheless requires a judge's recusal "when the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable"<sup>11</sup> — when, that is, there is a "serious, objective risk of actual bias."<sup>12</sup>

Justice Benjamin had conducted a searching examination of his own motives and found no improper inclination or actual bias, and the Court did not dispute his findings.<sup>13</sup> The Court stated, however, that a judge's subjective inquiry into actual bias "is not one that the law can easily superintend or review."<sup>14</sup> Accordingly, as the Court explained, the Due Process Clause has been implemented in the Court's prior disqualification decisions by objective standards that do not look to proof of actual bias but, instead, ask "whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to

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<sup>5</sup> 129 S. Ct. at 2257.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 2258 (citation omitted).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 2256-57.

<sup>10</sup> *Id.* at 2269.

<sup>11</sup> *Id.* at 2257 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

<sup>12</sup> *Id.* at 2265.

<sup>13</sup> *Id.* at 2262-63.

<sup>14</sup> *Id.* at 2263.

be adequately implemented.”<sup>15</sup> The Court concluded that such a serious and objective risk of actual bias exists — “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.”<sup>16</sup>

Applying this principle, the Court held that Justice Benjamin should have recused himself, noting that the facts of the case were “extreme by any measure.”<sup>17</sup> The Court reached its conclusion that Blankenship had a “significant and disproportionate influence” in Justice Benjamin’s placement on the case based upon the total amount of money Blankenship contributed to the campaign, its size compared to the total amount spent on the election, and the arguable effect of such contributions on the election’s outcome. In this regard, the numbers spoke for themselves. Blankenship’s \$3 million “eclipsed the total amount spent by all other supporters of Benjamin” and were three times the total amount Benjamin had spent on his own campaign.<sup>18</sup>

The timing of the contributions was also integral to the majority’s conclusion that due process had been violated. According to Justice Kennedy, “[i]t was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice.” Though there was no claim of *quid pro quo* collusion or coordination between Blankenship and Justice Benjamin, the contributions constituted a “serious, objective risk of actual bias that required . . . recusal,” both because of their timing and relative size.<sup>19</sup>

Four Justices dissented from the Court’s opinion. In his dissent, Chief Justice John Roberts argued that the decision would open the floodgates for a wide variety of *Caperton*-styled disqualification motions.<sup>20</sup> That remains to be seen. The extraordinary nature of the facts of *Caperton* may effectively preclude the deluge of disqualification motions that Chief Justice Roberts and the other dissenting Justices fear. Another open — and altogether more promising — question is how national and statewide advocates will respond to the decision and employ *Caperton* to push for much needed reform.

#### *Recusal Reform After Caperton*

In *Caperton*, Justice Kennedy made clear that states can require recusal even in situations that do not give rise to questions of constitutional significance. Justice Kennedy noted that “States may choose to ‘adopt recusal standards more rigorous than due process requires,’”<sup>21</sup>

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<sup>15</sup> *Id.* (quoting *Withrow*, 421 U.S. at 47).

<sup>16</sup> *Id.* at 2263-64.

<sup>17</sup> *Id.* at 2265.

<sup>18</sup> *Id.* at 2264.

<sup>19</sup> *Id.* at 2264-65.

<sup>20</sup> *Id.* at 2275 (Roberts, C.J., dissenting).

<sup>21</sup> *Id.* at 2267 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring)).

and on this point, even the dissenting Justices agreed.<sup>22</sup> *Caperton*'s reiteration that the “constitutional floor” is distinguished from the “ceiling set ‘by common law, statute, or the professional standards of the bench and bar’”<sup>23</sup> echoed a point made by Justice Kennedy in his concurring opinion in *Republican Party of Minnesota v. White*,<sup>24</sup> where he wrote that to mitigate threats to the impartiality of the courts, states “may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.”<sup>25</sup>

The need for states to heed Justice Kennedy’s advice was critical in 2002, when the *White* decision was issued. And, as the facts of *Caperton* make clear, it has only become more critical in the years since. To provide states guidance on reforming standards for recusal or disqualification, we offer below several reforms worthy of consideration. Broadly speaking, these proposals fall into three categories: those dealing with recusal procedures, those dealing with substantive recusal requirements, and those dealing with the transparency of the recusal/disqualification process.<sup>26</sup>

### **Procedural Proposals**

- **Peremptory disqualification.** Litigants could be allowed peremptory challenges of judges just as parties in criminal trials are permitted to strike a certain number of people from their jury pool without showing cause. About a third of the states already permit counsel to strike one judge per proceeding, and other states may be well served to consider adopting such a policy.
- ***De novo* review on interlocutory appeal.** Making appellate review more available — and more searching — would provide a valuable safeguard against partiality infecting decisions on recusal. The U.S. Court of Appeals for the Seventh Circuit, the only federal appeals court to review recusal determinations *de novo*, offers one example of a court that has embraced enhanced review.
- **Recusal advisory bodies.** Just as many states, bar associations, and other groups have created non-binding advisory bodies to serve as a resource for candidates on campaign-conduct questions, a similar model might be followed with respect to recusal. Advisory bodies could identify best practices and encourage judges to set high standards for themselves. In a model incorporating a non-binding advisory body, judges would retain the authority to rule on motions seeking their recusal, but would be encouraged to seek guidance from the advisory body before ruling. A

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<sup>22</sup> See, e.g., *id.* at 2268-69 (Roberts, J., dissenting) (“States are, of course, free to adopt broader recusal rules than the Constitution requires — and every State has — but these developments are not continuously incorporated into the Due Process Clause.”).

<sup>23</sup> *Id.* at 2267 (quoting *Bracy v. Gramley*, 520 U.S. 899, 904 (1997)).

<sup>24</sup> 536 U.S. 765 (2002).

<sup>25</sup> *Id.* at 794 (Kennedy, J., concurring).

<sup>26</sup> The majority of these proposals are taken from — and addressed in greater detail in — James Sample, David Pozen & Michael Young, *Fair Courts: Setting Recusal Standards* (2008), at [http://www.brennancenter.org/content/resource/fair\\_courts\\_setting\\_recusal\\_standards/](http://www.brennancenter.org/content/resource/fair_courts_setting_recusal_standards/).

judge relying on an advisory body's recommendation not to recuse could expect a public defense if a disgruntled party criticized a decision not to step aside.

- **Independent adjudication of disqualification motions.** That judges in many jurisdictions decide their own disqualification challenges, with no input from an advisory body and with little to no prospect of immediate review, is a much criticized feature of recusal law. Allowing judges the final word on motions calling for their own disqualification inevitably produces questions about the need for an unbiased arbiter with no personal stake in the result. Accordingly, states should consider proposals in which disqualification requests are decided by other parties — such as another judge on the same court as the target judge, or a specialized panel of judges or experts. A number of states employ such policies, and others should consider them.
- **Effective mechanisms for replacing disqualified judges.** If recusal is to provide meaningful due process protection, courts need to put in place efficient methods for replacing a disqualified judge — particularly at the appellate level.

### **Substantive Proposals**

- ***Per se* rules for campaign contributors.** To address the concern about judges who decline to recuse themselves when their campaign finances reasonably call into question their impartiality, the American Bar Association recommends mandatory disqualification of any judge who has accepted large contributions (*i.e.*, contributions over a pre-determined threshold amount) from a party appearing before her.<sup>27</sup> A number of states have considered variations of the ABA's proposal, and other states may wish to follow suit.
- **Expanded commentary in the canons.** Expanding the canon commentary on recusal would offer more detailed — and relatively inexpensive — substantive guidance regarding when recusal is appropriate, and would facilitate judges' ability to adhere to the highest ethical standards.
- **Judicial education.** Seminars that instruct judges on the substantive standards for recusal and enable them to confront the standard critiques of disqualification law might provide another “soft” solution for invigorating recusal practice. Judges could be instructed on the underuse and underenforcement of disqualification motions, the social psychological research into bias, the importance of avoiding the appearance of partiality, and their own potential role in helping to reform recusal doctrines and court rules.

### **Proposals for Increased Transparency**

- **Enhanced disclosure by judges.** States could require judges, at the outset of litigation, to disclose any facts, particularly those involving campaign statements and

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<sup>27</sup> See ABA Model Code of Judicial Conduct, Canon 2, R.2.11(A)(4).

campaign contributions, that might plausibly be construed as bearing on their impartiality. Such a mandatory disclosure scheme would increase the reputational and professional cost to judges who fail to disclose pertinent information that later emerges through other sources. To further enhance the disclosure of relevant information concerning disqualification, states could also provide a centralized system through which attorneys and their clients can review a judge's recusal history.

- **Enhanced disclosure by litigants.** In order to assist judges in determining whether grounds for disqualification exist, nongovernmental corporate parties are often required to file a statement identifying any parent corporation or publicly held corporation that owns a significant portion of the corporate party's stock early on in a court proceeding.<sup>28</sup> Similarly, states could require all litigants and their attorneys to file a disclosure affidavit at the outset of litigation, listing any campaign contributions to or expenditures in favor of presiding judges or judicial candidates with whom the presiding judges have competed or will compete in a pending election (or to state that no such contributions or expenditures have been made). Disclosure could be required of any expenditures or contributions by a party or its counsel that exceed a given threshold.
- **Transparent and reasoned decision-making.** All judges who rule on a disqualification motion should be required to explain their decision in writing or on the record, even if only briefly. Such a requirement would facilitate appellate review and ensure greater accountability for these decisions.
- **Increased and uniform data collection and dissemination.** To increase transparency in the recusal process, states should collect and publicize uniform data on recusal motions and their dispositions, including recusal histories of individual judges. In the short term, such data would be useful to litigants who could review the disqualification history of any judge assigned to their case. In the longer term, increased data collection would facilitate meaningful analysis of the impact of specific recusal policies in force in a given jurisdiction, as well as comparative analysis of recusal policies across jurisdictions.

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<sup>28</sup> See, e.g., Fed. R. Civ. P. 7.1 & advisory committee note; Fed. R. App. P. 26.1 & historical amendment notes.