By Donald R. Lundberg

Dancin' with them what brung ya: electing appellate judges

If ever there were a supremely bad idea, it is that we should popularly elect our Indiana Supreme Court justices. Yet that is precisely the proposal now before the General Assembly in House Joint Resolution No. 9. It would amend the Indiana Constitution to require that one justice be elected by voters in each of three geographic districts and the other two by voters statewide. The proposal says nothing about whether the elections will be partisan.

Hoosier common sense

At present, Indiana is an island of common sense in a surrounding sea of high court judicial selection gone wrong. Illinois, Michigan, Ohio and Kentucky elect their appellate judges either on a partisan, nonpartisan or quasi-partisan basis. Staggering sums of money are plowed into supreme court election campaigns. The Brennan Center for Justice at NYU Law School estimates campaign spending for seats on the supreme courts of Wisconsin and Michigan in 2008 totaled $3,747,613 and $3,638,651, respectively.

We're surrounded! But let's heed our mothers' advice: Just because our friends are doing it, doesn't mean it's a good idea.

If it ain't broke ...

Indiana's merit selection system for appellate judges isn't broken. It does not need fixing, especially when the fix threatens to expose the appellate process to another kind of "fix." Most lawyers, but probably few other citizens, know that Indiana appellate judges are appointed by the governor from a list of three candidates who were vetted by the Judicial Nominating Commission. The Commission, chaired by the Chief Justice, is additionally made up of three non-lawyers appointed by the governor and three lawyers elected by members of the bar from the state's three judicial districts.

But it's not as though the voters are without a voice. Newly appointed judges must stand for a retention vote in the general election following their first two years of service and every 10 years thereafter. Indiana voters are engaged in the judicial retention process in ever increasing numbers. The most votes ever were cast in 2008. And the percentage of voters favoring retention has been drifting up with time, culminating in 70-73 percent of *yes* votes in the most recent election, from historic lows in the 60-percent range. These statistics reflect an electorate that is opinionated about, but confident in, our appellate judiciary.

Not quite heaven, West Virginia

In West Virginia, the justices on its high court are popularly elected. It is a useful case study in why electing appellate judges is bad public policy. In fact, grave concerns about the fairness of an elected judge remaining on a West Virginia case are now before the U.S. Supreme Court. Certiorari was granted in a case that asks whether it violates due process when a judge refuses to disqualify in the face of a reasonable probability of judicial bias, absent proof of actual bias. *Caperton v. A.T. Massey Coal Co.,* 129 S.Ct. 593 (2008) (granting cert.)

A.T. Massey Coal Co. is a major coal producer in West Virginia. Don L. Blankenship, a powerful guy around those parts, is its board chairman, CEO and president. Massey is not an infrequent litigant in cases that wend their way up to the West Virginia Supreme Court. One case that found its way there started when Harman Mining, a Massey competitor owned by a fellow named Hugh Caperton, sued Massey for fraud and unlawfully interfering with its business relationships. In August 2002, a jury returned a verdict for $50 million in compensatory and punitive damages against Massey. Blankenship announced that Massey would appeal. Before the appeal (delayed by post-trial maneuvering) was perfected, an election for justice on the high court intervened. Attorney Brent Benjamin unseated an incumbent justice, Warren McGraw. Blankenship contributed $3 million to the effort, a small amount directly to Benjamin's campaign, and the rest to an independent campaign to defeat Justice McGraw.

Just saying no

By 2005, Justice McGraw was off the court, Justice Benjamin was on, and so was the Massey appeal. For obvious reasons, Caperton sought Justice Benjamin's disqualification pending the submission of a petition for review. Pointing out what I've briefly summarized, Caperton argued that it violates due process when campaign finance support creates a reasonable appearance that a judge is biased for or against a party to a case and asked Justice Benjamin to disqualify. He declined, claiming there was no objective evidence to show he was actually biased for or against either party to the appeal – reasonable appearances were irrelevant. Justice Benjamin pointed out that he had not disqualified himself from other Massey appeals, and he had ruled against Massey, including in cases involving large sums of money.

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The court accepted the case for review and issued a 3-2 opinion reversing the judgment and dismissing the case with prejudice. Justice Benjamin's vote helped make up the majority. The majority and dissent were sharply divided over whether the majority made new and questionable law to get to that result. The majority conceded that, the procedural grounds for its decision aside, "Massey's conduct warranted the type of judgment rendered." Given a choice between such faint damnation and $50 million of value, I imagine most of us would take the $50 million in a heartbeat. Caperton sought rehearing.

Riviera tête-à-tête

As if Justice Benjamin's situation weren't enough drama for one case, while the petition for rehearing was pending, photographs became public showing Blankenship and West Virginia Chief Justice Elliott Maynard together on the French Riviera, where each was vacationing while the Massey appeal pended. This prompted Caperton to seek Chief Justice Maynard's disqualification. The Chief Justice, saying he saw nothing wrong with his conduct, nonetheless agreed to step down from the case, as did another justice for different reasons. Justice Benjamin rebuffed another request to disqualify. A newly reconstituted court, including two acting justices appointed by Justice Benjamin who was by then acting as Chief Justice, issued a 3-2 opinion on rehearing, again reversing the $50 million judgment on the same grounds as before, with Justice Benjamin still in the majority.

Gettin' by with a little help from friends

Eleven *amici curiae* have filed briefs in the Supreme Court supporting Caperton on behalf of, by my count, 46 organizations, including the Defense Trial Counsel of Indiana, and 27 former state supreme court justices. Two law professors, seven states, 10 former state supreme court justices and two organizations have filed a total of five *amicus* briefs supporting Massey. Terre Haute's James Bopp Jr. is counsel of record for the James Madison Center for Free Speech in support of Massey.

The Conference of Chief Justices took the unusual step of filing an *amicus* brief co-authored by Indiana's own George T. Patton Jr. of Bose McKinney & Evans, and approved by a committee of chief justices that included Chief Justice Randall T. Shepard. Without expressly aligning with either party, the Chiefs' brief supports one of Caperton's key propositions – that refusal by a judge to disqualify when there is a reasonable probability of judicial bias, without direct proof of actual bias, raises a federal constitutional question. The Louisiana Supreme Court also filed a brief not aligned with either party.

Constitutional and ethical considerations

Caperton's experience in the West Virginia Supreme Court raises serious questions about the ethical standards for judicial recusal and whether refusal to disqualify, under some circumstances, violates federal due process protections. On the former point, the Code of Judicial Conduct, especially Rule 2.11(A), informs the bench, and the Commission on Judicial Qualifications enforces it. Appointed judges, like elected ones, face occasions when recusal is appropriate. Like Chief Justice Maynard, appointed judges go on vacation, too – sometimes to lounge on the beach, sometimes to hunt ducks. There's nothing wrong with these activities so long as they don't involve litigants with cases pending or impending before the judges' courts or, at least, the facts are disclosed. We will undoubtedly hear much more about the due process question from the U.S. Supreme Court by the end of the term. But my immediate concern pertains to the unique challenges that arise when appellate judges are elected.

Buying influence?

Caperton is but one bad-case scenario illustrating why electing appellate judges seriously threatens judicial independence. It is romantic, but naïve, to believe that informed voters should directly select all public servants who work for them. Despite the fact that most elected judges are appropriately sensitive to the difficult ethical questions that arise from judicial campaign financing, the reality is that money-fueled campaigns for judicial office threaten the judicial independence we revere.

High court elections invite cynical gamesmanship as in *Caperton* more than an engaged citizenry lifting its collective voice in favor of judicial independence and competence. Institutional interests or their proxies invest millions to get judges elected who are thought to be broadly supportive of their private agendas. The money isn't spent to buy judicial independence; it's an investment in hopes of a favorable slant on cases, if not a particular result in an individual case.

Much the same criticism could be lodged against selecting trial judges by popular vote, but it is not

quite the same. Trial courts largely decide disputes between parties without creating binding precedents that affect others who have no opportunity to be heard. Appellate courts, especially supreme courts, frequently set precedents that have important ramifications for economic, political and social relationships at-large. What else accounts for the quote in a recent ***slate.com*** article attributed to an unnamed Ohio union official? "We figured out a long time ago that it's easier to elect seven judges than to elect 132 legislators."

An appearance of impropriety

What is a party on appeal to think when one of the justices likely owes his job to millions of dollars of campaign spending by a proxy for the opposing party? Maybe Justice Benjamin's judgment wasn't actually affected by Blankenship's outsized financial role in his elevation to the West Virginia high court. Not being mind-readers, we can never know. But it is counter-intuitive to simply take Justice Benjamin's word for it. Plus, financial support of that magnitude could easily influence a judge in subconscious ways. Parties opposing Blankenship's company before Justice Benjamin will always have reason to wonder whether they received a serving of justice or a plate of home cookin'.

A strong tradition of judicial independence is a key difference between societies that are sincerely committed to the rule of law and those that view the judiciary as one more tool to be manipulated for the benefit of vested economic and political interests. It should never be taken for granted. It is folly to think that Indiana will enhance its commitment to the precious commodity of judicial independence by transforming the least political branch of government into just another arena for the push and pull of special interests. ⚖

The views expressed in this column do not necessarily represent the positions of the Indiana Supreme Court or the Disciplinary Commission.