

CAPERTON V. A.T. MASSEY COAL CO.: THE TEXAS IMPLICATIONS

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I. INTRODUCTION

In *Caperton v. A.T. Massey Coal Co.*,¹ the United States Supreme Court addressed whether the Due Process Clause of the United States Constitution was violated by the denial of a motion to recuse.² The motion sought to recuse one of the justices on the

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1. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

2. *Id.* at 2256.

Supreme Court of Appeals of West Virginia, who had received an extraordinary campaign contribution from the chief executive officer of a corporate party to a case pending before the court.³ Although many agree the Court's decision in *Caperton* is narrowly drawn to address the unique facts presented in that case,⁴ this Article examines how Texas courts addressed the issue of recusal based on campaign contributions prior to the *Caperton* decision, and how courts subsequently have interpreted and applied *Caperton*. This Article also examines the likely effect of Texas's laws limiting campaign contributions on the application of *Caperton* in Texas. Finally, this Article explores the broader implications of *Caperton* in terms of Texas's system of electing judges.

II. PRE-CAPERTON TEXAS CASES

Several Texas courts had addressed whether recusal was necessary based on campaign contributions prior to the United States Supreme Court's decision in *Caperton*.⁵ The courts universally held that recusal was not required.⁶

3. *Id.* at 2256–57.

4. Mary Flood, *High Court Ruling May Stir Debate in Texas: State's One of Seven with Partisan Elections for Judges*, HOUSTON CHRON., June 9, 2009, at A1, available at 2009 WLNR 10992023.

5. *See, e.g.*, *Williams v. Viswanathan*, 65 S.W.3d 685, 686–94 (Tex. App.—Amarillo 2001, no pet.) (addressing a motion to recuse a sitting justice based on the fact that the appellants' attorney had unsuccessfully challenged the justice in a primary election and the appellants themselves had actively campaigned for the justice's campaign opponent); *Aguilar v. Anderson*, 855 S.W.2d 799, 801–02 (Tex. App.—El Paso 1993, writ denied) (reviewing a claim “based upon the trial judge's solicitation and acceptance of a campaign contribution” from one of the plaintiff's attorneys); *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 842–45 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (examining an appeal claiming that Texaco was denied a fair trial because, after filing the lawsuit, one party's lawyer donated \$10,000 to the trial court judge's campaign fund); *River Rd. Neighborhood Ass'n v. S. Tex. Sports, Inc.*, 673 S.W.2d 952, 952–53 (Tex. App.—San Antonio 1984, no writ) (discussing a motion filed by the city of San Antonio to seek recusal or disqualification of two justices who received campaign contributions from the owner of a corporation appearing before the court); *Rocha v. Ahmad*, 662 S.W.2d 77, 77–79 (Tex. App.—San Antonio 1983, order) (en banc) (reviewing the appellant's motion to recuse or disqualify two judges who had received campaign contributions from the opposing party's attorney).

6. *See, e.g.*, *Williams*, 65 S.W.3d at 690 (holding that recusal and disqualification were not required); *Aguilar*, 855 S.W.2d at 801–02 (denying a motion to recuse the trial judge); *Texaco*, 729 S.W.2d at 845 (determining there was no evidence the trial judge “was either biased or prejudiced in any manner or that he was acting as judge in his own case or enjoyed any pecuniary interest in the outcome of the case”); *River Rd. Neighborhood*

A. Rocha v. Ahmad

In *Rocha v. Ahmad*,⁷ the appellant, Thomas Rocha, Jr., filed a motion to disqualify two justices of the San Antonio Court of Appeals who were assigned to the three-judge panel designated to hear oral argument in the appeal.⁸ The motion alleged that the two justices “received political contributions of many thousands of dollars from or through the Law Office of Pat Maloney, P.C. (attorney for appellees).”⁹ Chief Justice Carlos Cadena, writing for the majority, initially noted that the only provision of the Code of Judicial Conduct that might be applicable was a provision in Canon 3 that enjoined “a judge to be faithful to the law and remain unswayed by partisan interests, public clamor or fear of criticism.”¹⁰ In holding that neither associate justice was disqualified, the court distinguished the situation from one in which a *party* in the case contributed thousands of dollars to a justice.¹¹ The court lamented that the system requiring candidates for judicial office to stand for election forced candidates to seek contributions to defray all or part of the substantial expense of “what is, in reality, a political campaign.”¹² The court further asserted:

It is not surprising that attorneys are the principal source of contributions in a judicial election. We judicially know that voter apathy is a continuing problem, especially in judicial races and particularly in contests for a seat on an appellate bench. A candidate for the bench who relies solely on contributions from nonlawyers must reconcile himself to staging a campaign on something less than a shoestring. If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority

Ass'n, 673 S.W.2d at 953 (deciding that neither of the judges who were the subject of a motion to recuse or disqualify was disqualified); *Rocha*, 662 S.W.2d at 79 (overruling a motion to disqualify two judges).

7. *Rocha v. Ahmad*, 662 S.W.2d 77 (Tex. App.—San Antonio 1983, order) (en banc).

8. *Id.* at 77–78.

9. *Id.* The motion further alleged that “‘victory’ celebrations have been held at the law offices of Pat Maloney for said Justices after they had been elected to the Fourth Court of Appeals.” *Id.* Finally, the motion noted that local newspapers had referred on numerous occasions to the influence and political power Pat Maloney had on judges. *Id.* at 78.

10. *Rocha*, 662 S.W.2d at 78.

11. *Id.*

12. *Id.*

of the cases filed in their courts. Perhaps the next step would be to require a judge to recuse himself in any case in which one of the lawyers had refused to contribute or, worse still, had contributed to that judge's opponent.¹³

After excluding the challenged justices from participating in the decision, the remaining five members of the court unanimously denied the motion to recuse.¹⁴

B. *Aguilar v. Anderson*

The target of the motion to recuse in *Aguilar v. Anderson*¹⁵ was a trial judge who had solicited and accepted a campaign contribution from an attorney for the defendants and the attorney's law firm.¹⁶ A short time after the contribution was solicited and accepted, the trial judge heard the defendants' motion for summary judgment and warned the parties that the case should be settled.¹⁷ The plaintiffs filed a motion to recuse, arguing that the trial judge's impartiality reasonably could be questioned based on the campaign contribution.¹⁸ After a hearing, the presiding judge denied the motion to recuse, and the trial judge granted summary judgment for the defendants.¹⁹

One of the issues raised on appeal was that the presiding judge abused his discretion in denying the motion to recuse.²⁰ The El Paso Court of Appeals initially noted that Texas appellate courts repeatedly had rejected the argument that the acceptance of campaign contributions by a judge from a lawyer creates a bias or an appearance of impropriety that would require recusal.²¹ In overruling the appellant's complaint, the El Paso court emphasized the small amount of the contribution, asserting that "the contribution was small, the trial judge maintained a voluntary policy of accepting only very limited contributions from any single

13. *Id.*

14. *Id.*

15. *Aguilar v. Anderson*, 855 S.W.2d 799 (Tex. App.—El Paso 1993, writ denied).

16. *Id.* at 801 & n.2. The firm was composed of three attorneys, and each attorney contributed \$100. *Id.* at 801.

17. *Id.*

18. *Id.*

19. *Aguilar*, 855 S.W.2d at 801.

20. *Id.* at 800.

21. *Id.* at 802 (citing *J-IV Invs. v. David Lynn Mach., Inc.*, 784 S.W.2d 106, 107 (Tex. App.—Dallas 1990, no writ)).

source and the contributing lawyer was not even lead attorney for defendants.”²² The El Paso court also noted, however, that it was not lightly dismissing “the ethical dilemma posed by our system where an elected judiciary seeks campaign contributions from lawyers” or the “heated criticism this system has generated.”²³ Acknowledging the problems inherent in the elective scheme, the court held that the presiding judge, under the facts presented, “did not act outside the bounds of discretion” in denying the motion.²⁴

In a separate concurring opinion, Chief Justice Osborn referred to the applicable standard in deciding the recusal motion as the “reasonable person on the street” test, noting the objective standard was necessary to ensure the public’s confidence in the judiciary.²⁵ Chief Justice Osborn cautioned, however, that the “reasonable” person evaluating the judge’s impartiality had to be “aware of the ‘facts of life’ which surround the judiciary,” including the fact that election campaigns are very expensive in those states that elect judges and most contributions in judicial races are made by practicing attorneys.²⁶ Chief Justice Osborn also added that “[w]e might even expect the ‘reasonable’ person to have some knowledge as to the motives for contributing to a judicial campaign.”²⁷

One member of the court, Justice Barajas, dissented, asserting:

The majority and separate concurring opinions have this day effectively sanctioned as legitimate judicial conduct, a political campaign strategy by which a jurist can personally put the financial “pinch” on an attorney or party involved in pending litigation in order to fund his re-election campaign so long as it is a pinch and not a “squeeze.”²⁸

Emphasizing the trial judge’s timing in soliciting and accepting the contribution from an attorney associated with active, pending litigation, and the trial judge’s subsequent ruling in favor of the attorney, Justice Barajas found it “undeniable that the reasonable

22. *Id.*

23. *Id.*

24. *Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex. App.—El Paso 1993, writ denied).

25. *Id.* at 804–05 (Osborn, C.J., concurring).

26. *Id.* at 805.

27. *Id.*

28. *Id.* at 807 (Barajas, J., concurring and dissenting).

Texan might question the judge's impartiality in such a case."²⁹ Justice Barajas also addressed the realities of the election system, but stressed the need for judicial impartiality and neutrality.³⁰ After charging the majority opinion with effectively holding "that no solicitation of financial contributions by a judge can raise a reasonable question as to the judge's impartiality," Justice Barajas asserted: "This decision is unrealistic and is an open invitation for Texas jurists to test the limits and tolerance of reasonable Texans who already are clamoring for term limitations, ceilings on campaign spending, [and] elimination of political action committees and subdistricts."³¹

C. *Williams v. Viswanathan*

The motion to recuse filed in *Williams v. Viswanathan*³² was the motion Chief Justice Cadena predicted might be filed in *Rocha* when he cautioned that the next step could be "to require a judge to recuse himself in any case in which one of the lawyers had refused to contribute or, worse still, had contributed to that judge's opponent."³³ In *Williams*, the movant approached the recusal from all angles, asserting the appellants' attorney had unsuccessfully challenged Justice Brian Quinn in a Republican primary, the appellants vigorously campaigned for their attorney who was Justice Quinn's opponent, and the law firm representing the appellee had contributed several hundred dollars to Justice Quinn.³⁴

In denying the motion to recuse, the Amarillo Court of Appeals initially emphasized the duty a judge or justice has to sit and decide matters before the court.³⁵ The court noted that "[t]here is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is."³⁶ The court then stressed the need to decide recusal motions on a case-by-case basis, asserting that a per se rule requiring

29. *Aguilar*, 855 S.W.2d at 812–13 (Barajas, J., concurring and dissenting).

30. *Id.* at 814–16.

31. *Id.* at 815 (emphasis omitted).

32. *Williams v. Viswanathan*, 65 S.W.3d 685 (Tex. App.—Amarillo 2001, no pet.).

33. *Rocha v. Ahmad*, 662 S.W.2d 77, 78 (Tex. App.—San Antonio 1983, order) (en banc).

34. *Williams*, 65 S.W.3d at 687.

35. *Id.*

36. *Id.* (quoting *United States v. Burger*, 964 F.2d 1065, 1070 (10th Cir. 1992)).

recusal because a lawyer unsuccessfully challenged the sitting judge or a party supported the judge's challenger would seriously compromise the efficiency of the judicial system.³⁷ The court concluded that recusal was not warranted based on the facts presented, opining that "if such a path were begun, very seldom would the justices and judges of our two courts of last resort be able to perform their mandated duties."³⁸

D. *Texaco, Inc. v. Pennzoil, Co.*

Perhaps the most infamous of the pre-*Caperton* Texas cases addressing campaign contributions is *Texaco, Inc. v. Pennzoil, Co.*³⁹ In *Texaco*, Pennzoil's lead counsel contributed \$10,000 to the campaign fund of the trial judge and served on his steering committee.⁴⁰ Texaco filed a motion to recuse, asserting that the contribution created an appearance of impropriety requiring the judge to recuse himself.⁴¹ The matter was referred to another judge who denied the motion.⁴² On appeal, Texaco argued that the denial of the motion to recuse was error under both Texas law and the Due Process Clause of the United States Constitution.⁴³

Relying in part on the quoted language from Chief Justice Carlos Cadena's opinion in *Rocha*, the Houston Court of Appeals initially rejected Texaco's argument that recusal was required under Texas law.⁴⁴ The court then considered the argument that the failure to recuse was error under the Due Process Clause of the United States Constitution.⁴⁵ Citing *Aetna Life Insurance Co. v. Lavoie*,⁴⁶ the Houston court asserted, "The United States Supreme Court has recognized that most matters relating to judicial disqualification do not rise to a constitutional level, and that only in extreme cases would disqualification on the basis of bias and prejudice be constitutionally required."⁴⁷ Distinguishing

37. *Id.* at 688.

38. *Id.* at 689.

39. *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

40. *Id.* at 842.

41. *Id.*

42. *Id.*

43. *Id.* at 842, 844.

44. *Texaco*, 729 S.W.2d at 843–44.

45. *Id.* at 844–45.

46. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

47. *Texaco*, 729 S.W.2d at 844.

the facts from another case cited by Texaco, the Houston court noted that the trial judge “neither participated with Pennzoil in the case being tried nor enjoyed even ‘the slightest pecuniary interest’ in the outcome of the trial.”⁴⁸ The court then concluded that Texaco’s mere allegations of bias and prejudice were insufficient to establish a constitutional violation.⁴⁹

The \$10,000 contributed at the trial level, however, paled in comparison to the contributions made while the Texas Supreme Court considered whether to grant review of the Houston court’s decision, which affirmed an \$11 billion verdict awarded in favor of Pennzoil against Texaco. While the writ was pending before the Texas Supreme Court, representatives from Texaco contributed \$72,700 to seven justices on the Texas Supreme Court, while Pennzoil representatives contributed \$315,000.⁵⁰ Four of the justices who received contributions were not even running for re-election.⁵¹ The series of events became the subject of a segment on the CBS news show “60 Minutes” asking “if justice was for sale in Texas,”⁵² and one commentator recently referred to the series of events as the most egregious of the campaign contribution scandals. The commentator’s article however, was written before the events unfolded in *Caperton*.⁵³

III. CAPERTON AND ITS AFTERMATH

A. Caperton v. A.T. Massey Coal Co.

1. Factual Background

In August 2002, A.T. Massey Coal Co. and its affiliates were found liable by a jury in West Virginia of “fraudulent

48. *Id.* at 842, 845 (distinguishing *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145 (1968)).

49. *Id.* at 845.

50. Madison B. McClellan, *Merit Appointment Versus Popular Election: A Reformer’s Guide to Judicial Selection Methods in Florida*, 43 FLA. L. REV. 529, 555 (1991).

51. *Id.*

52. Anthony Champagne, Symposium, *Coming to a Judicial Election Near You: The New Era in Texas Judicial Elections*, 43 S. TEX. L. REV. 9, 12 (2001).

53. Lisa Denig, *The Perfect Storm: Why Judicial Selection for Supreme Court Justices Is the Right Remedy for New York State in the Wake of Torres v. Board of Elections*, 34 WESTCHESTER B.J. 21, 27 n.72 (2007).

misrepresentation, concealment, and tortious interference with existing contractual relations.”⁵⁴ The jury awarded the petitioners (referred to as “Caperton” in the Court’s opinion) \$50 million in compensatory and punitive damages.⁵⁵ After the jury’s verdict but before the filing of the appeal, the 2004 judicial elections were held in West Virginia.⁵⁶

Don Blankenship was Massey’s chairman, president, and chief executive officer.⁵⁷ Justice McGraw was a judicial candidate for re-election to the West Virginia Supreme Court of Appeals.⁵⁸ Believing the West Virginia Supreme Court of Appeals would consider an appeal of the verdict against Massey, Blankenship threw his support behind Brent Benjamin, an attorney who was seeking to replace Justice McGraw.⁵⁹ “In addition to contributing the \$1,000 statutory maximum to Benjamin’s campaign,” Blankenship also donated almost \$2.5 million to a political organization that opposed Justice McGraw and supported Benjamin.⁶⁰ “Blankenship’s donation accounted for more than two-thirds of the total funds raised” by the organization.⁶¹ Finally, Blankenship spent approximately \$500,000 on direct mailings, letters soliciting donations, and television and newspaper advertisements supporting Benjamin.⁶² When the election results were announced, Benjamin had won, receiving 53.3% of the vote.⁶³

Before Massey filed its appeal with the West Virginia Supreme Court of Appeals, Caperton moved to disqualify Justice Benjamin under the Due Process Clause, asserting that Blankenship’s campaign involvement created a conflict.⁶⁴ Justice Benjamin denied the motion to disqualify himself, and the West Virginia Supreme Court of Appeals granted review of Massey’s appeal.⁶⁵

54. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Caperton*, 129 S. Ct. at 2257.

60. *Id.*

61. *Id.*

62. *Id.* The total amount contributed by Blankenship was more than the total amount spent by Benjamin’s other supporters, and Caperton alleged that Blankenship contributed \$1 million more than was spent by both campaign committees combined. *Id.*

63. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009).

64. *Id.*

65. *See id.* at 2257–58 (noting that Massey filed its petition to appeal the trial verdict

In November 2007, the court reversed the \$50 million verdict against Massey.⁶⁶ After a series of rehearings and additional recusal motions, a petition for writ of certiorari was filed with the United States Supreme Court.⁶⁷

2. Analysis

The Court began its analysis by noting, as the Texas Supreme Court did in *Texaco*, that most issues regarding judicial disqualification do not give rise to a constitutional violation.⁶⁸ To place the *Caperton* case in context with its prior decisions, the Court discussed two instances where it had previously held recusal was constitutionally required.⁶⁹ The first instance involved a judge who had a financial interest in a case's outcome even though the interest was less than what common law would label as a direct or personal pecuniary interest.⁷⁰ The second instance involved a judge whose participation in an earlier proceeding created a conflict of interest because "it [would be] difficult if not impossible for a judge to free himself from the influence of what took place"⁷¹ in the earlier proceeding in making his rulings in the subsequent proceeding.⁷²

in December 2006).

66. *Id.* at 2258.

67. *See id.* at 2258–59 (explaining that Caperton initially sought rehearing and called for recusal of Justice Maynard based on photographs revealing that the justice had vacationed with Blankenship during the pendency of the case, while Massey sought and obtained recusal of Justice Starcher as a result of his widespread criticism of Blankenship's financial contributions during the 2004 election). Justice Starcher suggested that Justice Benjamin recuse himself, and Caperton filed a formal recusal motion, but Justice Benjamin rejected both requests. *Caperton*, 129 S. Ct. at 2258. When the court granted rehearing, Justice Benjamin was tasked with replacing the two recused justices, and Caperton once again sought Justice Benjamin's recusal. *Id.* As before, Justice Benjamin declined to recuse himself, the panel again voted to reverse the decision by the same 3–2 vote, and Caperton petitioned the Supreme Court of the United States for a writ of certiorari. *Id.* at 2258–59.

68. *Id.* at 2259 (citing *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948)).

69. *See generally id.* at 2259–62 (analyzing *Tumey v. Ohio*, 273 U.S. 510 (1927); *In re Murchison*, 349 U.S. 133 (1955)).

70. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2259–60 (2009) (discussing *Tumey*, 273 U.S. 510; *Ward v. Monroeville*, 409 U.S. 57 (1972); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986)).

71. *Id.* at 2261 (citing *In re Murchison*, 349 U.S. at 138).

72. *Id.* at 2261–62 (citing *In re Murchison*, 349 U.S. at 137). In the first proceeding, the judge questioned two witnesses to decide whether criminal charges were warranted. *Id.* at 2261. The judge found one witness untruthful and charged him with perjury. *Id.* The judge then found the second witness in contempt for declining to answer questions on

The Court noted that the issue in the *Caperton* case arose in the context of judicial elections, which was a framework that had not been presented in its earlier precedents.⁷³ Caperton argued Blankenship played a pivotal role in Justice Benjamin's election, creating a "constitutionally intolerable probability of actual bias."⁷⁴ In explaining the reasons he denied the recusal motions, Justice Benjamin countered that Caperton failed to provide objective evidence or information with regard to actual bias but merely relied on subjective belief.⁷⁵ The Court described Justice Benjamin's analysis as a "probing search into his actual motives and inclinations," which he did not find improper.⁷⁶

Stating that the Court was not questioning Justice Benjamin's "subjective findings of impartiality and propriety" or determining whether actual bias existed, the Court concluded that the implementation of the Due Process Clause required objective rules or standards, not proof of actual, subjective bias.⁷⁷ Quoting an earlier decision, the Court stated the standard was "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 be adequately implemented.'"⁷⁸ Stated differently, recusal is required when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."⁷⁹

Applying the objective standard to the facts presented, the Court noted that "not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal," but the Court emphasized that "this is an exceptional case."⁸⁰ The Court first considered the size of the contribution, stating:

the basis that he did not have counsel present as permitted by state law. *Caperton*, 129 S. Ct. at 2261. In the second proceeding, the same judge tried and convicted the first witness of perjury and the second witness of contempt. *Id.*

73. *Id.* at 2262.

74. *Id.*

75. *Id.*

76. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263 (2009).

77. *Id.*

78. *Id.* (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

79. *Id.* at 2257 (quoting *Withrow*, 421 U.S. at 47).

80. *Id.* at 2263.

We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.⁸¹

After comparing Blankenship's contribution to the total campaign contributions, as well as the total amount spent on the election, the Court concluded Blankenship's contribution “had a significant and disproportionate influence on the electoral outcome.”⁸² As a result, the Court held that “the risk that Blankenship's influence engendered actual bias is sufficiently substantial that it ‘must be forbidden if the guarantee of due process is to be adequately implemented.’”⁸³

In addition to the amount of the campaign contribution, the Court also noted that the timing of the contribution in relation to the election and the pendency of the case was also critical.⁸⁴ Noting that the next step to be taken by Massey was an appeal, the Court asserted that absent recusal, it became apparent that “Justice Benjamin would review a judgment that cost his biggest donor's company \$50 million.”⁸⁵ Thus, Blankenship made his extraordinary contribution “at a time when he had a vested stake in the outcome.”⁸⁶ The Court concluded:

Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the other parties' consent—a man chooses the judge in his own cause. Applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal. . . . We find that Blankenship's significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—“offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.” On

81. *Caperton*, 129 S. Ct. at 2263–64.

82. *Id.* at 2264.

83. *Id.* (quoting *Withrow*, 421 U.S. at 47).

84. *Id.* at 2264–65.

85. *Id.* at 2265.

86. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2265 (2009).

these extreme facts the probability of actual bias rises to an unconstitutional level.⁸⁷

3. Dissenting Opinion

The decision in *Caperton* was 5–4, with Chief Justice Roberts authoring the lead opinion for the four dissenting Justices. Although stating that he shared the majority’s sincere concern regarding the need to maintain an impartial judiciary and “one that appears to be such,” Chief Justice Roberts expressed his fear that the Court’s decision would “undermine rather than promote these values.”⁸⁸ Chief Justice Roberts asserted that only two instances of constitutionally required recusal previously had been recognized because “[v]aguer notions of bias or the appearance of bias” were issues to be “addressed by legislation or court rules.”⁸⁹ Unlike the two established instances of constitutionally required recusal, Chief Justice Roberts argued an appearance or probability of bias cannot be sufficiently defined to provide necessary guidance to judges and litigants regarding when recusal is constitutionally required.⁹⁰ Chief Justice Roberts’s concern was that the absence of a clear standard or rule “will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be,” and “[t]he end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.”⁹¹

Chief Justice Roberts proceeded to list forty questions that the majority’s standard left unanswered.⁹² He then asserted that the majority’s failure to provide a “‘judicially discernible and manageable standard’ strongly counsels against the recognition of a novel constitutional right.”⁹³ Chief Justice Roberts concluded by stating his belief that “opening the door to recusal claims under the Due Process Clause, for an amorphous ‘probability of bias,’

87. *Id.* (citations omitted).

88. *Id.* at 2267 (Roberts, C.J., dissenting).

89. *See id.* (reiterating that the Court has found recusal constitutionally required when a judge has a personal pecuniary interest in the result of the case and when a judge adjudicates specific types of criminal contempt cases).

90. *Id.*

91. *Caperton*, 129 S. Ct. at 2267.

92. *Id.* at 2269–72 (Roberts, C.J., dissenting).

93. *Id.* at 2272 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion)).

will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts.”⁹⁴ Chief Justice Roberts, however, did further remark that he hoped he was wrong.⁹⁵

B. Caperton's Aftermath

So, the question becomes, was Chief Justice Roberts wrong? Was Chief Justice Roberts an alarmist in predicting that a flood of *Caperton* recusal motions would be filed? Keyciting the *Caperton* opinion, it would not appear that such a storm is brewing; however, it is likely too early to predict. As of April 5, 2010, only twenty-six cases had conducted an in-depth analysis of *Caperton*, while thirty-three cases had merely referenced the decision briefly.

Although the cases citing *Caperton* do not appear to be numerous, some of the cases do appear to involve a frivolous use of *Caperton*. One such example involves a motion to recuse filed in a federal district court in *United States v. Basciano*.⁹⁶ Although defense counsel had filed three prior motions to recuse, counsel filed a fourth motion citing *Caperton* and arguing that the decision imposed “a new constitutional standard for recusal” that the court failed to consider in denying the previous recusal requests.⁹⁷ The district judge first rejected the premise that he failed to consider an objective recusal standard in his prior decisions, asserting that he explicitly stated in the prior rulings that he was relying on an objective standard.⁹⁸ The judge then rejected the premise that the objective recusal standard announced in *Caperton* was “new,” noting that the Court relied on existing precedent in clarifying the standard.⁹⁹ The judge concluded, “[W]hat was new in [*Caperton*] was not the objective standard, but the application of that standard to the area of judicial elections—something utterly irrelevant to an appointed federal district judge with life tenure.”¹⁰⁰

While *Basciano* is an example of a frivolous use of *Caperton*, one particularly contentious decision out of the Michigan Supreme

94. *Id.* at 2274.

95. *Id.*

96. *United States v. Basciano*, 242 N.Y. L.J., July 6, 2009, at 26 (E.D.N.Y. June 30, 2009), available at 7/6/2009 N.Y.L.J. 26, (col. 3) (Westlaw).

97. *Id.* at 1–2.

98. *Id.* at 2.

99. *Id.* at 3.

100. *Id.* (citing *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2262 (2009)).

Court is an example of how *Caperton* could be extended to create a flood of recusal motions. In *United States Fidelity Insurance & Guaranty Co. v. Michigan Catastrophic Claims Ass'n*,¹⁰¹ a motion to recuse a newly-elected justice was filed after the newly-composed court granted a motion to rehear a case.¹⁰² The party filing the motion, Michigan Catastrophic Claims Association (MCCA), “has an unlimited statutory obligation to reimburse insurers for 100 percent of claims paid to insureds whose losses due to personal injury exceed certain statutory caps.”¹⁰³ MCCA asserted that a reversal of the court’s earlier decision on rehearing would require MCCA “to reimburse all benefits paid by insurers to their catastrophically injured insureds, without regard to the reasonableness of the insured’s underlying expenditures.”¹⁰⁴ By making MCCA’s obligation unlimited as to the reasonableness of expenditures, insurers “will have little incentive to defend unreasonable claims by their insureds” and their insureds’ attorneys.¹⁰⁵ As a result, MCCA argued that the insurers would not oppose higher settlements that would directly benefit lawyers who represent the catastrophically injured insureds because those lawyers typically represent the plaintiffs on a contingency basis.¹⁰⁶

In light of this potential result if the prior opinion was reversed on rehearing, MCCA filed a motion to recuse Justice Hathaway because her husband was an attorney representing plaintiffs in this area of the law.¹⁰⁷ Justice Hathaway denied the motion, noting that she had reviewed the decision in *Caperton*.¹⁰⁸ Justice Hathaway asserted that the basis for recusal suggested by MCCA “is so attenuated from the facts of these cases that it strains reasoned logic.”¹⁰⁹ Justice Hathaway reasoned:

Due process does not require that a justice recuse himself or herself merely because the justice’s spouse or child is an attorney practicing

101. *U.S. Fid. Ins. & Guar. Co. v. Mich. Catastrophic Claims Ass’n*, 773 N.W.2d 243 (Mich. 2009).

102. *See generally id.* (reviewing the facts under which the Michigan Catastrophic Claims Association filed a motion requesting Justice Hathaway’s recusal).

103. *Id.* at 248 n.15 (Corrigan, J., dissenting).

104. *Id.*

105. *Id.*

106. *U.S. Fid. Ins.*, 773 N.W.2d at 248 n.15.

107. *Id.* at 248.

108. *Id.* at 243–44 (majority opinion).

109. *Id.* at 244.

in the field of law that is involved in the disputed case, just as due process would not require a justice's recusal in all medical malpractice cases merely because the justice's spouse is a physician or require a justice's recusal in all cases involving school systems merely because the justice's spouse is a teacher.¹¹⁰

Three other justices on the court concurred with Justice Hathaway's decision; however, three other justices criticized Justice Hathaway for not allowing the parties, at the very least, to file supplemental briefings to further explain *Caperton's* application.¹¹¹ The opinion in *Caperton* was issued on June 8, 2009, and the order denying the motion to recuse in *U.S. Fidelity* was issued on July 21, 2009.¹¹² One of those justices noted, "The scope of *Caperton* and how courts will implement it present significant unanswered questions, particularly for our Court."¹¹³ Another of those justices asserted his belief "that this new United States Supreme Court opinion has radically altered the landscape of judicial disqualification and this change warrants that this Court at least entertain argument by the parties about how *Caperton* might affect the pending disqualification motion."¹¹⁴ All three of the dissenting justices also discussed whether *Caperton* called into question the court's historical practice of allowing the challenged justice to decide the recusal motion, noting the better procedure might be to exclude the challenged justice from the decision.¹¹⁵

Although several Michigan Supreme Court justices, therefore, believe *Caperton* created a new standard, both the federal district judge in *Basciano* and the federal district judge in *Henry v. Jefferson County Commission*¹¹⁶ disagree. In *Henry*, the plaintiffs also argued that *Caperton* "alter[ed] the state of the law with

110. *Id.*

111. *U.S. Fid. Ins. & Guar. Co. v. Mich. Catastrophic Claims Ass'n*, 773 N.W.2d 243, 245-57 (Mich. 2009).

112. Compare *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2252 (2009) (stating the date the opinion issued), with *U.S. Fid. Ins.*, 773 N.W.2d at 243 (setting forth the date on which the court denied the motion for recusal).

113. *U.S. Fid. Ins.*, 773 N.W.2d at 246 (Corrigan, J., dissenting).

114. *Id.* at 253 (Young, J., dissenting).

115. *Id.* at 250-57 (Corrigan, Young & Markman, JJ., dissenting); see also *Schock v. Court of Appeals*, 768 N.W.2d 320, 322 n.3 (Mich. 2009) (Markman, J., concurring) (criticizing the denial of a motion to disqualify by the challenged justice as not satisfying *Caperton's* newly-established objective test).

116. *Henry v. Jefferson County Comm'n*, No. 3:06-CV-33, 2009 WL 2857819 (N.D. W. Va. Sept. 2, 2009).

regard to ‘when recusal is required and when it is not.’”¹¹⁷ The defendants responded that the plaintiffs attributed “too great a significance to *Caperton* which present[ed] an extreme case.”¹¹⁸ The court agreed with the defendants, finding “that while the Supreme Court may have found it appropriate to clarify the law in light of the extreme circumstances *Caperton* presented, it did not alter the substantive law.”¹¹⁹

IV. CAMPAIGN CONTRIBUTION LIMITS: THE TEXAS TWIST

Regardless of what happens as federal courts and the courts in other states interpret *Caperton*, the decision takes a somewhat unique twist in Texas where the legislature has adopted limits on judicial campaign contributions. Contribution totals for the years before the legislation was enacted in 1995 provide a sound basis for its passage.

In 1980, Texas passed a milestone by becoming the first state in which a judicial race cost more than \$1 million.¹²⁰ “Between 1980 and 1986, campaign contributions to candidates in contested appellate court races increased by 250%.”¹²¹ To date, the most expensive elections in Texas history occurred in the 1988 Texas Supreme Court races, in which twelve candidates for six seats raised \$12 million.¹²² Between 1992 and 1997, the seven candidates who won their elections to the Texas Supreme Court raised almost \$9.2 million, and over 40% of that total was contributed by lawyers or parties with cases before the court or contributors linked to those parties.¹²³

Against this backdrop, the Texas Legislature passed the Judicial Campaign Fairness Act (Act) in 1995.¹²⁴ The Act imposes limits on the contributions a judicial candidate can accept. A contri-

117. *Id.* at *1 (quoting *Caperton*, 129 S. Ct. at 2269).

118. *Id.*

119. *Id.* at *3.

120. American Judicature Society, *Judicial Selection in the States: Texas*, http://www.judicialselection.us/judicial_selection/index.cfm?state=TX (last visited May 11, 2010).

121. *Id.*

122. *Id.*

123. *Id.*

124. Judicial Campaign Fairness Act, 74th Leg., R.S., ch. 763, § 1, 1995 Tex. Gen. Laws 3957 (amended 1997, 1999, 2001) (current version at TEX. ELEC. CODE ANN. §§ 253.151–.176 (Vernon 2003 & Supp. 2009)).

bution from an individual cannot exceed \$5,000 for a statewide judicial office and from \$1,000 to \$5,000 depending on the population of a non-statewide judicial district.¹²⁵ In addition, the Act imposes limits on the total amount a candidate can spend on an election. The spending limit for a statewide judicial office is \$2 million, while the limit for courts of appeals justices is \$500,000 for judicial districts with a population of more than 1 million or \$350,000 for judicial districts with a population of less than 1 million.¹²⁶ Contributions from a general purposes political action committee are limited to 15% of the applicable limit on expenditures.¹²⁷

The question raised, then, is whether a campaign contribution that does not exceed the limits established by the Act could be a basis for a motion to recuse under the standard announced in *Caperton*. Although not addressed by Texas courts, the issue has been addressed by the Supreme Court of Florida in a pre-*Caperton* case.

In *MacKenzie v. Super Kids Bargain Store, Inc.*,¹²⁸ a trial judge's husband, who was himself a candidate for circuit judge, received a \$500 campaign contribution.¹²⁹ The contribution was the second largest amount contributed to the candidate's campaign.¹³⁰ A motion to disqualify was subsequently filed in two cases before the trial judge in which the attorney who contributed the money to the trial judge's husband was representing a party.¹³¹ The trial judge denied the motions, but the appeals court held that the motions should have been granted.¹³²

The Florida Supreme Court noted that some people might perceive that a judge will be biased where a litigant or attorney contributes to the judge's campaign; however, the court emphasized that the standard for determining disqualification is

125. TEX. ELEC. CODE ANN. § 253.155(b) (Vernon Supp. 2009). The contribution limits for non-statewide judicial offices are: "(A) \$1,000 if the population of the judicial district is less than 250,000; (B) \$2,500 if the population of the judicial district is 250,000 to one million; or (C) \$5,000 if the population of the judicial district is more than one million." *Id.* § 253.155(b)(2).

126. *Id.* § 253.168(a) (Vernon 2003).

127. *Id.* § 253.160(a) (Vernon Supp. 2009).

128. *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332 (Fla. 1990).

129. *Id.* at 1334.

130. *Id.*

131. *Id.*

132. *Id.*

“whether the facts alleged would place a *reasonably prudent person* in fear of not receiving a fair and impartial trial.”¹³³ The court then concluded that “allegations in a motion that a litigant or counsel for a litigant has made a legal campaign contribution to the political campaign of [a] trial judge, or the trial judge’s spouse, without more, is not a legally sufficient ground” for disqualification.¹³⁴

The court noted the necessity of contributions in a system where judges are elected, asserting, “As with other elections, judicial elections involve campaigns. As with other campaigns, judicial campaigns require funds. Judicial campaigns and the resultant contributions to those campaigns, therefore, are necessary components of our judicial system.”¹³⁵

The court found that “Florida’s Code of Judicial Conduct together with Florida’s statutory limitation upon campaign contributions and the requisite public disclosure of such contributions, provide adequate safeguards against” concerns arising from judicial campaign contributions.¹³⁶ The court cautioned, however, that it was not concluding that contributions to a judicial campaign may never be a basis for disqualification.¹³⁷ Stressing that the campaign contribution limits were not conclusive on the issue of disqualification, the court reasoned:

[T]he limitation is our legislatively determined method of avoiding potential quid pro quo arrangements. It is a legislative determination that a contribution made in a sum under that limit cannot create a reasonable fear of bias in the mind of the litigant. This legislative determination does not conclusively mandate a finding that no reasonably prudent person would fear they would not receive a fair and impartial trial because of a contribution within the statutorily allowed limit. The statutory limitation upon contributions does, however, reduce the possibility of a quid pro quo arrangement between the candidate and the contributor and also acts to eliminate

133. *MacKenzie*, 565 So. 2d at 1335 (quoting *Livingston v. State*, 441 So. 2d 1083, 1087 (Fla. 1983)).

134. *Id.* (footnote omitted).

135. *Id.* at 1335.

136. *See id.* at 1336 (concluding that current safeguards adequately address concerns regarding judicial campaign contributions).

137. *See id.* at 1335 (acknowledging that contributions to judicial campaigns sometimes may be “cause for reasonable concern”).

any appearance of impropriety.¹³⁸

Although the campaign contribution limits in Texas have not been directly addressed by an appellate court in considering a recusal motion, a concurring justice commented on the Florida court's holding in one of Texas's pre-*Caperton* cases prior to the passage of the Act, asserting:

The [Florida] Court reached [its] result in part based upon Florida's statutory limitation on campaign contributions which permitted contributions to a candidate for a circuit judge (for which the trial judge's husband was a candidate) of \$1,000. Currently, Texas has no such statute and much has been made, and rightly so, of one contributor giving \$200,000 to a candidate for the Texas Supreme Court. I have no problem in concluding that in a county with a population of over 500,000, a self-imposed restriction of \$100 per contributor is most reasonable and should never result in a determination that the judge's impartiality could be reasonably questioned. I would reach the same results as the Florida Supreme Court if the contribution was \$500. I do not believe the "reasonable person on the street" would conclude that receipt of a \$100 contribution or even a \$500 contribution, with today's standards and cost of campaigns, would result in a trial judge being biased or prejudiced.¹³⁹

Although this is some authority to support the proposition that modest contributions within the limits of the Act might not be a valid basis for recusal under *Caperton*, the sizes of contributions in the 2008 Texas Supreme Court elections might not fit the "modest" description even though the contributions were in compliance with the Act. In the 2008 election cycle, the three incumbent Texas Supreme Court justices raised a total of \$2.8 million.¹⁴⁰ Sixty-five percent of this money came from courtroom contributors, parties, or attorneys who had recent cases

138. *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1337 (Fla. 1990) (internal quotation marks and citations omitted) (citing *Breakstone v. MacKenzie*, 561 So. 2d 1164, 1175 (Fla. Dist. Ct. App. 1989) (Nesbitt, J., dissenting)).

139. *Aguilar v. Anderson*, 855 S.W.2d 799, 805 (Tex. App.—El Paso 1993, writ denied) (Osborn, C.J., concurring) (citations omitted).

140. See generally *Texans for Public Justice, Interested Parties: Who Bankrolled Texas' High-Court Justices in 2008?* (Oct. 2009), <http://info.tpj.org/reports/supremes08/InterestedParties.oct09.pdf> (listing contributions made to Texas Supreme Court justices seeking reelection).

before the three incumbent justices.¹⁴¹ “Three big defense firms gave totals of more than \$50,000 apiece to the three justices.”¹⁴² Given the amounts of money at issue, it remains to be seen whether the Act’s contribution limits will be decisive in ruling on a motion to recuse after *Caperton*.

V. IMPLICATIONS FOR ELECTION OF JUDGES

Although *Caperton* will directly impact future rulings on motions to recuse, many agree that *Caperton* has greater implications for Texas beyond the issue of recusal. As former Texas Supreme Court Chief Justice Tom Phillips is quoted as saying, “The greater value of this case is to cause a national debate on choosing judges the same way we choose legislators.”¹⁴³ Texas is one of only seven states that continue to elect judges in partisan elections, and the quest to change the system is a long-standing one.¹⁴⁴

The quest to reform Texas’s system for selecting judges began as far back as twenty-three years ago when then-Chief Justice John Hill began a campaign for change.¹⁴⁵ Support for changing the system finds continuous support in surveys of public perception and empirical studies on the influence campaign contributions have in judicial decision making.¹⁴⁶ In one poll, 80% of the

141. See Texans for Public Justice, Courtroom Contributions Stain Supreme Court Campaigns (Oct. 7, 2008), <http://info.tpj.org/reports/courtroomcontributions/press.html> (contrasting the amount of campaign funds raised by elected Texas Supreme Court justices with the amount raised by their unsuccessful opponents).

142. Texans for Public Justice, Interested Parties: Who Bankrolled Texas’ High-Court Justices in 2008? (Oct. 2009), <http://info.tpj.org/reports/supremes08/InterestedParties.oct09.pdf>.

143. Mary Flood, *High Court Ruling May Stir Debate in Texas: State’s One of Seven with Partisan Elections for Judges*, HOUSTON CHRON., June 9, 2009, at A1, available at 2009 WLNR 10992023.

144. See *id.* (noting that only seven states elect judges in partisan elections and identifying Texas as “a center of the controversy over judicial campaign contributions”).

145. See Wallace B. Jefferson, Chief Justice, Supreme Court of Texas, Presentation to the 81st Legislature: The State of the Judiciary in Texas (Feb. 11, 2009), in 72 TEX. B.J. 286, 288 (2009) (describing the origins of a discourse concerned with the widespread public perception of bias in the elected judiciary).

146. See generally Charles McElwee, *Disqualifications of Judges Because of Campaign Contributions*, 1999 W. VA. LAW. 23 (1999) (pointing to a common belief that campaign contributions impact judicial rulings); Aman McLeod, *Bidding for Justice: A Case Study About the Effect of Campaign Contributions on Judicial Decision-Making*, 85 U. DET. MERCY L. REV. 385 (2008) (outlining an empirical study indicating the increased likelihood that an elected justice will rule in favor of the attorney who donated the most

people who were polled believed that contributions influence a judge's decision.¹⁴⁷ A recent empirical study also confirmed that a quid pro quo relationship appears to exist between contributors and judges.¹⁴⁸ In addition to public perception, judicial campaigns are draining on the candidates who dislike asking for contributions.¹⁴⁹

Partisan elections also have allowed wholesale sweeps by political parties in judicial races in major Texas urban counties.¹⁵⁰ Republican sweeps in 1994 were followed by Democratic sweeps in 2006 and 2008.¹⁵¹ Some believe that even non-partisan elections cannot be the answer if the ability of judicial candidates to raise the money necessary to run a campaign requires party affiliation.

Senator Robert Duncan and other legislators have tried for sixteen years to change the system.¹⁵² Exasperated by the failure to find common ground on proposed legislative change during the

funds to his or her campaign); Chris W. Bonneau & Damon M. Cann, *The Effect of Campaign Contributions on Judicial Decisionmaking* 2–21, 28–31 (Feb. 4, 2009) (unpublished manuscript), available at http://www.publicintegrity.org/assets/pdf/Campaign_Conts.pdf (describing data suggesting that contributions made to elected judges in Texas and Michigan influence judicial rulings). *But see* Ronald D. Rotunda, *A Preliminary Empirical Inquiry into the Connection Between Judicial Decision Making and Campaign Contributions to Judicial Candidates*, PROF. LAW., Winter 2003, at 16 (“[S]tudies of several states do not support a statistical conclusion that judicial campaign contributions may be corrosive.”).

147. *See* Dave McNeely, *Chief Justice Wants Merit Selection of Judges*, TRIB., Feb. 24, 2009, <http://www.ourtribune.com/article.php?id=6765> (discussing a poll in which the vast majority of responses indicates the public's belief that campaign contributions affect judicial rulings).

148. *See* Chris W. Bonneau & Damon M. Cann, *The Effect of Campaign Contributions on Judicial Decisionmaking* 1 (Feb. 4, 2009) (unpublished manuscript), available at http://www.publicintegrity.org/assets/pdf/Campaign_Conts.pdf (“[I]t does appear that there is a quid pro quo relationship between contributors and votes in Michigan and Texas.”).

149. *See* Chuck Lindell, *Should Texas Judges Be Appointed Instead of Elected?*, AUSTIN AM.-STATESMAN, Apr. 20, 2009, <http://www.statesman.com/news/content/news/stories/local/04/20/0420judgeelect.html> (acknowledging that judges dislike solicitation of campaign contributions).

150. *E.g.*, Dave McNeely, *Chief Justice Wants Merit Selection of Judges*, TRIB., Feb. 24, 2009, <http://www.ourtribune.com/article.php?id=6765> (noting partisan sweeps in 1994, 2006, and 2008).

151. *Id.*

152. *See* Chuck Lindell, *Should Texas Judges Be Appointed Instead of Elected?*, AUSTIN AM.-STATESMAN, Apr. 20, 2009, <http://www.statesman.com/news/content/news/stories/local/04/20/0420judgeelect.html> (acknowledging Senator Robert Duncan's long-term effort to reform the Texas Judiciary).

2009 legislative session, Senator Duncan commented at one hearing, “We’re never going to get this perfect, because there is no perfect solution, but at some point everyone has to lay down their own personal bias . . . and say we have to make this work better Doing nothing preserves what is the worst system in the country.”¹⁵³ Retired United States Supreme Court Justice Sandra Day O’Connor also has joined the fray, asserting:

If I could do one thing to protect judicial independence in this country, it would be to convince those states that still elect their judges to adopt a merit selection system and—short of that—at least do something to remove the vast sums of money being collected by judicial candidates, usually from litigants who appear before them in the courtroom.¹⁵⁴

In his 2009 State of the Judiciary address, Chief Justice Wallace Jefferson concluded his remarks on the need to reform the system of electing judges by stating:

So long as we cast straight ticket ballots for judges, the fate of all judges is controlled by the whim of political tide. A merit system, in which voters later vote the judge up or down, is the best remedy, but I commend any innovation in which the goals are to recruit and retain qualified judges, and to reduce the role of money in judicial campaigns.¹⁵⁵

While a merit system of selection is just one of many alternatives that could be considered, the Texas Legislature ended its 2009 session without passing any of the proposed reform measures. Perhaps, however, the renewed impetus stirred by *Caperton* will lead to the national debate predicted by former Chief Justice Phillips regarding the need for a change in the system of selecting judges as opposed to the increased litigation predicted by Chief Justice Roberts.

153. *Id.*

154. Wallace B. Jefferson, Chief Justice, Supreme Court of Texas, Presentation to the 81st Legislature: The State of the Judiciary in Texas (Feb. 11, 2009), in 72 TEX. B.J. 286, 288 (2009) (quoting retired U.S. Supreme Court Justice Sandra Day O’Connor and sharing his own “concern about the corrosive influence of money in judicial elections”).

155. *Id.* at 289.

VI. CONCLUSION

Although *Caperton* did not result in radical substantive changes in the law, litigants may cite *Caperton* in an increased rash of motions for recusal. In Texas, the contribution limits established by Texas's Judicial Campaign Fairness Act will have an effect on the recusal rulings. Hopefully, *Caperton* can provide the impetus for changing Texas's system of electing judges. With two-thirds of Texas voters wanting the current system to remain unchanged, however, it would be overly optimistic to believe that such a change will come to fruition anytime soon.