

Committee for Economic Development (CED)

Why a Fair and Impartial Judiciary Matters to Business Leaders

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The line "common sense often makes good law," is attributed to Supreme Court Justice William O. Douglas. Details surrounding the West Virginia case *Caperton v. Massey*, argued March 3 before the U.S. Supreme Court, display a serious lack of common sense in judicial independence and selection procedures. The CEO of A.T. Massey Coal Co. spent \$3 million to elect lawyer Brent Benjamin to the state Supreme Court, while Massey Coal was appealing a \$50 million jury award against it. Even after repeated requests from the petitioners, Justice Benjamin refused to recuse himself, instead casting the deciding vote to overturn the \$50 million judgment. When large amounts of campaign spending are involved, integrity of the judicial process is readily questioned.

Caperton v. Massey has highlighted the business community's concern for judicial recusal. A 2007 poll of U.S. business leaders conducted by Zogby International reported that 97 percent of those surveyed said that judges should recuse themselves in cases involving those who have contributed financially to their campaign. In addition, the Committee for Economic Development, together with Fortune 500 giants Intel, Lockheed Martin, PepsiCo, and Wal-Mart Stores, Inc., submitted a Supreme Court amicus brief in support of the Petitioners, Hugh Caperton and the Harman Development Corporation.

A fair and impartial judicial system matters to business and to economic development. All citizens have a stake in this system and should support reforming the way our state judges are selected. The independence of our judicial system is critical to a functioning democracy and the rule of law. The escalation of large financial contributions to judicial campaigns undermines these principles. When candidates for the bench feel compelled to solicit campaign donations from parties that may have business before their court (as well as support from political parties and special interests with ideological agendas), there exists – at the very least – an appearance of corruption. The more politics plays a role in judicial selection, the more lawyers, business organizations, and interest groups feel compelled to enter the competition to elect the judges most favorable to their positions.

In today's economy, major corporations generally operate in every state. Methods of judicial selection can have a major effect on local business transactions. Plaintiffs can choose the state court that will be most favorable to them and business can stop selling products in a particular state that entails a higher litigation risk. The costs of these transactions affect employers, employees, and consumers.

Business leaders should take a good look at the Missouri Plan. Since 1940, the State of Missouri, where I reside, has had a merit selection system in which potential judicial candidates are identified by nonpartisan commissions, rather than through donor-driven political campaigns. Three candidates are sent to the governor for approval. If the governor fails to choose one, the committee does. Voters pass judgment on these appointments, through periodic yes-or-no retention elections in which they decide whether judges should stay on the bench. In a 2007 poll, 71% of Missourians voiced approval of the Missouri Plan and of the judiciary selected under its provisions.

Twenty-four states use this commission process to choose their Supreme Courts, and five others use different nonpartisan appointive systems. These systems have minimized politics on the bench and have enabled judges to focus on the law, not fundraising or electoral politics.

Just as important, the stability of the appointed courts has been good for business. A recent index developed by the Institute for Legal Reform (Joshua Hall and Russell Sobel were authors) supported the finding that judicial elections are bad for economic growth and job creation. States with the Missouri Plan have a legal climate more conducive to economic growth and prosperity. Also according to the 2008 U.S. Chamber of Commerce survey of state liability rankings, the five worst states all choose justices through competitive elections. The five best states all have appointed Supreme Courts. West Virginia, where the *Caperton v. Massey* mess occurred, ranks dead last.

Caperton vs. Massey may very well be a turning point in stimulating business to be more vocal about the need to support judicial selection reform in the states. The current economic crisis has companies and financial institutions struggling to regain the public trust. We have to ensure that our legal system is above reproach. Supporting judicial independence and selection reform is a clear-cut opportunity for business leaders to do the right thing.

This op-ed was originally published on March 11, 2009 in the [Joplin Globe](#). The author is a CED Trustee.