

A Brave New World of Judicial Recusal?

The United States Supreme Court Enters the Fray

By Kevin C. Newsom and Marc James Ayers

On June 8, 2009, the United States Supreme Court released its opinion in what has come to be known as “the West Virginia recusal case”—*Caperton v. A.T. Massey Coal Co.*¹ In a 5-4 ruling authored by Justice Kennedy, the Court held that the Fourteenth Amendment’s Due Process Clause required a state supreme court justice to recuse himself in a case involving a company whose CEO had made substantial expenditures in support of the justice’s election campaign. While its actual impact will be determined only in time, the Court’s decision raises a number of important questions and considerations for litigants and lawyers—not exclusively, but perhaps most particularly for those in the 39 states, Alabama among them, that elect at least some of their judges.

The Facts of the Case²

In August 2002, a West Virginia jury found A.T. Massey Coal Co. (“Massey Coal”) liable for certain business torts and awarded the plaintiffs, Hugh Caperton and his company Harman Development, \$50 million in damages. After the jury’s verdict but before Massey Coal filed its petition for appeal (what we in Alabama would call a petition for certiorari), West Virginia held its 2004 judicial elections. In that election cycle, attorney Brent Benjamin ran for a seat on the West Virginia Supreme Court of Appeals against an incumbent, Justice Warren McGraw. Benjamin ultimately won the election by some 50,000 votes (almost seven percentage points), and took his seat in January 2005.

The race between Benjamin and McGraw was heated by any measure, and involved strong messages and big dollars on both sides. Enter Don Blankenship, the CEO of Massey Energy and its subsidiary Massey Coal. Blankenship strongly disapproved of Justice McGraw’s jurisprudence. Blankenship believed that Justice McGraw was biased toward “the trial lawyers” and that McGraw’s decisions harmed West Virginia’s economy.³ (Blankenship’s sentiment tracked Benjamin’s campaign theme, which was that West Virginia’s courts had become “unfair and unpredictable”).⁴ Blankenship had no personal connection with Benjamin, but, according to Blankenship, desired to support him in order to unseat Justice McGraw.

And support Benjamin, Blankenship did. Not only did Blankenship contribute \$1,000 directly to Benjamin’s campaign, but also—and more significantly—he made substantial independent expenditures (without the cooperation of the Benjamin campaign) that totaled some \$3 million. Specifically, Blankenship spent approximately \$500,000 to fund direct mailings and advertising to support Benjamin and to oppose Justice McGraw, and then gave almost \$2.5 million to an organization established under 26 U.S.C. § 527(e)—“And for the Sake of the Kids”—which ran ads and held events opposing Justice McGraw.

Other organizations representing various interests—such as “Doctors for Justice,” “Citizens for Quality Health Care” and “Citizens Against Lawsuit Abuse”—also spent substantial sums to support Benjamin’s campaign. There was plenty of money on the other side, as well. The “West Virginia Consumers for Justice” (another § 527 group) spent approximately \$2 million to support Justice McGraw, approximately \$1.5 million of which it received from plaintiffs’ attorneys and \$10,000 of which it received from Caperton himself.

When Justice Benjamin took his seat on January 1, 2005, the *Caperton* matter was still before the trial court on post-judgment review. In October 2005—in anticipation of Massey Coal’s petition for appeal to the West Virginia Supreme Court of Appeals—Caperton filed a motion to disqualify the newly elected Justice Benjamin based on Blankenship’s campaign support. Justice Benjamin denied that motion in a written opinion.

The West Virginia Supreme Court of Appeals granted Massey Coal’s petition for appeal, and in November 2007, the West Virginia high court reversed the \$50 million verdict in a 3-2 opinion, which Justice Benjamin joined. Although the majority opinion noted that “Massey’s conduct warranted the type of judgment rendered in this case,” the court reversed the jury’s verdict based on (1) a contractual forum-selection clause that precluded the action from being brought in West Virginia and (2) the res judicata effect of a separate judgment reached in a Virginia court.⁵

Caperton requested rehearing, which was granted unanimously. Two of the justices—one from the majority opinion, and one from the dissent—recused themselves on rehearing, leaving Justice Benjamin (who had again refused to recuse and who was now sitting as acting chief justice) to appoint two new justices

to round out the rehearing panel. Justice Benjamin did so, and the court again, in another 3-2 decision, reversed the jury's verdict. (The justices appointed by Benjamin to rehear the *Caperton* decision split on the merits, with one justice in the majority and one in the dissent.) The dissenting justices not only challenged the majority opinion on the merits, but also objected to Justice Benjamin's participation in the matter.

Justice Benjamin eventually filed a lengthy concurring opinion, in which he addressed the various challenges to his participation in the *Caperton* matter. Benjamin contended that he had "no pecuniary interest in the outcome of this matter" and "no personal involvement with ... [or] personal antipathy toward any party or counsel."⁶ He also rejected the notion that he should recuse based on vague notions of "appearance." Moreover, Justice Benjamin wrote that even if "appearance" were the standard, there was no untoward appearance here. In particular, Justice Benjamin argued (1) that it was Justice McGraw's own message and actions that had sunk his campaign (Benjamin pointed specifically to a then-infamous campaign speech in which McGraw had claimed, among other things, that Benjamin wanted to "destroy democracy"); and (2) that Benjamin had voted *against* Massey companies in several other appeals.⁷ Indeed, before ruling on the merits of the *Caperton* appeal in November 2007, Justice Benjamin had ruled against Massey companies in four cases, at both the petition and the merits stages.⁸ And approximately one month after ruling in favor of Massey Coal in the *Caperton* matter, Justice Benjamin voted against hearing Massey's appeal of a \$243 million adverse judgment.

Caperton filed a petition for certiorari in the United States Supreme Court, alleging that Justice Benjamin's participation in the case violated the Fourteenth Amendment's Due Process Clause. The Court granted *Caperton*'s petition.

The Majority Opinion and the "Possible Temptation" Standard

In an opinion authored by Justice Kennedy and joined by justices Stevens, Souter, Ginsburg and Breyer, the Court found that Justice Benjamin's participation in the *Caperton* appeal violated the Due Process Clause. At the outset of its opinion, the Court identified two fundamental propositions: first, that "a fair trial in a fair tribunal is a basic requirement of due process," and second, that "most matters relating to judicial disqualification [do] not rise to a constitutional level."⁹ Under what circumstances, then, does a judge's non-recusal violate the Due Process Clause?

At common law, the Court observed, recusal was required only where the judge had a "direct, personal, substantial, pecuniary interest" in a case.¹⁰ That rule reflected the maxim that "no man is



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allowed to be a judge in his own cause."¹¹ Beyond that core common law prohibition, the Court pointed to two additional circumstances in which it had required recusal as a constitutional matter. The first involves tribunals "where a judge [has] a financial interest in the outcome of a case, although the interest [is] less than what would have been considered personal or direct at common law"—the quintessential example being a case in which a municipal judge is paid a salary supplement for convictions but not acquittals.¹² The second instance in which the Due Process Clause has been deemed to require recusal is where a judge has a conflict of interest as a result of his participation in an earlier proceeding—the quintessential example here being a case in which a judge slandered by a contemnor later presides over the trial of the contempt charge.¹³

So, the question remained, what about Justice Benjamin? His participation didn't run afoul of any of the particular categories marked out by existing precedent. Did "the context of judicial elections," which the Court acknowledged was "a framework not presented" in prior cases, call for a variation on the existing rules?¹⁴ *Caperton*'s theory of recusal was that in the judicial election context, a judge (like Justice Benjamin) who had received substantial support might feel some kind of political "debt of gratitude" to his supporters that should be repaid with favor from the bench.¹⁵

The Court emphasized that the unwieldiness and indeterminacy of inquiries into judges' subjective biases "underscore[s] the need for objective rules."¹⁶ To that end, the Court seemingly embraced the following constitutional criterion, which it adapted from language in earlier cases: "[W]hether the contributor's influence on the election under all the circumstances 'would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear, and true.'"¹⁷

In applying the "possible temptation" test to the case before it, the Court stressed that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal."¹⁸ But, the Court said, "this is an exceptional case."¹⁹ In finding the facts surrounding the *Caperton* appeal sufficiently "exceptional," the Court focused principally on two factors: the relative size of Blankenship's expenditures in support of Benjamin and the timing of those expenditures relative to the pendency of Massey's appeal:

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.²⁰

The Court attached no significance to the fact that all but \$1,000 of Blankenship's support was by way of independent expenditures rather than by direct contributions. Instead, the Court found the totality of Blankenship's expenditures were simply too great:

[W]e conclude that Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case. Blankenship contributed some \$3 million to unseat the incumbent and replace him with Benjamin. His contributions eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee. Caperton claims Blankenship spent \$1 million more than the total amount spent by the campaign committees of both candidates combined.²¹

The Court held that "[i]n an election decided by fewer than 50,000 votes (382,036 to 334,301), Blankenship's campaign contributions—in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election—had a significant and disproportionate influence on the electoral outcome."²²

Ultimately, the Court majority held 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."²³ "On these extreme facts," the Court held, "the probability of actual bias rises to an unconstitutional level."²⁴ Seemingly in an attempt to cabin the scope of its decision, the Court added the following coda: "Because [state recusal rules typically] provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances."²⁵

The Dissent and the Problem of Indeterminacy

Chief Justice John Roberts dissented, and was joined by Justices Scalia, Thomas and Alito. In his dissent, the Chief Justice lamented that the Court had improperly and unwisely extended the reach of the Due Process Clause into new territory with its "probability of bias" test—territory that in the past had been left to state-by-state regulation. The Court's new constitutional rule, he contended, "cannot be defined in any limited way" and "provides no guidance to judges and litigants about when recusal will be constitutionally required."²⁶ The Chief Justice predicted that the Court's decision "will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be."²⁷

The Chief Justice expressed concern that "the standard the majority articulates—'probability of bias'—fails to provide clear, workable guidance for future cases," and raises far more questions than it answers.²⁸ Among the most important, he said, is "whether the new probability of bias standard is somehow limited to financial support in judicial elections, or applies to judicial recusal questions more generally."²⁹ After all, if the underlying concern is that an elected judge would feel a debt of gratitude to a campaign supporter, wouldn't an appointed judge likewise feel a debt to the

president or governor who appointed him? And more generally, what about "friendship with a party or lawyer, prior employment experience, membership in clubs or associations," and so on?³⁰

Even moving beyond those initial macro-level questions concerning the scope of the Court's rationale, the Chief Justice lists 40 other significant open questions that litigants, lawyers and lower courts will have to address when thinking about recusal. Among them—

- How much money is too much money? What level of contribution or expenditure gives rise to a "probability of bias"?
- Are independent, non-coordinated expenditures treated the same as direct contributions to a candidate's campaign? What about contributions to independent outside groups supporting a candidate?
- Does the analysis change depending on whether the judge whose disqualification is sought sits on a trial court, appeals court or state supreme court?
- How long does the probability of bias last? Does the probability of bias diminish over time as the election recedes? Does it matter whether the judge plans to run for reelection?
- Must the judge's vote be outcome determinative in order for his non-recusal to constitute a due process violation?
- Should we assume that elected judges feel a "debt of hostility" toward major opponents of their candidacies? Must the judge recuse in cases involving individuals or groups who spent large amounts of money trying unsuccessfully to defeat him?
- Does what is unconstitutional vary from state to state? What if particular states have a history of expensive judicial elections?

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- Which cases are implicated by this doctrine? Must the case be pending at the time of the election? Reasonably likely to be brought? What about an important but unanticipated case filed shortly after the election?
- 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?
- Are the parties entitled to discovery with respect to the judge's recusal decision?³¹

Given these and many other open questions, and the difficult line-drawing exercises with which courts may be faced in resolving them, the Chief believes that the majority opinion "requires state and federal judges simultaneously to act as political scientists (why did candidate X win the election?), economists (was the financial support disproportionate?) and psychologists (is there likely to be a debt of gratitude?)."³²

The dissenting Justices also highlighted a number of procedural uncertainties. "What procedures must be followed to challenge a state judge's failure to recuse?" May *Caperton* claims be raised only direct review—as in *Caperton* itself—or may a litigant file suit in federal court under 42 U.S.C. § 1983 to prevent an allegedly biased judge from sitting on his case? "Are the parties entitled to discovery with respect to the judge's recusal decision?" "What is the proper remedy" for a *Caperton* violation, if proved? Does harmless-error analysis apply? "Does a litigant waive his

due process claim if he waits until after decision to raise it? Or would the claim only be ripe after decision, when the judge's actions or vote suggest a probability of bias?"³³

Finally, the dissenters expressed skepticism about the viability of the Court's repeated efforts to limit the scope of its holding to only cases involving "extreme" facts. "This," Chief Justice Roberts said, "is just so much whistling past the graveyard."³⁴ The difficulty, according to the Chief Justice, is that the majority's test is so circumstance-dependent—and seemingly limitless—that "all future litigants will assert that their case is *really* the most extreme so far."³⁵

The Ramifications of *Caperton*: Mountain or Molehill?

It is frankly unclear what *Caperton*'s real-world ramifications will be. The five Justices in the majority see no coming flood of recusal motions or other significant lurking complications. Litigants, they would say, have always had the ability to file recusal motions, and there does not appear to have been any unmanageable crush. That is an optimistic view, and may be proven correct in time.

Caperton could well change the game, though. Until now, litigants considering a recusal motion did not have a broadly-worded and seemingly open-ended federal constitutional sword to wield.



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Given the Supreme Court's full-throated endorsement of the "possible temptation" standard, and its extension of that standard in the judicial-election context, the institutional limitations on recusal practice may shift.

In any event, litigants and lawyers will need to begin to consider the propriety of the "Caperton motion." The basic battle lines would seem to be apparent: Parties seeking recusal on constitutional grounds in circumstances different from those in *Caperton*—say, with respect to a less "extreme" judicial-election scenario or with respect to an appointed judge—will have to focus on the Court's broad language and try to show that the support at issue would create a sense of political debt and would therefore "offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear, and true." On the other hand, parties resisting *Caperton* motions generally will want to hold fast to the particular facts of *Caperton* and contend that the Court's constitutional rule applies only in the judicial election context—and even there only to cases presenting nearly identical facts.

Whatever the relative merits of the Court's opinion and dissenters' objections, it is clear that there is at least a new weapon in the litigator's arsenal: the "Caperton motion." Recusal practice—particularly in state courts, but possibly in federal courts as well—may well get more aggressive, and much more complicated, in the months and years to come. ▲▲▲



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appeal involving an insurance company, and would have directly benefited by ruling against the insurance company in light of the pendency of his own lawsuit against another insurance company)).

13. *Id.* at 2261-62 (discussing *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (a judge who presided over criminal contempt proceedings was the same judge who was verbally attacked by the defendant, thus giving rise to the charge of criminal contempt); and *In re Murchison*, 349 U.S. 133 (1955) (after a judge had questioned witnesses to determine whether criminal charges should be brought against them, the same judge proceeded to try and convict those witnesses for contempt in the earlier proceeding)).

14. *Id.* at 2262.

15. *Id.*; see also Pet. Br. at 17, 31-35.

16. *Caperton*, 129 S. Ct. at 2263.

17. *Id.* at 2260, 2261, 2264, 2265 (internal quotations omitted).

18. *Id.* at 2263.

19. *Id.*

20. *Id.* at 2263-64.

21. *Id.* at 2264.

22. *Id.*

23. *Id.* at 2265 (internal quotations omitted).

24. *Id.*

25. *Id.* at 2267.

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

27. *Id.*; see also *Id.* at 2274-75 (Scalia, J., dissenting) (stating that adoption of the Petitioners' theory "was urged upon us on grounds that it would preserve the public's confidence in the judicial system," but that the Court's decision "will have the opposite effect" by reinforcing "the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice").

28. *Id.* at 2269 (Roberts, C.J., dissenting).

29. *Id.*; see also *Id.* at 2274 (Scalia, J., dissenting) ("[T]he principal consequence of today's decision is to create vast uncertainty with respect to a point of law that can be raised in all litigated cases in (at least) those 39 states that elect their judges.").

30. *Id.* at 2268 (Roberts, C.J., dissenting).

31. *Id.* at 2269-72.

32. *Id.* at 2272.

33. *Id.* at 2271-72.

34. *Id.* at 2272.

35. *Id.*

Endnotes

1. 556 U.S. ___, 129 S. Ct. 2252 (2009).

2. The facts of the case as presented in this article were assembled from the Supreme Court's opinion and from the opening briefs of the parties. See *Caperton*, 129 S. Ct. at 2257-59; Brief of Petitioners Hugh M. Caperton *et al.* at 1-15; Brief of Respondents A.T. Massey Coal Co. *et al.* at 3-9. Pinpoint cites are provided where text is quoted.

3. Resp. Br. at 3.

4. *Id.* at 5.

5. *Caperton*, 129 S. Ct. at 2258 (quoting *Caperton v. A.T. Massey Coal Co.*, 2007 WL 415960, Slip Op. at 13 (No. 33350, filed November 21, 2007) (withdrawn)).

6. Resp. Br. at 8-9 (quoting *Caperton v. A.T. Massey Coal Co.*, ___ S.E.2d ___, 2008 WL 918444 (W. Va. 2008) (Benjamin, J., concurring)).

7. See *id.* at 54.

8. See *U.S. Steel Mining Co. v. Helton*, 631 S.E.2d 559 (W. Va. 2005) (merits); *Helton v. Reed*, 638 S.E.2d 160 (W. Va. 2006) (merits); *McNeely v. Independence Coal Co.*, No. 042156 (W. Va. Feb. 9, 2005) (petition stage); *Brown v. Rawl Sales & Processing Co.*, No. 070889 (W. Va. Sept. 11, 2007) (petition stage).

9. *Caperton*, 129 S. Ct. at 2259.

10. *Id.*

11. *Id.*

12. *Id.* at 2259-61 (discussing *Turney v. Ohio*, 273 U.S. 501 (1927) (a judge in criminal case personally received fees and costs only if defendant was convicted); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (a mayor was acting as judge over criminal matters, and city received fines only upon conviction of defendants); and *Aetna Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (an Alabama Supreme Court justice heard an

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