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## COMMENTS

### CAPERTON V. A.T. MASSEY COAL CO.: DUE PROCESS LIMITATIONS ON THE APPEARANCE OF JUDICIAL BIAS

Whatever disagreement there may be as to the scope of the phrase “due process of law,” there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard.

— Justice Oliver Wendell Holmes, *Frank v. Mangum*, 1915<sup>1</sup>

Nearly ninety percent of the state and local judges in the United States face election.<sup>2</sup> What began as an experiment in the nineteenth century<sup>3</sup> has become an expensive,<sup>4</sup> widespread,<sup>5</sup> and significant<sup>6</sup> institution, yet many in the legal profession fail to appreciate its effects. Prior to the 2008 Term, the Supreme Court had only once openly considered whether judicial elections may yield bias, in *Republican Party of Minnesota v. White*.<sup>7</sup> In *White*, the Court held unconstitutional a Minnesota law that forbade judicial candidates from announcing their views on legal and political issues — a law that the state had enacted to limit apparent biases among judges.<sup>8</sup> In a concurrence, Justice Kennedy acknowledged “the difficulties imposed by the election system,”<sup>9</sup> but this acknowledgement merely invited a larger question: when does

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<sup>1</sup> 237 U.S. 309, 347 (1915) (Holmes, J., dissenting).

<sup>2</sup> See Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 181 (2004) (citing Robert C. Berness, Note, *Norms of Judicial Behavior: Understanding Restrictions on Judicial Candidate Speech in the Age of Attack Politics*, 53 RUTGERS L. REV. 1027, 1028 (2001) (estimating that eighty-seven percent of judges are subject to election either to win or to retain office)).

<sup>3</sup> See Jed Handelsman Shugerman, *Panic and Judicial Power: Financial Crisis and the Origins of Judicial Elections and Judicial Review*, 123 HARV. L. REV. (forthcoming Mar. 2010).

<sup>4</sup> See, e.g., JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2006: HOW 2006 WAS THE MOST THREATENING YEAR YET TO THE FAIRNESS AND IMPARTIALITY OF OUR COURTS — AND HOW AMERICANS ARE FIGHTING BACK 15 (Jesse Rutledge ed., 2007), available at <http://www.gavelgrab.org/wp-content/resources/NewPoliticsofJudicialElections2006.pdf>.

<sup>5</sup> Thirty-nine states select or remove at least some judges by election. Briffault, *supra* note 2, at 181. At the same time, the institution of judicial elections remains almost exclusively an American one: in the rest of the world, only Japan and Switzerland elect judges, and even those countries do so on a much more limited basis. See Shugerman, *supra* note 3 (manuscript at 3 n.4, on file with the Harvard Law School Library).

<sup>6</sup> There is reason to think that elected judges may rule differently from unelected judges. See Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q.J. POL. SCI. 107 (2007).

<sup>7</sup> 536 U.S. 765 (2002).

<sup>8</sup> *Id.* at 788.

<sup>9</sup> *Id.* at 796 (Kennedy, J., concurring).

the election system impose “difficulties” so significant that they render a particular elected judge unable to do justice to a particular party before her? Last Term, in *Caperton v. A.T. Massey Coal Co.*,<sup>10</sup> the Supreme Court again broached this topic, and again came close to answering this question.

In 1993, Hugh M. Caperton purchased the Harman Mine (Harman), a productive coal mine in Buchanan County, Virginia.<sup>11</sup> Four years later, A.T. Massey Coal Company (Massey), a competitor, purchased Caperton’s chief customer, intending it to purchase Massey’s own, inferior coal rather than Harman’s.<sup>12</sup> Massey used this new influence to pressure Caperton to negotiate the sale of his mine, but scuttled the deal shortly before closing.<sup>13</sup> Harman filed for bankruptcy, and Caperton sued for tortious interference, misrepresentation, and civil conspiracy, and sought punitive damages.<sup>14</sup> The trial court found that Massey had invoked the sales contract’s *force majeure* clause in bad faith and intentionally harmed both Harman and Caperton personally, and in 2002 a jury returned a \$50 million verdict.<sup>15</sup>

Before Massey appealed to the West Virginia Supreme Court of Appeals, the state conducted its 2004 judicial elections.<sup>16</sup> Massey’s CEO, Don Blankenship, supported local attorney Brent Benjamin against an incumbent on the court, Justice McGraw.<sup>17</sup> Blankenship donated \$1000 (the statutory maximum<sup>18</sup>) to Benjamin directly and also contributed \$2.5 million to an independent group called “And For The Sake Of The Kids,”<sup>19</sup> which targeted Justice McGraw for a ruling reinstating a child molester’s probation.<sup>20</sup> Blankenship also made more than \$500,000 in independent expenditures for television adver-

<sup>10</sup> 129 S. Ct. 2252 (2009).

<sup>11</sup> See *Caperton v. A.T. Massey Coal Co.*, No. 33350, 2008 WL 918444, at \*3 (W. Va. Apr. 3, 2008).

<sup>12</sup> *Id.* at \*4 & nn.11, 12.

<sup>13</sup> See *id.* at \*5.

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

<sup>15</sup> The exact award was \$50,038,406. *Id.* The trial court denied the defendants’ subsequent motion to set aside the verdict. *Caperton v. A.T. Massey Coal Co.*, No. 98-C-192, 2005 WL 5679073 (W. Va. Cir. Ct. Mar. 15, 2005).

<sup>16</sup> *Caperton*, 129 S. Ct. at 2257. West Virginia, like thirty-eight other states, constitutes its judiciary by election. W. VA. CONST. art. VIII, § 8-2, cl. 2; *id.* § 8-5, cl. 1; *id.* § 8-10, cl. 2; see also Shugerman, *supra* note 3 (manuscript at 3 n.3, on file with the Harvard Law School Library).

<sup>17</sup> *Caperton*, 129 S. Ct. at 2257. Benjamin ran as the Republican nominee, while Justice McGraw ran as a Democrat. *Caperton*, 2008 WL 918444, at \*74 (Benjamin, C.J., concurring).

<sup>18</sup> See W. VA. CODE ANN. § 3-8-12(f) (LexisNexis 2006).

<sup>19</sup> *Caperton*, 129 S. Ct. at 2257.

<sup>20</sup> John Gibeaut, *Caperton’s Coal*, A.B.A. J., Feb. 2009, at 52, 55. Several of the group’s television advertisements are preserved online. See, e.g., *Tired — Revised* (And For The Sake Of The Kids television broadcast Oct. 26, 2004), available at <http://www.youtube.com/watch?v=xL9Lj6WllLg>.

tisements and direct mailings.<sup>21</sup> Together, Blankenship's contributions exceeded those of the rest of Benjamin's donors combined and were three times greater than the sum spent by Benjamin's own campaign committee.<sup>22</sup> Benjamin won the election.<sup>23</sup>

The newly constituted Supreme Court of Appeals heard Massey's appeal. In a 3–2 decision, Justice Benjamin voted with the majority to overturn the jury's verdict on the grounds that the lower court erred in disregarding a forum selection clause and the preclusive effect of earlier litigation.<sup>24</sup> Caperton sought rehearing and moved to disqualify Justice Benjamin, as well as another justice for separate reasons.<sup>25</sup> Massey responded with a motion of its own to disqualify Justice Starcher, who had publicly criticized Blankenship's role in the 2004 election.<sup>26</sup> Justices Maynard and Starcher recused themselves, and the case was reargued. Again, the court ruled for the appellants on their forum selection and res judicata arguments, and again Justice Benjamin voted with the majority.<sup>27</sup> The court did not mention the propriety of Justice Benjamin's participation in the case; instead, the issue was left for the dissent and Justice Benjamin's concurrence. Writing in dissent, Justice Albright<sup>28</sup> largely confined his arguments to showing why the majority's contract and civil procedure conclusions were “just plain wrong and . . . a complete denial of justice.”<sup>29</sup> In an essential footnote, however, the dissent argued that the court's failure to examine Justice Benjamin's involvement for actual or apparent bias implicated due process.<sup>30</sup> In response, Justice Benjamin's concurrence argued that it was the dissenters who endangered judicial neutrality, suggesting that they “use[d] their opinions and orders simply as sensa-

<sup>21</sup> *Caperton*, 129 S. Ct. at 2257.

<sup>22</sup> *See id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Caperton v. A.T. Massey Coal Co.*, No. 33350 (W. Va. Nov. 21, 2007) (depublished), available at <http://www.state.wv.us/wvsc/docs/fallo7/33350.pdf>, vacated, No. 33350, 2008 WL 918444 (W. Va. Apr. 3, 2008). Chief Justice Davis wrote for the court and was joined by Justices Maynard and Benjamin. Justice Benjamin reserved the right to concur separately, while Justices Starcher and Albright dissented.

<sup>25</sup> *Caperton*, 129 S. Ct. at 2258. Justice Maynard, although not standing for reelection while the appeal was pending, was photographed with Blankenship vacationing on the French Riviera. See Adam Liptak, *Trip to Europe Has Repercussions in West Virginia*, N.Y. TIMES, Jan. 15, 2008, at A12.

<sup>26</sup> *Caperton*, 129 S. Ct. at 2258. Justice Starcher's comments about Blankenship's involvement had even reached his dissent from the appeal's first disposition. See *Caperton*, No. 33350, slip op. at 2–3 (Starcher, J., dissenting), available at <http://www.state.wv.us/wvsc/docs/fallo7/33350d2.pdf>.

<sup>27</sup> *Caperton*, 2008 WL 918444, at \*27–28. Justice Davis wrote for the court and was joined by Acting Chief Justice Benjamin and Judge Fox, sitting by assignment.

<sup>28</sup> Judge Cookman, sitting by assignment, joined Justice Albright's dissent.

<sup>29</sup> *Caperton*, 2008 WL 918444, at \*50 (Albright, J., dissenting).

<sup>30</sup> *See id.* at \*60 n.16.

tionalistic bombast by which to convey partisan agendas.”<sup>31</sup> Because West Virginia requires its judges to decide all cases “except those in which disqualification is required,” Justice Benjamin said, he could step aside only if due process itself commanded it.<sup>32</sup> Reviewing federal precedent, he concluded that it did not clearly do so.<sup>33</sup> Instead, he argued, the circumstances of his election to the Supreme Court of Appeals complied with West Virginia’s policy favoring partisan judicial elections<sup>34</sup> and turned on several factors apart from Blankenship’s spending.<sup>35</sup> That the spending was indirect<sup>36</sup> and legal<sup>37</sup> should have been sufficient, he concluded, to show that no bias was present.<sup>38</sup>

The U.S. Supreme Court granted certiorari and reversed.<sup>39</sup> Writing for the Court, Justice Kennedy<sup>40</sup> arrayed the facts of the case before a background of prior cases that specify two types of circumstances in which due process compels recusal. The Court concluded that Justice Benjamin was right that the circumstances of his election did not fall into the situation described in the first category of cases, formulated in *Tumey v. Ohio*<sup>41</sup> as “a direct, personal, substantial, pecuniary interest.”<sup>42</sup> He was wrong, however, to ignore a second category of the Court’s cases, which established other situations in which “the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable.”<sup>43</sup>

The Court identified two lines of cases with particular application to the case at hand. In the first, the Court had required recusal when the incentives to rule one way were sufficient to call into question a reasonable judge’s ability to ignore them.<sup>44</sup> In the second, the Court had required judges who had charged defendants with criminal contempt to recuse themselves from presiding over the contempt proceed-

<sup>31</sup> *Id.* at \*62 (Benjamin, C.J., concurring).

<sup>32</sup> *Id.* at \*68.

<sup>33</sup> *Id.* at \*69–70.

<sup>34</sup> *See id.* at \*71–72.

<sup>35</sup> *See id.* at \*72–75. In particular, Justice Benjamin said the “pivotal moment” for his campaign was a speech his opponent gave in Racine on Labor Day. *Id.* at \*74.

<sup>36</sup> *See id.* at \*75.

<sup>37</sup> *See id.* at \*76.

<sup>38</sup> *Id.* at \*78.

<sup>39</sup> *Caperton*, 129 S. Ct. 2252.

<sup>40</sup> Justices Stevens, Souter, Ginsburg, and Breyer joined Justice Kennedy’s opinion.

<sup>41</sup> 273 U.S. 510 (1927).

<sup>42</sup> *Caperton*, 129 S. Ct. at 2259 (quoting *Tumey*, 273 U.S. at 523) (internal quotation marks omitted).

<sup>43</sup> *Id.* (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)) (internal quotation mark omitted).

<sup>44</sup> *See id.* at 2259–61 (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey*, 273 U.S. 510).

ings.<sup>45</sup> In light of these precedents, the Court determined that its trust in Justice Benjamin's judgment that he could remain impartial was insufficient to meet the requirements of due process.<sup>46</sup> Instead, it reasoned, the fact that judicial decisionmaking (like human cognition generally) resists external, post hoc rationales requires the objective inquiry employed in this second series of opinions.<sup>47</sup> Whether or not Justice Benjamin could have won his seat without Blankenship's electioneering, Blankenship did in fact spend a substantial sum to elect him.<sup>48</sup> This spending was "exceptional";<sup>49</sup> its scale relative to the rest of the campaign and its timing (between Massey's loss at trial and its appeal) were enough to suggest a "temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."<sup>50</sup> The Court concluded by disputing Massey and its amici's prediction that finding a due process violation would spur a flood of recusal motions.<sup>51</sup> On the contrary, it wrote, its prior recusal decisions did not have that effect, and the present holding merely clarified the level of the "constitutional floor" above which the states are free to legislate.<sup>52</sup>

Chief Justice Roberts dissented.<sup>53</sup> In his view, the Supreme Court's precedents prescribe only two situations for which the Due Process Clause mandates disqualification: first, those in which a judge has a particular financial interest in the outcome of the case at hand; and second, those in which a judge hears a criminal contempt proceeding arising out of the defendant's trial before the judge.<sup>54</sup> By contrast, "matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of *legislative* discretion."<sup>55</sup> To the Chief Justice, the circumstances of Justice Benjamin's election fell into the latter category, and the Fourteenth Amendment therefore did not apply.<sup>56</sup> Chief Justice Roberts enumerated forty questions about the scope of the Court's test and its application to future cases.<sup>57</sup>

<sup>45</sup> See *Caperton*, 129 S. Ct. at 2261–62 (citing *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *In re Murchison*, 349 U.S. 133 (1955)).

<sup>46</sup> See *Caperton*, 129 S. Ct. at 2263–64.

<sup>47</sup> See *id.* at 2263.

<sup>48</sup> See *id.* at 2264.

<sup>49</sup> *Id.* at 2263.

<sup>50</sup> *Id.* at 2264 (omissions in original) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)) (internal quotation marks omitted).

<sup>51</sup> *Id.* at 2266.

<sup>52</sup> *Id.* at 2267 (quoting *Bracy v. Gramley*, 520 U.S. 899, 904 (1997)) (internal quotation marks omitted). At the same time, the Court described itself as responding to "an extraordinary situation where the Constitution requires recusal." *Id.* at 2265.

<sup>53</sup> Justices Scalia, Thomas, and Alito joined Chief Justice Roberts's dissent.

<sup>54</sup> See *Caperton*, 129 S. Ct. at 2268 (Roberts, C.J., dissenting).

<sup>55</sup> *Id.* (emphasis added) (quoting *Tumey*, 273 U.S. at 523) (internal quotation mark omitted).

<sup>56</sup> See *id.* at 2268.

<sup>57</sup> *Id.* at 2269–72.

He concluded his dissent with a prediction that “*Caperton* motions” will inundate the Court’s certiorari docket,<sup>58</sup> since Blankenship’s direct contribution (if not his independent expenditures) will not, despite the majority’s forecast, prove particularly “extreme.”<sup>59</sup>

Finally, Justice Scalia authored a short dissent.<sup>60</sup> In it, he described the Court’s decision as confusing, not clarifying, the law.<sup>61</sup> Its effect, he argued, will be to increase the public’s perception that litigation is a game for lawyers rather than a mechanism for delivering justice.<sup>62</sup> He concluded by contrasting the Due Process Clause with the Talmud, arguing that the former cannot answer every question put to it. Instead, he implied, some issues of judicial recusal should be deemed nonjusticiable.<sup>63</sup>

In the end, *Caperton* is a provocative case as much for the questions it does not answer as for the one it does. Of course, the Court and its dissenters were well aware of many of these questions. In addition to simply debating whether the Court’s holding was justified, the opinions included dueling predictions concerning the holding’s effects. More fundamentally, the majority and dissenters contested even the scope of the holding. The three Comments that follow participate in these ongoing debates. At the same time, they also pose questions of their own, as they help the public and the profession come to terms with the latest development in this ongoing American experiment.

In *Electing Judges, Judging Elections, and the Lessons of Caperton*, Professor Pamela S. Karlan situates *Caperton* within the Supreme Court’s other cases considering judicial elections, contrasting the Court’s concern about campaign contributions with its inattention to the broader concern about electoral accountability for *any* unpopular decision. She then turns to a consideration of the Court’s approach to politics generally. Like the Court’s opinions on redistricting, *Caperton* reflects unease with asking a question whose answer may be unpalatable or nonjudicial. Like the one-person, one-vote cases, *Caperton* confronts a structural issue — the role of money in elections — through the lens of an individual right. Whatever the decision’s im-

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<sup>58</sup> *Id.* at 2272.

<sup>59</sup> *See id.* at 2273. Chief Justice Roberts cited the Court’s experience with the Double Jeopardy Clause in further support of his prediction. *See id.* at 2272–73. The Court had long held that the clause applied only to criminal penalties, but in *United States v. Halper*, 490 U.S. 435 (1989), it ruled that the clause could forbid civil penalties in certain “rare case[s].” *Id.* at 449. Eight years later, however, the Court determined in *Hudson v. United States*, 522 U.S. 93 (1997), that the *Halper* test was inviable and should be abandoned. *Id.* at 101–02.

<sup>60</sup> *Caperton*, 129 S. Ct. at 2274 (Scalia, J., dissenting).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *See id.* at 2274–75.

mediate effects, Professor Karlan concludes that it will prove to be neither the first nor the last word on any of these subjects.

In *What Everybody Knows and What Too Few Accept*, Professor Lawrence Lessig first contrasts “formal” and “practical independence,” observing that the harm alleged in *Caperton* reflected the latter’s absence. He argues that this type of harm should be considered systemically; that is, as a harm to the institution of the judiciary itself. He holds up Congress as an example of what can happen when an institution of government loses the public trust — and, he argues, the courts rely more than Congress does on a reputation for neutrality. Nevertheless, Professor Lessig concludes that the Supreme Court erred in holding that due process compelled Justice Benjamin’s recusal. He argues that “fidelity to role” required the Court to defer to other institutions instead of intervening. In short, Professor Lessig finds, professional norms and state legislatures could have achieved the same change in judges’ behavior at a lower cost to the judiciary itself.

In *Relinquished Responsibilities*, Professor Penny J. White traces the root of the disagreement between *Caperton*’s majority and dissents to their different views of the facts. The Court viewed Blankenship’s spending as so extraordinary that it created a probability of bias that required recusal. For the dissenters, conversely, average lawyers, not extraordinary donors, are the true threat, and both dissenting opinions worried that what the dissenters considered an overbroad rule would only provoke unnecessary litigation. Professor White argues that this difference of perspectives ultimately led the dissenters to misunderstand the Court’s concern for the appearance of fairness. Using this principle and the Court’s earlier precedents, she responds to each of the Chief Justice’s questions and includes a set of related prescriptions for states in the areas of legislative recusal standards and campaign finance. Professor White concludes by comparing *Caperton* to *Republican Party of Minnesota v. White* and urging states to read *Caperton* broadly to protect the due process right to a fair trial.