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**THE PROBABILITY OF ACTUAL BIAS, OBJECTIVE
STANDARDS, AND PANDORA'S BOX—*CAPERTON V. A.T.
MASSEY COAL COMPANY***

*Honorable Leon D. Lazer**

In the Appellate Division there is always a reserve judge waiting to be called in to sit on a case if a judge on the sitting panel recuses. It is not at all infrequent for judges to recuse and then the waiting reserve judge who joins the panel hears the case. Nevertheless, in all the years I sat as a judge on the trial court, I may have received two applications to recuse myself. One of those instances involved a party who did not like the fact that I had been a town attorney when he was active in the town—I think he believed that I might be municipally-minded. I did not hesitate and recused myself. However, in *Caperton v. A.T. Massey Coal Co.*¹ a state judge refused to step down.²

Currently, thirty-nine states elect judges,³ and *Caperton* is a case from West Virginia involving an elected judge.⁴ In *Caperton*, Don Blankenship, the chairman of A.T. Massey Coal Company ("Massey"), contributed in total about \$3,000,000 both directly and

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¹ 129 S. Ct. 2252 (2009).

² *Id.* at 2256.

³ *Id.* at 2274.

⁴ *Id.* at 2257.

indirectly to a judicial campaign.⁵ The campaign succeeded and the beneficiary of the contributions—Brent Benjamin—was elected.⁶ Subsequently, Judge Benjamin refused, on three occasions, to recuse himself in a case involving Blankenship's company, and in fact, voted to reverse a \$50,000,000 judgment against the company.⁷ *Caperton* became a well-known judicial recusal case, which went to the Supreme Court and later became the subject of John Grisham's novel, *The Appeal*.⁸

In 2002, a West Virginia jury returned a verdict of \$50,000,000 against Massey for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations.⁹ Blankenship, the chairperson, CEO, and president of Massey knew that the judgment would be appealed to the West Virginia Supreme Court, and decided to support an attorney named Brent Benjamin in his election campaign against Justice McGraw—a West Virginia Supreme Court Justice who was running for reelection.¹⁰ Blankenship contributed \$1000 directly to Benjamin's campaign and \$2.5 million to an independent political organization that opposed Justice McGraw and supported Blankenship's campaign.¹¹ Blankenship also spent over \$500,000 on independent mailings, letters, and television and newspaper advertising to further Benjamin's campaign.¹² Blankenship's contributions exceeded the total amount of money spent by all other Benjamin supporters and were three times the amount of money spent by Benjamin's own campaign committee.¹³ In fact, "Blankenship spent [\$1,000,000] more than the total amount spent by" McGraw's campaign committee and Benjamin's campaign committee combined.¹⁴

Benjamin won the election with fifty-three percent of the

⁵ *Id.*

⁶ *Caperton*, 129 S. Ct. at 2257.

⁷ *Id.* at 2258.

⁸ JOHN GRISHAM, *THE APPEAL* (Doubleday 2008) (depicting the actions of a chemical company in the election of a state supreme court candidate against a sitting judge in the hopes of influencing the appeal of an adverse judgment associated with its dumping of toxic waste in a community's water supply).

⁹ *Caperton*, 129 S. Ct. at 2257.

¹⁰ *Id.*

¹¹ *Id.* The \$1000 contributed to Benjamin's campaign is the statutory maximum. *Id.*

¹² *Id.*

¹³ *Caperton*, 129 S. Ct. at 2257.

¹⁴ *Id.*

vote.¹⁵ “In October 2005, before Massey filed its petition for appeal,” the successful plaintiffs in the case against Massey—Caperton and the three mining companies—moved to disqualify Justice Benjamin from sitting on the appeal.¹⁶ However, in April 2006, Justice Benjamin refused to disqualify himself asserting that there was no objective information that he had prejudged the case or that he could not be fair and impartial.¹⁷ In December 2006, Massey filed its appeal challenging the adverse \$50,000,000 jury verdict to the West Virginia Supreme Court.¹⁸

In November 2007, the West Virginia Supreme Court reversed the \$50,000,000 judgment on a three to two vote, with Justice Benjamin voting for reversal and dissenting Justice Starcher declaring that the “ ‘majority’s opinion is morally and legally wrong.’ ”¹⁹ The plaintiffs then moved for a rehearing and for disqualification of the three justices who voted to reverse the judgment.²⁰ Of the two justices who recused, one did so after it had been exposed that he had vacationed with Blankenship in the French Riviera.²¹ The other justice had publicly criticized Blankenship’s role in the election of Justice Benjamin and, as a result, took the initiative to disqualify himself, urging Justice Benjamin to do the same.²² Justice Benjamin did not and, instead, inherited the role of chief justice in the case.²³

On rehearing, after the recusers were replaced, Caperton, for the third time, moved for recusal by Justice Benjamin again, who refused.²⁴ The court, in a three to two decision, once again ruled for reversal, with Justice Benjamin declaring that he had no “ ‘direct, personal, substantial, pecuniary interest’ in th[e] case.”²⁵ The case

¹⁵ *Id.*

¹⁶ *Id.* at 2257.

¹⁷ *Id.* at 2257-58.

¹⁸ *Caperton*, 129 S. Ct. at 2258.

¹⁹ *Id.* at 2258 (citation omitted). The court reversed on two grounds: (1) a clause in the contract and (2) res judicata barred the suit. *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Caperton*, 129 S. Ct. at 2258.

²³ *Id.* (“Justice Benjamin, now in the capacity of acting chief justice, selected Judges Cookman and Fox to replace the recused justices.”).

²⁴ *Id.*

²⁵ *Id.* at 2258, 2259 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986)). Four months after the reversal, Benjamin filed a concurring opinion in which he reiterated that he had no interest in the case, and that his campaign was independent of any group or

then advanced to the United States Supreme Court.²⁶ While it was pending, I thought, “How are the Justices going to split? This decision is not going to be a traditional liberal/conservative split.” However, to my surprise, the Court’s decision was the traditional split with Justice Kennedy joining the so-called liberals and writing the opinion reversing the West Virginia Supreme Court.²⁷

At the outset of his opinion, Justice Kennedy stated the proposition clearly: “Under our precedents there are objective standards that require recusal when ‘the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable.’”²⁸ In applying those precedents, Justice Kennedy concluded that “in all the circumstances of this case, due process requires recusal.”²⁹ However, the precedents he relied on are small in number and largely consist of dicta in pecuniary interest cases where a recusal was required.³⁰ He relied heavily on *Tumey v. Ohio*, a case decided in 1947, in which a village mayor had authority to sit as a judge to try those accused of violating the state liquor laws relative to their alleged possession of alcoholic beverages.³¹ The funds that paid the mayor’s salary for this

individual. *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 300 (W. Va. 2008).

²⁶ *Caperton*, 129 S. Ct. at 2259.

²⁷ See Adam Liptak, *The Roberts Court, Tipped by Kennedy*, N.Y. TIMES, July 1, 2009, at A1 (noting that the Supreme Court is currently made up of four liberal justices and four conservative justices, while Kennedy serves as a powerful swing vote and that *Caperton* was the only major case in the last quarter that Kennedy joined the liberal wing).

²⁸ *Caperton*, 129 S. Ct. at 2257 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

²⁹ *Id.* at 2257.

³⁰ See *Lavoie*, 475 U.S. at 825 (1986) (holding that a justice was required to recuse in a case where he was a lead plaintiff in a nearly identical lawsuit); *Withrow*, 421 U.S. at 47 (stating that recusal is required when “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable”); *Gibson v. Berryhill*, 411 U.S. 564, 578 (1973) (holding that an administrative board of optometrists were required to recuse themselves from a case involving competing optometrists because of a significant pecuniary interest); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (holding that a mayor was required to recuse because of the “possible temptation” he faced in deciding a case where he shared a direct interest in the fees granted); *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971) (holding that “a defendant in [a] criminal contempt proceeding[] should be given a public trial before a judge other than the one reviled by the contemnor”); *In re Murchison*, 349 U.S. 133, 136 (1955) (“[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.”); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (determining that the mayor of a village, sitting as a judge, was required to recuse because he had a direct pecuniary interest in the outcome of the case he was hearing).

³¹ *Tumey*, 273 U.S. at 515; see *Caperton*, 129 S. Ct. at 2259 (“The early and leading case on the subject is *Tumey v. Ohio* . . .”).

service were derived solely from the fines imposed—no conviction, no salary.³² The *Tumey* Court held that the mayor had a direct financial interest in the outcome and, therefore, due process required disqualification.³³

Although the *Tumey* Court declared that kinship, personal bias, state policy, and remoteness of interest were generally seen in matters of legislative discretion,³⁴ Justice Kennedy concluded that the Court was concerned with more than direct pecuniary interest when it declared that

[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict [a] defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.³⁵

Among the other cases cited by Justice Kennedy³⁶ was another one involving a mayor with a financial interest sitting as a judge.³⁷ That Court held that the proper constitutional requirement was whether sitting on the case would “offer a possible temptation to the . . . judge to . . . lead him not to hold the balance nice, clear and true”³⁸ Also cited was *Aetna v. Lavoie*, where a financial interest was indicated when the judge who cast the deciding vote on a punitive damages award against an insurance company had been a lead plaintiff in a similar lawsuit.³⁹ Another type of case requiring recusal was exemplified by a “judge presiding at [a] contempt hearing [who] also served as the ‘one-man grand jury’ out of which the contempt

³² *Tumey*, 273 U.S. at 520; *Caperton*, 129 S. Ct. at 2260 (“The mayor-judge thus received a salary supplement only if he convicted the defendant.”).

³³ *Tumey*, 273 U.S. at 523. The Court held disqualification was required under the Due Process Clause “because of [the mayor-judge’s] direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village.” *Id.* at 535.

³⁴ *Id.* at 523.

³⁵ *Id.* at 532.

³⁶ See *Lavoie*, 475 U.S. 813; *Withrow*, 421 U.S. 35; *Gibson*, 411 U.S. 564; *Ward*, 409 U.S. 57.

³⁷ *Caperton*, 129 S. Ct. at 2260.

³⁸ *Id.* (quoting *Tumey*, 273 U.S. at 532).

³⁹ *Id.* (citing *Lavoie*, 475 U.S. at 823-24).

charges arose.”⁴⁰

Based on those precedents,⁴¹ Justice Kennedy posited that the inquiry was not whether Benjamin was actually biased, but rather if the average judge when conducting a trial was likely to be neutral or whether there was an unconstitutional potential for bias.⁴² “[U]nder a realistic appraisal of psychological tendencies and human weakness,” whether the interest of the judge “poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.”⁴³ Thus,

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.⁴⁴

Under this standard, “[t]he 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.”⁴⁵ Further, “[d]ue process requires an objective inquiry into whether the contributor’s influence on the election under all the circumstances ‘would offer a possible temptation to the average . . . judge to . . .

⁴⁰ *Murchison*, 349 U.S. at 134. See also *Caperton*, 129 S. Ct. at 2261 (“The second instance requiring recusal that was not discussed at common law emerged in the criminal contempt context, where a judge had no pecuniary interest in the case but was challenged because of a conflict arising from his participation in an earlier proceeding.”).

⁴¹ *Caperton*, 129 S. Ct. at 2262 (“Based on the principles described in these cases we turn to the issue before us. This problem arises in the context of judicial elections, a framework not presented in the precedents we have reviewed and discussed.”). Kennedy further classified the recusal cases cited as illustrative and stated that “[i]n each case the Court dealt with extreme facts that created an unconstitutional probability of bias that ‘cannot be defined with precision.’” *Id.* at 2265 (citing *Lavoie*, 475 U.S. at 822 (quoting *Murchison*, 349 U.S. at 136)).

⁴² *Id.* at 2263 (“We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias.”).

⁴³ *Id.* (quoting *Withrow*, 421 U.S. at 47).

⁴⁴ *Id.* at 2263-64. It seems to have been glossed over in the media coverage that the Court is now encompassing those involved in campaign management and the campaigning process as relevant to the determination of whether a judge is required to recuse.

⁴⁵ *Caperton*, 129 S. Ct. at 2264.

lead him not to hold the balance nice, clear and true.”⁴⁶ Justice Kennedy concluded that “the risk that Blankenship’s influence engendered actual bias”—an influence of \$3,000,000, which exceeds the amount spent by Benjamin’s other supporters by 300% and is \$1,000,000 more than the amount spent by both campaigns’ committees combined—was “sufficiently substantial that it ‘must be forbidden if the guarantee of due process is to be adequately implemented.’”⁴⁷

In response to the argument that the Court’s decision would open up a Pandora’s Box—floods of recusals and unnecessary interferences with judicial elections—, Justice Kennedy noted that in the instant case, the facts were extreme and, although these types of cases are rare, extreme cases often test the balance of due process and are likely to cross those balances.⁴⁸

He also found support in the judicial canons of ethics and state codes.⁴⁹ For example, the American Bar Association Model Code of Judicial Conduct—adopted in most states—tests whether the conduct would create, in reasonable minds, a perception that the judge’s ability to carry out judicial responsibility with integrity, partiality, and competence is impaired.⁵⁰ “The Due Process Clause []marks ‘only the outer boundaries of judicial disqualif[ying]’ ” procedures.⁵¹ Most disputes will be resolved “without resort to the Constitution.”⁵² Incidentally, in 2003, a commission appointed by Judge

⁴⁶ *Id.* (quoting *Tumey*, 273 U.S. at 532).

⁴⁷ *Id.* at 2264 (quoting *Withdrow*, 421 U.S. at 47).

⁴⁸ *Id.* at 2265 (“Massey and its *amici* predict that various adverse consequences will follow from recognizing a constitutional violation here—ranging from a flood of recusal motions to unnecessary interference with judicial elections.”); *see, e.g.*, *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (Kennedy, J., concurring) (applying due process to the issue of “executive abuse of power . . . which shocks the conscience”).

⁴⁹ *Caperton*, 129 S. Ct. at 2266.

⁵⁰ *See* W. VA. CODE OF JUD. CON. ANN., CANON 2A (West 2009) (“A judge shall avoid impropriety and the appearance of impropriety . . .”). The New York canons of judicial ethics state that a judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned. *See generally* N.Y. CODE OF JUD. CON., CANON 2 (McKinney 2009).

⁵¹ *Caperton*, 129 S. Ct. at 2267 (“Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today.” (quoting *Lavoie*, 475 U.S. at 828)).

⁵² *See id.* (“Because the codes of judicial conduct 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.”).

Kaye recommended a \$500 contribution as the amount that would disqualify a judge.⁵³

The dissent in *Caperton* was vigorous. Chief Justice Roberts expressed his “fear that the Court’s decision will undermine” the very values that the majority seeks to promote.⁵⁴

[N]otions of bias or the appearance of bias were never a basis for disqualification, either at common law or under our constitutional precedents.

. . . “[P]robability of bias” cannot be defined in any limited way. The Court’s new “rule” provides no guidance to judges and litigants about when recusal will be constitutionally required. This will inevitably lead to an increase in allegations that judges are biased⁵⁵

The principle thrust of Chief Justice Roberts’ opinion lies in forty questions that he posed.⁵⁶ For example:

1. How much money is too much money? What level of contribution or expenditure gives rise to a “probability of bias”?

. . . .

8. What if the “disproportionately” large expenditure is made by an industry association, trade union, physicians’ group, or the plaintiffs’ bar? Must the judge recuse in all cases that affect the association’s interests? Must the judge recuse in all cases in which a party or lawyer is a member of that group? Does it matter how much the litigant contributed to the association?

9. What if the case involves a social or ideological issue rather than a financial one? Must a judge recuse from cases involving, say, abortion rights if he has re-

⁵³ See Daniel Wise, *Commission Recommends Reforms for Judicial Elections*, 230 N.Y. L.J. 1 (2003) (“Among the measures put forward by the commission is a requirement that judges recuse themselves when parties or lawyers appearing before them have contributed more than \$500 to their campaigns over the five previous years.”).

⁵⁴ *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting).

⁵⁵ *Id.*

⁵⁶ See *id.* at 2269-72.

ceived “disproportionate” support from individuals who feel strongly about either side of that issue? If the supporter wants to help elect judges who are “tough on crime,” must the judge recuse in all criminal cases?

....

10. What if the candidate draws “disproportionate” support from a particular racial, religious, ethnic, or other group, and the case involves an issue of particular importance to that group?

....

18. Should we assume that elected judges feel a “debt of hostility” towards 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?⁵⁷

Chief Justice Roberts also disputed the facts underlying the majority opinion, noting that Justice Benjamin did not have control over how Blankenship spent his money⁵⁸ and that the contributions were not disproportionate; in fact, the plaintiffs’ bar contributed \$2,000,000 to support Justice McGraw.⁵⁹ In the Chief Justice’s opinion, Justice McGraw simply did not run a very good campaign and at one point made a controversial and disturbing speech.⁶⁰ Finally, “an amorphous ‘probability of bias[]’ will itself bring our judicial system into underserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts.”⁶¹ He

⁵⁷ *Id.* at 2269.

⁵⁸ *Id.* at 2273 (“Other than a \$1,000 direct contribution from Blankenship, Justice Benjamin and his campaign had no control over how this money was spent. Campaigns go to great lengths to develop precise messages and strategies.”)

⁵⁹ *Caperton*, 129 S. Ct. at 2273.

⁶⁰ *Id.* at 2273-74.

⁶¹ *Id.* at 2274 (Roberts, C.J., dissenting). It was noted in the opinion that

[m]any observers believed that Justice Benjamin’s opponent doomed his candidacy by giving a well-publicized speech that made several curious allegations; this speech was described in the local media as “deeply disturbing” and worse. Justice Benjamin’s opponent also refused to give interviews or participate in debates. All but one of the major West Virginia newspapers endorsed Justice Benjamin. Justice Benjamin just might have won because the voters of West Virginia thought he would

concluded: "I hope I am wrong."⁶²

Justice Scalia joined Chief Justice Roberts in a separate brief dissent.⁶³ "The Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution."⁶⁴

The case has been reargued in West Virginia, and we await the opinion.⁶⁵

be a better judge than his opponent.

Id. (citation omitted).

⁶² *Id.*

⁶³ *Caperton*, 129 S. Ct. at 2274-75 (Scalia, J., dissenting).

⁶⁴ *Id.* at 2275.

⁶⁵ This opinion was later published in November 2009. See *Caperton v. A.T. Massey Co.*, No. 33350, 2009 WL 3806071 (W. Va. Nov. 12, 2009) (reversing the decision and remanding for dismissal with prejudice).