Fall 2011

Warning to Buyer- Never Pay Too Much to Elect a Judge (CAPERTON v. A. T. MASSEY COAL COMPANY, INC., ET AL.)

J.L. Yranski Nasuti
jlnasuti@iona.edu

Follow this and additional works at: http://digitalcommons.fairfield.edu/nealsb

Recommended Citation
Available at: http://digitalcommons.fairfield.edu/nealsb/vol26/iss1/1

This Article is brought to you for free and open access by DigitalCommons@Fairfield. It has been accepted for inclusion in North East Journal of Legal Studies by an authorized administrator of DigitalCommons@Fairfield. For more information, please contact digitalcommons@fairfield.edu.
WARNING TO BUYER—NEVER PAY TOO MUCH TO ELECT A JUDGE (CAPERTON v. A.T. MASSEY COAL COMPANY, INC., ET AL.)

by

J.L. Yranski Nasuti, J.D., LL.M.*

In John Grisham's novel, The Appeal, a Mississippi jury awarded a $41 million dollar verdict against a chemical company that was found to have dumped toxic waste into a town's water supply. The company's C.E.O. responded to the verdict by instructing his attorneys to initiate an aggressive appeal and by covertly contributing over $8 million to an effort to unseat a state supreme court justice who would most likely rule in favor of the plaintiff. The main qualification of the opposing candidate was his ability to be manipulated, marketed, and elected primarily for the purpose of eventually ruling in favor of the chemical company. The story is a good read—with a somewhat unexpected ending. It is also based, in part, on a real case that began in West Virginia and found its way to the U.S. Supreme Court) In that case, a $50 million jury award against the mining companies, was vacated by the West Virginia State Supreme Court in a 3-to-2 decision (with the deciding vote being cast by a justice who had received substantial campaign contributions from a powerful local businessman who also happened to be the chairman of the board and C.E.O. of the defendant mining companies). By the time the case of Caperton et al. v. A. T Massey Coal Company,

*Professor of Legal Studies in Business, Iona College, New Rochelle, NY
reached the U.S. Supreme Court, the sole issue to be addressed was whether the plaintiffs' due process rights under the Fourteenth Amendment had been violated when the justice who had received the extraordinary campaign contributions refused to recuse himself from the case.

I.

The original dispute between Hugh Caperton and A.T. Massey Coal Company, Inc. is, from a literary point of view, far less dramatic than the one presented in The Appeal. A.T. Massey Coal Company, Inc. is one of the largest coal mining companies in the United States. During the 1990s, LTV Steel rejected Massey's repeated offers to sell it coal. LTV, instead, continued to use the services of an intermediary, Wellmore Corporation, to purchase a higher quality metallurgical coal that was produced by Harman Mine. Harmon Mine was a smaller Virginia company, which had been purchased, in 1993, by Harman Development Corporation, a company formed by Hugh Caperton. In 1997, Massey bought the parent company of Wellmore—with the sole intention of finally selling its coal to LTV through Wellmore. Massey's plans were frustrated when LTV not only continued to reject offers to purchase Massey's coal but also terminated its relationship with Wellmore. Massey responded by directing Wellmore to invoke a force majeure clause, in the long-term contract that Wellmore had with Harman Mine, in order to substantially reduce the amount of coal that Wellmore would have to purchase from Harman Mine. The drastic reduction in the order was a serious financial blow to Harman Mine since it occurred too late in the year for company to find another buyer for its coal. To make matters worse, Massey, which had been negotiating a deal to purchase Harman Mine from Caperton, backed away from those negotiations in a manner that increased the financial distress of the Harman companies and also utilized the confidential information obtained in the course of the process to make the Harman Mine unattractive to others and to decrease its value. Hugh Caperton and the Harman companies eventually had no choice but to file for Chapter 11 protection in the U.S. Bankruptcy Court in Virginia.

In May 1998, Harman Mining, Inc. and Sovereign Coal Sales, Inc. (two of the companies that originally owned Harman Mines when it entered into the long-term sales agreement with Wellmore) brought an action against Wellmore in the Virginia state court alleging breach of contract and breach of covenant of good faith and fair dealing. A jury found in favor of the plaintiffs on their breach of contract claim and awarded $6 million in damage.

In the fall of 1998, Hugh Caperton and the Harman Companies (hereinafter referred to as Caperton) filed a lawsuit, this time in a West Virginia state court, against A.T. Massey Coal Company, Inc. and five of its subsidiaries (Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Perfo, and Coal Company, and Massey Coal Sales Company) (hereinafter referred to collectively as "Massey"). In their amended complaint, the plaintiffs alleged claims of tortious interference with existing contractual relations, tortious interference with prospective contractual relations, fraudulent misrepresentations, civil conspiracy, negligent misrepresentation, and punitive damages. During the pretrial stage of the West Virginia case, the defendants filed an unsuccessful motion to dismiss based on a claim that the long-term coal supply contract, which was at the heart of the case, contained a forum selection clause that required the case to be heard in Buchanan County, Virginia. The defendants also filed an unsuccessful motion for summary judgment based on the claim that the action was barred under the legal principal of res
judicato. In 2002, a jury returned a $50 million verdict in favor of the plaintiffs. The defendants immediately filed a motion seeking judgment as a matter of law, a new trial, or, in the alternative, remittitur. Two and a half years later, the motion was denied by the Circuit Court and the defendants appealed the decision to the West Virginia Supreme Court of Appeals. It was at this point that the legal issues in the case began to turn from those primarily relating to a breached contract to something completely different.

After the jury verdict was delivered but before the filing of an appeal in the West Virginia Supreme Court, Don Blankenship, chairman, chief executive officer, and president of the Massey Energy Company, took a very personal, and not inexpensive, interest in the composition of the state appellate court that would decide the outcome of the Massey case. The voters in 39 states elect some, if not all, of their state court judges. West Virginia is one of the few states were all judicial positions are filled through partisan elections. In 2004, Justice Warren McGraw, a Democrat, was seeking reelection to the West Virginia Supreme Court. His opponent, Brent Benjamin, was a Republican with no prior judicial experience. Benjamin, however, had something much more valuable than experience. He had a wealthy supporter, Don Blankenship. Blankenship had contributed to judicial campaigns in the past—but always in amounts not exceeding a few thousand dollars. His donations to unseat McGraw and elect Benjamin exceeded $3 million. Blankenship contributed $1,000 (the statutory maximum) to Benjamin’s campaign committee; $2.5 million to “And for the Sake of The Kids,” a political organization, which was established under 26 U.S.C. §527 and which supported Benjamin; and over $500,000 on independent expenditures such as direct mailings, solicitation letters, and media advertisements "to support...Brent Benjamin." Blankenship’s total contributions exceeded the amount spent by Benjamin’s other supporters and was treble the amount spent by Benjamin’s own committee. He also donated $1 million more than the combined amounts spent by the campaign committees for Benjamin and McGraw. The outcome of the election was a win for Benjamin who received 53.3% of the votes cast.

In the fall of 2005, Caperton filed a motion to disqualify Justice Benjamin from participating in any future appeal involving the trial court’s decision against Massey. Caperton argued that under the due process clause of the Fourteenth Amendment and the West Virginia Code of Judicial Conduct, Justice Benjamin had to recuse himself based on the conflict resulting from the campaign contributions that he had received from Blankenship. Under West Virginia law, the only party who can rule on such a motion is the judge to whom the disqualification request is directed. Benjamin denied the motion noting that he could find "no objective information...to show that this Justice has a bias for or against any litigant, that this Justice has prejudiced the matters which comprise this litigation, or that this Justice will be anything but fair and impartial." When the West Virginia Supreme Court subsequently granted Massey’s petition for appeal, it did so with the participation of Benjamin.

In 2007, West Virginia Supreme Court reversed the $50 million verdict against Massey on two grounds. The first was that the forum-selection clause in the contract (to which Massey was not a party) barred suit in West Virginia. The second was that the principle of res judicata barred the West Virginia suit since there had already been an out-of-state judgment (to which Massey had not been a party.) The 3-to-2 decision was supported by then-Chief Justice Davis and Justices Benjamin and Maynard and opposed by Justices Starcher and Albright.
Caperton successfully moved for a rehearing of the case. This time both sides filed motions to disqualify three of the five justices who had been involved in the original appeal. Massey challenged the impartiality of Justice Starcher based on critical comments that he had made about Blankenship's involvement in the 2004 elections. Caperton, in turn, requested the recusal of Justice Maynard after photos surfaced of him vacationing with Blankenship on the French Riviera at the same time that the appeal was pending. Both Starcher and Maynard agreed to disqualify themselves from participating in the rehearing. Justice Benjamin, on the other hand, once again denied Caperton's recusal motion which was based on the same grounds raised in the 2005 motion. By the time the case was set for its rehearing, Benjamin was the acting chief justice. That gave him the responsibility of selecting Judges Cookman and Fox to replace the recused justices. It also precipitated Caperton's third unsuccessful recusal request of Benjamin.

The outcome of the second hearing was the same as the first. In a 3-to-2 decision, the West Virginia Supreme Court once again reversed the jury verdict. This time Justices Davis, writing a modified version of his prior majority decision, was joined by acting-Chief Justice Benjamin and Judge Fox. Judge Cookman joined Justice Albright in a dissenting opinion that concluded that the majority's opinion was fundamentally unfair and that the acting-chief justice's refusal to recuse himself had genuine due process implications. Caperton filed a writ of certiorari with the U.S. Supreme Court. One month later Benjamin issued his concurring opinion that addressed both the merits of the majority decision as well as the minority's criticism of his own decision not to recuse himself.

The sole issue presented to the U.S. Supreme Court, in the case of Caperton, et al v. A.T. Massey, et al.,17 was whether a plaintiff's due process guarantees were violated when a justice, who had received extraordinary campaign contributions from and through the efforts of the chairman of the board and C.E.O. of the defendant, denied the plaintiff's recusal motion. In a 5-to-4 decision, which was delivered by Justice Anthony Kennedy and joined by Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer, the Court reversed the decision of the West Virginia Supreme Court and remanded the case for further proceedings. Two dissenting opinions were filed in the case. The first was written by Chief Justice John Roberts and joined by Justices Antonin Scalia, Clarence Thomas, and Samuel Alito. The second was a short solo dissent by Justice Scalia.

A. Majority Opinion

The majority opinion began with a brief review of the different approaches taken by the common law, legislation and judicial codes, and case law with regard to the issue of judicial recusals. Under the common law, judges were expected to recuse themselves where they have a direct substantial pecuniary interest in a case. The rationale for such a rule was explained by James Madison in The Federalist Papers when he wrote "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and not improbably, corrupt his integrity." Legislation and judicial codes were later enacted to supplement the common law rules—especially in those instances where a judge demonstrated personal bias and prejudice absent a direct substantial pecuniary interest in a case. Finally, case law identified a variety of situations where, as an objective matter, the
probability of the judge's actual bias was too high to be constitutionally tolerable. Of particular interest to the majority, were its own precedents in two kinds due process cases. The first involved judges who had the kind of personal and direct financial interests in the outcome of a case which were not covered by the common law rule and the second concerned judges who had charged defendants with criminal contempt and then refused to recuse themselves from presiding over the subsequent contempt proceedings.

The majority identified three cases, Tumey v. Ohio, 20 Ward v. Monroeville, 21 and Aetna Life Insurance Co. v Lavoie et al., 22 in which the U.S. Supreme Court had addressed the issue of whether a judge should be disqualified from hearing a case if the judge had a personal and financial interest that would not necessitate recusal under the common law. In each instance, the Court concluded that due process violations occurred when the judges refused to recuse themselves.

In Tumey, the mayor of a small town also served as the judge in limited local criminal proceedings involving an Ohio prohibition law. Under the terms of the statute, the mayor was only compensated for his judicial work if he found the defendant to be guilty. The municipality was also entitled to a percentage of the fines that the mayor assessed against the guilty defendants. 23 The unanimous decision, delivered by Chief Justice William Taft, clearly stated that while every question of judicial qualification may not raise a constitutional issue (especially matters of kinship, personal bias, state policy, and remoteness of interest which are generally left to legislative discretion), 24 "it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." 25 The Court concluded that in this instance the mayor, acting as judge, had both a direct pecuniary interest in the outcome (in so far as a guilty verdict increased his personal income) as well as an official motive (in so far as that same finding would augment his village's revenues).

The mayor in the Monroeville case also sat as a judge on cases involving ordinance violations and traffic offenses. Although the mayor received no additional compensation for his judicial work, his village received a major portion of its revenue from the fines, forfeitures, costs, and fees that were generated by the mayor's court. As in the Tumey case, the primary issue was "whether the mayor's situation [was] one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the State and the accused." "26 Justice William Brennan, in a 7-2 decision, concluded that a due process violation had occurred since the mayor's executive responsibilities for the village's finances exposed him to the "possible temptation" of rendering partisan decisions in order to fill the village coffers.

The recusal motion in the Lavoie case was primarily directed at a member of the Alabama Supreme Court who refused to disqualify himself from case involving an insurance company's bad-faith failure to pay a claim. Although the justice was not a party in that particular action, he was the lead plaintiff in a pending class action suit with a nearly identical claim against a different insurance company. The plaintiffs in that action included all state workers (including other members of the Alabama court) who were insured under the state's group medical plan. Both cases were based on an area of law that, at the time, was unsettled in the state. When the challenged justice cast the tie breaking vote in favor of Lavoie
in the state supreme court, he guaranteed that there would be a
precedent for recognizing bad-faith failure claims and
awarding punitive awards in his own pending action. Even
though Chief Justice Warren Burger, writing for the majority,
found the justice's interest in the Lavoie appeal to be "direct,
personal, substantial, [and] pecuniary," he saw no need to
decide whether the justice had in fact been influenced by his
own interests in deciding as he did. The only necessary inquiry
was "whether sitting on the case then before the Supreme Court
of Alabama "would offer a possible temptation to the average . . .
judge to . . . lead him not to hold the balance nice, clear and
true." That being the case, the Court held that it was a
violation of due process for that one justice to participate in the
appeal.

The majority then analyzed two additional U.S. Supreme
Court decisions that dealt with another type of recusal problem
that could not be resolved by applying common law norms.
The defendants in In Re Murchison et al. and Mayberry v.
Pennsylvania7 had argued for the reversal of criminal
contempt convictions entered by judges who had participated
in the defendants' preceding criminal proceedings. In each
case, the Court concluded that the due process guarantees had
been violated.

At the time of the Murchison case, judges in Michigan state
courts of record had the authority to conduct a "one-man grand
jury." Judges could compel witnesses to appear before them in
secret hearings for the purpose of testifying about suspected
crimes. Any witness held in contempt during one of these
proceedings was entitled to an impartial public contempt
hearing. In Murchison, the only issue that the Court considered
was whether it was possible for a witness to receive an
impartial hearing if the judge who issued the original contempt
echarge during the "one-man grand jury" proceeding was the
same judge who would preside over the contempt hearing.
Justice Hugo Black, writing for the majority, ruled that a fair
trial "requires not only the absence of actual bias" but also the
prevention of "even the probability of unfairness. To this end
no 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." He went on
to acknowledge that such an interest could not be
defined with precision and that it rested instead on an
examination of the circumstances and relationships. In this
particular case, "[h]aving been part of [the one-man grand jury]
process a judge cannot be, in the very nature of things, wholly
disinterested in the conviction or acquittal of those accused." That
was because, "as a practical matter it is difficult if not
impossible for a judge to free himself from the influence of
what took place in his 'grand-jury' secret session."

The Mayberry case involved three criminal defendants who
chose to represent themselves in court. During the course of
the jury trial, the defendants subjected the judge to repeated
verbal abuse—much of a personal nature. It was, however, not
until after the jury had returned a guilty verdict and just before
the judge imposed his judgment on that verdict that the judge
also pronounced one of the defendants guilty of numerous
counts of criminal contempt which would result in significant
jail time. The defendant argued on appeal that the trial judge's
finding of criminal contempt was a violation of due process.
Justice William O. Douglas, who delivered the decision of the
Court, agreed. While acknowledging that the actions by the
defendant constituted "brazen efforts to denounce, insult, and
slander the court and to paralyze the trial," the majority
questioned the trial judge's failure, during the course of the
trial, to maintain order in the courtroom by acting instantly,
with propriety, holding the defendant in contempt, or excluding
him from the courtroom, or, in some other way, insulting his
vulgarity. Vicious attacks should not, by themselves, drive a
judge from proceeding with a case. "Where, however, [the judge] does not act the instant the contempt is committed, but waits until the end of the trial, on balance, it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place." 37

Since there were no due process precedents that specifically addressed the issue of whether elected judges must recuse themselves from cases involving campaign supporters, the majority relied for guidance on the principles established in Tuney, Monroeville, Lavoie, Murchison, and Mayberry. In those cases, a finding of actual bias was not required to establish a due process violation. As a consequence, there was no need to question Justice Benjamin's own subjective findings of impartiality and propriety or to pursue an independent inquiry into the matter. The majority chose instead to adapt Benjamin Cardozo's premise that it is not easy for a judge to describe the actual process by which he or she arrives at a judicial decision 39 and observed that it is similarly difficult for a judge to conclude through self-examination alone, that actual bias had not contributed to that judicial decision. It was for these reasons that there needed to be objective rules to guarantee "adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding [a] case." 39

There was no suggestion in the Caperton that every elected judge is at risk of probable bias just because he or she has received campaign contributions either from a party to a lawsuit or that party's attorney. Nonetheless, in "exceptional" cases, "there is a serious risk of harm—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." 40 After considering a number of factors: the relative size of Blankenship's contributions to the campaign in comparison to the combined contributions of other donors; the total amount spent on the election; and the apparent impact of those contributions to the outcome of the election, the majority concluded that "Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case." 38

Massey and Benjamin argued that the people of West Virginia that had elected Benjamin to the bench based on factors that were independent of Blankenship's influence. Every major newspaper, but one, had endorsed Benjamin and his opponent had seemingly sabotaged himself in a much publicized and ill-fated campaign speech. The Court's response was to point out that while these kinds of arguments might help to answer the subjective question of the impact of Blankenship's campaign contributions on the Benjamin's victory, they did not contribute to the objective due process inquiry of "whether 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." 41 On the other hand, a consideration of the comparative largess of Massey's contributions and "the temporal relationship between the campaign contributions, the justice's election, and the pendency of the case" 43 were much more critical to the objective inquiry.

Blankenship made his "extraordinary" $3 million contribution to Benjamin's campaign during the same period of time that his company was preparing to file a challenge to the jury award in the West Virginia Supreme Court. Blankenship knew that it was reasonably foreseeable that the winner of the judicial race would participate in the outcome of that case. Under the circumstances, it was clear that Blankenship had a
vested interest in the outcome of the election. Expanding on
the common law rule that no man should be a judge in his own
case because of fears of bias, the Court concluded that similar
fears can occur "when--without the consent of the other
parties—a man chooses the judge in his own case." It then
applied the expanded principle to the judicial election process
and held that "there was a serious, objective risk of actual bias that
required Justice Benjamin's recusal."45

The majority never suggested that Justice Benjamin had
exhibited any actual bias in favor of Massey. A finding of
actual bias was, in fact, irrelevant since due process "may
sometimes bar trial by judges who have no actual bias and who
would do their very best to weigh the scales of justice equally
between contending parties." On the other hand, the Court
had to objectively review the facts (Blankenship's significant
and disproportionate contributions to Justice Benjamin's
campaign and the temporal framework of the election and the
pending case) to determine whether they seemed to "offer a
possible temptation to the average ... judge to . . . lead him not
to hold the balance nice, clear and true." The majority
concluded that in light of the "extreme facts" of this case,
Justice Benjamin's refusal to recuse himself suggested "the
probability of actual bias that rises to an unconstitutional
level."48

Massey (and Chief Justice Roberts and Justice Scalia in their
minority decisions) had predicted that the recognition of a due
process violation in this case would result in a flood of
Caperton recusal motions and an unnecessary interference in
state judicial elections. The majority refused this claim by once
again emphasizing that Caperton addressed "an extraordinary
situation" involving facts that were "extreme by any
measure." As in the earlier recusal cases cited by the Court, it
was the extreme nature of the facts that "created an
unconscionable probability of bias that "cannot be defined with
precision." And that cannot be allowed to interfere with a
person's basic right to a fair trial in a fair tribunal. Since those
cases had not generated a flood of Monroeville or Marchison
motions, the Court hoped for a similar result with regard to
future Caperton motions.

The opinion concluded by reiterating the Court's belief that
"the Due Process Clause demands only the outer boundaries of
judicial disqualifications. Congress and the states, of course,
remain free to impose more rigorous standards for judicial
disqualification than those we find mandated here today." Since
states have implemented codes of judicial conduct that
provide greater protection than the due process clause requires,
most recusal cases would not involve a Constitutional issue.

B. Minority Opinions
1. Dissenting Opinion (Roberts)

Chief Justice Roberts disagreed with the majority's
extended application of the due process clause to recusal cases
other than those in which the judge had a particular financial
interest in the outcome of a case or those in which the judge
presiding at the contempt hearing was the same judge who had
issued the contempt charge in a prior proceeding. His primary
objections to the majority opinion were the difficulties
that judges would have in applying the "probability of bias"
standard, the amount of groundless litigation that would be
generated by the holding, and his belief that the application of
such a standard would contribute to the erosion of public
confidence in judicial impartiality.

His first objection to the majority's "objective" standard
was that it "fails to provide clear, workable guidance for future
cases." Roberts included a list of 40 questions to demonstrate
how difficult it will be for judges to apply the new "probability of bias" standard.\textsuperscript{51} The questions raised a variety of issues including: how much money was too much money,\textsuperscript{52} whether it mattered that the litigant had contributed to other candidates or made large expenditures in connection with other elections,\textsuperscript{53} whether the "objective" test was determined through the lens of a reasonable person, a reasonable lawyer, or a reasonable judge,\textsuperscript{6} and what kinds of cases were implicated by the doctrine—cases pending at the time of the election, cases reasonably likely to be brought, or important but unanticipated cases that were filed shortly after the election.\textsuperscript{57} In trying to decide why a candidate won an election, whether the financial support was disproportionate, and whether a likely debt of gratitude existed, judges would be asked to "simultaneously act as political scientists . . . , economists . . . , and psychologists."\textsuperscript{58}

Roberts then went on to scoff at the Court's repeated declaration that its new rule only applied to the "extreme," "exceptional," and "extraordinary" case and, therefore, would not generate a rash of \textit{Caperton} motions. The fact that most cases would have little chance of success did not mean that they would not be filed. The proliferation of the \textit{Caperton} motions, with claims of judicial bias or the probable bias, would, instead, further contribute to "bringing the judge and the judicial system into disrepute."\textsuperscript{59}

The dissenting opinion concluded by questioning whether the facts in the case really were so extreme as to justify a finding of probable bias. The total amount of direct contributions to Justice Benjamin's campaign from Blankenship had been a mere $1,000 (the statutory limit). The rest of the $3 million were not even contributions but "independent expenditures" over which Benjamin had no control.\textsuperscript{60} The fact that "And for the Sake of the Kids," a independent group, received two-thirds of its funding from Blankenship and spent over $3,623,500 to support Benjamin's campaign was also seen as nothing more than business as usual. "Consumers for Justice," an independent group receiving large independent expenditure from the plaintiffs' bar, had also spent approximately $2 million on behalf of Benjamin's opponent. The fact that Blankenship had previously contributed large amounts of money on behalf other West Virginia candidates reassured the minority. That seemed to imply that Blankenship was not spending his money just to influence the outcome of a particular pending case—he was instead seeking to change everything.\textsuperscript{61} Roberts further suggested that after evaluating the performance of the candidates and checking out the newspaper endorsements, it was just possible that Benjamin won, not because Blankenship had "cho[sen] him to be the judge in his own cause" but because the voters thought he would be a better judge.\textsuperscript{62}

2. Dissenting Opinion (Scalia)

Justice Scalia, who had himself been the object of a very public recusal motion,\textsuperscript{63} delivered a brief dissenting opinion. He began by criticizing the majority's opinion for "creat[ing] a 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."\textsuperscript{64} He found it particularly ironic that the new rule, which was meant to preserve the public's confidence in the judicial system, would have the opposite effect. Scalia expressed a concern for the "eroding public confidence in the Nation's judicial system" and placed the blame squarely on the shoulders of lawyers who make litigation look like a game "that the party with the most resourceful lawyer can play . . . to win."\textsuperscript{65} "Adding [the \textit{Caperton}] claim to the vast arsenal of lawyerly gambits"\textsuperscript{66} would only reinforce that perception.
The remarkable accomplishment of the Caperton decision is that the Court, for the first time, turned to the due process clause of the Fourteenth Amendment to monitor the use of money in a state judicial election. It certainly did not outlaw the use of money. (That would have been too much for Justice Kennedy, who less than one year later, would also write the majority decision in Citizens United v. Federal Election Commission.) It did, however, hold that an elected judge was disqualified from participating in any case where an interested party's contribution to the judge's election efforts was large enough to create "the probability of actual bias." A due process review does not require a determination of actual bias on the part of the judge or a finding that the interested party's campaign contribution was a necessary and sufficient cause of the judge's victory. The only thing that matters is whether the interested party's spending had a "disproportionate influence" on a pending or imminent case.

Both the majority and minority opinions worry that the public's confidence in the judicial system is eroding. The majority places some of the blame for that on the public's perception that the right to a fair trial is jeopardized when elected judges are influenced by campaign contributors. The Court's solution is to disqualify elected judges from hearing cases where the campaign contributions of a party to a lawsuit are large enough to suggest "the probability of actual bias." The minority judges, on the other hand, see the cause of the problem to be with the attorneys and not with the judges. As Justice Scalia wrote, the public has no confidence in a system that looks more that a game with victory going to the side that employs the most tricks. To create a new due process grounds for disqualifying judges (who have not even been accused with actual bias) is to hand the trial lawyers yet another tool in their arsenal of tricks. The fear of the minority is that misuse of the new Caperton motion will bring judges and the judicial system into further disrepute.

How unfortunate that the one issue (the elephant in the room) that was not addressed by any of the justices was the overall impact of the massive amounts of money that are now being spent to elect judges. One can only wonder how retired Justice Sandra Day O'Connor, the only living U.S. Supreme Court justice who has also served as an elected state court judge and who is a strong advocate of ending judicial elections, would have ruled in this case.

ENDNOTES

In an interview on The Today Show, Matt Lauer asked Grisham whether the plot line involving the stacking of an appellate court was plausible. Grisham's response was that it's already happened. It happened a few years ago in West Virginia. A guy who owned a coal company got tired of getting sued. He elected his guy to the Supreme Court, and now he doesn't worry about getting sued. Caperton v. Massey: What a Long Strange Case It's Been (West Virginia Public Broadcasting report by Scott Finn, June 9, 2009). http://www.wvpb.org/newsarticle.aspx?sid=9955.

1 129 S. Ct. 2252; 173 L. Ed. 2d 1208; 2009 U.S. LEXIS 4157, June 8, 2009.

2 Prior to 1993, the Harman Mining was owned by Inspiration Coal Corporation through three subsidiaries: Inspiration Coal Corp., Sovereign Coal Sales, Inc. and Southern Kentucky Energy Company. In 1992, Sovereign and Southern Kentucky entered into the ten year agreement with Welmore in which it was agreed that Welmore would purchase a certain amount of coal each year from Harman Mining. The original contractual commitment to purchase a minimum of 573,000 tons of coal in 1997 was unilaterally reduced to a purchase of only 205,707 tons of coal.
The Harman companies (which were all owned by Caperton) included Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc.


Id. at 634.

No. 98-C-192 (Cir. Ct. of Boone County, W. Va.).

No. 98-C-192 (Appeal from the Cir. Ct. of Boone County, W. Va.), Order of Jay M. Hoke, (March 17, 2005).

The nine states that have no elected judges include: Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont. In the District of Columbia, the president's appointment of judges is subject to confirmation by the senate. In Virginia, legislative elections are used for judicial appointments. Methods of Judicial Selection, American Judicial Society, http://www.judicialselection.us/judicial_selection/methods/selection_of_jud.

Supra, note 2, at 2257.

Id. at 2257, (quoting Brief for Petitioners 28).

Id. at 2258, (quoting App. 336a-337a).

Among other things, Starcher referred to Blankenship as "a clown" and accused him of using his money to buy a seat on the court. Supra, note 1.

Benjamin also rejected a suggestion by Starcher in his recusal memorandum that Benjamin recuse himself based on the observation that "Blankenship's bestowal of his personal wealth, political tactics, and "friendship" created a cancer in the affairs of this Court." Supra, note 2, at 2258, (quoting App. at 459a-460a).

Supra, note 6, at 686.

Supra, note 2.

The common law rule stems from the ancient maxim of aequus non debet esse iudex in propria causa—no man shall be a judge in his own case.

Id. at 2259, (quoting The Federalist, No. 10, p.59 (J. Cooke ed. 1961) (J. Madison)).


409 U.S. 57; 93 S. Ct. 80; 34 L. Ed. 2d 267 (1972).


Supra, note 20, at 531. The fines could range between $100 and $1,000 for a first offense and $300 to $2,000 for second offenses.

Id. at 532, (citing Wheeling v. Black, 25 W. Va. 266, 270).

Id. at 532.

Supra, note 21, at 60, (quoting Tumey, supra, note 20, at 532).

Supra, note 22, at 824 (quoting Ward, id. at 60 and Tumey, supra, note 20, at 532.)

Id. at 825, (quoting Ward, supra, note 21, at 60 and Tumey, supra, note 20, at 532.)

Acta Insurance had originally asked all of the justices named in the class action case to recuse themselves from the appeal. Warren denied that request distinguishing the direct, personal, substantial, and pecuniary interests of the lead plaintiff from the slight pecuniary interest of the other justices who may not even have had any knowledge of the class action before the court issued its decision on the merits. Id. at 825-826.


34 Supra, note 2, at 2263. "This work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he has followed a thousand times and more. Nothing can be further from the truth." B. CARDOZO, THE NATURE OF JUDICIAL PROCESS, 6 (1921).

35 Id. at 2263.

36 Id. at 2264.

37 Id. at 2264, (quoting Tumey, supra, note 20, at 532.)

38 Id. at 2264.

39 Id. at 2265.

40 Id. at 2265, (quoting Marchion, supra, note 30, at 136).

41 Id. at 2265, (quoting Lavoie, supra, note 22, at 825 (quoting Monroeville, supra, note 21, at 60, in turn quoting Tumey, supra, note 20, at 532.)

42 Id. at 2265.

43 Id. at 2265. Neither party was able to identify any other case in which contributions to a judicial campaign presented the same potential for bias.

44 Id. at 2265.

45 Id. at 2265, (quoting Lavoie, supra, note 22, at 825-826; in turn quoting Marchion, supra, note 30, at 136.

46 Id. at 2267, (quoting Lavoie, supra, note 22, at 828.

47 Id. at 2269.

48 Supra, note 2, at 2269, (question 1).

49 Id. at 2269, (question 4).

50 Id at 2270, (question 24).

51 Id. at 2271, (question 28).

52 Id. at 2272.

53 Id. at 2272.

54 Id. at 2273. Roberts (citing Buckley v. Valeo, 424 U.S. 1, 47, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)) suggested that the additional $3,000,000 that was expended by Blankenship could just as easily been used to distort Benjamin's precise campaign messages and strategies rather than assist it.
60 Justice at Stake, a Washington, D.C. organization opposed to campaign spending for judicial races, has reported that between 1999 and 2008, over $200 million were raised nationally on behalf of state supreme court candidates. That represented more than a 100% increase over the amount raised in the previous nine years. Nathan Koppel, Ruling on 'Probable Bias' Spotlights Political Reality, THE WALL STREET JOURNAL, June 10, 2009, at A5.

61 In 2006, the New York Times reported that Blankenship had "promised to spend "whatever it takes" to help win a majority in the [West Virginia] State Legislature for the long beleaguered Republican Party." Between 2003 and 2004 Blankenship spent more than $5 million on a variety of political initiatives and local races (including over $3 million to successfully elect Brett Benjamin to the West Virginia Supreme Court and $650,000 to defeat Governor Joe Manchin, III's proposal to use bonds to shore up the state's employee pension plan), Ian Urbina, Wealthy Coal Executive Hopes to Turn Democratic West Virginia Republican, N.Y. TIMES, Oct. 22, 2006, http://www.nytimes.com/2006/10/22/us/2blankenship.htm.

62 Supra, note 2, at 2274.

63 In Cheney, Vice President of the United States, et al. v. U.S. District Court for the District of Columbia, et al., 541 U.S. 913; 124 S. Ct. 1391; 158 L.Ed. 2d 225; 2004 U.S. LEXIS 2008 (2004), Scalia was asked to recuse himself after it was revealed that he had gone on a private hunting trip with Vice President Cheney, one of the litigants in the pending action. The motion did not question whether his ability to be fair and impartial was compromised, but rather whether the trip created an appearance of judicial favoritism.

64 Id. at 2274.

65 Id. at 2274.

66 Id. at 2274.


68 A recent USA TODAY/Gallup Poll found that 89% of the 1,027 adults surveyed thought that the influence of campaign contributions on judges' rulings is a problem; 59% thought it was a major problem, and 90% thought that judges should be removed from cases involving parties who contributed to the judges' election campaigns. Joan Biskupic, At the Supreme Court, a case with the feel of a best seller: Like a Grisham novel, W. dispute examines conduct of elected judges, USA TODAY, Feb. 17, 2009, http://www.lexisnexis.com/us/findArticle/frame.do?reloadEntity=127135, 127135.