

Inevitable, Flexible, Expandable *Caperton*?

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I. INTRODUCTION

The fact pattern leading to *Caperton v. Massey*¹ sounds extreme. A West Virginia jury found Massey Coal Company liable for fraudulent misrepresentation and tortious interference with existing contractual relations.² The jury awarded damages of \$50 million.³ Massey appealed to the West Virginia Supreme Court during a heated high court election that pitted incumbent Warren McGraw against challenger Brent Benjamin.⁴ The CEO of Massey Coal Company, Don Blankenship, spent \$3 million of his personal funds in support of candidate Benjamin—three times the total spent by Benjamin’s own campaign.⁵ Benjamin won and assumed his position as state supreme court justice.⁶ When the case came before the state high court almost two years later, Justice Benjamin refused to recuse himself.⁷ Instead, he joined a 3–2 decision in favor of Blankenship’s Massey Coal Company and reversed the damages awarded by the jury.⁸

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1. *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252 (2009).

2. *Id.* at 2254.

3. *Id.*

4. See, e.g., Joan Biskupic, *Supreme Court Case with the Feel of a Best Seller*, USA TODAY, Feb. 16, 2009, available at http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm; Robert Barnes, *Case May Define When a Judge Must Recuse Self*, WASHINGTON POST, Mar. 2, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/03/01/AR2009030102265_3.html?sid=ST2009030201125.

5. *Caperton*, 129 S. Ct. at 2257.

6. *Id.*

7. *Id.*

8. *Id.* at 2258.

Many people found this sequence appalling, but for anyone following judicial elections over the past decade, it cannot be seen as surprising.⁹ *Caperton* represents the logical—even predictable—culmination of a decade-long trend toward high-cost, aggressive campaigns for the elected judiciary.¹⁰ State high court contests are undergoing a major transformation that could radically impact our justice system: if left unchecked, the new politics of judicial elections will affect the impartiality of our courts and jeopardize the public's confidence in a fair court system.

When *Caperton v. Massey* came before the U.S. Supreme Court in June 2009, the Court took these concerns to heart and ruled that the due process right to a fair trial required Justice Benjamin to recuse himself.¹¹ Many commentators view *Caperton* as a limited decision because it set stringent criteria for future due process recusal claims, but the revolutionary ferment surrounding judicial elections could make *Caperton*-style fact patterns more common in the years to come.¹² The fundamental fears that the Court expressed—that impartial justice and public confidence in the courts could be imperiled—will be stoked and aggravated by the financial arms race that now accompanies judicial elections. The new politics of judicial elections made a *Caperton* fact pattern inevitable. As court campaigns grow more corrosive, lower courts will have more opportunities to apply and expand *Caperton*'s principles to enforce recusal more seriously. As a result, *Caperton* could mark the tangible beginning of a new consciousness about the role of money in judicial elections.

II. INEVITABLE *CAPERTON*: THE NEW POLITICS OF JUDICIAL ELECTIONS

Over the past decade, a growing tide of political and special-interest pressure has threatened the cherished independence of our courts.¹³ Al-

9. See *infra* Part II.

10. See *infra* note 21.

11. *Caperton*, 129 S. Ct. at 2267–68.

12. See, e.g., Linda Greenhouse, *The Supreme Court Breakfast Table*, SLATE, June 24, 2009, available at <http://www.slate.com/id/2220927/entry/2221229/>.

13. See, e.g., DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS: HOW 2000 WAS A WATERSHED YEAR FOR BIG MONEY, SPECIAL INTEREST PRESSURE, AND TV ADVERTISING IN STATE SUPREME COURT CAMPAIGNS (Justice at Stake 2002); DEBORAH GOLDBERG & SAMANTHA SANCHEZ, THE NEW POLITICS OF JUDICIAL ELECTIONS 2002: HOW THE THREAT TO FAIR AND IMPARTIAL COURTS SPREAD (Bert Brandenburg ed., Justice at Stake 2004); DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2004: HOW SPECIAL INTEREST PRESSURE ON OUR COURTS HAS REACHED A “TIPPING POINT”—AND HOW TO KEEP OUR COURTS FAIR AND IMPARTIAL (Jesse Rutledge ed., Justice at Stake 2005); 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

though most states conduct supreme court elections,¹⁴ judges traditionally have not had to raise huge war chests, cater to special interests, make sound-bite promises, or respond to hardball campaign attacks. In recent years, however, the growing role of monetary contributions and aggressive campaigning has transformed state supreme court contests. These trends—tens of millions of dollars raised by candidates from parties who may appear before them, millions more poured in by interest groups, nasty and misleading ads, and pressure on judges to signal courtroom rulings on the campaign trail—have become the new normal.¹⁵ Campaign-trail politics is pressuring judges to become accountable to partisans and special interests instead of to the law and the Constitution.¹⁶ Many Americans have come to fear that justice is for sale.¹⁷ Given these trends, the real surprise seems to be why a *Caperton*-style fact pattern did not arrive sooner.

In just a decade, big money has assumed a major role in high court contests across America. Because state courts handle more than 98% of all lawsuits in America, the judicial independence of these high courts is especially important, and yet, would-be justices must raise millions of dollars from individuals and groups with business before the courts.¹⁸ Millions more are spent by political parties and special interest groups, though much of this support goes undisclosed.¹⁹ This “new politics of judicial elections” burst on the scene with the 1999–2000 election cycle, when total spending by state supreme court candidates increased 62% from the previous election cycle.²⁰

Since 2000, expensive campaigns have become all but essential for candidates to reach the high court in states without public financing systems for judicial elections.²¹ From 1999–2008, supreme court candidates

(Jesse Rutledge ed., *Justice at Stake* 2007); JUSTICE AT STAKE, THE NEW POLITICS OF JUDICIAL ELECTIONS IN THE GREAT LAKES STATES, 2000–2008 (Jesse Rutledge ed., *Justice at Stake* 2008); JUSTICE AT STAKE, THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009 (forthcoming 2010).

14. Eighty-seven percent of all state judges face some elections, and thirty-eight states hold supreme court elections. See National Center for State Courts, *FAQ: Judicial Selection and Retention—How Many State Judges are Elected?*, available at http://www.ncsconline.org/WC/Cour_Topic/FAQs.asp?topic=JudSel#FAQ628.

15. See *id.*

16. See JUSTICE AT STAKE, JUSTICE AT STAKE—STATE JUDGES FREQUENCY QUESTIONNAIRE (2001), available at http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf.

17. See *id.*

18. *Id.*

19. See *supra* note 14.

20. *Id.*

21. During the earlier decade, twenty-six candidates raised \$1 million or more, and all but two came from three states: Alabama, Pennsylvania, and Texas. In 1999–2008, by contrast, there were sixty-five “million-dollar” candidates, from a dozen states. JUSTICE AT STAKE, THE NEW POLITICS

raised \$200.7 million nationally, more than double the \$85.4 million raised from 1989–1998.²² An arms race between trial attorneys and business interests had boiled over, and national organizations began systematically targeting high court races.²³

Fueled by the explosion of money in high court elections, the past decade has also seen an unprecedented surge in money spent on TV ads in judicial races.²⁴ These ads have little to do with the qualifications needed to make a good judge. Instead, they create a dark fantasy world—complete with frightening horror-movie music—populated by abused children, fearsome rapists, malevolent corporations, greedy lawyers, and judges who apparently spend all their time trying to hurt ordinary Americans.²⁵ In the 2004 campaign that unseated Justice McGraw and led to *Caperton*, Massey CEO Blankenship gave \$2.4 million to a specially created group, “And for the Sake of the Kids,” which ran a battery of ads against McGraw.²⁶ In one of them, the announcer said:

Supreme Court Justice Warren McGraw voted to release child rapist Tony Arbaugh from prison. Worse, McGraw agreed to let this convicted child rapist work as a janitor, in a West Virginia school. Letting a child rapist go free? To work in our schools? That’s radical Supreme Court Justice Warren McGraw. Warren McGraw—too soft on crime. Too dangerous for our kids.²⁷

As twenty-first century politics take over judicial elections, it is simply unsurprising that a fact pattern like *Caperton* would emerge. Elections put too much money and power at stake. Like contestants in

OF JUDICIAL ELECTIONS (forthcoming May, 2010). During the same 1999–2008 period, nineteen of the twenty-two states that competitively elect Supreme Court judges set spending records. *Id.* In the five most expensive states, 51.7% of the total spent on the best-funded candidates came from just twenty-five “Super Spender” groups. *Id.* These elite twenty-five super spenders invested an average of \$362,000 apiece. *Id.* By contrast, the nearly 9,000 remaining contributors accounted for less than half of the total. *Id.* Their average contribution was about \$943. *Id.*

22. Press Release, Justice at Stake, *Citizens United* Called Grave Threat for America’s Courts (Jan. 22, 2010), available at http://www.justiceatstake.org/newsroom/press_releases.cfm/citizens_united_called_grave_threat_for_americas_courts?show=news&newsID=6669.

23. JUSTICE AT STAKE, *supra* note 21.

24. From 1999 to 2008, high court candidates spent an estimated \$89.3 million on airtime for television advertisements, including an estimated \$6.6 million spent in the unusually costly odd-year elections in 2007. *Id.* Just 22% of states with contested supreme court elections featured television advertising in 2000, but that number jumped to 64% in 2002. *Id.* By 2004, judicial TV ads were the unquestioned norm; 80% of states with contested elections ran TV ads. *Id.* And that number rose even further to 91% in 2006. *Id.* Of the fifteen states with contested elections in 2008, TV ads appeared in thirteen (over 85%) of them. *Id.* Minnesota and Washington were the only two states where television ads did not run in high court contests. *Id.*

25. See, e.g., JAMES SAMPLE ET AL., *supra* note 13, at 4–5, 13, 22, 35, 37.

26. See, e.g., GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, *supra* note 13.

27. *Id.* at 5–6.

any arms race, judges compete to raise millions of dollars, often from parties who appear before them. This fundraising worries the public: opinion surveys show that three out of four Americans think that campaign contributions to judges affect the outcome of cases in the courtroom.²⁸ Even more chilling is a poll showing that 46% of state judges agree.²⁹ As Illinois Supreme Court Justice Lloyd Karmeier said in his victory speech on election night in 2004, after the two candidates had raised a record \$9.3 million, “That’s obscene for a judicial race. . . . What does it gain people? How can people have faith in the system?”³⁰

III. FLEXIBLE *CAPERTON*?

On its face, *Caperton* appears limited. “Our decision today addresses an extraordinary situation where the Constitution requires recusal,” wrote Justice Kennedy.³¹ “Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal, but this is an exceptional case.”³² Afterward, former Texas Chief Justice Tom Phillips mused that “[g]iven how narrow that holding is, I’m not sure *Caperton* will ever be direct precedent for another recusal.”³³

But if judicial election campaigns continue to generate more massive outside spending, the Court’s own reasoning in *Caperton* could mean that such “exceptional” fact patterns become more frequent. The criteria are specific, but with each new election cycle, it is more likely that “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.”³⁴

Moreover, because “[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

28. Press Release, Justice at Stake, Poll: Frequency Questionnaire (Oct. 30–Nov. 7, 2001), available at http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf.

29. Press Release, Justice at Stake, Poll: State Judges Frequency Questionnaire (Nov. 5, 2001–Jan. 2, 2002), available at http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf.

30. Ryan Keith, *Republican Lloyd Karmeier Wins Supreme Court Seat*, ASSOCIATED PRESS, Nov. 3, 2004.

31. *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2265 (2009).

32. *Id.* at 2263.

33. Posting of Tony Mauro to The BLT: The Blog of Legal Times, *Coping With Caperton: A Q&A with Tom Phillips*, <http://legaltimes.typepad.com/blt/2009/06/coping-with-caperton-a-conversation-with-tom-phillips.html> (June 10, 2009, 16:21 EST).

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

such contribution had on the outcome of the election,” the *Caperton* test is aimed at campaigns where a single player plays an outsized role.³⁵ Because judicial elections do not attract the sheer number of players who routinely contribute significant resources to legislative and executive contests, elections where individual parties seek to dominate the campaign are more likely.

Because judicial elections themselves are changing, growing more costly, and becoming prone to outside spending, the *Caperton* standard could prove to be more flexible than many assume. Especially in the wake of *Citizens United v. Federal Election Commission*,³⁶ which bars states from keeping a lid on outside corporate and union spending campaigns, more extreme *Caperton*-like fact patterns could be just around the corner.

IV. EXPANDABLE *CAPERTON*

“As new problems have emerged that were not discussed at common law, however, the Court has identified additional instances which, as an objective matter, require recusal.”

Justice Kennedy, *Caperton v. Massey*³⁷

Behind the black letter of *Caperton* lie broader principles that invite deeper thinking and a new consciousness about when judges should recuse themselves. The Court’s stated rationales for its *Caperton* decision are anything but narrow. For example, Justice Kennedy wrote that “[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.”³⁸ The Court also realistically defined the effect of such contributions: “Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected.”³⁹ Finally, Justice Kennedy wrote that due 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 . . . lead him not to hold the balance nice, clear, and true.”⁴⁰

These are global concerns that are rooted in timeless views of human nature, its susceptibility to outside influence, and the universal de-

35. *Id.* at 2264.

36. *Citizens United v. Fed. Election Comm’n*, No. 08-205, 2010 WL 183856 (U.S. Jan. 21, 2010).

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

38. *Id.*

39. *Id.* at 2262.

40. *Id.* at 2264 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

mand that justice be impartial. This is why the public feels very strongly that judges should step aside when hearing cases from major backers.⁴¹ These principles, reinforced by three developments—evidence that *Caperton* is being used sparingly, the changing nature of judicial elections, and the potential expansion of corporate spending—could lead future courts to use *Caperton* more seriously as a foundation to enforce recusal as a requirement of due process.

First, more than six months after *Caperton* was decided, there is little sign of the flood of litigation that was direly predicted. *Caperton* has been applied sparingly and invoked infrequently.⁴² Attorneys can hardly be expected to be rash in asking judges, in front of whom they must appear, to recuse themselves.

Second, as I have outlined above, judicial elections are changing, not just dramatically, but perhaps in a revolutionary way. As more millions of dollars flood into our courts of law, through whatever route, the very nature of impartial justice will come into question. As retired Supreme Court Justice Sandra Day O'Connor recently put it, “[I]f both sides unleash their campaign spending monies without restrictions, then I think mutually-assured destruction is the most likely outcome.”⁴³ The potential for a “debt of gratitude” or a “possible temptation” will only continue to rise.

Finally, a new spigot of money may be about to be turned on. In January 2010, in *Citizens United v. Federal Election Commission*, the Court ruled that restrictions on outside corporate and union spending on elections are unconstitutional.⁴⁴ Such a ruling could blow the judicial election arms race wide open. In his dissent, Justice Stevens warned, “At a time when concerns about the conduct of judicial elections have reached a fever pitch . . . the Court today unleashes the floodgates of corporate and union general treasury spending in these races.”⁴⁵ Where more money comes, regardless of its source, more recusals should follow if courts are going to stay fair and enjoy public confidence.

41. Press Release, Justice at Stake, Poll: Huge Majority Wants Firewall Between Judges, Election Backers (Feb. 22, 2009), available at http://www.justiceatstake.org/newsroom/press_releases.cfm/poll_huge_majority_wants_firewall_between_judges_election_backers?show=news&newsID=5677.

42. As of March 31, 2010, there are forty-nine citations in the Westlaw databank of “All States and Federal Cases” for the *Caperton* citation, 129 S. Ct. 2252, in West’s Supreme Court Reporter. Many of the citations did not even involve recusal motions or campaign-trail conduct, and courts have been routinely rejecting the few recusal requests actually made.

43. Adam Liptak, *Former Justice O’Connor Sees Ill in Election Finance Ruling*, NEW YORK TIMES, Jan. 26, 2010, at A16.

44. See *Citizens United v. Fed. Election Comm’n*, No. 08-205, 2010 WL 183856 (U.S. Jan. 21, 2010).

45. *Id.* at *86.

Each of these developments, and others unforeseen, could lead the Supreme Court back to the issue that it grappled with in *Caperton*: if justice is going to be impartial in both fact and appearance, at what point does campaign support suggest that the wisest course of action would be to let another judge hear a case? The public is not conflicted over this point; a recent survey showed that more than 80% of all voters support the idea of having a different judge decide recusal requests and agree that judges should not hear cases involving major campaign backers.⁴⁶ Americans are unlikely to accept a court system that is overrun by money, politics and partisanship, but until *Caperton* is more seriously applied, they will have no other choice.

V. CONCLUSION

The *Caperton* fact pattern was a culmination of developments that have been brewing for years. As judicial elections continue to worsen, basic considerations of constitutional due process demand that recusal be taken more seriously. Courts are supposed to be insulated from big money and special-interest pressure so that judges can do their jobs without looking over their shoulders. Effective recusal standards will become increasingly important in ensuring that our courts are accountable to the law and the Constitution, not to partisan and special-interest pressure.

46. Press Release, Justice at Stake, Poll: Huge Majority Wants Firewall, *supra* note 41.