CAPERTON v. MASSEY: THE DUE PROCESS IMPLICATIONS OF CONTRIBUTIONS TO JUDICIAL CAMPAIGNS

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I. INTRODUCTION

The saga of *Caperton v. A.T. Massey Coal Co.* can be traced back to 1998 when the petitioner Caperton filed suit against Massey and several affiliates in the circuit court of Boone County, West Virginia.[1] At the heart of Caperton's complaint was a contract dispute, and following a lengthy trial in 2002, a Boone County jury returned a verdict of just over $50 million for the petitioners.[2] During the ensuing seven years, *Caperton v. Massey*—in all its various permutations—has generated an enormous amount of national attention, both inspiring a best-selling novel[3] and prompting two editorials in the *New York Times* that called for the Supreme Court to review the case.[4] Proponents of judicial election reform have seized upon *Caperton* as emblematic of all that is wrong with the way judges are selected in many parts of the United States.[5] Indeed, the petitioners allege that the case motivated Massey's CEO to work to defeat a sitting justice of the West Virginia Supreme Court of Appeals and elect his

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1. Caperton v. A.T. Massey Coal Co., No. 33350, at 10 (W. Va. April 3, 2008), *available at* http://www.state.wv.us/wvsca/docs/spring08/33350R.pdf.

2. *Id.* at 11.

3. Paul J. Nyden, *Novel Linked to State Election*, CHARLESTON GAZETTE, Jan. 20, 2008, *available at* http://www.wvgazette.com/News/200801290715; *see also* JOHN GRISHAM, THE APPEAL (Doubleday 2008).

4. Editorial, *Tainted Justice,* N.Y. TIMES, Nov. 13, 2008, at A36; Editorial, *Too Generous*, N.Y. TIMES, Sept. 7, 2008, at WK8.

5. *See, e.g.*, Brief of Justice at Stake, et al. as Amici Curiae in Support of Petitioners at 2–3, Caperton v. A.T. Massey Coal Co., No. 08-22 (U.S. Jan. 5, 2009), 2009 WL 45976.

replacement.[6] In a final twist, *Caperton* may yet lead to an important ruling from the United States Supreme Court on the meaning of the Fourteenth Amendment's Due Process Clause. The original contract dispute has thus come a long way.

Following the initial $50 million verdict, Massey filed numerous post-trial motions before finally seeking review of the trial court's decision in the West Virginia Supreme Court of Appeals in October 2006.[7] The composition of the Supreme Court of Appeals—West Virginia's only appellate court—changed significantly in 2004 when a political newcomer, Brent Benjamin, defeated the incumbent Justice Warren McGraw to gain one of the court's five seats.[8] The chairman and CEO of Massey, Don L. Blankenship, played a major role in Benjamin's 2004 campaign, spending some $3 million of his own money in an independent effort to defeat Justice McGraw.[9] When *Caperton v. Massey* came before the Court of Appeals, Caperton repeatedly moved for Justice Benjamin to recuse himself given the political support Benjamin had received from Mr. Blankenship.[10] Benjamin refused to do so and twice cast the deciding vote in favor of overturning the original jury verdict.[11] In November 2008, the Supreme Court granted Massey's petition for a writ of certiorari to decide the question of whether due process requires a judge to recuse himself when he has been the beneficiary of a litigant's significant campaign contributions.[12]

II. FACTS

Though largely beyond the scope of this commentary, the underlying conflict between the parties to this dispute began in the late 1990s. As one of the nation's largest coal companies, Massey was seeking to expand its market share by acquiring the business of LTV Steel.[13] LTV, however, had repeatedly refused Massey's direct overtures, preferring to purchase coal supplied by the Harman Mine

6. Brief for Petitioners at 5–8, Caperton v. A.T. Massey Coal Co., No. 08-22 (U.S. Dec. 29, 2008), 2008 WL 5433361.
7. *Id.* at 6.
8. *Id.*
9. *Id.* at 6–8.
10. *Id.* at 9–14.
11. *Id.*
12. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 593 (2008) (mem.).
13. Petition for a Writ of Certiorari at 3, Caperton v. A.T. Massey Coal Co., No. 08-22 (U.S. July 2, 2008), 2008 WL 2676568.

in Buchanan County, Virginia.[14] The petitioner, Caperton, owned the Harman Mine and sold all of its coal to the Wellmore Corporation, which acted as an intermediary between the Harman Mine and LTV steel.[15] To circumvent this arrangement, Massey purchased the parent company of Wellmore, planning to substitute the Massey coal for that of the Harman Mine.[16] But after Massey's acquisition of Wellmore, LTV still refused to purchase the Massey coal and subsequently broke off its business relationship with Wellmore.[17] At the direction of Massey, Wellmore then terminated its contract to buy coal from the Harman Mine, invoking the *force majeure* clause in its contract with Caperton.[18] The termination occurred late in the year, effectively preventing Caperton from securing another purchaser.[19] At this same time Massey entered into negotiations to purchase the Harman Mine.[20] Massey later withdrew from these negotiations, but only after it had obtained confidential information that Massey then used to strengthen its position against Caperton.[21]

The combined result of Massey's actions drove Caperton into bankruptcy, and in 1998 Caperton sued Massey in West Virginia for fraudulent misrepresentation, tortious interference with existing contractual relations, and fraudulent concealment.[22] Caperton filed this action against Massey in Boone County, West Virginia, after first filing suit against Wellmore in Buchanan County, Virginia.[23] As a result, Massey sought to dismiss the West Virginia suit, alleging that a forum selection clause required that any action be brought in Virginia and that Caperton's claims were precluded on the basis of res judicata.[24] The West Virginia trial court rejected both arguments, and a jury in Boone County delivered a verdict of $50 million for Caperton in late 2002.[25] Massey filed a variety of post-trial motions but did not

14. *Id.* at 3–4.
15. *Id.* at 4.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id*.
21. *Id.* at 4–5.
22. *Id.* at 5.
23. Brief for Respondents at 6, Caperton v. A.T. Massey Coal Co., No. 08-22 (U.S. Jan. 28, 2009), 2009 WL 216165.
24. *Id.* at 6–7.
25. *Id.* at 7.

actually appeal the decision to the West Virginia Supreme Court of Appeals until 2006.[26]

In the intervening four years, Massey's CEO, Don L. Blankenship, became heavily involved in an election for one of the seats on that court.[27] In 2004, the incumbent, Justice Warren McGraw, sought re-election to a twelve year term on the Supreme Court of Appeals but faced a challenge from a "political newcomer," Charleston lawyer Brent Benjamin.[28] Following a particularly acrimonious campaign, Benjamin surprised many and narrowly defeated McGraw.[29] During the campaign Mr. Blankenship spent over $3 million of his personal fortune to help defeat Justice McGraw.[30] Only $1,000 went to Benjamin's campaign directly; most of the rest—nearly $2.5 million—went to fund a "527 organization,"[31] And For The Sake Of The Kids ("ASK"), which Blankenship helped found.[32] The express purpose of ASK was to defeat Justice McGraw, and the organization worked towards that goal mainly by producing and publishing negative advertisements that targeted McGraw and his judicial record.[33] Beyond his support for ASK, Blankenship spent another $500,000 to purchase anti-McGraw advertisements in newspapers and on television.[34] Finally, Blankenship conducted an extensive letter-writing campaign aimed at West Virginia physicians. In these letters, Blankenship appealed for donations to Benjamin's campaign and claimed that defeating Justice McGraw would lead to lower medical malpractice premiums.[35]

Two years after Benjamin's 2004 election, Massey finally petitioned the West Virginia Supreme Court of Appeals to review its case.[36] At that time both sides sought to have judges recuse

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26. Brief for Petitioners, *supra* note 6, at 6.

27. *Id.*

28. Carol Morello, *W. Va. Supreme Court Justice Defeated in Rancorous Contest*, WASH. POST, Nov. 4, 2004, at A15.

29. *Id.*

30. Brief for Petitioners, *supra* note 6, at 6–7.

31. Named after the section of the United States tax code that created them, "527 Organizations" are tax-exempt organizations formed to influence political campaigns. Neither state nor federal election commissions regulate their contributions or activities. *See generally* 26 U.S.C.A § 527 (West 2007).

32. *Id.*

33. *Id.*

34. *Id.* at 7.

35. *Id.* at 7–8.

36. *Id.* at 9–10.

themselves.[37] Predictably, Caperton requested the recusal of the new justice, Brent Benjamin, on grounds that Mr. Blankenship's extraordinary support for Benjamin's campaign created an unconstitutional appearance of bias.[38] For its part, Massey sought the recusal of Justice Larry Starcher, who had publically criticized Blankenship for his involvement in Justice Benjamin's 2004 election.[39] Per the West Virginia Rules of Appellate Procedure, both motions were directed at the judges themselves, and neither motion was subject to review by the entire court.[40] Both judges declined to recuse themselves, and in November of 2007, the court issued a 3-2 decision that overturned the trial court's verdict and "created nearly a dozen new points of West Virginia law."[41] Justice Benjamin voted with the majority, and both Justices Starcher and Albright filed "vigorous dissents."[42]

Following its defeat, Caperton filed a petition for a rehearing.[43] A second scandal broke shortly thereafter: photographs surfaced showing Mr. Blankenship and acting Chief Justice Maynard dining together in the French Riviera.[44] The photographs had been taken while the *Massey* case was on appeal, and Maynard had been one of the three votes in the majority to overturn the original trial court decision. [45] In the wake of the ensuing scandal, Maynard claimed that his "longstanding friendship" with Blankenship had been well-known before the appeal came up and that it had not affected his decision; nevertheless, he decided to recuse himself from further participation in the case.[46] A circuit judge appointed by Justice Benjamin replaced Maynard, and the new court then voted to accept Caperton's petition for rehearing.[47] Before the rehearing, however, Justice Starcher also decided to recuse himself, accepting Massey's argument that his

37. *Id.* at 9.
38. *Id.*
39. *Id.*
40. *Id.*; *see also* W. VA. R. APP. P. 29.
41. Brief for Petitioners, *supra* note 6, at 10; *see also* Joint Appendix, Volume II, at 340a–411a, Caperton v. A.T. Massey Coal Co., No. 08-22 (U.S. Dec. 29, 2008), 2008 WL 5422892.
42. Brief for Petitioners, *supra* note 6, at 11; *see also* Joint Appendix, Volume II, *supra* note 41, at 420a–431a.
43. Brief for Petitioners, *supra* note 6, at 11.
44. Adam Liptak, *West Virginia Judge Steps Out of Case Involving a Travel Companion*, N.Y. TIMES, Jan. 19, 2008, *available at* http://www.nytimes.com/2008/01/19/us/19judge.html.
45. *Id.*
46. Ian Urbina, *West Virginia's Top Judge Loses His Re-election Bid*, N.Y. TIMES, May 15, 2008, *available at* http://www.nytimes.com/2008/05/15/us/15judge.html.
47. Brief for Petitioners, *supra* note 6, at 12.

criticisms of Blankenship's political involvement had created a public perception of bias.[48] Starcher also urged Justice Benjamin to recuse himself, but Benjamin held fast, serving as acting Chief Justice for the rehearing and appointing two circuit judges to replace Maynard and Starcher.[49] In April of 2008, this reconstituted court again voted 3-2 to overturn the original trial court verdict, and once again Justice Benjamin voted with the majority.[50] Several months later, Justice Benjamin issued a concurring opinion in which he explained, *inter alia*, his decision not to recuse himself.[51]

III. LEGAL BACKGROUND

The key question of *Caperton v. Massey*—whether the Due Process Clause is violated when a judge fails to recuse himself from a case that involves a significant contributor to the judge's political campaign—is one of first impression for the Supreme Court.

Traditionally, the states have been left to determine for themselves the rules governing recusal in their courts.[52] Of necessity, the question *Caperton* presents can arise only in the context of the state court system. After all, federal judges are nominated by the President and confirmed by the Senate; they have lifetime appointments and are not subject to popular elections.[53] In contrast, the states employ a wide variety of methods for selecting judges, including popular election, merit selection, appointment by the governor, and election by the state legislature.[54] Despite this variety, "all but a handful of States hold popular elections to choose at least *some* judges to *some* benches at *some* stage of a judge's career."[55] Just as the methods for selecting judges vary from state to state, so too the rules governing the recusal of state judges vary, and the Supreme Court has made it clear that "most matters relating to judicial disqualification [do] not rise to a

48. *Id.* at 13.
49. *Id.* at 13–14.
50. *Id.* at 14.
51. Joint Appendix, *supra* note 41, at 654a–98a.
52. Brief for Respondents in Opposition to a Writ of Certiorari at 24–26, Caperton v. A.T. Massey Coal Co., No. 08-22 (U.S. Sept. 3, 2008), 2008 WL 4126332.
53. U.S. CONST. art. 2, § 2, cl. 2, and art. 3, § 1.
54. For a survey of the various means used by the states to select judges, *see generally* The American Judicature Society, *Methods of Judicial Selection*, *available at* http://www.judicialselection.us/.
55. Brief of the Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 5, Caperton v. A.T. Massey Coal Co., No. 08-22 (U.S. Jan. 5, 2009), 2009 WL 45973.

constitutional level."[56] The Court has further held that the Fourteenth Amendment's Due Process Clause establishes a "constitutional floor, not a uniform standard";[57] the states are therefore free to enact stricter rules regarding recusal if they see fit.[58]

The notion of judicial recusal stems from the ancient common law maxim of *aliquis non debet esse judex in propria causa*: "no man shall be a judge in his own case."[59] In Anglo-American jurisprudence this was traditionally taken to mean that a judge had to recuse himself from any case in which he had a financial interest.[60] This principle clearly underlies most of the early recusal cases heard by the Supreme Court. In *Tumey v. Ohio*, for example, the Court found a violation of due process when a town mayor served as the judge of a criminal proceeding but was paid for overseeing the trial only if the defendant was convicted.[61] The *Tumey* court famously stated that "every procedure 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 denies the latter due process of law."[62]

The financial stake of a judge also proved dispositive in *Aetna Life Insurance v. Lavoie*, which involved a bad faith refusal-to-pay claim against an insurance company.[63] The case came before the Alabama Supreme Court, and the justice who authored that court's opinion and cast the deciding vote was also a plaintiff in a similar case pending before another state court.[64] In vacating and remanding the Alabama court's decision, the Supreme Court held that a litigant need not prove a judge's actual bias to show that a violation of due process has occurred.[65] Rather, a judge who might be capable of impartiality can nevertheless be barred from hearing a case because "'justice must satisfy the appearance of justice.'"[66]

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56. Fed. Trade Comm'n v. Cement Inst., 333 U.S. 683, 702 (1948).
57. Bracy v. Gramley, 520 U.S. 899, 904 (1997).
58. Brief of the Conference of Chief Justices, *supra* note 55, at 2–3.
59. John Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609–10 & n.14 (1947).
60. *Id.* at 610–12.
61. Tumey v. Ohio, 273 U.S. 510, 523 (1927).
62. *Id.* at 532.
63. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986).
64. *Id.* at 813–14.
65. *Id.* at 825
66. *Id.* (quoting *In re* Murchison, 349 U.S. 133, 136 (1955) (citation omitted)).

The financial interest of a judge was considerably less direct in *Ward v. Village of Monroeville*, yet the Supreme Court still found a due process violation.[67] In *Ward,* a town mayor both oversaw the town's budget and presided over its traffic court, which provided a substantial portion of the town's income through the imposition of various traffic fines.[68] The Court found this setup problematic, noting that its holding in *Tumey* concerning the "possible temptation to the average man . . . not to hold the balance nice clear and true" was not confined only to those situations where the mayor shared in the fines his court imposed.[69] A system where the judge could be torn between two "practically and seriously inconsistent positions, one partisan and the other judicial," also violated a defendant's due process rights.[70]

The Supreme Court has also held that recusal was constitutionally required in at least two cases that did not involve any pecuniary interest on the part of a judge. In *Mayberry v. Pennsylvania*, the Court held that a judge could not preside over a criminal defendant's contempt proceedings if the same judge had been subjected to the verbal abuse that prompted the proceedings.[71] Similarly, the Court found in *Taylor v. Hayes* that a judge could not preside over a lawyer's contempt proceeding when the same judge had been involved in a lengthy dispute with the lawyer during the trial.[72] "[T]he inquiry," the Court held, "must be not only whether there was actual bias on respondent's part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.'"[73]

IV. ARGUMENTS

A. Petitioners and Supporting Amici Curiae

Caperton's Petition for a Writ of Certiorari relied heavily on the cases described above, noting that "the appearance of impropriety created by the $3 million that Mr. Blankenship spent on Justice

67. Ward v. Village of Monroeville, 409 U.S. 57 (1972).
68. *Id.* at 57–58.
69. *Id.* at 60.
70. *Id.*
71. Mayberry v. Pennsylvania, 400 U.S. 455 (1971).
72. Taylor v. Hayes, 418 U.S. 488, 501 (1974).
73. *Id.* (quoting Ungar v. Sarafite, 376 U.S. 575, 588 (1964)).

Benjamin's campaign is at least as strong as the appearance of impropriety in *Murchison*, *Mayberry*, and *Lavoie*."[74] Curiously though, Caperton's merits brief largely abandoned the argument that an "appearance of bias" has constitutional implications for due process.[75] Instead, Caperton argued that *Tumey*, *Murchison*, and their progeny imply that due process requires a judge's recusal "where an objective inquiry establishes a probability of bias on a judge's part."[76] For example, a judge would not have to recuse himself from a case involving a supporter whose "contribution represents only a small fraction of the overall financial support for the judge's campaign." If the contribution is small, Caperton suggested, "no reasonable observer would conclude that such modest campaign support creates a probability that the judge is biased in favor of the supporter."[77] In contrast, an objective observer *would* conclude from the facts surrounding *Caperton v. Massey* and the Benjamin campaign that Justice Benjamin was probably biased.[78]

Caperton provided five reasons to support this contention, implicitly suggesting that the Court could use these reasons to establish a test to determine when campaign contributions implicate the Due Process Clause.[79] Caperton's first reason was based on the "sheer volume" of Mr. Blankenship's support: beyond West Virginia's limit of $1,000 in direct support,[80] Blankenship's personal contribution of $3 million to the overall campaign effort was $1 million more than the total amount spent by the campaign committees of McGraw and Benjamin *combined*.[81] This fact was closely tied to the second reason that an objective observer would find a reasonable probability of bias—the amount of Blankenship's support as a percentage of the total amount spent on Benjamin's campaign. Here, Blankenship's support was 60% of the total amount.[82]

Caperton's final three reasons why an objective inquiry could have established a probability that Benjamin was biased were—unlike

74. Petition for a Writ of Certiorari, *supra* note 13, at 19–20.

75. This change of strategy did not go unnoticed by Massey: *see* Brief for the Respondents, *supra* note 23, at 1.

76. Brief for Petitioners, *supra* note 6, at 15.

77. *Id.* at 26.

78. *Id.* at 27.

79. *Id.*

80. W. VA. CODE § 3-8-12(f)(2005).

81. *Id.* at 28.

82. *Id.*

the first two—not directly financial. The third was that Blankenship "actively campaigned" for Benjamin by writing letters and soliciting donations; he therefore deserved at least some credit for raising a substantial portion of the money that went directly to Benjamin's campaign committee.[83] Fourth, Caperton noted the suspicious timing of Blankenship's involvement, which looked as though it "was intended to influence the outcome of th[e] . . . appeal."[84] Fifth and finally, Caperton pointed to the procedural process governing recusal in West Virginia. There, when a judge decides not to recuse himself, his decision is not subject to review by the other members of the court. In states where such a decision is reviewed, "the likelihood of judicial bias may be diminished because the allegations of bias have been examined . . . by the judge's colleagues."[85]

The five factors set forth in Caperton's brief on the merits—the contribution volume, the volume as a percentage of the total amount spent, the litigant's active support for a candidate, the timing of the contribution, and the procedure for reviewing recusal decisions—were essentially endorsed and amplified in several amicus briefs. The American Bar Association (ABA), for example, conceded the impossibility of establishing any fixed amount of contribution beyond which a judge would have to recuse himself.[86] Election costs vary from state to state, and what would be a large amount in one state may not be so in others. The ABA nevertheless concluded that "a contribution that is unusually large in absolute or relative terms, or that results in an appearance of dependence on the contributor, should weigh heavily in favor of recusal."[87] The ABA also suggested that the Court consider the timing of the contribution and the "relationship between the contributor and the case."[88]

Like the ABA, the Conference of Chief Justices proposed that *Caperton* is an opportunity for the Court "to clarify the analysis to be considered in deciding whether a recusal is constitutionally required because of campaign support."[89] Among the criteria the Conference believed to be important were (1) the size of the expenditure

83. *Id.* at 29.
84. *Id.*
85. *Id.* at 29–30.
86. Brief of the American Bar Association as Amicus Curiae in Support of Petitioners at 19, Caperton v. A.T. Massey Coal Co., No. 08-22 (U.S. Jan. 5, 2009) 2009 WL 45978.
87. *Id.*
88. *Id.* at 19–20.
89. Brief of the Conference of Chief Justices, *supra* note 55, at 24.

considered relative to the size of the electorate; (2) whether the support is direct or—as in *Caperton*—mainly indirect; (3) the timing of the support; (4) the actual and perceived effectiveness of the support; (5) the nature of the supporter's prior political activities; (6) the nature of any prior relationship between the contributor and the judge; and (7) the relationship between the supporter and the actual litigant.[90]

Several pro-business research centers and numerous major corporations also wrote amicus briefs in support of Caperton. In essence, these parties pleaded with the Court to save American businesses from their own worst instincts. One amicus brief argued that if the Supreme Court does not act to require judges who have received substantial contributions to recuse themselves, then a business, its shareholders, and its board of directors might well be forced "to support candidates whose judicial philosophies represent the company's best interests in pending or anticipated litigation."[91] This brief likened the situation to a classic "prisoner's dilemma":

> For ethical and financial reasons, most corporations would prefer to avoid spending money on an election that involves candidates for a seat on a court where it has a matter pending. . . . In today's election environment, however, a corporation must consider the likelihood that its opponent in high-stakes litigation may actively support one or more of the judges that will hear the case. Increasingly, corporations feel compelled to support their own candidates to guard against an adverse judgment that damages the company and its shareholders. Mandatory recusal is necessary to stanch this campaign spending arms race and maintain the integrity of the judicial system.[92]

Wal-Mart, Pepsico, Lockheed-Martin, and other prominent American businesses expressed somewhat related concerns in their own amicus brief supporting Caperton. These corporations argued that the public's confidence in a fair and independent judiciary "is of particular value to those engaged in commerce, who rely on evenhanded justice to make informed financial and investment

90. *Id.* at 25–29.

91. Brief of the Center for Political Accountability and the Carol and Lawrence Zicklin Center for Business Ethics Research as Amici Curiae in Support of Petitioners at 10–11, Caperton v. A.T. Massey Coal Co., No. 08-22 (U.S. Jan. 5, 2009) 2009 WL 45977.

92. *Id.* at 4.

decisions."[93] If justice can be bought through political contributions, the legal framework upon which businesses "assess risks and calibrate benefits" becomes far less predictable and less reliable.[94]

B. Respondents and Supporting Amici Curiae

In a lengthy concurring opinion filed some three months after the second *Massey* decision came down, Justice Benjamin addressed his decision not to recuse himself.[95] Many of the arguments he touched on in his concurrence were picked up and amplified by Massey in its brief for the Supreme Court. Benjamin initially addressed and rejected the argument that a judge should recuse himself based on an appearance of impropriety. The Supreme Court, Benjamin contended, has never endorsed appearance-driven recusal; in fact, many appellate circuits have "rejected the contention that appearance driven conflicts, without more, raise due process implications."[96] Although Benjamin dismissed the argument that appearances demanded his recusal, his version of the facts mitigated the "appearance" of bias. For one, Benjamin pointed out that Blankenship's money went to a 527 organization and not directly to his campaign. "I had no role and no control in anything that ASK did during the campaign," Benjamin maintained, "nor did I have any role in causing Mr. Blankenship or anyone else to contribute to ASK or otherwise do or not do anything in the 2004 Supreme Court election."[97] Benjamin also observed that on other occasions he had voted *against* Massey's interests, including on cases that had involved a higher dollar amount than the case *sub judice*.[98]

Massey's merits brief reiterated these same arguments, rejecting the idea of appearance-driven recusal and suggesting instead that *Tumey*, *Lavoie*, and the Court's other Due Process Clause decisions are merely applications of the common law maxim that "'a judge with

93. Brief of Amici Curiae The Committee for Economic Development et al. in Support of Petitioners at 6, Caperton v. A.T. Massey Coal Co., No. 08-22 (U.S. Jan. 5, 2009) 2009 WL 45974.

94. *Id.* at 8–9.

95. Joint Appendix, *supra* note 41, at 654a–98a.

96. *Id.* at 665a (*citing* Johnson v. Carroll, 369 F.3d 253, 262 (3d Cir. 2004); Callahan v. Campbell, 427 F.3d 897, 928–29 (11th Cir. 2005); Del Vecchio v. Illinois Dept. of Corrections, 31 F.3d 1363, 1371–82 (7th Cir. 1994) (en banc)).

97. *Id.* at 685a.

98. *Id.* at 674a–75a, n.29.

a financial interest in the outcome of the case may not sit.'"[99] Massey also suggested that the Court's holdings in *Mayberry* and *Taylor*, though admittedly not involving a judge's pecuniary interest, were still "contempt-specific" and did not "rest on any generalized acceptance of a constitutional 'probability of bias' standard."[100] Moreover, were the Court to accept such a standard now, Massey contended, its adoption would suggest that many members of the Supreme Court itself had acted unconstitutionally over the past two hundred years. Most notably, Chief Justice Marshall was both the author of the Court's decision in *Marbury v. Madison* and the cause of the litigation![101] In contrast to his participation in *Marbury*, Marshall recused himself from adjudicating *Martin v. Hunter's Lessee*, because in *Martin*, Marshall had a pecuniary interest.[102] Thus, Massey summarized, "there is no basis in history, precedent, or the practice of this Court for the notion that a judge's 'bias' *in general*—let alone a mere 'probability of bias'—mandates disqualification under the Due Process Clause."[103]

Massey and supporting amici also raised the specter of an onslaught of due process challenges to state court decisions if the Court were to endorse a "probability of bias" standard.[104] Massey's brief criticized the "'vague and malleable'" guidelines offered by Caperton and supporting amici, and suggested that the impossibility of drawing a constitutional line would "open the gates for a flood of litigation."[105] Seven states echoed these concerns in an amicus brief, predicting that a reversal "will give birth to a new breed of litigation pleading: the '*Caperton* motion.'"[106] Every state-court recusal dispute would be at risk of becoming a federal case in which a "multifactor morass" would need to be applied to determine whether a judge was required to recuse himself.[107] "While that sort of hypercontextualism may well be appropriate to legislative policymaking on the state

99. Brief for Respondents, *supra* note 23, at 19 (quoting Del Vecchio v. Illinois Dept. of Corrections, 31 F.3d 1363, 1391 (7th Cir. 1994) (Easterbrook, J., concurring)).

100. *Id.* at 23.

101. *Id.* at 25–26; *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

102. *Id.* at 26–27; *see also* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

103. *Id.* at 15.

104. *Id.* at 44–46.

105. *Id.* at 44 (*quoting* Baze v. Rees, 128 S. Ct. 1520, 1542 (2008) (Alito, J., concurring)).

106. Brief of the States of Alabama, et al. as Amici Curiae in Support of Respondents at 28, Caperton v. A.T. Massey Coal Co., No. 08-22 (U.S. Feb. 4, 2009) 2009 WL 298466.

107. *Id.* at 5.

level," the brief concluded, "it is not the stuff of which constitutional doctrines should be made."[108]

V. PROBABLE DISPOSITION

Given the widespread support for Caperton and the calls for action by various amici across the political spectrum, the Supreme Court may clarify that due process requires a judge who has received substantial campaign support to recuse himself from a supporter's case. Massey's arguments will have little appeal to the Court's liberal justices. And even the Court's conservative justices may decide that the weight of the argument lies with Caperton and the independent groups advocating on Caperton's behalf. Indeed, this is not a case that breaks down easily along ideological lines; both major corporations and the liberal-leaning Brennan Center at New York University have written amicus briefs supporting Caperton, and Ted Olson, the solicitor general during President George W. Bush's first administration, is arguing Caperton's case.[109]

Certainly the neo-federalists on the Court will be inclined to sympathize with at least some of the arguments advanced in Massey's brief. Recusal in state courts is generally a matter of state concern, and some conservative justices will be wary of federalizing this domain, especially with fuzzy standards that leave room for creative lawyering.[110] If, however, the Court can agree on explicit standards that both give guidance to the states as they make their own reforms and prevent an onslaught of potential "*Caperton* challenges" to state court decisions, some of the more conservative justices might join in a vote for the petitioners.

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108. *Id.*

109. *See* Brief of Amici Curiae The Committee for Economic Development et al. in Support of Petitioners, *supra* note 93; Brief of Amici Curiae the Brennan Center for Justice at NYU School of Law, et al. in Support of Petitioners, Caperton v. A.T. Massey Coal Co., No. 08-22 (U.S. Jan. 5, 2009) 2009 WL 45972; *see also* Paul J. Nyden, *Mining Appeal Moving Along,* CHARLESTON GAZETTE, May 16, 2008, *available at* http://www.wvgazette.com/News/200805150741 (reporting on Olson's taking the case).

110. *See generally* David Franklin, *The Roberts Court, the 2008 Election, and the Future of the Judiciary*, 6 DEPAUL BUS. & COM. L.J. 513, 515 (2008) ("We are obviously still very early in the career of Chief Justice John Roberts, . . . but it's already clear that one way in which Roberts is similar to Justices Scalia and Thomas is that he has a strong preference for what he views as clear, bright-line, judicially imposed rules as opposed to what he views as broad, fuzzy, manipulable, open-ended standards."); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (arguing generally for a rule-based approach).

In its amicus brief the Conference of Chief Justices directly addressed the fear that a ruling for Caperton would open the floodgates to thousands of challenges based on due process grounds. The Conference concluded, however, that this fear was "unfounded" since federal review of a state judge's failure to recuse himself "would be limited to cases of extraordinary [campaign] support."[111] Given the bi-partisan and neutral position of the Conference, its opinion may help to sway some conservatives on the Court who have misgivings about federalizing another due process standard.

Caperton's change between its petition for certiorari and merits brief from an "appearance argument" to a "probability of bias" argument may also be an attempt to win over the Court's most conservative members. Indeed, Justice Scalia was very skeptical when the Sierra Club asked him to recuse himself from *Cheney v. U.S. District Court for the District of Columbia* because of an appearance of bias.[112] "The decision whether a judge's impartiality can 'reasonably be questioned,'" Justice Scalia declared, "is to be made in light of the facts as they existed, and not as they were surmised or reported."[113] Even in *Cheney*, though, Justice Scalia conceded that the Sierra Club's argument that he should resolve all doubts in favor of recusal "might be sound advice" were he sitting on an appellate court where the case "would be taken by another judge, and . . . proceed normally."[114] Because the case was before the Supreme Court, however, *Cheney* would have been forced to proceed with only eight judges, creating the possibility of a tie vote.[115] Obviously the procedures of the West Virginia Supreme Court are closer to those of a federal appellate court: had Justice Benjamin recused himself, another circuit judge would have been appointed to take his place.

Finally, Massey's suggestion that a "probability of bias" standard has no support in either the common law or an original understanding of the Due Process Clause is clearly an appeal meant to resonate with the Court's conservative justices. Nevertheless, this argument ignores the fact that judicial elections, especially those that involve significant expense and campaign contributions, are an entirely modern

111. Brief of the Conference of Chief Justices, *supra* note 55, at 23.

112. Cheney v. United States District Court for the District of Columbia, et al., 541 U.S. 913 (2004) (Scalia, J., in chambers).

113. *Id.* at 913 (*quoting* Microsoft Corp. v. United States, 530 U.S. 1301, 1302 (2000)).

114. *Id.* at 915.

115. *Id.*

phenomenon.[116] As twenty-seven former justices and chief justices of state supreme courts said in their amicus brief, "Novel practices call for new paradigms of due process analysis; otherwise, cleverly designed schemes and convoluted machinations would eviscerate the ancient protections of due process."[117] In deciding to hear *Caperton* this term, the Court may well be on the verge of announcing one of these "new paradigms" very soon.

116. Brief Amici Curiae of 27 Former Chief Justices and Justices in Support of Petitioners at 10, Caperton v. A.T. Massey Coal Co., No. 08-22 (U.S. Jan. 2, 2009) 2009 WL 45979.

117. *Id.*