**CAPERTON *et al.* *v*. A. T. MASSEY COAL CO., INC., *et al.***

**certiorari to the supreme court of appeals of west virginia**

No. 08-22. Argued March 3, 2009--Decided June 8, 2009

(NOTE: Dr. Sager has put titles on the various sections of the majority opinion to show its organization. Only the Roman Numerals appear in the original opinion)

     *Justice Kennedy* delivered the opinion of the Court.

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**I FACTS**

( Dr. Sager’s brief summary of facts:A trial court had found Massey guilty of a variety of torts and awarded Caperton $50 million in compensatory damages. Before the final appeal to the Supreme Court, there was an election for a position on the Weest Virginia Supreme Court. .Basically the head of Massey Coal, Don Blankenship gave 2.5 million to a 527 Nonprofit to spend in a judicial campaign against the opponent of Brent Benjamin who was running for a seaton the West Virginia Supreme Court. He also made independent expenditures of ½ million on behalf of Benjamin.    The Caperton side asked Benjamin to recuse himself, take himself out of the case, when it got to the West Virginia Supreme Court. He did not. West Virginia Supreme Court reversved verdict for Caperton. Caperton appealed to the U.S. Supreme Court claiming a denial of due process) . . . .

     To provide some perspective, Blankenship's $3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee. *Id.,* at 288a. Caperton contends that Blankenship spent $1 million more than the total amount spent by the campaign committees of both candidates combined. Brief for Petitioners 28.

     Benjamin won. He received 382,036 votes (53.3%), and McGraw received 334,301 votes (46.7%). App. 677a.

. . .

(Benjamin in a concurrence) defended the merits of the majority opinion as well as his decision not to recuse. He rejected Caperton's challenge to his participation in the case under both the Due Process Clause and West Virginia law. Justice Benjamin reiterated that he had no " ' direct, personal, substantial, pecuniary interest' in this case.' " \_\_\_ W. Va., at \_\_\_, \_\_\_ S. E. 2d, at \_\_\_; App. 677a (quoting *Lavoie*, *supra*, at 822). Adopting "a standard merely of 'appearances,' " he concluded, "seems little more than an invitation to subject West Virginia's justice system to the vagaries of the day--a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations." \_\_\_

**II Elements of Fair Trial When Is Recusal Required**

     It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process.". . .

. To place the present case in proper context, two instances where the Court has required recusal merit further discussion.

**A Financial Interest**

     The first involved the emergence of local tribunals where a judge had a financial interest in the outcome of a case, although the interest was less than what would have been considered personal or direct at common law.

     This was the problem addressed in *Tumey*. There, the mayor of a village had the authority to sit as a judge (with no jury) to try those accused of violating a state law prohibiting the possession of alcoholic beverages. Inherent in this structure were two potential conflicts. First, the mayor received a salary supplement for performing judicial duties, and the funds for that compensation derived from the fines assessed in a case. No fines were assessed upon acquittal. The mayor-judge thus received a salary supplement only if he convicted the defendant. [273 U. S., at 520](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=US&vol=273&page=520). Second, sums from the criminal fines were deposited to the village's general treasury fund for village improvements and repairs. *Id.*, at 522.

     The Court held that the Due Process Clause required disqualification "both because of [the mayor-judge's] direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village." *Id.*, at 535. It so held despite observing that "[t]here are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it." *Id.*, at 532. The Court articulated the controlling principle: . . .

**B Criminal Contempt**

     The second instance requiring recusal that was not discussed at common law emerged in the criminal contempt context, where a judge had no pecuniary interest in the case but was challenged because of a conflict arising from his participation in an earlier proceeding. This Court characterized that first proceeding (perhaps pejoratively) as a " 'one-man grand jury.' " *Murchison*, [349 U. S., at 133](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=US&vol=349&page=133). . . .

**III Apply Principles To Come Up With Rule For This Case**

     Based on the principles described in these cases we turn to the issue before us. This problem arises in the context of judicial elections, a framework not presented in the precedents we have reviewed and discussed.

     Caperton contends that Blankenship's pivotal role in getting Justice Benjamin elected created a constitutionally intolerable probability of actual bias. 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. That temptation, Caperton claims, is as strong and inherent in human nature as was the conflict the Court confronted in *Tumey* and *Monroeville* when a mayor-judge (or the city) benefited financially from a defendant's conviction, as well as the conflict identified in *Murchison* and *Mayberry* when a judge was the object of a defendant's contempt.

     Justice Benjamin was careful to address the recusal motions and explain his reasons why, on his view of the controlling standard, disqualification was not in order. In four separate opinions issued during the course of the appeal, he explained why no actual bias had been established. He found no basis for recusal because Caperton failed to provide "objective evidence" or "objective information," but merely "subjective belief" of bias . . .

"The 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 had followed a thousand times and more. Nothing could be farther from the truth." B. Cardozo, The Nature of the Judicial Process 9 (1921).

     The judge inquires into reasons that seem to be leading to a particular result. Precedent and *stare decisis* and the text and purpose of the law and the Constitution; logic and scholarship and experience and common sense; and fairness and disinterest and neutrality are among the factors at work. To bring coherence to the process, and to seek respect for the resulting judgment, judges often explain the reasons for their conclusions and rulings. There are instances when the introspection that often attends this process may reveal that what the judge had assumed to be a proper, controlling factor is not the real one at work. If the judge discovers that some personal bias or improper consideration seems to be the actuating cause of the decision or to be an influence so difficult to dispel that there is a real possibility of undermining neutrality, the judge may think it necessary to consider withdrawing from the case.

     The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. ….

We conclude that there is a serious risk of actual bias--based on objective and reasonable perceptions--when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent../ . .

     Applying this principle, we conclude that Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case. . . .

     Whether Blankenship's campaign contributions were a necessary and sufficient cause of Benjamin's victory is not the proper inquiry./ . .

     The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical.

**IV Applying Principles**

     Our decision today addresses an extraordinary situation where the Constitution requires recusal. . . .

     It is true that extreme cases often test the bounds of established legal principles, and sometimes no administrable standard may be available to address the perceived wrong . .

     The West Virginia Code of Judicial Conduct also requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."

Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances.

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     The judgment of the Supreme Court of Appeals of West Virginia is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

***Chief Justice Roberts*, with whom *Justice Scalia*, *Justice Thomas,* and *Justice Alito* join, dissenting.**

     I, of course, share the majority's sincere concerns about the need to maintain a fair, independent, and impartial judiciary--and one that appears to be such. But I fear that the Court's decision will undermine rather than promote these values.

     Until today, we have recognized exactly two situations in which the Federal Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts. Vaguer notions of bias or the appearance of bias were never a basis for disqualification, either at common law or under our constitutional precedents. Those issues were instead addressed by legislation or court rules.

     Today, however, the Court enlists the Due Process Clause to overturn a judge's failure to recuse because of a "probability of bias." Unlike the established grounds for disqualification, a "probability of bias" cannot be defined in any limited way. The Court's new "rule" provides no guidance to judges and litigants about when recusal will be constitutionally required. This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.

**I**

     There is a "presumption of honesty and integrity in those serving as adjudicators." *Withrow* v. *Larkin*, [421 U. S. 35, 47](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=US&vol=421&invol=35&pageno=47) (1975). All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise. See *Republican Party of Minn.* v. *White*, [536 U. S. 765, 796](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=US&vol=536&invol=765&pageno=796) (2002) (*Kennedy, J*., concurring) ("We should not, even by inadvertence, 'impute to judges a lack of firmness, wisdom, or honor' " (quoting *Bridges* v. *California*, [314 U. S. 252, 273](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=US&vol=314&invol=252&pageno=273) (1941))). . . .

     In any given case, there are a number of factors that could give rise to a "probability" or "appearance" of bias: friendship with a party or lawyer, prior employment experience, membership in clubs or associations, prior speeches and writings, religious affiliation, and countless other considerations. We have never held that the Due Process Clause requires recusal for any of these reasons, even though they could be viewed as presenting a "probability of bias." Many state *statutes* require recusal based on a probability or appearance of bias, but "that alone would not be sufficient basis for imposing a *constitutional* requirement under the Due Process Clause." . .

**II**

     In departing from this clear line between when recusal is constitutionally required and when it is not, the majority repeatedly emphasizes the need for an "objective" standard. *Ante*, at 1, 6, 9, 11-18. The majority's analysis is "objective" in that it does not inquire into Justice Benjamin's motives or decisionmaking process. But the standard the majority articulates--"probability of bias"--fails to provide clear, workable guidance for future cases. At the most basic level, it is unclear whether the new probability of bias standard is somehow limited to financial support in judicial elections, or applies to judicial recusal questions more generally.

     But there are other fundamental questions as well. With little help from the majority, courts will now have to determine:

1.      How much money is too much money? What level of contribution or expenditure gives rise to a "probability of bias"? Line drawing argument

2.      How do we determine whether a given expenditure is "disproportionate"? Disproportionate *to* *what*?

3.      Are independent, non-coordinated expenditures treated the same as direct contributions to a candidate's campaign? What about contributions to independent outside groups supporting a candidate?

4.      Does it matter whether the litigant has contributed to other candidates or made large expenditures in connection with other elections?

5.      Does the amount at issue in the case matter? What if this case were an employment dispute with only $10,000 at stake? What if the plaintiffs only sought non-monetary relief such as an injunction or declaratory judgment?

6.      Does the analysis change depending on whether the judge whose disqualification is sought sits on a trial court, appeals court, or state supreme court? Apply to other structures-analogy

7.      How long does the probability of bias last? Does the probability of bias diminish over time as the election recedes? Does it matter whether the judge plans to run for reelection?

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

9.      What if the case involves a social or ideological issue rather than a financial one? Must a judge recuse from cases involving, say, abortion rights if he has received "disproportionate" support from individuals who feel strongly about either side of that issue? If the supporter wants to help elect judges who are "tough on crime," must the judge recuse in all criminal cases?

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

11.     What if the supporter is not a party to the pending or imminent case, but his interests will be affected by the decision? Does the Court's analysis apply if the supporter "chooses the judge" not in *his* case, but in someone else's?

12.     What if the case implicates a regulatory issue that is of great importance to the party making the expenditures, even though he has no direct financial interest in the outcome (*e.g.,* a facial challenge to an agency rulemaking or a suit seeking to limit an agency's jurisdiction)?

13.     Must the judge's vote be outcome determinative in order for his non-recusal to constitute a due process violation? Applied conditions

14.     Does the due process analysis consider the underlying merits of the suit? Does it matter whether the decision is clearly right (or wrong) as a matter of state law?

15.     What if a lower court decision in favor of the supporter is affirmed on the merits on appeal, by a panel with no "debt of gratitude" to the supporter? Does that "moot" the due process claim?

16.     What if the judge voted against the supporter in many other cases?

17.     What if the judge disagrees with the supporter's message or tactics? What if the judge expressly *disclaims* the support of this person?

18.     Should we assume that elected judges feel a "debt of hostility" towards major *opponents* of their candidacies? Must the judge recuse in cases involving individuals or groups who spent large amounts of money trying unsuccessfully to defeat him?

19.     If there is independent review of a judge's recusal decision, *e.g.*, by a panel of other judges, does this completely foreclose a due process claim?

20.     Does a debt of gratitude for endorsements by newspapers, interest groups, politicians, or celebrities also give rise to a constitutionally unacceptable probability of bias? How would we measure whether such support is disproportionate?

21.     Does close personal friendship between a judge and a party or lawyer now give rise to a probability of bias?

22.     Does it matter whether the campaign expenditures come from a party or the party's attorney? If from a lawyer, must the judge recuse in every case involving that attorney?

23.     Does what is unconstitutional vary from State to State? What if particular States have a history of expensive judicial elections?

24.     Under the majority's "objective" test, do we analyze the due process issue through the lens of a reasonable person, a reasonable lawyer, or a reasonable judge? Nature of the test

25.     What role does causation play in this analysis? The Court sends conflicting signals on this point. The majority asserts that "[w]hether Blankenship's campaign contributions were a necessary and sufficient cause of Benjamin's victory is not the proper inquiry." *Ante*, at 15. But elsewhere in the opinion, the majority considers "the apparent effect such contribution had on the outcome of the election," *ante*, at 14, and whether the litigant has been able to "choos[e] the judge in his own cause," *ante*, at 16. If causation is a pertinent factor, how do we know whether the contribution or expenditure had any effect on the outcome of the election? What if the judge won in a landslide? What if the judge won primarily because of his opponent's missteps?

26.     Is the due process analysis less probing for incumbent judges--who typically have a great advantage in elections--than for challengers?

27.     How final must the pending case be with respect to the contributor's interest? What if, for example, the only issue on appeal is whether the court should certify a class of plaintiffs? Is recusal required just as if the issue in the pending case were ultimate liability?

28.     Which cases are implicated by this doctrine? Must the case be pending at the time of the election? Reasonably likely to be brought? What about an important but unanticipated case filed shortly after the election?

29.     When do we impute a probability of bias from one party to another? Does a contribution from a corporation get imputed to its executives, and vice-versa? Does a contribution or expenditure by one family member get imputed to other family members?

30.     What if the election is nonpartisan? What if the election is just a yes-or-no vote about whether to retain an incumbent?

31.     What type of support is disqualifying? What if the supporter's expenditures are used to fund voter registration or get-out-the-vote efforts rather than television advertisements?

32.     Are contributions or expenditures in connection with a primary aggregated with those in the general election? What if the contributor supported a different candidate in the primary? Does that dilute the debt of gratitude?

33.     What procedures must be followed to challenge a state judge's failure to recuse? May *Caperton* claims only be raised on direct review? Or may such claims also be brought in federal district court under 42 U. S. C. §1983, which allows a person deprived of a federal right by a state official to sue for damages? If §1983 claims are available, who are the proper defendants? The judge? The whole court? The clerk of court?

34.     What about state-court cases that are already closed? Can the losing parties in those cases now seek collateral relief in federal district court under §1983? What statutes of limitation should be applied to such suits?

35.     What is the proper remedy? After a successful *Caperton* motion, must the parties start from scratch before the lower courts? Is any part of the lower court judgment retained?

36.     Does a litigant waive his due process claim if he waits until after decision to raise it? Or would the claim only be ripe after decision, when the judge's actions or vote suggest a probability of bias?

37.     Are the parties entitled to discovery with respect to the judge's recusal decision?

38.     If a judge erroneously fails to recuse, do we apply harmless-error review?

39.     Does the *judge* get to respond to the allegation that he is probably biased, or is his reputation solely in the hands of the parties to the case?

40.     What if the parties settle a *Caperton* claim as part of a broader settlement of the case? Does that leave the judge with no way to salvage his reputation?

     These are only a few uncertainties that quickly come to mind. Judges and litigants will surely encounter others when they are forced to, or wish to, apply the majority's decision in different circumstances. Today's opinion requires state and federal judges simultaneously to act as political scientists (why did candidate X win the election?), economists (was the financial support disproportionate?), and psychologists (is there likely to be a debt of gratitude?).

     The Court's inability to formulate a "judicially discernible and manageable standard" strongly counsels against the recognition of a novel constitutional right. See *Vieth* v. *Jubelirer*, [541 U. S. 267, 306](http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=US&vol=541&invol=267&pageno=306) (2004) (plurality opinion) (holding political gerrymandering claims nonjusticiable based on the lack of workable standards); *id.*, at 317 (*Kennedy, J*., concurring in judgment) ("The failings of the many proposed standards for measuring the burden a gerrymander imposes ... make our intervention improper"). The need to consider these and countless other questions helps explain why the common law and this Court's constitutional jurisprudence have never required disqualification on such vague grounds as "probability" or "appearance" of bias.

**III**

**A**

     To its credit, the Court seems to recognize that the inherently boundless nature of its new rule poses a problem. But the majority's only answer is that the present case is an "extreme" one, so there is no need to worry about other cases . .

     But this is just so much whistling past the graveyard. Claims that have little chance of success are nonetheless frequently filed. The success rate for certiorari petitions before this Court is approximately 1.1%, and yet the previous Term some 8,241 were filed. Every one of the "*Caperton* motions" or appeals or §1983 actions will claim that the judge is biased, or probably biased, bringing the judge and the judicial system into disrepute. And all future litigants will assert that their case is *really* the most extreme thus far.. . .

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**B**

     And why is the Court so convinced that this is an extreme case? It is true that Don Blankenship spent a large amount of money in connection with this election. But this point cannot be emphasized strongly enough: Other than a $1,000 direct contribution from Blankenship, *Justice Benjamin and his campaign had no control over how this money was spent*.. . .

     Moreover, Blankenship's independent expenditures do not appear "grossly disproportionate" compared to other such expenditures in this very election. "And for the Sake of the Kids"--an independent group that received approximately two-thirds of its funding from Blankenship--spent $3,623,500 in connection with the election. App. 684a. But large independent expenditures were also made in support of Justice Benjamin's opponent. "Consumers for Justice"--an independent group that received large contributions from the plaintiffs' bar--spent approximately $2 million in this race. *Id.*, at682a-683a, n. 41. Did Justice Kennedy lie or just shad the truth in not mentioning this?And Blankenship has made large expenditures in connection with several previous West Virginia elections, which undercuts any notion that his involvement in this election was "intended to influence the outcome" of particular pending litigation. Brief for Petitioners 29.

     It is also far from clear that Blankenship's expenditures affected the outcome of this election. Justice Benjamin won by a comfortable 7-point margin (53.3% to 46.7%). Many observers believed that Justice Benjamin's opponent doomed his candidacy by giving a well-publicized speech that made several curious allegations; this speech was described in the local media as "deeply disturbing" and worse. App. 679a, n. 38. Justice Benjamin's opponent also refused to give interviews or participate in debates. All but one of the major West Virginia newspapers endorsed Justice Benjamin. Justice Benjamin just might have won because the voters of West Virginia thought he would be a better judge than his opponent. Unlike the majority, I cannot say with any degree of certainty that Blankenship "cho[se] the judge in his own cause." *Ante*, at 16. I would give the voters of West Virginia more credit than that.

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     It is an old cliché, but sometimes the cure is worse than the disease. I am sure there are cases where a "probability of bias" should lead the prudent judge to step aside, but the judge fails to do so. Maybe this is one of them. But I believe that opening the door to recusal claims under the Due Process Clause, for an amorphous "probability of bias," will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts. I hope I am wrong.

     I respectfully dissent.

***Justice Scalia*, dissenting**.

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     The decision will have the opposite effect. What above all else is eroding public confidence in the Nation's judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice. The Court's opinion will reinforce that perception, adding to the vast arsenal of lawyerly gambits what will come to be known as the *Caperton* claim. The facts relevant to adjudicating it will have to be litigated--and likewise the law governing it, which will be indeterminate for years to come, if not forever. Many billable hours will be spent in poring through volumes of campaign finance reports, and many more in contesting nonrecusal decisions through every available means.

     A Talmudic maxim instructs with respect to the Scripture: "Turn it over, and turn it over, for all is therein." The Babylonian Talmud, Tractate Aboth, Ch. V, Mishnah 22 (I. Epstein ed. 1935). Divinely inspired text may contain the answers to all earthly questions, but the Due Process Clause most assuredly does not. The Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution. Alas, the quest cannot succeed--which is why some wrongs and imperfections have been called nonjusticiable. In the best of all possible worlds, should judges sometimes recuse even where the clear commands of our prior due process law do not require it? Undoubtedly. The relevant question, however, is whether we do more good than harm by seeking to correct this imperfection through expansion of our constitutional mandate in a manner ungoverned by any discernable rule. The answer is obvious.