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

The selection of state judges has become increasingly controversial. In many states, judges are elected or subject to retention elections after their initial appointment. Judicial elections are often low-profile affairs, but in recent years state courts have been recognized as important political actors and interest groups have paid more attention to the selection of state judges. The modern politicization of judicial elections is often traced to the defeat of California Chief Justice Rose Bird in her 1986 retention election. Opposition to Bird focused particularly on her overwhelming record of votes blocking the imposition of the death penalty in California.

Subsequent debates have focused either on the perception and reality of corruption in judicial elections or the influence of political and social forces on judicial decision making. Like other elected officials, judges must raise money and campaign in order to keep their offices. Wealthy individuals and organizations with interests in the state courts like businesses and trial lawyers have been the most willing to offer support for judicial candidates. As with other government officials, these practices have given rise to concerns that outside actors are buying influence by helping their favored candidates win judicial office. Regardless of how judicial elections are financed or campaigns are run, judges without life tenure may worry that they may be held accountable for their decisions, as Chief Justice Bird was in California. In 2009, for example, the Iowa state supreme court unanimously found that that the state constitution required same-sex marriage. In 2010, all three of the Iowa justices who stood for retention elections were defeated.[1]

In 2002, A.T. Massey Coal Co. lost a jury trial in West Virginia over a contract dispute with Hugh Caperton and a group of mining and coal sales interests. The verdict against Massey was in the amount of $50 million. The chairman of Massey subsequently gave $2.5 million to a political organization dedicated to defeating a sitting state supreme court justice in the 2004 elections and spent another $500,000 in independent expenditures to support the challenger in the election. That $3 million expenditure by itself constituted well over a majority of the funds spent in the campaign. The incumbent was defeated.

Caperton asked that the newly elected Justice Brent Benjamin recuse himself from any suit involving Massey Coal, but Benjamin denied the request on the grounds that there was not objective evidence that he could not be fair and impartial. Massey Coal then filed an appeal with the state supreme court. In a 3-2 decision, the West Virginia supreme court overturned the jury verdict. Caperton moved that three of the justices recuse themselves and that the state court rehear the case. Two of the justices agreed to step aside. Benjamin again declined, but one of the other members of the majority had been photographed vacationing in the French Riveria with the chairman of Massey Coal while the case was under consideration (one of the dissenters also recused themselves). With two lower court judges temporarily appointed to sit in on the case, the court once again divided 3-2 in favor of Massey Coal.

Caperton appealed to the U.S. Supreme Court arguing that the failure of Benjamin to recuse himself was a violation of constitutional due process. In a 5-4 decision, the U.S. Supreme Court agreed. What standard does the Court set for judicial recusals? Does the due process clause set the standard for judicial recusals, or is this only a floor? How well can this standard be reconciled with the realities of judicial elections and a political judicial selection process? In the California same-sex marriage case, it was revealed that the trial judge who ruled in favor same-sex marriage was in a committed same-sex relationship. Should he have been required to recuse himself?[2]

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[1] See generally, Brandice Canes-Wrone, Tom S. Clark, and Jee-Kwang Park, "Judicial Independence and Retention Elections," *Journal of Law, Economics and Organization* (2012); Sanford C. Gordon and Gregory A. Huber, "The Effect of Electoral Competitiveness on Incumbent Behavior," *Quarterly Journal of Political Science* 2 (2007): 107.

[2] The Ninth Circuit concluded that he did not. *Perry v. Schwarzenegger*, Memorandum Regarding Motion to Disqualify, United States Court of Appeals for Ninth Circuit (January 4, 2011).

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JUSTICE KENNEDY delivered the opinion of the Court.

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It is axiomatic that "[a] fair tribunal is a basic requirement of due process." As the Court has recognized, however, "most matters relating to judicial disqualification [do] not rise to a constitutional level." The early and leading case on the subject is *Tumey v. Ohio* (1927). There, the Court state that "matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion."

The *Tumey* Court concluded that the due process clause incorporated the common-law rule that a judge must recuse himself when he has "a direct, personal, substantial, pecuniary interest" in a case." . . . Personal bias or prejudice "alone would not be a sufficient basis for imposing a constitutional requirement under the due process clause."

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. . . .

. . . .

The difficulty of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. . . . [T]he due process clause has been implemented by objective standards that do not require proof of actual bias. . . . In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weaknesses," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow v. Larkin* (1975).

We turn to the influence at issue in this case. 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. 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 a judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount of money spent in the election, and the apparent effect such contributions had on the outcome of the election.

. . . .

Whether [these] campaign contributions were a necessary and sufficient cause of Benjamin's victory is not the proper inquiry. . . . [The] campaign contributions . . . had a significant and disproportionate influence on the election outcome. And the risk that [the contributor's] influence engendered actual bias is sufficiently substantial that it "must be forbidden if the guarantee of due process is to be adequately implemented."

The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical. . . . Although there is no allegation of a *quid pro quo* agreement, the fact remains that [the] extraordinary contributions were made at a time when he had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when – without the consent of the other parties – a man chooses the judge in his own cause. . . .

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. . . . 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.

[Reversed and remanded]

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA, JUSTICE THOMAS, and JUSTICE ALITO, dissenting.

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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 a 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 of 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 isolated failure to recuse in a particular case.

There is a "presumption of honesty and integrity in those serving as adjudicators." *Winthrow v. Larkin* (1975). . . .

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 of lawyer, prior employment experience, membership in clubs or associations, prior speeches and writings, religious affiliations, 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 a sufficient basis for imposing a constitutional requirement under the due process clause." . . . .

. . . .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. . . .

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To its credit, the Court seems to recognize that the inherently boundless nature of its new rule is a problem. But the majority's 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. . . .

Extreme cases often test the bounds of established legal principles. There is a cost to yielding to the desire to correct the extreme case, rather than adhering to the legal principle. The cost has been demonstrated so often that it is capture in a legal aphorism: "Hard cases make bad law."

. . .

But why is the Court so convinced that this is an extreme case? . . .

[The] independent expenditures do not appear "grossly disproportionate" compared to other such expenditures in this very election. . . [L]arge independent expenditures were also made in support of Justice Benjamin's opponent. "Consumers for Justice" – an independent group that received large contributions from the plaintiff's bar – spent approximately $2 million in this race. [Massey Coal's chairman] 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.

It is also far from clear that [his] expenditures affected the outcome of this election. Justice Benjamin won by a comfortable 7-point margin. . . .Many observers believed that Justice Benjamin's opponent doomed his [own] candidacy. . . . 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 [Massey Coal] "cho[se] the judge in his own cause." I would give the voters of West Virginia more credit than that.

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I respectfully dissent.

JUSTICE SCALIA, dissenting.

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