Lessons from America: judicial elections and the law of bias

A recent decision of the Supreme Court of the United States, *Caperton v AT Massey Coal Co,* is an important re-statement of the law in that country in relation to the circumstances in which a judge should, or may, recuse him or herself on the ground of bias.

The decision also identifies some of the problems that may arise where, as is the case in many states in America, judges are appointed by way of popular election. Although the facts in the case were unusual, even unique, Justice Kennedy, delivering the opinion of the court, remarked that 'the facts now before us are extreme by any measure'.

Caperton involved a coal producer operating in West Virginia and Eastern Kentucky. In August 2002 a jury in West Virginia found the coal producer guilty of fraudulent misrepresentation, concealment and tortious interference with existing contractual relations. The jury awarded the plaintiff the sum of $50 million in compensatory and punitive damages.

As noted by the US Supreme Court, the West Virginia state trial court found that the coal producer had:

> … intentionally acted in utter disregard of [*Caperton's*] rights and ultimately destroyed [*Caperton's*] businesses because, after conducting cost benefit analyses, [*the coal producer*] concluded it was in its financial interest to do so.

West Virginia is an election state – that is, it appoints its judges through a process of popular election. Elections were due to be held in 2004. A Justice McGraw was then a sitting judge. He stood for re-election. He was opposed by a local attorney, Brent Benjamin.

The chairman, chief executive officer and president of the coal producer, a Mr Don Blankenship, decided to support Brent Benjamin's campaign for election. Justice Kennedy observed as follows (references omitted):

> In addition to contributing the $1,000 statutory maximum to Benjamin's campaign committee, Blankenship donated almost $2.5 million to "And For The Sake of the Kids," a political organisation formed under 26 U.S.C. §527. The §527 organization opposed McGraw and supported Benjamin. Blankenship's donations accounted for more than two-thirds of the total funds it raised. This was not all. Blankenship spent, in addition, just over $500,000 on independent expenditures – for direct mailings and letters soliciting donations as well as television and newspaper advertisements – "to support… Brent Benjamin".

Justice Kennedy went on (references omitted):

> 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. Caperton contends that Blankenship spent $1 million more than the total amount spent by the campaign committees of both candidates combined.

The elections were duly held. Brent Benjamin won. He took his place on the West Virginia Court.

In December 2006 the coal producer filed a petition for appeal to challenge the jury verdict.

In November 2007 the West Virginia Supreme Court of Appeals upheld the appeal, 3 to 2. The majority opinion was written by the then chief justice, who was joined by Justice Maynard and the newly elected Justice Benjamin.

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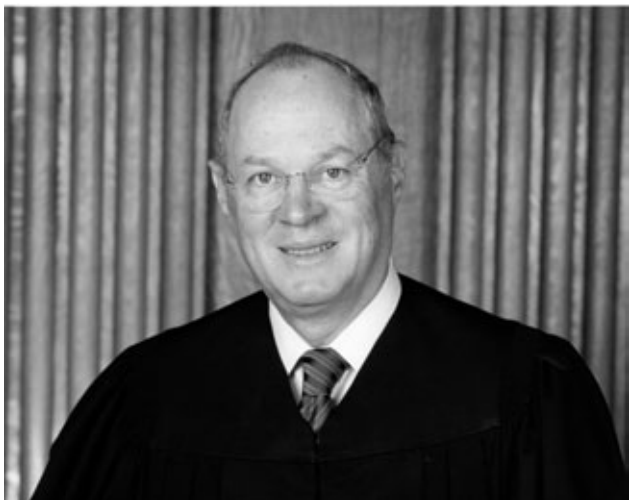
Caperton sought a re-hearing of the appeal. The parties made various applications for disqualification of a number of the judges sitting on the appeal. Among other things, Caperton had obtained photographs of Justice Maynard vacationing with Blankenship in the French Riviera while the case was pending. In the light of this evidence Justice Maynard recused himself. Justice Benjamin denied Caperton's recusal motion.

At the re-hearing of the appeal Justice Benjamin sat as acting chief justice. Caperton made yet another application for Benjamin to disqualify himself; again Justice Benjamin refused to withdraw.

In April 2008 the West Virginia Supreme Court of Appeals, following the re-hearing of the appeal, again reversed the jury verdict. Justices Davis, Benjamin and Fox allowed the appeal; two others justices dissented.

The US Supreme Court decided by a majority of five to four that Justice Benjamin should have recused himself by reason of a probability or risk of actual bias.



Justice Kennedy of the United States Supreme Court.

The opinion of the majority was delivered by Justice Kennedy, who held:

> Not every campaign contribution by litigant or attorney creates probability of bias that requires a judge's recusal, but this is an exceptional case.

Justice Kennedy continued:

> 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. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal.

The opinion of the minority was delivered by Chief Justice Roberts, with whom Justice Scalia, Justice Thomas and Justice Alito joined.

Chief Justice Roberts noted at the outset of his judgment:

> Until today, we have recognised 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 precedence.

Roberts CJ was critical of what he apprehended would result from the decision of the majority, namely an uncertain and amorphous test for probability of bias in lieu of the current test. Roberts CJ identified no less than forty "fundamental questions" which courts will now have to determine – the first three of which questions were as follows:

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

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?

After reciting these and a further 37 questions Roberts CJ held:

> 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?).

Roberts CJ further expressed the view that the court's inability to formulate a 'judicially discernible and manageable standard' strongly counselled against the recognition of a novel constitutional right.

Roberts CJ concluded his decision as follows:

> 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.

The facts in *Caperton* reveal the problems that can arise when judges are elected – even if those facts were an extreme case. In a recent speech the Chief Justice of the High Court of Australia, Robert French, discussed *Caperton* in the context of a speech delivered in July this year entitled 'In Praise of Unelected Judges', expressing the view that *Caperton* and decisions like it 'demonstrate powerfully why we should not have elected judges'.

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