

CAPERTON AND THE COURTS: DID THE FLOODGATES OPEN?

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REMARKS OF ADAM LIPTAK

Thank you, Sacha. It's a pleasure to be here with all of you today. As Wendy was saying, this is a fascinating and urgent topic, and I don't know about the other panels, but this panel's going to be really good.

Before I introduce the panelists, I just want to set the stage and give a little background. I know most of you know what we're talking about when we talk about *Caperton* but just to make sure we're all on the same page. As Wendy was suggesting, this whole issue is an artifact of a distinctively American practice of electing judges. As you know our federal judges are appointed for life, but many of our state courts, states, have chosen to strike the balance between accountability and independence, more in the direction of accountability.

The rest of the world thinks this is a ludicrous way to run a justice system. With the exception, I think, of the Japanese Supreme Court and a couple of cantons in Switzerland, nobody else thinks it's a good idea to elect judges. But when you ask federal judges about all of this, they may not be crazy about the practice, but they say if you're

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going to have elected judges, you're going to have the First Amendment apply to judicial elections and they're going to be run like any other election. So, Justice Scalia in the oral argument in a key 2002 case, *Republican Party of Minnesota v. White*,¹ said something like the following: "maybe you shouldn't have judicial elections, it may be a very bad idea, but as long as you have it, I don't see the interest in keeping the electorate from being informed."² And that has meant that judicial elections look much like any other elections of people in the political branches, with one exception, says the Supreme Court, and that's why we're here today. There may be a way to address the issues this gives rise to on the back-end through recusal.

So in 2009 the Supreme Court in a 5-4 decision in the *Caperton* case issues a decision on this question,³ and it's a good case from a journalist's perspective, because it involved some colorful characters. Two main protagonists: one a coal company executive named Don Blankenship, who has a kind of mustache-curling quality, and—to support that assertion, yesterday he was indicted in connection with a mining disaster⁴—he was an executive of the Massey Energy company. Massey Energy loses a \$50 million dollar verdict, and it's clear this verdict is going to West Virginia's supreme court and Mr. Blankenship decides it'd be a good idea to spend three million dollars in support of his candidate. Only \$1000 was a contribution and this will probably turn out to be something that matters. The rest of it was independent expenditures. His candidate, Brent Benjamin, is elected and casts the deciding vote to throw out the fifty-million-dollar verdict. Justice Kennedy, in a 5-4 decision joining the Court's four liberal members, says that's a due process problem.⁵ Many litigants might think it's a due process problem if the judge hearing his or her case was elected with the help of \$3 million dollars of an interested party's money. But Kennedy, in a typically Kennedy-esque opinion, gives fuzzy guidance at best. He makes clear repeatedly that this is an extreme case, that this particular thing violates due process, but maybe

1. 536 U.S. 765 (2002).

2. Transcript of Oral Argument at 45, *White*, 536 U.S. 765 (No. 01-521), http://www.supremecourt.gov/oral_arguments/argument_transcripts/01-521.pdf. ("Now, [judicial elections] may be a very bad idea, but as long as [the First Amendment's] in your constitution, I find it hard to believe that it is a significant State interest of Minnesota to prevent elections from being informed.")

3. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

4. See, e.g., Gail Sullivan, *Ex-Massey CEO Don Blankenship Indicted for Coal Mine Disaster that Killed 29*, WASH. POST: MORNING MIX (Nov. 14, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/11/14/ex-massey-ceo-don-blankenship-indicted-for-coal-mine-disaster-than-killed-29/>.

5. *Caperton*, 556 U.S. at 876–79.

all other kinds of contributions and expenditures do not.⁶ But he does say, as Wendy was saying, that the Constitution only sets a floor, and the states may adopt recusal standards more rigorous than due process requires.⁷

There is a vigorous, caustic dissent of a kind I think Chief Justice Roberts has ratcheted back from writing, joined by the Court's most conservative members, in which he predicts there will be of a flood of *Caperton* motions, of people objecting to all kinds of judges in and all kinds of places.⁸ And he says that the Kennedy opinion leaves unanswered questions and goes on to pose forty of those questions.⁹ The only other thing I'll say before we move to the panel is there seems to be a little tension between this *Caperton* decision and *Citizens United*,¹⁰ which comes only seven months later and is again written by Justice Kennedy, but now he joins the Court's four more conservative members.¹¹ So the only person in the majority in both *Caperton* and *Citizens United* is Justice Kennedy, and now he says that speech about our elected representatives in the political branches can only be limited if there's proof of actual quid pro quo corruption in the sense of bribery.¹²

Now in *Caperton*, he said that Brent Benjamin should be recused because he may have felt a debt of gratitude towards the guy spending money on his behalf.¹³ On the political side that doesn't seem to be an issue, so it's hard to reconcile the two, or if you can, I reconcile them as thinking we trust our judges less than we trust our politicians. Now, *Citizens United* is not wholly unrelated to judicial elections, and Justice Stevens, in his dissent, drew the comparison; he said, "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."¹⁴ So we have the

6. *Id.* at 886–88.

7. *Id.* at 889.

8. *Id.* at 899 (Roberts, C.J., dissenting).

9. *Id.* at 893–98.

10. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 345 (2009).

11. *See, e.g.*, Adam Liptak, *Caperton After Citizens United*, 52 ARIZ. L. REV. 203, 203 (2010) ("They were decided just seven months apart and are in some ways hard to reconcile.").

12. *See Citizens United*, 558 U.S. at 458 (Stevens, J., dissenting) (emphasizing that the *Caperton* Court "accepted the premise that, at least in some circumstances, independent expenditures on candidate elections will raise an intolerable specter of quid pro quo corruption").

13. *Caperton*, 556 U.S. at 882 (majority opinion).

14. *Citizens United*, 558 U.S. at 460 (Stevens, J., dissenting) (citing Sandra Day O'Connor, *Justice for Sale*, WALL ST. J. (Nov. 15, 2007, 12:01 AM), <http://www.wsj.com/articles/SB119509262956693711>; and then citing Brief of *Amicus Cu-*

Chief Justice predicting a flood of *Caperton* motions and Justice Stevens predicting a flood of spending in judicial elections, and we'll explore if one or both of them is right.

And let me now introduce our panelists in the order that they'll speak. Keith Swisher is Associate Dean and a professor at Arizona Summit Law School and has written a great piece, which you should look up, in which he answers one by one the Chief Justice's forty questions. James Sample is a real student of these matters, a professor at Hofstra Law School and formerly counsel here at the Brennan Center. Brad Smith is a professor at Capital University visiting this year at West Virginia University Law School and previously served on the Federal Election Commission.

Keith, what kind of floodgates should we be worried about?

REMARKS OF KEITH SWISHER

Thank you, Adam. I was one of not few people who wanted the floodgates to open to some extent and expected to be swimming but was left to some extent high and dry. Happy to be here this morning. It's fortuitous, but it's perhaps good that I'm one of the first panelists today because I have one of the most optimistic and arguably naïve outlooks as to *Caperton*, so the panelists now and throughout the day can issue insightful critiques hereafter. But preliminarily, let me give a lot of thanks for being at this important forum, to the renowned Adam Liptak for shepherding and moderating our panel, to the *NYU Journal of Legislation and Public Policy*, Sacha Baniel-Stark, Eddie Rooker, all of the editors, and to the ABA Center for Professional Responsibility and the Ethics Committee, which have attempted to promote reform in the areas under review today, and last but not least to the Brennan Center for its irreplaceably pivotal role before, in, and after *Caperton*. So thank you for permitting me to participate in this forum on this critical case on judicial ethics and money in government.

There are just two parts to my remarks: (1) I wanted to talk a little bit about the legal landscape, briefly—I won't do it justice—and (2) move to a little love letter that I wrote to the five Justices in the *Caperton* majority. Before *Caperton*, even with the surge of money into what may have once been sleepy judicial elections, applicable recusal cases and ethics opinions were notably divided and occasionally timid in *White's* wake—that is, *Republican Party of Minnesota v.*

riae Justice at Stake et al. in Support of Appellee at 2, Citizens United, 558 U.S. 310 (No. 08-205)).

*White*¹⁵—and what to make of independent expenditures increasing as well was anyone’s guess. Moreover, we hobbled ourselves in our dialogue with the causation question, namely, whether dollars followed votes or votes followed dollars. While the causal question presents a difficult empirical puzzle, its difficulty should not have slowed progress then and certainly should not slow progress now. First, the public, lawyers, and even many judges themselves believe that campaign spending influences judges,¹⁶ and therefore dollars, by both appearance and admission, are corrupting to some extent. And second, even naïvely assuming that money follows votes and never the other way around, we would still be implicitly conceding a very sobering fact: those with the money may choose the judiciary. In contrast, those who cannot afford to spend money, or think of themselves as too principled to participate in any event, will be unable to elect or re-elect the judges embodying their preferred judicial philosophy.

Enter *Caperton*. By using a realistic appraisal of psychological tendencies and human weaknesses and by coupling it to due process, *Caperton* took us one small step out of this thicket and shifted the focus to the serious risks of actual bias or pre-judgment, the debts of gratitude, or possible temptations jeopardizing judicial impartiality and independence in elective environments. This thus sets the stage, again not fully doing it justice, but now on to my little love letter that I wrote to the five Justices in the majority.

Many of us have puzzled over, delighted in, or criticized heavily Chief Justice Roberts’s memorable decision to use his dissent in *Caperton* to spin off twenty questions times two about the implications of the majority opinion that Adam laid out for you. In other words, the Chief Justice thought it useful to raise forty counterfactual questions not directly—and for some, even indirectly—raised by the *Caperton* case.¹⁷ So, in tribute or rebellion, I have therefore posed my remarks in a similar twenty-point fashion.

Why twenty versus forty? Because out of respect for your time and attention, and that of my copanelists, I have reduced the cycle of abuse by half, by only going over twenty points. But in light of their nevertheless high number, their explication will be admittedly thin and glossy, but like *Caperton* they may serve to spark debate.

15. 536 U.S. 765 (2002).

16. See, e.g., ADAM SKAGGS, BRENNAN CTR. FOR JUSTICE, BUYING JUSTICE: THE IMPACT OF *CITIZENS UNITED* ON JUDICIAL ELECTIONS 4 (2010) (reporting survey data on public perceptions of ties between campaign donations and judicial decision-making).

17. *Caperton*, 556 U.S. at 893–98 (Roberts, C.J., dissenting).

These points are roughly broken into three sections. One is *Caperton's* role in boosting recusal reform; two, *Caperton's* preliminary role in keeping the First Amendment out of recusal law; and then finally three, some additional implications, such as what is the lawyer's role in all of this?

A. *Boosting Recusal Reform on All Levels*

Caperton warrants some attention, then and now, by:

(1) Causing approximately thirty percent of states to adopt more money-sensitive substantive and procedural recusal reform;¹⁸

(2) Causing attitudinal shifts and boosting confidence in judicial regulators and certain (but certainly not all) courts;¹⁹

(3) Extending due process to—and sparking renewed debate, research, and reform on—the significantly corrupting effects of contributions on the actual and apparent biases of elected judges;²⁰

(4) Recognizing critically that those same, or at least similar, effects follow from independent expenditures, not merely contributions, which as you know in *Caperton* were only approximately \$1,000;²¹

(5) Causing renewed efforts and some success in permitting or requiring first- or second-order review by an independent judge whose impartiality has not been questioned;

(6) Recognizing and arguably even encouraging that state-based recusal laws and procedures may be “more rigorous” than the due pro-

18. See, e.g., Ryan M. McInerney, *Rethinking Judicial Disqualification Based on Campaign Contributions: A Practical Critique of Post-Caperton Proposals and a Call for Greater Transparency*, 11 NEV. L.J. 805, 815 (2011) (observing that more than a dozen states have taken at least tentative steps to revisit their standards for judicial recusal in the years since *Caperton* (citing *Recusal Reform in the States After Caperton v. Massey*, BRENNAN CTR. FOR JUST. (Nov. 20, 2010), <http://www.brennancenter.org/analysis/2009-2010-state-judicial-reform-efforts>)); James J. Sample, *Caperton: Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. 293 (2010) (noting early reform efforts in *Caperton's* wake).

19. See, e.g., JOHN ROBINSON, JUSTICE AT STAKE CAMPAIGN, TESTIMONY TO THE SPECIAL COMMITTEE ON JUDICIAL DISCIPLINE AND RECUSAL 2 (2010), http://www.justiceatstake.org/file.cfm/media/news/Justice_at_Stake_Testimony_to_the_W_91AB50503870E.pdf (“Strong recusal rules protect the courts and build public trust by removing even the appearance that justice might be up for sale.”).

20. See generally, e.g., Gabriel D. Serbulea, *Due Process and Judicial Disqualification: The Need for Reform*, 38 PEPP. L. REV. 1109 (2011); Andrey Spektor & Michael Zuckerman, *Judicial Recusal and Expanding Notions of Due Process*, 13 U. PA. J. CONST. L. 977 (2011); Penny J. White, *Relinquished Responsibilities?*, 123 HARV. L. REV. 120 (2009).

21. *Caperton*, 556 U.S. at 873 (majority opinion).

cess floor.²² And even Chief Justice Roberts agreed with that in his dissent;²³

(7) Encouraging such laws and canons because, according to the Court, they are “[t]he principal safeguard against judicial campaign abuses’ that threaten to imperil ‘public confidence in the fairness and integrity of the nation’s elected judges’”;²⁴

(8) Supporting explicitly and implicitly the ubiquitous standard that disqualification is mandatory “in any proceeding in which the judge’s impartiality might reasonably be questioned”;²⁵

(9) Suggesting arguable approval of the controversial “appearance of impropriety” standard, which is contravened whenever “the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired”;²⁶

(10) Exposing—eventually—the deficient ability of many top state-court judges to recognize the corrosive effects of money on judges and to enact prophylactic measures to protect elected judges from these apparent and actual effects. Although casting blame is surely unproductive, certain states such as Wisconsin²⁷ have flopped, while others such as California²⁸ and New York²⁹ have excelled in their post-*Caperton* reform efforts;

22. *Id.* at 889 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986)).

23. *Id.* at 893 (Roberts, C.J., dissenting) (“States are, of course, free to adopt broader recusal rules than the Constitution requires . . .”).

24. *Id.* at 889 (majority opinion) (alteration in original) (quoting Brief of the Conference of Chief Justices as *Amicus Curiae* in Support of Neither Party at 4, 11, *Caperton*, 556 U.S. 868 (No. 08-22)).

25. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A) (AM. BAR ASS’N 2011).

26. *Caperton*, 556 U.S. at 888 (citing MODEL CODE OF JUDICIAL CONDUCT Canon 2A cmt. (2004) (AM. BAR ASS’N, amended 2011); and then citing W. VA. CODE OF JUDICIAL CONDUCT Canon 2A & cmt. (2009)).

27. *See* WIS. SUP. CT. R. 60.04(7)–(8) (rejecting the notion—arguably required in certain cases by *Caperton* and due process—that contributions or independent expenditures may warrant recusal).

28. *See* CAL. CIV. PROC. CODE § 170.1(9)(A) (West 2011) (requiring recusal whenever a “judge has received a contribution in excess of one thousand five hundred dollars (\$1500) from a party or lawyer in the proceeding,” and the contribution was received either “in support of the judge’s last election, if the last election was within the last six years,” or “in anticipation of an upcoming election”).

29. *See, e.g.*, *Important Information Related to: Part 151—Rules Governing the Assignment of Cases Involving Contributions to Judicial Campaigns*, N.Y. ST. UNIFIED CT. SYS., <https://www.nycourts.gov/rules/chiefadmin/151-intro.shtml> (last updated Apr. 26, 2013) (describing New York court rules that were developed in the wake of *Caperton* and that govern the assignment of cases that could pose conflicts of interest based on judicial campaign contributions).

(11) Enabling reformists—following the failures just listed—to refocus on more capable audiences and more palatable reform.

B. Leaving the First Amendment on the Campaign Trail and Off of Recusal Law

And shifting more to the First Amendment:

(12) Rejecting the invitation of First Amendment jurisprudence to overreach into recusal law,³⁰ and:

(13) Like Chief Justice Roberts, I stretch my questions a little bit—thirteen, setting the stage for the dynamic duo of *Caperton* and *Carrigan*³¹ in 2011, whose confluence is commendable by:

(14) Recognizing the historical pedigree and constitutional legitimacy of recusal laws;

(15) Solidifying the distinction between campaign-trail conduct, such as campaign speeches or sending a solicitation letter to an unknown number of lawyers asking for contributions, on the one hand, and official conduct, such as recusing or failing to recuse yourself from voting, on the other hand;³²

(16) Recognizing the difference between judicial regulation and legislative regulation—and that difference was further recognized in both *Citizens United*³³ and *Carrigan*.³⁴

C. Additional Implications: Judges as Trustees, Lawyers as Contributors, and Miscellany

Moving, finally, to some additional implications:

(17) Starting or perhaps sparking, arguably, the conceptualization of judges as trustees—who own no part of cases, and have no standing or interest to retain their cases or their votes on cases—paving the way for potentially healthier and more accurate recusal practice;

(18) Enabling renewed scrutiny of lawyers and law firms' significant and oft-problematic contributions to judges before whom they appear. If one had asked, although few did, where were the lawyers

30. See, e.g., Spektor & Zuckerman, *supra* note 20, at 996–1004 (considering judicial recusal law vis-à-vis modern First Amendment jurisprudence).

31. Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2347 (2011) (holding that a legislative recusal law did not contravene First Amendment protections of speech and relying on the historical pedigree of recusal law in arriving at this conclusion).

32. See Keith Swisher, *Recusal, Government Ethics, and Superannuated Constitutional Theory*, 72 MD. L. REV. 219, 232–33, 233 n.55 (2012) (discussing the distinction between “campaign-trail conduct” and “acts or omissions in office”).

33. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 360 (2010).

34. See *Carrigan*, 131 S. Ct. at 2348.

when judicial campaign spending was rising to an alarming high, the answer would have been in part that they were contributing mightily to the problem by giving money to judges before whom they appeared.³⁵ As so-called “officers of the court,”³⁶ contributing has paradoxically been both appropriate and inappropriate at the same time. Many of us believe that these contributions should be disclosed just like corporate disclosure statements, and many of us in the room are interested in both legal and judicial ethics, moreover, and *Caperton* led more of us to explore and scrutinize this intersection;

(19) Giving us the comically unforgettable name “And for the Sake of the Kids,”³⁷ and with it, energizing our concern over the vehicles through which money travels in our elections, both judicial and beyond, and finally;

(20) Allowing many of us to play the “Twenty Questions” game times two on a topic as interesting and compelling as this. Thank you.

Adam Liptak:

Thank you, Keith. James, would you respond to each of those twenty points?

REMARKS OF JAMES SAMPLE

Absolutely. Neither the *Caperton* plaintiffs nor the majority in the Supreme Court made this a constitutional case. *Caperton* became a constitutional case because of the impotence of state process, because of our generally impotent judicial ethics rules, including the rule that was at issue for Brent Benjamin. Save for the Due Process Clause, there was no other remedy for the wrong of one judge’s utter refusal to comply with even the most basic norms of the applicable, general “might reasonably be questioned” recusal provision.³⁸ To that end, *Caperton* the case is about much more than three million dollars. It’s about what Charlie Geyh rightly calls “the questionable practice of relying too heavily on judges to evaluate their own disqualification.”³⁹

35. See, e.g., Keith Swisher, *Legal Ethics and Campaign Contributions: The Professional Responsibility to Pay for Justice*, 24 GEO. J. LEGAL ETHICS 225 (2011).

36. See MODEL RULES OF PROF’L CONDUCT r. 3.3 cmt. 2 (AM. BAR ASS’N 2013) (referencing “the special duties of lawyers as officers of the court”).

37. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 873 (2009) (discussing And for the Sake of the Kids, a political group through which Blankenship supported Justice Benjamin over Justice McGraw).

38. *Caperton*, 556 U.S. at 888.

39. Eliza Newlin Carney, *A Win for Fairer Courts: The Caperton Ruling Will Establish Clearer Recusal Rules for Judges Who May Face Conflicts of Interest*, NAT’L J. (June 15, 2009), reprinted at National Journal: *A Win for Fairer Courts*, DEMOC-

In line with Keith's comments regarding the dissent: the dissent chastised the majority for serving one of the Court's most sacred roles—that of establishing a constitutional floor, a constitutional outer boundary, without drawing unnecessarily bright lines that address questions that were not before the Court in *Caperton* itself. The non-issue of the floodgates opening vis-à-vis recusal motions and *Caperton* motions became an issue only because the ostensible judicial minimalists on the Court chose to reach beyond the four corners of the *Caperton* case itself to speculate.⁴⁰ If the Court had done nothing in *Caperton*, the line-drawing questions emphasized in dissent could just as easily be flipped. What if Blankenship had spent ten million dollars supporting Brent Benjamin? What if he'd spent one hundred million dollars? What if Blankenship had accounted for the majority of the campaign support that every one of the members of the West Virginia Supreme Court had received? What if Brent Benjamin had been with then-Chief Justice Spike Maynard and Don Blankenship in the French Riviera while this very case was pending before the Supreme Court of Appeals of West Virginia? What if Adam's reporting—including a photo of that vacation—had not appeared on the pages of the *New York Times*?⁴¹ It's quite possible that this case would have never seen the inside of the U.S. Supreme Court. Is there any level at which due process would have been implicated for the Justices in dissent? If so, what is that level? Would Hugh Caperton and Harman Mining have had their fair hearing in any of those instances I suggested?

All of which is to say that the slippery-slope arguments and the floodgates arguments make for sassy copy in dissent, but the reality is that they do very little substantive lifting. Is *Caperton* a narrow decision? Yes. Is it, in Adam's words, a "fuzzy" decision?⁴² Definitely. Is it nonetheless hugely significant? Absolutely. *Caperton* makes credible a proposition that I can personally assure you was just a few years ago considered a wild-eyed voice in the wilderness, maybe the—to use Keith's phrase—optimistic and naïve proposition that campaign expenditures in a judicial election implicated not one but two constitutional amendments. I say, not lightly, that no journalist has covered this case or these issues at large more thoroughly than Adam. That

RACY 21 (June 15, 2009), <http://www.democracy21.org/archives/newswire/national-journal-a-win-for-fairer-courts/>.

40. See *Caperton*, 556 U.S. at 899 (Roberts, C.J., dissenting) (expressing concern about the implications of the majority's holding for cases beyond the one at bar).

41. Adam Liptak, *Motion Ties W. Virginia Justice to Coal Executive*, N.Y. TIMES (Jan. 15, 2008), <http://www.nytimes.com/2008/01/15/us/15court.html>.

42. See *supra* notes 5–6 and accompanying text.

said, his counterparts across the pond at the *Economist*, perhaps benefiting from an international perspective on this uniquely American practice of electing judges, put the real problem this way: “Mr. Benjamin found he was unbiased after deliberating with himself.”⁴³ If, as I believe is happening, though all too slowly, *Caperton* helps us to confront that practice, then regardless of how often or how rarely it applies as dispositive precedent in itself, I think the case has done us a real service.

Adam Liptak:

So Brad, I think you have a different perspective from the first two panelists, and you’re outnumbered, but perhaps not outgunned. Let’s see.

REMARKS OF BRADLEY A. SMITH

Well thank you, Adam, and I will just give a quick thank you to all the folks Keith thanked in the interest of brevity here, because I have got about ninety minutes of remarks, so dig in.

No, actually, it’s very simple, because the question is: did the floodgates open? No! Back to you, Adam. But I have flown in all the way from West Virginia—and if this is like most of my trips to New York, I will spend the next two days at LaGuardia, so I better go ahead and address this here.

Let me begin by noting some facts about *Caperton* that I think are somewhat important. I come here today, by the way, not to praise *Caperton*, but to bury it—if I may rip off Mark Antony—but unlike Mark Antony, I actually really mean it when I say I think the good that *Caperton* has done should now be interred with it and not let the evil perhaps live on.⁴⁴

So let’s talk a little bit about some of the facts that don’t come out that much about the case but are worth noting. The first is that Brent Benjamin did raise sizable sums on his own, close to a million dollars out of his own campaign.⁴⁵ In addition, there was substantial independent spending by other spenders than Don Blankenship on his behalf, and there was, by the way, very substantial spending on the

43. *The Caperton v. Massey Case: Not for Sale*, *ECONOMIST* (June 11, 2009), <http://www.economist.com/node/13832427>.

44. WILLIAM SHAKESPEARE, *THE TRAGEDY OF JULIUS CAESAR* act 3, sc. 2.

45. See Bradley A. Smith & Jeff Patch, *Can Congress Regulate All Political Speech?*, *WALL ST. J.* (Mar. 3, 2009, 12:01 AM), <http://www.wsj.com/articles/SB123604532738815399>.

behalf of the incumbent whom he was challenging—Justice McGraw—who had a very well-funded campaign as well.

Now Justice McGraw was defeated, and I think—I don't have any surveys on this or scientific evidence—but my experience is that most lawyers in West Virginia agree, and I agree that Justice Benjamin ought to have recused himself. On the other hand I think—anecdotally, being there in West Virginia—that most lawyers in West Virginia agree that clearly the better man with the better judicial temperament won that race and sat on the Supreme Court to hear the *Caperton* case.

McGraw lost in part after something that is called the “Rant in Racine.”⁴⁶ You can Google it. Don't do it now; you should do it later. If you watch the video online,⁴⁷ you will see him speaking at a rally in an American flag shirt—sounding more or less like he is drunk—in a long talk in which he points out that the Republican party has made abortion-on-demand possible throughout the United States; in which he accuses the United States Supreme Court—remember, this is 2004—that the United States Supreme Court has mandated the constitutional right to gay marriage. He shows a near-paranoia, saying, “They are trying to make us look ugly! That is what they are trying to do! They are trying to make me look ugly! They are following me around!”⁴⁸ He actually says that, and he talks more or less like that. This is not a man—if you watch that video—where you'd say, “Boy, I wish we had him sitting on the West Virginia Supreme Judicial Court.”

Now, Justice Benjamin was—not surprisingly—being endorsed by every newspaper in the state of West Virginia that made an endorsement, with one exception.⁴⁹ Although it's sometimes said, “oh, he won a close race,” he actually he won a fairly comfortable race. He won it by six-and-a-half percentage points.⁵⁰ It was a fairly solid victory, as we tend to think about American politics in the United States, which tends toward the mean. It's worth noting that once elected, Jus-

46. MICHAEL SHNAYERSON, *COAL RIVER* 82–83 (2008).

47. See, e.g., West Virginia Citizens Against Lawsuit Abuse, *Former Justice Warren McGraw's "Rant in Racine" Is a Reminder of How Far Our Supreme Court Has Come in Seven Years*, FACEBOOK (Feb. 23, 2011), <https://www.facebook.com/wvcala/videos/205561592792062/>.

48. See *id.*; see also SHNAYERSON, *supra* note 46, at 82.

49. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 902 (2009) (Roberts, C.J., dissenting) (“All but one of the major West Virginia newspapers endorsed Justice Benjamin.”).

50. *Id.* at 901 (observing that Justice Benjamin beat Justice McGraw by a margin of nearly seven points).

tice Benjamin voted against Massey Coal in a case in which the amount at stake was \$243 million, or nearly five times the amount at stake in the *Caperton* case.⁵¹ It's also worth noting that after recusal was required by the decision in *Caperton*, the case of course went back to the West Virginia Supreme Court, and this time *Caperton* lost not three to two, but four to one.⁵²

So when we think about that, we may start to wonder whether this isn't such a big deal after all. It's certainly not a good case, not a case that looks good for Justice Benjamin. As I say, I think he made a bad decision in not simply choosing to recuse, but it's not clear that his election was due to the efforts of Mr. Blankenship. It certainly isn't clear that he owed anything to Mr. Blankenship. He has not yet faced re-election. They have long terms in West Virginia.

Massey Coal is now owned by a totally different company, Alpha or something like that.⁵³ Don Blankenship has just been indicted, it has been pointed out, for other matters⁵⁴—he is probably not going to be an ally in any election in West Virginia. The mere attention focused on this case—and remember, Benjamin continued to stubbornly say that he was not going to recuse himself long after there was a lot of attention on this case⁵⁵—suggests that this case will actually hurt him if he seeks reelection in a few years when his term expires. If you want to talk about benefiting from the support of Blankenship, the beneficial thing for him to do probably would have been to recuse himself, and if Don Blankenship is at all upset about this, well then, I'm sorry, right? Consideration already given is not really consideration at all. And now, from there, we get into the actual case that went to the Supreme Court.

As has been pointed out, Justice Kennedy in his lead opinion refers to the case as “extreme.” He used that term eight times.⁵⁶ Five times he calls the circumstances of the case “extraordinary.”⁵⁷ He re-

51. Brief for Respondents at 2, *Caperton*, 556 U.S. 868 (No. 08-22).

52. See *Caperton v. A.T. Massey Coal Co.*, 690 S.E.2d 322 (W. Va. 2009).

53. See Howard Berkes, *Merged Company Tries to Retire Massey's Legacy*, NPR (June 2, 2011), <http://www.npr.org/2011/06/02/136879295/merged-company-tries-to-retire-masseys-legacy>.

54. Trip Gabriel, *West Virginia Coal Country Sees New Era as Don Blankenship Is Indicted*, N.Y. TIMES (Nov. 30, 2014), <http://www.nytimes.com/2014/12/01/us/west-virginia-coal-country-sees-new-era-as-a-mine-boss-is-indicted.html>.

55. See, e.g., Jesse Greenspan, *Judge Refuses to Recuse Himself from Massey Case*, LAW360 (Feb. 25, 2008, 12:00 AM), <http://www.law360.com/articles/48057/judge-refuses-to-recuse-himself-from-massey-case>.

56. *Caperton*, 556 U.S. at 886–88.

57. *Id.* at 872, 882, 886–87.

fers to it as a one-of-a-kind case, one in which there was no other instance comparable to that particular situation.⁵⁸

Therefore, it has indeed been rare to have *Caperton* motions. This has been in part because of the narrowness of Justice Kennedy's opinion for the majority and the fact that lower courts have been unwilling to take a broad, sweeping approach to *Caperton* recusals. In fact, it's virtually impossible. There may be some—and maybe I just need a better research assistant—but my research assistant really couldn't find any cases in which there had been a recusal based on a strong reading of *Caperton* with judges using the idea of just campaign spending as a basis for recusing. So it's not clear to me that *Caperton* has had a tremendous practical effect. It may be good that it has set a constitutional floor. I don't necessarily challenge that.

It's important to note some of the main things that have come up—I think, for example, James has written some good stuff on it, and I think Keith has illustrated this point, too—is that the courts can do more, the states can do more than that constitutional floor. But they could have done more before *Caperton*. So at most *Caperton* may have drawn attention to the issue, given it a bit of a boost, but to the extent that it has done that, that *Caperton* has done that, I think that we are all better off if *Caperton* is in fact not broadly extended and used widely. I think the reason for that is simply that we don't want a lot of satellite litigation on recusal going on prior to the main litigation event, and I do think the dissent has a point that such recusal-focused litigation in and of itself can lead to an erosion of confidence in the judiciary in situations where such confidence should not be eroded.⁵⁹ Casual use of recusal motions may begin to make people think, "What's going on at those courts?" because people don't follow it that closely. They don't look closely to see if those motions have merit and so on, and how they are being used in fact. We note that one of the goals of justice includes a speedy resolution of cases, and one has to envision the impact of large numbers of cases if we're going in front of independent recusal authorities. You have briefing, and you would have to decide if you get an appeal from the decision of the recusal authority, and so on. In other words, we could get carried away here very quickly with something that would open the floodgates and—contrary to what Keith has kind of intimated—I do not think that that would be a good idea.

58. *Id.* at 868, 887 ("The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case.").

59. *See id.* at 903 (Scalia, J., dissenting).

Historically, we have asked for judges to recuse themselves where they have a direct pecuniary conflict in the case.⁶⁰ We know—this is one of the great advancements of legal realism—that judges bring biases to cases. What we ask is that judges try to set those biases aside, and most judges and justices do that to the best of their ability—and I think pretty well. I don't think that this was a big national crisis prior to 2009 and the Supreme Court's decision, and I don't hear now lots of people really complaining that there are a lot more judicial recusals or that there are a great deal of problems with this. We count in the end on the character of judges and electing people with good judicial temperament—not people like Justice McGraw, who was defeated in this case—to protect that.

Now, many states have decided that the best way to select those people is through judicial elections. I don't necessarily agree with that, but that's the decision they've made—that ultimately, the key to judicial integrity is electing people of integrity and ability and electing people with proper temperament, and not simply using lots of recusal rules and creating a whole other area of litigation that is almost, in a way constantly, casting aspersions on the honesty of the judges involved.

Let me add that whatever good comes from *Caperton* will be more than offset if lawmakers and judges try to use it as a proxy for limiting campaign spending. The description of this panel asked the question of whether *Caperton* has use as “a tool to limit spending.” *Caperton* is not intended as a tool to limit spending. As has been pointed out,⁶¹ seven months after *Caperton* was decided, Justice Kennedy wrote the majority opinion in *Citizens United*.⁶² And the interesting thing is that Justice Kennedy is not a swing vote on campaign finance issues.⁶³ He had been on the Court for over twenty years and votes against the government every time one of these cases comes up.⁶⁴

60. See *id.* at 878–79 (majority opinion) (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); then citing *Ward v. Monroeville*, 409 U.S. 57 (1972); and then citing *Tumey v. Ohio*, 273 U.S. 510 (1927)).

61. See, e.g., Liptak, *supra* note 11.

62. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

63. See, e.g., David G. Savage, *Hillary: The Law Changer*, A.B.A. J. (Sept. 2, 2009, 2:30 AM), http://www.abajournal.com/magazine/article/hillary_the_law_changer.

64. Cf. Joshua A. Douglas, *Roberts: The “Swing” Justice of Election Law*, CHI. TRIB. (Oct. 7, 2013), http://articles.chicagotribune.com/2013-10-07/news/sns-rt-us-roberts-the-swing-justice-of-election-law-20131007_1_election-law-chief-justice-john-campaign-finance-case (“Public perception of the Supreme Court is that there are four conservatives, four liberals and Justice Anthony Kennedy in the middle—as the

So how do we put *Caperton* into that paradigm of Justice Kennedy? Well, I don't think it's fair to say that he just thinks judges are less trustworthy. I think what's actually the case is Kennedy makes exactly the argument that the Brennan Center makes, that James makes in some of his writings,⁶⁵ that others make, which is that judicial elections are in some ways a bit different—that they involve specific litigants and specific cases, with the idea of an impartial adjudicator, whereas the legislature involves people who are supposed to be responsive to voters, who are supposed to (generally, at least) achieve the goals that the people who elected them wanted them to do, and that there is a fundamental difference there in that respect in that it is not particularly difficult to reconcile the cases at all—that there is some difference. And if *Caperton* is used as a surrogate for limiting campaign spending generally, I don't think that it will last very long.

Spending in judicial races can be good. It is highly unlikely that Brent Benjamin would have defeated McGraw in a low-spending race. Benjamin himself raised a lot of money, but there are a lot of other things going on. If you don't think that's a good result, then put aside your judicial ideology or political ideology, go to Google and watch the "Rant in Racine," and tell me if this is a man who ought to be serving on a supreme court of any state in the nation. If you don't think so, then you recognize the importance of money in judicial elections, as in other elections, as an important way to inform the electorate and get better results. Thank you.

QUESTIONS AND ANSWERS

Questions from Adam Liptak to the Panelists

Adam Liptak:

Thanks. So we're going to follow the time-honored panel discussion format, where we'll talk a little bit, but then I'm eager to have your questions, so start thinking about those. Let me ask you, Brad: what do you say to the litigant who is not particularly sophisticated but learns that the judge who is about to hear her case has gotten contributions from the lawyer and the party on the other side, doesn't think she is going to get a fair shake, doesn't want to make a recusal

'swing' vote. But that's wrong—at least where voting rights and campaign finance cases are concerned.”).

65. See, e.g., James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, 66 N.Y.U. ANN. SURV. AM. L. 727, 756–57 (2011) (“[T]his Article thus argues that . . . the differences in democratic expectations in the courts as compared to the constituent branches justify differential treatment of expenditures in a judicial elections context.”).

motion, partly because she doesn't want to offend the judge, but thinks there is something smelly about all of this?

Bradley A. Smith:

What capacity am I? Am I that person's counsel? If I am that person's counsel, what I'd tell them is, "I trust this judge, I think this judge will make a fair decision. This is not a big issue. This goes on all the time, all across the country in every state in which there are judicial elections."

Adam Liptak:

Okay. Let me ask Keith and James a little bit about some of what was suggested by Brad's remarks. How exactly are these motions supposed to happen? When do you make them? Why aren't you afraid that the judge will be offended if you do make them? How much strategic behavior might be involved? Might you make a contribution in order to be able to make a motion to knock the judge off a case?

Keith Swisher:

Thanks, Adam and Brad. Well done. Part of it depends on where you are operating, Adam. Is, for instance, the challenged judge going to be the same one ruling on the motion? And that obviously goes into the strategy of whether you lodge it at all. With respect to the devious spender that's often mentioned—who will contribute to the other side just to force a recusal or a later disqualification—there are rules, including some that have since been enacted, that allow the non-contributing side to waive that judge's recusal.⁶⁶ So there are some mitigating procedural rules, and some aggravating, depending on the jurisdiction.

James Sample:

Keith's point about the waiver is, I think, the key point in the response. I think there are a couple things to say, and I take Brad's points about McGraw quite well. McGraw may not have been—and I think it's fair to say probably was not—a strong candidate. That does not mean, however, that Brent Benjamin had to be the alternative. There were other potential alternatives, and though Benjamin did raise

66. See NAT'L CTR. FOR STATE COURTS, CTR. FOR JUDICIAL ETHICS, JUDICIAL DISQUALIFICATION BASED ON CAMPAIGN CONTRIBUTIONS 3, 11 (2015), <http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Disqualification%20contributions.ashx> (discussing California and New York provisions relating to the waiver of judicial disqualifications).

some money on his own, I think it bears noting—in response to Brad’s point—that Blankenship’s expenditures in this campaign were more than the total of Benjamin’s direct contribution-based fundraising, and all other non-Blankenship independent expenditures in his support.⁶⁷ Don Blankenship was his campaign. Now, Warren McGraw might have lost anyways, but Don Blankenship was the campaign. And with respect to the \$240 million case and the other cases in which Benjamin did vote against Massey, the only time Brent Benjamin ever had the opportunity to cast a deciding vote in a case involving Massey—and this case also involved Don Blankenship’s personal conduct; that’s what was at issue in the *Caperton v. Massey* battle, it was Blankenship’s personal conduct—the only time he ever had an opportunity to cast a deciding vote was this case.

So I think that it’s fair to say that some of those extra facts—in addition to the extra facts that Brad provided—give it a little bit of flavor. And in terms of Adam’s question, Massey Energy itself, in a separate litigation that was going on as of the time Massey was arguing this case in the Supreme Court, had already filed motions seeking the recusal of other justices on the Supreme Court of Appeals of West Virginia in other cases, on the same recusal provision of the general “might reasonably be questioned” grounds.⁶⁸ So I think it’s a little disingenuous to say that it’s just opportunistic.

Adam Liptak:

So I interviewed Don Blankenship once and he said that his goal—and this is consistent with Brad’s points—was really to defeat the other guy.⁶⁹ He didn’t care much for Benjamin. They sat down once, Benjamin did most of the talking. Blankenship said something like, “If you want my support you’re going to have to listen to me a little bit,” and Benjamin wasn’t willing to listen. Blankenship also told me that he didn’t think that he was buying Benjamin’s vote, particularly in a case with long terms, because you can buy people but they don’t stay bought. What about, though, the point that this was almost entirely James’s independent expenditures? I feel a little bit for Blankenship. If it’s a contribution he can turn down the contribution. But if

67. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 868 (2009).

68. Lawrence Messina, *Lawyers Offer Poll in Bid for Justice’s Recusal from Massey Case*, TIMESWV.COM (July 27, 2014), http://www.timeswv.com/news/lawyers-of-fer-poll-in-bid-for-justice-s-recusal-from/article_c5fe9be4-69d5-5c9e-b66b-3ce1bba85669.html?mode=jqm.

69. Adam Liptak, *Case May Alter Judge Elections Across Country*, N.Y. TIMES (Feb. 14, 2009), http://www.nytimes.com/2009/02/15/washington/15scotus.html?page_wanted=all&_r=0.

someone's just out there speaking on his behalf, but perhaps not saying what he wants said about him, why should that be something that requires recusal?

James Sample:

Well, I'm sympathetic to the notion that if anyone would support me to the tune of \$3 million on an independent basis, I'm willing to accept your support. That being said, I also understand that truly, Benjamin didn't have the opportunity—these are non-coordinated, truly independent expenditures—Benjamin doesn't have the opportunity to decline those expenditures on his behalf, but he does have the opportunity to decline to subsequently participate in the case.

I think Justice Kennedy, as Brad says, is not a swing vote in campaign finance cases. If you were to go down the list of the cases that touch on either judicial elections or campaign finance—*Republican Party of Minnesota v. White*,⁷⁰ *Citizens United*,⁷¹ *McCutcheon*,⁷² *Arizona Free Enterprise*⁷³—the only case you will come to in which Justice Kennedy casts a vote that's different is *Caperton*. And to me that's not because we can't trust judges. It's because there is an interest that is present in a judicial context, namely the impartial arbiter, that's just simply—that warrants treating judicial campaigns differently. Erwin Chemerinsky and I have written a piece arguing for limiting independent expenditures in judicial races⁷⁴ in a way that they can't be limited pursuant to *Buckley v. Valeo*⁷⁵ in non-judicial races. I think ultimately there's just a different constituent when you're judge. The constituent is the rule of law, not the people who elected you.

Bradley A. Smith:

I just want to add a couple of very quick points—I hope they're very quick points. First, in response to your initial question, I do want to add one qualifier. I was assuming in that case that we're talking about someone who gives a legal contribution to a campaign of a relatively modest amount. Again, I have said that I don't necessarily oppose *Caperton*'s ultimate holding. I did file an amicus brief that would

70. 536 U.S. 765 (2002).

71. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2009).

72. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014).

73. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

74. Erwin Chemerinsky & James J. Sample, Opinion, *You Get the Judges You Pay For*, N.Y. TIMES (Apr. 18, 2011), <http://www.nytimes.com/2011/04/18/opinion/18sample.html>.

75. 424 U.S. 1 (1976).

be contrary to that at the time through the Center for Competitive Politics.⁷⁶ But our main goal was to get the kind of opinion that, in fact, we got—one that stresses the narrowness of it. Obviously, if we were talking your hypothetical \$3 million, or a large sum like that, that might be a different kind of question.

I do just want to say that I agree with James, and I think there is an important point—although I’ve said I think generally we are looking for actual conflicts, direct conflicts—I do think the question of perception is a real one, and I think that’s why I, and I think most lawyers from West Virginia, think that Benjamin probably ought to have recused himself. I’ve talked to him about it. I’ve gotten to know him since, and I like him, and I think he’s a pretty good judge. I think he made an error in this one, and then got a little stubborn about it because I think he felt his integrity was being personally attacked. You’ll hear later today from justices and judges who may have a better sense of it. I will just say I’ve had a little experience in having to recuse from sitting on the Federal Election Commission. And at the time I didn’t have to recuse myself often, but a couple of occasions I did recuse, not because I had to—general counsel told me I didn’t have to recuse—but I just felt, why make it controversial when it didn’t need to be?

Adam Liptak:

Was it wholly your decision?

Bradley A. Smith:

It was totally my decision.

Adam Liptak:

And do you think that it’s appropriate? I accept, of course, that judges are beyond corruption and have no self-interest. But are they really the right people to decide their own cases?

Bradley A. Smith:

Well, I think this is a very tough issue, and these two gents may have more to say on what’s the best way to get there. I do think there is something to be said for the idea that maybe there should be some review. On the other hand, again I do think one would be cautious about wanting to create a whole set of satellite litigation that both

76. Brief of Amicus Curiae: Center for Competitive Politics in Support of Respondents, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (No. 08-22).

precedes the beginning of the case, and then may follow up on it, as in, are you going to get appeals on that decision.

Adam Liptak:

Yeah. What do you guys say about who is the correct decision-maker for a recusal motion?

Bradley A. Smith:

And how do you do it?

Keith Swisher:

Sure, if I could just backtrack quickly. Adam, on your previous question about sort of suggesting—you didn't say this—poor Benjamin would have to recuse himself because someone else beyond his control spent money on him. This suggestion implies that there is something terrible or sub-optimal about recusal. And where is Benjamin's interest in sitting on a particular case? I think we might be able to locate that interest, but it is not clear to me that he should have to sit on the case. And then—

Adam Liptak:

Well many courts do speak of a duty to sit.

Keith Swisher:

They do, but it is almost identically canceled out, depending on the jurisdiction, by “subject to disqualification.”⁷⁷ So it is there; you should sit rather than going to the movies, et cetera, but not if there is a valid basis for disqualification—which includes appearances and public confidence. You always wonder how these panels are going to go in your mind, and I wasn't sure how nuanced and thoughtful Brad would be and he absolutely was both—

Adam Liptak:

Sorry he didn't live up to your expectations—

77. Cf. CHARLES GARDNER GEYH, *FED. JUDICIAL CTR., JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 12–13* (2d ed. 2010) (discussing the so-called duty to sit as it relates to judges' obligations to recuse themselves).

Keith Swisher:

But I was thinking I'm going to start every remark with a quote from the dissent and with respect to the facts I would say that's "so much whistling past the graveyard"⁷⁸ because the appearances of the independent expenditures, and that the public's view of them having that same or at least similar influence, need to be taken into account. And then I would agree with Brad's suggestion that it's not always optimal to have this important issue decided at the disqualification stage—at the motion stage—and that instead systemic, administrative, and procedural reforms are often better. And that for me is one of the great legacies of *Caperton*: that it has boosted those reforms.

Adam Liptak:

So thank you for answering my last question, but the question that was pending was who should decide?

Keith Swisher:

It absolutely should be an independent reviewer. It could be the presiding judge of the court. It depends on the level. But, it absolutely should not be the judge whose impartiality is being questioned.

James Sample:

I agree with that, although I don't have a problem with the judge taking the first pass at the question. I think one of the big keys that we have learned is that recusal if it happens, or disqualification if it happens, in a situation where you don't have substitute judges, can be a result in itself. So if you take away this notion that by recusing Benjamin and that no one will sit in his place and that maybe we will get a two-to-two tie, that's not a good scenario either. But particularly, when we're talking about courts other than the United States Supreme Court—which I think is just constitutionally different under Article III—we have judges sit by designation all the time, and so if Benjamin recusing in this case—or if a judge in similar circumstances recusing in a particular case—just means you are going to get another random substitute judge pursuant to the wheel then the stakes become much lower, and I think the opposition to recusal becomes less of an issue. We are going to hear from Louis Butler later today. The Wisconsin Supreme Court currently, on which he used to sit, if you don't have

78. *Caperton*, 556 U.S. at 899 (Roberts, C.J., dissenting) ("But this is just so much whistling past the graveyard. Claims that have little chance of success are nonetheless frequently filed.").

substitute justices for cases—and they don’t—you have a difficulty getting a quorum if you take recusal seriously in this day and age.⁷⁹ And so it is an important question and I think an independent decision maker is key, but also a substitute judge on the backside.

Adam Liptak:

Let’s turn to your questions.

Question from Andy von Salis to the Panelists

Andy von Salis:

Hello, I’m Andy von Salis, a lawyer in New York. I’ve been following the *Floyd* case in which Judge Shira Scheindlin was recused by the Circuit Court of Appeals in the case on police governance in New York.⁸⁰ Do you have any comment as to whether the factors that came up in *Caperton*—obviously election wasn’t one of them—but did *Caperton* have any effect on making that recusal happen, which was kind of messy and embarrassing?

Adam Liptak:

So the issue there was whether Judge Scheindlin essentially steered the case to herself by urging lawyers to call it a related case. I think it’s a fascinating question but it’s a little far afield from this morning’s topic.

Question from Oscar Chase to the Panelists

Oscar Chase:

Hi. I’m Oscar Chase. I’m on the faculty here. I think that *Caperton* may turn out to be a one-off case because of the unusual situation in which the litigation was pending while Blankenship made his efforts to get someone other than McGraw on the court, and also because it was decided by the man that he had given so much money to. But apart from that there is one issue in the room that you haven’t discussed—but I bet you have some thoughts about—and that is that so many of these elections, judicial elections, turn on phony issues. And your point about “And for the Sake of the Kids” is a very good

79. See, e.g., Lincoln Caplan, *The Destruction of the Wisconsin Supreme Court*, NEW YORKER (May 5, 2015), <http://www.newyorker.com/news/news-desk/the-destruction-of-the-wisconsin-supreme-court> (detailing the court’s recent difficulty securing a quorum of justices to hear a case).

80. *Ligon v. City of New York*, 736 F.3d 118, 121–25 (2d Cir. 2013) (explaining the reasons for Judge Scheindlin’s recusal).

one. That organization was made up, I think—maybe you could help us on that from West Virginia—by supporters of Benjamin and opponents of McGraw because of a decision that was thought to be insensitive to children who had been abused. I don't know enough about the case to say that I disagree with him, but it was certainly a reasonable decision.

So what happens in many of these states, and the best description of it is not in—pardon me—your writing and others, but in Grisham's book *The Appeal*,⁸¹ which is fictional—

Adam Liptak:

Ouch.

Oscar Chase:

I know that's a hard one to take. But I'm sure you've read the book. But in any event, because it highlights this notion that interest groups—not particularly targeting a judge for a particular case, but in general—are going to come up with these kinds of phony issues. I don't know that there's a solution to that, if we're going to have elections, and we're going to have campaigning.

Bradley A. Smith:

I'll just say that I think that your description of “And for the Sake of the Kids” and of the prior decision is correct, and you've raised an important issue that goes not only to judicial elections, but even beyond judicial elections, and that's what issues people want to raise; and I don't know that there's a good answer for that.

Adam Liptak:

You were very concerned, Brad, about the harms to the judicial reputation that might arise from recusal motions. Don't these ads have that problem a hundredfold?

Bradley A. Smith:

No, I wouldn't say a hundredfold. But I do think—

Adam Liptak:

Fifty?

81. See JOHN GRISHAM, *THE APPEAL* (2008).

Bradley A. Smith:

But I do think they have that problem, and, again, I'm not sure what the answer is. Is the answer that we should have elections where people don't run ads and don't talk about the candidates? I can't really see that as a very good answer, either. And so in the end I think that we need—look, I don't think this is the full answer, but one thing I've complained about for years is that newspapermen spend way too much time talking about who's raised how much money, rather than try to inform the electorate about what some of the issues are in the campaign and why they ought to vote as they should. All I can say is that we need to try to have a better political debate here, and I generally don't think that the focus on money and campaign tactics has been helpful there, rather than spending that same time and effort to talk about the issues and try to give an honest explanation of the case and ruling that Judge McGraw made—which is one of those classic “releasing a child molester” things, or something like that, on a “technicality”—you know, like a constitutional provision. One of the “technicalities.”

James Sample:

To Professor Chase's point on the one-off point, I tend to think there's some validity to that, but I don't think that it's a complete one-off, and if you look at Illinois right now—I mean, even a few years prior to *Caperton*, we had a failed cert petition effort in a case, it was called *Avery v. State Farm*, that pertained to a case in which, not only was the case pending while the campaign occurred, oral argument had already occurred and the court was sitting on the case while millions and millions of dollars flowed in to candidates from the competing parties in the litigation.⁸² And even right now, and currently pending to some degree, is some Philip Morris litigation in the Illinois courts in which there are at least some pretty strong indicators that the interested parties raised and spent a lot of money in support of, actually, the same candidate who was at issue in *Avery*.⁸³ So I don't think it

82. *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E. 2d 801 (Ill. 2005); see also *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12–0660–DRH, 2013 WL 1287054, at *14 (S.D. Ill. Mar. 28, 2013) (allowing the plaintiffs' RICO claims, which were based on the *Avery* recusal controversy, to proceed).

83. See Memorandum in Support of Appellees' Motion for Recusal or Disqualification at 5–12, *Price v. Philip Morris Inc.*, No. 117687 (Ill. Feb. 9, 2015); see also *Supreme Court to Hear \$10B Philip Morris Appeal*, CHI. SUN-TIMES (May 19, 2015, 9:45 AM), <http://chicago.suntimes.com/springfield-politics/7/71/618728/supreme-court-hear-10b-phillip-morris-appeal> (reporting on the Illinois Supreme Court's consideration of the case).

was a complete one-off just because the case was pending, but there's also no doubt that your second point is totally correct. I mean, if you want to frame a judicial election campaign, frame it as "Americans for Apple Pie" when your real interest is lead paint liability.

Question from Joan Claybrook to the Panelists

Joan Claybrook:

Joan Claybrook, President Emeritus of Public Citizen. It seems to me, Mr. Smith, that the key issue on *Caperton* not having been used very much is the fact that there is no disclosure of who gives the money—or not much. And particularly for the corporate money it's all washed through various and sundry committees—the Chamber of Commerce or the Republican Leadership Committee. It's very hard to file a recusal motion if you don't know where the money comes from. Really, *Caperton* needs a second half to be effective, and that is public disclosure required of judges who receive money—not just that it comes from the Chamber of Commerce, but that that the money comes to the Chamber of Commerce from various and sundry corporations and interested parties. On the other side, most of the time, the lawyers who money give directly, and so they are disclosed. So it's only half disclosure, if you would, now. But it seems to me that the full disclosure—and I address this to the full panel—that full disclosure is needed in order to make *Caperton* a viable entity.

Bradley A. Smith:

I'll start since you started with me, and then add the whole panel and let them at it. First, of course, there was lots of disclosure in West Virginia. That's how we know, and how the case got to the Supreme Court. We have more compulsory disclosure laws now in the United States than we've had at any time in American history.⁸⁴ There is more campaign disclosure now than there has ever been in the past.⁸⁵ And there are costs to compulsory disclosure, which the Supreme Court has long noted in a lengthy series of cases, in a variety of settings.⁸⁶ One of the problems you have is—you know, I'll give you a

84. See CTR. FOR COMPETITIVE POLITICS, CAMPAIGN FINANCE DISCLOSURE: THE DEVIL IS IN THE DETAILS 4 (2014), http://www.campaignfreedom.org/wp-content/uploads/2013/12/2014-08-19_Policy-Primer_Disclosure.pdf ("All spending calling for the election or defeat of candidates requires some type of disclosure, and there is more disclosure today than at any previous time in U.S. history.").

85. *Id.*

86. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462–63 (1958) (conceding that mandatory disclosure provisions burdened citizens' exercise of their

very real-world scenario. So Acme Widgets gives money to the U.S. Business Association, because it's a member, so it pays dues. And they may be fairly substantial for big companies—\$500,000, \$750,000, or something. The U.S. Business Association says, “Well, we’re going to work with the state business association, and we want to encourage them to get involved.” So they say to the state association, “We’ll match the money you raise for campaigns this year.” So the state association raises \$300,000. The national association gives them \$300,000. The state association takes their \$600,000 and they transfer it to a 501(c)(4)⁸⁷ that they use specifically for their more political aspects, not just campaigning, but certain other things that they do. The 501(c)(4) then decides to spend \$200,000 on its own, but to also give \$400,000 to the State Business Alliance, which is a coalition of various business groups and which is involved in the campaign. And that group spends the money in independent expenditures. Who should be disclosed? What should be disclosed? Is it really fair to say that Acme Widgets is responsible for the spending of the state business alliance, which might be two years down the line from the point at which they gave their spending?

There is one question that has not been answered by people who keep making this argument—“we need more disclosure! we need more disclosure!”—which is: how far up the chain are you going to go? At what point are you merely confusing voters and misleading voters as to who the speaker is rather than enlightening them? And I think that we need to not get carried away on this. About five percent of spending in U.S. political races is what people have dubbed—well I don’t even want to use the term because it’s so biased—“dark money,” right?⁸⁸ Which is, we might call it, non-itemized spending. And the disclosure generally is there and I think the effort to squeeze out the last little bit to find out just a little bit more is very, very hard to do. For example, when a lawyer gives to a campaign, well you’ve said, that’s all disclosed, right? Except, do we know who all the lawyer’s clients are? Uh-oh, maybe Massey Coal’s a client of this lawyer who’s representing somebody else. I mean, you know, you just can’t get that far. You’ve got to make those cuts, and at some point trying to

First Amendment rights). *See generally* CTR. FOR COMPETITIVE POLITICS, *supra* note 84, at 7; William McGeveran, *Mrs. McIntyre’s Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 J. CONST. L. 1 (2003).

87. *See generally* 26 U.S.C. § 501(c)(4) (2013).

88. *See* MATT NESE, CTR. FOR COMPETITIVE POLITICS, *FIVE MISCONCEPTIONS ABOUT “DARK MONEY”* 1 (2015) (citing Federal Election Commission data indicating that so-called “dark money” constituted less than five percent of money spent in the 2012 and 2014 election cycles).

squeeze that last five percent out is not a juice that's worth the squeeze.

Joan Claybrook:

But . . . In fact, the money's only given once or twice. And if you look at that case in Illinois, the one dealing with Phillip Morris, there was a recusal motion, and the judge, Karmeier, said, "Well, I don't know where the money came from. There's nothing on the record."⁸⁹ Well, you could put money on the record. And, by the way, it doesn't go fifteen times through. It's usually once or twice that the money is transferred, and you can follow the money.

Adam Liptak:

Let me make sure we have time for a couple more questions. Keith, James, do you have points on disclosure?

Keith Swisher:

Well, just that, as a general matter, many of these stops on the chain should be disclosed. With respect to this area of law, and the indirectness of it, some of Brad's questions about whether it's fair to say that this entity actually gave to this candidate are very legitimate. That said, I think they should be disclosed. And as happened in Illinois very recently, then a court can consider whether that donation should warrant disqualification.⁹⁰

Question from an Audience Member to the Panelists

Audience Member:

I have two points. One, as to the judicial dark money, I think that is different than all the other campaign issues. So I think we can argue that the dark money in campaigns for judges perhaps deserves a higher level of scrutiny than all the other dark money in all the other campaigns. But I want to just shift a little bit, and ask the question—going

89. Order Denying Motion for Recusal or Disqualification at 8–10, *Philip Morris USA v. Appellate Court*, No. 117689 (Ill. Sept. 24, 2014), http://www.illinois.courts.gov/supremecourt/specialmatters/2014/102114_117689_Order.pdf ("In reality, the notion that movant was responsible for financing my run for office ten years ago is just that, a notion. It is based entirely on conjecture, innuendo and speculation In other words, respondents appear to be suggesting that the lack of direct evidence to support their position actually substantiates that what they are claiming is true.")

90. *See id.* at 8–9 (implicitly distinguishing, for purposes of campaign donation records, between Philip Morris as an entity and PACs with which the company might have been affiliated).

back to *Caperton*—what, if any, obligation did the rest of the Supreme Court of Appeals of West Virginia have to take some type of action when this matter was raised? Benjamin didn't recuse. Did the court have some obligation to consider whether he should be disqualified?

Bradley A. Smith:

I can make two quick points. First, on something James mentioned earlier: West Virginia does allow for a replacement judge, which is the fact there.⁹¹ He suggested that was something to consider, and that was the case there, which would have been another reason for Benjamin to have decided voluntarily to recuse. To your particular question, I don't think there's anything the other justices on West Virginia's supreme court can do, other than in chambers perhaps argue with Justice Benjamin and, in at least one case, write a stinging opinion in dissent.

Adam Liptak:

So a judge, in the process of recusing himself, said Benjamin should recuse himself too.

James Sample:

Larry Starcher.⁹²

Adam Liptak:

And then interestingly, Benjamin, having not recused, and having become Chief Justice, then appointed the other judges who would sit on the case.⁹³

Question from an Audience Member to the Panelists

Audience Member:

The 2012 Massachusetts senatorial race was the catalyst for the "People's Pledge" to discourage independent, dark-money type in-

91. W. VA. TR. CT. R. 17.01(c).

92. See John O'Brien, *Starcher Hoping Recusal Cleanses Court*, W. VA. REC. (Feb. 19, 2008), <http://wvrecord.com/news/208134-starcher-hoping-recusal-cleanses-court>.

93. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 875 (2009) ("The court granted rehearing. Justice Benjamin, now in the capacity of acting chief justice, selected Judges Cookman and Fox to replace the recused justices.").

volvement in a race.⁹⁴ Does the People's Pledge have a place in judicial elections?

James Sample:

That was a fascinating race. I think—you want to talk about one-offs—that was a very unique election in a lot of circumstances. It's worth a try. I'm not too optimistic that that is a successful model or one that we should, certainly, rely on.

Bradley A. Smith:

In the People's Pledge, as I understand it, the candidates agree that if there's independent spending, they'll contribute the equivalent out of their own funds to some other kind of organization.⁹⁵ I've always kind of rejected the idea that independent spending is somehow inappropriate or wrong in campaigns. It strikes me that if the candidates don't want to talk about issues that some group of voters wants to talk about, that group of voters has a pretty good right to bring up that issue on their own. And I think this effort to wall off the public and say, "this campaign is for us—it's us—you guys just vote and don't participate in the debate," I think is very, very misguided and honestly, I really don't like the idea.

Question from an Audience Member to the Panelists

Audience Member:

This year the Supreme Court is going to hear *Williams-Yulee v. Florida Bar*, which is the first significant case since *Caperton* that involves judicial elections.⁹⁶ What, if anything, does *Caperton* tell us about how the Court should consider *Williams-Yulee*?

Adam Liptak:

It's really an elections case. Kennedy's the guy. As Brad was suggesting, we know where Kennedy is in elections cases, but *Caperton* does send a signal that Kennedy does have some sense that

94. See, e.g., Ganesh Sitaraman, *Contracting Around Citizens United*, 114 COLUM. L. REV. 755, 757–58 (2014) (discussing the People's Pledge and its origins in the 2012 Brown-Warren senatorial race in Massachusetts).

95. Sean Sullivan, *Everything You Need to Know About the Brown-Shaheen "People's Pledge" Ruckus*, WASH. POST (Mar. 21, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/21/everything-you-need-to-know-about-the-brown-shaheen-peoples-pledge-ruckus/>.

96. 138 So. 3d 379 (Fla. 2014).

judicial elections are different. But if I had to predict I would say it's a 5–4 with Kennedy joining the conservatives. Other thoughts?

You guys might not know the question in the case. There are canons of judicial ethics in thirty of the thirty-nine states that elect judges, which prohibit judges from personally soliciting campaign contributions.⁹⁷ And four federal circuit courts have struck that down on First Amendment grounds.⁹⁸ The Florida Supreme Court upheld it,⁹⁹ saying, well, “Easy for you guys to say, you federal judges, you don’t have to run for office.”

Question from an Audience Member to the Panelists

Audience Member:

So far the conversation has been all about the need to disqualify in the face of substantial support. Are we having the same conversation—or should we be having the same conversation—about parties who appear before judges who have engaged in substantial opposition?

Adam Liptak:

Great question.

James Sample:

Well, I think there are a lot of different ways to slice that question. Most elections—and I think it's easy to overstate and misstate this, so this is imperfect—but most elections are zero-sum games. The support for one candidate is either support for a candidate, or it's opposition to another candidate. And so support and opposition can be fungible in that respect, particularly when you're talking about expenditures. Now, let's say that Benjamin had been on the receiving end of three million dollars of independent expenditures spent against

97. *See, e.g., id.* at 385.

98. *Wolfson v. Concannon*, 750 F.3d 1145, 1158 (9th Cir.) (striking down a restriction on campaign funding solicitations insofar as the provision applied to “non-judge candidates” for judicial office), *reh’g en banc granted*, 768 F.3d 999 (9th Cir. 2014); *Carey v. Wolnitzek*, 614 F.3d 189, 209 (6th Cir. 2010) (affirming the lower court’s invalidation of a Kentucky Code of Judicial Conduct provision that prohibited judicial candidates from personally soliciting campaign funds); *Wersal v. Sexton*, 613 F.3d 821, 841–42 (8th Cir. 2010) (striking down a restriction on judicial candidates’ personal solicitations for campaign funding), *rev’d*, 674 F.3d 1010 (8th Cir. 2012); *Weaver v. Bonner*, 309 F.3d 1312, 1322–23 (11th Cir. 2002) (declaring the unconstitutionality of a canon that restricted judicial candidates from personally soliciting publicly stated support or campaign contributions).

99. 138 So. 3d at 381.

him, should he have to recuse because presumably, then he would be more apt to stick it to that party that had spent the three million against him? I don't know. I think it's a slightly different case and I think I'm less troubled by that—by a judge just sitting in that situation. I'm still troubled, but I don't think it's as profound as the support for the candidate, but it's a close call, and I think it depends on circumstance.

Keith Swisher:

And I think it's a great question—sometimes off-handedly remarked as the debt of hostility, in part. But one of the great things about the conversation lately—and to be sure, it happened some in the past—is that we should be considering both sides. It presents a number of questions if someone was the big attacker on the other side, and including whether the judge—or at least the appearance of it all—whether the judge can be impartial in that situation. And maybe the judge will, or maybe the judge will go the other way. There are plenty of judges who would bend over backward not to take it out on the opponent, and then how does that bending impact the ruling, too? I'm glad that it's in the conversation now and I think it's an important component.

Question from an Audience Member to the Panelists

Audience Member:

The conversation so far seems to be focused mostly on contributions to judges and judicial elections. In seven states, supreme courts are elected by district rather than at large.¹⁰⁰ And in many of those states, the state legislature can redistrict judicial districts by simple majority vote.¹⁰¹ So, one way in which a donor could influence a judicial election is simply by supporting legislators who then gerrymander judicial districts so as to ensure the right (in their view) judges are elected. Do you think *Caperton* has relevance in those situations? And, particularly with regard to disclosure, should we disclose state

100. ILL. CONST. art. VI, § 3; KY. CONST. § 117; LA. CONST. art. V, § 4; MD. CONST. art. IV, pt. II, § 14; MISS. CONST. art. VI, § 145; NEB. CONST. art. V, § 5; TENN. CONST. art. VI, § 2; *see also, e.g.*, CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 10 (2009) (discussing the different systems of elections to state supreme courts).

101. *See, e.g.*, JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, A CITIZEN'S GUIDE TO REDISTRICTING 20, 27 (2010 ed.) (observing that state legislatures generally control redistricting, and that “[i]n most states, a redistricting plan can pass if it wins a simple majority of the votes of the people drawing the lines”).

legislator contributions if you do on the judicial side, because they have that flow-on effect to judicial elections?

Adam Liptak:

Who would like to handle that extremely sophisticated question?

James Sample:

My guess is that Professor Chase would respond that we have a political question doctrine, and that delving that deeply into legislative races because they might have an ancillary effect on judicial districts—I don't see it as a viable avenue for challenge.

Bradley A. Smith:

I'll just say briefly that there is pretty good research that shows that as judicial elections become more competitive, judges, at least at the margins, are behaving a bit more like politicians, and what I mean is that they're more likely to overturn past precedents.¹⁰² You're getting more swings in the law within states. But I think, as a response to your question, that ultimately if you're going to elect judges, or even if they're going to be appointed by the governor, it's often an issue for executive campaigns—or for the president, at the federal level. In the end, I don't think you can try to use some type of recusal rule or anything for the idea that judges are being selected in a way that reflects the desires of some electorate that has the right to elect them. I just don't think you can go there.

Adam Liptak:

We probably have time for one or two more.

Question from an Audience Member to the Panelists

Audience Member:

Thank you. In terms of an on-the-ground, tactical perspective for lawyers, how do you think we should deal with the situation of having

102. See, e.g., Nicole Mansker & Neal Devins, *Do Judicial Elections Facilitate Popular Constitutionalism; Can They?*, 111 COLUM. L. REV. SIDEBAR 27, 33 (2011) (“Judges subject to contested elections look and act more like politicians.”); cf. Andrew Cohen, *An Elected Judge Speaks Out Against Judicial Elections*, ATLANTIC (Sept. 3, 2013) (“In seeking votes, in acting like politicians, judges invariably lose what they ought to prize most: their perceived credibility as neutral arbiters of cases and controversies.”). See generally Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589 (2009) (examining the effects of different retention election methods on judicial behavior).

made a recusal motion which is then denied? Actually, I have a situation—

Adam Liptak:

Double your contribution.

Audience Member:

Exactly. And you also touched on the pre-recusal situation assignment rule. We actually wrote a letter, you know, saying the judge was assigned in violation of the assignment rule, and now I'm in the predicament of having to go before a judge, essentially having made a recusal motion. Do you think that's grounds, in and of itself, for another recusal motion, or what happens then?

James Sample:

No way. I mean, you'd be bootstrapping and gaming—strategic behavior. No way. If you took that to its logical end, the system would collapse. Brad and I are in complete agreement.

Bradley A. Smith:

We're like blood brothers.

Adam Liptak:

Because that's not going to happen again, maybe it's the right point to agree that I think this panel has gotten the day off to a great start. Please join me in thanking them.