CAPERTON AND JUDICIAL DISQUALIFICATION IN NEVADA

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In *Caperton v. A.T. Massey Coal Company*, the U.S. Supreme Court will answer the question of whether or not the 14th Amendment's Due Process Clause required the recusal of a West Virginia Supreme Court justice. Justice Brent Benjamin refused to remove himself from a case involving a party whose CEO – Don Blankenship – had spent almost $3 million supporting the justice's election bid. Instead, Benjamin cast the deciding vote in a 3-2 decision that reversed a $50 million jury verdict against the CEO's company. Did the failure to recuse amount to a constitutionally unacceptable appearance of impropriety?

In West Virginia, as in Nevada, judges are not expressly disqualified from sitting on cases involving their campaign donors. Any recusal is left to judicial discretion. Thus, Benjamin could reason: "no objective information is advanced to show that this justice has a bias for or against any litigant, that this justice has prejudged the matters which comprise this litigation or that this justice will be anything but fair and impartial in his consideration of matters related to this case." Absent proof of actual bias – the lack of which may have just been an evidentiary hurdle – he concluded there was no obligation to disqualify.

Call it a suspicion, but the U.S. Supreme Court might disagree with Benjamin. It's unlikely the court granted certiorari just to affirm. The donations were enormous; Benjamin's subsequent vote proved decisive. Of course, any finding of a due process violation could be confined in subsequent cases to *Caperton*'s exceptionally bad facts, but the court could use the case to articulate a rationale with reach. *Caperton* could provide constitutional due process guideposts for judicial recusals – much as *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and its progeny guide judicial decisions to reduce punitive damage awards. At the very least, the court might create a due process presumption of actual bias where a judge receives significant donations – however defined. Failure to rebut the presumption could then mandate disqualification.

Could a *Caperton*-type challenge be brought in Nevada? At present, there are no systemic safeguards in place to avoid it. A party, an attorney or a law firm could make large amounts of bundled contributions and massive independent expenditures in favor of a judge's campaign. Then, notwithstanding the other party's motion to disqualify, the judge could elect to sit on the case of a party, an attorney or a law firm that made the contributions and expenditures. An enterprising attorney could then preserve the *Caperton* issue and seek certiorari at the U.S. Supreme Court.

That outcome is neither necessary nor inevitable. Proactive and preventive rulemaking providing for mandatory disqualification could avoid the need for, or the occurrence of, any *Caperton* challenge in Nevada. The Nevada Judicial Conduct Code Commission could amend its present draft of the proposed rule revisions and require judges to disqualify themselves from cases involving campaign donors who give above defined dollar thresholds. The drafting task is easy. The ABA's latest model Code of Judicial Conduct offers language that could be adapted to suit. Rule 2.11(A)(4) would require a judge to "disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned," including where "a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that [is greater than $[insert amount] for an individual or $[insert amount] for an entity]." The Code Commission would specify the temporal and monetary limits.

This model rule provides a good starting point, but an enhancement or two is in order. First, the disqualification rule as drafted does not capture amounts spent in support of a campaign but not directly contributed to, or coordinated with, the candidate. After all, the *Caperton* expenditures were *not* "contributions" – i.e. money donated directly to a candidate's campaign – but ostensibly independent issue advocacy expenditures made by a 527 organization. It might be desirable to draft the rule to apply not only to aggregate contributions, but also to money expended in support of a campaign.

Second, the model rule does not address the very real possibility of bundling, or the aggregation of individual contributions falling at or below the contribution limits. Such aggregations empower a bundler to exercise undue influence, or the appearance of it, over an elected official.

For a measure with real teeth, the Code Commission might add an anti-bundling provision to prevent contribution aggregation.

Opponents to such a disqualification rule might argue that litigants and their counsel will "game the system" to obtain a preferred adjudicator by "buying" disqualifications, i.e. by donating to disfavored judicial candidates. Doubtless this will happen to some extent, but consider a few built-in disincentives. First, under the rule, the way to game the system is for donors to assist in the election of judges *they are disinclined to like for substantive reasons*. If these judges were elected, they would be disqualified *only* in those cases involving the donor(s). In many other cases, the judges would have the opportunity to shape the direction of the law in ways that the contributors would dislike. Ultimately, these rulings may prove to be persuasive or controlling on cases where these judges are recused. Second, judicial candidates need not accept *all* contributions tendered to them. They remain free to reject the gaming. Third, this "game" carries a risk for its players. Litigants and their counsel who play the game might have to explain to the judges they wanted elected why they supported their challengers. Finally, a disqualification game may prove much more expensive to play than the present game: counsel would have to contribute and expend money both for those candidates they sincerely support (at levels below any disqualification threshold) as well as those they merely strategically back (at levels above any disqualification threshold).

Although some anticipate a Missouri-type plan will replace contested elections in the not-too-distant future, similar proposals have failed before. The modest reform of mandatory disqualification may provide a parachute that helps avoid the sort of problem raised by *Caperton*. Whether the U.S. Supreme Court concludes the 14th Amendment Due Process Clause requires a judge to disqualify in such cases, Nevada might just decide it's a good idea and provide for it by rule. NL

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