Excuse Me, Recuse You

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Categories : Procedure, Uncategorized

Tagged as : judicial conduct, judicial elections, recusal

Date : June 9, 2009

Yesterday, the United States Supreme Court decided a case that could have been the subject of a John Grisham novel. The case is Caperton v. A.T. Massey Coal Company, and the basic facts are as follows. Massey is a huge coal mining conglomerate. Caperton is the president of a much smaller company. Caperton and his company sued Massey for "fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations," and a West Virginia jury awarded Caperton $50 million in damages. Massey planned to appeal to the West Virginia Supreme Court, but before the appeal was filed, judicial elections were held.

Don Blankenship, the chairman, CEO, and president of Massey, decided to support Brent Benjamin, a candidate for a state supreme court seat held by an incumbent justice. Blankenship donated the maximum legal amount -- $1,000 -- to Benjamin's campgain, spent $500,000 on "independent" direct mailings and newspaper and television advertisements supporting Benjamin, and gave $2.5 million to a third-party organization dedicated to supporting Benjamin's candidacy. Blankenship's $3 million in expenditures was three times more than the combined total of all of Benajmin's other supporters. Benjamin won with 53% of the vote.

Massey appealed the $50 million jury verdict to the state supreme court, including now-Justice Benjamin. The court granted review, and Caperton moved for Justice Benjamin to recuse himself, citing due process concerns and arguing that the state's judicial standards required recusal. Justice Benjamin denied the motion and participated in the case. The court reversed the judgment on a 3-2 decision, with Justice Benjamin in the majority.

Caperton sought rehearing, and on rehearing, one of the justices in the majority recused himself after pictures surfaced of he and Blankenship vacationing together on the French Riviera. One of the justices in the minority recused himself based on his public criticism of Blankenship's role in Justice Benjamin's election. Justice Benjamin, however, again declined to recuse himself, and participated in another narrow decision reversing the trial court's judgment.

The United States Supreme Court granted certiorari and, in a 5-4 decision, ruled that Justice Blankenship should not have heard the case. Justice Kennedy wrote the majority opinion, noting that motions for recusal normally do not implicate constitutional concerns, but instead are matters of judicial ethics. However, the majority noted, when the evidence of a judge's bias is sufficiently strong, the Due Process Clause requires recusal. For example, precedent dictates that when a judge receives a bonus for convictions, or when a mayor-judge knows that the town's coffers will benefit from fines received from convicted defendants, due process is compromised.

The majority determined that there is likewise "a serious risk of actual bias . . . when a person with a personal stake in a particular case ha[s] a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." Although it purported not to question Justice Benjamin's claim that he was not actually biased in favor of Massey, and purported to be agnostic about whether Blankenship's donations played a decisive role in the election, the majority nonetheless ruled that the objective facts of the situation created so great a *risk* of bias as to be constitutionally intolerable. In an apparent effort to limit the reach of its holding, the majority emphasized that the case at bar was extremely unusual, noting that the parties had been unable to point to a single additional case involving equally egregious facts.

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Chief Justice Roberts penned the principal dissent. He noted that Justice Benjamin's opponent also benefited from the support of large third-party organizations, and observed that Justice Benjamin's margin of victory was large enough that Blankenship's contributions may not have mattered. More fundamentally, he worried that the majority did not impose a clear standard for when due process requires recusal. He listed 40 questions left unanswered by the majority, including "[h]ow much money is too much money?" and "[h]ow long does the probability of bias last?" The lack of a bright-line rule, in his view, is an invitation to frivolous motions seeking recusal.

Although I am open to persuasion, I doubt that the Chief Justice's parade of horribles, including countless frivolous recusal motions, will come to pass in North Carolina. First, the Code of Judicial Conduct already requires recusal in any case in which the judge's impartiality "may reasonably be questioned." Thus, the basis for recusal motions already exists, yet few are filed. Second, I'm not aware of any judges with anything like the disproportionate support received by Justice Benjamin. (Those with lots of time on their hands can certainly check out the campaign finance reports on the Board of Elections website and tell me if I'm wrong.) The latter point is particularly true with respect to criminal matters, where the number of dollars at stake is relatively low, and it's particularly true with respect to appellate judges, since most candidates for appellate judgeships accept public financing and its attendant restrictions.

Am I wrong?

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