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MEMORANDUM

TO: Friends / Colleagues

FROM: Mike Wittenwyler / Brady Williamson
Godfrey & Kahn, S.C.

DATE: June 8, 2009

SUBJECT: Political Law Update: *Caperton v. A.T. Massey Coal Co., Inc.*

Earlier today, the U.S. Supreme Court held that constitutional due process requires an elected West Virginia Supreme Court justice to recuse himself from a matter involving a litigant whose financial support – almost entirely independent spending – that benefited the justice's campaign "had a significant and disproportionate influence in placing [the justice] on the case." *Caperton v. A.T. Massey Coal Co., Inc.*, Case No. 08-22 (June 8, 2009). While the Court emphasized that today's decision addresses an "extreme case" and "an extraordinary situation," it is an important decision likely to affect any organization that financially supports independent communications involving the judiciary or judicial elections.

THE MAJORITY OPINION

In *Caperton*, the chief executive officer of a coal company with a case pending before the West Virginia Supreme Court spent approximately $3 million on independent political communications – over $500,000 on direct independent expenditures and almost $2.5 million through donations to a section 527 organization – supporting a candidate for the state supreme court. In addition to his support for these independent communications over which the judicial candidate had no control, the CEO also contributed $1,000 – directly and legally – to the candidate's campaign.

The candidate that benefited from the independent political communications won the election and joined the West Virginia Supreme Court. Based on this independent spending, the attorneys on the other side of the coal company in a civil case requested that the new justice recuse himself. He refused and, in two instances, cast a vote in favor of the coal company's position, invalidating a $50 million verdict against the coal company. During the litigation, a petition for certiorari was filed with the U.S. Supreme Court arguing that due process required the judge to recuse himself from participating in the matter.

Writing for a 5-4 majority, Justice Kennedy agreed:

> We conclude that there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to

> the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.[1]

Justice Kennedy makes clear that this decision "addresses an extraordinary situation, where the Constitution requires recusal" on due process grounds. Moreover, the majority opinion does *not* adopt a position that direct contributions or independent political communications inherently create a reason for recusal.

> Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case.
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> …
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> The facts now before us are extreme by any measure.
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> …
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> … [M]ost disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances.

But on these "extreme facts," the majority decision concludes that "the probability of actual bias rises to an unconstitutional level" and due process requires a recusal to maintain the integrity of the judiciary and the rule of law.

DISSENTING OPINION

In a dissenting opinion, Chief Justice Roberts expresses serious concern with the majority's desire for an "objective standard" that "fails to provide clear, workable guidance for future cases." He then goes on to list 40 "fundamental questions" that will now need to be determined, largely by state courts, in developing objective standards that would apply to such requests for recusal. These questions include:

- "How much money is too much money? What level of contribution or expenditure gives rise to a 'probability of bias.'?"
- "Are independent, non-coordinated expenditures treated the same as direct contributions to a candidate's campaign? What about contributions to independent outside groups supporting a candidate?"
- Does it matter whether the campaign expenditures come from a party or the party's attorney? If from a lawyer, must the judge recuse in every case involving that attorney?

[1] As Chief Justice Roberts points out in his dissent: "The majority [decision] repeatedly characterizes the [CEO's] spending as 'contributions' or 'campaign contributions' but it is more accurate to refer to them as 'independent expenditures.' [The CEO] only 'contributed' $1,000 to the [justice's] campaign.

- "What type of support is disqualifying? What if the supporter's expenditures are used to fund voter registration or get-out-the-vote efforts rather than television advertisements?"

- "Are the parties entitled to discovery with respect to the judge's recusal decision?"

In sum, Chief Justice Roberts and the dissenting justices are concerned about the majority's "inability to formulate a 'judicially discernible and manageable standard.'" The Chief Justice concludes his dissenting opinion:

> I believe that opening the door to recusal claims under the Due Process Clause, for an amorphous "probability of bias," will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts. I hope I am wrong.

CONCLUSION

Caperton is a decision based on "extreme facts" but it will not be the last word on judicial recusal. It is a decision that almost certainly will generate even more discussion on judicial elections, judicial campaign contributions and the standards for judicial recusal. And, for those organizations that financially support independent communications involving the judiciary and judicial elections, *Caperton* almost certainly will generate questions about the participation of judges who benefit from those communications when these organizations are before their courts.

As always, please let us know if you have questions or need any additional information about *Caperton* and judicial recusal.

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