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Remarks by Hugh M. Caperton*

The Fourteenth Amendment to the United States Constitution grants every citizen the right to due process of the law; a fair trial in a fair tribunal. It doesn’t say some citizens, or citizens with lots of money, or citizens who support special interest groups that are spending millions on judicial elections; it says every citizen.

Imagine growing up in a small coal mining town in the Appalachian mountains of West Virginia. The town is actually owned by the company, so everyone who lives there works for the company. The miners get up each morning and make their way down the shaft of the mine to work so they can provide for their families. As you walk to school, you pass by the portal of the mine, hoping for the chance to wave goodbye to your dad as the mine car he is riding in passes by you and heads underground. On your way home from school, you stop by the company store. Miners who are awaiting the second shift gather there and talk about what they love the most, mining coal. You sit mesmerized listening to their stories from five miles underground. You have lived and breathed coal your whole life—it’s in your veins.

You have a dream of building your own coal company. You spend years working for other companies learning your trade, constantly keeping that dream in front of you.

Your hard work pays off and you take that plunge and start your company from scratch. It takes years of work but eventually your company grows from a small business with the only employee being yourself, to a twenty-five-million-dollar-a-year company producing almost a million tons of coal annually and providing over a hundred well paying jobs in a region that sorely needs them. Between shifts, you stand on the porch of the company office and talk with the miners and you talk about one thing, mining coal.

Now, imagine all of your hard work being destroyed by one of the nation’s largest coal companies, who coveted the business that you had worked so hard to build, not by using ethical competitive

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* Hugh M. Caperton, Address at the National Judicial College’s “ELECTING NEVADA’S Judges: Protecting Impartiality and Ensuring Accountability” (Oct. 18, 2010).

business practices, but by engaging in an illegal and fraudulent scheme that they had planned for years.

Personally, you lose nearly everything, including your job and your business. More importantly, the 150 employees that have worked their entire adult lives underground in the mines have lost their jobs and their retirement and their medical benefits.

In the hope of saving everything you have worked for, you take the big company to court and you wage a nine-year court battle with that company. You take this action despite their CEO threatening that he will spend millions on attorneys and tie you up in court for years.

And after nine years of delays, motions, pretrial hearings, depositions, and a trial that lasted over seven weeks, and in which a jury of your peers found in your favor against that company, you are now finally sitting in front of the West Virginia Supreme Court of Appeals hoping, that after all these years, justice will finally be served.

Imagine looking up and seeing on the bench a justice who has been the beneficiary of one individual’s $3 million spending spree in an election he won just a few years before. That individual is the CEO of the coal company you have battled for those nine years. Earlier, you have filed a motion asking for this justice’s recusal. He denies your motion and admonishes you for filing a motion that he claims was based on rumors and conjecture. Never mind that the firm that he worked for prior to becoming a justice had represented the coal company or that he had a personal relationship with the CEO of the appellee that he failed to disclose, or the small fact that he had received millions of dollars in support of his election from that same CEO as I mentioned above. During the hearing, that justice never asks a question, he never says a word.

When it comes time for the oral arguments, your attorney stands and starts to speak and as he does, another of the justices rises from his chair and proceeds to leave the bench. He will not return to the bench until your attorneys have concluded their arguments. [Notably,] that justice and the CEO had exchanged per-

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sonal e-mails.\textsuperscript{5} Two weeks later, the husband of the Chief Justice of the court, himself a successful plaintiff’s attorney, hosts a fundraiser for this justice’s reelection at their home.\textsuperscript{6} One of the largest blocks of contributors to his campaign is the coal company’s employees.\textsuperscript{7} Three months later pictures are made public of that justice, the CEO, and their girlfriends vacationing together on the French Riviera while your case was pending before the court.\textsuperscript{8}

This incredible scenario seems almost too hard to believe. But this is exactly what happened to me in October of 2007 and I’m here to tell you that the feeling for me, my family, and everyone involved in my case that day can only be described in one word—sickening. It is a feeling that no citizen should ever have to endure in any court in this country.

I waited nine years to have my case heard before the West Virginia Supreme Court and before my attorneys even stood up to make their oral argument I knew that two of the five justices had already made up their minds. The actions of Chief Justice Robin Davis that day made it clear where the third vote would come from. She completely ignored the briefs that had been filed by the parties and instead focused on forum selection, an issue so critical to the appellees argument that they devoted one entire sentence to the subject in their ninety-page brief to the court. Although bitterly disappointed, none of us were surprised when the court overturned the jury award by a 3-2 margin. Justice Brent Benjamin, the man on whom Don Blankenship, the CEO of Massey Energy, had spent millions to get elected, cast the deciding vote. Justice Spike Maynard, Blankenship’s long time friend, and Chief Justice Robin Davis, whose husband held the fundraiser at their home for Justice Maynard joined the majority. It was the first time in the 147 year history of West Virginia that a jury award had been over-


turned on the grounds of forum selection. The case was dismissed with prejudice.

Writing for the majority Chief Justice Davis said the following:

We wish to make it perfectly clear that the facts of this case demonstrate that Massey’s conduct warranted the type of judgment rendered in this case. However, no matter how sympathetic the facts are, or how egregious the conduct, we simply cannot compromise the law in order to reach a result that clearly appears to be justified.9

In other words, the jury got it right. They then proceeded, in their opinion, to change the court’s standard for review on a motion to dismiss for improper venue from an abuse of discretion standard to a de novo standard.10 This highly questionable decision allowed the court to reverse the circuit court judge’s denial of the Defendant’s motion to dismiss, which he had ruled on seven years prior to the Supreme Court hearing this case.11

After they had that small hurdle out of the way, the majority went about throwing out the forum selection law that had been on the books in West Virginia for nearly 100 years and replacing it with eight new points of law complete with a four part test to determine if in fact the proper venue had been chosen.12 Of course to make it all work, the court then applied these new laws retroactively to my case.13 We were never given the opportunity to defend ourselves against these new laws.

If you go to the West Virginia Supreme Court website, in its overview of the court’s responsibilities, it says the following: “The

   We first review the correctness of the circuit court’s denial of the Massey Defendants’ motion to dismiss for improper venue in light of the forum-selection clause contained in the 1997 CSA. “This Court’s review of a trial court’s decision on a motion to dismiss for improper venue is for abuse of discretion.” Syl. pt. 1, United Bank, Inc. v. Blosser, 218 W.Va. 378, 624 S.E.2d 815 (2005). However, we now hold that “[o]ur review of the applicability and enforceability of [a] forum[-] selection clause is de novo.” Hugel v. Corporation of Lloyd’s, 999 F.2d 206, 207 (7th Cir.1993) (citing Northwestern Nat’l Ins. Co. v. Donovan, 916 F.2d 372, 375 (7th Cir.1990); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 956 (10th Cir.1992)). Cf. Syllabus point 1, Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995) (“Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.”).

Caperton, 679 S.E.2d at 233-34.
12. Id. at 234-56.
13. Id.
judiciary is one of three coequal branches of state government, each with separate powers. The legislative branch makes the law. The executive branch enforces the law. The judicial branch interprets and applies the law in cases brought before the courts.”

So much for the Supreme court reviewing and interpreting the laws of our state, so much for allowing the legislative branch to write and pass laws, and so much for due process.

The late Justice Joseph Albright, in his dissent, called the decision “result driven.” He couldn’t have been more right in his assessment.

In light of these dubious actions, the West Virginia Supreme Court has been the subject of numerous articles in papers across the country ridiculing the court for their failure to act appropriately and without the appearance of impropriety. They have cast a black eye on the judicial system in our state. Our citizens have lost faith in our courts.

Although Justice Brent Benjamin’s failure to recuse himself in my case ultimately led to Caperton v. Massey becoming a landmark decision that forever changed the way campaign contributions will affect judicial recusals, it had little or no bearing on the outcome of my case.

And the reason it didn’t was because the damage to the West Virginia court had already been done. One man had succeeded in tainting the entire court. There could be no fair trial in a fair tribunal because the buying of a Supreme Court seat by Don Blankenship, the CEO of Massey Energy, and his winning and dining of Justice Spike Maynard had rendered useless the ability of the court to act in any way that resembled a fair tribunal. Former Justice Larry Starcher said it best when he said that Blankenship had “created a cancer in the . . . Court.” And that cancer was created when big money was introduced into Justice Benjamin’s campaign by one of the so called “Super Spenders” mentioned in the New Politics report just released by Justice at Stake.

17. Joint Appendix, supra note 3, at 480a.
Let's be clear and I think we all know this. Don Blankenship did not spend $3 million of his own money on Justice Benjamin's election because he wanted a fair and balanced court. He did it to influence a vote that ultimately led to his company essentially being granted a fifty million dollar get out of jail free card.

Without the influx of super spender and special interest money into the Benjamin election, the outcome of this case almost certainly would have been different. This is what makes the issue of big money influencing judicial elections so troubling for the ordinary citizen. It appears that justice is indeed for sale.

I am here today not because I am a legal scholar or one of the leading appellate attorneys in the country. I am here because I am a citizen that has experienced firsthand the devastation and destruction that big money campaign donations are causing in judicial elections and ultimately in our courts.

It is absolutely imperative that we do everything we can to eliminate special-interest financing of judicial elections so that citizens will regain confidence in our judicial system.

In 1998, when my legal battles began, I was forty-three years old and had been in the coal business for over twenty years. In that time, I had never seen the inside of a courtroom. I had never filed a lawsuit of any kind and I had never had a suit filed against me or my companies.

Twelve years later, my legal odyssey has taken me into every conceivable type of court in our judicial system. I have been in circuit courts in Virginia and West Virginia, federal bankruptcy court, federal district court, the Virginia Supreme Court, the West Virginia Supreme Court and finally, the Supreme Court of the United States. I think this pretty well qualifies me as an expert on court systems in the U.S.

In my twelve years of legal battles we prevailed against Massey in every one of these courts with the exception of one: the West Virginia Supreme Court. We won in the circuit courts, the federal courts, the Virginia Supreme Court, and the U.S. Supreme Court. And, what is the common thread with each of these courts in which we won? With the exception of the circuit court in West Virginia, all of the other courts have appointed judges and justices. In the circuit court in West Virginia, where we elect our judges, we had the benefit of a jury that listened to the seven weeks of testimony from key witnesses and experts from both sides, reviewed over 300 exhibits, and listened to closing arguments. The West Virginia Supreme Court is the only venue in which we ever lost. It is a court that elects its justices in big mon-
ey partisan elections. And it is a court whose justices included Justice Benjamin, the benefactor of Don Blankenship's spending spree in his election bid and who actually served as Chief Justice and appointed replacement justices at one point during our case, and Justice Spike Maynard, a close personal friend of Blankenship who failed to disclose their cozy relationship and took thousands of dollars from Massey employees in his reelection campaign. Those two made up forty percent of the court.

*Caperton v. Massey*, ladies and gentleman, is a textbook case of why we need to stop electing judges to serve on our courts.

Given my case history, I think it is fairly easy to figure out that I am not a fan of judicial elections in any shape or form. Indeed, I am not a fan of judicial election for two reasons. One is the obvious reason of having big money influence judicial elections. The other is that in some cases, because judicial elections have become popularity contests, we are electing people to the court whose qualifications are questionable. Justice Robin Davis was a family law attorney before becoming a justice. With that background, she wrote the opinion in *Caperton* which was a complex tort case involving two coal companies. All we knew about Justice Benjamin's career record when he ran for Supreme Court Justice is that he worked for a law firm in Charleston. So, neither of these justices had any type of judicial record that could be reviewed by our citizens so that they could make an informed decision on whether or not they had the qualifications necessary to be a part of our highest court.

Just because *Caperton v. Massey* could not change the outcome of my case in West Virginia, that doesn't mean it hasn't had a tremendous impact on our judicial system. *Caperton* has now given judges a standard in which to follow with respect to their recusal from cases involving large contributors.

This is where the great state of Nevada comes in. To borrow an old adage from the marines, you are the “Tip of the Spear.” You are out front leading the fight for impartial, unbiased, fair courts. It is a fight that if it is won, will not only create fair and balanced courts in Nevada, but you will pave the way for the other twenty states that elect judges to pursue amendments such as yours so that we can rid this nation's courts of any appearance of bias and restore people's faith in our judicial system. Every citizen will then truly be awarded what our constitution calls for—due process and a fair trial in a fair tribunal.

It is now within your reach to be the first state in over twenty-five years to reverse the system of electing judges and begin merit
based appointments. We have to stop forcing judges to act like politicians. No judge should be asked to go out and raise outrageous amounts of money to get him elected and then attempt to rule on cases involving those donors. It is beyond my scope of reasoning to believe any individual could, in fact, act impartially under these circumstances.

Even if a judge felt that he could act impartially, that is not the standard for recusal set forth by the American Bar Association and adopted by nineteen states, including Nevada and West Virginia. The standard is not whether a judge feels he can be impartial; it is whether a "reasonable person" would feel he could act without bias.

Justice at Stake has done some polling on how a "reasonable person" feels about this question. In February 2009, just as my case was about to be argued in the Supreme Court, sixty-eight percent of voters nationally said they "would doubt that judge's impartiality." In June 2010, eighty-one percent said judges should not hear cases of those who spent more than $10,000 to elect them (only eleven percent said they should). This is how Americans, Republican and Democrat, feel about elections in which $10,000 or $50,000 is spent. As my case shows, special interests are willing to spend millions to get the judges they want on our states' highest courts.

Now, if only the justices of the West Virginia Supreme Court would have followed the Code of Conduct that they themselves implemented, then most likely, I wouldn't be standing here today nor would we have *Caperton v. Massey* as a landmark decision that is making ballot measures such as yours possible. I guess there really is a silver lining in every dark cloud.

I had the pleasure of participating in a panel discussion a few weeks ago in Washington involving this very issue before you this year. I had the unenviable task of having to follow Justice Sandra Day O'Connor as a speaker. Believe me, you don't want to do that. She is so very passionate about this debate and such a dynamic speaker. One statistic though that I was stunned to learn from her speech is that the United States is the only country in the world that elects judges. How can it be that the world leader in democracy can be the only country in which they inject enormous amounts of money into the election of judges and then expect all these other countries to look up to and respect our way of democracy? Our rule of law? That is truly astounding and it has to change and that change needs to start with the citizens of Nevada. Thank you.