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"A Fair Trial in a Fair Tribunal": A Preface to the Petitioners' Brief in *Caperton v. Massey*

Theodore B. Olson* and Amir C. Tayrani†

As Justice Kennedy stated at the outset of his opinion in *Caperton v. Massey*, "a fair trial in a fair tribunal is a basic requirement of due process."1 The Court's decision in *Caperton* reaffirmed that basic constitutional guarantee. While the facts of the *Caperton* case are, in the Court's words, "extraordinary," the constitutional principles on which the decision rests are elementary; they are fundamental to our system of justice and essential to maintaining public confidence in our judicial system.

Every litigant has a right to have his case heard by a judge who will hold "the balance nice, clear, and true"2 between the parties—even where one of the litigants has the financial resources to facilitate the election of the judge who will decide the parties' dispute. Where that is the case, state canons of judicial ethics and judges' introspective appraisals of their own ability to decide a dispute in a neutral, evenhanded fashion are insufficient to ensure that all litigants receive what is promised to them by the Due Process Clause and by the words engraved in the façade of the Supreme Court: "Equal Justice Under Law."

In another respect, however, *Caperton* may well prove to be extraordinary. With the reaffirmation of the basic constitutional principle that parties cannot be permitted to select the judges in their own case, litigants may no longer have an incentive to spend massive sums of money in an effort to elect the judges who will decide their disputes. If that proves to be true—if *Caperton* turns out to be a rarely invoked and infrequently implicated precedent—then the decision will truly have been a victory for the principles of judicial independence and procedural fairness on which it so firmly rests.

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