

How the United States Supreme Court's decision in *Caperton v. Massey Coal Co.* may impact United States Court of Appeals for the Third Circuit nominee Stephanos Bibas

An Ethics CLE

Presented by

Yvonne Campbell, Esquire

# Who is Stephanos Bibas?

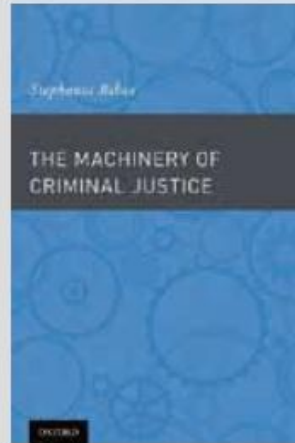
- Columbia University B.A. political theory 1989
- Oxford University B.A. and M.A. Jurisprudence 1991
- Yale Law School 1994



# Stephanos Bibas Resume

- Professor of Criminal Law and Procedure
- US Attorney
- Litigator
- Law Clerk
- Author
- Third Circuit Nominee

## THE MACHINERY OF CRIMINAL JUSTICE



Provides readers with a powerful critique of the criminal justice system and its domination by insider lawyers.

Discusses a wide range of topics in criminal justice, including victim's rights, restorative justice, therapeutic justice, public morality and moral debate.

Written by a seasoned expert in criminal justice with experience as a Supreme Court clerk and a former Manhattan federal prosecutor.

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**Author:**

Stephanos Bibas

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# REBOOTING JUSTICE

MORE TECHNOLOGY, FEWER LAWYERS,  
AND THE FUTURE OF LAW

BENJAMIN H. BARTON  
STEPHANOS BIBAS



# Excerpts from September 21, 2015 National Review Article: The Truth About Mass Incarceration

- So the stock liberal charges against “mass incarceration” simply don’t hold water. There is no racist conspiracy, nor are we locking everyone up and throwing away the key. Most prisoners are guilty of violent or property crimes that no orderly society can excuse...But just because the liberals are wrong does not mean the status quo is right. Conservatives cannot reflexively jump from critiquing the Left’s preferred narrative to defending our astronomical incarceration rate and permanent second-class status for ex-cons. The criminal justice system and prisons are big-government institutions...Now we warehouse large numbers of criminals, in idleness and at great expense. ..There is evidence that prison turns people into career criminals. ..Instead of having to learn vocational skills, they have too much free time to hone criminal skills and connections. And instead of removing wrongdoers from criminogenic environments, prison clusters together neophytes and experienced recidivists, breeding gangs, criminal networks and more crime...Any benefit from locking criminals up temporarily is more than offset by the crime increase caused when prison turns small-timers into career criminals

# 28 U.S.C. § 455: Disqualification of justice, judge, or magistrate judge

- (a) Any justice, judge, or magistrate judge of the United States shall **disqualify himself** in any proceeding in which his impartiality **might reasonably** be questioned.
- (b) He shall also disqualify himself in the following circumstances:
  - (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
  - (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
  - (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
  - (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
  - (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
    - (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
    - (ii) Is acting as a lawyer in the proceeding;
    - (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
    - (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.
- (c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.



"YOUR HONOR, MY CLIENT FEELS YOU SHOULD RECUSE YOURSELF AS HE IS A CAT PERSON."



# Massey Energy Co.

- The A.T. Massey Coal Company was started in 1920 as a coal brokering business
- In 1945 it expanded to coal mining and processing
- Currently operates 35 underground mines and 12 surface mines in West Virginia, Kentucky and Virginia.
- 4<sup>th</sup> largest producer of coal in the U.S.

# Amicus Briefs

- Wal-Mart, PepsiCo, Intel Corporation, Lockheed Martin, Common Cause and Public Citizen filed briefs in the case urging the United States Supreme Court to reject the West Virginia Supreme Court's decision.

*Caperton v. A.T. Massey Coal Co., Inc.*  
556 U.S. 868 (2009)

**Procedural History**

- Plaintiffs were a competing mining company
- Sued Defendants in WV and went to a jury trial on claims of fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations.
- Jury verdict of \$50,000,000

*Caperton v. A.T. Massey Coal Co., Inc.*  
556 U.S. 868 (2009)

**Procedural History**

- Trial was August 2002
- “Massey intentionally acted in utter disregard of Caperton's rights and ultimately destroyed Caperton's businesses because, after conducting cost-benefit analyses, Massey concluded it was in its financial interest to do so.”

*Caperton v. A.T. Massey Coal Co., Inc.*  
556 U.S. 868 (2009)

**Where things get interesting (Facts)**

- Massey's chairman, CEO, and president: Don Blankenship decided to support Brent Benjamin to replace an incumbent justice on WV's Supreme Ct of Appeals
- Blankenship donations to support Benjamin
  - Blankenship's 3 Mil was more than all other Benjamin supporters, and three times the amount spent by Benjamin's own committee
- Benjamin won with 53.3% of the vote

*Caperton v. A.T. Massey Coal Co., Inc.*  
556 U.S. 868 (2009)

**Caperton's First Motion for Recusal**

- Who decides recusal motions?
- He “carefully considered the bases and accompanying exhibits proffered by the movants.” But he found “no objective information ... 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.”

# *Caperton v. A.T. Massey Coal Co., Inc.*

556 U.S. 868 (2009)

## **So what does the WV court do?**

- Reverse the \$50 M verdict
- 3 to 2 opinion
- “Massey's conduct warranted the type of judgment rendered in this case.”
  - Reversed, nevertheless, based on two independent grounds— first, that a forum-selection clause contained in a contract to which Massey was not a party barred the suit in West Virginia, and, second, that res judicata barred the suit due to an out-of-state judgment to which Massey was not a party.
- Dissent
  - The majority “misappl[ied] the law and introduc[ed] sweeping ‘new law’ into our jurisprudence that may well come back to haunt us.”

# *Caperton v. A.T. Massey Coal Co., Inc.* 556 U.S. 868 (2009)

## **Motion for rehearing and more recusal motions**

- One justice granted Caperton's recusal motion b/c photos of him vacationing with Blankenship on the French Riviera
- Another justice granted Massey's recusal motion b/c of his public criticism of Blankenship's role in the 2004 election
  - In his recusal, he again publicly criticized Blankenship stating "Blankenship's bestowal of his personal wealth, political tactics, and 'friendship' have created a cancer in the affairs of this Court."
- Who denied the recusal motion?





*Caperton v. A.T. Massey Coal Co., Inc.*  
556 U.S. 868 (2009)

**A third recusal motion!**

- Justice Benjamin again refused to recuse
- Again the court heard the case, and by 3-2 decided for the same reasons as the prior court to reverse the 50 Mil verdict

*Caperton v. A.T. Massey Coal Co., Inc.*  
556 U.S. 868 (2009)

**The Supremes**

- Issue of first impression
- Statutory & Constitutional reasons for recusal
- Precedent showed two bases under the due process clause
  - When a judge has a financial interest in a case
  - When the judge is trying a defendant for criminal contempt that occurred before that judge
- Let's discuss each of these in more detail.

*Caperton v. A.T. Massey Coal Co., Inc.*  
556 U.S. 868 (2009)

**When a judge has a financial interest in a case**

- *Tumey v. Ohio*, 273 U.S. 510 (1927).
- USSC concerned with general temptations for adjudicators to disregard neutrality.
- The Court was thus concerned with more than the traditional common-law prohibition on direct pecuniary interest. It was also concerned with a more **general concept of interests** that **tempt adjudicators to disregard neutrality**

*Caperton v. A.T. Massey Coal Co., Inc.*  
556 U.S. 868 (2009)

**Judge's financial interest continued...**

- “The Court stressed that it was not required to decide whether in fact the justice was [**actually**] influenced...the proper constitutional inquiry is...**possible** temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.” *Massey* at 879.

# *Caperton v. A.T. Massey Coal Co., Inc.*

## 556 U.S. 868 (2009)

**When the judge is trying a defendant for criminal contempt that occurred before that judge**

- *In re Murchison*, 349 U.S. 133, (1955).
  - The Court set aside the convictions on grounds that the judge had a conflict of interest at the trial stage because of his earlier participation followed by his decision to charge them. The Due Process Clause required disqualification. The Court recited the general rule that no man can be a judge in his own case, adding that **no man is permitted to try cases where he has an interest in the outcome.**
  - The Court went on to note that the **disqualifying criteria cannot be defined with precision.** Circumstances and relationships must be considered.

*Caperton v. A.T. Massey Coal Co., Inc.*  
556 U.S. 868 (2009)

**When the judge is trying a defendant for criminal contempt that occurred before that judge cont.**

- The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the **average** judge in his position is “likely” to be neutral, or whether there is an unconstitutional “potential for bias.”

*Caperton v. A.T. Massey Coal Co., Inc.*  
556 U.S. 868 (2009)

- Turning to the issue before the Court: Judicial elections
- “Justice Benjamin was careful to address the recusal motions...in four separate opinions issued during the course of the appeal, he explained why no actual bias had been established.”
- “We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was **actual bias.**” *Massey* at 882.

*Caperton v. A.T. Massey Coal Co., Inc.*  
556 U.S. 868 (2009)

**New rule of law**

- Objective standard
  - The probability of actual bias on the part of the judge is too high to be constitutionally tolerable



# *Caperton v. A.T. Massey Coal Co., Inc.*

556 U.S. 868 (2009)

- “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.” *Massey* at 884.
- “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.” *Massey* at 884.
- “Whether Blankenship's campaign contributions were a necessary and sufficient cause of Benjamin's victory is not the proper inquiry.” *Massey* at 885.
- “The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical, for it was reasonably foreseeable that the pending case would be before the newly elected justice. The \$50 million adverse jury verdict had been entered before the election, and the Supreme Court of Appeals was the next step once the state trial court dealt with post-trial motions. So it became at once apparent that, absent recusal, Justice Benjamin would review a judgment that cost his biggest donor's company \$50 million “ *Massey* at 886.
- “There was here a serious, objective risk of actual bias that required Justice Benjamin's recusal.” *Massey* at 886.

# New York Times Editorial Opinion

- “The right to a fair hearing before an impartial judge, untainted by money or special interests...is more secure” following the 5-4 *Caperton v. Massey* decision.
- “The case involved egregious ethical myopia on the part of Justice Brent Benjamin.”
- “The only truly alarming thing about [the] decision was that it was not unanimous.” “An ethical matter that should transcend ideology should have united all nine justices.”

# Post-*Caperton* issues

- “[The case] gives rise to the question of whether a federal judge or justice must disqualify himself from cases in which PAC support for (or opposition to) a nominee creates a similar probability of bias when a party closely associated with the PAC has a case before that judge.”
  - Charles Gardner Geyh
    - Professor at Indiana University's Maurer School of Law
    - To the ABA Journal

# The PAC Ad



TELL YOUR SENATOR TO  
CONFIRM **STEPHANOS BIBAS**  
TO THE US 3RD CIRCUIT  
COURT OF APPEALS

CONTACT YOUR  
SENATOR NOW

# Who are the Concerned Veterans of America?

- A nonprofit 501(c)4
  - <https://cv4a.org/cva-urges-quick-action-lower-court-nominees/>
- Receives considerable funding from the Koch Brothers
  - Two politically conservative brothers who own Koch Industries
    - The second largest privately owned company in the U.S.
    - <http://www.kochind.com/companies/>

# Why advertise nominees?

- “I think its probably to get the Senate moving”
  - G. Terry Madonna, Director of the Center for Politics and Public Affairs at F&M College
- It “could signal either growing concern with partisan gridlock in Washington, or concerns that Bibas might be perceived as being a politically weak nominee.”
  - From the ABA Journal

# Chief Justice Roberts's dissent

- “But the standard the majority articulates—“probability of bias”—fails to provide clear, workable guidance for future cases. At the most basic level, it is unclear whether the new probability of bias standard is somehow limited to financial support in judicial elections, or applies to judicial recusal questions more generally.” *Massey* at 893.
- How much money is too much money such that it give the “probability of bias?” *Caperton* at 893.
- Does the analysis change depending on whether the judge whose disqualification is sought sits on a trial court, appeals court, or state supreme court? *Id.* 894
- What if the case involves a social or ideological issue rather than a financial one? *Id.*
  - Example here – the Koch brothers apparent agreement on criminal issues
- What if the judge expressly disclaims the support of this person? *Id.* at 895

# Further Discussion Questions

- What type of cases would you now expect a recusal from Bibas if he were to be confirmed?
- Are you concerned that Judges feel a ‘debt of gratitude?’
- When is the time to file your motion to recuse – before or after that judge has reached a decision?
- Do judge’s even rule in contributors favor?
  - One lawyer, who, together with his law partners gave \$63,000 to judges who ruled against him told a reporter “had I known ahead of time that the candidate were going to take 2/3 of the cases and decide them in favor of the defense, I would have donated the money to a good charity.” From Ronald D. Rotunda 60 Syracuse L. Rev. 247 Judicial Disqualification in the Aftermath of Caperton v. A.T. Massey Coal Co.