

Impeach Brent Benjamin Now!?

Giving Adequate Attention to Failings of Judicial Impartiality

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I. INTRODUCTION: MEN WITH NO REGRETS AND
INADEQUATE CONCERN

“It just doesn’t smell right.”

Brent D. Benjamin, Chief Justice¹
West Virginia Supreme Court of Appeals²

Justice Benjamin proved far less sensitive to the “smell test” when his own conduct was at issue. In *Caperton v. A.T. Massey Coal Co.*,³ the U.S. Supreme Court, albeit by a slim 5–4 vote,⁴ vacated a decision in which he had received \$3 million in campaign support from the CEO of

1. Audio tape: comment to policyholder counsel David A. Gauntlett, Esq. during oral argument before West Virginia Supreme Court of Appeals, *Mylan Labs., Inc. v. Am. Motorists Ins. Co.*, Appeal No. 34402, Civ. Action No. 07-C-69 (Sept. 2, 2009) (on file with author) (reviewing trial court decision that held that insurers have no duty to defend).

Policyholder Mylan was seeking defense pursuant to purchased advertising injury coverage from its liability insurers in connection with a class action over alleged manipulation of average wholesale price of its products that policyholder contended were potentially within coverage because it involved price discrimination in marketing that allegedly inflicted advertising injury for purposes of the insurance policy. The standard for triggering a duty to defend is whether plaintiff’s claim creates a potential for coverage based on facts alleged in the complaint, even if noncovered claims are also alleged. *See Aetna Cas. & Sur. Co. v. Pitrolo*, 342 S.E.2d 156, 160 (W. Va. 1986); 1 JEFFREY W. STEMPEL, STEMPEL ON INSURANCE CONTRACTS § 9.03 (3d ed. 2006 & Supp. 2009). Justice Benjamin was visibly irked at the prospect of a company’s violating the law and obtaining insurance protection, albeit—as policyholder counsel emphasized—only for defense of the claims (if criminal conduct were proven, then an exclusion would likely apply).

2. Although this is the court’s proper title, this Article will commonly refer to it as the “West Virginia Supreme Court” or the “state supreme court” for ease of reference.

3. 129 S. Ct. 2252 (2009).

4. *See id.* at 2252. Justice Kennedy’s opinion was joined by Justices Stevens, Souter, Ginsburg, and Breyer, forming a majority to vacate the West Virginia Supreme Court’s decision when the state court justice casting the deciding vote had received \$3 million in campaign aid from the CEO of defendant Massey. Chief Justice Roberts was joined by Justices Scalia, Thomas, and Alito, voting to let the decision stand in spite of the key participation by the challenged state court justice. *Id.* at 2267 (Roberts, C.J., dissenting); *see also id.* at 2274–75 (Scalia, J., dissenting) (criticizing majority for extending due process review to cases of judicial recusal based on campaign activity).

a litigant seeking to avoid a \$50 million liability.⁵ The dissenters not only objected to removing Justice Benjamin, but also minimized the danger of biased judging presented by the situation,⁶ and questioned the wisdom of expanding review of state court judicial disqualification pursuant to the Due Process Clause.⁷ Editorial comment on the decision was largely favorable, although a significant number of commentators embraced the dissent's bizarre view that requiring the disqualification or

5. See *infra* Part II.A for a review of the facts of *Caperton*. According to some estimates, Blankenship spent as much as \$3.5 million on behalf of the Benjamin candidacy. See Editorial, *Clouded: State Supreme Court*, CHARLESTON GAZETTE, Apr. 7, 2008, at 4A (“Benjamin was elected in 2004 because Massey Energy’s CEO spent an astounding \$3.5 million to defeat Benjamin’s Democratic opponent.”). For purposes of analyzing the disqualification issues presented, this Article will assume that Blankenship’s campaign support was no greater than \$3 million.

6. Chief Justice Roberts stated:

And why is the Court so convinced that this is an extreme case? It is true that Don Blankenship spent a large amount of money in connection with this election. But this point cannot be emphasized strongly enough: Other than a \$1,000 direct contribution from Blankenship, [disqualified West Virginia Supreme Court of Appeals] Justice [Brent] Benjamin and his campaign had no control over how this money was spent.

Caperton, 129 S. Ct. at 2273 (Roberts, C.J., dissenting). Chief Justice Roberts also found, “Moreover, Blankenship’s [\$3 million in] independent expenditures do not appear ‘grossly disproportionate’ compared to other such expenditures in this very election.” *Id.* Justice Scalia stated that “[t]he Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution. Alas, the quest cannot succeed—which is why some wrongs and imperfections have been called nonjusticiable.” *Id.* at 2275 (Scalia, J., dissenting).

7. See *id.* at 2267 (Roberts, C.J., dissenting) (contending that the “end result [of the majority’s decision favoring disqualification] will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case”). The Chief Justice then raises a list of specific questions regarding application of the majority’s standards for judicial impartiality satisfying constitutional due process. *Id.* at 2269–72. Justice Scalia continued:

In the best of all possible worlds, should judges sometimes recuse even where the clear commands of our prior due process law do not require it? Undoubtedly. The relevant question, however, is whether we do more good than harm by seeking to correct this imperfection through expansion of our constitutional mandate in a manner ungoverned by any discernable rule. The answer is obvious.

Id. at 2275 (Scalia, J., dissenting). More precisely, the Roberts dissent posed forty questions in defense of its view that the majority’s invocation of the Due Process Clause to require judicial disqualification due to receipt of enormous campaign contributions was not a sustainably practical approach to policing the judicial integrity of state courts. Forty enumerated questions, that is, with many containing subparts or follow-up questions. If one calculates the total number of questions in the Roberts dissent as one would in reviewing litigation interrogatories, the total number of questions actually totals eighty queries. See *id.* at 2269–72 (Roberts, C.J., dissenting).

recusal⁸ of a justice who had received so much financial aid from a litigant somehow brought the judiciary into disrepute.⁹

And what of the men whose behavior prompted the relatively rare act of U.S. Supreme Court scrutiny over the participation of a state court justice in a case involving questions of state law? Massey Coal CEO Don L. Blankenship, the man who had showered \$3 million in support of the justice in question, remained defiant, defending his enormous assistance as mere civic activism:

Simply put, I helped defeat a judge [Justice Benjamin's 2004 opponent former Supreme Court Justice Warren McGraw] who had released a pedophile to work in a local school,¹⁰ who had driven doctors out of the state, and who

8. This Article treats the words "disqualification" and "recusal" as synonyms. Some courts and commentators have historically distinguished the terms, suggesting that disqualification is a judge's mandatory obligation to avoid participation in a case while recusal is a more voluntary, discretionary act informed by the judge's own preferences as well as prevailing law. See JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS, at 4-11 (4th ed. 2007) (tending to use disqualification as preferred term but using recusal as acceptable synonym); RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 1.1 (2d ed. 2007) (noting traditional distinction but using terms interchangeably throughout the treatise); Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1214 (2002) (using terms interchangeably); Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 460 (2004) (outlining traditional distinction between the terms).

9. Compare Joan Biskupic, *Court Says Judges Must Avoid Appearance of Bias with Donors*, USA TODAY, June 9, 2009, at 2A, Jess Bravin & Kris Maher, *Justices Set New Standard for Recusals*, WALL ST. J., June 9, 2009, at A3, Michael Doyle, *Supreme Court Makes It Easier To Force Elected Judges off Cases*, McCLATCHY NEWSPAPERS, June 9, 2009, <http://www.mcclatchydc.com/257/story/69665.html>, Editorial, *Honest Justice*, N.Y. TIMES, June 9, 2009, at A26 (endorsing Caperton's removal of Justice Benjamin from case and criticizing dissenters), and Editorial, *Raising the Bar*, L.A. TIMES, June 9, 2009, at A18 (favoring Caperton result), with Editorial, *Judges and 'Bias.'* WALL ST. J., June 9, 2009, at A18 (criticizing decision), and Editorial, *Judicial Impartiality*, LAS VEGAS REV. J., June 11, 2009, at 6B (finding that the decision could cause more problems than it solves and endangers continued election of judges by making campaign support ground for recusal).

10. Notwithstanding that the McGraw-Benjamin election contest was over five years ago, Blankenship remained in campaign mode, alluding to the "hot button" political issue that appears to have been key to defeating McGraw. Along with a state supreme court majority, McGraw had vacated the sentence of Tony Arbaugh, who at age fifteen was convicted of molesting his younger half-brother and sentenced to thirty-five years in jail, with the case vacated and remanded in a unanimous per curiam opinion. Arbaugh was then given probation and later charged with drug, weapons, and domestic violence crimes. The case was subsequently featured in anti-McGraw campaign advertisements to imply that McGraw was soft on crime and insufficiently protective of children. See *Figure in Court Election Ads Faces Charges*, CHARLESTON GAZETTE, Mar. 1, 2005, at 3A.

The Arbaugh matter was seen by many observers as a red herring tactic designed to make McGraw look bad but mask the real political conflict in the McGraw-Benjamin race:

had cost workers their jobs for thirty plus years.¹¹ I think this effort helped unchain West Virginia's economy and benefited working families. . . .

Like millions of other Americans I contributed my time, my energy, and, yes, my money to oppose a candidate I disagreed with personally and politically. It is unfortunate that the Supreme Court's ruling is being reported as a matter of corporate influence and judicial review. This is not and was not ever about the company I have served for more than 27 years or the industry I have worked for the majority of my entire life.¹²

The race is seen by many as a proxy war between business and labor for control of the five-member Supreme Court. The state Chamber of Commerce spent about \$850,000 on commercials critical of the court in an unsuccessful effort to knock off McGraw in the Democratic primary.

If Benjamin wins in November, business groups believe he will vote with the Democratic justices viewed as more business-friendly, Spike Maynard [subsequently disqualified in *Caperton* because of his vacations with and other social ties to Blankenship and later defeated by a more liberal Democrat] and Robin Davis.

Chris Wetterich, *Massey CEO Seeks Donations for McGraw Opponent*, CHARLESTON GAZETTE, Aug. 18, 2004, at 3A. Unquestionably, the Arbaugh case was prominent in a campaign notable for its harsh attacks on a sitting justice. See Terry Carter, *Mud and Money: Judicial Elections Turn to Big Bucks and Nasty Tactics*, A.B.A. J., Feb. 2005, at 40, 45 (noting that leading state newspaper labeled attack ads "West Virginia's version of Swift Boat Veterans for the Truth" (quoting Brad McElhinny, *McGraw Campaign Cries Foul: Candidate's Team Says Independent Group Must Be Coordinating with Foe's Campaign Staff*, CHARLESTON GAZETTE, Sept. 22, 2004, at 1A)). See also Jeffrey W. Stempel, *Playing Forty Questions: Responding to Justice Roberts' Concerns in Caperton and Some Tentative Answers About Operationalizing Judicial Recusal and Due Process*, 39 SW. U. L. REV. 1 (2009) (discussing Arbaugh case and 2004 McGraw-Benjamin election contest in greater detail).

11. In this portion of his statement, Blankenship is referring to former Justice McGraw's votes to uphold plaintiff tort verdicts and to strike down certain aspects of medical malpractice tort reform legislation championed by much of the medical and business community.

12. See *Don L. Blankenship Addresses the U.S. Supreme Court Ruling on Caperton v. A.T. Massey Coal Company*, No. 08-22, PR NEWSWIRE, June 10, 2009, <http://www.pnnewswire.com/news-releases/don-l-blankenship-addresses-the-us-supreme-court-ruling-on-caperton-v-at-massey-coal-company-no-08-22-62084212.html>. Blankenship downplays the corporate power aspects of the case and stresses that he was "born in Appalachia" and has "spent almost [his] entire life as a resident of West Virginia," issuing this statement with a dateline of Sprigg, West Virginia. Interested readers seeking more information are instructed to contact Chelsea Cummings at (202) 683-3106 for Don Blankenship. This is the Washington, D.C. phone number of the McLean, Virginia-based public relations firm of Qorvis Communications, LLC, which according to its website "specializes in corporate communications" and includes as clients the Kingdom of Saudi Arabia and the Kurdistan Regional Government of Iraq. See Qorvis, <http://www.qorvis.com> (last visited Feb. 7, 2010). So much for Blankenship's down-home, local West Virginia boy posture in the press release.

Blankenship's statement conveniently fails to mention that the disqualified justice cast the deciding vote in a decision eliminating a \$50 million judgment against Massey Coal, which had grown to approximately \$82 million with interest by summer 2009, and that the *Caperton v. Massey* case was not only financially important to Massey Coal, but also served as something of a referendum on Blankenship's conduct as a businessman. In the underlying litigation, a jury had concluded that Blankenship directed Massey in predatory, deceptive, fraudulent, unfair business practices that were designed to acquire plaintiff Hugh Caperton's Harman Mining Company and that had eventually forced Caperton into bankruptcy.¹³ The verdict, which was to a large degree a verdict on Blankenship and his business practices, undermined his efforts to portray himself as a champion of a better West Virginia.¹⁴

Justice Benjamin was more subdued but hardly contrite. He refused to concede even the possibility that he had erred in failing to step away from the *Caperton v. Massey* litigation:

It is obvious from the argument in March, the 5–4 vote of the Court, and the diversity of opinions from the Supreme Court, that the issue in the Caperton case was not an easy one. . . .

I am pleased that the Supreme Court has not questioned my ethics, my integrity, or my personal impartiality or propriety. . . .

In focusing on the issue of due process, the Supreme Court's majority opinion recognizes that there is no "white line" to guide judges like me in resolving the issue of an elected judge's duty to remain on the case versus the need to remove

13. See *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 229–33 (W. Va. 2008) (reviewing factual background and history of litigation), *vacated*, 129 S. Ct. 2252 (2009).

14. But perhaps not. Before the West Virginia Supreme Court, Massey Coal and Blankenship succeeded in their challenge to the judgment based on the technical legal defenses of forum selection and res judicata rather than on any appellate overturning of adverse fact determinations on the merits of plaintiff's claim of predatory business behavior:

Although numerous issues have been raised on appeal in this case, we find that the instant matter may be resolved on the issue of the forum-selection clause contained in the 1997 CSA [coal supply agreement] between Sovereign Coal Sales, Inc., Wellmore Coal Corporation and Harman Mining Corporation.

In the alternative, this case may be resolved based on the doctrine of res judicata.

Id. at 234. Having succeeded on the technical defenses, defendants appear not to have expended much energy continuing to protest their innocence of plaintiffs' charges. Eventually, despite the forced recusal of Justice Benjamin, the technical defense of improper forum based on a forum selection clause in a subsidiary's contract prevailed for Massey when the case was decided on remand from the U.S. Supreme Court. See *Caperton v. A.T. Massey Coal Co.*, No. 33350, 2009 W. Va. LEXIS 107 (W. Va. Nov. 12, 2009); see also *infra* notes 291–92 and accompanying text. At what appears to be the end of the day for this protracted litigation, West Virginia trial court findings of fact highly damning of Massey remain largely unrefuted, but Massey avoids civil liability for the sharp-elbowed tactics it deployed in gaining control of Caperton's Harman Mine.

oneself due to external factors. The Supreme Court's new standard appears to focus on the perceptions created regarding the impact on due process in a given case caused by the activities of persons other than the judge in question. Specifically, the Supreme Court focuses on whether there may be a risk to due process in a case when an external party's influence in a given situation, such as in an election, is sufficiently substantial that it must be presumed to engender the potential for actual bias by a judge despite there being no direct relationship between the judge and the external party, and despite the lack of any benefit to the judge.

This is a very fact-specific new standard. The focus of "potential for bias" now places more due process emphasis on perceptions and independent actions of external parties than on a judge's actual conduct or record.¹⁵

Although less combative than Blankenship, Justice Benjamin is essentially unrepentant over his failure to recuse—a lack of contrition that is perhaps understandable in light of the 5–4 vote on the merits as well as the dissents in the Supreme Court opinion. Justice Scalia's dissent is almost Blankenship-like in its opposition to the majority's recusal decision. Chief Justice Roberts authored a more measured dissent that garnered the votes of Justices Alito and Thomas as well as Scalia and that was nonetheless quite forgiving of Justice Benjamin.¹⁶ In essence, both dissents found nothing amiss in Justice Benjamin's decision to participate in *Caperton v. Massey* nor did they criticize the manner of his participation.¹⁷

This Article takes a different view. Although one hesitates to level strong personal criticism at an individual justice who may be a perfectly

15. See Statement of Brent D. Benjamin, Chief Justice, Supreme Court of Appeals of W. Va. (June 8, 2009), available at http://www.state.wv.us/wvsca/press/benjamin_stmt.pdf (noting that "[t]his release is personal and is not a release of the Supreme Court of Appeals of West Virginia"). The statement continued by noting "my four-year record of voting 81 percent of the time against Massey's interests would now be only a part of the factors to be balanced in a recusal consideration." *Id.*; see also *infra* text accompanying notes 202–09 (discussing Justice Benjamin's voting record on other Massey matters and his efforts to deploy this record to suggest that he was not subject to recusal in *Caperton*). The justice also stated that he was:

[C]onfident that there will be a lot of posturing and politicizing about this decision from all sides, as there has been with so many aspects of this case. Such a response would be counter to the philosophy of removing politics from the court, which all fair-minded people share. I would hope instead that the decision be given a fair and sober reading, and that it be respected as all decisions of the United States Supreme Court should be.

Statement of Brent D. Benjamin, *supra*.

16. See *supra* notes 6–7 and accompanying text (summarizing *Caperton* dissents).

17. See *infra* Part II.G (further outlining *Caperton* dissents).

likeable attorney and person¹⁸ as well as an avid amateur archaeologist,¹⁹ any extensive substantive analysis of Justice Benjamin's behavior in *Caperton* requires his condemnation. The due process issues before the U.S. Supreme Court may have been reasonably debatable but the recusal motion pending before Justice Benjamin was not based on a constitutional argument—it was a straightforward request that he refrain from participating in the case on the basis of the Code of Judicial Conduct, which requires that a jurist not participate if a reasonable observer might question his impartiality.

Not only did Justice Benjamin clearly make the wrong decision in electing to stay on the case, but he consistently applied the wrong legal standard to his behavior over the course of more than three years despite repeated opportunities to correct the error. His badly and consistently misframed legal analysis calls into question his judicial competence, his judicial temperament (being too emotionally invested in the issue to view his situation with suitable dispassion), and even his integrity. In addition to making a legal error so gross that it might not be regarded as inadvertent, he engaged in a rearguard action of dissembling defensiveness in response to *Caperton*'s disqualification motion.²⁰

Justice Benjamin's handling of the recusal decision and the decision itself is so bad that it calls into question his fitness for the bench. Notwithstanding the normal reluctance of the legal system to punish judges for decisions rendered in their official capacity, the Benjamin

18. See Toby Coleman, *Brent Benjamin, Political Unknown Runs Against McGraw's Record*, CHARLESTON GAZETTE, Oct. 23, 2004, at 8A (describing candidate Benjamin as a father of five, being well received on the campaign trail, and having worked as an attorney "for a Kanawha County girl molested by a teacher"). Attorney Benjamin's primary practice appears to have been defense of tort and workers' compensation claims for the firm of Robinson & McElwee, which seems to be primarily a business, insurance, and workers' compensation defense firm. See Robinson & McElwee, PLLC, <http://www.ramlaw.com> (last visited Feb. 7, 2010) (describing itself as employer advocate and listing as clients American Electric Power, Bacardi U.S.A., Food Lion, Koch Industries, Marathon Petroleum, Kaiser Aluminum, Georgia Pacific, and other businesses). See Cheryl Caswell, *A Rookie with a Mission: Benjamin Hopes To Unseat McGraw, Alter Balance on High Court*, CHARLESTON GAZETTE, Oct. 18, 2004, at 1A. Caswell's article discusses Benjamin's relatively modest middle class background in Marietta, Ohio, and college and law school attendance at Ohio State where he played lacrosse as an undergraduate. It further notes that "[t]he McGraw campaign also argues that Benjamin has spent most of his legal career in Charleston, blocking workers' compensation claims" and wages character assassination campaigns against Justice McGraw rather than fairly discussing their jurisprudential differences. *Id.*

19. See Jake Stump, *Hobby Takes Justice Far: Benjamin Has Made Five Trips to Egypt for Archaeological Photos*, CHARLESTON GAZETTE, May 3, 2006, at 1A.

20. See *infra* Part III (assessing Justice Benjamin's conduct and opinions denying disqualification).

performance cries out for at least some consequential discipline and could arguably support impeachment.²¹ To date, unfortunately, the legal system's treatment of Justice Benjamin's problematic behavior has been a figurative shrug of the shoulders, even by the Court's majority that correctly ejected him from further participation in *Caperton*.²² Worse yet, the *Caperton* dissenters have given legal and political cover to Justice Benjamin's shameful behavior.²³

Notwithstanding the political reality that more serious consequences for Justice Benjamin are unlikely, a strong case exists for disciplining him. At the very least, some additional action to raise judicial consciousness is in order. The Court's *Caperton v. Massey* decision was a huge step forward in promoting sounder judicial ethics, particularly so in the recent era of big money in state judicial elections.²⁴ But the

21. See *infra* Part IV (discussing the permissible scope of impeachment and judicial discipline).

22. See *infra* Part II.H (discussing *Caperton* majority ruling and its efforts not to be critical of Justice Benjamin).

23. See *infra* Part II.G (discussing *Caperton* dissents).

24. The *Caperton* decision has spurred renewed interest in the states for adopting some form of rule requiring disqualification based on substantial campaign support that might raise a reasonable question as to a judge's impartiality. For example, in Nevada, a state that elects its judges, the Supreme Court's Commission on the Amendment to the Nevada Code of Judicial Conduct had initially declined to recommend adoption of the portion of the 2007 ABA Model Code providing for disqualification based on campaign contributions in excess of a chosen amount. See COMM'N ON THE AMENDMENT TO THE NEV. CODE OF JUDICIAL CONDUCT, FINAL REPORT: EVALUATION OF THE 2007 ABA MODEL CODE, ADKT No. 427, at 4–5 (2007). After the *Caperton* decision, the Nevada Supreme Court remanded the issue to the Commission, which has promulgated a rule—awaiting court action as of this writing—that would require disqualification if an interested or counsel party provides more than \$50,000 in campaign support to the judge and require the judge to consider recusal under the ordinary “reasonable question as to impartiality” standard whenever an interested party or counsel provides more than 5% of the judge's total campaign support. The affected parties are defined broadly to include law firms and affiliated entities, and campaign support is defined to include in-kind assistance as well as direct campaign contributions. See COMM'N ON THE AMENDMENT TO THE NEV. CODE OF JUDICIAL CONDUCT, SUPPLEMENT TO FINAL REPORT DATED APRIL 1, 2009, ADKT No. 427, at 2 (2009) (following the court's request for supplement in light of *Caperton*).

Under this rule, Justice Benjamin's disqualification in *Caperton* would have been required approximately \$2.95 million sooner than the limit of the Blankenship contributions, which further suggests that Justice Benjamin is living in a dream world to think that reasonable observers would not question his impartiality in matters impacting Blankenship. The proposed Nevada rule was unanimously supported by the twenty-member commission, chaired by the immediate past chief justice and consisting of judges, experienced attorneys, and one law professor (full disclosure: it was me), all of

Caperton affair also reveals the troubling tendency of our current system to fail to hold judges sufficiently accountable for their failures to observe the established canons of impartiality.

Part II of this Article recaps the *Caperton* litigation, including the Court's reluctance to criticize Justice Benjamin's outrageous decision not to recuse. Part III takes a closer look at Justice Benjamin's repeated attempts to justify his continued participation in the case, demonstrating that he erred greatly in framing and assessing the relevant legal question, far more than he, the Court's dissenters, and even the Court's majority have recognized. Part IV focuses on the range, limits, and application of judicial discipline in response to sufficiently poor recusal performance by judges, urging that Justice Benjamin's extreme failure to observe proper disqualification protocol be suitably investigated and punished.

II. *CAPERTON V. MASSEY*: JUDICIAL ERROR; WASTED RESOURCES; NEW CONSTITUTIONAL LAW—AND LIGHT TREATMENT OF THE PERPETRATOR

A. *The Underlying Action*

The *Caperton v. Massey* drama began when Hugh Caperton purchased the Harman Mine in southwestern Virginia in 1993. The mine contained “high-grade metallurgical coal, a hot-burning and especially pure variety that steel mills crave to fuel the blast furnaces used to make coke needed in their production process.”²⁵ A.T. Massey Coal Company, led by CEO Don L. Blankenship, wanted to acquire the Harman Mine and its high-grade coal, but Caperton was unwilling to sell. Through a series of commercial and legal initiatives, which Caperton viewed as fraudulent and predatory but Massey characterized as merely aggressive business, Massey eventually drove the Harman Mining Corporation and other Caperton corporate entities into bankruptcy.²⁶ “Through a series of complex, almost Byzantine transactions, including the acquisition of Harman's prime customer and the land surrounding the competing mine, Massey both landlocked Harman with no road or rail access and left Caperton without a market for his coal even if he could ship it.”²⁷ In

whom concluded that reasonable questions as to judicial impartiality arise far sooner than the \$3 million mark.

25. See John Gibeaut, *Caperton's Coal*, A.B.A. J., Feb. 2009, at 52, 52.

26. See *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 229–34 (W. Va. 2008) (providing extensive background of case in opinion written by three state court justices who ruled for Massey), *vacated*, 129 S. Ct. 2252 (2009).

27. Gibeaut, *supra* note 25, at 52; see *Caperton*, 679 S.E.2d at 229–34.

1998, Caperton agreed to sell the Harman Mine to Massey, but the deal collapsed down the home stretch as Massey insisted on changes that Caperton contended reflected bad faith and an attempt to ruin the Caperton interests.²⁸

Caperton's companies—Harman Mining Corporation, Harman Development Corporation, and Sovereign Coal Sales, Inc.²⁹—filed for Chapter 11 bankruptcy in 1998, facing \$25 million in claims.³⁰ Caperton, who had personally guaranteed \$1.9 million of his companies' debt,³¹ sued Massey in West Virginia,³² alleging fraud and tortious interference with contract and obtaining a \$50 million jury verdict in 2002 that survived vigorous post-trial attack by Massey.³³ The trial court rejected

28. See Gibeaut, *supra* note 25, at 52.

29. See *Caperton*, 679 S.E.2d at 229–31 (discussing the relation of the Caperton companies and Mr. Caperton).

30. See Brief of Appellee at 13, *Caperton*, 679 S.E.2d 223 (No. 33350), 2007 WL 2886509.

31. *Id.* The Caperton guarantees included interest on the unpaid amounts.

32. Other plaintiffs in the West Virginia action were Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales. In addition to Massey, other defendants in the case were Massey subsidiaries Elk Run Coal Company, Independence Coal Company, Marfork Coal Company, Performance Coal Company, and Massey Coal Sales Company. As in the U.S. Supreme Court's opinion, these plaintiffs will generally be referred to as "Caperton" unless otherwise indicated. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009).

Harman Mining and Sovereign Coal also sued Wellmore, a Massey subsidiary, in Virginia for breach of contract and bad faith in connection with Wellmore's failure to purchase Harman coal as promised. This was based on Massey's assertion of a force majeure excuse from contract performance due to the closing of an LTV Steel plant that was Wellmore's primary customer. According to Massey's counsel, Harman Mining "voluntarily withdrew" the tort claim originally pled "prior to trial in the Virginia action with assurances that [Harman] would not later assert such a claim." Brief of Appellant at 9, *Caperton*, 679 S.E.2d 223 (No. 33350), 2007 WL 2886508. The jury in the Virginia breach of contract action rendered a jury verdict of \$6 million for Harman. "The appeal to the Virginia Supreme Court was refused on technical grounds." *Id.* The parties' dispute over the preclusive effect, if any, of the Virginia action over the West Virginia action was perhaps the key issue before the West Virginia Supreme Court and was the basis for Massey's success in the case when it involved Justice Benjamin. See *infra* note 45 and accompanying text.

33. See, e.g., Final Order Denying Defendants' Rule 50(b) Motion for Judgment as a Matter of Law; Rule 50(c)/59 Motion for New Trial, or in the Alternative, Motion for Remittitur, *Caperton v. A.T. Massey Coal Co.*, No. 98-C-192 (W. Va. Cir. Ct. Mar. 16, 2005), 2005 WL 5679073 (denying Massey motions and awarding postjudgment interest at a 10% annual rate from the date of August 15, 2002, judgment for Caperton).

Massey's new trial and remittitur motions in June 2004, and denied Massey's motion for judgment as a matter of law in March 2005.³⁴

B. *The 2004 West Virginia Supreme Court Elections*

Elections for the West Virginia Supreme Court were slated for November 2004, with Justice Warren McGraw seeking reelection. Massey CEO Blankenship threw his support to challenger Brent Benjamin.³⁵ Blankenship contributed the statutory maximum of \$1000 to the Benjamin campaign committee and also donated nearly \$2.5 million to a political organization named "And For The Sake Of The Kids," which opposed Justice McGraw and advocated Justice Benjamin's election.³⁶ In addition, Blankenship spent more than \$500,000 independently on television and newspaper advertisements favoring Justice Benjamin as well as for fundraising on behalf of Justice Benjamin.³⁷

As the U.S. Supreme Court summarized, "Blankenship's \$3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee. Caperton contends that Blankenship spent \$1 million more than the total amount spent by the campaign committees of both candidates combined."³⁸ Justice Benjamin won with slightly more than 53% of the approximately 700,000 votes cast.³⁹ Although Justice McGraw appears to have had some significant electoral baggage that may have more than offset the advantage incumbents traditionally

34. See *Caperton*, 129 S. Ct. at 2257 ("In March 2005, the trial court denied Massey's motion for judgment as a matter of law.").

35. See Elliot G. Hicks, Editorial, *Merit Selection, Not Elections, Must Be How We Choose Justices*, CHARLESTON GAZETTE, Dec. 14, 2004, at 5A; *Millions Spent To Defeat Warren McGraw*, CHARLESTON GAZETTE, Dec. 4, 2004, at 3A; Cecil E. Roberts, Editorial, *Blankenship's Hollow Rhetoric: His Money Defeated McGraw, Now He Must Help Miners*, CHARLESTON GAZETTE, Dec. 13, 2004, at 5A.

36. Marcia Coyle, *Amici Urge Recusals in Cases of Substantial Election Contributions*, TEX. LAW., Jan. 12, 2009, at 5 (discussing how the And For The Sake Of The Kids group worked to defeat Justice McGraw); Paul N. Nyden, *They Are Not Friends: Dinner, Campaign Reports Show Connections Between Blankenship, Benjamin*, CHARLESTON GAZETTE, Feb. 15, 2009, at 1A (noting that And For the Sake Of The Kids specialized in running negative advertisements targeting Justice McGraw).

37. See, e.g., DEBORAH GOLDBERG ET AL., JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, at 4–5 (Jesse Rutledge ed., 2005), available at <http://www.gavelgrab.org/wp-content/resources/NewPoliticsReport2004.pdf> (discussing an advertisement opposing McGraw that accused him of letting a child rapist out of prison and allowing him to work as a high school janitor).

38. *Caperton*, 129 S. Ct. at 2257 (internal citation omitted).

39. "Benjamin won. He received 382,036 votes (53.3%), and McGraw received 334,301 votes (46.7%)." *Id.*

possess,⁴⁰ the consensus of observers appears to be that Blankenship's heavy financial support was a key factor in Justice Benjamin's election.⁴¹

C. Review and Recusal

After the election and adjudication of post-trial motions in *Caperton v. Massey*, Massey sought review of the \$50 million judgment. In October 2005, Caperton sought Justice Benjamin's recusal, which he denied in April 2006, the first in a series of repeated rebuffed attempts to obtain

40. The dissenters in particular stressed McGraw's perceived deficiencies as a candidate as part of their argument that the election outcome and Benjamin's purported gratitude toward Blankenship could not conclusively be said to flow from Blankenship's massive financial support of Benjamin's candidates. Chief Justice Roberts's dissent stated:

It is also far from clear that Blankenship's expenditures affected the outcome of this election. Justice Benjamin won by a comfortable 7-point margin (53.3% to 46.7%). Many observers believed that Justice Benjamin's opponent doomed his candidacy by giving a well-publicized speech that made several curious allegations; this speech was described in the local media as "deeply disturbing" and worse. Justice Benjamin's opponent also refused to give interviews or participate in debates. All but one of the major West Virginia newspapers endorsed Justice Benjamin. Justice Benjamin just might have won because the voters of West Virginia thought he would be a better judge than his opponent. Unlike the majority, I cannot say with any degree of certainty that Blankenship "cho[se] the judge in his own cause." I would give the voters of West Virginia more credit than that.

Id. at 2274 (Roberts, C.J., dissenting) (alteration in original) (citations to record omitted).

Justice Roberts's assessment is at considerable odds with a substantial amount of political science literature finding that voters are extremely ill informed in low visibility races such as judicial elections and that advertising and campaign spending plays a particularly pivotal role in such races. *See* GOLDBERG ET AL., *supra* note 37, at 40 (commenting that low voting rates allow special interest groups to swing campaigns and suggesting judicial voter guides as a solution); JAMES SAMPLE ET AL., JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006, at 15–16, 22 (Jesse Rutledge ed., 2007), *available at* <http://www.gavelgrab.org/wp-content/resources/NewPoliticoofJudicialElections2006.pdf> (noting trend in state judicial elections toward large campaign expenditures and emphasis on often misleading attack ads having little to do with substantive legal issues actually facing courts); Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 18–26 (2003) (noting that voters in judicial elections get little information and tend to make uninformed decisions); Jeffrey W. Stempel, *Malignant Democracy: Core Fallacies Underlying Election of the Judiciary*, 4 NEV. L.J. 35 (2003).

In addition, a review of contemporary news accounts of the hard-fought 2004 West Virginia Supreme Court election suggests that Blankenship's financial support translated into an effective media campaign on behalf of the Benjamin candidacy. *See* sources cited *supra* note 10.

41. *See* sources cited *supra* note 10.

recusal.⁴² According to Justice Benjamin, “no objective information . . . [shows] 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.”⁴³

In November 2007, the West Virginia high court reversed the \$50 million judgment against Massey in a 3–2 decision in which Justice Benjamin joined two others for the decisive vote.⁴⁴ The dissenting justices characterized the majority’s pro-Massey opinion, based on a forum selection clause and *res judicata*, as “new law” at odds with prior court precedent, a convenient instance of law reform to assist Justice Benjamin’s major benefactor.⁴⁵

Caperton sought rehearing and more recusal motions followed, with Caperton and Massey moving for disqualification of three of the five justices involved in the November 2007 decision:

Photos had surfaced of [majority opinion, pro-Massey] Justice Maynard vacationing with Blankenship in the French Riviera while the case was pending. Justice Maynard granted Caperton’s recusal motion. On the other side Justice Starcher granted Massey’s recusal motion, based on his public criticism of Blankenship’s role in the 2004 elections. In his recusal memorandum Justice Starcher urged Justice Benjamin to recuse himself as well [and characterized Blankenship’s sociopolitical electioneering activities as a “cancer” on the West Virginia high court].⁴⁶

Justice Benjamin again refused to recuse and also rejected a third Caperton motion for disqualification. In his capacity as acting chief justice, he was not only free to participate in the rehearing but also replaced the two recused justices.⁴⁷ In April 2008, the West Virginia Supreme Court again ruled 3–2 in Massey’s favor, with Justice

42. See *infra* notes 44–52 and accompanying text (discussing in detail the chronology of recusal motions and Justice Benjamin’s responses).

43. See *Caperton*, 129 S. Ct. at 2259; see also *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 285–86 (W. Va. 2008) (Benjamin, Acting C.J., concurring) (setting forth full Benjamin opinion refusing disqualification), *vacated*, 129 S. Ct. 2252.

44. See *Caperton v. A.T. Massey Coal Co.*, No. 33350, 2007 WL 4150960, at *4 (W. Va. Nov. 21, 2007), *vacated*, 679 S.E.2d 223.

45. The West Virginia Supreme Court’s rationale was:
[F]irst, 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. Justice Starcher dissented, stating that the “majority’s opinion is morally and legally wrong.” Justice Albright also dissented, accusing the majority of “misapplying the law and introducing sweeping ‘new law’ into our jurisprudence that may well come back to haunt us.”

Caperton, 129 S. Ct. at 2258 (citations to record omitted).

46. *Id.* (citations to record omitted).

47. *Id.*

Benjamin again in the slim majority.⁴⁸ The two justices appointed to the case by Justice Benjamin split their votes.⁴⁹ Again, the two-justice dissent was strong, raising serious questions about the majority's rulings on the substantive law⁵⁰ and complaints about Justice Benjamin's refusal

48. See *Caperton*, 679 S.E.2d at 223.

49. See *Caperton*, 129 S. Ct. at 2258.

50. *Id.* (noting dissent's concerns); *Caperton*, 679 S.E.2d at 284 (Albright & Cookman, JJ., dissenting) ("Not only is the majority opinion unsupported by the facts and existing case law, but it is also fundamentally unfair. Sadly, justice was neither honored nor served by the majority.")

What distressed Justices Albright and Cookman was the Benjamin majority's ruling that the *Caperton* West Virginia claims were barred because of the prior Harman Mining litigation in Virginia against Wellmore. See *supra* note 32. Although the West Virginia and Virginia cases are connected by virtue of the Blankenship-Massey machinations aimed at taking control of the Harman Mine, the cases largely involved different legal claims and arguments, different facts and evidence, and different parties. Consequently, only the broadest view of the "logical relationship" test for assessing res judicata would bar the West Virginia action due to Harman's success in the Virginia lawsuit. Further, as *Caperton* argued, the controlling Virginia precedent on res judicata—applicable to the West Virginia case via choice of law principles—purported to follow the same-law-facts-evidence test rather than the logical relationship test. See *Caperton*, 679 S.E.2d at 265, 281–83 (Albright & Cookman, JJ., dissenting) (citing Virginia case law on res judicata, including *Davis v. Marshall Homes, Inc.*, 576 S.E.2d 504 (Va. 2003)). See generally FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE §§ 11.1–32 (5th ed. 2001) (providing a comprehensive review of topic); RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 1094–97 (5th ed. 2009) (outlining established approaches to determining res judicata). The other successful ground in Massey's challenge to the \$50 million verdict was the assertion that a forum selection clause in a Wellmore-Harman Mining contract controlled and that Massey, which was not a party to that contract, had standing to enforce the clause. See *Caperton*, 679 S.E.2d at 234. The clause in question provides that:

[The Wellmore-Harman Mining] [a]greement, in all respects, shall be governed, construed and enforced in accordance with the substantive laws of the Commonwealth of Virginia. All actions brought in connection with this Agreement shall be filed in and decided by the Circuit Court of Buchanan County, Virginia.

Id. (second alteration in original). A full discussion of the merits of Massey's res judicata and forum selection arguments lies beyond the scope of this Article. However, even a brief look at these issues suggests that the West Virginia decision favoring Massey is open to criticism in that it takes a very, very broad view of the forum selection clause at issue and applies a very, very broad version of the "same transaction" test for res judicata by connecting many disparate events spread over time due to the assertedly common thread of fractious *Caperton*-Massey relations and the machinations of Blankenship. See Jeffrey W. Stempel, *Completing Caperton and Clarifying Common Sense Through Using the Right Standard for Constitutional Judicial Recusal*, 29 REV. LITIG. 249 (2010) (discussing procedural questions in *Caperton* in more detail). On remand from the U.S. Supreme Court, the West Virginia Supreme Court avoided the weakness of Massey's res judicata argument by focusing on a forum selection clause

to recuse pursuant to the West Virginia Code of Judicial Conduct and the Due Process Clause.⁵¹ In July 2008, Justice Benjamin issued a concurring opinion defending the majority's decision on the merits and his decision to participate in the case.⁵²

D. *The Supreme Court Intervenes*

Caperton successfully sought certiorari.⁵³ By this time, the case had become widely discussed in the media.⁵⁴ It was thoroughly briefed,⁵⁵ including seventeen amicus briefs, most of which supported Caperton.⁵⁶

requiring litigation in Buchanan County Virginia of any disputes “connected” with a coal purchase contract breached by Massey. *See Caperton v. A.T. Massey Coal Co.*, No. 33350, 2009 W. Va. LEXIS 107, at *31–80 (W. Va. Nov. 12, 2009). This case is discussed in greater detail at the conclusion of the Article.

51. *See Caperton*, 129 S. Ct. at 2258; *see also Caperton*, 679 S.E.2d at 292–96 (Benjamin, Acting C.J., concurring).

52. *See Caperton*, 679 S.E.2d at 285–309 (Benjamin, Acting C.J., concurring), and *infra* notes 186–96 and accompanying text for a detailed discussion.

53. *See Caperton*, 679 S.E.2d 223, *cert. granted*, 129 S. Ct. 593 (2008).

54. *See, e.g.*, Marcia Coyle, *High Court Review Sought on Judicial Recusals*, LAW.COM, Aug. 4, 2008, <http://www.law.com/jsp/article.jsp?id=1202423489061>; Lawrence Messina, *Legal Groups Blast W. Va. Justice in Massey Case*, CHARLESTON DAILY MAIL, Aug. 5, 2008, available at <http://www.campaignlegalcenter.org/press-3311.html>; Paul J. Nyden, ABA, *Groups Urge High Court To Grant Harman Appeal*, CHARLESTON GAZETTE, Aug. 5, 2008, at 1A; Editorial, *Too Generous*, N.Y. TIMES, Sept. 7, 2008, at 8.

55. *See* Brief of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 5433361. The brief was authored by counsel at prominent firms: Berthold, Tiano & O'Dell of Charleston, West Virginia; Buchanan Ingersoll & Rooney, PC of Pittsburgh, Pennsylvania; Reed Smith, LLP, also of Pittsburgh; and Gibson Dunn & Crutcher, LLP of Washington, D.C., most notably former U.S. Solicitor General Theodore B. Olson. The respondents' brief was authored by counsel at prominent firms: Offutt Nord, PLLC of Huntington, West Virginia; Hunton & Williams, LLP, including Lewis F. Powell III; Mayer Brown, LLP, notably with veteran Supreme Court advocates Andrew L. Frey and Evan M. Tager; and UCLA law professor Eugene Volokh. *See* Brief of Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 216165. Caperton's case was argued by former U.S. Solicitor General Theodore Olson while Massey retained prominent Supreme Court advocate Andrew Frey. *See generally* Transcript of Oral Argument, *Caperton*, 129 S. Ct. 2252 (No. 8-22), 2009 WL 527723.

56. Eleven of the seventeen amicus briefs supported Caperton. Among the amici were the American Bar Association (for Caperton); the Conference of Chief Justices (supporting neither party but setting forth criteria for determining disqualification that favored Caperton); “Twenty-Seven Former Chief Justices and Justices” (supporting Caperton); Public Citizen (supporting Caperton); Committee for Economic Development (supporting Caperton); Center for Political Accountability and Zicklin Center for Business Ethics (supporting Caperton); Washington Appellate Lawyers Association (supporting Caperton); American Academy of Appellate Lawyers (supporting Caperton); Justice at Stake (supporting Caperton); Brennan Center for Justice at N.Y.U. School of Law (supporting Caperton); American Association for Justice (supporting Caperton); National Association of Criminal Defense Lawyers (supporting Caperton); Center for Competitive Politics (supporting Massey); Professors Ronald Rotunda and Michael Dimino (supporting

In June 2009, the Court by a 5–4 majority sided with Caperton and vacated the decision that had reversed his \$50 million judgment against Massey.⁵⁷ The Court observed:

[T]here 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.

Applying this principle, we conclude that Blankenship’s campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case.⁵⁸

E. Caperton’s Test for Determining When Recusal Is Required by the Due Process Clause

The Blankenship-Benjamin situation violated the Due Process Clause, according to the majority, in that it raised for the reasonable lay observer the significant probability that Justice Benjamin could not be fair in assessing such an important case implicating his sponsor Blankenship’s finances.⁵⁹ Reviewing the Court’s due process disqualification precedents, the Court found the significant magnitude of Blankenship’s campaign support to be uncomfortably close to the type of personal judicial financial self-interest in past cases that had merited judicial recusal.⁶⁰

The majority reviewed the key precedents and concluded they supported recusal in *Caperton*.⁶¹ A line of cases extending from *Tumey v. Ohio*⁶² in 1927 held that disqualification was required when a judge

Massey); James Madison Center for Free Speech (supporting Massey); “Ten Current and Former Chief Justices” (supporting Massey); States of Alabama, Colorado, Delaware, Florida, Louisiana, Michigan, and Utah (supporting Massey). See Stempel, *supra* note 50, at 261–62 & nn.47–49 (listing amicus briefs in full and discussing in more detail).

57. *Caperton*, 129 S. Ct. at 2267.

58. *Id.* at 2263–64.

59. *See id.* at 2264–65.

60. *See id.* at 2262–63.

61. *See id. passim* (discussing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Withrow v. Larkin*, 421 U.S. 35 (1975); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *In re Murchison*, 349 U.S. 133 (1955); *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *Tumey v. Ohio*, 273 U.S. 510 (1927)).

62. 273 U.S. 510.

had a “direct, personal, substantial pecuniary interest”⁶³ in a case, a situation reflected in the longstanding Anglo-American axiom that no person should be “allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity,” a standard with roots in Blackstonian England.⁶⁴ Operationalizing the standard in *Tumey*, the Court stated that when the judge “had a financial interest in the outcome of a case, although the interest was less than what would have been considered personal or direct at common law,” he must recuse.⁶⁵

Although the Court had not previously found due process to require recusal due to election campaign support, the *Caperton* result is quite consistent with *Tumey* and its progeny. For example, in the 1986 *Aetna Life Insurance v. Lavoie*⁶⁶ decision, the Court found that an Alabama Supreme Court justice’s participation in a case that could set favorable precedent for his similar suit against an insurer was the type of financial interest that merited disqualification under the Due Process Clause.⁶⁷ The *Caperton* majority viewed campaign financial support as something other than the type of direct pecuniary interest that made a jurist a “judge in his own case.”⁶⁸ Nonetheless, the majority found that the Benjamin nonrecusal fell easily within the zone of cases requiring recusal on due process grounds. “The proper constitutional inquiry is ‘whether sitting

63. *Id.* at 523.

64. *Caperton*, 129 S. Ct. at 2259 (quoting THE FEDERALIST NO. 10, at 59 (James Madison) (J. Cooke ed., 1961), and citing *Tumey*, 273 U.S. at 523, as the seminal case in this category). In *Tumey*, the village mayor sat as a judge in trying alcohol violations, receiving extra compensation from his judicial duties that was funded by fines assessed for conviction. The *Tumey* Court concluded that this presented the mayor with an unconstitutional conflict of interest. *Tumey*, 273 U.S. at 523.

65. *Caperton*, 129 S. Ct. at 2259–60. A second established category for which due process-required recusal was “where a judge had no pecuniary interest in the case but was challenged because of a conflict arising from his participation in an earlier proceeding.” *Id.* at 2261. This approach has been recognized since *In re Murchison*, 349 U.S. 133, and *Mayberry*, 400 U.S. 455.

66. 475 U.S. 813.

67. *See id.* at 825. Commentators generally supported the *Lavoie* holding and rationale. *See, e.g.*, Ignazio J. Ruvolo, *California’s Amendment to Canon 3E of the Code of Judicial Conduct Requiring Self-Recusal of Disqualified Appellate Justices—Will It Be Reversible Error Not To Self-Recuse?*, 25 T. JEFFERSON L. REV. 529, 551 (2003); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 640 (1987); S. Matthew Cook, Note, *Extending the Due Process Clause To Prevent a Previously Recused Judge from Later Attempting To Affect the Case from Which He Was Recused*, 1997 BYU L. REV. 423, 441–42.

68. *See Caperton*, 129 S. Ct. at 2260–61 (quoting *In re Murchison*, 349 U.S. at 136). Arguably, however, Justice Benjamin’s nonrecusal did violate this norm. Judges who are not reelected lose their jobs and their income. *See Stempel, supra* note 50, at 267 n.64 (elaborating on this point).

on the case then before the [court] “would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true.”⁶⁹ By this standard, Justice Benjamin’s recusal was clearly required. The average judge presiding over a very important—\$50 million, more than \$80 million with accrued interest—case to a very substantial benefactor—\$3 million—would of course be tempted to be biased in favor of the benefactor and prejudiced against his litigation opponent.

*F. Comparing the “Reasonable Question as to Impartiality”
Standard for Nonconstitutional Recusal Under Federal
and State Law to the “Serious Risk of Bias” Standard
for Constitutional Due Process Under Caperton*

Whatever the merits of the contrasting *Caperton* majority and dissent positions regarding due process recusal, it is important to emphasize that Justice Benjamin was also clearly disqualified under then operative Canon 3(E)(1) of the West Virginia and ABA Codes of Judicial Conduct—now Rule 2.11 in the 2007 revision to the ABA Judicial Code—in that his impartiality was subject to reasonable question. West Virginia Canon Rule 3(E)(1) states that “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.”⁷⁰ Rule 29(b) of the West Virginia Rules of Appellate Procedure provides that “[a] justice shall disqualify himself or herself, upon proper motion or sua sponte, in accordance with the provisions of Canon 3(E)(1) of the Code of Judicial Conduct or, when sua sponte, for any other reason the justice deems appropriate.”⁷¹

69. *Caperton*, 129 S. Ct. at 2261 (omissions in original) (quoting *Lavoie*, 475 U.S. at 825; *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972); *Tumey*, 273 U.S. at 532).

70. See W. VA. CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (West 2008), available at <http://www.state.wv.us/WVSCA/JIC/codejc.htm#Canon%203>.

71. See W. VA. R. APP. P. 29(a), available at <http://www.state.wv.us/wvsca/rules/appellate.htm#RULE%2029.%20DISQUALIFICATION>, stating that:

In any proceeding, any party may file a written motion for disqualification of a justice within thirty days after discovering the ground for disqualification and not less than seven days prior to any scheduled proceedings in the matter. If a motion for disqualification is not timely filed, such delay may be a factor in deciding whether the motion should be granted.

Id. As discussed below, Justice Benjamin intimated that the *Caperton* parties had been untimely in their request for his recusal, suggesting in one of his memoranda rejecting

Current ABA Model Rule 2.11—the substance of which has been essentially the same since the 1972 Model Code—like West Virginia Canon 3(E)(1) provides that “[a] judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might be reasonably questioned,”⁷² enumerating, as does the West Virginia rule, specific examples of when disqualification is required.⁷³ The ABA and adopting

recusal that the motions came almost four years after the 2004 judicial election in which Blankenship’s money had played so large a role in Justice Benjamin’s ascension to the bench. As also demonstrated below, Justice Benjamin’s accusation is incredible and a little strange. It was indeed 2008 when he suggested that 2004 was too far in the past to be relevant to a current case. But in making this assertion, Justice Benjamin conveniently neglected to mention that the Caperton parties had been seeking his recusal more or less continuously since October 2005 when the case first arrived on the state supreme court’s docket and that the case remained pending in 2008 in significant part because of all the judicial impartiality problems surrounding the court and the matter. See *infra* text accompanying notes 169–70 (suggesting that this argument by Justice Benjamin demonstrates an addled mind, lack of candor, or both).

Regardless of who is right regarding the relative timeliness of the recusal motion, Rule 29(a) makes it clear that even a tardy motion, if sufficiently persuasive, should be granted. Delay in making the motion may at most be “a factor” in deciding the issue. Weighed against the overwhelming case for disqualifying Justice Benjamin, any delay in the motion, real or perceived, could not serve as legitimate grounds for him to deny the motion.

72. See MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007). See generally FLAMM, *supra* note 8, § 5.5; Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably Be Questioned,”* 14 GEO. J. LEGAL ETHICS 55, 57–65 (2000) (restating law and arguing for stringent standard requiring recusal if lay observers have significant well-founded concern about judge’s impartiality); Bassett, *supra* note 8, at 1223–32 (summarizing federal and state law on recusal); John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43, 43–51 (1970) (describing history of judicial recusal and evolution of ABA Model Code); Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 535–40 (2005) (summarizing federal and state law on recusal); Jeffrey W. Stempel, *Chief William’s Ghost: The Problematic Persistence of the Duty To Sit*, 57 BUFF. L. REV. 813 (2009) (describing history of judicial recusal and evolution of ABA Model Code).

73. Rule 2.11 of the Model Code of Judicial Conduct lists the “following circumstances” for when a judge shall recuse himself:

1. The judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of facts that are in dispute in the proceeding.
2. The judge knows that the judge, the judge’s spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:
 - a. a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
 - b. acting as a lawyer in the proceeding;
 - c. a person who has more than a de minimus interest that could be substantially affected by the proceeding; or
 - d. likely to be a material witness in the proceeding.
3. The judge knows that he or she, individually or as a fiduciary, or the judge’s spouse, domestic partner, parent, or child, or any other member of the judge’s

states such as West Virginia have in effect stated that in the enumerated situations, many of which seem far less troublesome than Blankenship's campaign support of Justice Benjamin, reasonable question as to impartiality is a given. Impartiality is defined as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge."⁷⁴

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- family residing in the judge's household, has an economic interest in the subject matter in controversy or is a party to the proceeding.
4. The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer, has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than \$[insert amount] for an individual or \$ [insert amount] for an entity [is reasonable and appropriate for an individual or an entity].
 5. The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.
 6. The judge:
 - a. served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;
 - b. served in government employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding or has publically expressed in such capacity an opinion concerning the merits of the particular matter in controversy;
 - c. was a material witness concerning the matter; or
 - d. previously presided as a judge over the matter in another court.

MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(1)–(6) (asterisks for defined terms eliminated). The terminology section of the Model Code defines terms such as aggregate, domestic partner, fiduciary, impartiality, "know," and personal knowledge. Rule 2.11(B) requires the judge to keep reasonably informed about his and his family's financial interests. Rule 2.11(C) permits the parties to agree to the judge's continued participation in the case, provided that there is no Rule 2.11(A)(1) ground for disqualification on the basis of personal bias or prejudice toward attorney or litigant or the judge's personal knowledge of disputed facts. *Id.* R. 2.11(A)(1).

74. MODEL CODE OF JUDICIAL CONDUCT 6; *accord* Republican Party of Minn. v. White, 536 U.S. 765, 775–79 (2002) (emphasis in original) (noting possible definitions of impartiality, including "openmindedness," and that the "root meaning" of impartiality "is the lack of bias for or against either party to the proceeding"). The Court continued:

Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. This is the traditional sense in which the term is used. . . . It is also the sense in which it is used in the cases cited by respondents [the State of Minnesota defendants] and *amici* for the proposition that an impartial judge is essential to due process.

Id. at 775–76 (citations omitted).

Case law interpreting the ABA Code’s “reasonable question regarding impartiality” standard and equivalent language in the federal judicial code generally views a judge as disqualified if a reasonable layperson aware of the relevant facts would harbor significant doubt about the judge’s ability to be impartial.⁷⁵ Consequently, disqualification based on a violation of due process as announced in *Caperton* is somewhat different from disqualification under the ABA Judicial Code and state analogues or under the general federal disqualification statute, 28 U.S.C. § 455(a), which in language similar to the ABA Model Code states that “[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”⁷⁶ In a manner similar to the Model Code’s disqualification provision, § 455(b) lists a number of specific instances—essentially the same as those of the Model Code—when disqualification is required, codifying particular circumstances that create a per se question as to a judge’s impartiality.⁷⁷

Again, as with the Model Code, the particular instances when disqualification has been required under federal statutory law present circumstances that, for many a reasonable observer, pose far less risk of bias than Justice Benjamin’s receipt of \$3 million in campaign aid from the CEO of a litigant appearing before him in an important case. Put another way, one might ask which is more troubling: Justice Benjamin’s actual situation in *Caperton* or if one of his children owned \$3 million of stock in Massey? Disqualification of Justice Benjamin would have been

75. See, e.g., *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988) (applying this standard to disqualify federal trial judge who sat on board of university that stood to profit from land sale if particular party prevailed in dispute over right to build hospital); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101 (5th Cir. 1980) (finding that a judge faced with a disqualification motion should consider how participation in a given case appears to the average citizen); *United States v. Ferguson*, 550 F. Supp. 1256, 1259–60 (S.D.N.Y. 1982) (“The issue [of impartiality] . . . is not the Court’s own introspective capacity to sit in fair and honest judgment with respect to the controverted issues, but whether a reasonable member of the public at large, aware of all the facts, might fairly question the Court’s impartiality.”); see LESLIE W. ABRAMSON, *AM. JUDICATURE SOC’Y, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT* (2d ed. 1992); ALFINI ET AL., *supra* note 8, §§ 4.01–13; FLAMM, *supra* note 8, §§ 5.6.3, 5.7; Bassett, *supra* note 8, at 1227; John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237 (1987); Stempel, *supra* note 72, at 883–87.

76. See 28 U.S.C. § 455(a) (2006).

77. See *id.* § 455(b)(1)–(5) (requiring recusal in essentially the same specific circumstances delineated in Rule 2.11 of the Model Code); see MODEL CODE OF JUDICIAL CONDUCT R. 2.11. Section 455(e) provides that when these enumerated grounds apply, the parties may not agree to let the judge preside but, like Rule 2.11(C), federal law permits the parties to waive disqualification and agree to permit the judge to preside even if his impartiality might be subject to question. 28 U.S.C. § 455(e) (2006).

required if anyone in the Benjamin family owned more than a de minimus amount of stock in Massey.⁷⁸ Yet Justice Benjamin refused to recuse when the problem was not an attenuated investment, but instead involved \$3 million in important campaign support from the CEO of a litigant company that needed his vote to avoid an eight-figure liability.

Although some minor differences exist between the Model Code and § 455(a),⁷⁹ the core standard governing a judge's eligibility to hear and decide cases is the same. Under the Judicial Code and § 455(a), the reviewing court asks whether the judge's impartiality may be reasonably questioned. Under a due process analysis, the inquiry is similar but disqualification is harder to obtain in that the Court's precedents appear to require not just reasonable question as to impartiality but also probability of bias.⁸⁰

78. See MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(2) (requiring recusal when a close relative has an economic interest in a matter, with the terminology portion of the Code defining economic interest as "ownership of more than a de minimis legal or equitable interest" in a litigant or affected entity).

79. For example, 28 U.S.C. § 455(d) defines several key terms such as "fiduciary" and "financial interest" in the statute itself rather than referring to a terminology section.

Regarding waiver, 28 U.S.C. § 455(e) permits the parties to agree to let a judge subject to § 455(a) hear the case but forbids such stipulations if one of the § 455(b) grounds for recusal applies, most of which involve financial interest of the judge or a family member. § 455(e). The strong federal bar to litigant consent when a judge has even modest financial conflict is in part a legacy of now disparaged past practice in which a judge would announce that he owned stock in a litigant company and then actively sought litigant consent to his continued involvement, placing lawyers and parties in an awkward position should they refuse to consent. The great Learned Hand allegedly used this approach so regularly that the tactic acquired the name "velvet blackjack." See JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* 95–117 (1974); Stempel, *supra* note 67, at 631 n.170.

However, federal law also differs from the Model Code in that § 455(f) specifically provides that if "substantial judicial time has been devoted" to a case, then a § 455(b) problem is discovered and recusal is not required "if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for disqualification." 28 U.S.C. § 455(f) (2006).

80. The Court has stated:

In defining these standards [for required due process recusal rather than general disqualification] the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."

Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263 (2009) (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). The Court also drew upon *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward v. Village*

The *Caperton* majority took pains not only to state that due process-required recusal would continue to be rare but also that the standard for due process recusal was distinctly higher than the standard for ordinary disqualification:

“The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today.” Because the codes of judicial conduct provide more protection than due process requires, most 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.⁸¹

For purposes of this Article, the important point, elaborated upon in Part III, is that the Supreme Court’s 5–4 *Caperton* ruling reflected a Court split over recusal subject to the Due Process Clause. The opinion did not address the question of recusal pursuant to the applicable state and ABA judicial codes or federal or state statutory law. If it had, the inevitable conclusion is that even if the question of Justice Benjamin’s participation is a close one under the Due Process Clause, it is not even reasonably debatable under the standard set forth in the Judicial Code. Perhaps someone with extreme resistance to disqualification, such as Justices Roberts, Scalia, Thomas, and Alito, could conclude that Justice Benjamin was not actually or probably biased in favor of

of Monroeville, 409 U.S. 57 (1972); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *In re Murchison*, 349 U.S. 133 (1955); *FTC v. Cement Institute*, 333 U.S. 683 (1948); and *Tumey v. Ohio*, 273 U.S. 510 (1927). Applied to the instant matter, the Court found:

[T]hat 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.

Applying this principle, we conclude that Blankenship’s campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case.

Caperton, 129 S. Ct. at 2263–64.

81. *Caperton*, 129 S. Ct. at 2267 (quoting *Lavoie*, 475 U.S. at 828). The *Caperton* majority opinion can be properly criticized as less than crystal clear regarding the differences between recusal under 28 U.S.C. § 455(a) and the Judicial Code. At times the opinion appears to suggest that the general “reasonable question as to impartiality” standard used in nonconstitutional disqualification motions also governs the inquiry into whether due process has been violated. At other junctures, the majority states that something more—probability of bias as opposed to reasonable question of impartiality—is required to support recusal on due process grounds as opposed to nonconstitutional recusal.

Blankenship.⁸² But almost no one—except, as we shall see, Justice Benjamin—could conclude that a reasonable observer would have no question as to his impartiality.

Because the recusal motions filed in the West Virginia courts based their arguments on the Judicial Code rather than the Due Process Clause, the relevant standard for assessing Justice Benjamin’s conduct is not the degree to which his conduct diverges from the due process recusal test outlined by the Supreme Court in *Caperton*. Rather, the question is whether Justice Benjamin’s refusal to disqualify pursuant to the Judicial Code was defensible. As elaborated in Part IV, it was not and thus prompts the question of whether sanctions are appropriate.

G. The Dissenters’ Defense of Justice Benjamin— And Defective Judging

As previously noted, the issue of reaching Justice Benjamin’s failure to recuse through the Due Process Clause divided the Court, engendering dissents by Chief Justice Roberts—joined by Justices Scalia, Thomas, and Alito⁸³—and Justice Scalia.⁸⁴ In the main, the Roberts dissent attacked the majority approach as too indeterminate and unpredictable,⁸⁵ which the dissent contended was a sufficient problem to argue in favor of refusing to intervene in state court disqualification decisions of this type, no matter how bad it may look to a casual newspaper reader.⁸⁶

82. As discussed below, the dissenting *Caperton* Justices, although unduly acceptant of Justice Benjamin’s behavior, were in the main arguing that the due process disqualification should not reach “probability of bias” cases but should only apply if a jurist is subject to direct pecuniary interest in a matter—with election support too indirect to qualify—or if the jurist is both prosecutor and adjudicator over a party. See *infra* Part II.G.

83. See *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting).

84. See *id.* at 2274 (Scalia, J., dissenting).

85. “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.” *Id.* at 2269 (Roberts, C.J., dissenting). Chief Justice Roberts’s dissent also notes “other fundamental questions as well” and lists forty such questions, eighty questions if one counts subparts. *Id.* at 2269–72.

86. Chief Justice Roberts explains that:

The Court’s new “rule” provides no guidance to judges and litigants about when recusal will be constitutionally required. This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.

Chief Justice Roberts raised forty questions regarding the wisdom and feasibility of the majority decision, questions that actually appear quite susceptible to basic answers.⁸⁷ Primarily, the Roberts dissent contended that whatever benefit gained by removing Justice Benjamin from the case is outweighed by the anticipated avalanche of less meritorious disqualification motions that will flow from expanding due process recusal review to include cases posing the perhaps hard to define “serious risk of bias” issue, which will add to judicial workload and create unfounded public concern regarding the neutrality of judges.⁸⁸

Justice Scalia’s lone dissent expressed similar cost-benefit concerns in more strident terms. Rejecting the contention that there was net benefit

Id. at 2267.

87. See Caperton *Ruling May Spur States To Enhance Their Process for Judges’ Recusal*, in 25 A.B.A. LAW MANUAL ON PROF. CONDUCT 335 (2009); see also Stempel, *supra* note 10. Law professor Charles Geyh, a reporter for the 2007 ABA Model Judicial Code, describes concerns raised in Roberts’s dissent questions as “alarmist,” contending there is only “remote” risk of difficulties concerning the dissenters. Caperton *Ruling May Spur States To Enhance Their Process for Judges’ Recusal*, *supra*, at 338. Law professor Roy Schotland views the dissent’s prediction of doom as “preposterous” but concedes that some of Roberts’s dissent questions posed reasonable questions that may need to be answered in future cases. *Id.* Although precise lines cannot be drawn in the absence of concrete cases, a series of presumptive guidelines suggest themselves for application of due process disqualification. See Stempel, *supra* note 10, at 27–65.

One might also criticize the Roberts dissent for engaging in a bit of “straw man” argumentation in that it announces an unnecessary goal—laying out an encyclopedic view of due process qualifications that enunciates particularized rules of application for every conceivable future dispute on the matter—and then criticizes the majority for not meeting the dissenters’ perhaps unwise goal. In another context, judicial conservatives like Justices Roberts, Scalia, Thomas, and Alito might well label such a project as an impermissible advisory opinion. A straw man is defined as “[a] tenuous and exaggerated counterargument that an advocate puts forth for the sole purpose of disproving it.” BLACK’S LAW DICTIONARY 1461 (8th ed. 2004). Having erected a straw man that is less attractive or compelling than the actual argument opposed, the speaker then proceeds to “knock down” this weaker target but in doing so is largely destroying something other than the argument that was supposed to be at issue. Under the ground rules of justiciability, courts—in particular the U.S. Supreme Court—are to refrain from rendering advisory opinions. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 2.12 (6th ed. 2000) (containing an overview of justiciability doctrines and general prohibition on advisory opinions). Conservative jurists are generally viewed as particularly supportive of this doctrine because it tends to reduce the degree to which judicial decisions may amplify or contradict actions of the legislative or executive branch.

88. See Caperton, 129 S. Ct. at 2267–73 (Roberts, C.J., dissenting) (stressing presumption of judicial impartiality and need to foster respect for courts as well as citing “cautionary tale” of Court’s short-lived willingness to permit double jeopardy attacks in civil litigation, leading to many novel claims that forced retreat on the issue and confinement of double jeopardy issues to criminal proceedings). “[O]pening the door to [due process-based] recusal claims” based on 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.” *Id.* at 2274.

to setting aside the tainted Massey victory, Justice Scalia argued that the majority “decision will have the opposite effect.”⁸⁹ Without benefit of any cited empirical evidence, he contended:

What above all else is eroding public confidence in the Nation’s judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice.⁹⁰

According to Justice Scalia, the majority opinion “will reinforce that perception, adding to the fast arsenal of lawyerly gambits what will come to be known as the *Caperton* claim,”⁹¹ producing an attendant sharp rise in disputing costs and further drain on the judicial system.⁹² To Justice Scalia, “[t]he relevant question . . . is whether we do more good than harm by seeking to correct this imperfection through expansion of our constitutional mandate in a manner ungoverned by any discernable rule [and the] answer is obvious.”⁹³

Perhaps to Justice Scalia. To most observers, however, Justice Benjamin’s refusal to disqualify looks bad whether measured by the due process standard of probable bias or the lower standard of reasonable question as to impartiality. A *New York Times* editorial addressing *Caperton* succinctly captures the reaction of many to the protests of the four dissenters:

[T]he only truly alarming thing about [the *Caperton*] decision was that it was not unanimous. The case drew an unusual array of friend-of-the-court briefs from across the political spectrum, and such an extreme case about an ethical matter that should transcend ideology should have united all nine justices.

Chief Justice Roberts is fond of likening a judge’s role to that of a baseball umpire. It is hard to imagine that professional baseball or its fans would trust the fairness of an umpire who accepted \$3 million from one of the teams.⁹⁴

89. *Id.* (Scalia, J., dissenting).

90. *Id.*

91. *Id.*

92. *Id.* Justice Scalia’s dissent continued stating that:

The facts relevant to adjudicating it will have to be litigated—and likewise the law governing it, which will be indeterminate for years to come, if not forever. Many billable hours will be spent in poring through volumes of campaign finance reports, and many more in contesting nonrecusal decisions through every available means.

Id.

93. *Id.* at 2275.

94. *Honest Justice*, *supra* note 9.

Applying the standards of 28 U.S.C. § 455(a) and Rule 2.11 of the Model Judicial Code, it seems inarguable that a reasonable lay observer would reasonably question Justice Benjamin's ability to be impartial in an important case involving a company headed by his seven-figure campaign contributor. It is according to that standard that the discharge of his judicial duties should be measured, an examination that suggests his dereliction of judicial duty should not go unpunished.

H. Enablers: Reluctance To Criticize Justice Benjamin

As detailed below, the more one knows about Justice Benjamin's refusal to recuse, the worse it looks for him and the judicial system. What could at first superficially look like simple judicial error, perhaps committed in the heat of the moment while a case speeds along as part of a busy docket, turns out to be an extensive record of judicial incompetence and inappropriate behavior in which he repeatedly fails to recognize and correct his errors. Even in his June 2009 statement regarding the U.S. Supreme Court decision, which addressed only due process-based recusal and not reasonable question over his impartiality, he continues to fight a rearguard action, rationalizing his behaviors and refusing to squarely address and admit his errors.⁹⁵ One would think such behavior would have brought substantial judicial criticism upon him. But that appears not to be the case. Other than a few press outlets,⁹⁶ no one has been very hard on Brent Benjamin, least of all the U.S. Supreme Court.⁹⁷ Even the two dissenting state court justices in the *Caperton* merits decision, who lambasted the majority's determinations regarding the forum selection and res judicata issues in the case,⁹⁸ barely adverted to Justice Benjamin's more obviously erroneous decisions and impropriety in remaining on the case and tended to pull punches in their criticism.⁹⁹

95. See *supra* note 15 and accompanying text (quoting Benjamin's statement in the wake of the U.S. Supreme Court decision).

96. See *supra* notes 8–9 and accompanying text (noting comments both favorable to U.S. Supreme Court decision and defending Benjamin's participation in *Caperton*).

97. See *infra* notes 103–04 and accompanying text (discussing how the *Caperton* majority was careful not to criticize Justice Benjamin to any significant degree while the *Caperton* dissenters defend his failure to recuse).

98. See *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 275–78, 281–84 (W. Va. 2008) (Albright & Cookman, JJ., dissenting), *vacated*, 129 S. Ct. 2252.

99. The dissenting justices' concern is confined to a footnote:

Mr. Caperton raised a further issue regarding possible disqualification of Justice Benjamin. The majority did not address this issue, likely because it is the practice of this Court, as it is the practice of the United States Supreme Court and other federal courts, to leave decisions on disqualification motions

In the U.S. Supreme Court's *Caperton* majority opinion, one also sees the impact of judicial collegiality. Justice Kennedy's majority opinion, despite its disapproval of what happened below, takes pains to dispel any notion that it is accusing Justice Benjamin of wrongdoing:¹⁰⁰

Justice Benjamin was careful to address the recusal motions and explain his reasons why, on his view of the controlling standard, disqualification was not in order. In four separate opinions issued during the course of the appeal, he explained why no actual bias had been established. . . . [B]ased on the facts presented by *Caperton*, Justice Benjamin conducted a probing search into his actual motives and inclinations; and he found none to be improper. We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias.¹⁰¹

In particular, the majority tries to make clear that it does not see Justice Benjamin as having taken a bribe or having become embroiled in a quid pro quo arrangement with benefactor Blankenship. Readers

for each judge to decide individually. Unfortunately, with true regret, we are unable to stand silent in the present circumstances. Upon reviewing the cases of *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813 (1986), and *In re Murchison*, 349 U.S. 133 (1955), it is clear that both actual and apparent conflicts can have due process implications on the outcome of cases affected by such conflicts. On the record before us, we cannot say with certainty that those cases have application here. It is now clear, especially from the last motion for disqualification filed in this case, that there are now genuine due process implications arising under federal law, and therefore under our law, which have not been addressed.

Id. at 284 n.16.

The dissenters' observation is correct but tentative and bloodless, and tends to miss the point: regardless of the due process issues in the case, there was at all times a command under the West Virginia Code of Judicial Conduct Canon 3(E) that Justice Benjamin step aside if a reasonable person might question his impartiality. *See supra* text accompanying note 70. As detailed above, this test does not present nearly as high a burden on the movant as does the argument that due process has been violated. The dissenters, like Justice Benjamin himself, should simply have conceded the obvious fact that a reasonable observer may have reasonable questions about the impartiality of a judge who received \$3 million in campaign support from an interested litigant.

Although not a dissenter in the April 2008 decision, West Virginia Justice Starcher, who had previously recused in response to a Massey motion and addressed the issue in a memorandum, was more implicitly critical of Benjamin but directed his ire primarily at Blankenship whose "bestowal of his personal wealth, political tactics, and 'friendship' have created a cancer in the affairs of this Court." *Caperton*, 129 S. Ct. at 2258 (citing Starcher memorandum in 2 Joint Appendix at 459a–60a, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 5422892).

100. *See Caperton*, 129 S. Ct. at 2262–64.

101. *Id.* at 2262–63. "Justice Benjamin did undertake an extensive search for actual bias." *Id.* at 2265.

might conclude that this is merely good manners on Justice Kennedy's part and an aversion to kicking Justice Benjamin when he is down. But the majority's kid-gloves treatment of Justice Benjamin misses the mark. Justice Benjamin's views on disqualification under the Due Process Clause and the serious risk of actual bias standard test applied by the Court, although incorrect, might be defensible under the probability of bias standard. However, Justice Benjamin was never asked to conduct a due process disqualification inquiry. He was asked to apply the broader, nonconstitutional standard of whether a reasonable person might question his impartiality. As discussed above, he never correctly addressed that question and made an indefensible error in denying disqualification under the Judicial Code. The *Caperton* majority in carefully chosen words soft-pedaled the magnitude of Justice Benjamin's error in self-servingly concluding that he was not actually biased because of Blankenship's multimillion dollar support.

The *Caperton* majority opinion reflects how slow jurists are to make negative conclusions about one another. The dissenters, of course, essentially thought Justice Benjamin did nothing wrong,¹⁰² another illustration of the practical reluctance judges can have toward finding error or wrongdoing in another judge's disqualification. The majority acknowledges, as would any reasonable observer, that \$3 million is a lot of money.¹⁰³ But rather than blaming Justice Benjamin for failing to see how receipt of such large sums made his participation in *Caperton v. Massey* problematic, the *Caperton* majority blames Blankenship for injecting the specter of influence peddling into judicial elections.¹⁰⁴ "It takes two to tango" is a cliché, but one with some bite in this situation. Although Justice Benjamin could not prevent Blankenship individually or Blankenship-funded special interest groups from supporting the Benjamin candidacy, Justice Benjamin could have easily refused to assist Blankenship in overturning a \$50 million liability.

Justice Benjamin deserves more than a little scorn. Instead, even the majority that found his participation to violate due process treated him as

102. See *supra* Part II.G (reviewing Chief Justice Roberts's and Justice Scalia's dissents).

103. *Caperton*, 129 S. Ct. at 2264 ("[Blankenship] contributions eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee. *Caperton* claims Blankenship spent \$1 million more than the total amount spent by the campaign committees of both candidates combined." (citations to record omitted)).

104. See *id.* at 2257–59 (directing most implicit criticism for problematic nature of case and 2004 West Virginia Supreme Court election at Blankenship as contributor and activist rather than at Justice Benjamin for failing to recuse).

if his ego were made of Waterford crystal that needed gentle handling. Worse yet, four members of the Court—Justices Roberts, Scalia, Thomas, and Alito—defended Justice Benjamin’s grotesquely bad error in judgment. Unfortunately, such reluctance to criticize a judge or to implement effective recusal standards appears characteristic of the High Court and the judiciary in general. The Court, although occasionally providing a needed corrective when state courts fail to police judicial neutrality,¹⁰⁵ has not led well in this area. To begin with, the Court has for more than 200 years set the horrible example of permitting each Justice complete authority over his or her participation in a case. Each Justice makes an isolated decision as to whether to disclose potential disqualification issues to counsel and whether to recuse in a matter. There is no review by the full Court, any panel of the Court, or any other designated judicial or administrative body.¹⁰⁶

Even when the Court is attempting to set forth what it regards as a positive development regarding judicial ethics, its pronouncements have not been particularly comforting. For example, in 1993, the Court issued a statement regarding recusal policy when children of the Justices were affiliated with law firms working on Court matters.¹⁰⁷ The statement goes no further than the bare minimum in terms of judicial ethics by requiring recusal only if the child of a Justice is directly involved in the case as counsel so long as the attorney-child does not directly share in law firm revenue from the case.¹⁰⁸ This policy, which Justices Blackmun and Souter did not sign,¹⁰⁹ permits the children of the Justices to continue to have rainmaking capacity and be compensated indirectly while allowing their parents to hear and decide cases in which they know their attorney-children have at least an indirect professional interest and perhaps a de facto economic interest.¹¹⁰ Although one sympathizes with the Justices’ concern over strategically manufactured disqualification

105. See, e.g., *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *In re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1927).

106. See Stempel, *supra* note 72, at 861 n.129; *infra* note 259.

107. See Press Release, U.S. Supreme Court, Statement of Recusal Policy (Nov. 1, 1993), reprinted in STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 724–25 (2009).

108. See *id.*

109. *Id.* at 724.

110. See Stempel, *supra* note 72, at 913–16 (criticizing recusal statement at length).

through law firm hiring, one also wishes the Justices had used the opportunity to take a more expansive approach to judicial impartiality.¹¹¹ In at least one case, when Justice Rehnquist refused to recuse in *United States v. Microsoft* despite his son's partnership in the law firm representing Microsoft, the policy appears to have permitted questionable, though not obviously improper, disqualification practice.¹¹²

Well before the issuance of the Justice's statement, Justice Rehnquist had perhaps set a high-water mark for improper failure to recuse by participating in *Laird v. Tatum*,¹¹³ a case challenging Department of Defense domestic civilian surveillance that had been reviewed by then-Assistant Attorney General Rehnquist, who also made statements on the matter suggesting that he had rejected plaintiff's claim of illegal wiretapping well before hearing the case on the merits.¹¹⁴ Justice Rehnquist violated the time-honored rule that a judge should not be a "judge in his own case" because Rehnquist had been a participant in the matter and would surely have been deposed had the case gone forward.¹¹⁵ Adding arrogance to injury, Justice Rehnquist defended his

111. *See id.* (acknowledging that a stronger attitude toward recusal might inconvenience attorney-children of justices, but concluding that this is a small price to pay for more stringent recusal practices regarding law firm representation of litigants before the Court).

112. *See id.* at 917–18 (finding question reasonably close but concluding that Justice Rehnquist should have resolved uncertainty in favor of recusal when his son was an equity partner in the firm representing Microsoft and was also doing antitrust work for Microsoft regarding other matters).

113. 409 U.S. 1, 15–16 (1972) (deciding on the merits ruling that legal challenge to Army's domestic surveillance program was not justiciable).

114. *See* Stempel, *supra* note 72, at 851–62 (describing *Laird*, Rehnquist's participation, and public reaction, and assessing Rehnquist's decision and finding it clearly incorrect); accord MACKENZIE, *supra* note 79, at 215–17 (strongly criticizing Rehnquist's participation in *Laird*); Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 682–707 (2005) (criticizing Rehnquist's decision and rationale as well as criticizing the Court for a lax system regarding recusal).

115. *See* Letter from Stephen Gillers, Professor, N.Y. Univ. Sch. of Law, to Senator Howard M. Metzenbaum, U.S. Senate (Sept. 4, 1986), *reprinted in* 132 CONG. REC. 22,592 (1986) (assessing the issue during the time when then-Justice Rehnquist was being considered for elevation to chief justiceship, and concluding that Justice Rehnquist had acted as a judge in his own case); accord Letter from Geoffrey C. Hazard, Professor, Yale Law Sch., to Senator Charles Mathias, U.S. Senate (1986), *reprinted in* ROBERT M. COVER AT AL., PROCEDURE 1274 (1988) (submitting letter in connection with 1986 chief justiceship confirmation hearings). Hazard's letter stated that: "Mr. Rehnquist was the responsible counsel in the matter in question, as well as a potential witness concerning any factual issues regarding the policy. Each of these two relationships is independently a ground for disqualification." Letter from Geoffrey C. Hazard to Senator Charles Mathias, *supra*. *See also* Stempel, *supra* note 72, at 852–53 (noting Rehnquist's personal involvement in the case and public pronouncements suggesting predecision on the matter).

participation in a memorandum regarded by most commentators as misstating the record and misanalyzing the issue.¹¹⁶

More recently, the public was treated to the spectacle of Justice Scalia taking a duck hunting trip with Vice President Dick Cheney while a case challenging Cheney's secretive energy policy sessions was pending before the Court.¹¹⁷ Justice Scalia not only participated by casting the deciding vote¹¹⁸ but also issued a defensive, arguably caustic memorandum explaining his decision,¹¹⁹ further attracting criticism.¹²⁰ Even more than Justice Rehnquist, who seemed genuinely torn at times

116. See *Laird v. Tatum*, 409 U.S. 824 (Rehnquist, J., mem.). Some of the statements in the Rehnquist memorandum were, however, correct and the memorandum has continued to be widely cited, primarily for its correct components but occasionally for its problematic portions or regarding his discussion of the "duty to sit," which was abolished in the 1974 amendments to federal recusal law, in part as a negative reaction to Justice Rehnquist's conduct in *Laird*. See Stempel, *supra* note 72, at 855–63.

Professor Monroe Freedman is even more critical of Justice Rehnquist—as well as criticizing the largely overlooked issue of Justice Breyer's pattern of failing to recuse in questionable cases. See Monroe H. Freedman, *Judicial Impartiality in the Supreme Court—The Troubling Case of Justice Stephen Breyer*, 30 OKLA. CITY U. L. REV. 513, 514 ("[Justice Rehnquist] lied in a Supreme Court memorandum opinion regarding his failure to recuse himself in *Laird v. Tatum*."). Freedman also notes that Justice Rehnquist has been "criticized for flying on a corporate jet owned by an Ohio power plant that had dozens of cases in federal court." *Id.* See also MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYER'S ETHICS 231–42 (3d ed. 2004) (including an extensive analysis of Rehnquist's conduct related to *Laird*, and concluding that he committed perjury).

117. See Stempel, *supra* note 72, at 900–08 (providing background on Cheney v. U.S. Dist. Court, 542 U.S. 367 (2004), and Scalia's refusal to disqualify himself and the attendant scholarly and law reaction).

118. See *Cheney*, 542 U.S. at 372. See also *In re Cheney*, 334 F.3d 1096 (D.C. Cir. 2003), *vacated*, 542 U.S. 367, *remanded to* 406 F.3d 723 (D.C. Cir. 2005) (en banc).

119. See *Cheney v. U.S. Dist. Court*, 541 U.S. 913 (2004) (Scalia, J., mem.) (denying motion to recuse).

120. See Stempel, *supra* note 72, at 900–08. Particularly scathing in its criticism is Monroe H. Freedman, *Duck-Blind Justice: Justice Scalia's Memorandum in the Cheney Case*, 18 GEO. J. LEGAL ETHICS 229 (2004) (assessing Scalia's memorandum and finding its analysis incorrect and unpersuasive, and concluding that Justice Scalia should have recused himself in *Cheney*). However, most other commentators were similarly negative regarding Justice Scalia's failure to recuse, his proffered rationale, and the unrepentant tone of his memorandum. See, e.g., David Feldman, Note, *Duck Hunting, Deliberating, and Disqualification: Cheney v. U.S. District Court and the Flaws of 28 U.S.C. § 455(A)*, 15 B.U. PUB. INT. L.J. 319 (2006); Timothy J. Goodson, Comment, *Duck, Duck, Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of Cheney v. United States District Court*, 84 N.C. L. REV. 181 (2005).

over his situation,¹²¹ Justice Scalia expressed implicit contempt for those who questioned his decision.¹²²

The legal community must await access to Justice Scalia's papers. Justice Rehnquist's however, reflect his brethren—and it was all brethren at the time—supporting his decision and minimizing the concerns of his critics. Chief Justice Burger and Justices Stewart, White, and Powell all praised his analysis and at least implicitly endorsed the Rehnquist decision¹²³ even though the closer examination of academic commentators reveals great error by Justice Rehnquist in sitting on the case.¹²⁴ With informal gatekeeping like this by the Justices themselves, there is little de facto check on the self-interested recusal decisions of the Justices—and little wonder they were so gentle in their assessment of Justice Benjamin's conduct.

III. THE AUDACITY OF DENIAL: A CLOSER LOOK AT THE BENJAMIN NONRECUSAL

Requests that Justice Benjamin remove himself from the case began in October 2005, shortly after the case came within reach of the state

121. See Stempel, *supra* note 72, at 858 n.126 (noting that Justice Rehnquist in an earlier draft of his recusal memorandum had described the question as close and that he sought counsel from Chief Justice Burger and Justices Stewart and White—reflecting some uncertainty over the issue and in particular whether he should issue a memorandum explanation of his decision not to recuse). *But see id.* at 855 (noting that the final version of the memorandum issued by Justice Rehnquist “was distinguished by its feisty rhetoric and unbowed attitude”). Once having finalized his memorandum, Justice Rehnquist almost flaunted his flaunting of proper disqualification practice. See, e.g., William H. Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 REC. ASS'N B. CITY N.Y. 694 (1973) (vigorously defending his memorandum and participation in *Laird*).

122. See *Cheney*, 541 U.S. at 929 (Scalia, J., mem.) (“If I could have [recused] in good conscience, I would have been pleased to demonstrate my integrity, and immediately silence the criticism, by getting off the case. Since I believe there is no basis for recusal, I cannot.”); see also Stempel, *supra* note 72, at 905–06 (noting the stridency of Scalia's defense of his nonrecusal and resistance to accepting idea that concern of lay observers, particularly newspaper editorialists, was reasonable). Perhaps unsurprisingly, Justice Rehnquist defended Justice Scalia and criticized others for their criticism of Justice Scalia. See Gina Holland, *Panel To Study Federal Judicial Ethics*, SAN DIEGO UNION-TRIB., May 26, 2004, at A10 (quoting January 2005 Rehnquist letter to U.S. Senate Democrats).

Justice Breyer also defended the Scalia nonrecusal in *Cheney*. See Freedman, *supra* note 116, at 515. Justice Breyer's failure to disqualify himself, both as a First Circuit judge and a Supreme Court Justice, has also come under criticism. See *id.* at 515–34.

123. See Stempel, *supra* note 72, at 851–63; see also *id.* at 813 (discussing letter from Justice Potter Stewart approving of Rehnquist's draft memorandum and assessment); *id.* at 860 n.126 (noting Justice Powell's praising Justice Rehnquist for his “splendid memorandum”).

124. See *id.* at 851–63; *supra* text accompanying notes 113–16.

supreme court.¹²⁵ The motions were filed by Hugh Caperton individually and by the plaintiff Caperton companies—Harman Mining Corporation, Harman Development Corporation, and Sovereign Coal Sales, Inc.¹²⁶ Both motions squarely raised the claim that participation by Justice Benjamin would violate Canon 3(E)(1) of the West Virginia Code of Judicial Conduct and West Virginia Rule of Appellate Procedure 29, which incorporates the Judicial Code’s standard that a judge must recuse when a reasonable person might question the judge’s impartiality.¹²⁷

Even prior to the case reaching the state high court, the magnitude of the litigation and Blankenship’s support of then candidate Benjamin had attracted attention, a fact noted in Caperton’s recusal motion, which worried that:

[F]rom the media accounts, it appears that Justice Benjamin intends to consider the issue *subjectively*: According to one published report, “Benjamin would not promise to remove himself from any case involving Massey Energy, but he said he would remove himself from any case in which *he believed he could not be fair*. He said he thought he could be fair, though. ‘I don’t know why I wouldn’t be,’ he said.” Exhibit F, “Benjamin knocks Warren McGraw off Supreme Court,” *Charleston Daily Mail*, November 3, 2004 (emphasis provided). *See also*, Exhibit G, “Benjamin May Face Bias Questions,” *The Charleston Gazette*, November 4, 2004. (“Benjamin does not know if he will participate in any of those cases [involving Massey, with specific reference made to this case]. ‘I will have to see each case on a case-by-case basis,’ he said after promising to recuse himself ‘from any case *I don’t believe I will be fair in.*’”¹²⁸

125. Prior to the 2004 judicial election, however, it was obvious that the *Caperton v. Massey* litigation and its large judgment would eventually reach the state supreme court. Judgment on the compensatory damages verdict for Caperton was entered in August 2002, with a jury award of punitive damages entered in September 2004. However, the circuit court’s final order denying Massey post-trial motions was not entered until March 2005. *See* 1 Joint Appendix at 2a, *Caperton v. Massey*, 129 S. Ct. 2252 (2009) (No. 08-22), 2008 WL 5784213. Consequently, the October 19, 2005 Caperton party motions for Justice Benjamin’s recusal were quite timely in that petitions for appeal required for the supreme court to hear the case would not be filed until late 2006. Regarding the process of obtaining review before the West Virginia Supreme Court of Appeals, *see* W. V.A. R. APP. P. 3, *available at* <http://www.state.wv.us/wvsca/rules/appellate.htm#RULE%203.%20PETITION%20FOR%20APPEAL>.

126. *See* 1 Joint Appendix, *supra* note 125, at 104a, 106a, 110a, 323a (reproducing October 19, 2005 Corporate Plaintiff’s Motion to Disqualify Justice Benjamin, and October 19, 2005 Hugh Caperton’s Motion to Disqualify Justice Benjamin).

127. *See, e.g., id.* at 104a, 106a–10a (reproducing October 19, 2005 Motion of Respondent Corporations for Disqualification of Justice Benjamin); *id.* at 323a, 327a–34a (reproducing October 19, 2005 Hugh M. Caperton’s Motion for Disqualification Directed to Justice Brent D. Benjamin).

128. *Id.* at 329a (alteration in original) (Caperton motion to disqualify).

As the *Caperton* plaintiffs correctly pointed out in their October 2005 papers submitted to Justice Benjamin and the court, the standard for judicial disqualification under the Code is not a subjective one hinging on the judge's view of whether he or she is and can remain unbiased. Rather, the clear standard as expressed both in the text of the Judicial Code and interpretative case law is whether the mythically objective reasonable person so frequently invoked in the law might question the judge's impartiality.¹²⁹

The *Caperton* plaintiffs also invoked negative editorial comments about Justice Benjamin's previous refusals to recuse in Massey cases¹³⁰ and additionally raised as ground for disqualification the apparent past representation of at least one Massey entity by Justice Benjamin's former law firm during the time Benjamin was in practice.¹³¹ A judge's

129. See *id.* at 330a–33a (Caperton motion to disqualify). The Caperton motion cited cases and noted the existence of “more than one hundred media pieces raising the very issue of the perceived impartiality of Justice Benjamin where Mr. Blankenship and Massey are involved.” *Id.* at 331a. The motion also noted Blankenship's central status to the West Virginia Republican Party, of which Benjamin was nominee in the race against McGraw. *Id.* See also, e.g., West Virginia *ex rel.* Mantz v. Zakaib, 609 S.E.2d 870 (W. Va. 2004), cited in 1 Joint Appendix, *supra* note 125, at 106a–08a, 113a (reproducing October 19, 2005 Motion of Respondent Corporations for Disqualification); Tennant v. Marion Health Care Found., Inc., 459 S.E.2d 374, 385 (W. Va. 1995) (“[T]he standard for recusal [is] whether a reasonable and objective person knowing all the facts would harbor doubts concerning the judge's impartiality.”), cited in 1 Joint Appendix, *supra* note 125, at 107a, 110a (reproducing October 19, 2005 Motion of Respondent Corporations for Disqualification); FLAMM, *supra* note 8, §§ 5.1–8 (deciding that standard for recusal is an objective test asking whether an adequately informed lay observer would harbor questions as to judge's ability to be impartial in light of ties to interested party or counsel).

130. 1 Joint Appendix, *supra* note 125, at 333a–34a (Caperton motion to disqualify). The motion stated:

Justice Benjamin failed to disqualify himself in the coal severance tax litigation in which a Massey Energy subsidiary is one of many named parties. As a result, the Huntington Herald-Dispatch, which endorsed Justice Benjamin's candidacy, offered the following editorial opinion:

“Benjamin did not recuse himself from the case. He should have. His impartiality is in doubt given the amount of help he received from Blankenship's money last year. Benjamin is part of a justice system that relies on partisan political elections to select state Supreme Court justices, county circuit court judges and county magistrates. Any Supreme Court justice who accepts campaign contributions from any person, party, group or political action committee, or who benefits from third-party help such as Benjamin receive from Blankenship, is similarly tainted. *Benjamin's case is more extreme than the others*, but the same concern applies to all.”

Id.

131. The motion also asserted that:

In addition to the negative appearance created by Mr. Blankenship's massive spending in the 2004 general election campaign, there is also the issue of Robinson & McElwee's prior representation of Massey Defendant A.T.

former law firm's representation of a litigant during the time of the judge's practice there would itself be sufficient ground for disqualification if the firm had worked on the same matter now pending before the court.¹³² Because the Massey claims handled by his former firm differ from Massey's defense of the Caperton claim, recusal was not required on this basis alone, but the existence of the tie added to the list of factors suggesting that an objectively reasonable observer would have doubts about Benjamin's ability to be impartial in Massey and Blankenship cases.

All told, the *Caperton* motions for disqualification seem irrefutably persuasive—unless one is willing to advance the proposition that reasonable lay observers will not be concerned if a judge hearing a case has received millions in support from a more or less directly interested person.¹³³ The motion papers correctly cite the proper legal standard, which is a very favorable one for those seeking disqualification, and note that a relatively reasonable set of lay observers—the news media—has overtly questioned Justice Benjamin's ability to be impartial. In addition, the movants cautioned Justice Benjamin that his subjective belief in his impartiality, even if sincere and accurate, does not permit his participation in the case if outside observers would perceive the situation differently.

Massey Coal Co., Inc. Specifically, it is believed that while Justice Benjamin was still employed there, Robinson & McElwee represented A.T. Massey during the Lady H. Coal Company, Inc. bankruptcy proceedings in the United States Bankruptcy Court for the Southern District of West Virginia.

This historical relationship between Justice Benjamin's prior law firm and Massey is further complicated by the fact that Justice Benjamin is presumably utilizing the services of Charles R. McElwee, one of the firm's founding partners, in a clerk capacity.

Id. at 333a (citations omitted).

132. See W. VA. CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(b) (West 2008).

133. Although Blankenship was technically not a party to the case and his interest was arguably indirect in that he would not personally be required to pay Caperton if the trial court judgment were upheld, this seems an exercise in form over substance. Adverse judgments against a company in the tens of millions of dollars logically imperil and likely reduce the compensation (and perhaps even the continued employment) of the company CEO (perhaps especially when the CEO is so personally involved in the actions that led to the liability). Even more importantly, for all practical purposes Blankenship is Massey, his picture and position prominently touted on the company's website. See Massey Energy Company, <http://phx.corporate-ir.net/preview/phoenix.zhtml?c=102864&p=irol-govBio&ID=140028> (last visited Feb. 7, 2010).

Although Justice Benjamin may have unwittingly mischaracterized the legal test for recusal in off-the-cuff public comments, the *Caperton* motions gave him the opportunity to research the issue, reflect, and presumably rectify this orientation and correctly decide the motion in favor of recusal. Or so one might have thought. But somewhat shockingly, Justice Benjamin reiterated these errors of analysis in his formal response to the motion. In an April 7, 2006 memorandum to the court’s clerk, Justice Benjamin denied the motion. Although professing to be focusing on “objective factors to believe that a given jurist will be unable to render a fair and impartial decision in a given case,” he found that the movants had presented:

[N]o 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 in his consideration of matters related to this case. What is amply present in the materials filled are surmise, conjecture and political rhetoric.¹³⁴

The justice’s memorandum establishes that he misunderstood—or did not want to understand—what is meant by the objective test for recusal. Instead of focusing on what outside observers would think based on their observations (for example, \$3 million in campaign support from interested de facto party for judge deciding case important to benefactor), Justice Benjamin instead seems to view the objective test as a matter of whether he personally is persuaded by the motion for recusal, notwithstanding whatever number of reporters, editorialists, or commentators may disagree.¹³⁵ In addition, Justice Benjamin appears to focus primarily on whether he is biased or prejudiced, giving implicit short shrift to the correct standard of impartiality.¹³⁶ Even when nodding in this direction, Justice Benjamin mangles the concept. He states that recusal is not required because there is insufficient evidence to prove that he would fail to be fair and impartial—but the correct inquiry is whether observers would harbor doubts about his impartiality. Instead of playing by the rules and correctly applying the proper standard, Justice Benjamin imposes a burden not required by law—the burden to prove that he cannot be impartial.¹³⁷

134. 1 Joint Appendix, *supra* note 125, at 336a–37a (reproducing Memorandum from Brent D. Benjamin, Chief Justice, W. Va. Supreme Court of Appeals, to Rory L. Perry, II, Clerk, W. Va. Supreme Court of Appeals (Apr. 7, 2006) (discussing the case and underlying plaintiffs’ motion to disqualify Justice Benjamin)).

135. *See id.*; sources cited *supra* note 54.

136. *See* 1 Joint Appendix, *supra* note 125, at 336a–37a.

137. *Id.* at 336a.

In addition to twisted legal analysis, Justice Benjamin is openly defensive, engaging in rather bombast rhetorical flourish accusing the movants of employing “political rhetoric,” an irony that seems lost on him.¹³⁸ Then, in a marvelous non sequitur, Justice Benjamin devotes a long paragraph to *United States v. Haldeman*,¹³⁹ in which federal district Judge John Sirica refused to cease presiding over a Watergate-related¹⁴⁰ prosecution directed toward President Nixon’s former White House Chief of Staff and others allegedly involved in the caper, which involved a burglary at the Democratic Party’s national headquarters—in the Washington, D.C. Watergate complex, hence the name of the scandal—and other illegal efforts to disrupt President Nixon’s political foes. What Justice Benjamin seems to have overlooked, however, is that the motion to disqualify Judge Sirica came well into the Watergate prosecution process and was largely directed at Judge Sirica’s prior judicial activity rather than at any alleged extrajudicial bias toward defendants. In other words, the judge’s alleged biases against the defendants were the product of knowledge acquired through the judicial process itself.¹⁴¹ Such judicially acquired attitudes, even if eventually amounting to bias or prejudice, are usually not grounds for recusal because they are not the product of preconceived notions or external bias but instead result from the judge’s assessment of the case itself.¹⁴²

138. *Id.* at 337a (labeling recusal motion as one of “surmise, conjecture and political rhetoric”).

139. *Id.* at 337a–38a (citing *United States v. Haldeman*, 559 F.2d 31, 139 n.360 (D.C. Cir. 1976)).

140. *See Haldeman*, 559 F.2d at 52–59 (describing Watergate).

141. *See id.* at 132–33 (“Every complaint [defendants] register derives from judicial acts by Judge Sirica during his tenure as the officer presiding over a series of criminal proceedings emanating from the Watergate affair.”). In addition, the recusal motion in *Haldeman* involved the version of 28 U.S.C. § 455 in existence prior to the extensive 1974 revisions that produced today’s § 455. Nonetheless, the D.C. Circuit found that “even under the appearance-of-impartiality standard” of current § 455(a), disqualification of Judge Sirica was inappropriate because “[m]ost of the activities relied upon where exercises of judicial functions. . . . Should the appearance-of-impropriety standard be woodenly applied to work a judge’s disqualification because of earlier legal adjudications entirely proper when made, the result would be truly amazing.” *See id.* at 133 n.297.

142. *See Liteky v. United States*, 510 U.S. 540, 550–51 (1994); FLAMM, *supra* note 8, §§ 4.1–7. In extreme cases, a judge’s evident antipathy toward a litigant or counsel, even if judicially acquired, may require removal of the judge from the case in the interests of justice when the antipathy is deemed sufficiently pronounced to jeopardize the right to a fair trial. *See, e.g., Haines v. Liggett Group, Inc.*, 975 F.2d 81, 97–98 (3d Cir. 1992) (disqualifying trial judge in tobacco product liability case in which judge, based on discovery controversies in case, labeled tobacco industry from

The essence of judging is to come to conclusions based on the evidence and proceedings. If a judge comes to view a litigant as dishonorable based on the adjudication itself, this is normally deemed to be merely the product of judging. The Judicial Code is aimed primarily at extrajudicial bias and avoiding adjudication by judges who appeared to lack impartiality prior to participating in the case.¹⁴³ Consequently, Justice Benjamin's invocation of Judge Sirica crusading for justice so that the Watergate matter would not be swept under the rug by its perpetrators, however heroic the image, is an inapt picture of the disqualification situation presented in *Caperton v. Massey*.

After the West Virginia Supreme Court's initial 2007 decision vacating the judgment against Massey on the technical grounds of res judicata and forum selection clause enforcement, another round of disqualifications and motions resulted in a vacation of the opinion and scheduled rehearing of the case. The Caperton parties again sought Justice Benjamin's disqualification in January 2008. Their motions reiterated the earlier grounds and also noted that Justice Maynard, who had socialized extensively with Blankenship—most notoriously in Monte Carlo and was embarrassingly photographed while doing so—voluntarily recused himself, strongly suggesting that another reasonable person—a justice friendly with Blankenship who had voted for Massey in the 2007 decision—had been forced to acknowledge that close ties to the CEO of Massey raised reasonable questions regarding impartiality.¹⁴⁴

which defendants were drawn “king of concealment and disinformation”); *Reserve Mining Co. v. Lord*, 529 F.2d 181, 185–86 (8th Cir. 1976) (removing trial judge from case because his dislike for defendant appeared to have transformed him from jurist to advocate for plaintiffs). The *Reserve Mining Co.* court observed:

The record demonstrates overt acts by the district judge reflecting great bias . . . and substantial disregard for the mandate of this court.

. . . [T]he record reveals more than a trial judge merely acting in accord with his prior judgment.

Judge Lord seems to have shed the robe of the judge and to have assumed the mantle of the advocate. The court thus becomes lawyer, witness and judge in the same proceeding, and abandons the greatest virtue of a fair and conscientious judge—impartiality.

Id.

143. See FLAMM, *supra* note 8, §§ 4.1–.7.

144. See 2 Joint Appendix, *supra* note 99, at 433a–39a (reproducing January 17, 2008 Motion of Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. for Disqualification of Justice Maynard and Renewal of Motion for Disqualification of Justice Benjamin).

To be fair to Justice Maynard, his recreational outings with Blankenship may not be the attempts to “bribe” a justice with a vacation, as implicitly suggested by his critics. Maynard and Blankenship have apparently been friends since childhood. See John O'Brien, *Supreme Court Says It Can't Investigate Maynard-Blankenship Friendship*, W. VA.

In addition, the second attempt to disqualify Justice Benjamin built on his denial of the prior motion, noting that in his earlier memorandum denying recusal, Justice Benjamin stated that he had seen no evidence to establish his bias, prejudice, or inability to be impartial:

[T]his is simply not the test against which Harman's Motion should have been decided. Rather, the test is whether a reasonable and objective person knowing all the facts would harbor doubts concerning the judge's impartiality. Indeed, Justice Benjamin conceded as much when he committed shortly after his election to considering recusal in cases involving Mr. Blankenship and Massey. Justice Benjamin should also disclose the nature of this relationship with Mr. Blankenship, including private meetings, dinners, etc.¹⁴⁵

Counsel for the Caperton parties correctly read Justice Benjamin's April 2006 memorandum as invoking the language of objectivity and appearance but in actuality required that he step aside only if it were proven to his satisfaction that he could not be fair in a case involving Blankenship. To be sure, Caperton counsel had an incentive to read the first Benjamin memo in this manner for purposes of continuing their challenge, but it appears no other reading is possible. Justice Benjamin, despite having six months to think about the issue, used the wrong legal test and decided the issue incorrectly. Now, more than two years after the original motion for disqualification and more than three years after the matter was raised during the election campaign, he was presented with an opportunity for redemption—an opportunity he squandered.

On January 18, 2008, in another memorandum to the clerk of court, Justice Benjamin again curtly denied to disqualify, essentially reiterating the flawed approach of his April 2006 memorandum.¹⁴⁶ He further

REC., Mar. 6, 2008, <http://www.wvrecord.com/news/208928-supreme-court-says-it-cant-investigate-maynard-blankenship-friendship> ("They have been friends since their childhoods in Mingo County . . ."). However, Justice Maynard has stated that the now infamous Monte Carlo vacation pictures resulted from the mere coincidence of the two men's separately deciding to take vacations on the Riviera at the same time. "[T]he two claim the [Monaco] meeting was purely coincidental." *Id.* Anyone willing to believe in this sort of coincidence probably also has purchased the Brooklyn Bridge several times over. But notwithstanding Justice Maynard's credibility problems, he at least had the good sense to step aside from *Caperton v. Massey* when these matters came to light. And, of course, even without any vacations, a judge may be required to recuse if a key interested party is a close friend.

145. 2 Joint Appendix, *supra* note 99, at 438a.

146. See 2 Joint Appendix, *supra* note 99, at 442a–43a (reproducing Memorandum from Brent D. Benjamin, Chief Justice, W. Va. Supreme Court of Appeals, to Rory L. Perry, II, Clerk, W. Va. Supreme Court of Appeals (Jan. 17, 2008) (regarding January

criticized the movants for failing to introduce new information and making the motion “after the undersigned filed his concurring opinion to that majority opinion.”¹⁴⁷ This is a judicial cheap shot. Justice Benjamin was of course quite aware of the facts as the case unfolded. He knew that questions had been raised about his ties to Blankenship even before his election and that the movants had requested his disqualification at the outset of the case. He also knew that the court’s decision to rehear the matter and reconsider its 2007 decision on the merits had created an opportunity for all parties to raise various issues. For example, the Massey defendants successfully sought the recusal of Justice Starcher,

17, 2008 Motion of Disqualification of Justice Brent D. Benjamin filed by Appellees Harman Development Corporation)). The memo explained:

A review of the instant motion reveals the motion to essentially be identical to an earlier motion filed by movants in which I issued a memorandum on April 7, 2006 denying the prior motion, finding:

“[L]ittle if any [information in the motion] relates to this Justice and no *objective* information is advanced to show that this Justice has a bias for or against the litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial in his consideration of matters related to this case.”

Id. (quoting Memorandum from Brent D. Benjamin, Chief Justice, W. Va. Supreme Court of Appeals, to Rory L. Perry, II, Clerk, W. Va. Supreme Court of Appeals (Apr. 7, 2006), *reprinted in* 1 Joint Appendix, *supra* note 125, at 336a).

This passage was bad enough when first issued and gets no better on a second reading. In addition, it shows that Justice Benjamin appears to misunderstand the concept of objective evidence. He incorrectly claims that none had been mustered in support of his recusal. But all of the recusal motions are chock-full of objective evidence that cannot reasonably be questioned: that Blankenship supported Benjamin’s candidacy with \$3 million; that Blankenship is the CEO of Massey; that Massey had a case before the Supreme Court in which it hoped Justice Benjamin would provide a supporting vote to relieve it of a multimillion dollar judgment; that 100 news accounts noted the Blankenship-Benjamin relationship; and that Justice Benjamin’s ability to be impartial in Blankenship matters has been reasonably questioned by many. All of these are objectively, undeniably true facts, whether Justice Benjamin likes it or not. He may be unpersuaded by these facts, as well as burdening the facts with a greater task—proving his bias—than is actually assigned by the law—raising reasonable question as to his impartiality. But this does not change the reality that all of these facts are objective and unquestionable.

Although this is perhaps a relatively small point in the list of errors made by Justice Benjamin, it clearly calls into question his ability to perform legal analysis. Second-year law students are normally adept at correctly distinguishing the objective from the subjective. At least in the April 2006 and January 2008 memoranda, in which his own conduct was subject to scrutiny, Justice Benjamin botched this basic legal distinction.

147. In his memoranda, Justice Benjamin had an annoying tendency to refer to himself in the royal third person (“this Justice” and “the undersigned”). 2 Joint Appendix, *supra* note 99, at 443a (January 18, 2008 memorandum). Although pomposity is not an impeachable offence, the tone of the memoranda is consistent with the mindset of a judge on a pedestal, resistant to criticism and viewing oneself with a bit of a deified attitude. His writing would have been improved by some straight talk about “I” or “me” as well as a bit more consciousness that jurists are human beings and possess no special quality that exempts them from basic psychology applicable to all humans.

who had voted for Caperton in the 2007 decision. Against this backdrop, it is simply absurd for Justice Benjamin to criticize the movants for making a recusal motion when they did. It reflects unfairness and hostility toward the movants and is dramatically inconsistent with judicial impartiality.

Continuing in the cheap shot mode, Justice Benjamin's January 2008 memorandum also states that the "motion contains no specific legal precedent for the position advanced by movants."¹⁴⁸ The motions seeking his recusal had cited both U.S. Supreme Court and West Virginia Supreme Court case law regarding the applicable standard for disqualification. If Justice Benjamin intended to say that there were no prior cases cited involving election support recusal, this may have been a fair statement but is something of a red herring. Courts regularly make legal determinations in the absence of precedent "on all fours" with an instant matter by applying the clear principles of precedent to the facts at hand. The movants had supplied such precedent that could have easily and correctly been applied to determine that recusal was required due to \$3 million in campaign support just as it would be required if a judge's spouse held \$3 million in litigant stock.

After this initial defensive salvo, the January 2008 memorandum more seriously addresses the question of whether reasonable observers would question his impartiality, noting that the state's Department of Environmental Protection decided not to seek his recusal in a Massey pollution case.¹⁴⁹ Despite this generally helpful turn,¹⁵⁰ Justice Benjamin refuses to acknowledge that so much monetary aid from an interested person might

148. *Id.*

149. *Id.* at 443a-44a.

150. But not an entirely helpful turn. A state agency's decision that grounds for recusal did not exist in a regulatory matter involving Massey may be a fact to consider regarding the reasonable perception of outside observers, but it is hardly a conclusive fact. But Justice Benjamin treats this data point, drawn not from any formal legal papers but from a newspaper account, as conclusive on the issue. *See id.* (citing Ken Ward Jr., *Recusal Unnecessary, DEP Says*, CHARLESTON GAZETTE, Nov. 3, 2005, at 1C).

Logically, Justice Benjamin should have surveyed legal and public sentiment on the issue rather than clinging to one particularly favorable news account. His error was compounded because during the course of the recusal proceedings, he repeatedly treated unfavorable news accounts of public concern over his impartiality as irrelevant. What's sauce for the proverbial goose should be sauce for the metaphorical gander. If one news account and one opinion of this sort are relevant, then all are relevant. And in this case, the vast bulk of reporting suggests that most lawyers and laypersons would have reasonable question as to Justice Benjamin's impartiality. *See* 1 Joint Appendix, *supra* note 125, at 331a (reproducing Caperton motion to disqualify, which referred to approximately 100 media accounts raising matter of Benjamin's impartiality).

cause concern to a reasonable observer. Then, retreating from the actual facts surrounding the motion, he attempts to argue that recusal under these circumstances would be both antidemocratic and permit too much strategic behavior by litigants:

[T]he need for a proper factual basis to support a motion for disqualification is necessary to ensure that popularly-elected judges are not subject to media-driven attacks from which they cannot defend themselves, from campaigns to generate a veto power over judges by the creation and maintenance of public controversy in media outlets, and from attempts to engage in “judge-shopping” —a practice universally condemned. . . .

. . . To interpret the term “impartiality might reasonably be questioned” in such a subjective and partisan manner as the movants seem to suggest, particularly after this Justice voted in the Majority against their legal positions in this case, would create a system where there would be almost no limit to recusal motions and popularly-elected courts of this State would be open to “judge-shopping” under the guise of litigation strategy.¹⁵¹

Now, that’s chutzpah! A justice whose election is the product of very expensive judge shopping—in the form of Blankenship’s efforts to place on the court a justice less likely to support a business tort plaintiff’s large judgment against a campaign supporter—accuses his critics of judge shopping. A justice who obtained his position due to media-driven attacks on his opponent—regarded as misleading by many observers¹⁵²—attempts to paint himself as the victim, falsely claiming that he cannot defend himself—in the body of his second memorandum defending himself. He also exaggerates by claiming that recusal based on campaign spending will create a veto over certain judges’ participation, overlooking the fact that no one forced Blankenship to spend \$3 million or prevented candidate Benjamin from repudiating Blankenship’s smear campaign against Justice McGraw.

Whether acting as a public-spirited citizen or a cunningly astute businessperson, Blankenship is the one who created the instant problem, and Justice Benjamin is at least guilty of allowing the situation to go unchecked, allowing it to escalate to the point that it raised questions about his ability to be impartial regarding Blankenship. Nothing prevented Justice Benjamin from making a public repudiation of the advertisements accusing Justice McGraw of pandering to pedophiles. Nothing prevented Justice Benjamin from disavowing the And For The Sake Of The Kids attacks on his opponent and asking voters to do the

151. 2 Joint Appendix, *supra* note 99, at 444a–45a (January 18, 2008 memorandum).

152. *See supra* Part II.B (describing hard-fought, arguably nasty and deceptive 2004 election won by Benjamin).

same. Instead, Justice Benjamin ran a campaign that made substantial use of the smear tactics, including Justice Benjamin's own invocation of the Tony Arbaugh pedophile/predator-set-free case against Justice McGraw.¹⁵³

In addition, Justice Benjamin is again taking a very cheap shot at the movants by accusing them of belatedly seeking his disqualification due to his rulings on the merits when in fact the movants had wanted him off the case from the beginning. He attempts to turn a motion based on extrajudicial factors—his ties to Blankenship—into one based on judicially acquired factors, a tactic he amplifies by again misusing Watergate's *United States v. Halderman* precedent.¹⁵⁴

Under these circumstances, Justice Benjamin is a bit like the child who murders his parents and then asks for mercy due to his status as an orphan. On the whole, his January 2008 memorandum is perhaps worse than its predecessor April 2006 memorandum. Both reflect a jurist who either grossly misunderstands the law or is willfully distorting it and who either negligently or intentionally is making an erroneous decision on the motion. Both memoranda also reflect a judge who has become overly emotional and defensive about the challenge to his continued participation. Both reflect a judge unnecessarily distorting the actions and positions of the movants and grasping for a purported higher principle—democracy, stability of the bench—that will excuse his very low conduct in remaining on the case.¹⁵⁵

153. See Timothy C. Bailey, Editorial, *Supreme Court Race Ad Misrepresents Decision*, CHARLESTON GAZETTE, Sept. 3, 2004, at 5A (chastising Benjamin for using Arbaugh case in ads and misrepresenting facts).

154. See 2 Joint Appendix, *supra* note 99, at 445a (January 18, 2008 memorandum) (citing *United States v. Haldeman*, 559 F.2d 31, 140 n.360 (D.C. Cir. 1976)); *supra* text accompanying notes 139–44 (regarding inapplicability of *Haldeman* precedent).

155. In the context of academia, it has been observed that the lower the behavior at issue, the higher the values that will be invoked to justify the conduct. Having attended a few fractious faculty meetings during the past twenty-three years, I am inclined to agree. Although it is on one level refreshing to see judges behaving no better than professors (on their worst days), it is at a more basic level highly dispiriting to see a judge who many would view as beholden to a predatory fat cat to be defending his actions by reference to lofting concepts such as democracy and courageous events such as the system's ability to curb a law-breaking President in Watergate. Law is about making distinctions. To paraphrase Senator Lloyd Bentsen's famous comment during his 1988 vice presidential debate with Senator Dan Quayle, Justice Benjamin is no Judge Sirica. Nor did the nation's founders seek to establish a democratic republic so that Justice Benjamin could decide cases involving his \$3 million campaign benefactor.

Undaunted by a second rejection of their disqualification motion, in March 2008, the Caperton parties filed another recusal motion,¹⁵⁶ which, in addition to renewing its prior arguments and continuing to urge application of the correct legal standard, mustered new evidence and argument based on survey research conducted for the case. To be sure, the survey research sprung from advocacy in an adversary system, but the material nonetheless on the whole added to the overwhelming case for recusal.

The Caperton parties retained Talmey-Drake Research & Strategy, Inc., a Colorado-based market research firm, to conduct random telephone interviews with West Virginia residents.¹⁵⁷ The 753 interviews took place in late March 2008.¹⁵⁸ Respondents were asked their opinion regarding various persons and entities, including Massey Coal (on which the group held slightly positive views) and Don Blankenship (on which the group held slightly negative views, although nearly 40% were unaware of him, suggesting that open insertion into the political process does not make one a household word).¹⁵⁹

Respondents were then asked about the *Caperton v. Massey* litigation, of which roughly one-third of the group was aware.¹⁶⁰ Respondents were then told that Justice Spike Maynard had been photographed vacationing with Blankenship in Monaco and had recused himself from the case.¹⁶¹ Asked whether Justice Maynard's decision was correct, 79% agreed.¹⁶² Respondents were then asked of their awareness of Blankenship's support for Benjamin—one-third was aware¹⁶³—and then asked:

156. 2 Joint Appendix, *supra* note 99, at 463a (reproducing March 28, 2008 Second Renewed Joint Motion for Disqualification of Justice Benjamin by Hugh Caperton et al.).

157. *Id.* at 469a (reproducing Affidavit of Robert Drake, attached to Second Renewed Joint Motion for Disqualification of Justice Benjamin by Hugh Caperton et al.). Drake was at the time Senior Vice President of Talmey-Drake.

158. *Id.* at 470a.

159. As a benchmark of sorts, the respondents were asked about longtime Democratic U.S. Senator Jay Rockefeller (D-W. Va.), the grandson of Standard Oil founder John D. Rockefeller and a member of one of America's richest, most famous families, with more than 60% of the group expressing positive views of the Senator and only 2% unaware of him. *Id.* at 474a (reproducing Appendix to Affidavit, which reproduced the survey instrument).

160. *Id.* at 475a.

161. *Id.* at 475a–76a.

162. *Id.* at 476a.

163. *Id.*

Thinking first about the \$75 million dollar judgment against Massey Coal Company, does the three and a half million dollars the head of Massey Energy spent to help elect Justice Benjamin to the court create doubt in your mind that Justice Benjamin will be fair and impartial, or do you feel he can be fair and impartial?¹⁶⁴

Of the respondents polled, 66% said they had doubts while only 15% thought Justice Benjamin could be impartial under these circumstances.¹⁶⁵ Based on these results, the Caperton parties now argued that they had powerful additional proof that the mythical reasonable observer, as reflected in the survey, would have doubts about Justice Benjamin's impartiality.¹⁶⁶

Justice Benjamin responded within days, denying the renewed motion in a third memorandum, dated April 3, 2008, that both reiterated his earlier rationale for denial and attacked the Talmey-Drake survey.¹⁶⁷ He again criticized the movants for making the motion late, this time perhaps having a point. Although he ignored that the movants had been seeking his disqualification since the inception of the matter on the court's docket, this last motion came only days before the court issued its second decision on the merits of the case on April 3, 2008.¹⁶⁸ The understandably annoyed justice was rushing to deny the recusal in time for the court's issuance of its second opinion on the merits in a judicial version of beat the clock.

In the greater context of the case, however, Justice Benjamin's treatment of the timeliness issue remains unfair to the movants. He contended:

The said motion relies on arguments which relate to the 2004 campaign and which could have been advanced in a timely manner, but have instead been raised now, nearly four years after the 2004 race, during the pendency of a new

164. *Id.*

165. *Id.* at 477a.

166. *Id.* at 467a (reproducing Second Renewed Joint Motion for Disqualification of Justice Benjamin by Hugh Caperton).

167. *Id.* at 483a (reproducing Memorandum from Brent D. Benjamin, Chief Justice, W. Va. Supreme Court of Appeals, to Rory L. Perry, II, Clerk, W. Va. Supreme Court of Appeals (Apr. 3, 2008) (regarding *Caperton v. Massey* Second Renewed Joint Motion for Disqualification of Justice Benjamin)).

168. *See Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223 (W. Va. 2008), *vacated*, 129 S. Ct. 2252 (2009).

2008 political race. Citing no good cause for the delay in raising issues which could have been earlier raised, the said motion is untimely.¹⁶⁹

Justice Benjamin is, of course, incorrect to accuse the movants of failing to raise issues that could have been raised earlier. From October 2005 forward, the movants had raised the issue of his impartiality. Having been repeatedly denied relief despite a compelling case, the Caperton parties did what any litigant with deep enough pockets and high enough stakes would do. They made one last attempt to meet the judge's objections to recusal with more persuasive evidence and argument by obtaining additional data about what reasonable persons might think about Justice Benjamin's ability to be impartial. By this point, they of course knew it was a long shot with Justice Benjamin. But in an adversary system, a fair observer can hardly fault Caperton counsel for trying to change the judicial mind through the introduction of new empirical evidence intended to overcome Justice Benjamin's contention that prior motions had been based only on conjecture. Seen in context, it is simply incorrect and unfair to label this an unjustified and belated motion. Rather, it is a motion born of frustration due to the justice's continued refusal to acknowledge basic reality about the appearances created by his links to Blankenship.

This aspect of the April 2008 memorandum may seem minor but it shines a bright light on very dark behavior by Justice Benjamin. Instead of giving the disqualification motions a fair hearing, which he should have done in late 2005, he resorts to a rhetorical trick. By erroneously denying the first motion, he attempts to argue that each subsequent motion is untimely or strategic—a mere rehashing of an issue on which the movant has already lost. In truth, the subsequent motions were made necessary only because of Justice Benjamin's initial egregious error. For counsel to attempt to persuade the court to reverse earlier error is never improper and does not become untimely until deadlines have passed and a matter has become final. As of March 2008, decision on the merits remained pending—although just barely. Rather than harping at the red herring of purported delay, Justice Benjamin should have devoted more attention to the merits of the motion.

In the main, however, Justice Benjamin's April 2008 memorandum criticized the methodology of the survey:

169. 2 Joint Appendix, *supra* note 99, at 483a (reproducing Memorandum from Brent D. Benjamin, Chief Justice, W. Va. Supreme Court of Appeals, to Rory L. Perry, II, Clerk, W. Va. Supreme Court of Appeals (Apr. 3, 2008) (regarding *Caperton v. Massey* Second Renewed Joint Motion for Disqualification of Justice Benjamin)).

It is further observed that this joint motion has been filed during the pendency of a 2008 political race in which two seats on the West Virginia Supreme Court of Appeals are to be elected; that the said survey specifically references one candidate [Justice Maynard] in the said race who is a member of this Court and who has recused himself in this case; and that the said survey does not reference another member of this Court [Justice Starcher] who also has recused himself in this case, but who is not a candidate in the said race.¹⁷⁰

Justice Benjamin appears to be invoking a non sequitur by suggesting that the survey is defective because it addresses only recusal questions concerning Blankenship-related justices. A more persuasive argument is that because of the disclosure that Justice Maynard had recused, respondents may have been unduly influenced to conclude that Justice Benjamin should also have recused, even though Maynard undoubtedly had more fun in Monaco than did Benjamin on the campaign trail. Despite Benjamin's misdirected criticism, he is onto something. Once respondents see Justice Maynard stepping aside due to Blankenship ties, it looks bad when Justice Benjamin failed to do so. In addition, even a luxury vacation in Monaco costs a lot less than the \$3 million Blankenship spent electing Justice Benjamin, a factor tending to make Justice Benjamin look bad in comparison to Justice Maynard.¹⁷¹

Justice Benjamin both hits on a more debatable point and displays a certain self-centered judicial arrogance when he observes that the

"survey" which appears to be a "push poll" specifically designed with limited information for the purpose of supporting the instant joint motion, is, as a matter of law, neither credible nor sufficiently reliable to serve as a basis for an elected judge's disqualification.¹⁷²

Without benefit of citation to precedent, he broadly announces that surveys of the type in question are incredible "as a matter of law" and

170. *Id.*

171. In addition, as previously noted, Justice Maynard contends, however unpersuasively, that he was vacationing on his own in Monaco and just happened to run into his old friend Blankenship, which resulted in the pictures of them on the Riviera. If this contention were correct, this would be another reason for viewing Maynard's situation as less troubling than Benjamin's. In any event, notwithstanding his recusal, Justice Maynard was unseated in the ensuing fall 2008 election by challengers Menis Ketchum and Margaret Workman. See Lawrence Messina, *New Justices Likely To Keep State's High Court Calm, Moderate in 2009*, CHARLESTON DAILY MAIL, Jan. 12, 2009, at 10A; Lawrence Messina, *West Virginia Supreme Court Justice Takes Oath; Workman Returns to Bench*, CHARLESTON GAZETTE, Dec. 30, 2008, at 1C. Cynics among us might wonder whether Justice Maynard would have stepped aside had he not been facing reelection.

172. 2 Joint Appendix, *supra* note 99, at 483a (April 3, 2008 memorandum).

have no evidentiary value for a recusal motion. One wonders on what authority—other than personal preference and self-interest—he based this assessment. Although push polls, discussed more below, must be viewed with care and are often—perhaps even usually—too misleading to be of any evidentiary value, the survey nonetheless provides additional data that are quite consistent with other information about public concern over Benjamin participation in Blankenship cases. Besides, the movants were not attempting to obtain recusal solely on the basis of the survey. Rather, they were arguing that the survey provided additional support for their already meritorious arguments and were seeking to force an epiphany from Justice Benjamin.

His concern over survey methodology does, however, raise serious questions about the persuasiveness of the survey. As noted above, the survey sets the table for an opinion adverse to Justice Benjamin by relating the story of Justice Maynard’s recusal. In doing so, the survey also gives respondents the mental image of Blankenship’s wining and dining a justice on the Riviera as well as giving survey respondents anti-Benjamin facts such as the large amount of the Blankenship campaign support, arguably misstating it as \$3.5 million rather than \$3 million.¹⁷³ In addition, the survey question pumps up the amount of the *Caperton v. Massey* judgment as much as possible, calling it \$75 million—because of accrued interest—rather than simply using the jury verdict of “only” roughly \$50 million.¹⁷⁴ Further, a much larger—\$240 million—judgment against Massey Energy is invoked although this is arguably outside the scope of the precise case pending before the court.¹⁷⁵

Although Justice Benjamin, perhaps in a hurry and too annoyed to spend more time on his memorandum, does not fully explore these issues, one can argue that the survey is indeed flawed and needs to be taken with the proverbial grain (or shaker) of salt. But even if compromised, the survey has some evidentiary value unless it can be characterized as completely misleading. Notwithstanding whatever imperfections surround the presentation of the situation to the respondents, the fact remains that by a 4:1 ratio, they questioned Justice Benjamin’s impartiality.¹⁷⁶ Although the reasonable person standard is not an invitation for a plebiscite, these are awfully strong numbers. Combined with other factors of public record, the case for disqualification appears, on the whole, strengthened by the survey results.

173. *See id.* at 475a–76a (Affidavit of Robert Drake).

174. *See id.* at 475a.

175. *See id.*

176. *See id.* at 477a.

Was the survey a “push poll”? A push poll is generally viewed as a poll in which the respondent is not asked for opinion in a vacuum or in a sufficiently neutral setting but instead is first given information that is clearly designed to bias the respondent toward a particular answer.¹⁷⁷ For example, a Democratic pollster currently operating in Nevada might ask, “Are you aware that Senator John Ensign (R-Nev.) recently admitted to having an affair with an office staff worker who was one of his wife’s best friends and that after his mistress stopped working for the Senator, his parents paid her nearly \$100,000?”¹⁷⁸ Although these facts are all in the public domain and appear—according to consistent media reports undenied by the Senator—unquestionably true, most everyone would view this type of approach as a push poll. It provides the respondent with highly inflammatory information about this politician without providing any airing of his side of the story.¹⁷⁹ Consequently, one would reasonably expect that when the respondent is then immediately asked for an opinion about the politician, it will be considerably more negative than if the initial question had never been asked.

The survey done by the Caperton parties of course has some elements of a push poll in that it provides information, some of it quite negative, prior to asking the respondent’s opinion. But telling the respondents about relatively noninflammatory, unquestioned facts, such as the Maynard vacation and the Benjamin campaign support, is a far cry from the type of nasty push polls seen during the height of campaign season. While Justice Benjamin is correct in pointing out problems with the survey, he appears incorrect in completely discounting it.

177. See generally RUSS A. DEWEY, *Push Polls*, in *PSYCHOLOGY: AN INTRODUCTION* (2007), http://www.psywww.com/intropsych/ch01_psychology_and_science/push_polls.html (explaining push polls as “thinly disguised attempts to sway the opinion of the people who are being questioned”).

178. I am not making this up. Molly Ball, *Extramarital Affair: Ensign Explains His Silence: Potential Inquiries Prevent Response*, *LAS VEGAS REV. J.*, July 25, 2009, <http://www.lvrj.com/news/51692247.html> (discussing nine-month affair and other details surrounding scandal); Molly Ball, *Senator’s Affair: Ensign Wounds Keep Festering: News that Parents Paid Hamptons \$96,000 Adds to Questions*, *LAS VEGAS REV. J.*, July 12, 2009, <http://www.lvrj.com/news/50575447.html>.

179. Although reporters following the Ensign matter have not been very impressed with his side of the story, a survey respondent might be more favorably disposed to Senator Ensign if they were aware that he has apologized, expressed regret, and characterized the \$96,000 in payments by his parents as a charitable gift rather than as hush money, as might otherwise be inferred by the respondent. See sources cited *supra* note 178.

On the heels of this third denial of recusal, the West Virginia Supreme Court issued its second opinion on the merits in *Caperton v. Massey*, again by a 3–2 margin holding that reversed Caperton’s victory, ruling that the claim was barred by res judicata due to an earlier breach of contract case in Virginia brought by a Caperton company against a Massey company.¹⁸⁰ The majority also ruled that the controversy was subject to a forum selection clause and thus never should have been litigated in West Virginia at all.¹⁸¹ It was this decision from which Caperton successfully sought certiorari review on the ground that his due process rights were violated by Justice Benjamin’s participation in the case.¹⁸²

But Justice Benjamin, responding to the strong dissent in the case, was not finished defending his decision not to recuse. In late July 2008, while the machinery of U.S. Supreme Court review was getting underway,¹⁸³ Justice Benjamin, obviously hoping to stave off further review, issued a lengthy written concurring opinion defending the majority’s res judicata and forum selection rulings as well as reiterating his view that his disqualification was not required.¹⁸⁴

As previously discussed, Justice Benjamin’s three prior memoranda regarding recusal were all deeply flawed in that they applied the incorrect legal standard, reached highly questionable conclusions, made illegitimate criticisms of the movants, and incorrectly confused disqualification and the public’s rights regarding how judges are elected.¹⁸⁵ In Benjamin’s defense, one might minimize the badness of these memoranda by pointing out that they were short and, in at least the third case, created hurriedly to respond to a motion. By July 2008, Justice Benjamin had had nearly four years to establish a coherent framework for assessing his participation in Blankenship-related cases as well as time to write at length. In addition, he likely was writing for the

180. See *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 256–64 (W. Va. 2008), *vacated*, 129 S. Ct. 2252 (2009).

181. See *id.* at 248–56.

182. See *Caperton*, 129 S. Ct. at 2265–67.

183. Certiorari was granted in *Caperton* on July 2, 2008. See Petition for Writ of Certiorari, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 2676568. Petitioners’ brief was filed in late 2008. See Brief for Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 5433361. Respondents’ brief was filed in January 28, 2009. See Brief for Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 216165. Petitioners responded one month later. See Reply Brief for Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 476570. Some seventeen amicus briefs were also submitted in January 2009. See *supra* notes 55–56.

184. See *Caperton*, 679 S.E.2d at 285–309 (Benjamin, Acting C.J., concurring).

185. See *supra* Part II.C.

Supreme Court, hoping that the petition filed three weeks earlier would be denied. One might have expected a better defense of his nondisqualification.

Instead, the July 2008 concurrence raises even more questions about Justice Benjamin's legal ability, emotional stability, and even his candor and motives. Notwithstanding some significant time for cooling off, the July 2008 concurrence continues in highly defensive mode as Justice Benjamin continues to "protest too much" about the challenge to his participation.¹⁸⁶ Perhaps more importantly, he continues to use the wrong legal standard despite having repeatedly had the opportunity to realize that he initially was asking the wrong question—whether he subjectively felt biased or prejudiced.¹⁸⁷ He blithely concludes because

186. Justice Benjamin criticized the Caperton parties for their use of the Talmey-Drake survey and again labeled it a "push-poll":

Proper legal decisions should never be mere rationalizations fronting for political correctness. Nor should actual justice be fettered by the political expediencies of the day. Partisan rhetoric and resorts to emotion-laden rants betray a contempt for the judiciary's role in a constitutional government. Sadly, such political considerations have, it seems from recent behaviors, institutionalized and entrenched themselves in our Court.

Caperton, 679 S.E.2d at 294 (Benjamin, Acting C.J., concurring). The opinion continued: "The very notion of appearance-driven disqualifying conflicts, with shifting definitional standards subject to the whims, caprices, and manipulations of those more interested in outcomes than in the application of law, is antithetical to due process." *Id.* at 292–93 n.11. See *supra* notes 172–77 and accompanying text.

187. See *Caperton*, 679 S.E.2d at 292 (Benjamin, Acting C.J., concurring) ("Nor does the Dissenting opinion, or the Appellees herein, claim any actual bias or prejudice on my part in this case."). Benjamin incorrectly accuses the dissenting justices of advancing a subjective test for judicial disqualification. *Id.* at 293 n.12. He also addresses due process recusal, even though all efforts to disqualify him in the case were based on the Code of Judicial Conduct's "reasonable question as to impartiality standard." *Id.* at 294–95. Finally, Benjamin determines that the focus in judicial disqualification "is on what actually affects a judge's decision-making" rather than appearances or questions as to impartiality. *Id.* at 295.

In addition, Justice Benjamin pays homage to the notion of a "duty to sit," a doctrine abolished by the ABA Model Code in 1972 and federal recusal law in 1974. *Id.* at 294–95. See generally Stempel, *supra* note 72 (tracing history and status of "duty to sit," and criticizing concept for creating presumption of deciding close cases against recusal when public confidence in courts is better served when close cases are decided in favor of recusal). The doctrine appears to remain good law in West Virginia although Justice Benjamin seems to recognize its abolition at the federal level. *Caperton*, 679 S.E.2d at 296 (Benjamin, Acting C.J., concurring). Benjamin only concedes that the doctrine was "arguably" abolished when it was in fact eradicated more than thirty years ago. *Id.* There remains a judicial responsibility to hear and decide cases, currently codified in Rule 2.7 of the 2007 ABA Model Code. MODEL CODE OF JUDICIAL CONDUCT R. 2.7 (2007). But this principle yields to the recusal requirements of Rule 2.11 of the Code,

the mere presence of some campaign contributions is “an insufficient basis, alone, to require disqualification” that it automatically follows that “contributions by a third-person to a completely independent campaign—with no ties to the judicial candidate—do not rise to a due process requirement of disqualification.”¹⁸⁸ Ignored in this “analysis,” of course, is the practical impact of these so-called independent expenditures and the magnitude of those made by Blankenship in the 2004 West Virginia Supreme Court race.

In addition, Justice Benjamin persists in addressing an issue—recusal standards under the Due Process Clause—that was not germane to the *Caperton* motions, which were based on the recusal under the Judicial Code rather than due process.¹⁸⁹ Because Justice Benjamin erroneously refused to recuse pursuant to the Judicial Code, the *Caperton* parties were forced to seek U.S. Supreme Court review and make the ultimately successful argument that his participation in the case not only violated the Judicial Code—old Canon 3(E)(1) and new Rule 2.11—but also deprived them of due process of law.¹⁹⁰

Justice Benjamin’s tardy tagalong attempt to lobby the Supreme Court is a problematic exercise of judicial power¹⁹¹ but not any better exploration of the basic recusal issues he had faced—and mangled—in his three prior memoranda denying recusal. Nonetheless, his continued insistence on talking about almost everything but the correct legal standard for recusal seems odd. Because so much other information

and there no longer is any presumption against disqualification in close cases. MODEL CODE OF JUDICIAL CONDUCT R. 2.11; see Stempel, *supra* note 72, at 827–29.

188. *Caperton*, 679 S.E.2d at 306 (Benjamin, Acting C.J., concurring).

189. *See id.*

190. *See Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). Because the greater includes the lesser, the U.S. Supreme Court’s finding of a due process violation necessarily includes a finding that a reasonable person would have doubts about Justice Benjamin’s impartiality. However close the U.S. Supreme Court vote in *Caperton*, there is no question that Benjamin erred.

191. There is an apt time, place, and manner for all activities. If Justice Benjamin wished to engage in a lengthy analysis of the recusal issues in the case, the time for that was well before July 2008. Even with the rush of judicial business, it is more than strange that he was expending judicial resources to concur nearly four months after the decision on the merits and the dissents of Justices Albright and Cookman that appeared to enrage him greatly. By this point, his focus should have been on achieving better resolution of the cases still pending before the West Virginia Supreme Court. Using the concurrence to lobby the U.S. Supreme Court seems a misuse of the judicial office—to try for a sort of last word on due process recusal when that was not the issue properly before him—as well as a waste of time given that the case was being extensively lawyered by competent counsel. If anything, the July 2008 Benjamin concurrence may have hurt Massey’s cause in that it was poorly executed as compared to Massey’s own submissions and amicus briefs in support of Massey.

suggests that Justice Benjamin is not dumb, his continued adherence to the obviously wrong legal standard could suggest to a reasonable observer that he was intentionally misstating the law in order to avoid missing a chance to assist Blankenship. Could it really be that after four years he just did not “get it” regarding the correct approach to judicial disqualification under the Code?

The concurrence is lengthy and filled with citations but fails to properly address the relevant legal questions. For example, on the merits, Justice Benjamin defends the court majority’s views on res judicata and enforcement of forum selection clauses.¹⁹² But his defense is largely based on simply citing cases expressing broad principles of these areas of law.¹⁹³ Nowhere in the twenty-seven-page concurrence does he explain why he thinks the Virginia breach of contract action sufficiently involves the same claim so as to preclude the fraud and tortious interference claims brought by Caperton in West Virginia.¹⁹⁴ Similarly, nowhere in the concurrence is there any discussion of why he is so sure that the forum selection clause, which requires that “[a]ll actions brought in connection with [the 1997 contract between Sovereign Coal, Wellmore Coal, and Harman Mining] shall be filed in and decided by the Circuit Court of Buchanan County, Virginia,”¹⁹⁵ is sufficiently broad to encompass the West Virginia litigation, which in essence contended—successfully before a jury of apparently reasonable people—that Blankenship and Massey schemed to destroy Caperton and his companies.¹⁹⁶

Regarding the issue of disqualification, the July 2008 concurrence exhibits the same pattern of continually making pronouncements that are irrelevant to the actual legal question at issue.¹⁹⁷ More than even in his three prior memoranda, Justice Benjamin in his concurrence continues to assert that he is not biased in favor of Blankenship or prejudiced against

192. See *Caperton*, 679 S.E.2d at 287 (Benjamin, Acting C.J., concurring).

193. *Id.* at 290 (extensively citing cases on general propositions of preclusion law, in particular judicial support for the transactional approach to res judicata, but failing to ever apply the elements of the transactional approach to *Caperton v. Massey* and attempt to persuade the reader that the test had been satisfied). He also extensively cites cases supporting de novo review of forum selection clauses but fails to explain why the forum selection clause at issue in *Caperton v. Massey* applied to the dispute. *Id.* at 291–92.

194. *Id. passim.*

195. *Id.* at 234 (majority opinion).

196. *Id.* at 291–92 (Benjamin, Acting C.J., concurring).

197. See *supra* text accompanying notes 187–88.

his opponents. As noted repeatedly above, this is not the correct legal standard. The correct question is not whether he is biased or prejudiced or thinks he has bias or prejudice. The correct question is whether a reasonable observer might have doubts about his impartiality. In twenty-seven pages, this question is never addressed. After four years of hard-fought campaigning and litigation, Justice Benjamin continued to articulate the wrong legal standard.

As Justice Oliver Wendell Holmes observed, even a dog distinguishes between being stepped on and being kicked.¹⁹⁸ At some juncture, litigants, lawyers, and the public have a right to ask whether a judge's continued gross error in legal analysis is merely the product of limited intellectual capacity or is instead an intentional effort to avoid a result the judge dislikes. As noted above, Justice Benjamin successfully practiced law for more than twenty years, having graduated from a respected law school, Ohio State. Is he really so dense that after years of opportunity and prompting, he remains unable to apply the correct legal standard, however badly? Or is it fair for observers to conclude that he is intentionally distorting the analysis to avoid recusal?

The apt test for recusal under the Judicial Code—as distinguished from the more difficult test for recusal under the Due Process Clause—is straightforward. In the nearly fifteen years that I have tested students on the concept as part of a professional responsibility course that includes judicial ethics in the syllabus, nearly all students appreciate the distinction between the reasonable-doubt-about-impartiality test and an actual bias or prejudice test—and related inquires such as whether there is an “undue risk” or “probability” of bias, the standard adopted by the U.S. Supreme Court for recusal governed by the Due Process Clause.¹⁹⁹ Some student exam writers err, to be sure. But these students are working under intense time pressure in closed-book exams. Mistakes are inevitable, even for good students.

By contrast, Justice Benjamin was engaged in what might be described as a thirty-three-month (more if one goes back to the 2004 election), take-home, open-book exam in which he was aided by the parties briefing the issue, who were represented by some of the best attorneys in the nation, and a law clerk, who was a founding partner in a

198. See Sévane Garibian, *Taking Denial Seriously: Genocide Denial and Freedom of Speech in French Law*, 9 CARDOZO J. CONFLICT RESOL. 479, 485 n.27 (2008); sources cited *supra* note 18.

199. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009).

successful firm.²⁰⁰ How could Justice Benjamin have erred so badly under these circumstances? Three explanations seem possible: (1) despite his success, he is not particularly bright or not a good legal analyst; (2) he was so emotionally upset over the perceived attack on his integrity that he was unable to think straight notwithstanding the passage of time and the factors regularly informing him of the errors of his legal analysis; or (3) he committed knowing legal error in order to attempt to justify impermissible favoritism toward a campaign benefactor.

Obviously, the last explanation is the most damning, although none of these possible reasons give one much confidence in Justice Benjamin's fitness for the bench. If Justice Benjamin were stupid, he almost certainly would not be where he is today. His writing is eloquent, even if it tends to mask large analytic errors. Similarly, if he were so thin-skinned and emotionally damaged that it affected his thinking this greatly, we probably would have discovered it before now—and it would have impeded his considerable legal and political success. Consequently and sadly, one can make a compelling case that Justice Benjamin was corruptly misstating the law and misdirecting the legal analysis to stay on the case to aid Blankenship, although this thesis is undermined by his votes against Massey in other cases, a factor discussed below.²⁰¹

Perhaps Justice Benjamin's integrity is above reproach. Perhaps he is a skilled legal analyst who simply occasionally slips into an intellectual trough from which he was unable to escape because of emotional attitudes about the motion, its implied criticism of him, or his relationship with Blankenship. But even if these explanations, rather than corruption, explain his failure to recuse, he remains unexonerated. Any of the three likely explanations for his failures in *Caperton v. Massey* raise serious questions about the judge's fitness for the bench. Clearly, judges who do not understand the law are not good. Similarly, thin-skinned, emotionally distracted judges are inconsistent with the ideal of dispassionate judging based on substantive reason. And, of course, judges with a hidden agenda of assisting a favored party should not be holding judicial office. Regardless of which explanation accounts

200. See Paul J. Nyden, *Starcher off Massey Case: Justice Suggests Colleague Benjamin Do the Same*, CHARLESTON GAZETTE, Feb. 16, 2008, at 4A (stating that Charles R. McElwee, owner of a Charleston law firm, is Justice Benjamin's senior law clerk).

201. See *infra* text accompanying notes 205–11.

for Justice Benjamin's atrocious conduct in *Caperton v. Massey*, there is now serious question regarding his fitness for the bench. The state's judicial discipline commission or legislature should investigate the matter and take apt action, a topic addressed in Part IV below.

But, as they say in the infomercials: "Wait—there's more." Not content to let his July 2008 concurrence, filed months after the decision on the merits, be his last word on the issue of disqualification, Justice Benjamin used or perhaps abused his power as chief justice to enlist, at least ostensibly, the entire West Virginia Supreme Court, or at least its staff under his control, in a rearguard action attempting to support his nonrecusal and to influence the outcome of *Caperton v. Massey* before the U.S. Supreme Court.²⁰² On March 2, 2009, while *Caperton* was briefed and pending before the U.S. Supreme Court, the West Virginia Supreme Court issued a press release giving a "Summary of Chief Justice Benjamin's Dispositive Voting Record Regarding Massey Energy Cases from 01/01/2005 to 12/31/2008."²⁰³ State supreme courts are generally not in the habit of attempting to defend the recusal decisions of individual justices by issuing press releases designed to influence pending review. At apt junctures, judges have ample ability to issue detailed rulings on disqualification—as Justice Benjamin did with his July 2008 concurrence. The individual, nonrecusing jurist hardly needs a public relations campaign on his or her behalf.

The press release was obviously designed again to lobby the U.S. Supreme Court and did so in a manner that limited the ability of the *Caperton* parties to dispute the contents while providing the Massey parties with additional ammunition in their fight to keep their slim victory in the West Virginia Supreme Court. Justice Benjamin's behavior in this regard is ironic in light of his having previously lambasted the *Caperton* parties for submitting survey research late in the state court proceedings in a last ditch effort to obtain recusal.²⁰⁴

202. Press Release, Supreme Court of Appeals, State of W. Va., Summary of Chief Justice Benjamin's Dispositive Voting Record Regarding Massey Energy Cases from 01/01/2005 to 12/31/2008 (Mar. 2, 2009), available at http://www.state.wv.us/wvscal/press/march2_09.htm.

203. See *id.* The press release was issued on the letterhead of the Supreme Court of Appeals, State of West Virginia, listing the court's address and contact information, informing readers that they may obtain more information from designated employees of the court's public information office. The release is labeled "News" in bold type significantly larger than the other typefaces used in the release. *Id.*

204. See *supra* text accompanying notes 157–72 (discussing survey research employed by *Caperton* parties in support of their third disqualification motion).

The informational content in the news release is that overall Justice Benjamin voted against Massey-related—Blankenship-related—entities more than 80% of the time while on the court and that these Massey losses involved millions of dollars in liability.²⁰⁵ Although this is interesting and perhaps relevant at the margin, it hardly settles the recusal issue. Because the correct inquiry regarding recusal is the reasonable question as to impartiality standard and because recusal is to be decided at the outset of a case, post hoc empirical data about a judge's actual votes are nearly or perhaps entirely irrelevant to the inquiry.²⁰⁶

In other Massey cases, the issues may have been so clear-cut that even a biased judge could not cast a vote for Massey. For example, in two of the Massey cases cited in the press release, the vote was unanimous²⁰⁷

205. See Press Release, Supreme Court of Appeals, State of W. Va., *supra* note 202.

206. If there had been unwitting participation in a case that was later recognized (for example, the judge's brother owns a few shares of stock in a company), reasonable people might conclude that it would be foolish to upset the result of a case when the judge had voted against the company, particularly when the overall court vote was not close or when the result was not considered particularly debatable. But this was not *Caperton*, which involved nearly four years of active resistance to recuse by a judge applying incorrect analysis and doing so in a highly combative manner. Finding out that he voted against Massey in some other cases hardly washes out the stain.

207. See *May v. Bd. of Review*, 664 S.E.2d 714 (W. Va. 2008) (reversing denial of unemployment benefits for Don Blankenship's former personal maid, who alleged constructive discharge due to mistreatment and changes in assignments); *Davis v. Eagle Coal & Dock Co.*, 640 S.E.2d 81 (W. Va. 2006) (answering certified question regarding state court jurisdiction over silica dust claim with a 5–0 vote); see also Press Release, Supreme Court of Appeals, State of W. Va., *supra* note 202. In *May*, Justice Maynard, who had been photographed in Monaco with Blankenship, recused, as was the case in the second *Caperton* decision on the merits, but Justice Benjamin nonetheless participated in a manner consistent with his refusal to recuse in *Caperton*. See *May*, 664 S.E.2d at 719.

May also provides a fascinating view of the rarified pedestal upon which Blankenship apparently lives his life. May, employed by Mate Creek Security, earned less than \$9 an hour working as a maid at a “three story home owned by Rawl Sales in Sprigg, West Virginia” that was occupied by Blankenship. *Id.* at 716. The case was unclear as to whether Blankenship paid rent or received the home as a business perk. Over a three-year period, Blankenship steadily increased duties and demands for which May received no additional compensation. *Id.* In addition, as the court majority noted with some restraint, May “also submitted rather colorful evidence . . . of Mr. Blankenship's strident behavior which . . . added to the Appellant's stress. For example . . . she was required to write to Mr. Blankenship explaining why there was no ice cream in the freezer at one of the houses.” *Id.* at 718–19.

Concurring, Justice Albright (who voted against Massey in *Caperton*) and Justice Starcher (who recused from the second *Caperton* decision on the merits) were more graphic, noting evidence from the record that Blankenship had “physically grabbed”

while another was decided in a 4–1 vote and a fourth by a 3–1–1 vote.²⁰⁸ *Caperton* was the only reported decision for which Justice Benjamin provided the swing vote.²⁰⁹ Consequently, one can easily use Justice Benjamin’s own press release against him: when he provided the decisive vote in a reported case, he supported Massey one hundred percent of the time.

A similar but more mixed situation exists regarding consideration of petitions involving Massey. Most were by lopsided votes. Justice Benjamin provided a pivotal vote for Massey in only one of the eighteen cases,²¹⁰ but only two of these cases were cliffhangers—Justice Benjamin

May and began throwing a misplaced McDonald’s order at her in anger when the fast food vendor had filled it incorrectly and reportedly told her “[a]ny time I want you to do exactly what I tell you to do and nothing more and nothing less.” *Id.* at 720 (Albright & Starcher, JJ., concurring). When May forgot to “leave a coat hanger out” for Blankenship to hang his coat, his “reaction was to tear the coat hanger and tie rack out of the closet,” conduct the concurring justices found “shocking.” *Id.* Blankenship himself was apparently stressed, writing May a note that he “had 3 dogs stolen in 9 days, mines robbed, people complain incessantly, all of them want more money. None of them do what their (sic) asked.” *Id.*

Alas, “uneasy lies the head that wears a crown.” WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE FOURTH* act 3, sc. 1, l. 31. Most of us could, however, probably endure these headaches in return for receiving the large compensation and other benefits presumably flowing to the CEO of one of the nation’s largest coal companies. In contrast, litigants asserting First Amendment rights are often less than exemplary characters. *See* *Hustler Magazine, Inc., v. Falwell*, 485 U.S. 46 (1988) (reversing victory for political activist, the late Reverend Jerry Falwell, against *Hustler* publisher Larry Flynt). Regarding the victory, Flynt stated, “If the First Amendment will protect a scumbag like me, then it will protect all of you. Because I’m the worst.” Frank Rich, *Pornographer Glorifies Constitution*, *CHATTANOOGA TIMES*, Oct. 15, 1996, at A5. Just the same, knowing a little more about Blankenship’s apparent treatment of other human beings and how close a man like that came to putting a hand-picked jurist on a reviewing court of last resort hardly inspires great confidence in the American system. At least Flynt had some perspective about himself.

208. *See* *Helton v. Reed*, 638 S.E.2d 160 (W. Va. 2006) (reversing decision below in coal company’s favor regarding improperly filed petition for corporate tax refund and answering certified question regarding state court jurisdiction, a 4–1 vote against Massey); *U.S. Steel Mining Co. v. Helton*, 631 S.E.2d 559, 577 (W. Va. 2005) (Benjamin, J., concurring in part and dissenting in part) (involving coal company challenge to state severance tax formula, reported as 3–1–1 vote in a press release because Justice Benjamin had concurred in part and dissented in part). Justice Maynard, who ultimately recused in *Caperton* because of his social connections to Blankenship, *see supra* note 10, dissented and supported Massey, *U.S. Steel Mining*, 631 S.E.2d at 568 (Maynard, J., dissenting).

209. *See* Press Release, Supreme Court of Appeals, State of W. Va., *supra* note 202.

210. *See id.* (citing *Marfork Coal Co. v. Dir.*, W. Va. Dep’t of Env’tl. Prot., No. 051011 (W. Va. Nov. 3, 2005) (granting petition for review by 3–2 vote in favor of Massey, with Justice Benjamin casting vote for Massey in case involving surface mining permit and casting vote against Massey subsidiary), and *Jackson v. Power Mountain Coal Co.*, No. 072598, Civ. Action No. 05-C-10 (W. Va. Apr. 24, 2008) (refusing petition for review by 3–2 vote in favor of Massey, with Justice Benjamin casting vote

did oppose Massey on one matter in which it prevailed by a single vote; opposition did not change the result.²¹¹ Preservation of confidence in the judiciary requires that the public be confident that judges hearing cases will be especially impartial about close or difficult cases, which are the type of cases in which a judge's unconscious lack of neutrality could unfairly tip the scales. A closer look at the voting patterns of Justice Benjamin in Massey-related cases is far less comforting than his assertion that because he opposed Massey most of the time, he must be unquestionably unbiased.

More to the point for this Article, the voting record news release and its strategic deployment in an attempt to influence the U.S. Supreme Court casts further doubt on Justice Benjamin's judicial performance. What could be initially analogized as a mistake made on the fly when dealing with a busy docket—Justice Benjamin's initial bad decision refusing recusal—steadily begins to look more and more like intended shirking of judicial responsibility in that he continues to enunciate a legal standard that any reasonable jurist would now recognize as wrong and relentlessly attempts to put a favorable public relations spin on his nonrecusal. By March 2009, Justice Benjamin had become a veritable

against Massey)). The other cases involve petitions—three seeking interlocutory relief through writs of probation. *See id.* (citing *West Virginia ex rel. Cent. W. Va. Energy Co. v. Wilson*, No. 34403, Civ. Action No. 08-C-160 (W. Va. Oct. 23, 2008) (5–0 vote for Massey); *West Virginia ex rel. Independence Coal Co. v. Hoke*, No. 071498, Civ. Action Nos. 03-C-185, 03-C-201 & 05-C-165 (W. Va. June 6, 2007) (4–0 against Massey); *West Virginia ex rel. Cent. W. Va. Energy Co. v. Gaughan*, No. 052797, Civ. Action No. 05-C-85 (W. Va. Jan. 11, 2006) (5–0 vote against Massey)). In addition, there were eight cases involving petitions for review in which Massey lost by two or more votes. *See id.* (citing *Burns v. Independence Coal Co.*, No. 081402, Civ. Action No. 06-C-80 (W. Va. Nov. 12, 2008) (4–1 against Massey); *Wheeling Pittsburgh Steel Corp. v. Cent. W. Va. Energy Co.*, Nos. 080183 & 080182, Civ. Action No. 05-C-85-MJG (W. Va. May 22, 2008) (5–0 against Massey) (allowing \$220 million verdict against Massey to stand, and in the second vote (3–2 with Benjamin in the minority), issuing a stay pending application for U.S. Supreme Court review); *Timmermeyer v. Goals Coal Co.*, No. 34138 (W. Va. May 21, 2008) (4–1 against Massey); *Brown v. Rawl Sales & Processing Co.*, No. 070889, Civ. Action No. 04-C-332 (W. Va. Sept. 11, 2007) (5–0 against Massey); *Ooten v. Massey Coal Servs., Inc.*, No. 061854, Civ. Action Nos. 02-C-203 & 02-C-232 (W. Va. Jan. 24, 2007) (3–1 against Massey); *Birchfield v. Independence Coal Co.*, No. 060451, Civ. Action No. 03-C-201 (W. Va. Sept. 13, 2006) (4–0 against Massey); *Am. Mining Ins. Co. v. Lightning Contract Servs., Inc.*, No. 052364, Civ. Action No. 04-C-52 (W. Va. Nov. 29, 2005) (5–0 against Massey); *McNeely v. Independence Coal Co.*, No. 042156, Civ. Action No. 01-C-3 (W. Va. Feb. 9, 2005) (5–0 against Massey)).

211. *See id.*

Energizer Bunny of a nonrecusing jurist. He had written three memoranda, a concurring opinion, and a press release arguing his case.

This last effort put Justice Benjamin's mistakes beyond his individual errors and the rights of the litigants. With the March 2009 press release, he additionally appears to have abused his administrative authority as chief justice both to file an end-run amicus brief and to make it appear that the court as an institution supports his decision of nonrecusal. This is particularly inappropriate in that West Virginia permits each individual justice to make his or her own decision on recusal with no review by the full court or any other entity. In other words, each justice is the final and authoritative word on his or her eligibility to sit on a case. To borrow Chief Justice Roberts's well-known—and criticized—analogy to a baseball umpire, Justice Benjamin and his colleagues get to call their own balls and strikes.²¹²

This lack of oversight is itself highly regrettable, but common in many courts, most notoriously the U.S. Supreme Court.²¹³ Such a system is indefensible—but it should at least carry with it the notion that because each judge's recusal decision is individual, a judge's decision not to disqualify does not represent the view of the entire court membership, the court as an institution, or the state in which the court sits. Yet here is Justice Benjamin individually refusing to recuse and then using the court as an institution to act as his public relations flack attempting to have extrarecord impact on a pending U.S. Supreme Court case.

If Justice Benjamin had called Justice Kennedy—who provided the swing vote in *Caperton*—to lobby, we would instantly recognize the wrongfulness of the behavior. Enlisting the state's supreme court as an institution in this type of conduct is less dramatic but similarly troublesome. It reflects Justice Benjamin as overly involved in the matter and insufficiently neutral and detached. Perhaps most disturbingly, it

212. See RICHARD A. POSNER, *HOW JUDGES THINK* 78–79 (2008) (relating umpire metaphor used by Chief Justice Roberts at his confirmation hearings and criticizing it as inaccurate and incomplete); Stephen J. Choi & G. Mitu Gulati, *Ranking Judges According to Citation Bias (as a Means To Reduce Bias)*, 82 NOTRE DAME L. REV. 1279, 1279–80 (2007) (noting public relations success of Roberts's umpire analogy but finding it misleading and inaccurate); Frank B. Cross, *What Do Judges Want?*, 87 TEX. L. REV. 183, 187 (2008) (reviewing Posner book); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimization*, 24 CONST. COMMENT. 701, 701–05 (2007); see also *Honest Justice*, *supra* note 9 (“Chief Justice Roberts is fond of likening a judge's role to that of a baseball umpire. It is hard to imagine that professional baseball or its fans would trust the fairness of an umpire who accepted \$3 million from one of the teams.”).

213. See Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107 (2004); Stempel, *supra* note 67.

misleads in that it suggests that the full court supports his decision not to recuse. As the merits opinion in *Caperton* demonstrates, at least 40% (two dissenting justices) of the court as well as a disqualified member of the court (Justice Starcher) strongly opposed Justice Benjamin's failure to recuse.²¹⁴

The press release and its underlying study also wasted state resources. *Caperton* was already pending before the U.S. Supreme Court. The empirical "Benjamin Project" trumpeted in the release used court employee time for something that had stopped being court business—at least until the U.S. Supreme Court acted—nearly a year earlier, when Justice Benjamin spurned the third recusal request in early April 2008. In essence, Justice Benjamin was misusing court resources for his effort at personal gain, albeit in reputation and result in a pending case rather than for monetary profit.

Although different courts have different customs, it seems unlikely that this could have occurred in West Virginia or elsewhere if Justice Benjamin had not been chief justice. Under the ordinary operating procedures of most courts, the chief has extensive authority beyond that of the other judges to direct the institution's resources. Had he not been chief, Justice Benjamin probably would not have been able to issue a self-interested press release in the court's name. Providing some judges with these avenues of pleading their case for nondisqualification based on the accident of the chief justiceship diminishes courts as institutions. If Justice Benjamin wished to supplement the record regarding his disqualification decisions, the proper vehicle was his July 2008 concurrence, a vehicle no longer available in March 2009.

IV. WHAT PUNISHMENT SHOULD FIT THIS CRIME?

As Professor Miller's survey of bad judging and the activity of state judicial discipline commissions suggest, there seems no shortage of improper judicial conduct as well as significant, if imperfect, efforts to

214. See *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 264–65, 284 n.16 (W. Va. 2008) (Albright & Cookman, JJ., dissenting) (dissenting primarily on the merits but also critical of Benjamin's failure to recuse), *vacated*, 129 S. Ct. 2252 (2009); 2 Joint Appendix, *supra* note 99, at 453a, 461a–62a (February 15, 2008 Order of Justice Starcher Regarding Recusal) (noting Justice Starcher's recusal memorandum and recommendation that Justice Benjamin also recuse).

detect and police such misconduct.²¹⁵ A review of these cases suggests that judicial discipline efforts have been insufficiently attentive to the problem of judicial lawlessness and misconduct regarding recusal. For example, in his article, Professor Miller lists twelve categories of improper judicial behavior²¹⁶ and cites examples of its detection and punishment consuming 242 footnotes.²¹⁷ Only three of these disciplinary example footnotes concern judicial “conflict of interest” and disqualification.²¹⁸ Although some of the other examples of punishment for bad judging also touch on Justice Benjamin’s errors in *Caperton* (for example, incorrect framing of the legal inquiry, electioneering, and possible corruption), the Miller presentation is telling and suggests, as does a broad Lexis search, that judges seldom get into serious trouble for failing to recuse, no matter how egregious the resistance to disqualification.²¹⁹

215. See Miller, *supra* note 8.

216. *Id.* at 432–33. Miller categorizes the types of judicial misbehavior as:

- (1) [C]orrupt influence on judicial action; (2) questionable fiduciary appointments;
- (3) abuse of office for personal gain; (4) incompetence and neglect of duties;
- (5) overstepping of authority; (6) interpersonal abuse; (7) [racial, gender, ethnic, or religious] bias, prejudice, and insensitivity; (8) personal misconduct reflecting adversely on fitness for office; (9) conflict of interest; (10) inappropriate behavior in a judicial capacity; (11) lack of candor; and (12) electioneering and purchase of office.

Id.

217. See *id.* at 433–56.

218. See *id.* at 450–51.

219. An August 31, 2009 LexisNexis search for cases with “Judicial Conduct” or “Judicial Discipline” in the case name and mentioning disqualification or recusal produced only ninety-six citations, many of which were federal court cases involving constitutional challenges to discipline commissions in which recusal or disqualification was mentioned only in passing. Another significant subgroup of the database involved states’ enacting a revised or new judicial code. Only about twenty-five of the cases involved disciplinary matters in which a primary ground for judicial discipline was failure to recuse or improper disqualification behavior. Only Arkansas, Nevada, and New York appear to have reported discipline cases founded significantly on recusal.

However, as discussed below, in disciplinary actions and advisory opinions not contained in the LexisNexis or Westlaw databases, improper failure to recuse may be the source of significant admonition or discipline. See *infra* note 263. For example, the Judicial Investigation Commission of West Virginia lists nearly 100 “Advisory Opinions and Admonishments” involving a judicial officer’s failure to recuse from 1994 through March 2009. See JUDICIAL INVESTIGATION COMM’N OF W. VA., INDEX AND SYNOPSES OF ADVISORY OPINIONS AND ADMONISHMENTS BY THE WEST VIRGINIA JUDICIAL INVESTIGATION COMMISSION, <http://www.state.wv.us/wvsca/JIC/advop.htm>.

These opinions and admonishments as a whole are generally correct in counseling recusal in the situations presented and chastising jurists for failing to disqualify themselves under circumstances requiring their disqualification. To the extent that West Virginia’s experience is typical, this would suggest that judicial discipline commissions take disqualification more seriously than case law might initially suggest. However, this information also provides additional evidence of Justice Benjamin’s error in *Caperton*.

From the halls of the U.S. Supreme Court to the local judiciary and state disciplinary boards, it appears that judges who fail to recuse when they should seldom face significant consequences or criticism. In *Caperton*, the Supreme Court is unwilling to be very critical of even extreme conduct, with nearly half of the Court seeming to harbor no concerns over poor recusal practice. A move away from this de facto professional conspiracy of silence—or at least undercriticism—would be a welcome step toward improving public confidence. A good starting point is consideration of possible action against Justice Benjamin.

That Justice Benjamin erred and erred badly should now be viewed as beyond dispute, notwithstanding the protestations of the *Caperton* dissenters, who have proven themselves undue apologists for judicial wrongdoing. After erring so badly and consistently over so many years, it would only improperly dilute the force of the *Caperton* holding if there were not some adverse consequences to Justice Benjamin for his pronounced failings. The question then arises: what is an apt response to Justice Benjamin's misconduct? What action would appropriately express the system's disapproval of his actions, punish him aptly, and deter him and other jurists from continuing on a path of disqualification insensitivity?

Potential remedies or punishment for bad judging generally include: impeachment,²²⁰ recusal and disqualification,²²¹ appeal,²²² mandamus,²²³ liability,²²⁴ and discipline.²²⁵ In addition, the efficacy of informal remedies—judicial colleagues counseling recusal or other restraint—cannot be discounted,²²⁶ although such informal mechanisms were obviously ineffective in *Caperton*. Professor Miller also suggests systematic remedies, such as electoral reform,²²⁷ increasing use of merit

There appears to be a legal culture of taking recusal seriously in West Virginia, one that Justice Benjamin clearly and repeatedly violated.

220. See ALFINI ET AL., *supra* note 8, §§ 15.01–.07; Miller, *supra* note 8, at 458–60.

221. Miller, *supra* note 8, at 460–62.

222. *Id.* at 462–63.

223. *Id.* at 463–64.

224. See ALFINI ET AL., *supra* note 8, §§ 14.01–.12; Miller, *supra* note 8, at 464–65.

225. See ALFINI ET AL., *supra* note 8, §§ 13.01–.12; Miller, *supra* note 8, at 465–69.

226. See Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243 (1993) (finding that peer influence directed at improving judicial performance is significantly effective); Miller, *supra* note 8, at 465.

227. See Miller, *supra* note 8, at 469–71.

selection,²²⁸ greater dissemination of information regarding judges, including published ratings of the judges,²²⁹ judicial education,²³⁰ expanded grounds for challenging the judge initially assigned to a case,²³¹ and his own proposed “panel-exclusion approach.”²³²

This latter cluster of remedies, whatever their merits, do little to address the instant problem presented by the vacation and remand of *Caperton* due to Justice Benjamin’s judicial failings. Electoral reform is a good idea and will likely be spurred by *Caperton*.²³³ So, too, with revision of methods of judicial selection and recusal reform generally.²³⁴ Judicial education sounds nice in the abstract but Justice Benjamin was repeatedly educated by the *Caperton* movants as to the correct legal standard for recusal and yet consistently disregarded or distorted that

228. *See id.* at 471–74.

229. *See id.* at 474–77.

230. *See id.* at 477–79. Professor Miller correctly concludes that improved judicial education may have limited impact in situations when a judge errs not because of inadequate knowledge or training but because of psychological orientation or problems. Professor Miller explains that:

[E]ducation alone cannot solve many of the problems of bad judges. Even brilliant judges behave badly. Consider former New York State Chief Judge Sol Wachtler, widely viewed as an outstanding intellect and a superbly qualified jurist. Few judges were less in need of continuing education than Judge Wachtler. Yet when a romance with a New York socialite went awry, Wachtler commenced a disastrous course of conduct resulting in a fall from grace worthy of a Shakespearian tragedy.

Id. at 479 (footnote omitted).

231. *See id.* at 479–82; *see also* Deborah Goldberg et al., *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 526–34 (2007) (recommending greater use of peremptory challenges, enhanced disclosure requirements, per se rules on campaign contributions, referral of recusal decisions to a different judge, greater transparency, de novo review, easier substitution of judges, and expanded commentary in the Judicial Code as well as judicial education as a means of alleviating problem of judges unable to recognize questions as to their impartiality).

232. *See* Miller, *supra* note 8, at 482–87 (outlining the panel-exclusion approach, which operates in a manner similar to the selection of arbitrators under American Arbitration Association methodology, with parties permitted to strike unacceptable judges coupled with systematic monitoring to determine the degree to which certain judges are to be avoided by the parties if possible).

233. *See* sources cited *supra* note 24 (regarding the Nevada Judicial Code Revision Commission’s response to *Caperton*); *see also* John Gibeaut, *Caperton Capers: Court’s Recusal Ruling Sparks States To Mull Judicial Contribution Laws*, A.B.A. J., Aug. 2009, at 21, 21–22 (noting renewed interest in judicial campaign spending limits or expanded disqualification based on campaign support in response to *Caperton*).

234. *See* Nathan Koppel, *Ruling on ‘Probable Bias’ Spotlights Political Reality*, WALL ST. J., June 10, 2009, at A5 (noting increased interest in moving to merit or appointment selection even while *Caperton* was pending and noting that *Caperton* will add steam to these movements).

standard.²³⁵ In the future, all of these reforms may make another *Caperton* case less likely.

As to Justice Benjamin himself, the possibility of electoral remedies is effectively limited by the timing of West Virginia's judicial elections in relation to the *Caperton* matter and the state's lengthy terms of judicial office. When Justice Benjamin was elected in 2004, it was for a twelve-year term and it was in this inaugural election that he received the benefit of Don Blankenship's largesse.²³⁶ Although those infected chickens have come home to partial roost, Justice Benjamin still has almost seven years remaining in his term. Even if the voters want to throw him out over the *Caperton* nondisqualification, they must wait until 2016. And during the intervening eight years, Justice Benjamin may be able to rehabilitate himself and win reelection notwithstanding his black eye in *Caperton* or may elect to retire from the bench.

Electoral feedback thus is likely of limited utility in this case and certainly of no immediate utility except perhaps through the method of judicial recall, which exists "in a relatively small number of states," West Virginia not among them.²³⁷ Under judicial recall, as with the more common executive recall—perhaps most famously used in recent times to oust Gray Davis as California Governor and arrange his replacement with Arnold Schwarzenegger in 2004—a required number of signatures are collected on a recall petition, engendering a special recall election through which the judge may be removed from office.²³⁸

Notwithstanding progress in the area of public scrutiny and electoral reform, the fact remains that despite the havoc he has wreaked, Justice Benjamin remains unscathed except for some modest criticism in the public arena. Although some of the public opprobrium to which he has been subjected undoubtedly hurts, Justice Benjamin continues to be employed as a jurist, with no reduction in salary and no sanction affecting him personally. Society and the legal system need to

235. However, it may be that insufficient judicial training and consciousness raising exist today. Judges may be unduly unaware of the cognitive errors commonly made by people or may incorrectly think themselves largely immune to such errors. See Jeffrey W. Stempel, *Refocusing away from Rules Reform and Devoting More Attention to the Deciders*, 87 DENV. U. L. REV. 335 (2010).

236. See *supra* Part II.B (describing monetary contributions in Benjamin's 2004 campaign).

237. See ALFINI ET AL., *supra* note 8, § 15.06, at 15-11.

238. See *id.*

figuratively ask whether this is letting off the perpetrator of judicial error too easily.

Of these case-specific methods listed above, recusal and appeal/mandamus have already been applied in *Caperton*, with some success. Whatever the ultimate outcome on the merits of the tort claims against Massey, the Supreme Court's action has accomplished much to enhance judicial integrity both by removing Justice Benjamin from the case and spurring considerable discussion in the states regarding reform of state disqualification law in light of the problems presented by election aid to judicial candidates.²³⁹ However, as discussed throughout this Article, these corrective measures still leave Justice Benjamin personally untouched despite the damage he has done. *Caperton* thus far offers little incentive for care by judges and implicitly suggests that judges may push the envelope of nonrecusal very far with the only consequence being that the judge may ultimately not be able to sit on a case of interest to a financial benefactor or may receive some media criticism. This is hardly an effective mechanism for encouraging better recusal practice by judges.

Civil liability for judges who greatly err regarding disqualification may be tempting. Justice Benjamin's pattern of flouting disqualification law cost the litigants, the legal system, and society millions of dollars. The *Caperton* parties' legal fees alone resulting from the Benjamin resistance to recusal logically exceed a million dollars in view of the many hours their expensive attorneys logically devoted to the case.²⁴⁰ All of this could have been saved if Justice Benjamin had performed even an average job in addressing the recusal question. Forcing him to pay the bill he imposed on others has a certain element of poetic justice.

But judicial liability for the economic consequences of judicial action is probably a cure worse than the disease. If judges face civil liability for their mistakes, the price paid by increased tentativeness and

239. See Gibeaut, *supra* note 25.

240. As discussed earlier, the recusal aspects of the *Caperton* litigation extended for more than three years and involved several motions, two state supreme court decisions on the merits, seeking of certiorari, and extensive briefing of the case by prominent law firms of the type that tend to charge \$200/hour or more for young associates and up to \$800/hour for partners. The likely result of all this litigation by top-notch, expensive lawyers is probably seven figures in legal fees for all parties. In addition, there were seventeen amicus briefs filed, all drafted by attorneys and involving the representatives of the amici organizations. In addition, of course, the Justices, their law clerks, and other U.S. Supreme Court staff devoted substantial time to *Caperton*. This colossal expenditure of adjudicatory resources and legal fees would have been saved had Justice Benjamin properly recused himself in October 2005. See *supra* Parts II–III.

decreased independence would likely be too much.²⁴¹ Only if judicial misconduct exceeds the scope of judicial employment and amounts to an actionable tort should judges be liable for damages. A judge's view of the merits may be colored by the possible financial consequences to a losing litigant and the judge's concern regarding the litigant's realistic inclination and ability to seek civil remedies should the judge's order be reversed.²⁴² Even if the judicial system imposes the requirement of a finding of egregious error as a prerequisite to civil action against the judge, there will likely be too much chilling effect if a judge is subject to civil remedies for financial harm caused to the parties by improper decisions.

Impeachment, like civil liability, may at first present a seemingly attractive remedy but on closer examination seems problematic. Removing a judge is severe punishment.²⁴³ Removing a judge due to recusal error seems excessive punishment for most failures of disqualification. Although impeachment should not be off the table as a response to a pattern of repeated judicial recusal error, it should be reserved for only the most egregious cases in order to avoid politicizing the process and allowing it to become legislative review of the substantive merits of judicial decisions.²⁴⁴

241. See, e.g., *Mireles v. Waco*, 502 U.S. 9, 13 (1991) (deciding that judge was immune for ordering seizure of attorney failing to appear for calendar call); *Stump v. Sparkman*, 435 U.S. 349, 362–63 (1978) (finding that judge was immune from personal liability for erroneous order sterilizing litigant as punishment for promiscuity; despite pronounced judicial error, all error occurred within scope of judicial employment and was subject to immunity); *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (noting that judicial “immunity applies even when the judge is accused of acting maliciously and corruptly”); see also ALFINI ET AL., *supra* note 8, §§ 14.01–.05; Miller, *supra* note 8, at 464–65 (discussing liability for errant judges and noting its practical limits due to generally broad doctrines of judicial immunity as well as prudential limits due to concern over undue interference with judicial independents).

242. Certainly, this is the long-standing rationale for restrictions on liability for judges' conduct within the scope of their judicial duties. See ALFINI ET AL., *supra* note 8, §§ 15.02–.04 (noting drawbacks and potential abuses of impeachment); Miller, *supra* note 8, at 464–65. At the risk of departing from this Article's overall iconoclasm, I find the traditional rationale largely persuasive.

243. See ALFINI ET AL., *supra* note 8, § 15.02, at 15-2; Miller, *supra* note 8, at 458–59; Tuan Samahon, *The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent*, 67 OHIO ST. L.J. 783 (2006) (suggesting potentially greater use of impeachment for removing judges and altering composition of judiciary based on broader variety of grounds than those traditionally employed).

244. See generally ALFINI ET AL., *supra* note 8, §§ 15.01–.07; CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF*

Further, the law and history of impeachment suggest that it should be used sparingly and usually only for judicial misconduct rather than mere judicial error.²⁴⁵ Federal impeachment law is limited to “treason, bribery and other high crimes and misdemeanors.”²⁴⁶ However, many states permit impeachment not only for criminal behavior by judges but also “malfeasance or misfeasance in official duties, gross misconduct, gross immorality, habitual drunkenness, corrupt conduct in office, maladministration, or incompetence.”²⁴⁷ West Virginia includes “maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor” in its criteria that may support impeachment.²⁴⁸

Justice Benjamin’s failure to recuse will be viewed by many as mere judicial error. As the discussion earlier in this Article suggests, I disagree. The Benjamin nonrecusal was egregious error that resulted from repeated unwillingness to apply the correct legal standard and

AMERICA’S JUDICIAL SYSTEM 119–25 (2006); Miller, *supra* note 8, at 459. Miller noted that “[i]mpeachment inevitably threatens judicial independence,” and that:

Impeachment has value in that it is a well-recognized, traditional method for disciplining bad judges. If grounded in a constitution, it poses no problems under doctrines of separation of powers. It is also a high-profile process with significant opportunities for public participation and input.

. . . [But impeachment] is not a satisfactory solution to the problem of bad judges [for practical political and logistical reasons].

Id.

Of course, one problem with Justice Benjamin’s recusal error in *Caperton* was its extended repetition and his failure to correct his initial mistake. Consequently, one could argue that even though the recusal error was confined to a single case, it was part of a pattern and practice of disqualification error. In addition, as admitted by Justice Benjamin himself in the press release he issued under the auspices of the court, he has participated in roughly twenty matters involving Massey or an affiliate in spite of having received \$3 million in support from Blankenship. That certainly constitutes a pattern and practice of improper failure to recuse, even if Justice Benjamin normally voted against Massey in these cases.

A rational and dispassionate look at the situation might counsel impeachment. But like everyone else, I have grown up in a legal culture that historically has not impeached judges for recusal violations. Consequently, it seems too extreme a remedy to me.

245. See ALFINI ET AL., *supra* note 8, §§ 15.03–.04 (noting comparatively rare use of impeachment in both federal and state systems, with impeachment usually reserved for instances when a judge is accused of criminal conduct or misuse of office rather than error in adjudication); GEYH, *supra* note 244, at 119–25; Miller, *supra* note 8, at 459–60 (noting modern aversion to politicized impeachment proceedings, such as one directed toward early nineteenth-century Justice Samuel Chase due to his attempted enforcement of Sedition Act, as well as instances when impeachment was suggested in obviously inappropriate cases for political reasons); Jonathan Turley, *The Executive Function Theory, the Hamilton Affair, and Other Constitutional Mythologies*, 77 N.C. L. REV. 1791, 1840–42 (1999) (summarizing federal judicial impeachments).

246. ALFINI ET AL., *supra* note 8, § 15.04, at 15-5.

247. *Id.* (footnotes omitted).

248. W. VA. CONST. art. IV, § 9.

repeated distortion of the situation by an unduly defensive justice straining to avoid recusal. Recall that Justice Benjamin issued four separate opinions denying disqualification over more than three years as well as enlisting West Virginia Supreme Court resources in fighting a rearguard public relations action attempting to influence the U.S. Supreme Court in his favor.²⁴⁹ His zealotry in refusing to disqualify makes this case different from ordinary judicial error for which impeachment is inappropriate. His repeated application of the wrong legal standard raises serious questions as to his judicial competence and could support impeachment in states where lack of competence is a ground for impeachment. Less charitably to Justice Benjamin, one might also argue that his conduct in *Caperton* is circumstantial evidence sufficient to support a finding of malfeasance, gross misconduct, or even corruption.

Under these circumstances, the Benjamin episode presents a far stronger case for impeachment than most disqualification cases. However, impeachment is seldom if ever used in cases of judicial incompetence and usually requires substantial proof of scienter or malfeasance. Justice Benjamin's judicial performance has been appalling, but the record to date does not appear to be able to support a finding of intent to violate the rules.²⁵⁰ While "Impeach Brent Benjamin Now!" is a political slogan with some force, it is probably overkill, even in the eyes of observers like me who find Justice Benjamin's conduct in *Caperton* unconscionable. Hence the question mark following the exclamation mark in this Article's title.

The Benjamin episode tempts one to consider the drastic remedy of impeachment, but the application of the remedy risks too much judicial independence for more capable judges in return for forcing Justice Benjamin to bear the consequences of his actions. For similar reasons, the less common remedy of "legislative address" appears a crude

249. See *supra* Part III (reviewing protracted history of Justice Benjamin's refusal to disqualify in *Caperton*).

250. Although, he clearly intended his actions, which were violations of the rules. Further, as discussed above, his repeated error in the face of repeated efforts to at least make him focus on the correct legal standard regarding recusal pursuant to the Judicial Code—rather than the higher bar for recusal compelled by the Due Process Clause—could permit an inference that he did indeed intend to violate the rules and remain on the case for ulterior motives. See *supra* Part III. A full investigation of the matter might reveal some very unpleasant things regarding Justice Benjamin's motivation and conduct. But until such evidence is adduced, he of course deserves the benefit of the doubt and a presumption that his errors were not maliciously intended.

instrument for addressing the problem in that it functions like impeachment through a legislative plebiscite regarding the particular judge but with a broader array of grounds for removal, creating the risk that a partisan legislature may remove a judge for largely political reasons, however veiled.²⁵¹

Judicial discipline, however, seems more than apt for Justice Benjamin. Without question, he has violated his state's and the ABA's codes of judicial conduct.²⁵² West Virginia, like all states, has a judicial conduct or judicial discipline commission.²⁵³ These entities are generally comprised of a mix of sitting or retired judges and laypersons, with commission staff and the power to appoint and compensate attorneys to act as prosecutors in particular matters.²⁵⁴ The commission responds to complaints or, based on its knowledge of possible violations, files charges and adjudicates claims in the manner of a criminal prosecution.²⁵⁵ Evidence is

251. Legislative address usually involves both houses of the legislature requesting the governor remove the judges. The difference between address and impeachment is that: [T]he power to remove by address is typically broader than the power to impeach because the judicial misconduct usually does not have to rise to the level of an impeachable offense. . . . [In most states with the procedure] a judge can be removed by legislative address for any reasonable cause, which need not rise to a level sufficient for impeachment.

ALFINI ET AL., *supra* note 8, § 15.05, at 15-10 to -11.

252. See *supra* text accompanying notes 127–29 (discussing Justice Benjamin's violations of Canon 3(E)(1) of the West Virginia Code of Judicial Conduct and general canons of judicial ethics).

253. See W. VA. CONST. art. VIII, § 8; W. VA. R. JUDICIAL DISCIPLINARY P. 1, 3. Prior to 1994, West Virginia was in the minority of states with a "two-tiered" structure for its commission but now has a variant of the common "one-tier" model. See *Structural Changes in West Virginia, California, and Nevada*, JUD. CONDUCT REP., Fall 1994, at 6; see also JUDITH ROSENBAUM, PRACTICES AND PROCEDURES OF STATE JUDICIAL CONDUCT ORGANIZATIONS 3–4 (1990) (describing former two-tier structure in West Virginia).

254. ALFINI ET AL., *supra* note 8, § 13.01, at 13-2, §§ 13.02–.05 (finding that judicial conduct commissions are "the primary means by which judicial conduct is regulated and discipline imposed"); Miller, *supra* note 8, at 466. Miller notes:

Commission members are drawn from the judiciary, the bar, and the general public. In some states the judicial conduct commission has only the power to recommend punishments (other than informal sanctions such as admonishments).

In other states, the commission itself has sanctioning authority. In some cases, there are two commissions—one to investigate and prosecute complaints, the other to act in a judicial capacity to determine punishment.

Id. (footnotes omitted). West Virginia's judicial commission has full prosecutorial and sanctioning authority subject to the state supreme court. See W. VA. CONST. art. VIII, § 8; W. VA. R. JUDICIAL DISCIPLINARY P. 4.12; accord IRENE A. TESITOR & DWIGHT B. SINKS, JUDICIAL CONDUCT ORGANIZATIONS 12–18 (2d ed. 1980); *Structural Changes in West Virginia, California, and Nevada*, *supra* note 253, at 6 (discussing a variety of disciplinary remedies in West Virginia).

255. See ALFINI ET AL., *supra* note 8, §§ 13.04–.11.

taken, normally in a public hearing²⁵⁶ much like a civil or criminal trial—although generally with reduced due process protections for the judge under investigation²⁵⁷—and the commission renders a decision²⁵⁸ subject to further judicial review, usually by the state supreme court.²⁵⁹

This method is followed in West Virginia, where the state commission has broad authority, including jurisdiction to investigate supreme court justices and to bring its own complaint even if no complainant has filed charges.²⁶⁰ There thus exists a forum for examining a jurist’s refusal to recuse in which both judge and critics can present their respective cases—provided a critic will step forward or the commission is willing to launch a proceeding on its own initiative.²⁶¹ Although judicial discipline for failure to recuse or improper recusal behavior is not

256. *See id.* §§ 13.12–.12H13-41.

257. *See id.* §§ 13.09–.11.

258. *See id.* §§ 13.04–.11.

259. *Id.* § 13.02. Described in the text is the so-called one-tier system of judicial discipline, which:

[W]orks within the state court system subject to review by the state Supreme Court, which is normally responsible for the final disposition of the cases and usually has *de novo* review powers. In a two-tier system, a panel, also usually composed of judges, attorneys, and public members, investigates complaints and files and prosecutes formal charges (tier one), while a select panel of judges or a special court adjudicates the formal charges and determines their final disposition (tier two). Two-tier systems operate independently of the state courts in that they usually provide for finality at the second-tier, thus precluding Supreme Court review.

Forty-one states and the District of Columbia have adopted the one-tier model while the remaining nine states have opted for the two-tier system.

Id. § 13.01, at 13-2; *see also* ROSENBAUM, *supra* note 253.

260. *See* ALFINI ET AL., *supra* note 8, § 13.01, at 13-2 n.1 (stating that West Virginia is a state with a two-tier system). The author also notes that: “All state judicial conduct organizations have jurisdiction over judges of general trial courts, intermediate appellate courts, and state supreme courts.” *Id.* § 13.02, at 13-6. *See also* W. VA. CONST. art. VIII, § 8; W. VA. R. JUDICIAL DISCIPLINARY P. 1.11 (listing commission authority over “a judge”). Rule 2 of the West Virginia Commission clarifies that commission authority extends to supreme court justices:

Any person may file a complaint against a “judge” with the Office of Disciplinary Counsel regarding a violation of the Code of Judicial Conduct. The term “judge” is defined in the Code of Judicial Conduct as “Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including but not limited to Justices of the Supreme Court of Appeals . . .”

Id. R. 2. *Accord* W. VA. CODE JUDICIAL CONDUCT Canon 6, Terminology (West 2008); O’Brien, *supra* note 144 (noting that the supreme court administrator referred complaint about justice to Judicial Investigation Commission).

261. Presumably, if a commission decision were before the full supreme court, Justice Benjamin would recuse himself from the court’s review—but after witnessing his performance in *Caperton*, there is no guarantee.

commonplace, it is far from unprecedented,²⁶² especially in West Virginia.²⁶³ Even though there is no overt evidence that the Benjamin failure to recuse was corruptly motivated, the seriousness of his failings on the question coupled with his repeated tenacity in failing to comply with the Code support judicial discipline.

262. See Miller, *supra* note 8, at 450–51; *supra* text accompanying notes 220–32 (setting forth additional examples of discipline based in significant part on improper failure to recuse). See also, e.g., Huffman v. Ark. Judicial Discipline & Disability Comm’n, 42 S.W.3d 386, 388–91 (Ark. 2001) (admonishing judge for entering temporary restraining order in favor of Wal-Mart when judge owned \$700,000 in Wal-Mart stock and failed to disclose these holdings); Decision and Order Imposing Public Censure and Barring Judge Sullivan from Receiving Assignments, *In re Sullivan*, No. 163 (Cal. Comm’n on Judicial Performance May 17, 2002), available at http://cjp.ca.gov/userfiles/file/Censures/Sullivan_05-17-02.pdf (criticizing judge for presiding over probate matter despite having administered decedent finances, witnessing will, and being substitute executor); JUDICIAL INQUIRY BD., STATE OF ILL., 1989 REPORT app. f, at 46 (1989), available at <http://www.state.il.us/jib/summariescomplaints.htm#summ> (suspending judge for failing to disclose that opposing counsel was his business partner); Jose Arballo Jr., *Ex-Judge Censured by Panel*, PRESS-ENTERPRISE, May 18, 2000, at B1 (describing in more detail Judge Sullivan’s behavior, including buying a home from the person whose conservatorship he had processed); Letter from James A. Badami, Executive Dir., Ark. Judicial Discipline & Disability Comm’n, to the Honorable Gayle Ford, Circuit/Chancery Judge (Sept. 22, 1998), available at <http://www.arkansas.gov/jddc/pdf/sanctions/Ford96.311.PDF> (finding violation of code when judge did not disclose leasing office space to attorney appearing before judge).

263. As previously noted, West Virginia’s Judicial Investigation Commission has issued scores of opinions or admonishments criticizing jurists for participating in cases in which they should have recused. These decisions suggest ample precedent for confirming that Justice Benjamin erred even if they are not determinative of the apt punishment for the error. See JUDICIAL INVESTIGATION COMM’N OF W. VA., *supra* note 219 (citing to matter dated March 23, 2009 (“Commission advised that a judge should recuse himself from all cases involving an attorney who was the judge’s campaign manager and who also is a close personal friend of the judge.”); matter dated October 31, 2007 (“[A] judge should utilize the recusal procedures if one of the parties to a lawsuit involving the judge’s campaign manager objects to the judge continuing to preside over the case.”); matter dated April 10, 2006 (“[J]udge should disqualify herself in light of the fact that a relative of the judge, who was also a witness in the case, had given the judge a purse as gift while the case was still pending.”); matter dated March 16, 1999 (finding that a judge must recuse upon request in cases involving attorney who represented judge in adoption of a child); matter dated December 13, 1995 (“Attorneys appearing before a judicial officer may serve on that judicial officer’s campaign committee. However, the judicial officer must disclose this relationship when one of these attorneys does appear before the judicial officer so that all parties and their attorneys can make an informed decision [regarding disqualification]”); matter dated February 19, 1996 (deciding that ownership of 100 shares of Bell Atlantic stock sufficiently small to be de minimus within meaning of Code and does not require recusal); matter dated October 14, 1988 (“Improper for judicial officer to sign default in case in which bank in which he or she owns stock is a party.”)).

Although the existence and impact of these commissions have generally been regarded as positive developments,²⁶⁴ they have been commonly criticized as insufficiently aggressive and unduly friendly toward judges,²⁶⁵ as well as lacking sufficient resources to consistently bring necessary claims.²⁶⁶ Conversely, they have also been criticized as having the potential to be unduly aggressive and “chill the judge’s exercise of judgment or her ability to control the conduct of litigation”²⁶⁷ in a manner that threatens judicial independence.²⁶⁸ “Moreover, if sanctions become too severe or the standards for judicial conduct set too high, good judges may leave the bench in order to avoid the risk of being penalized for actions taken in good faith and excellent judicial candidates might be deterred from seeking to replace them.”²⁶⁹

Of particular concern regarding any proceedings against Justice Benjamin is the risk that judges will be punished simply because a majority of a judicial commission disagrees with a ruling on the merits in a case rather than because misconduct exists.²⁷⁰ As in most areas of law, “the line between these two is not always clear-cut.”²⁷¹ Undoubtedly, at least four members of the U.S. Supreme Court, seeing no apparent problem with Justice Benjamin’s failure to recuse, would characterize any discipline as punishing him for his substantive views concerning disqualification.²⁷²

264. Miller, *supra* note 8, at 466–67 (“[Conduct commissions have] significantly improved policing against bad judges . . . [and have a] wide range of possible sanctions [that makes them] able to devise punishments suitable for the offense . . . [with authority that] extends to the full range of problems of bad judging . . .”).

265. *See id.* at 467–68.

266. *See id.*

267. *Id.* at 468.

268. Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 LAW & CONTEMP. PROBS. 59, 65–71 (1998); Miller, *supra* note 8, at 469; Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 674–76 (1999).

269. Miller, *supra* note 8, at 468.

270. *See* Lubet, *supra* note 268, at 65 (explaining that sanctions of judges based on the substantive merits of the ruling can pose grave threats to judicial independence); *see, e.g.,* Harriet Chiang, *State Commission Drops Charges Against S.F. Judge: Rare Misconduct Allegation over Judicial Opinion*, S.F. CHRON., Aug. 20, 1999, at A1.

271. Miller, *supra* note 8, at 469.

272. *See supra* Part II.G (describing *Caperton* dissenters’ resistance to removing Justice Benjamin from case and defense of very broad judicial authority to sit on cases involving large campaign contributors).

However, as detailed above, Justice Benjamin's error was not just a garden variety application of law to facts that may engender disagreement based on different views of the facts. He consistently applied the wrong legal standard for years in spite of ample opportunity to conduct a proper analysis, doing so in a manner suggesting lack of competence, undue emotional investment in his continued participation, or perhaps even undue desire to aid a major campaign supporter.²⁷³ Although the merits-misconduct line may be fuzzy, some substantive judicial performance is so deficient as to rise to a level of misconduct justifying discipline. In addition, so long as the regulatory sanction is proportionate to the offense and proceedings are not targeted against particular judges for political or ideological reasons, the danger to judicial independence appears minimal.

Discipline for violation of former Canon 3(3)(1), now Rule 2.11 of the ABA Model Judicial Code, could include: private reprimand,²⁷⁴ public reprimand or censure,²⁷⁵ required legal education,²⁷⁶ a fine,²⁷⁷ suspension,²⁷⁸ temporary or permanent reassignment,²⁷⁹ or even removal

273. See *supra* Part III (assessing and criticizing Justice Benjamin's performance regarding recusal in *Caperton*).

274. See ALFINI ET AL., *supra* note 8, § 13.04, at 13-6; Miller, *supra* note 8, at 450.

275. See ALFINI ET AL., *supra* note 8, § 13.04, at 13-6; Miller, *supra* note 8, at 450; see also, e.g., *Huffman v. Ark. Judicial Discipline & Disability Comm'n*, 42 S.W.3d 386, 388-91 (Ark. 2001) (admonishing for failure to disclose investment in litigant); *In re Kinsella*, 476 A.2d 1041, 1057 (Conn. 1984) (censuring probate judge for mishandling estate of incapable person); *In re Hart*, 849 N.E.2d 946, 949 (N.Y. 2006) (censuring judge for erring in use of summary contempt power); Arballo, *supra* note 262.

276. See Miller, *supra* note 8, at 477-78; see also, e.g., *In re Assad*, 185 P.3d 1044, 1054 (Nev. 2008) (reversing commission decision of censure and requiring judge to apologize and obtain judicial education at own expense); *In re Mosley*, 102 P.3d 555, 558 (Nev. 2004) (censuring judge and requiring him to attend judicial education course and pay \$5000 fine to library).

277. See ALFINI ET AL., *supra* note 8, § 13.04, at 13-6; see also, e.g., *In re Mosley*, 102 P.3d at 558 (fining judge \$5000 for misusing judicial letterhead, arranging release of arrestee, and delaying in self-recusal from case). A dissenting judge in the case disagreed regarding the release of the arrestee on own recognizance because there was an established local custom to do so regularly. *Id.* at 566-67 (Maupin, J., concurring in part and dissenting in part). Another judge dissented as to the finding of ex parte communications and whether the judge had used his position to preside over the matter. *Id.* at 567 (Rose, J., concurring in part and dissenting). The final dissenting judge rejected the majority opinion on the ground that the judge was precluded from presenting proffered expert. *Id.* at 567-69 (Gibbons, J., dissenting). In the interests of disclosure: I was the expert witness proffered but not admitted by the commission.

278. See ALFINI ET AL., *supra* note 8, § 13.04, at 13-6; see also, e.g., JUDICIAL INQUIRY BD., STATE OF ILL., *supra* note 262, app. f, at 43; Miller, *supra* note 8, at 450 nn.193-95.

279. See ALFINI ET AL., *supra* note 8, § 1.04, at 1-9; see also, e.g., *Thomas v. Judicial Conduct Comm'n*, 77 S.W.3d 578, 579-82 (Ky. 2002) (affirming judge's 180-

from the bench.²⁸⁰ Although the cases are not legion, there is nonetheless substantial precedent for removal of judges who improperly fail to disqualify themselves.²⁸¹

For the same reasons that impeachment seems overkill, the sanction of removal seems too harsh even for Justice Benjamin's misapplication of the law and unrepentant refusal to admit his ineligibility to participate in *Caperton*.²⁸² However, all of the other potential remedies beyond

day suspension for misleading commission regarding amorous relationship, misuse of office, and ex parte contacts); Miller, *supra* note 8, at 445 n.142.

280. See ALFINI ET AL., *supra* note 8, § 13.04, at 13-6; see also, e.g., Judicial Discipline & Disability Comm'n v. Thompson, 16 S.W.2d 212, 222-23 (Ark. 2000) (removing judge for continuing active practice of law after his election); *In re Fine*, 13 P.3d 400, 414 (Nev. 2000) (removing family court judge from bench for pattern of ex parte contacts with litigants, interested parties, and witnesses); Goldman v. Nev. Comm'n on Judicial Discipline, 830 P.2d 107, 143 (Nev. 1992) (removing justice for willful misconduct and habitual intemperance and also finding voluntary abandonment of post); *In re Cerbone*, 812 N.E.2d 932, 932 (N.Y. 2004) (removing judge for converting funds from escrow accountant and retaliating against district attorney who made complaint to commission); *In re Roberts*, 689 N.E.2d 911, 912 (N.Y. 1997) (removing judge for pattern of misconduct, including incarcerating individual for eighty-nine days for contempt without affording due process); Miller, *supra* note 8, at 450 n.194.

281. See, e.g., *In re Romano*, 712 N.E.2d 1216, 1216-17 (N.Y. 1999); *In re Murphy*, 626 N.E.2d 48, 50-51 (N.Y. 1993); *In re Tyler*, 553 N.E.2d 1316, 1316-17 (N.Y. 1990); *In re Intemann*, 540 N.E.2d 236, 237 (N.Y. 1989); *In re VonderHeide*, 532 N.E.2d 1252, 1254 (N.Y. 1988); *In re Myers*, 496 N.E.2d 207, 210 (N.Y. 1986); *In re Wait*, 490 N.E.2d 502, 503 (N.Y. 1984); *In re Sims*, 462 N.E.2d 370, 375 (N.Y. 1984); *In re Scacchetti*, 439 N.E.2d 345, 345-46 (N.Y. 1982). All of these cases had some additional judicial misconduct although in several, failure to recuse from cases involving relatives appears to have been the gravamen of the charge against the judge. By contrast, Justice Benjamin's ethically challenged behavior on recusal appears to date to involve only cases involving Blankenship and Massey. However, I am not insisting that Justice Benjamin be removed from the bench. I simply think a thorough investigation and some sanction is in order.

282. Most instances of removal from the bench as a judicial sanction involve criminal activity or intentional misuse of the office or at least a persistent pattern of misconduct. See, e.g., *In re Terry*, 394 N.E.2d 94, 95 (Ind. 1979) (involving judge charged with multiple counts of misconduct); *In re Del Rio*, 256 N.W.2d 727 (Mich. 1977) (regarding judge accused of pattern of abusing position); *In re Kirby*, 354 N.W.2d 410, 421 (Minn. 1984) (regarding judge charged with pattern of improper disposition of traffic cases, chronic tardiness, and several episodes of intoxication); *In re Fine*, 13 P.3d at 414 (removing judge for engaging in repeatedly impermissible ex parte contacts); *In re Corning*, 741 N.E.2d 117, 120 (N.Y. 2000) (finding pattern of abuse of power, lack of judicial temperament, and mishandling of public funds); *In re Spector*, 392 N.E.2d 552, 554 (N.Y. 1979) (accusing judge of pattern of nepotism and logrolling regarding hiring for courthouse positions); *Curran v. Comm'n on Judicial Fitness & Disability*, 815 P.2d 212, 213 (Or. 1991) (describing judge who regularly decided traffic violation cases by flipping a coin). Although Justice Benjamin exhibited a repeated pattern

private reprimand—a figurative slap on the wrist that accomplishes less than the public scrutiny already surrounding *Caperton*²⁸³—would appear apt. At a minimum, Justice Benjamin deserves more direct official criticism for his unrepentant direct violation of the Judicial Code.²⁸⁴ In addition, his repeated use of the wrong legal standard for assessing his eligibility to participate in *Caperton* calls into question his knowledge of substantive recusal law and suggests that mandatory judicial education is warranted.²⁸⁵

Perhaps more controversially, a monetary fine and perhaps even a modest suspension appear to be apt in Justice Benjamin’s case. Certainly, there is precedent for imposing penalties this severe upon jurists who have erred less than Justice Benjamin and caused considerably less collateral damage due to their alleged failings of compliance with the Judicial Code.²⁸⁶ State judicial conduct commissions have punished at times for less obviously erroneous or damaging

of misconstruing the legal question surrounding his participation in the case, no pattern of such behavior across cases has been established. *See supra* Part III.

283. *See supra* note 9 (collecting examples of news and editorial commentary regarding *Caperton*, many criticizing Justice Benjamin’s failure to recuse).

284. *See supra* Part III (describing why Justice Benjamin’s nonrecusal was egregiously wrong and why his indignation at being challenged was inappropriate).

285. *See supra* Part III (describing repeatedly erroneous legal framing of issue by Justice Benjamin).

286. *See, e.g., In re Agerter*, 353 N.W.2d 908, 912 (Minn. 1984) (holding commission could investigate judge over alleged drinking problem and sexual affair); *In re Assad*, 185 P.3d 1044, 1054 (Nev. 2008) (ordering judge to attend judicial ethics education for restraining defendant’s girlfriend for approximately two hours, who had appeared in his stead, until defendant appeared as ordered for court proceeding); *In re Mosley*, 102 P.3d 555, 557–66 (Nev. 2004) (fining, publically reprimanding, and requiring judge to obtain additional education in judicial ethics even though he, unlike Justice Benjamin, recused himself in matter involving witness also tied to litigation involving judge, but viewing this recusal as unduly slow); *In re LaBombard*, 898 N.E.2d 14, 17 (N.Y. 2008) (affirming removal of judge for invoking status in discussion with other party involved in auto accident and presiding over case involving step-grandson, including efforts to ease step-grandson’s punishment); *In re Going*, 761 N.E.2d 585, 588–89 (N.Y. 2001) (affirming judge’s removal for affair with law clerk and retaliatory behavior as well as other incidents of erratic behavior and misuse of office to reinstate friend’s suspended driver’s license); *In re Romano*, 712 N.E.2d 1216, 1217 (N.Y. 1999) (removing judge for insensitivity regarding domestic violence and sexual abuse); *In re Bailey*, 490 N.E.2d 818, 818 (N.Y. 1986) (removing judge because he conspired to avoid limits on hunting); *In re Hoffman*, 595 N.W.2d 592 (N.D. 1999) (suspending judge from bench for stalking ex-wife); *see also In re Lobdell*, 451 N.E.2d 742, 743 (N.Y. 1983) (removing judge from bench for “flouting of the law”); *In re Kane*, 406 N.E.2d 797, 798–99 (N.Y. 1980) (removing judge due to misuse of appointment powers to aid friends and family). By way of disclosure, I was proffered—but not received by the commission—as an expert witness on behalf of Judges Mosely and Assad.

conduct creating far less damage to the system and to the litigants than that of Justice Benjamin.²⁸⁷ The same holds true for West Virginia.²⁸⁸

287. See ALFINI ET AL., *supra* note 8, §§ 13.04–.11; Miller, *supra* note 8, at 450–51; *see, e.g.*, cases cited *supra* note 286.

288. *See, e.g.*, *In re Cruickshanks*, 648 S.E.2d 19, 20–22 (W. Va. 2007) (Benjamin, J., authoring opinion for court) (affirming magistrate’s suspension without pay for allegedly retaliating against witness—her son—in criminal proceeding); *In re McCourt*, 633 S.E.2d 17, 18–19 (W. Va. 2006) (affirming suspension of judge without pay, pending investigation of sexual misconduct); *In re Toler*, 625 S.E.2d 731, 734 (W. Va. 2005) (imposing public censure of magistrate, suspending for a year without pay, and fining \$5000 for multiple instances of inappropriate sexual behavior); *In re Riffle*, 558 S.E.2d 590, 591 (W. Va. 2001) (affirming magistrate’s public censure and suspension for one year without pay for fraudulent attempt to collect workers compensation benefits); *In re McCormick*, 521 S.E.2d 792, 797–99 (W. Va. 1999) (issuing public reprimand of magistrate for violation of “on call” schedule that deterred domestic violence victims from coming to courthouse to seek protective orders); *In re Tennant*, 516 S.E.2d 496, 497–98 (W. Va. 1999) (admonishing magistrate for personal solicitation of campaign contributions); *In re Binkoski*, 515 S.E.2d 828, 829–30 (W. Va. 1999) (ordering public censure of magistrate for driving under influence of alcohol, possessing marijuana, and encouraging witnesses to be “less than candid”); *In re Reese*, 495 S.E.2d 548, 549–51 (W. Va. 1997) (admonishing magistrate for failure to avoid appearance of impropriety by counseling defendant regarding strategy for return of his driver’s license and accepting gift from defendant’s uncle in return); *In re Means*, 452 S.E.2d 696, 696–97 (W. Va. 1994) (issuing public reprimand of family law master for having financial and business dealings with attorney appearing before him); *In re Codispoti*, 438 S.E.2d 549, 550 (W. Va. 1993) (holding magistrate should be publically censured for involvement in circuit judge’s misleading campaign advertisement); *In re Eplin*, 416 S.E.2d 248, 249 (W. Va. 1992) (suspending magistrate for six months for accorded “special treatment to criminal defendant in order to curry favor with state senator”); *In re Neely*, 364 S.E.2d 250, 251 (W. Va. 1987) (admonishing state supreme court justice for discharging private secretary who refused to babysit the justice’s infant son when justice had imposed this as job requirement on approximately a dozen occasions over a year). In *Neely*, there were two concurring and dissenting justices—all justices were disqualified and replaced with circuit judges—who preferred harsher sanction of public censure. *Id.* at 255.

Certainly, one should not minimize the behavior in these cases that resulted in sanctions. If anything, many a reasonable observer is likely to regard most of the punishments as light. For example, in *Riffle*, a judicial officer engaged in workers’ compensation fraud and was merely suspended rather than removed. 558 S.E.2d at 591. Nonetheless, bad as some of the above offenses may be, it is not at all clear that any are worse than Justice Benjamin’s protracted, repeated, clearly erroneous refusal to recuse that has caused so much financial and doctrinal cost. Consider *Toler*, a case in which Justice Benjamin voted with a unanimous supreme court to impose a \$5000 fine and suspend a magistrate for a year without pay for sexual boorishness. 625 S.E.2d at 733–34.

Magistrate Toler’s conduct was outrageous but appears to reflect the actions of a libidinally desperate man more than a grave threat to justice, a somewhat less romantic version of South Carolina Governor Mark Sanford. For example, Toler asked a female corrections officer “if he could ‘go downtown on her.’” *Id.* at 735. Toler also offered to help a divorcing litigant wife, fondled her breast, and “told her he wanted to f**k her.” *Id.* However, Toler was also responsible for much more serious behavior that affected

While one should not minimize the seriousness of the offenses that got these judges removed from their posts, it is important to keep some perspective. Nothing is more integral to the American judicial system than impartiality of the bench. Even minor and quickly passing errors in failing to disqualify undermine this value. Egregious, repeated errors do significant violence to the ideal of judicial neutrality. Although harsh treatment of litigants and lawyers should also be condemned, civility is no greater value than impartiality. Similarly, use of the bench for patronage is outrageous—but may do less damage than failure to recuse, particularly in a case involving tens of millions of dollars and requiring U.S. Supreme Court correction.²⁸⁹ If the judicial discipline system cares enough to take action in the cases involving bad temper, insensitivity, mismanagement, excessively harsh temporary treatment of litigants, ex parte contacts, and the like, it should also care enough to treat the Benjamin nonrecusal—which exhibited and continues to exhibit a pattern of error, insensitivity, and dissembling—with similar seriousness. Justice Benjamin’s unsupportable decision to deny disqualification amounts to misconduct and goes to the heart of the judging function and integrity of the system.

V. CONCLUSION

Reargument in *Caperton v. Massey* was held before the West Virginia Supreme Court—without the disqualified Justice Benjamin—on September

the rights of litigants and the adjudication process, rather than just merely displaying simple boorishness. In one instance, Toler suggested an exchange of a judicial favor for a sexual favor from another litigant. *Id.* Another time, Toler kissed a domestic violence petitioner and asked “if she liked sex and if she was any good at performing oral sex.” *Id.* See also *In re McCourt*, 633 S.E.2d at 18–19 (suspending magistrate without pay, pending investigation of sexually inappropriate behavior—essentially seeking to view domestic violence victim naked and fondle her under guise of evaluating her injuries).

Because Toler exhibited a pattern of misbehavior and suggested lack of impartiality for those who submitted to his sexual overtures, he of course deserved sanction, probably more severe sanction than he actually received. But was his departure from the impartiality norm any more severe than that of Justice Benjamin? Although Toler’s misconduct is more titillating, Benjamin’s almost certainly had greater financial and systemic impact. Put another way, one might ask whether West Virginia’s judicial discipline system resembles the worst of a cable news cycle, overemphasizing sexual indiscretion while underemphasizing more serious events and problems.

289. Criminal behavior by any judge is abhorrent, but Judge Bailey’s scheming merely to shoot a few more deer is almost comic. See *In re Bailey*, 490 N.E.2d at 818 (finding that the judge conspired to avoid limits on the number of animals that could be shot during hunting season). By contrast, the Benjamin failure to recuse has consumed more than a few game animals during its long march through the judicial system.

8, 2009,²⁹⁰ with a new decision rendered November 12.²⁹¹ Perhaps ironically, the court again found for Massey and obliterated Caperton's multimillion dollar judgment, this time by a 4–1 vote. Opponents of the U.S. Supreme Court's expansion of due process-based disqualification may argue that what appears to be the unchanged ultimate outcome of the long-running Caperton-Massey-Blankenship feud argues in favor of the position espoused by the Court's dissenters. But whatever injustices may have been visited on Hugh Caperton²⁹² in spite of his contribution

290. Argument Docket, W. Va. Supreme Court (Sept. 8, 2009), http://www.state.wv.us/wvsca/calendar/sept8_09ad.htm.

291. Caperton v. A.T. Massey Coal Co., No. 33350, 2009 W. Va. LEXIS 107, at *107 (W. Va. Nov. 12, 2009).

292. The West Virginia Supreme Court's November 12, 2009 decision is likely to be the last word on the case because it is based on the court's construction of a forum selection clause in a coal supply contract between Caperton's Harman Mine and a Massey subsidiary. As such, the court's decision, no matter how seemingly erroneous it may seem to some observers (including me), is almost certainly insulated from U.S. Supreme Court review because it is based on state contract law and procedure and appears to invoke no federal constitutional questions that might invite further review by the U.S. Supreme Court.

There remains the possibility that Caperton might file his now seemingly dead case alleging tortious interference with contract, fraudulent misrepresentation, and fraudulent concealment in Virginia, although it appears the statute of limitations has run. *See id.* at *82 n.37 (“Caperton asserts . . . a remedy [that] may no longer be available in Virginia due to the running of the limitations period . . .”). Even if able to proceed in Virginia, Caperton would face the question of whether his \$50 million tort claims are merged with the \$6 million contract claims already adjudicated. *See id.* at *114 n.48 (noting but declining to decide issue). At this juncture, it appears that Blankenship and Massey quite literally “got away with it” in their concerted efforts to drive down Caperton for their mutual economic benefit. There appears no serious dispute about the West Virginia trial court's findings of impermissible misconduct toward Caperton.

Further, the most recent West Virginia decision on the merits hardly gives one confidence in the judicial system. The court ruled that years of West Virginia litigation, including trial court findings of impermissibly predatory business behavior causing more than \$50 million of injury, was a nullity because in one aspect of that predation, Massey had breached a coal sales contract in which Caperton had sought relief in Virginia state court pursuant to a clause in the contract that provided that “[a]ll actions brought in connection with this Agreement shall be filed in and decided by the Circuit Court of Buchanan County, Virginia.” *Id.* at *10. By a 4–1 vote, the Benjamin-less West Virginia Supreme Court found that Massey's extensive efforts to gain control of the Harman Mine from Caperton were sufficiently “in connection with” the breached coal sales contract to require that the outcome in the Buchanan County action—a \$6 million victory for Caperton on the contract breach claim—merge into its judgment the claims that Caperton had advanced in the \$50 million West Virginia action. *See id.* at *48–60.

Just as hard cases may make bad law, perhaps high profile cases implicating judicial pride make bad law. One can only hope that the West Virginia Supreme Court's decision was prompted by some irritation over the U.S. Supreme Court's interference

to the jurisprudence of judicial impartiality, the fact remains that his litigation struck a substantial blow in favor of judicial neutrality. The U.S. Supreme Court's decision heightened the legal system's awareness of the problems that big money election campaigns pose for judicial neutrality and is likely to spur reform and improvement, however tentative and incremental.

Yet the man whose sustained failure of judicial duty brought this havoc remains largely unscathed and certainly unbowed, almost irritatingly so.²⁹³ He continues to hold high judicial office and has incurred no discipline for his lengthy, repeated shortcomings as a jurist. Until this situation is corrected, *Caperton's* message to the legal profession remains muted and provides insufficient incentive for judges to take seriously their duties of impartiality and judicial competence. Discipline is in order for Justice Benjamin, its seriousness and magnitude dependent on the results of disciplinary investigation. Continued quiescence by West Virginia—and the greater legal community—only serves to exacerbate the state's already tarnished reputation and spreads the stain to all lawyers and judges.

rather than a long-standing commitment to questionable forum selection clause jurisprudence. If the words “in connection with” are to be interpreted this broadly in the future with such severe consequences, West Virginians may be in for some unpleasant surprises whenever they have a dispute with a party with whom they also once contracted about something tangential to the core of their dispute. The gravamen of the West Virginia action between Caperton and Massey was whether Massey had engaged in an impermissible scheme to gain control of the Harman Mine and drive Caperton out of business. The Buchanan County Virginia action was about the breach of a coal sales contract. Although the breach was one part of the broad pattern of Massey activity directed against Caperton, it stretches the notion of “connection” to require that any and all Caperton gripes about Massey be litigated in a jurisdiction chosen as the site for hearing disputes over a particular coal sales contract, even if breach of that contract was part of the overall fabric of Massey's bad behavior. Although courts routinely give broad construction to terms like “in connection with,” “arising out of,” or “relating to,” they seldom demand that a specific contract provision control the location of all disputes between the contracting parties or those affiliated with them, as occurred on remand in *Caperton*. *But see id.* at *57 (concluding that Caperton's injuries inflicted by Massey “flow directly from” Massey subsidiary's breach of agreement to buy coal from Caperton's Harman Mine).

To the extent that the West Virginia Court's highly questionable, problematic decision in *Caperton* resulted in even small part because of the odd history of the case, this is further ground for treating Justice Benjamin's recusal failings as serious misconduct that concretely harmed actual litigants and his own judicial institution as well as the larger value of judicial impartiality.

293. *See supra* Part III (noting Justice Benjamin's lack of apology or admission of error in response to Court's removal of him from case in *Caperton* decision).