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Impeach Brent Benjamin Now!? Giving Adequate Attention to Failings of Judicial Impartiality

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GIVING ADEQUATE ATTENTION TO FAILINGS OF JUDICIAL IMPARTIALITY

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Introduction: Men With No Regrets and Inadequate Concern

“It just doesn’t smell right.”

Brent D. Benjamin, Chief Justice
West Virginia Supreme Court of Appeals

Comment to policyholder counsel David Gauntlett, Esq., during oral argument, Mylan Labs., Inc. v. American Motorists Ins., Sept. 2, 2009, Appeal No. 34402, reviewing trial court decision, Civil Action No. 07 C 69 (Va. Cir. 2007) (Robert B. Stone, J.) (holding insurers have no duty to defend) (recording on file with author).

Policyholder Mylan was seeking defense pursuant to purchased advertising injury coverage from its liability insurers in connection with 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 policyholder contended 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 if facts alleged in the complaint, even if non-covered claims are also alleged. See Aetna Cas. & Sur. Co. v. Pitrolo, 342 S.E.2d 156, 160 (W. Va. 1986); 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 violating the law and obtaining insurance protection, albeit (as policyholder counsel emphasized) only for defense of the claims (if criminal conduct was proven, an exclusion would likely apply).

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.
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., Inc., the U.S. Supreme Court, albeit by a slim 5-4 vote, vacated a decision in which he had received $3 million in campaign support from the CEO of a litigant seeking to avoid a $50 million liability. The dissenters not only objected to removing Justice Benjamin but also minimized the danger of biased judging presented by the situation and questioned the wisdom of expanding review of state court judicial disqualification pursuant to the Due Process Clause. 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 recusal of a justice who had received so much financial aid from a litigant somehow brought the judiciary into disrepute.

4 See id. (Kennedy, J., joined by Stevens, Souter, Ginsburg & Breyer, JJ, forming majority voting to vacate West Virginia Supreme Court decision where state court justice casting deciding vote had received $3 million in campaign aid from CEO of defendant Massey; and Roberts, C.J., joined by Scalia, Thomas & Alito, JJ, voting to let the decision stand in spite of key participation by challenged state court justice); id. at 2274-75, *57-59 (Scalia, J., dissenting) (shorter dissent criticizing majority for extending due process review to cases of judicial recusal based on campaign activity).
5 See infra Part I.A (reviewing facts of Caperton). According to some estimates, Blankenship spent as much as $3.5 million on behalf of the Benjamin candidacy. See Edit., Clouded, CHARLESTON GAZETTE, April 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 See Caperton, 129 S. Ct. at 2273, *54-55 (Robert, C.J., dissenting) (“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.”) (italics in original). See also id. at 2273, *55-56 (“Moreover, Blankenship’s [$3 million in] independent expenditures do not appear ‘grossly disproportionate’ compared to other such expenditures in this very election.”); id. at 2275, *59 (Scalia, J., dissenting) (“The 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 nonjusticiable.”).
7 See id. at 2268, *40 (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” and raising list of specific questions regarding application of majority’s standards for judicial impartiality satisfying constitutional due process); id. at 2274, *57, *59 (Scalia, J., dissenting) (“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.”).
8 More precisely, the Roberts dissent posed 40 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 sustainable practically 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 80 queries. See id. at 2267, 2269-72, *39, *44-52 (Robert, C.J., dissenting).
9 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 judges own preferences as well as prevailing law. See RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 20.8 at 3-4, passim (2d ed. 2007) (noting traditional distinction but using terms interchangeably through the treatise); JAMES J. ALFINI, STEVEN LUBET, JEFFREY M. SHAMAN & CHARLES GARDNER GEYH, JUDICIAL CONDUCT AND ETHICS, § 4.04 at 4-11 (2007) (tending to use disqualification as preferred term but using recusal as acceptable synonym); Geoffrey P. Miller, Bad Judges, 83 TEX. L. REV. 431, 460 (2004) (outlining traditional
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 CEO Don L. Blankenship, the man who had showered $3 million in support on 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, who had driven doctors out of the state, and who had cost workers their jobs for thirty plus years. I think this effort helped unchain West Virginia’s economy and benefited working people . . . .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

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Notwithstanding that the McGraw-Benjamin election contest was almost 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 15 was convicted of molesting his younger half-brother and sentenced to 35 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. See Chris Wetterich, Massey CEO Seeks Donations for McGraw Opponent, CHARLESTON GAZETTE, Aug. 18, 2004, at 3A (“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.”). 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, 91 A.B.A. 40, 42 (2005) (leading state newspaper labels attack ads “West Virginia’s version of Swift Boat Veterans for the Truth.”). 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, SOUTHWESTERN L. REV. (forthcoming 2009) (discussing Arbaugh case and 2004 McGraw-Benjamin election contest in greater detail).

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.
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.\footnote{See Don L. Blankenship Addresses the U.S. Supreme Court Ruling on Caperton v. A.T. Massey Coal Company, No. 8-22, PR NEWSWIRE, June 10, 2009, 11:19 a.m. GMT, available at http://www.prnewswire.com. Although Blankenship downplays the corporate power aspects of the case and stresses that he was “born in Appalachia” and has “spent almost my entire life as a resident of West Virginia” as well as issuing this statement with a dateline of Sprigg, West Virginia, interested readers seeking more information are instructed to contact “Chelsea Cummings, +1-202-683-3106, for Don Blankenship,” directing readers to the Washington, DC 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 Royal Embassy of Saudia Arabia and the Kurdistan Regional Government. See www.quorvis.com (visited August 24, 2009). 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 (that had grown to approximately $82 million with interest by Summer 2009 and that the \textit{Caperton v. Massey} case not only was 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 designed to acquire plaintiff Hugh Caperton’s Harman Mining Company and that had eventually forced Caperton into bankruptcy. For the man who fancied himself a champion of a better West Virginia, the judgment against Massey because of Blankenship’s aggressive business practices should have had additional, nonfinancial sting.\footnote{See Caperton v. A.T. Massey Coal Co., Inc., 2008 W. Va. LEXIS 22 at *7-*21 (W. Va. Apr. 3, 2008), 	extit{vacated by 129 S. Ct. 2252 (2009)} (reviewing factual background and history of litigation).}

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 \textit{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 \textit{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 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.\(^\text{15}\)

Although less combative than Blankenship, Justice Benjamin is essentially unrepentant over his failure to recuse, lack of contrition that is perhaps understandable in light of (as he notes) the 5-4 vote on the merits as well as the dissents penned by Justice Scalia, who is almost Blankenship-like in his opposition to the majority’s recusal decision, and Justice Roberts, whose more measured but strong dissent garnered the votes of Justices Alito and Thomas as well as Scalia.\(^\text{16}\) Both dissents in essence found nothing amiss in Justice Benjamin’s decision to participate in \textit{Caperton v. Massey} nor did they criticize the manner of his participation.\(^\text{17}\)

This article takes a different view. Although one hesitates to level strong personal criticism at an individual Justice who may be a perfectly likeable attorney and person\(^\text{18}\) as well as

\(^{15}\) \textit{See Statement of Chief Justice Brent D. Benjamin, June 8, 2009, available at courts.wv.gov} (also noting that “this 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.” \textit{See infra} text accompanying notes 203-210, 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 \textit{Caperton} and that the justice 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.” \textit{See Statement of Chief Justice Brent D. Benjamin, supra.}

\(^{16}\) \textit{See infra} Part 1.G further outlining \textit{Caperton} dissents.

\(^{17}\) \textit{See infra} Part 1.G further outlining \textit{Caperton} dissents.

\(^{18}\) \textit{See Toby Coleman, Brent Benjamin, Political Unknown Runs Against McGraw’s Record, CHARLESTON GAZETTE}, Oct. 23, 2004, at 8A (describing candidate Benjamin, 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 Robinson & McElwee, which seems to be primarily a business, insurance and workers compensation defense firm. \textit{See Robinson & McElwee, PLLC website, www.ramlaw.com} (last visited Sept. 9, 2009) (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). \textit{See Cheryl Caswell, A Rookie with a Mission Benjamin Hopes to Unseat McGraw, Alter Balance on High Court, CHARLESTON DAILY MAIL}, Oct. 18, 2004, at 1A (Benjamin comes from relatively modest middle class background in Marietta, Ohio, attending college and law school at Ohio State, where he played lacrosse as an undergraduate). \textit{But see Caswell, supra} (“The McGraw campaign also argues that Benjamin has spent most of his legal career in Charleston, blocking workers’ compensation claims” and waged character assassination campaigns against Justice McGraw rather than discussing their jurisprudential differences fairly).
an avid amateur archeologist, 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 straight-forward 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 mis-framed legal analysis calls into question his judicial competence, his judicial temperament (being too emotionally wrapped 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 rear-guard action of dissembling defensiveness in response to *Caperton’s* disqualification motion.  

Justice Benjamin’s handling of the recusal decision and the decision itself is so bad as to call 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 performance cries out for at least some consequential discipline and could arguably support impeachment. Unfortunately, the legal system’s treatment to date of Justice Benjamin’s problematic behavior has been a figurative shrug of the shoulders, even by the Court majority that correctly ejected him from further participation in *Caperton*. Worse yet, the *Caperton* dissenters have given legal and political cover to Justice Benjamin’s shameful behavior.

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 judicial consciousness-raising 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. But the *Caperton* affair also reveals the troubling tendency of our
current system to fail to hold judges sufficiently accountable for their failure to observe the established cannons of impartiality.

Part I of this article recaps the *Caperton* litigation, including the Court’s reluctance to criticize Justice Benjamin’s outrageous decision not to recuse. Part II 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 dissenter’s, or even the Court majority, have recognized. Part III 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.


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.” A.T. Massey Coal Company, led by CEO Don L. Blankenship, wanted to acquire the Harman Mine and its high-grade goal, 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. “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.” In 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.

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Caperton’s companies (Harmon Mining Corporation, Harman Development Corporation and Sovereign Coal Sales, Inc.) filed for Chapter 11 bankruptcy in 1998 facing $25 million in claims. Caperton, who had personally guaranteed $1.9 million of his companies’ debt, sued Massey in West Virginia, alleging fraud and tortious interference with contract, obtaining a $50 million jury verdict in 2002 that survived vigorous post-trial attack by Massey. The trial court rejected Massey’s new trial and remittitur motions in June 2004 and in March 2005 denied Massey’s motion for judgment as a matter of law.

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 re-election. Massey CEO Blankenship threw his support to challenger Brent Benjamin. Blankenship contributed the statutory maximum of $1,000 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. In addition, Blankenship spent more than $500,000 independently on

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29 The relation of the Caperton companies and Mr. Caperton is discussed at 2008 W. Va. LEXIS 22 at *7-12.
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, Inc. In addition to Massey, other defendants in the case were Massey subsidiaries Elk Run Coal Co., Inc., Independence Coal Co., Inc., Marfork Coal Co., Inc., Performance Coal Co., Inc., and Massey Coal Sales Co., Inc. 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 U.S. LEXIS 4157 at *9 (2009).
36 Paul N. Nyden, U.S. SUPREME COURT They are not Friends’ Dinner, Campaign Report Shows Connections Between Blankenship, Benjamin, CHARLESTON GAZETTE, Feb. 15, 2009, at 1A (And For the Sake of The Kids specialized in running negative advertisements targeting Justice McGraw); Marcia Coyle, Amici Urge Recusals in
television and newspaper advertisements favoring Justice Benjamin as well as for fundraising on behalf of Justice Benjamin.\textsuperscript{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.”\textsuperscript{38} Justice Benjamin won with slightly more than 53 percent of the approximately 700,000 votes cast.\textsuperscript{39} Although Justice McGraw appears to have had some significant electoral baggage that may have more than offset the advantage incumbents traditionally possess,\textsuperscript{40} the consensus of observers appears to be that Blankenship’s heavy financial support was a key factor in Justice Benjamin’s election.\textsuperscript{41}


\textsuperscript{38} Caperton, 129 S. Ct. at 2257, 2009 U.S. LEXIS 4157 at *10-11.

\textsuperscript{39} See id. at 2257, *11 (“Benjamin won. He received 382,036 votes (53.3%) and McGraw received 334,301 votes (46.7%)”).

\textsuperscript{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. See id. at 2274, *56-57 (Roberts, C.J., joined by Scalia, Thomas and Alito, dissenting) (citations to record omitted):

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.

Justice Roberts’ 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 Jeffrey W. Stempel, \textit{Malignant Democracy: Core Fallacies Underlying Election of the Judiciary}, 4 NEV. L.J. 337 (2004); RUTLEDGE, 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); Lawrence Baum, \textit{Judicial Elections and Judicial Independence: The Voter’s Perspective}, 64 OHIO ST. L.J. 13, Part III (2003) (voters in judicial elections get little information and tend to make uninformed decisions). See also JAMES SAMPLE, LAUREN JONES, AND RACHEL WEISS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006 128 (2006) (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).

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.

\textsuperscript{41} See sources cited supra note 10.
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 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 Monaco while the case was pending. Justice Maynard granted Caperton’s recusal motion. On the other side Justice Starcher granted Caperton’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 as characterizing 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 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

42 See infra Part I.C, discussing in detail the chronology of recusal motions and Justice Benjamin’s responses.
45 The West Virginia Court’s rationale was

. . . first, that a forum-selection clause contained in a contract to which Massey was not a party barred the suit in West Virginia, and second, that res judicata barred the suit due to an out-of-state judgment to which Massey was not a party. 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.

47 Id. at 2258, *12-13.
48 See id. at 2258, *13.
dissent was strong, raising serious questions about the majority’s rulings on the substantive law and complaints about Justice Benjamin’s refusal to recuse pursuant to the West Virginia Code of Judicial Conduct and the Due Process Clause. 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.

D. The Supreme Court Intervenes

Caperton successfully sought certiorari. By this time, the case had become widely discussed in the media. It was thoroughly briefed, including 17 amicus briefs, most of which supported Caperton.

50 See id. (noting dissent concerns); Caperton, 2008 W. Va. LEXIS 22 at *207 (Albright, J., joined by Cookman, J.) (“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 v. Massey was 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, 2008 W. Va. LEXIS 22 at *134, *196-99 (W. Va. April 3, 2008) (Albright J. and Cookman, J., dissenting) (citing Virginia caselaw on res judicata, including Davis v. Marshall Homes, Inc., 576 S.E.2d 504 (Va. 2003)). See generally RICHARD L. MARCUS, ET AL., CIVIL PROCEDURE: A MODERN APPROACH 1094-97 (5th ed. 2009) (outlining established approaches to determining res judicata); FLEMING JAMES, GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE Ch. 11 (5th ed. 2001) (comprehensive review of topic). 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 2008 W. Va. LEXIS 22 at *23-29. 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.

See id. at *24-25.

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 suggest 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 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 also Jeffrey W. Stempel, Completing Caperton and Clarifying Common Sense Through Using the Right Standard for Constitutional Judicial Recusal, REV. LITIG., TAN 35-40 (forthcoming 2009)(discussing procedural questions in Caperton in more detail). See Caperton v. A.T. Massey Coal Co., Inc., No. 08-22, 2009 U.S. LEXIS 4157 at *13-14 (June 8, 2009). See also Caperton v. A.T. Massey Coal Co., Inc., No. 33350, 2008 W. Va. LEXIS 22 (W. Va. Apr. 3, 2008).


In June 2009, the Court by a 5-4 majority sided with Caperton and vacated the decision reversing his $50 million judgment.\(^{57}\) The Court observed that there is 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.\(^{58}\)

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\(^{56}\) Eleven of the 17 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 Litigation Group (supporting Caperton); Committee for Economic Development (supporting Caperton); Center for Political Accountability and Zicklin Center for Business Ethics (supporting Caperton); Washinton Appellate Lawyers Association (supporting Caperton); American Academy of Appellate Lawyers (supporting Caperton), Justice at Stake (supporting Caperton); Brennan Center for Justice at NYU 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 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, Completing Caperton, supra note 50 at notes 42-45 and accompanying text (listing amicus briefs in full and discussing in more detail).

\(^{57}\) See 129 S. Ct. at 2267, 2009 U.S. LEXIS 4157 at *38-39.

\(^{58}\) See id. at 2263-64, *28-29.
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 where a judge had a “direct, personal, substantial pecuniary interest” in a case, a situation reflected in the long-standing 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,”63 a standard with roots in Blackstonian England.64 Operationalizing the standard in *Tumey*, the Court stated that where 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 Ins. Co. 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

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59 See id. at 2262-64, *24-30.
63 See id.
64 See *Caperton*, 129 S. Ct. at 2259, 2009 U.S. LEXIS 4157 at *17* (citing *Tumey v. Ohio*, 273 U.S. 510, 520 (1927) 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.).
65 See id. at 2259, *21-24*. A second established category where 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.” This approach has been recognized since *In re Murchison*, 349 U.S. 133 (1955) and *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971). See id.
67 See id. at 825. Commentators generally supported the *Lavoie* holding and rationale. See, e.g., 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 (1997); Ignazio J. Ruvolo, *California’s Amendment to*
something other than the type of direct pecuniary interest that made a jurist a ‘judge in his own case.’ Nonetheless, the majority found the Benjamin nonrecusal fell easily within the zone of cases requiring recusal on due process grounds. ‘The proper constitutional inquiry is ‘whether sitting 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.’’ 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 Non-Constitutional Recusal Under Federal and State Law to Caperton’s Constitutional Due Process Standard of a “Probability of Actual Bias.”**

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

[quote]
[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned . . . .
[/quote]

Rule 29(b) of the West Virginia Rules of Appellate Procedure provides that

[quote]
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.
[/quote]

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68 See Caperton, 129 S. Ct. at 2260-61, 2009 U.S. LEXIS at *20 (quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986); Ward v. Monroeville, 409 U.S. 57, 60 (1972); and Tumey v. Ohio, 273 U.S. 510, 532 (1927)). Arguably, however, Justice Benjamin’s nonrecusal did violate this norm. Judges who are not re-elected lose their jobs and their income. See Stempel, Completing Caperton, supra note 50, at note 72 and accompanying text (elaborating on this point).


70 See W. VA. CODE OF JUDICIAL CONDUCT CANON 3(E)(1).

71 See W.V.A. R. APP. P. 29(b).

Rule 29(a) states that “[i]n 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.”

As discussed below (text accompanying notes 170-71, infra), Justice Benjamin intimated that the Caperton parties had been untimely in their request for his recusal, suggesting in one of his memoranda rejecting recusal that the motions came almost four years after the 2004 judicial election in which Blankenship’s money 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
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,” enumerating (as does the West Virginia rule) specific examples of when disqualification is required. The ABA and adopting states such as West Virginia have in

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 text accompanying notes 170-71, infra (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 than 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.


73 Rule 2.11 listed the “following circumstances” in which the judge shall recuse when:

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 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].
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.”  

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. Consequently, disqualification based on a violation of

(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

(c) previously presided as a judge over the matter in another court.

See ABA Model Code of Judicial Conduct R. 2.11(A) (1)-(6) (2007) (asterisks for defined terms eliminated) (Terminology section of 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.  

See ABA Model Code Terminology Section, in ABA Center for Professional Responsibility, Model Code of Judicial Conduct 6 (2007). Accord, Republican Party of Minnesota v. White, 536 U.S. 765, 775-79 (2002), noting possible definitions of impartiality, including “openmindedness,” and that “root meaning” of impartiality “is the lack of bias for or against either party to the proceeding.” (emphasis in original). See also id. at 775-76 (citations omitted):

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 judges is essential to due process.

See Flamm, supra note 7, §§ 5.6.4, 5.7; Alfiniti, et al., supra note 7, Ch. 4; Leslie W. Abramson, Judicial Disqualification Under Canon 3 of the Code of Judicial Conduct (2d ed. 1992); Stempel, Chief William’s Ghost, supra note 63, at 883-87; Basset, supra note 7, at 1227; John Leubsdorf, Theories of Judging and Judicial Disqualification, 62 N.Y.U. L. Rev. 237 (1987). See, e.g., Liljeberg v. Health Services 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 Const.
due process as announced in Caperton is somewhat different than disqualification under the ABA Judicial Code and state analogs or under 28 U.S.C. § 455(a) (the general federal disqualification statute) 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) where 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 where 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 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 Co., 609 F.2d 1101 (5th Cir. 1980) (judge faced with disqualification motion should consider how participation in a given case appears to 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 controverted issues, but whether a reasonable member of the public at large, aware of all the facts, might fairly question the Court’s impartiality.”).

77 See 28 U.S.C. § 455(b) (1)-(5) (requiring recusal in essentially the same specific circumstances delineated in the Rule 2.11 of the Model Code. See supra note 64, quoting relevant section of Rule 2.11. Section 455(c) provides that where 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.
78 As set forth in note 73 above, Rule 2.11 of the 2007 ABA Judicial Code requires recusal where 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. 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 Ch. 4 (1974); Stempel, Rehnquist, Recusal, and Reform, 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, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for disqualification.”
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.\textsuperscript{80}

The \textit{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.

\textit{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.\textsuperscript{81}

For purposes of this article the important point, elaborated upon in Part II, is that the Supreme Court’s 5-4 \textit{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 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


Applied to the instant matter, the Court found

that there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent. The inquiry centers on the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.

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

\textsuperscript{81} \textit{See Caperton} at 2264, 2009 U.S. LEXIS 4157 at *29. \textit{See Caperton} at 2267, 2009 U.S. LEXIS 4157 at *38 (italics in original), quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986). The \textit{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 non-constitutional 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.
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 Blankenship. 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 Judicial Code was defensible. As elaborated in Part III, 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 Alito) and Justice Scalia. In the main, the Roberts dissent attacks the majority approach as too indeterminate and unpredictable, which the dissent contends to be 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.

Chief Justice Roberts raised forty questions regarding the wisdom and feasibility of the majority decision, questions that actually appear quite susceptible to basic answers. Primarily,

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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 I.G.


84 See id. at 2274, *57 (Scalia, J., dissenting).

85 See id. at 2267, 2269, *39, *44 (“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.” Also noting “other fundamental questions as well” and listing 40 such question, 80 questions if one counts subparts).

86 See id. at 2267, *39-40 (“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.”).

87 See Stempel, *Forty Questions*, supra note 10. See also Charles Geyh, *Caperton Ruling May Spur States to Enhance Their Process for Judges’ Recusal*, A.B.A.J., June 24, 2009, at 5 (law professor Charles Geyh, a Reporter for the 2007 ABA Model Judicial Code, describes concerns raised in Roberts dissent questions as “alarmist,” contending there is only “remote” risk of difficulties concerning the dissenters). See also id. at 4 (law professor Roy Schotland views dissent’s prediction of doom as “preposterous” but concedes that some Roberts dissent question posed reasonable questions that may need to be answered in future cases). 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, *Forty Questions*, supra note 10, at text accompanying notes 58-113. One
the Roberts dissent contends that whatever benefit 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 “probability 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 to setting aside the tainted Massey victory, Justice Scalia argued that the majority “decision will have the opposite effect.” 89 He contended, without benefit of any cited empirical evidence, that “[w]hat 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

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 qualification 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) (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 v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2267, 2272-73, 2009 U.S. LEXIS 4157 at *39-40, *53-55 (2009) (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). See also id. at 2274, *57 (“opening 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.”).


90 See id.

91 See id.

92 See id. (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 pouring through volumes of campaign finance reports, and many more in contesting nonrecusal decisions through every available means.).

93 See id.
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

Applying the standard of 28 U.S.C. § 455(a) and Rule 2.11 of the Model Judicial Code, it seems inarguable that 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 sped 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 rear guard 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

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94 Honest Justice, supra note 9.
95 See supra note 15 and accompanying text (quoting Benjamin statement in wake of U.S. Supreme Court decision).
96 See supra notes 8-9 and accompanying text, noting comment both favorable to U.S. Supreme Court decision and defending Benjamin’s participation in Caperton.
97 See infra notes 103-04 and accompanying text (Caperton majority careful not to criticize Justice Benjamin to any significant degree while Caperton dissenters defend his failure to recuse).
obviously erroneous decisions and impropriety in remaining on the case and tended to pull punches in their criticism. 99

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 standards, 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. . . . Based 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 might conclude that this is merely good manners on Justice Kennedy’s

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 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.


The dissenters’ observation is correct but tentative, bloodless and tends to miss the point: regardless of the due process issues in the case, there was at all times a command under W. Va. Judicial Code 3(E) that Justice Benjamin step aside if a reasonable person might question his impartiality. 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.” See 129 S. Ct. 2252, 2258, 2009 U.S. LEXIS 4157 at *13 (citing Starcher memorandum in Appendix at 459a-460a).


101 See also id. at 2264-65, *32-33 (“Justice Benjamin did undertake an extensive search for actual bias.”).
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. While Justice Benjamin’s views on
disqualification under the Due Process Clause, although rejected by the Court (he wanted an
actual bias standard; the Caperton majority adopted a probability of bias standard), are arguably
defensible even if incorrect, Justice Benjamin was never asked by the movants to conduct a due
process disqualification inquiry. Justice Benjamin was asked to apply the broader, non-
constitutional 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 appears to completely
have ignored this distinction in its strained rush to praise Justice Benjamin’s self-serving
contemplation of whether he thought he was actually biased because of Blankenship’s multi-
million dollar support.

The Caperton majority opinion reflects how slow jurists are to make negative
conclusions about one another. The dissenter, of course, essentially thought Justice Benjamin
did nothing wrong, another illustration of the practical reluctance judges 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. 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. “It’s 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 if his ego was 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,
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

102 See supra Part II.B, reviewing Roberts and Scalia dissents.
103 See 129 S. Ct. 2252, 2264, 2009 U.S. LEXIS 4157 at *29 (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 Caperton, 129 S. Ct. at 2256-59, 2009 U.S. LEXIS 4157 at *8-15 (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).
105 See, e.g., Liljeberg v. Health Services, 486 U.S. 847 (1988); Aetna v. LaVoie, 475 U.S. 813 (1986); Ward v.
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.  

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 1992, the Court issued a statement regarding recusal policy when children of the justices were affiliated with law forms working on Court matters. 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. This policy, which Justices Blackmun and Souter did not sign, 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. Although one sympathizes with the justices’ concern over strategically manufactured disqualification through law firm hiring, one also wishes the justices had used the opportunity to take a more expansive approach to judicial impartiality. In at least one case, Justice Rehnquist’s refusal to recuse in U.S. 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.

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, 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. 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. Adding arrogance to injury, Justice Rehnquist

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106 See note 260, infra; Stempel, Chief William’s Ghost, supra note 72, at 861 n.129
108 See id.
109 See Gillers, Simon & Perlman, supra note 107, at 724.
110 See Stempel, Chief William’s Ghost, supra note 72, at 913-16 (criticizing Recusal Statement at length).
111 See id. (acknowledging that stronger attitude toward recusal might inconvenience attorney children of justices but concluding that this is small price to pay for more stringent recusal practice 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 uncertain in favor of recusal where his son was equity partner in firm representing Microsoft and was also doing antitrust work for Microsoft regarding other matters).
113 408 U.S. 1 (1972) (decision on the merits ruling that legal challenge to Army’s domestic surveillance program was not justiciable).
115 See Stempel, Chief William’s Ghost, supra note 72, at 852-53 (noting Rehnquist personal involvement in case and public pronouncements suggesting predecision on the matter); Stephen Gillers, Letter to Hon. Howard M.
defended his participation in a memorandum regarded by most commentators as misstating the record and mis-analyzing the issue.\textsuperscript{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.\textsuperscript{117} Justice Scalia not only participated by casting the deciding vote,\textsuperscript{118} but also issued a defensive, arguably caustic memorandum explaining his decision,\textsuperscript{119} further attracting criticism.\textsuperscript{120} Even more than Justice Rehnquist, who seemed

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\textsuperscript{116} See Laird v. Tatum, 409 U.S. 824 (1972) (Mem.) (Rehnquist, J.). 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 v. Tatum. See Stempel, Chief William’s Ghost, supra note 72, at 855-863.

\textsuperscript{117} See Stempel, Chief William’s Ghost, supra note 72, at 900-08 (providing background on case and Scalia refusal to disqualify and attendant scholarly and law reaction).


\textsuperscript{119} See Cheney v. U.S. Dist. Court, 541 U.S. 913 (Scalia, J., Mem.) (denying motion to recuse).

genuinely torn at times over his situation, Justice Scalia expressed implicit contempt for those who questioned his decision.

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 decision even though the closer examination of academic commentators reveals great error by Justice Rehnquist in sitting on the case. With informal gatekeeping like this by the Justices themselves, there is in little de facto check on the self-interested recusal decisions of the justices.

II. 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 supreme court. 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.). Both motions squarely raised the claim that participation by Justice Benjamin would violate Canon 3(E)(1) of the West Virginia Rules of the Supreme Court.

Justice Breyer also defended the Scalia nonrecusal in Cheney. See Freedman, Judicial Impartiality, 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 Freedman, Judicial Impartiality, supra note 116, at 515-34.

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 was entered in September 2004. However, the circuit court’s final order denying Massey post-trial motions was not entered until March 2005. See Caperton v. Massey Docket. 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. Va. R. App. P. R. 3 (2002).

See supra text accompanying notes 113-16; See Stempel, Chief William’s Ghost, supra note 72, at 851-62. See also id. at 813 (letter from Justice Potter Stewart approving of Rehnquist draft memorandum and assessment); n.126 (noting Justice Powell’s not praising Justice Rehnquist for his “splendid memorandum”).
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 where 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

From 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. “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.’”) (emphasis provided)).128

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 caselaw 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 comment about Justice Benjamin’s previous refusals to recuse in Massey cases130 and additionally raised as ground for

127 See, e.g., Motion of Respondent Corporations for Disqualification of Justice Benjamin (Oct. 19, 2005), available at Caperton v. Massey U.S. Supreme Court Appendix at 104a, 106a-110a; Hugh M. Caperton’s Motion for Disqualification Directed to Justice Brent D. Benjamin (Oct. 19, 2005), available at U.S. Supreme Court Appendix 323a, 327a-334a.

128 See Caperton Motion to Disqualify, supra note 127 [previous note], at 329a.

129 See Caperton Motion to Disqualify, supra note 101, at 330a-333a (citing cases and noting at 331a 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 . . .” See id. at 331a (also noting Blankenship’s central status to West Virginia Republican Party of which Benjamin was nominee in race against McGraw). See, e.g., Tennant v. Marion Health Care Foundation, Inc., 459 S.E.2d 374, 385 (W.Va. 1995) (cited in Caperton parties’ motions) (“the standard for recusal [is] whether a reasonable and objective person knowing all the facts would harbor doubts concerning the judge’s impartiality.”); State ex rel. Mantz v. Zakaib, 609 S.E.2d 870 (W. Va. 2004) (cited in Caperton corporate parties’ motion) (same); FLAMM, supra note 8, §§ 5.1-5.8 (2d ed. 2007) (standard for recusal is objective test asking whether 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 See Caperton Motion to Disqualify, supra note 127, at 333a-334a:
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 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 bankruptcy claims differ from Massey’s defense of the Caperton claim, recusal was not required on this basis alone but the existence of the tie was 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 as well and note that a relatively reasonable set of lay observers (the news media) has overtly questioned Justice Benjamin’s ability to be impartial. In Exhibit N, Benjamin shows need for judicial selection reform,” Huntington Herald-Dispatch, September 24, 2005 (emphasis provided).

131 See Caperton Motion to Disqualify, supra note 101, at 333a:

In addition to the negative appearance created by Mr. Blankenship’s massive spending in the 2004 general election campaign, the is also the issue of Robinson & McElwee’s prior representation of Massey Defendant A.T. 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. See, e.g., In re Lady H. Coal. Co., Inc., 193 B.R. 233 (Bankr. S.D. W. Va. 1996).

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. Exhibit M, “Benjamin taps McElwee for Supreme Court clerk,” The Charleston Gazette, January 14, 2005.

132 See W. VA. CODE OF JUDICIAL CONDUCT CANON 3(E) (1) (b).

Although Blankenship is technically not a party to the case and his interest is 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 important, for all practical purposes Blankenship is Massey, his picture and position prominently touted on the company’s website. See Corporate Governance, MASSEY ENERGY. http://phx.corporate-ir.net/preview/phoenix.zhtml?q=c=102864&p=irol-govBio&ID=140028 (last visited Sept. 9, 2009).
addition, the movants have cautioned Justice Benjamin that his subjective believe in his impartiality, even if sincere and accurate, does not permit his participation in the case if outside observers would perceive the situation differently.

Although Justice Benjamin may have unwittingly mischaracterized the legal test for recusal in off-the-cuff public comments, the Caperton motions would give him the opportunity to research the issue, reflect, and presumably correct 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 motions. 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 “no objective information . . . to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial in his consideration of matters related to this case. What is amply present in the materials filled is surmise, conjecture and political rhetoric.”\textsuperscript{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 (e.g., $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.\textsuperscript{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.\textsuperscript{136} Even when nodding in this direction, Justice Benjamin mangles the concept. He states that the motions fail 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.\textsuperscript{137}

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.\textsuperscript{138} Then, in a marvelous non sequitur, Justice Benjamin devotes a long paragraph to \textit{United States v. Haldeman},\textsuperscript{139} in which federal district judge John Sirica refused to cease presiding over a Watergate-related prosecution directed toward President Nixon’s former White House Chief of Staff and others allegedly involved in the caper, which

\textsuperscript{134} See Memorandum of April 7, 2006 from Brent D. Benjamin, Justice to Rory L. Perry, II, Clerk re Caperton v. Massey and Underlying Plaintiffs’ Motion to Disqualify Justice Brent D. Benjamin.
\textsuperscript{135} See Benjamin memorandum of April 7, 2006; sources cited supra note 54.
\textsuperscript{136} See Benjamin memorandum of April 7, 2006; sources cited supra note 54.
\textsuperscript{137} See Benjamin memorandum of April 7, 2006; sources cited supra note 54.
\textsuperscript{138} See Benjamin memorandum of April 7, 2006 (labeling recusal motion as one of “surmise, conjecture and political rhetoric”); sources cited supra note 54.
\textsuperscript{139} 559 F.2d 31 (D.C. Cir. 1976), note 360.
\textsuperscript{140} See note 140, supra describing Watergate.
involved a burglary at the Democratic Party’s national headquarters (in Washington D.C.’s 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 trial, a point where the alleged biases against the defendants were the product of knowledge acquired through the judicial proceeding 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

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 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

142 See Liteky v. United States, 510 U.S. 540; 114 S. Ct. 1147 (1994); FLAMM, supra note 8, Ch. 4. 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 where the antipathy is deemed sufficiently pronounced to jeopardize the right to a fair trial. See, e.g., Haines v. Liggett Group, 975 F.3d 81, 87-88 (3d Cir. 1992) (disqualifying trial judge in tobacco product liability case in which judge, based on discovery controversies in case, labeled tobacco industry from 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 appears to have transformed him from jurist to advocate for plaintiffs) (“[t]he record demonstrates overt acts by the district judge reflecting great bias [and] substantial disregard for the mandate of this court”; “the 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.”).
143 See FLAMM, supra note 8, Ch. 4.
144 See 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, available at U.S. Supreme Court Appendix, page 433a.

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, March 6, 2008, http://www.wvrecord.com/news/208928-supreme-court-says-it cant-investigate
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 actually required that he step aside only if it was 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 criticized the movants for failing to introduce new information and

145 See id. at 438a.
146 See Memorandum of Jan. 18, 2008 from Brent D. Benjamin, Justice to Rory L. Perry, II, Clerk in Caperton v. Massey regarding Motion of Disqualification of Justice Brent D. Benjamin filed by Appellees Harman Development Corporation, et al. on January 17, 2008, available at Supreme Court Appendix at 442a (“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 [that] ‘little 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 this cases.’”) (quoting April 2006 memorandum).

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 nothing 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 has a case before the Supreme Court in which it hopes Justice Benjamin will provide a supporting vote to relieve it of a multimillion judgment; that 100 news accounts have noted the Blankenship-Benjamin relationship; that Justice Benjamin’s ability to be impartial in Blankenship matters has
making the motion “after the undersigned filed his concurring opinion to that majority opinion.” 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, 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.” 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. Despite this generally helpful turn, Justice Benjamin refuses to acknowledge being 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 memorandum, where his own conduct was subject to scrutiny, Justice Benjamin botched this basic legal distinction.

In his memoranda, Justice Benjamin has an annoying tendency to refer to himself in the royal third person: “this Justice,” “the undersigned,” etc. Although pomposity is not an impeachable offence, the tone of the memorandum 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.

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149 See id. at 2-3, 443a-444a.

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 outsider 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 Memorandum of January 18, 2008, supra note 146, at 2-3, 443a-444a, citing Charleston Gazette article quoting lawyer for environmental department.
that so much monetary aid from an interested person might 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 anti-democratic 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 campaign to generate a veto power over judges by the creation and maintenance of public controversy in media outlets, and form attempts to engage in “judge-shopping” – a practice universally condemned.\textsuperscript{151}

* * *

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 position in this case would create a system where there would be almost no limit to recusal motion and popularly-elected courts of this State would be open to “judge-shopping” under the guise of litigation strategy.\textsuperscript{152}

Now, that’s chutzpa! 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 observers)\textsuperscript{153} 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 that 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.

Logically, Justice Benjamin should have surveyed legal and public sentiment on the issue rather than clinging to one particularly favorable news account. His error is 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 is relevant, than 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. \textit{See supra} note 129 (motions for disqualification refer to approximately 100 media accounts raising matter).

\textsuperscript{151} See Memorandum of January 18, 2008, \textit{supra} note 146, at 3, 444a.
\textsuperscript{152} See id. at 3-4, 444a-445a.
\textsuperscript{153} \textit{See supra} Part I.B (describing hard-fought, arguably nasty and deceptive 2004 election won by Benjamin).
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 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.\(^{154}\)

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. Haldeman* precedent.\(^{155}\)

Under these circumstances, Justice Benjamin is a bit like the child that 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.\(^{156}\)

Undaunted by a second rejection of their disqualification motion, the Caperton parties in March 2008 filed another recusal motion\(^{157}\) that, 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 Boulder-Colorado based market research firm, to conduct random telephone interviews with West


\(^{156}\) 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 23 years, I’m 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 lofty 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.

\(^{157}\) *See* Second Renewed Joint Motion For Disqualification of Justice Benjamin by Hugh Caperton et al., (March 28, 2008), available at Supreme Court Appendix at 463a.
Virginia residents. Respondents were asked their knowledge of an 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 percent were unaware of him, suggesting that open insertion into the political process does not make one a household word).

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

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?

Sixty-six (66) percent of the respondents said they had doubts while only 15 percent thought Justice Benjamin could be impartial under these circumstances. 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.

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. 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

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158 See Affidavit of Robert Drake, attached to Second Renewed Joint Motion For Disqualification of Justice Benjamin by Hugh Caperton et al., supra note 124 [previous note] available at Supreme Court Appendix at 469a. Drake was at the time Senior Vice President of Talmey-Drake.
159 Id. ¶ 8.
160 As a benchmark of sorts, the respondents were asked about long-time 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 most richest, most famous families, with more than 60 percent of the group expressing positive views of the senator and only two percent unaware of him. See Drake Affidavit, supra note 158, at 474a (Appendix to Affidavit reproducing survey instrument).
161 See id. at 475a.
162 See id. 125, at 475a-476a.
163 See id. at 476a.
164 See id.
165 See id.
166 See id. at 477a.
167 See Second Renewed Joint Motion For Disqualification of Justice Benjamin by Hugh Caperton et al., (March 28, 2008), available at Supreme Court Appendix at 463a.
168 See Memorandum of April 3, 2008 from Brent D. Benjamin, Justice regarding Caperton v. Massey Second Renewed Joint Motion for Disqualification of Justice Benjamin.
only days before the Court issued its new decision on the merits of the case on April 3, 2008. The understandably annoyed justice was rushing to deny the recusal in time for the opinion’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

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

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.

170 Drake Affidavit, supra note 158, at 2, 483a.
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.\textsuperscript{171}

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 by telling the respondents 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 on to 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.\textsuperscript{172}

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.\textsuperscript{173}

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

\textsuperscript{171} Id. at 2, 483a.
\textsuperscript{172} 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 is 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, \textit{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 DAILY MAIL, Dec. 30, 2008, at 1C. Cynics among us might wonder whether Justice Maynard would have stepped aside had he not been facing re-election.}

\textsuperscript{173} Drake Affidavit, \textit{supra} note 158 at 2, 483a.
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 wining and dining a justice on the Riviera as well as giving 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. 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. 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.

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. 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.

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. 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?” 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

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174 See id. at 475a-477a.
175 See id.
176 See id.
177 See id. at 477a.
178 See generally RUSS DEWEY, PSYCHOLOGY AND SCIENCE, Ch. 1, available at http://www.psywww.com/intropsych/ch01_psychology_and_science/push_polls.html (last visited Sept. 9, 2009) (explaining push polls as “thinly disguised attempts to sway the opinion of the people who are being questioned.”).
Consequently, one would reasonably expect that when the respondent is immediately then 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 non-inflammatory, 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.

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 reversing 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.

The majority also ruled that the controversy was subject to an arbitration clause and thus never should have been litigated at all. 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.

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, Justice Benjamin, obviously hoping to stave off further review, issued a lengthy written concurring opinion defending the majority’s res judicata and arbitration rulings as well as reiterating his view that his disqualification was required.

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 where judges are elected. 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

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180 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 Sen. Ensign if they were aware that he has apologized, expressed regret, and has characterized the payments ($96,000) 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 179.
182 See id. at *24-*106.
186 See supra Part I.C.
Blankenship-related cases as well as time to write at length. In addition, he likely was writing for the Supreme Court, hoping that the petition filed three weeks earlier would be denied. One might have expected a better defense of his non-disqualification.

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.187 Perhaps more important, 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).188 He blithely concludes because 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.”189 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.190 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

187 See Caperton v. A.T. Massey Coal Co., Inc., 2008 W. Va. LEXIS 123 (July 28, 2008) (Benjamin, Acting C.J., concurring) at *40 (“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 consideration have, it seems from recent behaviors, institutionalized and entrenched themselves in our Court”); at *34 (“The very notion of appearance-driven disqualification 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’’); at *31, n.11 (criticizing Caperton parties for use of Talmey-Drake survey and again labeling it a “push-poll” (see supra notes 173-78 and accompanying text).

188 See 2008 W. Va. LEXIS 123 at *32 (“Nor does the dissenting opinion, or the appellees herein, claim any actual bias or prejudice on my party in this case.”); at *34 (incorrectly accusing dissenting justices of advancing subjective test for judicial disqualification); at *41-*49 (addressing due process recusal even though all efforts to disqualify him in case were based on Code of Judicial Conduct’s reasonable question as to impartiality standard); at *44 (focus in judicial disqualification “is on what actually affects a judge’s decision-making” rather than appearances or questions as to impartiality).

In addition, Justice Benjamin pays homage to the notion of a “duty to sit” (2008 W. Va. LEXIS at *41-*43), a doctrine abolished by the ABA Model Code in 1972 and federal recusal law in 1974. See generally Stempel, Chief William’s Ghost, supra note 72(tracing history and status of concept; criticizing concept for creating presumption of deciding close cases against recusal when public confidence in courts is better served when close cases decided in favor of recusal). Although the doctrine appears to remain good law in West Virginia and Justice Benjamin seems to recognize its abolition at the federal level (2008 W. Va. LEXIS 123 at *49) (but only conceding that doctrine “arguably” abolished when it was in fact eradicated more than 30 years ago). There remains a judicial responsibility to hear and decide cases, currently codified in Rule 2.7 of the 2007 ABA Model Code. But this principle yields to the recusal requirements of Rule 2.11 of the Code and there no longer is any presumption against disqualification in close cases. See Stempel, Chief William’s Ghost, supra, at 827-29.

189 See 2008 W. Va. LEXIS 123 at *88.

190 See id.
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.\textsuperscript{191}

Justice Benjamin’s tardy tag-along attempting to lobby the Supreme Court is a problematic exercise of judicial power\textsuperscript{192} 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 suggests that Justice Benjamin is not dumb, his continued clinging 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 citation 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.\textsuperscript{193} But his defense is largely based on simply citing cases expressing broad principles of these areas of law.\textsuperscript{194} Nowhere in the 27-page concurrence does he explain why he thinks it is the case that the Virginia breach of contract action sufficiently involves the same claim so as to preclude the fraud and tortuous interference claims brought by Caperton in West Virginia.\textsuperscript{195} 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”\textsuperscript{196} is sufficiently broad to encompass the West Virginia litigation, which in essence contended (successfully before a jury of apparently

\textsuperscript{191} See 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 \textit{Caperton}, there is no question that he erred.

\textsuperscript{192} 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 dissent of Justices Albright and Cookman that appeared to so enrage him. 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.


\textsuperscript{194} See 2008 W. Va. LEXIS at *11-*27 (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 \textit{Caperton v. Massey} and attempt to persuade the reader that the test had been satisfied). \textit{See} 2008 W. Va. LEXIS at *28-*31 (extensively citing cases supporting de novo review of arbitration clauses but failing to explain why the arbitration clause at issue in \textit{Caperton v. Massey} applied to the dispute).

\textsuperscript{195} See 2008 W. Va. LEXIS at *11-*27.

reasonable people) that Blankenship and Massey schemed to destroy Caperton and his companies.\textsuperscript{197}

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.\textsuperscript{198} 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 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 27 pages, this question is never addressed. After four years of hard-fought campaigning and litigation, Justice Benjamin continues to articulate the wrong legal standard.

As Justice Oliver Wendell Holmes observed, even a dog distinguishes between being stepped on and being kicked.\textsuperscript{199} 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 20 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 straight-forward. In the nearly 15 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 a “probability of bias,” the standard adopted by the U.S. Supreme Court for recusal governed by the Due Process Clause).\textsuperscript{200} 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 33-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 (represented by some of the best attorneys in the nation) and a law clerk who was a founding partner in a successful firm.\textsuperscript{201} 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

\textsuperscript{197} See 2008 W. Va. LEXIS at **28-*31
\textsuperscript{198} See supra text accompanying notes 198-99.
\textsuperscript{200} See 129 S. Ct. 2252 (2009).
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 gives 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.\(^{202}\)

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 \textit{Caperton v. Massey}\(^{203}\) raise serious question 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 for Justice Benjamin’s atrocious conduct in \textit{Caperton v. Massey}\(^{203}\), 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 III, 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 attempt to influence the outcome of \textit{Caperton v. Massey}\(^{204}\) before the U.S. Supreme Court. On March 2, 2009, while \textit{Caperton}\(^{203}\) 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.”\(^{204}\) State supreme courts are

\(^{202}\) See \textit{infra} text accompanying notes TAN ??, \textit{infra}.  
\(^{204}\) See Summary of Chief Justice Benjamin’s Dispositive Voting Record Regarding Massey Energy Cases form 01/01/2005 to 12/31/2008. The press release is issued on 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.
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, non-recusing jurist hardly needs a public relations campaign on his or her behalf.

The press release was obviously designed to again 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.

The informational content in the news release is that overall Justice Benjamin voted against Massey-related (i.e., Blankenship-related) entities more than 80 percent of the time while on the Court and that these Massey losses involved millions of dollars in liability. Although this is interesting and perhaps relevant at the margin, it is 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.

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 unanimous while another as decided in a 4-1 vote and a fourth by a 3-

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205 See supra text accompanying notes 158-73, discussing survey research employed by Caperton parties in support of their third disqualification motion.
207 If there had been unwitting participation in a case that was later recognized (e.g., 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 where the judge had voted against the company, particularly where the overall court vote was not close or where the result was not considered particularly debatable. But this was not Caperton v. Massey. As discussed above, Caperton involved nearly four years of active resistance to recusal 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.
208 See May v. Bd. or Review, 664 S.E.2d 714 (W. Va. 2008) (reversing denial of unemployment benefits by 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) (5-0 vote answering certified question regarding state court jurisdiction over silica dust claim) (related to Helton v. Reed, note 209 below). See also Press Release, supra note 206. 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.

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 nine dollars an hour working as a maid at a “three story home owned by Rawl Sales in Sprigg, West Virginia” that was occupied by Blankenship. The case is unclear as to whether Blankenship paid rent or received the home as a business perk. Over 20 months, Blankenship steadily increased duties and demands for which May received no additional compensation. In addition, as the Court majority noted with some restraint, May “also submitted rather colorful evidence . . . of 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.”.

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Concurring, Justice Albright (who voted against Massey in Caperton) and Starcher (who recused from the second Caperton decision on the merits) were more graphic, noting evidence of record that Blankenship had “physically grabbed” 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.” See 664 S.E. 2d at 719, 720 (Allbright, J. & Starcher, J., 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. at 720. 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. at 720.

Alas, uneasy lies the head that wears a crown. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE FOURTH act 3, sc. 2. 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. While litigants asserting First Amendment rights are often less than exemplary characters (See Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (reversing libel victory for political activist the late Rev. Jerry Falwell against Hustler publisher Larry Flynt, about which Flynt stated “If the First Amendment will protect a scumbag like me, then it will protect all of you. Because I’m the worst.” See Frank Rich, Pornographer Glorifies Constitution, THE CHATTANOOGA TIMES, Oct. 15, 1996, at 9A). 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. And at least Flynt had some perspective about himself.

209 See Helton v. Reed, 638 S.E.2d 160 (W. Va. 2006) (4-1 vote against Massey, reversing decision below where it was defendant in silica dust claim, answering certified question regarding state court jurisdiction); U.S. Steel Mining Co. LLC v. Helton, 631 S.E.2d 559 (W. Va. 2005) (reported as 3-1-1 vote in press release because Justice Benjamin concurred in part and dissented in part) (coal company challenge to state severance tax formula). See 631 S.E.2d at 570 (Benjamin, J., concurring in part and dissenting in part). Justice Maynard, who ultimately recused in Caperton because of his social connections to Blankenship (see note 10, supra) dissented and supported Massey. See 631 S.E.2d at 568 (Maynard, J., dissenting).

210 See Press Release, supra note 206.
Preservation of confidence in the judiciary requires that the public be confident that judges hearing a case will be especially impartial about close of difficult cases, which are the type of cases where 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 since 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 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 nor 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’ well-known (and criticized) analogy to a baseball umpire, Justice Benjamin and his colleagues get to call their own balls and strikes.213

This lack of oversight is itself highly regrettable, but common in many courts, most notoriously the United States Supreme Court.214 Such a system is indefensible – but it should at least carry with it the notion that since each judge’s recusal decision is individual and that 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 extra-record impact on a pending U.S. Supreme Court case.

212 See Press Release, supra note 206.
213 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); 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. COMM. 701, 701-705 (2007) (noting public relations success of Roberts’ umpire analogy but finding it misleading and inaccurate); Stephen J. Choi & G. Mitu Gulati, Ranking Judges According to Citation Bias As a Means to Reduce Bias, 82 NOTRE DAME L. REV. 1279, 1729-80 (2007) (same). 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.”).
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 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 percent (2 dissenting justices) of the Court as well as a disqualified member of the Court (Justice Starcher) strongly opposed Justice Benjamin’s failure to recuse.\(^{215}\)

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 non-disqualification 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.

**III. What Punishment Should Fit This Crime?**

As Professor Miller’s survey of bad judging and the activity of state judicial discipline commissions suggests, there seems no shortage of improper judicial conduct as well as significant, if imperfect, efforts to detect and police such misconduct.\(^{216}\) 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 behavior\(^{217}\) and cites examples of its detection

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\(^{216}\) See Miller, *supra* note 8.

\(^{217}\) See *id.*, categorizing types of judicial misbehavior as: (1) corrupt 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.
and punishment consuming 242 footnotes.\textsuperscript{218} Only three of these disciplinary example footnotes concern judicial “conflict of interest” and disqualification.\textsuperscript{219} Although some of the other examples of punishment for bad judging also touch on Justice Benjamin’s errors in \textit{Caperton} (e.g., incorrect framing 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.\textsuperscript{220}

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 \textit{Caperton} the Supreme Court is unwilling to be very critical of even extreme conduct, with nearly half 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 under-criticism) 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 \textit{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 \textit{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;\textsuperscript{221} Recusal and Disqualification;\textsuperscript{222} Appeal;\textsuperscript{223} Mandamus;\textsuperscript{224} Liability;\textsuperscript{225} and Discipline.\textsuperscript{226} In addition, the

\textsuperscript{218} See id. at 433-56.
\textsuperscript{219} See id. at 450-51.
\textsuperscript{220} An August 31, 2009 LEXIS search for cases with “Judicial Conduct” or “Judicial Discipline” in the case name and mentioning disqualification or recusal produced only 96 citations, many of which were federal court cases involving constitutional challenges to discipline commissions where 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 25 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 (note 264, infra), in disciplinary actions and advisory opinions not contained in the Lexis or Westlaw databases, improper failure to recuse may be the source of significant admonition or discipline. 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. \textit{See Index and Synopses of Advisory Opinions and Admonishments by the West Virginia Judicial Investigation Commission}, \url{http://www.state.wv.us/wvsca/JIC/advop.htm}, (pages 5-19 of listing).

These opinions and admonishments as 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 caselaw might initially suggest. However, this information also provides additional evidence of Justice Benjamin’s error in \textit{Caperton}. There appears to be a legal culture of taking recusal seriously in West Virginia, one which Justice Benjamin clearly and repeatedly violated.

\textsuperscript{221} See ALFINI, ET AL., supra note 8, Ch. 15; Miller, \textit{supra} note 8, at 458-60.
efficacy of informal remedies (e.g., judicial colleagues counseling recusal or other restraint) cannot be discounted, although such informal mechanisms were obviously ineffective in Caperton. Professor Miller also suggests systematic remedies such as electoral reform, increasing use of merit selection, greater dissemination of information regarding judges, including published ratings of the judges, judicial education, expanded grounds for challenging the judge initially assigned to a case and his own proposed “panel-exclusion approach.”

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. So, too, with revision of methods of judicial selection and recusal reform generally. 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 standard. In the future, all of these reforms may make another Caperton case less likely.

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222 See Miller, supra note 8, at 460-62.
223 See id. at 562-63.
224 See id. at 463-64.
225 See ALFINI ET AL., supra note 8, Ch. 14; Miller, supra note 8, at 464-65.
226 See ALFINI ET AL., supra note 8, Ch. 13; Miller, supra note 8, at 465-69.
228 See Miller, supra note 8, at 469-471.
229 See id. at 471-474.
230 See id. at 474-477.
231 See id. at 477-79. Professor Miller correctly concludes that improved judicial education may have limited impact in situations where a judge errs not because of inadequate knowledge or training but because of psychological orientation or problems. See id. at 479 (“education 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.”).
232 See id. at 480-82. See also Deborah Goldberg, James Sample & David E. Pozen, 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 Judicial Code as well as judicial education as means of alleviating problem of judges unable to recognize questions as to their impartiality).
233 See Miller, supra note 8, at 482-87 (outlining approach, which operates in manner similar to selection of arbitrators under American Arbitration Association methodology, with parties permitted to strike unacceptable judges coupled with systematic monitoring to determine degree to which certain judges are avoided by the parties if possible).
234 See supra note 24 regarding Nevada Judicial Code Revision Commission’s response to Caperton; John Gibeaut, Caperton Capers, Court’s Recusal Ruling Sparks States to Mull Judicial Contribution Laws, A.B.A.J., Aug. 2009, at 21 (noting renewed interest in judicial campaign spending limits or expanded disqualification based on campaign support in response to Caperton.).
235 See Nathan Koppel, Ruling on ‘Probable Bias’ Spotlights Political Reality, WALL ST. J., June 10, 2009, http://online.wsj.com/article/SB124459013388500007.html.html (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).
236 However, it may be that insufficient judicial training and consciousness-raising exists today. Judges may be unduly unaware of the cognitive errors commonly made by people or may incorrectly think themselves largely
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 12-year term and it was in this inaugural election that he received the benefit of Don Blankenship’s largesse.\(^{237}\) Although those infected chickens have come home to partial roost, Justice Benjamin still has more than 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 re-election 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.\(^ {238}\) 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 Schwartzzenegger 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.\(^ {239}\)

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 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.\(^ {240}\) 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.

\(^{237}\) See supra Part I.B, describing 2004 campaign and Benjamin election to 12-year term.

\(^{238}\) See *ALFINI ET AL., supra* note 8, §15.06 at 15-11.

\(^{239}\) See *id.*

\(^{240}\) See Gibeaut, *supra* note 234.
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.\footnote{As discussed in Parts I and II, supra, the recusal aspects of the *Caperton* litigation have extended over more than three years and involved several motion, 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 associated 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.} 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.

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 decreased independence would likely be too much.\footnote{See ALFINI, ET AL., supra note 8, §§ 14.01-14.05; 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. See, e.g., Mireles v. Waco, 502 U.S. 9 (1991) (judge immune for ordering seizure of attorney failing to appear for calendar call); Stumpf v. Sparkman, 433 U.S. 349, 362 (1978) (judge 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) (judicial “immunity applies even when the judge is accused of acting maliciously and corruptly”).} 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.\footnote{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, §§ 15.02-15.05 (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.} 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 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.\footnote{See ALFINI, ET AL., supra note 8, § 15.02; 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).} 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.\textsuperscript{245}

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.\textsuperscript{246} Federal impeachment law is limited to treason, bribery and other high crimes and misdemeanors.\textsuperscript{247} 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.”\textsuperscript{248} West Virginia includes “maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor” in its criteria that may support impeachment.\textsuperscript{249}

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 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 rear guard public relations action attempting to influence the U.S. Supreme Court in his favor.\textsuperscript{250} His zealotry in refusing to disqualify makes this case different than ordinary judicial error for which impeachment is inappropriate. His repeated application of the wrong legal standard raises

\textsuperscript{245} See generally ALFINI, ET AL., supra note 8, Ch. 15; CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM 119-25 (2006); Miller, supra note 8, at 459 “Impeachment inevitably threatens judicial independence. See id. (“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).

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 the press release he issued under the auspices of the Court, he has participated in roughly 20 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 votes 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 to extreme a remedy to me.

\textsuperscript{246} See ALFINI, ET AL., supra note 8, §§ 15.03-15.04 (noting comparatively rare use of impeachment in both federal and state systems, with impeachment usually reserved for instances when judge is accused of criminal conduct or misuse of office rather than error in adjudication); GEYH, supra note 245, at ?? (same); Miller, supra note 8, at 459-60 (same, 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; noting instances where 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).

\textsuperscript{247} See ALFINI, ET AL., § 15.04 at 15-5.

\textsuperscript{248} See id.

\textsuperscript{249} See W. VA. CONST. art. IV, § 9.

\textsuperscript{250} See supra Part II, reviewing protracted history of Justice Benjamin’s refusal to disqualify in Caperton.
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 misfeasance. 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. 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 unconscionable Justice Benjamin’s conduct in *Caperton*. 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 to 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 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. 252

Judicial discipline, however, seems more than apt for Justice Benjamin. Without question, he has violated his state’s and the ABA’s Code of Judicial Conduct. West Virginia, like all states, has a judicial conduct or judicial discipline commission. 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.

251 Although he clearly intended his actions that were violations of the rules. Further, as discussed above (Part II, supra), 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. 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.

252 Legislative address usually involves both houses of the legislature requesting the governor remove the judges. “The 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 offences. [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.” See ALFINI, ET AL., supra note 8, § 15.05 at 15-10 to 15-11.

253 See text accompanying notes 127-29, supra, discussing Justice Benjamin’s violations of W. Va. Code Jud. Conduct 3(E)(1) and general canons of judicial ethics.

254 See W. VA. CONST. art. VIII, § 8; RULES OF JUDICIAL DISCIPLINARY P. R. 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, Judicial Conduct Reporter* 6 (Fall 1994), reprinted in JUDITH ROSENBAUM, PRACTICES AND PROCEDURES OF STATE JUDICIAL CONDUCT ORGANIZATIONS (1990 with 1997 update). See also ROSENBAUM at 3-4 (describing former two-tier structure in West Virginia).

255 See ALFINI, ET AL., supra note 8, §§ 13.01-13.05, and at 13-2 (judicial conduct commissions are “the primary means by which judicial conduct is regulated and discipline imposed.”); Miller, supra note 8, at 466 (“Commission
The commission responds to complaints or based on its knowledge of possible violations, filing charges and adjudicating claims in the manner of a criminal prosecution. Evidence is taken, normally in a public hearing, much like a civil or criminal trial (although generally with reduced due process protections for the judge under investigation), and the commission renders a decision subject to further judicial review, usually by the state supreme court.

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. There thus exists a forum for examining a jurist’s refusal to recuse in a forum in which both judge and critics can present their respective members are drawn from the judiciary, the bar, and the general public. In some states the judicial 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 case, there are two commissions – one to investigate and prosecute complaints, the other to act in a judicial capacity to determine punishment.”). West Virginia’s judicial commission has full prosecutorial and sanctioning authority subject to Supreme Court. See W. VA. CONST. art. VIII, § 8; R. OF JUDICIAL DISCIPLINARY P. R. 4.12. Accord, Structural Changes, supra note 254, at 6 (discussing variety of disciplinary remedies in West Virginia) in ROSENBAUM, supra note 254; IRENE A. TESTOR & DWIGHT B. SINKS, JUDICIAL CONDUCT ORGANIZATIONS 11 (2d d. 1980) (Table 1).

works 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, the 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.


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 . . . .

cases – provided a critic will step forward or the commission is willing to launch a proceeding on its own initiative. Although judicial discipline for failure to recuse or improper recusal behavior is not commonplace, it is far from unprecedented, especially in West Virginia. 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.

Although the existence and impact of these commissions has generally been regarded as a positive development, they have been commonly criticized as insufficiently aggressive and unduly friendly toward judges, as well as lacking sufficient resources to consistently bring necessary claims. 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

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262 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. 263 See Miller, supra note 8, at 450-51; and text accompanying notes 221-33, supra (setting forth additional examples of discipline based in significant part on improper failure to recuse). See, e.g., Huffman v. Ark. Judicial Discipline and Disability Comm’n, 42 S.W.3d 386, 388-91 (Ark. 2001) (judge admonished 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); In re Sullivan (Cal. Comm’n on Jud. Performance, May 17, 2002) (judge criticized for presiding over probate matter despite having administered decedent finances, witnessing will and being substitute executor), available at http://cjp.ca.gov/CNCensureRTF; In re Forde, No. 96-311 (Ark. Jud. Discipline and Disability Comm’n, Sept. 22, 1998) (violation of Code where judge did not disclose leasing office space to attorney appearing before judge), available at http://www.state.ar.us/jddc/pdf/sanctions/Ford96.311.pdf; In re Durr, No. 72 CC-1 (Ill Jud. Inquiry Bd., Aug. 1, 1973) (judge suspended for failing to disclose that opposing counsel was his business partner; summary available at http://www.state.il.us/jib/summary.htm.; Jose Arballo, Jr., *Ex-Judge Censured by Panel, PRESS-ENTERPRISE* (Riverside, CA), May 18, 2000 at B01 (judge bought home from person whose conservatorship judge had processed). 264 As previously noted (note 220, supra), 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, e.g., Index and Synopses of Advisory Opinions and Admonishments by the West Virginia Judicial Investigation Commission, http://www.state.wv.us/wvsca/JIC/advop.htm. See, e.g., 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 (Commission opinion that “judge 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 (Judge must recuse upon request in cases involving attorney who represented judge in adoption of child”); Matter Dated December 12, 1995 (“Attorneys appearing before a judicial officer may serve on that judicial offer’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 about whether to move to disqualify the judicial officer from that particular case.”); Matter Dated Feb. 19, 1996 (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). 265 See 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”). 266 See id. at 467-68. 267 See id.
conduct of litigation” in a manner that threatens judicial independence. “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.”

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. As in most areas of law, “the line between these two is not always clear-cut.” 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.

However, as detailed above, Justice Benjamin’s error was not just a garden variety application of law to facts that my 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. 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, public reprimand or censure, required legal education, a fine, suspension, temporary or permanent reassignment, or even

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268 See id. at 468.
270 See Miller, supra note 8, at 468.
272 See Miller, supra note 8, at 469.
273 See supra Part I.G (describing Caperton dissenter’s resistance to removing Justice Benjamin from case and defense of very broad judicial authority to sit on cases involving large campaign contributors).
274 See supra, Part II (assessing and criticizing Justice Benjamin’s performance regarding recusal in Caperton).
275 See ALFINI, ET AL., supra note 8, §§ 13.04-13.11; Miller, supra note 8, at 450.
276 See ALFINI, ET AL., supra note 8, §§ 13.04-13.11; Miller, supra note 8, at 450. See, e.g., In Re Hart, 849 N.E.2d 946 (N.Y. 2006) (judge censured for erring in use of summary contempt power); Huffman v. Ark. Judicial Discipline and Disability Comm’n, 42 S.W.3d 386, 388-91 (Ark. 2001) (admonishment for failure to disclose investment in litigant); In re Kinsella, 476 A.2d 1041 (Conn. 1984) (probate judge censured for mishandling estate of incapable person); Jose Arballo, Jr., Ex-Judge Censured by Panel, PRESS-ENTERPRISE (Riverside, CA), May 18, 2000 at B01 (judge bought home from person whose conservatorship judge had processed).
277 See ALFINI, ET AL., supra note 8, §§ 13.04-13.11; Miller, supra note 8, at 450. See, e.g., Assad v. Nevada Comm’n on Jud. Discipline, 185 P.3d 1044, 1054 (Nev. 2008) (reversing Commission decision of censure; judge required to apologize and obtain judicial education at own expense); Mosley v. Nevada Comm’n on Jud. Discipline,
removal from the bench.281 Although the cases are not legion, there is nonetheless substantial precedent for removal of judges who improperly fail to disqualify themselves.282

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 unrepentent refusal to admit his ineligibility to participate in Caperton.283 However, all of the other potential remedies beyond private reprimand (a figurative slap on the risk that accomplishes less than the public scrutiny

102 P.3d 555, 565 (Nev. 2004) (judge required to attend judicial education course, pay $5,000 fine to library and censured).

278 See ALFINI, ET AL., supra note 8, §§ 13.04-13.11; Miller, supra note 8, at 450. See, e.g., Mosley v. Nevada Comm’n on Jud. Discipline, 102 P.3d 55, 565 (Nev. 2004) (judge fined $5,000 for misuse of judicial letterhead, arranging release of arrestee, and delay in recusing self from case). See also 102 P.3d at 566 (Maupin, J., with Becker, J and Puccinelli, D.J, dissenting as to release of arrestee on own recognizance due to established local custom in this regard); 102 P.3d at 925 (Rose, J., dissenting in part as to ex parte communications and presiding over matter); 102 P.3d at 926 (Gibbon, J., dissenting on ground judge was precluded from presenting proffered expert).

In the interests of disclosure: I was the expert witness proffered but not admitted by the Commission.


280 See ALFINI, ET AL., supra note 8, §§ 13.04-13.11; Miller, supra note 8, at 450. See, e.g., Thomas v. Judicial Conduct Comm’n, 77 S.W.2d 578 (Ky, 2002) (judge given 180-day suspension for misleading Commission regarding amorous relationship, misuse of office, and ex parte contracts).

281 See ALFINI, ET AL., supra note 8, §§ 13.04-13.11; Miller, supra note 8, at 450. See, e.g., In re Cerbone, 812 N.E.2d 932 (N.Y. 2004) (judge removed for converting funds from escrow accountant and retaliating against district attorney who made complaint to Commission); In re Fine, 13 P.3d 400, 414 (Nev. 2000) (family court judge removed from bench for pattern of ex parte contacts with litigants, interested parties, and witnesses); Judicial Discipline and Disability Com’n v. Thompson, 16 S.W.2d 212 (Ark. 2000) (judge removed for continuing active practice of law after his election); In re Roberts, 689 N.E.2d 911, 912 (N.Y. 1997) (judge removed for pattern of misconduct, including incarcerating individual for 89 days for contempt without affording due process); Goldman v. Nevada Comm’n on Judicial Discipline, 830 P.2d 107 (Nev. 1992) (just removed for willful misconduct and habitual intemperance; also finding of voluntary abandonment of post).

282 See, e.g., In re Romano, 689 N.E.2d 911 (N.Y. 1997); In re Murphy, 626 N.E.2d 48 (N.Y. 1993); In re Tyler, 553 N.E.2d 1316 (N.Y. 1990); In re Kiley, 546 N.E.2d 916 or 96 (N.Y. 1989); In re Intemann, 540 N.E.2d 236 (N.Y. 1989); In re VonderHeide, 532 N.E.2d 1252 (N.Y. 1988); In re Myers, 496 N.E.2d 207 (N.Y. 1986); In re Wait, 490 N.E.2d 502 (N.Y. 1984); In re Sims, 462, N.E.2d 370 (N.Y. 1984); In re Scacchelli, 439 N.E.2d 345 (N.Y. 1984). 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.

283 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 Fine, 13 P.3d 400 (Nev. 2000) (judge engaged in repeatedly impermissible ex parte contacts); In re Corning, 741 N.E.2d 117 (N.Y. 2000) (pattern of abuse of power, lack of judicial temperament, and mishandling of public funds); Currin v. Commission on Judicial Fitness and Disability, 815 P.2d 212 (Or. 1991) (judge regularly decided traffic violation cases by flipping coin); In re Kirby, 354 N.W.2d 410 (Minn. 1984) (judge charged with pattern of improper disposition of traffic cases, chronic tardiness and several episodes of intoxication); In re Terry, 394 N.E.2d 94 (Ind. 1979) (judge charged with multiple counts of misconduct); Specter v. Comm’n on Judicial Conduct, 392 N.E.2d 552 (N.Y. 1979) (judge accused of pattern of nepotism and logrolling regarding hiring for courthouse positions); In re Del Rio, 256 N.W.2d 727 (Mich. 1977) (judge accused of pattern of abusing position). Although Justice Benjamin exhibited a repeated pattern of misconstruing the legal question surrounding his participation in the case (see supra Part II), no pattern of such behavior across cases has been established.
already surrounding *Caperton*) would appear apt. At a minimum, Justice Benjamin deserves more direct official criticism for his unrepentant direct violation of the Judicial Code. 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.

Perhaps more controversially, a monetary fine and perhaps even a modest suspension appears 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. State judicial conduct commission have punished at times for less obviously erroneous or damaging conduct than that of Justice Benjamin and which created far less damage to the system and to the litigants. The same holds true for West Virginia.

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

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

286 See id. (describing repeatedly erroneous legal framing of issue by Justice Benjamin).

287 See, e.g., In re Labombard, 898 N.E.2d 14 (N.Y. 2008) (judge removed 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); Assad v. Nevada Comm’n on Jud. Discipline, 185 P.3d 1044 (Nev. 2008) (judge fined and ordered 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); Mosley v. Nevada Comm’n on Jud. Discipline, 102 P.3d 555 (Nev. 2004) (judge fined, publically reprimanded, and required 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; recusal was viewed as unduly slow by Commission; also minor misuse of official letterhead for personal correspondence and release of nondangerous arrestee pursuant to well-established local custom); In re Going, 761 N.E.2d 585 (N.Y. 2001) (judge removed 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 Hoffman, 595 N.E.2d 592 (N.Y. 1999) (judge removed from bench for stalking ex-wife); In re Romano, 712 N.E.2d 1216 (N.Y. 1999) (judge removed for insensitivity regarding domestic violence and sexual abuse); In re Bailey, 490 N.E.2d 818 (N.Y. 1986)) (judge conspired to avoid limits on hunting); In re Agerton, 353 N.W.2d 908 (Minn. 1984) (judge investigated over alleged drinking problem and sexual affair); By way of disclosure, I was proffered (but not received by the Commission) as an expert witness on behalf of Judges Mosely and Assad. See also Lobdell v. State Comm’n on Judicial Conduct, 451 N.E.2d 742 (N.Y. 1980) (judge removed from bench for “flouting the law”); In re Kane, 406 N.E.2d 797 (N.Y. 1980) (judge removed due to misuse of appointment powers to aid friends and family).

288 See AFINI ET AL., supra note 8, §§ 13.04-13.11; Miller, supra note 8, at 450-51; See, e.g., cases cited in note 287, supra.

289 See, e.g., In re Cruickshanks, 648 S.E.2d 19 (W. Va. 2007)(Benjamin, J., authoring opinion for Court) (magistrate suspended without pay for allegedly punishing witness against her son in criminal proceeding); In re McCourt, 633 S.E.2d 17 (W. Va. 2006)(suspension without pay pending investigation of sexual misconduct); In re Toler, 625 S.E.2d 731 (W. Va. 2005)(magistrate publically censured, suspended a year without pay, and fined $5,000 for multiple instances of inappropriate sexual behavior); In re Riffle, 558 S.E.2d 590 (W. Va. 2001)(magistrate publically censured and suspended for one year without pay for fraudulent attempt to collect workers compensation benefits); In re McCormick, 521 S.E.2d 792 (W. Va. 1999)(magistrate publically reprimanded 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 (W. Va. 1999)(magistrate admonished for personal solicitation of campaign contributions); In re Binkoski, 515 S.E.2d 828 (W. Va. 1999)(public censure of magistrate for driving under influence of alcohol, possession of marijuana, and encouraging witnesses to be less than candid); In re Reese, 495 S.E.2d 548 (W. Va. 1997)(magistrate admonished 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.
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. 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 judging function and integrity of the system.

in return); In re Means, 452 S.E.2d 696 (W. Va. 1994)(family law master publically reprimanded for having financial and business dealings with attorney appearing before him); In re Codipoti, 438 S.E.2d 549 (W. Va. 1993)(magistrate publically censured for involvement in circuit judge’s misleading campaign advertisement); In re Eplin, 416 S.E.2d 248 (W. Va. 1992)(magistrate suspended six months for according special treatment to criminal defendant in order to curry favor with state senator); In re Neely, 364 S.E.2d 250 (W. Va. 1987)(state’s Chief Justice publically admonished for discharging private secretary who refused to babysit Chief Justice’s infant son where Chief Justice had imposed this as job requirement on approximately a dozen occasions over a year)(two concurring and dissenting judges – all justice were disqualified and replaced with circuit judges – preferred harsher sanction of public censure).

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 In re Riffle, 558 S.E.2d 590 (W. Va. 2001) a judicial officer engaged in workers compensation fraud and was merely suspended rather than removed. 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 In re Toler, 625 S.E.2d 731 (W. Va. 2005), a case in which Justice Benjamin voted with a unanimous Supreme Court to imposed a $5,000 fine and suspend a magistrate for a year without pay for sexual boorishness.

Magistrate Toler’s conduct was outrageous, but appears to reflect the actions of a libidinously desperate man more than a grave threat to justice, a somewhat less romantic version of South Carolina Governor Mark Sanford. See 625 W. Va. At 735 (Toler asks female corrections officer “if he could ‘go downtown’ on her.”). But see id. at 735 (Toler offers to help divorcing litigant wife, fondles her breast and “told her he wanted to f**k her”)(a much more serious problem because it affects the rights of litigants and the adjudication process rather than displaying simple boorishness); id. at 735 (Toler suggests exchange of judicial favor for sexual favor from another litigant); id. at 735 (Toler kisses domestic violence petitioner and asked “if she liked sex and if she was any good at performing oral sex.”). See also In re McCourt, 633 S.E.2d 17 (W. Va. 2006)(magistrate suspended without pay pending investigation of sexually inappropriate behavior in 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 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.

290 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 818 (N.Y. 1986) (judge conspired to avoid limits on 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.
Conclusion

The *Caperton* saga remains ongoing. Reargument was held on September 8, 2009. A new and presumably final adjudication of the Caperton-Blankenship feud will eventually emerge from a West Virginia Supreme Court lacking the disqualified Justice Benjamin. In the meantime, the U.S. Supreme Court’s decision has heightened the legal system’s awareness of the problems posed for judicial neutrality by big money election campaigns and is likely to spur reform and improvement, however tentative and incremental.

But the man whose sustained failure of judicial duty brought this havoc remains largely unscathed and certainly unbowed, almost irritatingly so. 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.

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292 See *supra* Part II, noting Justice Benjamin’s lack of apology or admission of error in response to Court’s removal of him from case in *Caperton* decision.