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Caperton's New Right to Independence in Judges

Gerard J. Clark*

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I. Introduction

In *Caperton v. Massey*¹, the Court expanded the Due Process Clause applying it to a judge on the West Virginia Supreme Court of Appeals who refused the plaintiff's recusal motion based upon the judge's receipt of three million dollars of campaign assistance from the defendant in a judicial election campaign. The case reviewed a reversal of a jury award of \$50,000,000 to the plaintiff, a coal company, based upon a finding the defendant, also a coal company drove it out of business through a series of business torts. The case expanded the scope of due process by requiring inquiry into conflicts of interest of a judge arising out of support in a judicial election campaign. While the facts of the case read like a movie script² with a big bad arrogant villain against a down trodden hero, it is far from clear that the US Supreme Court should have intervened.

II. Facts

The Harman mine in southwestern Virginia's Buchanan County was thought to be spent³ when lifelong coal man Hugh M. Caperton⁴ purchased it in 1993. By the end of 1993, the mine's yield had increased to 1 million tons of bituminous coal per year for Caperton's company Harman Coal, quadruple its previous output.⁵ A.T. Massey Coal Co. and its CEO, Don L. Blankenship⁶

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¹ *Caperton v. A.T. Massey Coal Co., Inc.* 129 S.Ct. 2252 (2009).

² It has already spawned a novel, *The Appeal* by John Grisham reviewed by Stephen Brill in NYT Book Review March 30, 2008 <http://www.nytimes.com/2008/03/30/books/review/brill.html?pagewanted=2> (last visited Dec. 10, 2009.)

³ John Gibeaut, *Caperton's Coal: The battle over an Appalachian mine exposes a nasty vein in bench politics* ABAJ Feb, 2009

⁴ Hugh M. Caperton developed, mined and sold coal through three companies that he controlled: Harman Development Corporation, Harman Mining Corporation and Sovereign Coal Sales All entities will be referred to herein as Caperton

⁵ Op. cit. n. 3.

⁶ Blankenship conducted his business through the following companies: T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfolk Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc. All entities will be referred to herein as Blankenship

offered to purchase the mine. But Caperton was at first unwilling to sell, despite what he described as intimidating warnings from Blankenship.⁷

Caperton's prized customer was Wellmore which, in turn sold its coal to LTV, a steel maker in Pittsburg.⁸ In 1997, Caperton and Wellmore renegotiated their prior arrangement and signed a new five year coal supply agreement (CSA).⁹ Blankenship sought the LTV business as well. After failing to convince LTV that his coal was as good as Caperton's Harman mine coal, Blankenship acquired Wellmore.¹⁰ He then engaged in a series of transactions that led to Caperton's bankruptcy.¹¹ He used the expansive force majeure clause in the 1997 CSA to cut the Wellmore purchases of Caperton's coal by more than fifty percent.¹² He then bought abutting properties to the Harman Mine that Caperton had planned to buy.¹³ He then again offered to buy the Harman Mine and Caperton finally agreed to sell in early 1998.¹⁴ But on the day the deal was to be consummated, Massey reneged, forcing Caperton into bankruptcy.¹⁵ After filing a Chapter 11 petition, Caperton filed a breach of contract action in Virginia against Blankenship claiming that the facts did not support the declaration of force majeure in the CSA and won a judgment of \$6,000,000.¹⁶ Then Caperton sued Massey in West Virginia state court alleging fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations. He won a \$50 million jury verdict.¹⁷

After a number of post trial motions attacking the verdict, Blankenship appealed. During the pendency of the appeal before the West Virginia Supreme Court of Appeals in 2004, West Virginia held an election for the WVCA. Blankenship spent some \$3 million in the campaign, resulting in the election of a Charleston lawyer named Brent D. Benjamin.¹⁸ After the election, the WVCA reversed the trial court judgment of \$50,000,000, with the now Justice Benjamin casting the deciding vote on a divided court on the basis of a forum selection clause.¹⁹ A motion for a rehearing was granted, resulting in an affirmance.²⁰

Meanwhile, Blankenship's relations with other members of the high court began receiving notice. In early 2008 photos surfaced of Blankenship vacationing on the French Riviera with Justice Elliott "Spike" Maynard.²¹ Though he insisted he paid his own way and did nothing

⁷ *Op. cit.* n.3.

⁸ *Slip opinion* Nov 12, 2009 p. 4.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* p. 6.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* P. 7.

¹⁸ At 2257.

¹⁹ At 2258

²⁰ At 2258

²¹ at 2258.

wrong, Maynard withdrew from the coal case in January 2008. His term as a justice ended with his defeat in the May, 2008 primary. Meanwhile, Justice Larry V. Starcher, an especially vociferous and public critic of Massey and its practices,²² had a run-in with Blankenship, who not only wanted him off the Caperton matter but also has asked the U.S. Supreme Court to use his harsh attacks as a basis to disqualify Starcher from another Massey case, *Massey Energy Co. v. Wheeling-Pittsburgh Steel Corp.*²³

Starcher, who retired in January, dissented in the first Caperton decision but withdrew before the rehearing. He declined comment, but in his written recusal he hinted that Blankenship had disrupted the state supreme court's business.²⁴

Another rehearing resulted again in an affirmance on April 3, 2008.²⁵ Caperton brought the case to the U.S. Supreme Court. Three weeks later, Benjamin added a concurrence to the state court's April ruling.²⁶

III. The Supreme Court Decision

US Supreme Court split 5-4 in reversing the decision of the W. V. Supreme Court of Appeals with Justice Kennedy writing the opinion for Justices Stevens, Souter, Breyer and Ginsberg.²⁷ The opinion stated the issue as: "whether the Due Process Clause of the [Fourteenth Amendment](#) was violated when one of the justices in the majority denied a recusal motion," based upon the fact that "the justice had received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the corporation found liable for the damages."²⁸ The Court asked whether: "the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable."²⁹

The two categories of precedent for a mandated disqualification on the basis of due process concern cases: first where the adjudicator had a financial interest which favored or disfavored one of the parties, and second, criminal contempt cases where a judge cites a party for contempt

²² "I repeat – the pernicious effects of Mr. Blankenship's bestowal of his personal wealth and friendship have created a cancer in the affairs of this Court. And I have seen that cancer grow and grow. . . . At this point, I believe that my stepping aside in the instant case might be a step in treating that cancer – but only if others as well rise to the challenge. If they do not, then I shudder to think of the cynicism and disgust that the lawyers, judges, and citizens of this wonderful State will feel about our judicial system. And I reiterate that unless another justice also steps aside in this case, my replacement on the Court will be selected by the justice whose campaign was supported by something close to \$4,000,000 from monies that came from one side of the case." Notice of Voluntary Disqualification of the Hon. Larry V. Starcher, Justice of the Supreme Court of Appeals of West Virginia, *A.T. Massey Coal Co., Inc., v. Caperton*, No. 33350 (Feb. 15, 2008).

²³ At 2258 see Gibeaut, op. cit.

²⁴ cite

²⁵ 129 S. Ct. 2258.

²⁶ Id at 2259

²⁷ 129 S.Ct 2252, 2256

²⁸ id

²⁹ Id citing *Witherow v Larkin* 421 U. S. 35, 47 (1975)

and then goes on to try the contempt.³⁰ In the first category, the Court relied principally on three cases: *Tumey v. Ohio*³¹ and *Ward v. Monroeville*.³² and, *Aetna Life Ins. Co. v. Lavoie*³³ In *Tumey*, the mayor of a village had the authority to sit as a judge (with no jury) to try those accused of violating a state law prohibiting the possession of alcoholic beverages.³⁴ For performing judicial duties, the mayor received a salary supplement, the sole source of which was fines assessed in cases he heard. Additional sums from the criminal fines were deposited to the village's general treasury fund for village improvements and repairs. *Id.*, at 522.³⁵ The Court reasoned that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has "a direct, personal, substantial, pecuniary interest" in a case. *Ibid.*³⁶ This rule reflects the maxim that "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."³⁷ The mayor-judge had a direct pecuniary interest in convictions to pay his salary supplement and also because as the village's chief executive officer fines helped meet the financial needs of the village."³⁸ The Court articulated the controlling principle:

"Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."³⁹

Ward invalidated a conviction in another mayor's court where fines assessed went into the municipal treasury. The mayor's "executive responsibilities for village finances may make him partisan to maintain the high level of contribution [to those finances] from the mayor's court."⁴⁰

*Lavoie*⁴¹ involved a justice on the Alabama Supreme Court who cast the deciding vote to uphold a punitive damages award against an insurance company for bad-faith refusal to pay a claim. At the time of his vote, the justice was the lead plaintiff in a nearly identical lawsuit pending in Alabama's lower courts. His deciding vote, the Court surmised, "undoubtedly 'raised the stakes' " for the insurance defendant in the justice's suit. 475 U. S., at 823–824.⁴²

The Court stressed that it was "not required to decide whether in fact [the justice] was influenced." *Id.*, at 825. The proper constitutional inquiry is "whether sitting on the case then

³⁰ 129 S. Ct. 2259

³¹ *Tumey v. Ohio*, 273 U. S. 510 (1927)

³² [409 U. S. 57](#) (1972)

³³ *Aetna Life Ins. Co. v. Lavoie*, [475 U. S. 813](#) (1986)

³⁴ 129 S. Ct 2260

³⁵ *id*

³⁶ *Id*

³⁷ The Federalist No. 10, p. 59 (J. Cooke ed. 1961) (J. Madison)

³⁸ *id*

³⁹ *id*

⁴⁰ *Lavoie*, *op.cit*

⁴¹ *Op.cit. n.*

⁴² *Id* p. 2260

before the Supreme Court of Alabama ‘ “would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.” *Ibid.* (quoting *Monroeville, supra*, at 60, in turn quoting *Tumey, supra*, at 532).⁴³

A similar result was reached in *Gibson v. Berryhill*, [411 U. S. 564](#), 579 (1973) where an administrative board composed of optometrists had a pecuniary interest of “sufficient substance” so that it could not preside over a hearing against competing optometrists.⁴⁴

The second instance requiring recusal under due process emerged in the criminal contempt context, where a judge was challenged because of a conflict arising from his participation in an earlier proceeding. In *In re Murchison*⁴⁵, a state court judge was holding a hearing to determine whether criminal charges should be brought. Two witnesses were called.⁴⁶ One answered questions, but the judge found him untruthful and charged him with perjury.⁴⁷ The second declined to answer on the ground that he did not have counsel with him, as state law seemed to permit.⁴⁸ The judge charged him with contempt and then proceeded to try and convict the witness.⁴⁹ This Court set aside the convictions because the judge had a conflict of interest at the trial stage based in his earlier participation in charging them. The Due Process Clause required disqualification. The Court recited the general rule that “no man can be a judge in his own case,”⁵⁰ adding that “no man is permitted to try cases where he has an interest in the outcome.” *Id.*, at 136 Following *Murchison* the Court held in *Mayberry v. Pennsylvania*, [400 U. S. 455](#), 466 (1971), “that by reason of the Due Process Clause of the [Fourteenth Amendment](#) a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor.”⁵¹ The Court reiterated that this rule rests on the relationship between the judge and the defendant: “[A] judge, vilified as was this Pennsylvania judge, necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication.” *Id.*, at 465.⁵² The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is “likely” to be neutral, or whether there is an unconstitutional “potential for bias.”⁵³

IV. Due process

The Fourteenth Amendment states that “no state shall deprive any person of life liberty or property without due process of law.”⁵⁴ Criminal proceedings can result in the taking of a

⁴³ *Id* p. 2261

⁴⁴ *id*

⁴⁵ [349 U. S. 133](#), 136 (1955)

⁴⁶ 129 S. Ct at 2261

⁴⁷ *id*

⁴⁸ *id*

⁴⁹ *Id*

⁵⁰ *id*

⁵¹ *Id* at 2262

⁵² *Id.*

⁵³ *Id.*

⁵⁴ U.S. Const. 14th A.

defendant's life or a deprivation of liberty through incarceration. Criminal defendants can be fined and civil defendants can have money judgments entered against them, both of which result in property deprivations. The two central concerns of procedural due process are the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process.⁵⁵ The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.⁵⁶ At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done,"⁵⁷ by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.⁵⁸ It assures "equal application of the law"⁵⁹ and guarantees that the judge who hears his case "will apply the law to him in the same way he applies it to any other party."⁶⁰

Due Process requires notice and an opportunity to be heard in each such instance. The hearing must be real and the judge or hearing officer must conduct the proceedings fairly, find the facts based upon the evidence (or instruct a jury how to find facts) and apply the relevant law. The parties have a right to present evidence and to be heard on their respective versions of the facts and their legal claims.⁶¹ If it were established that the judge wore ear plugs during a hearing or was listening to her i-pod, a party could claim a failure to be heard. Likewise if a judge were inebriated or were suffering from a psychotic episode wherein he was hearing voices, a party could claim a failure to be heard. Indeed distractions of all sorts including reading a newspaper, talking to court personnel or on a cell phone, day dreaming or sleeping undermine the right to be heard.

A harder question arises when the hearing officer is not open to persuasion because she has closed her mind to a party's claim.⁶² The causes or sources of the closed-mindedness are

⁵⁵ See *Carey v. Piphus*, [435 U.S. 247, 259](#)-262, 266-267 (1978).

⁵⁶ See *Mathews v. Eldridge*, [424 U.S. 319, 344](#) (1976).

⁵⁷ *Joint Anti-Fascist Committee v. McGrath*, [341 U.S. 123, 172](#) (1951) (Frankfurter, J., concurring),

⁵⁸ *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). See also *Johnson v. Mississippi*, [403 U.S. 212](#), 215-216 (1971) (per curiam) (judge violated due process by sitting in a case in which one of the parties was a previously successful litigant against him); *Bracy v. Gramley*, [520 U.S. 899](#), 905 (1997) (would violate due process if a judge was disposed to rule against defendants who did not bribe him in order to cover up the fact that he regularly ruled in favor of defendants who did bribe him); see also Gerard J. Clark, *An Introduction to Constitutional Interpretation* 34 Suff. L. Rev. 485, 493 (Court's reasons should transcend the immediate result)

⁵⁹ Gerard J. Clark, *Ingraham v. Wright and the Decline of Due Process* 12 Suff. L. Rev. 1151, 1167 (1978) (a regularized hearing process promotes equality)

⁶⁰ *Republican Party of Minnesota v. White* 536 U.S. 765 (2002) (Invalidating the prohibition against the announcing of views in judicial elections)

⁶¹ *Hamdi v. Rumsfeld* 542 U.S. 507 (2004) (Hamdi has right to present evidence)

⁶² A third possible meaning of "impartiality" (again not a common one) might be described as openmindedness. This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending

infinite. *Caperton* held that a party has a right to raise this question and to litigate it. It quoted *Tumey* for the Due Process standard: “[e]very procedure which would offer a possible temptation to the average man as a judge to forget” his obligation to apply the law “nice, clear and true” denies due process of law. The Court characterized this as an objective standard.

The objective standard avoids a personal and potentially nasty inquiry with a meta-rule which asks instead how would the average man as a judge be affected by the conflict causing conduct. But who is this average man as judge and how do we know what would influence him. Is friendship or enmity sufficient? The average man as judge is what the court reviewing the claimed conflict thinks it is. Indeed, Justice Benjamin asserted that a judge should be afforded a presumption of honesty and integrity from appellate courts.⁶³

Blankenship contributed the \$1,000 statutory maximum to Benjamin’s campaign committee. Further his Massey Coal is the sixth largest coal producer in the United States⁶⁴ making it an entity of substantial political influence in the State of West Virginia.⁶⁵ In August 2004 he also formed a section 527 organization—so named for the Section of the Internal Revenue Code that allows such groups to collect money to support or oppose candidates.⁶⁶ Blankenship’s 527, called And for the Sake of the Kids, was designed not to work for Republican challenger and political novice Benjamin, but to fund televised attack ads designed to defeat Warren McGraw, the Democratic incumbent.⁶⁷ McGraw was under intense public scrutiny for joining an unsigned opinion that freed a child molester from custody⁶⁸ and placed him on probation. Blankenship also maintained that “anti-business rulings” by McGraw poisoned the Mountain State’s economic climate. Of the \$3.6 million the group raised, \$2.4 million came from Blankenship, with 25 other contributors uniting to contribute the remaining \$1.1 million. The organization ranked fifth nationally among other 527s in the amount raised in a state election. Blankenship also contributed \$515,000 in direct support to Benjamin’s campaign committee, while other donors contributed the remaining \$330,000 of the \$845,000.

In response Justice Kennedy stated, “We conclude that there is a serious risk of actual bias--based on objective and reasonable perceptions--when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case

case. This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so. *White, supra at n.60*

⁶³ Slip opinion July, 2008 p.7 <http://www.state.wv.us/wvsca/docs/spring08/33350c4.pdf> (last visited 3-5-10)

⁶⁴ U. S. Energy Information Administration <http://www.eia.doe.gov/cneaf/coal/page/acr/table10.html>

⁶⁵ Lawrence Lessig, *What Everybody Knows and Too Few Accept* 123 Harv L. Rev. 104 (2009) (Citing the amounts of money corporate entities spend in order to get results that they want.)

⁶⁶ 26 USC 527.

⁶⁷, see Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949 (2005). (Regulating independent expenditure committees is difficult and controversial)

⁶⁸ *Judicial Races in Several States Become Partisan Battlegrounds*, ADAM LIPTAK NYT October 24, 2004

by raising funds or directing the judge's election campaign when the case was pending or imminent.⁶⁹ 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.”⁷⁰

Thus Justice Kennedy acknowledged the role that campaign spending plays in influencing outcomes. If spending can influence judges, the same would appear to apply to candidates for other office. However he took a different position in *McConnell v. FEC*,⁷¹ where he insisted that the only basis for limiting campaign contributions in federal elections were quid pro quo situations which are tantamount to bribery. Moreover, a key distinction in campaign finance law is between contributions and expenditures,⁷² Expenditures that are independent, like creating and paying for a newspaper advertisement supporting a candidate or an issue, are akin to pure speech and thus receive full First Amendment protection. Contributions to a candidate have a conduct component and are subject to reasonable regulation.⁷³ Some payments, like contributions to issue-orientated PAC's are difficult to categorize. Justice Kennedy misstates the issue at the beginning of the case as follows: "The basis for the motion was that the Justice had received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the corporation found liable for the damages." However, only \$1000 of the \$3 million spent by Blankenship came in the form of a contribution to his campaign, in compliance with a West Virginia limitation on campaign contributions. The remainder were for independent expenditures; the funds were not received by the Justice but by a 527.⁷⁴ Justice Kennedy, as a proponent of an expansive reading of the First Amendment, joined the Courts opinion in *Wisconsin Right to Life*⁷⁵ where the Court refused to apply *McConnell*'s⁷⁶ facial approval to BCRA's limitations on an expenditure on electioneering communication to

⁶⁹ 21. George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1551 (2008) ("Public opinion surveys . . . identify these contributions as fostering a negative perception of the state courts.").

⁷⁰ At 2263.

⁷¹ 540 U.S. 93, at 296

⁷² *Buckley v. Valeo* 424 U.S. 1 (1976) (establishing the distinction between contributions and expenditures for purposes of First Amendment review of campaign finance laws)

⁷³ Mark Spottswood, Comment, *Free Speech and Due Process Problems in the Regulation and Financing of Judicial Election Campaigns*, 101 NW. U. L. REV. 331, 346 (2007) (judges believe that their decisionmaking is affected by a pecuniary interest).

⁷⁴ Initial Thoughts on *Caperton v. Massey*: First Meaningful Constitutional Limits on Excesses of Judicial Elections Election law Blog June 13,2009 <http://electionlawblog.org/archives/013784.html>

⁷⁵ *FEC v. Wisc. Rt. to Life* 127 S Ct (2007) See also *Citizens United v. The Federal Election Commission* (a.k.a. "The Hillary Movie Case") began as a challenge to the distribution of a conservative interest group's documentary denouncing Hillary Clinton during her presidential election campaign. Because the documentary was funded with corporate money, the FEC claimed authority to prevent its distribution under the "McCain-Feingold" Bipartisan Campaign Reform Act of 2002 (which limits corporate expenditures nationwide on political campaign messaging transmitted via broadcast, satellite or cable TV).

⁷⁶ *McConell v. FEC* 540 U.S. 93 (2003)

television ads⁷⁷ that suggested that Senator Feingold was playing politics with the president's appointments to the federal judiciary. The Court stated that "The freedom of speech ... guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." Justice Kennedy distinguished *Caperton* in *Citizens United* suggesting that that *Caperton* was not about limiting speech, but requiring recusal.⁷⁸ Thus in the closely allied field of campaign finance, it is clear that Blankenship had a First Amendment right to make his contributions to Save the Kids and to independently run ads to influence the West Virginia Supreme Court elections.

Canon 4 of the ABA Judicial Code addresses the special conflicts arising out of elections and fund raising, but they are weak and do not specifically prohibit receiving campaign contributions from parties to proceedings in their courts or from lawyers who appear before them.⁷⁹

Objective tests are at odds with the reality that a conflict of interest is a very personnel, and therefore a subjective opinion of an individual judge. For instance, assume that a judge were to declare that he had always harbored a hatred of a party in a case before him and that he would use his position as judge to harm the party and that this would give him great satisfaction.⁸⁰ If the judge refused to recuse himself, we can assume that the subsequent decision against his avowed enemy would likewise violate due process. His personal enmity would dominate his deliberations and no other factor, whether factual or legal could dissuade him from acting on his bias. Clearly the victimized party has been denied the right to be heard just as effectively as if the judge wore earplugs at the hearing or silenced the party before he spoke. Further while the conflict is subjective it would qualify under the objective rubric as well because "the average man as judge," who expressed this level of enmity would also be presumed to be disqualified.

What of the judge who is less forthcoming than the one described above- he has a similar enmity against a party but does not declare it. Does the Due Process right vest additional rights in the victimized party to hearings, cross-examination, discovery or expert testimony? Can he conduct a searching inquiry into the mind and motives of the judge. *Caperton's* finding of Due Process violation would seem to imply that the victim now has additional procedural rights to minimize the risk of error and to participate in the process as an incident of individual dignity.

⁷⁷ Gerard J. Clark, *Finger in the Dike: Campaign Finance after McConnell* 39 *Suff L. Rev.* 629 (2006) (suggesting that the complexities of the subject undermine the idea of ever successfully regulating it)

⁷⁸ *Citizens United v FEC* 1-21-10 slip opinion at p. 44-45. Compare Stevens dissenting pp. 68-70 suggesting that the Kennedy majority's limited view of corruption to quid pro quo was inconsistent with *Caperton's* requirement of recusal in the absence of quid pro quo (like in *Tumey*)

⁷⁹ Molly McLucas, *The Need for Effective Recusal Standards for an Elected Judiciary* 42 *Loyola of Los Angeles Law Review* 670 (2009) (Election are pre se dangerous to fair adjudications)

⁸⁰ Geoffrey P. Miller, *Bad Judges* 83 *Texas Law Review* 431, 433 et seq (long list of judicial defalcations)

*Murchison*⁸¹, the contempt case cited by the Court, which required an independent and uninvolved judge to hear the contempt case, would seem to require independent and uninvolved judges to hear recusal motions. The new fact finder would have to disbelieve the protestations of denial of the judge targeted by the motion. The fact that the fact-finder is herself a judge may cause a new conflict arising out of a felt solidarity among judges that such inquiries are demeaning and inappropriate. Justice Benjamin argued that a subjective conflict was the only legitimate basis for recusal. But the psychological literature that tells us that bias is subconscious,⁸² which would appear to disqualify Justice Benjamin from being a judge of his own bias. Might the judge under inquiry be examined under oath? Could the proponent of the conflict claim have the judge under inquiry examined by a psychological expert? Could the psychologist analyze the target judge and testify that in his expert opinion the targeted judge was deluding himself and engaging defensive behavior because of a will to succeed born from the criticisms of a strict father. What about psychological testimony that the target judge feels a great deal of gratitude to his staunchest ally in a difficult and personally contentious campaign of the judgeship.⁸³ Psychologists have claimed for years that human beings tend to create justification narratives for their wrongful behavior.⁸⁴ Could a court- approved expert psychologist testify about these tendencies in general in a hearing on a recusal motion.

Caperton holds that Justice Benjamin has violated Caperton's right to due process. Thus Caperton now grants some recusal movants a chose in action and Benjamin is in effect a constitutional tort-feasor. Of what use are these new rights and liabilities. Rights supposedly spawn remedies. A claim for damages seems foreclosed by venerable doctrine judicial immunity which is absolute, at least as to damages. Recent amendments to 42 USC 1983⁸⁵ seem to expand judicial immunity against most injunctive relief. If the due process violation occurred in a criminal case the wrongfully convicted defendant would have an enhanced right to challenge his incarceration in a federal habeas corpus proceeding.⁸⁶ Other than that the case may only expand the bases for cert petitions from the state courts

⁸¹ See note , *supra*

⁸² Dovidio, J. F. et al., *On the Nature of Prejudice: Automatic and Controlled Processes*. 33 *Journal of Experimental Social Psychology* 510 (1997)

⁸³ Mark Andrew Grannis, *Note, Safe Guarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 *MICH. L. REV.* 382, 387 (1987).

⁸⁴ Bargh, J.A. and Pratto, F., *Individual Construct Accessibility and Perceptual Selection* 22 *Journal of Experimental Social Psychology* 293 (1986)

⁸⁵ Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, *except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.*

⁸⁶ 28 USC 2254

The Court never alluded to the well-established doctrine of the judiciary's absolute immunity. The leading case is *Stump v. Sparkman*,⁸⁷ in which a state court judge approved an ex parte petition filed by the parents of a 15 year old girl to have her sterilized without her consent. The Supreme Court held that the judge did not lose his absolute immunity by virtue of the fact that there was no state statute which authorized his conduct. The rationales in favor of absolute immunity include: the need for a judge to be free to act on his own convictions without fear of personal consequences, the fact that judges often sit between very hostile parties one of whom is likely to feel aggrieved by the judge's decision with a desire to retaliate, the fact that liability to suit might cause the judge to engage in counter-productive self-protective behavior, the fact that most judicial decisions are reviewable, the fact that there are other mechanisms for supervision of the courts and the fact that vexatious litigation could be easily filed.⁸⁸

The Court, in *Caperton* however, states: "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.... Further we have seen that the regulation of this arena has been vested to the sound discretion of the targeted judge; or to a state judicial conduct commission under the auspices of the highest court of the state; or in extreme cases to prosecutorial authorities."⁸⁹

V. Conflict of interest

1. Common Law Origins of Conflict of Interest

Conflict of interest has wide application in American law.⁹⁰ Its source is the fiduciary duty.⁹¹ The fiduciary duty is imposed by the law on those who are entrusted with discretion to care for the property or the well-being of another.⁹² It demands independence and prohibits self-dealing. Independence is undermined by conflict of interest. Trustees owe their settlors and beneficiaries

⁸⁷ 435 U.S. 349 (1978)

⁸⁸ See Schuck, *Suing Government: Citizen Remedies for Official Wrongs*, 90 (1983)

⁸⁹ 129 S.Ct. at 2267

⁹⁰ Indeed conflict of interest is a major issue in all of western philosophy. In Plato's *Republic* those who were vested with governing power were required to be isolated from the rest of society and from the riches and comforts of the world lest their own self interest interfere in their decisions. Book VIII In Rawles's *Theory of Justice* those deliberating about the foundations of the just society are separated from a knowledge of their particular circumstances by a veil of ignorance lest they be influenced by favoring rules from which they might profit. pp 136-142 Hobbes and Locke utilize the veil of ignorance as well. Western philosophy has recognized the problem of conflict of interest for over three thousand years. Its solutions however have been make-shift at best. Possibly because any judge or human being cannot be effectively isolated from his self-interest making ideological purity difficult or perhaps impossible to achieve.

⁹¹ Weinreb The Fiduciary Obligation 25 U Tor LR 1 (1975)

⁹² PAULA MONOPOLI, The Fiduciary Relationship between Attorney and Client: Through the Contractualist Looking Glass,"

a fiduciary duty to use their best efforts to protect the properties entrusted to them.⁹³ Likewise agents owe a fiduciary duty to advance the principal's project with prudence and expertise.⁹⁴ Self-dealing with the principal's property or taking on additional principals with interests that are at odds with the agent's initial engagement inject prohibited conflict of interests into the arrangement and entitle the principal to damages in a civil action.⁹⁵

2. Conflict of Interest in Other Law

A recognition of the need to protect against conflict of interest can be found in the Constitution,⁹⁶ as well as professional codes.⁹⁷ Further legislative attempts to maintain the integrity of governmental officials at every level prohibit self-dealing and conflict of interest.⁹⁸

⁹³ A trust relationship to property that arises out of an agreement between a settlor and a trustee that the trustee shall take title to the property and hold it for the benefit of the settlor's designees. *Rest. Of Trusts*, Third. Sec. 2 The Trustee has duties of prudence, *Id* Sec 77 loyalty, *Id* Sec. 78. impartiality among beneficiaries, *Id* Sec 79 income productivity, delegation when the trustee himself may lack the requisite skills, *Id* Sec. 80 and information to the beneficiaries. *Id*. Sec. 82. More specifically the trustee is prohibited from "engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests." *Id* Sec 78 (2) He is also required to "communicate all to the beneficiary all material facts" *Id* Sec 78 (3)

⁹⁴ [An agency is a relationship created by an agreement between a principal and an agent that the agent shall act for the principal and under the principal's control. *Rest. Of Agency*, Third Sec. 1.01. An agent has a fiduciary duty "to act loyally for the principal's benefit in all matters connected with the agency relationship" *Id* Sec. 8.01 (2006) The agent is prohibited from acquiring a benefit for himself from a third party in connection with transactions conducted on behalf of the principal or otherwise through the agent's use of his own position. *Id* Sec. 8.02 Likewise an agent may not place himself in a position where he deals with the principal as an adverse party, *Id* Sec. 8.03 or on behalf of the principal's competitors. *Id* Sec 8.04 The agent may not use the property of the principal for his own purposes or for the benefit of a third party. *Id* Sec. 8.05 (1) The agent may not use confidential information for his own benefit or communicate it to a third party. *Id* Sec. 8.05 (2).

⁹⁵ These kinds of relationships are ubiquitous indeed. Business organizations like corporations and partnerships are replete with agency obligations. The members of the boards of directors of corporations owe these duties to the entity. The same can be said of officers and employees. Partners owe these duties to one another. The independence duty requires an avoidance of self-dealing and of other relations that will undermine objectivity by introducing conflicts of interest into the relationship.

⁹⁶ The very idea of separation of powers in the US Constitution is at least in part grounded in the idea of avoidance of conflict of interest. The enforcers of the law need independence from the makers of the law. So too the interpreters and appliers of the law need separation from the enforcers and the creators of the law. Judicial independence is further enhanced for federal judges by life tenure and the protection from salary diminutions. Diversity of citizenship jurisdiction in the federal courts attempt to protect foreign litigants from an assumed parochialism in the state courts. The Twenty-sixth Amendment limits Congress's ability to vote itself a salary increase.

⁹⁷ Professional codes often impose independence on their professional members. For instance, the ethical rules of the legal profession require zealous advocacy. See Susan P. Shapiro, *Tangled Loyalties, Conflict of Interest in Legal Practice* (Ann Arbor, University of Michigan Press, 2002) (report on a massive empirical study on conflict of interest in law firms in Illinois)

This radical dedication to client excludes engagements that might detract from the goal of client advantage. Thus, Model Rule 1.7 prohibits representation of a client if the representation will be "materially limited by the lawyer's

3. An Attempt at Definition

Conflict of interest enforcement seeks to promote independence in perception, narration, deliberation and judgment. The best decision-making results from deliberation that is free from the interferences and the irrelevancies of self-interest. The crime of bribery, which requires a quid pro quo exchange, is the most extreme example of a conflict. State and federal conflict statutes which typically apply to each of the three branches of government usually catalogue prohibited financial conflicts including those arising from family, investments and

responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. a personal interest of the lawyer". (ABA Model R. of Prof'l Conduct R 1.7 reads "A concurrent conflict of interest exists if:(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

The accounting profession has similar rules. Rule states that "a conflict of interest may occur if a member performs a professional service for a client... that could...be viewed as impairing the member's objectivity..." (The American Institute of Certified Public Accountants Code of Professional Conduct. Et Sec.102-2)

ET Section 101 requires members in the "public practice" to be "independent in the performance of professional services." AICPA Code of Professional Conduct, ET Sec. 101 The rule then has a very extensive list of relationships where "independence shall be considered to be impaired"

The AMA Code dictates independence only in the most general way: "A physician shall, while caring for a patient, regard responsibility to the patient as paramount." The first Code of Medical Ethics Sec 7 stated "in the practice of medicine a physician should limit the source of his professional income to medical services actually rendered by him, or under his supervision, to his patients." AMA Principles of Medical Ethics, VIII. <http://www.ama-assn.org/ama/pub/category/2512.html> The current Code eliminates any prohibitory reference to sources of income. HMO malpractice pre-emption case – *Aetna Health v. Davila* 542 U.S. 200 (2004) (Health Plans exempt from fiduciary duty). Similar concerns are voiced by scholars, journalists and teachers.

⁹⁸ Governmental service is analogous to agency and trusteeship. A legislator is referred to as a representative or an agent of the people. Governmental service may be referred to as a public trust. Although governmental officials are not fiduciaries in a technical sense, representing as they do multiple constituencies, often with conflicting interests, the prohibitions of conflict advance integrity in government and combat corruption. The goal of these prohibitions is to keep the subject independent to exercise her discretion to make good judgments. At the federal level, the criminal statutes include bribery and prohibited financial interests in a matter or decision before a government agency including a court. The Ethics in Government Act of 1978 prohibits self-dealing in § 208, entitled Acts affecting a personal financial interest. It makes it a crime for any officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, who "participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest." 18 USC. 208 Each house of Congress polices its members' conflict through rules enforced at the committee level. Each State has its own definition of these prohibited relationships and its own enforcement mechanism. See also *US v. Weyhrauch* 548 F.3d 274 (9th Cir., 2008) Federal prosecution for state legislative conflict for honest services fraud under 18 USC 1346) (cert granted June 29, 2009); see also *Black v. United States*, 129 S. Ct. 2379 (cert. granted May 18, 2009); decision below at 530 F.3d 596 (7th Cir. 2008). (theft of honest services)

fiduciary relations. Although there is no definitive catalogue of biases that constitute prohibited conflicts, they typically spring an allegiance or a loyalty. Although a parent will almost always prefer a child, other relationships, values, interests and individual experiences may cause conflicts.⁹⁹ Justice Kennedy suggested that the Due Process inquiry required “a realistic appraisal of psychological tendencies and human weakness.”¹⁰⁰

There is no position of omniscience from which we can objectively judge the quality of decisions. Biases are undiscoverable by an outsider, and a more searching processes of discovery would be an unacceptable invasion of the psyche and privacy of the decision-maker. Thus we are left with the somewhat weak alternative of relying upon the sense of duty, professionalism, commitment to justice, and objectivity of the judge. Thus conflict rules are a group of prophylactic prohibitions, *mala prohibita*, which are considered most predictive of creating conflict. As such they at least two steps removed from our real objective: good deliberation.¹⁰¹

Justice Benjamin refused to make the objective inquiry because he claimed that it was political and therefore illegitimate. He wrote in the concurrence, filed August, 2008: “The fundamental question raised by the appellees and the dissenting opinion herein is whether, in a free society, we should value ‘apparent or political justice’ more than ‘actual justice. Actual justice is based

⁹⁹ Jost J. T., Pelham, B. W. and Carvaqlo, M., *Non-Conscious Forms of system Control: Cognitive, Affective and Behavioral Preferences for Higher Group Status*. 38 Journal of Experimental Social Psychology 586 (2002)

¹⁰⁰ Slip at 7

¹⁰¹ The majority opinion in *Republican Party of Minnesota v. White* 536 U.S. 765 (2002) (invalidating campaign restrictions on judges); see discussion, *infra* discussed the state interest in impartiality in the context of a first Amendment challenge to a prohibition against judicial office candidates from announcing their views on issues that they may face on the bench. The opinion found three meanings of impartiality:

One meaning of impartiality “is the lack of bias for or against either *party* to the proceeding.” Thus impartiality assures “equal application of the law.” 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.”

Another possible meaning of “impartiality” is the “lack of preconception in favor of or against a particular *legal view*.” This interest “has never been thought a necessary component of equal justice, and with good reason.” The majority cited then-Justice Rehnquist: “Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution ... Proof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.” The Minnesota Constitution dictates that judges “shall be learned in the law”. Minn. Const., Art. VI, §5

A third possible meaning of “impartiality” (again not a common one) might be described as openmindedness. This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so. Lavioe might be an example of this.

on actualities,” he asserted. “Through its written decisions, a court gives that transparency of decision-making needed from government entities. Apparent or political justice is based instead on appearances and is measured not by the quality of a court’s legal analysis, but rather by the political acceptability of the case’s end result as measured by dominant partisan groups such as politicians and the media, or by the litigants themselves. Apparent or political justice is based on half-truths, innuendo, conjecture, surmise, prejudice and bias.”¹⁰²

Based upon Judge Benjamin’s criteria how do we judge his decision? Was it faithful to the Court’s own precedent? Was it well reasoned? Did it follow the Court’s procedural rules? Was it correctly decided? The Kennedy opinion never made this inquiry.

Justice Benjamin filed a 33 page concurring opinion in August of 2008.¹⁰³ Indeed the WVSCA wrote a three exhaustive opinions as well. There were two independent legal grounds for the reversal of the jury verdict. First, that Caperton’s damage action in the West Virginia courts was violative of a valid forum selection provision, signed with Blankenship’s predecessor, Wellmore, that bound Caperton to bring any action arising under the contract in the Virginia courts; and second that Caperton had failed to assert all of his outstanding claims against Blankenship in the earlier contract action and any additional rights that he had against Blankenship were merged in the \$6,000,000 judgment. The author has reviewed the two WVSCA opinions and the respective dissents and concurrences. The majority opinion concerning the forum selection clauses seems wrong. The 1997 CSA between Sovereign, Wellmore and Harman Mining provided that the “[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. . . .” In the proceeding below the Massey Defendants filed a motion to dismiss alleging, in relevant part, that the forum-selection clause in the 1997 CSA required that any action related to that agreement be brought in the Circuit Court of Buchanan County, Virginia. Accordingly, the Massey Defendants argued that the action was improperly before the Circuit Court of Boone County, West Virginia, and that the instant action should therefore be dismissed. (See footnote 22) The circuit court denied the motion to dismiss.¹⁰⁴

Putting aside the fact that neither Caperton nor Blankenship signed the contract in question, they both seem bound as privies of their signatories. Caperton controlled the plaintiff signatories. Blankenship acquired the defendant signatory. But the clause¹⁰⁵ applied to actions arising out of the contract or “in connection with” the contract. The majority found that the whole controversy

¹⁰² Slip opinion p.7.

¹⁰³ Supra . n. 63

¹⁰⁴ Davis 11-21-07 (w/drawn) <http://www.state.wv.us/WVSCA/docs/fall07/33350.htm> (last visited 3-5-10)

¹⁰⁵ The 1997 CSA between Sovereign, Wellmore and Harman Mining provided that the “[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. . . .”

sprung out of the declaration of the force majeure and thus Caperton's tort actions were in connection with the 1997 contract. The reality however was that Blankenship seems to have had a much larger plan, namely to drive Caperton out of business and to seize the valuable Harman mine with its incomparable coal. The declaration, which served to void Caperton's contractual rights to sell his coal to Wellmore was only part of the plan and while one could conceivably assert that the whole diabolical plan was "connected" to the 1997 CSA, a more reasonable interpretation is that only controversies about the terms of the contract are covered. Blankenship's offer, and then refusal, to buy Caperton's interest in his mine seems too distant from the 1997 CSA to bootstrap that controversy into the 1997 CSA's forum selection clause. Of course the terminology "in connection with" is imprecise and the two controversies are not entirely unconnected either. Indeed everything is ultimately interconnected; it is just a question of degree. The Blankenship plan had more parts and more parties than a breach of the 1997 CSA and the connections between them were too tenuous to force Caperton into a court that he did not choose, which was his right as a plaintiff.

The res judicata claim is closer. The federal rule of joinder¹⁰⁶ allows the joinder of all claims that a plaintiff has against a defendant in one case. This liberal rule has pushed res judicata law in the direction of requiring such joinders. Both actions were filed in the same year and both involved events related to coal produced from the Harman Mine. One claim sounded in contract and the other sounded in tort. Some of the evidentiary material produced for the first claim would duplicate evidence in the second claim. A liberal interpretation of the transactional test in the Restatement of Judgments, Second¹⁰⁷ could easily conclude that both claims arose out of the same transaction and the failure to bring the tort case and the contract case together bars the tort case because of merger. Indeed, it appears that both claims were in the original complaint in the Virginia court, but that the tort claim was dropped in the amended complaint. But the applicable law in this defense is also vague. Was the declaration force majeure in the 1997 CSA the same transaction as the series of business torts or were they separate transactions? The application of the Restatement standard to these facts generates a great deal of uncertainty as well.

Clearly if either of these defenses are correct as a matter of law, then any claim of conflict of interest may be labeled as harmless error. Unfortunately American case law is often uncertain and the WVCA's legal justifications are hard to judge. These two questions: whether Blankenship's whole destruction of Caperton was "in connection with" the 1997 CSA; and, whether the breach of contract and the series of torts were one transaction or more than one; are precisely the kinds of question that can go either way, which leaves a large amount of discretion in the court.¹⁰⁸ What are the appropriate factors in such an exercise of discretion. Especial care to avoid conflicts of interest seems appropriate. What seems not to have been considered is that

¹⁰⁶ F.R.Civ. P. R. 18.

¹⁰⁷ Rest. Judgments 2d Sec 60.

¹⁰⁸ Here one is reminded of Holmes' disquisition on judging: "It is the merit of the common law that it decides the case first and determines the principle afterward" Oliver Wendell Holmes Jr., *Codes and the Arrangement of the Law* 44 Harv. L. Rev. 725,725 (1931)

even the WVSCA majorities that ruled against Caperton seemed to agree that the jury's verdict was well justified because Blankenship's actions against Caperton were egregious indeed.¹⁰⁹ Nor was the Court influenced by the fact that a reversal of a seven year old jury verdict would probably leave Caperton without a remedy and leave Blankenship with the substantial fruits of his wrong-doing. This is so either because a new trial was now barred by a statute of limitations, or because the evidence and the witnesses of this now twelve year old dispute were no longer available. Justice Kennedy never inquired into the various claims and defenses under state law.

Absent also from the Kennedy opinion is any discussion of the standards of review that the Court is applying to the findings of the Court below. Justice Benjamin found as a fact that he was not biased. On direct review from a state supreme court one would expect deference to finding of fact unless clearly erroneous.¹¹⁰

Although the U.S. Supreme Court reversed and remanded. The WVCA reheard the appeal yet again on September 8, 2009. The panel included Acting Chief Justice Davis, now that Chief Justice Benjamin was required to step aside, Justice Workman, and Senior Status Judge Holliday, who was named by Acting Chief Justice Davis to fill Justice Benjamin's empty seat in his absence.¹¹¹ The Court sat in a panel of three and it is unclear why one of the other two WVSCA members did not take the vacancy created by Justice Benjamin's forced recusal. Judge Holliday joined the Acting Chief Justice to affirm for the third time now that the verdict of \$50,000,000 had to be reversed as a matter of law. The Courts lengthy opinion issued on November 12, 2009 relied solely on the forum selection clause in the 1997 contract between Caperton and Wellmore, which Blankenship could plead since he acquired Wellmore in 1998, just long enough to invoke the force majeure clause that set the events of the case in motion, before he divested himself of that interest.¹¹² One can, of course only speculate on the level of independence that Justice Davis's designee brought to case that had served to shine a national spotlight on WVCA and King Coal. Justice Workman dissented and reserved her right to file a dissenting opinion at a later date.

4. Conflict Regulation of the Judiciary

¹⁰⁹ The November 21, 2007 WVSCA opinion, withdrawn on motion for rehearing on April 3, 2008, states: "At the outset, we wish to make perfectly clear that the facts of this case demonstrate that Massey's conduct warranted the type of judgment rendered in this case. However, no matter how sympathetic the facts are, or how egregious the conduct, we simply cannot compromise the law in order to reach a result that clearly appears to be justified." Slip opinion p. 6. Holmes may have thought otherwise.

¹¹⁰ See, e.g., Paul G. Lewis, *Systemic Due Process: Procedural Concepts and the Problem of Recusal*, 38 U. Kan. L. Rev. 381, 407 (1990) (critiquing the abuse of discretion standard for not providing meaningful protection against judicial misconduct); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 Brook L. Rev. 589, 661-62 (1987) (same).

¹¹¹ The Charlestown Gazette, June 12, 2009, [Paul J. Nyden](#) Supreme Court appoints judge in rehearing of Massey case

¹¹² --- S.E.2d ----, 2009 WL 3806071, W.Va., November 12, 2009 (NO. 33350)

Judicial conflict prohibitions are enforced in a variety of ways. They include impeachment, prosecution, administrative sanctions, divestiture, disclosure and recusal.

- A. Article III of the U. S. Constitution grants federal judges life tenure and protects them against salary diminution. Removal a federal judge requires impeachment by the U.S Senate and trial before the House of Representatives. This cumbersome process is rarely used and is inappropriate for the run-of –the-mill ethical violation.¹¹³ The procedures at the state level vary with each state’s constitution, but they tend to be similarly cumbersome and rare.¹¹⁴
- B. State and federal statutes criminalize some inappropriate relationships between judges and others. The most obvious example is bribery. One who “directly or indirectly, corruptly gives, offers or promises anything of value to any public official...” to influence any official act commits the crime.¹¹⁵ Less obviously, however, a government official, including a judge who acts as an attorney¹¹⁶ or, who attempts to influence an agency in which he or she was employed within statutorily defined time periods¹¹⁷, or has a personal interest in a particular matter with which he or she must deal in an official capacity¹¹⁸ also commits a criminal act. However criminal penalties often appear harsh where the person who allegedly committed the malum prohibitum violation is either a professional, or a person who has dedicated herself to the position out of good motives, which in turn may undermine a finding of mens rea. Further these mala prohibita may have difficulty commanding the attention of prosecutorial authorities.
- C. A work-place sanction, such as a private of public reprimand, a reduction in rank or responsibility, a suspension or termination might seem more appropriate. All fifty states have established some kind of judicial oversight commission usually under the authority of the state’s highest court. The West Virginia Supreme Court of Appeals has the power to investigate and discipline judges.¹¹⁹ It does so through the Judicial Investigation Commission of West Virginia, which is composed of nine members appointed by the Supreme Court, which will include three circuit judges, one magistrate, one family law master, one mental hygiene commissioner and three members of the public.¹²⁰ The W. Va. procedure for handling complaints is prescribed by the rules of the Judicial Conduct Commission.¹²¹

¹¹³ The first federal judicial impeachment in twenty years occurred on June 9, 2009 with impeachment of Judge Samuel Kent for sexual misconduct with his female staff. The House convicted Kent on June 19, 2009. <http://thecaucus.blogs.nytimes.com/2009/06/19/house-votes-to-impeach-texas-judge/> Last visited Dec 11, 2009

¹¹⁴ Geoffrey Miller, *Bad Judges* 83 Texas L. Rev. 430 at 459

¹¹⁵ 18 USC 201 (b)(1)

¹¹⁶ 18 USC 206

¹¹⁷ 18 USC 207

¹¹⁸ 18 USC 208

¹¹⁹ . In addition to formal discipline, these procedures can include informal mechanisms bywhich peer pressure may be applied to judges whose conduct falls short of expectations. See Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 305 (1993) (noting the impact of peer influence on misbehaving judges and suggesting that “allavailable evidence suggests that its impact is salutary”).

¹²⁰ at <http://www.state.wv.us/wvsca/JIC/geninfo.htm>

¹²¹ *ibid*

When a determination has been made that probable cause exists but that formal discipline is not appropriate under the circumstances, the Commission shall issue a written admonishment to the judge who has 14 days after receiving it to object. The written admonishment is available to the public. If an objection to the written

At the federal level, responsibility for disciplining judges falls to the Chief Judge of each circuit and to the circuit Judicial Councils. Under the Judicial Conduct and Disability Act of 1980,¹²² any person may file a written complaint with the clerk of the relevant court of appeals containing a brief statement of the facts upon which the complaint is based. The clerk is required to promptly transmit the complaint to the Chief Judge of the circuit as well as to the judge whose conduct is questioned. The Chief Judge screens the complaint and either dismisses it, finds that an appropriate corrective action has already been taken, or refers the matter to a special committee.¹²³ If the third option is chosen, a committee consisting of the Chief Judge and an equal number of circuit and district judges investigates the complaint and reports its findings to the Judicial Council of the circuit, which then undertakes an appropriate intervention to redress the problem.¹²⁴

The state codes of judicial conduct are based upon the ABA Model. A revised Code was approved by the ABA House of Delegates in 2007. The preservation of independence and the avoidance of conflict of interest is perhaps the chief concern of the A.BA Model Code of Judicial Conduct.¹²⁵ Canon 1 exhorts the judge “to promote the independence, integrity and impartiality of the judicial” and to avoid “impropriety and appearance of impropriety.” **Canon 2 states that “A judge shall perform the duties of judicial office impartially, competently and diligently.” Canon 2.11 goes on to state “A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned,” including**

admonishment is filed timely, the Commission shall file a formal charge with the Clerk of the Supreme Court of Appeals. Admonishment shall not be administered if: (1) the misconduct involved the misappropriation of funds; (2) the misconduct resulted or will likely result in substantial prejudice to a litigant or other person; (3) the respondent has been disciplined in the last three years; (4) the misconduct is of the same nature as misconduct for which the respondent has been disciplined in the last five years; (5) the misconduct involved dishonesty, deceit, fraud, or misrepresentation by the respondent; (6) the misconduct constituted a crime that adversely reflects on the respondent's honesty, trustworthiness, or fitness as a judge; or (7) the misconduct was part of a pattern of similar misconduct.

While West Virginia law and the Code of Judicial Conduct require state judges to annually file reports disclosing their financial interests, the filings are not available online and do not include some critical information, such as the economic interests of the judge’s spouse. West Virginia’s Code of Judicial Conduct does not place meaningful limitations on the reimbursements and compensation that judges may accept in connection with corporate and special interest funded trips.¹²¹ See HALT judicial accountability report card at http://www.halt.org/jip/2008_jarc/pdf/WV_RC.pdf

¹²² 28 U.S.C. §§ 351–363 (Supp. 2004). Congress revisited the issue in 1990 by establishing the National Commission on Judicial Discipline and Removal, a body charged with investigating and studying the problems of disciplining and removing Article III judges and recommending potential reforms. Judicial Improvements Act of 1990, Pub. L. No. 101-650, tit. IV, § 410, 104 Stat. 5089, 5124 (1990).

¹²³ See Ronald D. Rotunda, [Judicial Transparency, Judicial Ethics, And a Judicial Solution: An Inspector General for the Courts](#), 41 Loy. U. Chi. L.J. 301 (2009). (suggesting the need for an Inspector General of the federal courts)

¹²⁴ Geoffrey P. Miller, [Bad Judges](#), 83 Tex. L. Rev. 431 (2004).

¹²⁵ ABA Model Code of Judicial Conduct (1990, as amended)

but not limited to instances where: “(1) the judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;... (3) the judge knows that he or she, individually or as a fiduciary, or the judge’s spouse, parent or child wherever residing, 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...”¹²⁶ And further “ judge shall keep informed about the judge’s

¹²⁶ Id at Rule 2.11 The complete text is:

Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality* might reasonably be questioned, including but not limited to the following circumstances:

(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 minimis* 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 in a party to the proceeding.

(4) The judge knows or learns by means of a timely motion that a party, a party’s lawyer, or the law firm of a party’s lawyer has within the previous [insert number] year[s] made aggregate* contributions* to the judge’s campaign in an amount that is greater than [\$(insert amount) for an individual or \$(insert amount) for an entity] [is reasonable and appropriate for an individual or an entity].

(5) The judge, while a judge or a judicial candidate,* has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(6) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

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

(B) A judge shall keep informed about the judge’s personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge’s spouse or domestic partner and minor children residing in the judge’s household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge’s disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge

personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge’s spouse and minor children residing in the judge’s household.”¹²⁷ Canon 3 states that when engaging in “extra-judicial activities” a judge shall not “participate in activities that will interfere with the proper performance of the judge’s judicial duties.”¹²⁸ Canon 3 goes on to state “A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity...”¹²⁹ Further, “A judge shall not engage in financial activities that:(a) interfere with the proper performance of judicial duties”¹³⁰ A judge “shall publicly report the amount or value of compensation received for extrajudicial activities.”¹³¹ Canon 4 goes into considerable detail in prohibiting judges from engaging in political activity.¹³²

The West Virginia Code of Judicial Conduct also requires a judge to “disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” Canon 3E(1). The standard for federal judges stated in [28 U. S. C. §455\(a\)](#) is the same.¹³³ Under Canon 3E(1), “ ‘[t]he question of disqualification focuses on whether an objective assessment of the judge’s conduct produces a reasonable question about impartiality, not on the judge’s subjective perception of the ability to act fairly.’ ”¹³⁴ The Court has stated that these codes of conduct serve to maintain the integrity of the judiciary and the rule of law.¹³⁵ This is a vital state interest.¹³⁶

should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

¹²⁷ Id at Rule 2.11 (B)

¹²⁸ Id at Rule 3.1

¹²⁹ Id at Rule 3.11(B)

¹³⁰ Rule 3.11 © (1)

¹³¹ Id at Rule 3.15

¹³² Id at Canon 4. **A Judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity or impartiality of the judiciary**

¹³³ [28 U. S. C. §455\(a\)](#)

¹³⁴ Indeed, some States require recusal based on campaign contributions similar to those in this case. See, e.g., Ala. Code §§12–24–1, 12–24–2 (2006); Miss. Code of Judicial Conduct, Canon 3E(2) (2008).

¹³⁵ The Conference of the Chief Justices has underscored that the codes are “[t]he principal safeguard against judicial campaign abuses” that threaten to imperil “public confidence in the fairness and integrity of the nation’s elected judges.” Brief for Conference of Chief Justices as *Amicus Curiae* 4, 11

¹³⁶ Here Justice Kennedy quoted his own opinion in *White*: “Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen’s respect for judgments depends in turn upon the issuing court’s absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.” *Republican Party of Minn. v. White*, [536 U. S. 765](#), 793 (2002) (Kennedy, J., concurring).

- D. Divestiture is applicable to financial conflicts and places the obligation to purge the conflict on the subject. It assumes that the termination of a financial connection will eliminate the conflict. Blind trusts or mutual funds are a simple solution for the typical investment portfolio, and should be mandatory for the judge who wishes to own stock. While the rights of ownership in Fortune 500 companies by the typical small investor are certainly de minimus, a decision to invest signals a preference which is incompatible with judicial independence. Family business connections are clearly more dangerous to independence.
- E. Disclosure obligations typically apply only to financial interests. It makes the conflict a matter of public record but does not eliminate the conflict.¹³⁷ It assumes that the information will be available to interested members of the public who will take the time to read and investigate the record and attribute the appropriate weight to the disclosure. Disclosure typically does not apply to ideological conflicts, which are harder to define and evaluate. Disclosure also violates privacy interests of the subject and may discourage individuals from entering the field.

The Caperton court took notice of the fact the ABA code states that “a judge must avoid even the appearance of partiality.”¹³⁸ West Virginia rule states: “A judge shall avoid impropriety and the appearance of impropriety.” The ABA Model Code’s test for appearance of impropriety is “whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”¹³⁹ This test seems similar to Tumey’s reasonable man as judge. Justice Ginsburg, in dissent in *White*, asserted that “another compelling state interest protected by the pledges or promises clause is “preserving the public’s confidence in the integrity and impartiality of its judiciary.” Because courts control neither the purse nor the sword, their authority ultimately rests on public faith in those who “don the robe.”¹⁴⁰

F. Recusal occurs when an individual judge decides not to participate in the hearing or decision of a particular case. The decision may be prompted by a motion filed by a party or on the judge’s own motion. The sources for the standards are common law, recusal statutes, judicial codes and now the Due Process Clause. The judge in question should apparently engage in a two part inquiry. She should ask all of the conflict questions referred to above by examining whether there is any personal reason why she cannot decide the question fairly. Next she should ask the more objective question of whether any of her relationships with the case would affect the

¹³⁷ Judicial Watch maintains a web-site with the financial disclosure documents of all federal judges. <http://www.judicialwatch.org/judicial-financial-disclosure> (last visited Dec. 10, 2009) The requirements of financial disclosure of state judges varies from state to state. West Virginia requires reporting of the financial interest of judges, but the reports maintained by the Center for Public Integrity are difficult to read. <http://projects.publicintegrity.org/StateDisclosure/Default.aspx?act=judicial> Last visited Dec. 10, 2009)

¹³⁸ ABA Annotated Model Code of Judicial Conduct, Canon 2 (2004)

¹³⁹ Canon 2A, Commentary; see also W. Va. Code of Judicial Conduct, Canon 2A, and Commentary (2009) (same).

¹⁴⁰ See *Mistretta v. United States*, [488 U.S. 361](#), 407 (1989) (“The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.”).

average man as judge or raise a question in the mind of the reasonable outside observer. If either question is answered in the affirmative the judge should recuse herself. Under the rules of court in most jurisdictions, an application to recuse is heard at least in the first instance by the targeted judge.¹⁴¹ Its usefulness is limited because of party reluctance to suggest to the judge of their case that she has an ethical problem because such a suggestion may generate retaliation. Recusal eliminates the conflict by replacing the person with the conflict with another who has no conflict. It is available only in situations where personnel are fungible, where an adequate and qualified substitute is readily available. In a court of last resort it may cause a tie and deprive a party of final resolution. The availability of mandamus and interlocutory appeals is very limited.. Its usefulness can be enhanced with some of the reform proposals discussed below

Thus the targeted judge must judge him or herself. He or she has a conflict of interest in deciding both questions. Most likely the judge truly believes that the average man as judge would decide the matter as he or she did. Likewise the judge would likely find that the appearance of his or her course of action in the eyes of the public is a model of propriety. Clearly the majority practice of making recusal motions to the targeted judge is fatally flawed. But alternatives, especially in a court of last resort, are similarly flawed, assuming a reluctance of members of a court to make an accusatory finding against a colleague.

Justice Benjamin's complaints were that his difficulties were attributable to the press. The claims are similar to those made by Justice Scalia in his response to a recusal request in the case of *Cheney v. U. S. District Court*.¹⁴² The case was an action under the Federal Advisory Committee Act (FACA), 5 U. S. C. App. §2, p. 1, which was enacted in 1972 to ensure that advice by the various advisory committees formed to assist and advise government is objective and accessible to the public. It also formalized a process for establishing, operating, overseeing, and terminating these advisory bodies. The plaintiffs sought discovery and other information concerning an Energy Advisory Panel, convened at the behest of the VP Richard Cheney to assist the Bush administration in formulating energy policy. The Government resisted disclosure of the meetings, lists of attendees and conclusions as beyond the reach of FACA and also covered by executive privilege.

The federal statute¹⁴³ that defines when federal judges are to be disqualified relies upon the generalized objective standard in (a) and then continues with a longer and more specific list of

¹⁴¹ James Sample, David Pozen and Michael Young, *Fair Courts: setting recusal standards*, p. 33 The Brennan Center

for Justice

¹⁴² *Cheney v. United States District Court*, 541 U.S. 913, 914, 124 S.Ct. 1391, 1392, 158 L.Ed. 225 (2004) (Scalia, J.) (Memorandum on Motion for Disqualification)

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

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

relationships which dictate disqualification in (b). In addition to situations in which a judge's "impartiality might reasonably be questioned," the statute lists "personal bias or prejudice concerning a party." ¹⁴⁴

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household....

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not

required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

28 USC sec 144 applies only in federal district courts:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

¹⁴⁴ See *Liljeberg v. Health Services Acquisition Corp* 486 U.S. 847 (1988) (judges ignorance of a disqualifying relationship is no defense); *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302, 121 S.Ct. 25,

One of the plaintiffs, the Sierra Club moved that Justice Scalia recuse himself based on the fact that during the pendency of the appeal, Justice Scalia accompanied the Vice-President Cheney on a duck-hunting trip to Louisiana. The justice, his son and his son-in-law were transported from Washington to Louisiana on the Vice-President's official airplane. The facts of the encounter are laid out in detail in the Scalia opinion. He asserts that his time with the vice-president was very limited (he was never part of the vice-president's "pride") and that they never spoke about the case.

In his discussion of the motion, Justice Scalia distinguishes between cases where a public official is sued in his professional capacity wherein his status as a party is nominal and those where the official is sued individually, citing, for instance, *Clinton v Jones* and *US v Nixon*. He concludes that friendship cannot be a basis for disqualification in official capacity cases, citing a long history of the social interaction of Washington society, which is natural, beneficial, innocuous and are thus insufficient basis for the motion. He cites the standard in the federal statute concerning whether "impartiality can reasonably be questioned," and concluded that it had not been met.

However Justice Scalia continued that "if I were to withdraw from this case," it would "harm the court." It would "give elements of the press a veto over participation of any Justices who had social contacts with, or were even known to be friends of, a named official." He viewed this as "intolerable." He cited other examples where "so-called investigative journalists ... suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons." For instance, "[t]he Los Angeles Times has already suggested that it was improper for me to sit on a case argued by a law school dean [Pepperdine's Kenneth Starr, independent counsel who investigated President Clinton] whose school I had visited several weeks before—visited not at his invitation, but at his predecessor's. See *New Trip Trouble for Scalia*, Feb. 28, 2004, p. B22." Further, "[t]he same paper has asserted that it was improper for me to speak at a dinner honoring Cardinal Bevilacqua given by the Urban Family Council of Philadelphia because (according to the Times's false report) that organization was engaged in litigation seeking to prevent same-sex civil unions, and I had before me a case presenting the question (whether same-sex civil unions were lawful?—no) whether homosexual sodomy could constitutionally be criminalized. See *Lawrence v. Texas*, 539 U. S."

The question, simply put, is whether someone who thought I could decide this case impartially despite my friendship with the Vice President would reasonably believe that I cannot decide it impartially because I went hunting with that friend and accepted an invitation to fly there with him on a Government plane. If it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined.

As the newspaper editorials appended to the motion make clear, I have received a good deal of embarrassing criticism and adverse publicity in connection with the matters at issue here—even to the point of becoming (as the motion cruelly but accurately states) "fodder for late night comedians." **Motion to Recuse 6.**

Justice Scalia proceeded to deny the motion. Both Justice Benjamin and Justice Scalia complained that their recusal motions were political and manipulated by the press.

A similar question arose concerning Justice Breyer should recuse himself from ruling on two cases that decided the constitutionality of federal sentencing guidelines. When Breyer was the Chief Counsel to the Senate Judiciary Committee in 1984, he played a leading role with regard to the Sentencing Reform Act, which created the Sentencing Commission that created the controversial sentencing guidelines. Justice Breyer also served on the first Sentencing Commission that created the guidelines in the very structure at issue in two cases, *United States v. Booker* and *United States v. Fanfan* though by that time he was a First Circuit judge. Should a justice who played such a key role in developing the sentencing guidelines participate in considering their constitutionality?"¹⁴⁵

Supreme Court Justice Ruth Bader Ginsburg lent her name and presence to a lecture series cosponsored by the liberal NOW Legal Defense and Education Fund, an advocacy group that often argues before the high court in support of women's rights that the justice embraces.¹⁴⁶ In January, 2004 Justice Ginsburg gave opening remarks for the fourth installment in the Justice Ruth Bader Ginsburg Distinguished Lecture Series on Women and the Law. Two weeks earlier, she had voted in a medical screening case and taken the side promoted by the legal defense fund in its friend-of-the-court brief. The NOW fund brings lawsuits in the lower courts and regularly files briefs in the Supreme Court. In 2003 and 2004, it has urged the Court to uphold affirmative action in University of Michigan cases, to endorse gay rights in a Texas sodomy case, and to preserve the Family Medical Leave Act in a Nevada case.

In his dissenting opinion for himself, and Justices Alito, Scalia, and Thomas in *Caperton*, Chief Justice Roberts lists 40 questions that he says need to be answered in subsequent cases about how this standard is to be implemented. The Chief is right that the due process standard announced by the majority leaves open many questions. The list is primarily concerned with uncertainty and causation. Is it worth the risk of many more recusal motions and additional litigation to flesh out the details of the new recusal standard, and to promote the enhanced standards of fairness in the judicial process, especially in cases brought before elected judges.¹⁴⁷

¹⁴⁵ Monroe Freedman, *Judicial Impartiality in the Supreme Court- The Troubling Case of Justice Stephen Breyer* 30 *Oklahoma City Law Review* 513 (2005) (criticizing Justice Breyer for his failure to recuse himself here as well as in other cases while on the First Circuit)

¹⁴⁶ [Ginsburg Has Ties to Activist Group: The justice lends her name to a legal fund's event on women's rights. Critics see a conflict.](#) Richard A. Serrano and David G. Savage *LA Times* March 11, 2004

¹⁴⁷ American Constitution Society blog <http://www.acslaw.org/node/13537> See also [Judicial Ethics Blog, Caperton: Answers to the Chief Justice's "Twenty Questions" Times Two](#) Posted by kswisher on Monday, June, 15, 2009

VI. ABA Proposals

ABA Standing Committee on Judicial Independence issued a new set of recommendations in response to *Caperton* on July 31, 2009. The recommendations include; “assigning contested disqualification motions to a different judge, ...adopting a *de novo* standard of appellate review in matters in which judges’ decisions not to disqualify themselves are challenged;” when high court judges decline party requests to disqualify themselves, “establishing procedures for review of those decisions by the remainder of the court, by a specially constituted court, or by an advisory board; adopting judicial substitution or peremptory challenge procedures for trial judges...; disseminating data about judicial disqualification within their jurisdictions; encouraging judges to explain the reasons for their judicial disqualification decisions.” Further, in states where judges are elected, considering “the following factors when giving guidance to judges concerning when the campaign support a judicial candidate receives might reasonably call his or her impartiality into question: [t]he level of support; any distinction between direct contributions or independent expenditures; [t]he timing of the support in relation to the case for which disqualification is sought; the relationship, if any, between the supporter and (i) any of the litigants, (ii) the issue before the court, (iii) the judicial candidate, and (iv) the total support received by the judicial candidate and the total support received by all candidates for that judgeship.”¹⁴⁸ A Brennan Center report echoes the ABA proposal, but adds rules encouraging enhanced disclosure by judges and litigants, and system-wide reporting.¹⁴⁹ The ABA proposals and those of the Brennan Center would improve recusal.

¹⁴⁸ AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON JUDICIAL INDEPENDENCE REPORT TO THE HOUSE OF DELEGATES July 31, 2009 http://www.abanet.org/judind/pdf/JDP_RES_REPORT_7-31-09.pdf (last visited Nov 11, 2009)

As Accepted and Reported by Committee on July 31, 2009

¹⁴⁹ Enhanced disclosure by judges. States could require judges, at the outset of litigation, to disclose any facts, particularly those involving campaign statements and campaign contributions, that might plausibly be construed as bearing on their impartiality. ..To further enhance the disclosure of relevant information concerning disqualification, states could also provide a centralized system through which attorneys and their clients can review a judge’s recusal history.

Enhanced disclosure by litigants. In order to assist judges in determining whether grounds for disqualification exist, nongovernmental corporate parties are often required to file a statement identifying any parent corporation or publicly held corporation that owns a significant portion of the corporate party’s stock early on in a court proceeding.²⁸ Similarly, states could require all litigants and their attorneys to file a disclosure affidavit at the outset of litigation, listing any campaign contributions to or expenditures in favor of presiding judges or judicial candidates with whom the presiding judges have competed or will compete in a pending election (or to state that no such contributions or expenditures have been made). Disclosure could be required of any expenditures or contributions by a party or its counsel that exceed a given threshold.

Increased and uniform data collection and dissemination. To increase transparency in the recusal process, states should collect and publicize uniform data on recusal motions and their dispositions, including recusal histories of individual judges. In the short term, such data would be useful to litigants who could review the disqualification history of any judge assigned to their case. In the longer term, increased data collection would facilitate meaningful analysis of the impact of specific recusal policies in force in a given jurisdiction, as well as comparative

VII. Judicial Elections

West Virginia elects its Justices of its Supreme Court of Appeals, circuit judges, family court judges and magistrates through partisan primary and general elections.¹⁵⁰ Thirty-nine states have some form of judicial elections for some or all their judges.¹⁵¹ The conflict-causing conduct occurred during Judge Benjamin's campaign. The campaign expenditures of Blankenship, the owner of Massey, the 50 million dollar judgment creditor, arguably delivered to Benjamin a judgeship on West Virginia's highest court.¹⁵²

In her concurring opinion in *White*,¹⁵³ Justice O'Connor states her fears that the process of election of judges imposes additional pressures on judges. Judges who must run for re-election "are likely to feel that they have at least some personal stake in the outcome of every publicized case."¹⁵⁴ Elected judges understand "that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects."¹⁵⁵ Even in cases where judges were able to suppress their awareness of the "potential electoral consequences of their decisions" and

analysis of recusal policies across jurisdictions. James Sample, David Pozen and Michael Young, Fair Courts: setting recusal standards http://brennan.3cdn.net/1afc0474a5a53df4d0_7tm6brjhd.pdf (last visited Dec. 8, 2009)

¹⁵⁰ A proposal by the Executive Director of the West Virginia Judiciary Association to end partisan elections of judges is under consideration by the West Virginia legislature. Herald-Dispatch.com Dec. 3, 2008. <http://www.herald-dispatch.com/news/x1649868507/W-Va-sticking-with-partisan-judicial-elections> (last visited Oct 3, 2009)

¹⁵¹ *White* supra US (Justice O'Connor concurring). See also: James Sample and Lauren Jones, The New Politics of Judicial Elections 2006 http://brennan.3cdn.net/49c18b6cb18960b2f9_z6m62gwji.pdf (last visited Nov 11, 2009)

¹⁵² Thomas R. Phillips and Karlene Dunn Poll, *Free Speech and Fair Appeals for Litigants: Judicial Recusal in a Post-White World*, 55 DRAKE L. REV. 691, 698–99 (2007) (referring to lower court decisions in Alaska, Kansas, Kentucky, and North Dakota).

¹⁵³ In *Republican Party of Minn. v. White* [536 U.S. 765](#), 793 (2002) the Supreme Court invalidated the so-called Announce clause in the Minnesota Code of Judicial Conduct in a 5-4 decision authored by Justice Scalia. The Minnesota Constitution provided for the selection of all state judges by popular nonpartisan election.¹⁵³ Since 1974, a candidate for a judicial office, including incumbent judge have been subject to a legal restriction which states that shall not "announce his or her views on disputed legal or political issues."¹⁵³ This prohibition was promulgated by the Minnesota Supreme Court and based on Canon 7(B) of the 1972 American Bar Association (ABA) Model Code of Judicial Conduct. Incumbent judges who violate it are subject to discipline, including removal, censure, civil penalties, and suspension without pay. Minn. Rules of Board on Judicial Standards 4(a)(6), 11(d) (2002). Lawyers who run for judicial office also must comply with the announce clause.¹⁵³ Those who violate it are subject to, *inter alia*, disbarment, suspension, and probation..

¹⁵⁴ *id*

¹⁵⁵ Justice O'Connor cites the following authorities: Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. Colo. L. Rev. 733, 739 (1994) (quoting former California Supreme Court Justice Otto Kaus' statement that ignoring the political consequences of visible decisions is "like ignoring a crocodile in your bathtub' "); Bright & Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B. U. L. Rev. 759, 793–794 (1995) (citing statistics indicating that judges who face elections are far more likely to override jury sentences of life without parole and impose the death penalty than are judges who do not run for election).

refrain from acting on it, the “public’s confidence in the judiciary” could be undermined simply by the possibility that judges would be unable to do so.¹⁵⁶

Moreover, contested elections generally entail substantial funds.¹⁵⁷ Thus judicial candidates who are not wealthy, must incur the cost of fundraising.¹⁵⁸ Yet relying on campaign donations may “leave judges feeling indebted to certain parties or interest groups.”¹⁵⁹ Even if judges were able to refrain from favoring donors, the mere possibility that judges’ decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public’s confidence in the judiciary.¹⁶⁰

Conclusion

The first thing that can be said about all of the recusal standards is that they are uniformly vague. Reasonable questions about impartiality or public perception or the average man as judge lack precision. The Court calls these standards objective but they are not. Imprecise standards provide uncertain guidance and invite disputes. Distinctions between appropriate and inappropriate influences defy easy definition. Indeed the very inquiry borders very closely on the limits of privacy of the judge and judicial immunity.

*Caperton*¹⁶¹ breaks new ground with respect to the requirements of Due Process. *Tumey*¹⁶² and *Ward*¹⁶³ are easy cases. The judge, either as an individual or as a mayor benefitted from guilty

¹⁵⁶ id

¹⁵⁷ Justice O’Connor cites: Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. Rev. Mich. State U. Detroit College of Law 849, 866 (reporting that in 2000, the 13 candidates in a partisan election for 5 seats on the Alabama Supreme Court spent an average of \$1,092,076 on their campaigns); American Bar Association, Report and Recommendations of the Task Force on Lawyers’ Political Contributions, pt. 2 (July 1998) (reporting that in 1995, one candidate for the Pennsylvania Supreme Court raised \$1,848,142 in campaign funds, and that in 1986, \$2,700,000 was spent on the race for Chief Justice of the Ohio Supreme Court).

¹⁵⁸ id

¹⁵⁹ See Thomas, National L. J., Mar. 16, 1998, p. A8, col. 1 (reporting that a study by the public interest group Texans for Public Justice found that 40 percent of the \$9,200,000 in contributions of \$100 or more raised by seven of Texas’ nine Supreme Court justices for their 1994 and 1996 elections “came from parties and lawyers with cases before the court or contributors closely linked to these parties”)

¹⁶⁰ See Greenberg Quinlan Rosner Research, Inc., and American Viewpoint, National Public Opinion Survey Frequency Questionnaire 4 (2001), (available at <http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf>) (describing survey results indicating that 76 percent of registered voters believe that campaign contributions influence judicial decisions); *id.*, at 7 (describing survey results indicating that two-thirds of registered voters believe individuals and groups who give money to judicial candidates often receive favorable treatment); Barnhizer, “*On the Make*”: *Campaign Funding and the Corrupting of the American Judiciary*, 50 Cath. U. L. Rev. 361, 379 (2001) (relating anecdotes of lawyers who felt that their contributions to judicial campaigns affected their chance of success in court).

¹⁶¹ Op. it n. 1.

¹⁶² Op. cit. n. 31.

¹⁶³ Op. cit. n.32.

findings and got nothing from acquittals. Increased compensation would tempt the average man as judge. Essentially all conflict principles would forbid this type of self-dealing: fiduciary duties of trustees and agents would prohibit it; most professional codes prohibit financial interference with the exercise of professional judgment; and, many of the statutes applicable to governmental employees require the avoidance of situations where the employees have a financial interest in a matter involving their official duty. *Murchison*¹⁶⁴ is bit more subtle. Here there is no money involved. The judge, acting in an (unusual) investigative role in presiding over an investigation, has a stake in truth finding and when a witness refuses to cooperate, the judge cites him for contempt. Here the judge assumes the role of prosecutor by filing an accusation. In doing so he has lost his independence; he has a stake in the outcome. When he assumes the role of judge, his stake in the outcome remains. An acquittal would suggest to an observer that the original citation of contempt was wrongful and that the judge-accuser had acted wrongfully. The judge has an interest in saving face and this is achieved by a finding of guilt. *Lavoie*¹⁶⁵ is a bit more remote. The appellate judge has an opportunity to establish a precedent which will later be used for his financial benefit in a case in which he is a member of a plaintiff class. In hearing a case where a similar issue is presented, he becomes a participant in the creation of rules for his own case. He will then cite those rules against an adversary and they will serve his quest for a money judgment against an insurance company which he claims harmed him in its handling of his personal insurance claim. In both *Murchison*¹⁶⁶ and *Lavoie*,¹⁶⁷ the conflict causing behavior is assuming a role, a prosecutor in *Murchison*¹⁶⁸ and plaintiff in *Lavoie*,¹⁶⁹ which is incompatible with the independence necessary to the judicial office. Recall that Canon 3 of the Model Code of Judicial Conduct prohibits judges from assuming positions inconsistent with the judicial function.¹⁷⁰

*Caperton*¹⁷¹ is more remote again. In 2004 Judge Benjamin won a twelve year term on the WVSCA. While his campaign committee did receive one thousand dollars from Blankenship, the other three million dollars were independently expended, not so much on his behalf, but more against his opponent.¹⁷² Those expenditures put his opponent in a bad light. However Judge Benjamin suggests in his August 2008 opinion that Judge McGraw dug his own grave with his “Rant at Racine.”¹⁷³ Thus the conflict- causing connection was the fact that three years beforehand his weakened opponent was attacked for a decision concerning a child molestor, which Blankenship publicized through expenditures made by Save the Kids. His seat on the

¹⁶⁴ Op. cit n. 45.

¹⁶⁵ Op. cit. n. 33.

¹⁶⁶ Op. cit. n. 45.

¹⁶⁷ Op. cit. n. 33

¹⁶⁸ Op. cit, n. 45.

¹⁶⁹ Op. cit. n. 33.

¹⁷⁰ Canon3, ABA Model Code of Judicial Conduct.

¹⁷¹ Op. cit. N. 1.

¹⁷² See discussion, *supra*

¹⁷³ McGraw’s devastating political speech can be viewed on You Tube.

<http://www.youtube.com/watch?v=TQ6nQaE2FM8> (Last visited Dec. 17,2009)

Court was safe for another nine years when the case involving a ten year old business tort reached his court. He received no benefit from a reversal and no harm from an affirmance. The assumption is that he is grateful to Blankenship and this gratitude pushed him to go along with another judge on the court who had no cause for gratitude to depart from his obligation to “hold the balance nice and clear and true”¹⁷⁴ with respect to two legal claims that were very close legal questions.¹⁷⁵ Or more correctly, the average man as judge in Judge Benjamin’s place would place his bias above his obligation. This breaks new ground by allowing a past connection with no present or future effect on the judge to serve to create an assumption of bias.¹⁷⁶ In states with active partisan elections for judgeships, the difficulties of such past connections multiply: the judge participated in fund-raising, sought endorsements and made many speeches.¹⁷⁷

*Caperton*¹⁷⁸ will also generate some reconsideration of judicial elections. Blankenship exercised his constitutional rights in the West Virginia judicial elections of 2004. There is no evidence of quid pro quo or even communication between Blankenship and Benjamin. The case against Benjamin is purely circumstantial,¹⁷⁹ relying on inference and supposition. Blankenship’s expenditures required Benjamin’s recusal. If 39 states elect their judges, the difference between the *Caperton* facts and at least some cases that come before those thousands of elected judges, is really just one of degree not a difference in kind. *Caperton* points up in stark relief the incompatibility of elected judges and the ideal of an independent judiciary. Judges concerned about their re-election will not be independent.¹⁸⁰ The very reason for having

¹⁷⁴ *Tumey supra* at n.

¹⁷⁵ See discussion *supra*

¹⁷⁶ Another case that broke new ground, was *Gibson v. Berryhill supra* where the Court invalidated the decision of a board of optometrists that were following a newly enacted state statute that said that corporations could not practice optometry. Apparently Lee Optical had taken the state by storm and was pushing the little guys out. The Board cited a number of optometrists working for Lee Optical for assisting in the unauthorized practice of optometry. The Court took the extraordinary step of enjoining the unexhausted state administrative proceedings to end the threat against the plaintiffs from the board which the Court assumed to be sufficiently conflicted to require Due Process intervention. Very similar disputes have occurred in the legal profession under R. 5.4 Model Rules Pro’l Conduct. Certainly an assumption that licensing boards composed of licensees are tainted with conflicts in judging their competitors would apply to vast numbers of licensing proceedings. Indeed the problem of using state power to further monopoly has been before the court many times. *The Slaughterhouse Cases* ; 83 U.S. 36 (1873) New Orleans seizes the slaughtering business); *Williamson v. Lee Optical* 348 U.S. 483 (1955) (same company, same fight).

¹⁷⁷ James Sample & David E. Pozen, *Making Judicial Recusal More Rigorous*, 46 THE JUDGES’ JOURNAL 1, 2 (Winter 2007)

¹⁷⁸ USLegal Blog June 26th, 2009 by Bryan Lieb [Caperton v. Massey: Preserving Faith in Fairness](http://blog.uslegal.com/2009/06/caperton-v-massey-preserving-faith-in-fairness/) <http://blog.uslegal.com/2009/06/caperton-v-massey-preserving-faith-in-fairness/> (last visited Nov 28,2009)

¹⁷⁹ See, e.g., Frank B. Cross, *What Do Judges Want?*, 87 TEX. L. REV. 183, 202 (2008) (reviewing RICHARD A. POSNER, *HOW JUDGES THINK* (2008)) (“Empirical evidence of apparently political decision making at the Supreme Court level is extensive.”); Ran Hirschl, *Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend*, 15 CAN. J.L. & JURIS. 191, 217 (2002) (“Constitutional scholars, legal practitioners, and political activists critical of the U.S. Supreme Court’s crucial role in determining the outcome of the 2000 presidential election, regard the *Bush v. Gore* saga as the most glaring example of the judicialization of politics in the United States.”).

¹⁸⁰ Penny J. White, *Relinquished Responsibilities* 123 Harv. L. Rev. 120 (2009) (Relying on a comparative law perspective to suggest that judges that are elected violate due Process

elections is to tether the politician to the electorate which makes for responsive legislators and executives. Judges tethered to the electorate will sacrifice justice and the rule of law to public opinion.¹⁸¹

Indeed *Caperton* is at war with judicial elections. It is inconsistent with *White*.¹⁸² The issue in *White*¹⁸³ required the resolution of the conflict between speech and the protection of the judicial process from politics. *White*¹⁸⁴ favored speech; *Caperton* favored protection.¹⁸⁵

Further, Justice Kennedy makes it adequately clear that this is an “extreme” case.¹⁸⁶ One might ask what good does a precedent on an extreme case do for the more run of the mill cases with unjust results springing from judicial bias. An answer is that Supreme Court opinions are sizable public events. The Court’s opinion has already generated extensive discussion on judicial conflict of interest and recusal and has shown a light on a problem which will spawn energetic responses from advocates and reformers as well. Others, including scholars, judicial conduct commissions and the ABA will elaborate the decision. Procedural proposals like those advocated by the ABA and the Brennan Center will be considered and hopefully adopted.

Although it has often been said that the role of the Supreme Court is not to do justice in the individual case¹⁸⁷, the Court felt that Justice Benjamin could not be allowed to decide the case in favor of the company which had massively funded his election campaign. An affirmance would send a message to the public that justice can be bought. The opinion, in broadening the scope of the due process clause, expands federal oversight of state administration of justice.¹⁸⁸ Justice Scalia is undoubtedly correct that it will be used by lawyers to complicate the litigation process, which can be said of any expansion of rights.¹⁸⁹ The Court’s Due Process standard, however, is really no different than the standards in recusal statutes and in judicial codes. Thus in the

¹⁸¹ See Pamela S. Karlen, *Electing Judges, Judging Elections and the Lessons of Caperton* 123 Harv. L. Rev. 80 (2009); David E. Pozen, *The Irony of Judicial Elections* 108 Colum L. Rev. 265 (2008) (explaining the incompatibility of electoral politics and the judicial function)

¹⁸² Op. cit n. 149

¹⁸³ Id.

¹⁸⁴ Id.

¹⁸⁵ Op. cit. n. 1. Similar speech versus process questions arise in the trial publicity cases. *Gentile v. State Bar of Nevada* 501 U.S. 1030 (1991) (protecting attorney Gentile’s press conference against a claim of improper trial publicity)

¹⁸⁶ A notable other extreme case was *Bush v. Gore* 531 U.S. 70, 81 (2000) (Court suggested that its holding would not be precedent in future cases: “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities”)

¹⁸⁷ See Justice Scalia dissenting 129 S. Ct. at 2274

¹⁸⁸ Due process creates federal oversight of state procedure in many circumstances. *Philip Morris USA v. Williams* 548 U.S.346 (2007) (large punitive damage awards may violate the defendant’s right to notice) ; class action ns and res judicata where else?

¹⁸⁹ 129 S. Ct. at 2274.

absence of a bright-line rule, future cases will have to be decided on a case-by-case basis- but with an enhanced¹⁹⁰ attention paid to the independence of the judge.

¹⁹⁰129 S. Ct. at 2274.