The Elusive Goal of Impartiality

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ABSTRACT: Over the past ten years, the topic of judicial recusal has received increased attention in virtually every quarter—in the media, in the legal commentary, and even in Congress. The reason for this surge in interest is not due to recent changes in the applicable recusal standards or enhanced investigative reporting, but rather largely appears to be the result of inadequate attention to—or perhaps in some cases, arrogance or callous disregard for—the recusal standards, exacerbated by procedural deficiencies that prevent the recusal rules from being fully effective. This Article seeks to identify the flaws with the current approach to judicial recusal, and then offers a four-step proposal for restoring faith in the judiciary.

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INTRODUCTION

> *[L]et the suspect judge be removed and one who is not suspect substituted for him. . . . [I]t is a very fearful thing to litigate under a suspect judge and very often results in the saddest outcomes.*
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> *But there is only one reason to recuse—suspicion, which arises from many causes . . . .*[1]

The notion of an impartial trial under the direction of an unbiased judge is a central tenet of our system of justice; indeed, "[a] fair trial in a fair tribunal is a basic requirement of due process. . . . To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."[2] A judge's partiality for one party over another—regardless of the reason—taints not only that particular proceeding, but the entire judicial system, reducing public confidence in the courts.[3] The significance of impartiality is reflected in the American Bar Association's *Model Code of Judicial Conduct* and the *Code of Conduct for United States Judges*, which both set forth a general standard requiring judicial disqualification[4] from any proceeding "in which the judge's impartiality

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1. HENRI DE BRACTON, THE LAWS AND CUSTOMS OF ENGLAND (1270), *as reprinted in* THE RESPONSIBLE JUDGE: READINGS IN JUDICIAL ETHICS 278, 278–79 (John T. Noonan, Jr. & Kenneth I. Winston eds., 2001).

2. *In re* Murchison, 349 U.S. 133, 136 (1955); *see also* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821–22 (1986) (requiring an impartial tribunal for due process).

3. *See* Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) ("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.").

4. Although the terms *recusal* and *disqualification* frequently are treated as synonyms, *recusal* and *disqualification* traditionally have had different meanings:

> Whereas "recusal" normally refers to a judge's decision to stand down voluntarily, "disqualification" has typically been reserved for situations involving the statutorily or constitutionally mandated removal of a judge upon the request of a moving party or its counsel.
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> . . . In most jurisdictions, however, whatever differences between the terms that may once have been thought to exist are of little practical significance today. In fact, in modern practice "disqualification" and "recusal" are frequently viewed as synonymous, and employed interchangeably.

RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 1.1, at 3–4 (2d ed. 2007) (footnotes omitted); *see also* John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43, 45 (1970) ("There is a technical distinction between disqualification or exclusion by force of law, and recusation, or withdrawal at the judge's discretion, but the latter term is now largely obsolete . . . ."). Traditionally, *recusal* has referred to a judge's discretionary, voluntary decision to step down. FLAMM, *supra*, § 1.1, at 3 (noting this traditional view); Karen Nelson Moore, *Appellate Review of Judicial Disqualification*

might reasonably be questioned."[5] Yet despite this broad standard, headlines—and cases—suggest that impartiality can be an elusive goal.

Over the past ten years, the topic of judicial recusal has received increased attention in virtually every quarter—in the media,[6] in the legal commentary,[7] and even in Congress.[8] The reason for this surge in interest is not due to recent changes in the applicable recusal standards or enhanced investigative reporting, but rather appears to be the result of inadequate attention to—or perhaps in some cases, arrogance or callous disregard for—the recusal standards by our courts, exacerbated by procedural deficiencies that prevent the recusal rules from being fully effective. This Article identifies the flaws with the current approach to judicial recusal and offers a four-step proposal for restoring faith in the judiciary.

Part I of this Article presents *Caperton v. A.T. Massey Coal Co.*,[9] the United States Supreme Court's most recent judicial disqualification decision. *Caperton*'s facts and rationale provide an unparalleled illustration of the problems inherent in the current approach to judicial disqualification, including the limited role the Constitution and the Supreme Court can play in the area, and thus the case serves as a backdrop

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Decisions in the Federal Courts, 35 HASTINGS L.J. 829, 830 n.3 (1984) ("Although the term 'recus[al]' is often used as a synonym [for disqualification], it technically refers to a voluntary decision of the judge to step down."). *Disqualification*, in contrast, refers to a motion for "the statutorily or constitutionally mandated removal of a judge." FLAMM, *supra*, § 1.1, at 3.

5. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007); CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C(1) (2011).

6. *See, e.g.*, Marcia Coyle, *Review Sought on Judicial Recusals; W. Va. Case Triggers Key Ethical Query*, NAT'L L.J., Aug. 4, 2008, http://www.law.com/jsp/article.jsp?id=1202423489061; Michael Janofsky, *Scalia's Trip with Cheney Raises Questions of Impartiality*, N.Y. TIMES, Feb. 6, 2004, http://www.nytimes.com/2004/02/06/politics/06SCAL.html; Charles Lane, *High Court Questioned on Allowing Scalia Trip*, WASH. POST, Jan. 23, 2004, at A4; Dana Milbank, *Scalia Joined Cheney on Flight; Justice's Ride on Air Force Two Adds New Element to Conflict Issue*, WASH. POST, Feb. 6, 2004, at A4; Paul J. Nyden, *ABA, Groups Urge High Court To Grant Harman Appeal; Benjamin Shouldn't Have Heard Massey Case, Groups Argue*, CHARLESTON GAZETTE (W. Va.), Aug. 5, 2008, at 1A; Bernard Ries, *You Can't Duck This Conflict, Mr. Justice*, WASH. POST, Feb. 29, 2004, at B4; David G. Savage, *Trip with Cheney Puts Ethics Spotlight on Scalia: Friends Hunt Ducks Together, even as the Justice Is Set To Hear the Vice President's Case*, L.A. TIMES, Jan. 17, 2004, http://articles.latimes.com/2004/jan/17/nation/na-ducks17.

7. *See, e.g.*, ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001); Bruce A. Green, *Fear of the Unknown: Judicial Ethics After* Caperton, 60 SYRACUSE L. REV. 229 (2010); Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in* Bush v. Gore, 61 MD. L. REV. 606 (2002); Richard K. Neumann, Jr., *Conflicts of Interest in* Bush v. Gore*: Did Some Justices Vote Illegally?*, 16 GEO. J. LEGAL ETHICS 375 (2003); Ronald D. Rotunda, *Judicial Disqualification in the Aftermath of* Caperton v. A.T. Massey Coal Co., 60 SYRACUSE L. REV. 247 (2010); Jeffrey W. Stempel, *Completing* Caperton *and Clarifying Common Sense Through Using the Right Standard for Constitutional Judicial Recusal*, 29 REV. LITIG. 249 (2010).

8. *See generally Examining the State of Judicial Recusals After* Caperton v. A.T. Massey*: Hearing Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2009), *available at* http://judiciary.house.gov/hearings/printers/111th/111-118_53947.PDF.

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

to what will follow. Part II sets forth the three general bases of authority for judicial disqualification and their corresponding limitations. Part III returns to *Caperton* in analyzing a broad range of issues that arise in the judicial disqualification context. Finally, Part IV offers four specific proposals to address the seemingly elusive goal of impartiality.

I. *CAPERTON*

Questions about judicial impartiality arise regularly, forming the basis for recusal motions in federal and state courts. Less frequently, particular circumstances suggest a judicial indifference to recusal sufficiently egregious to command headlines. By a five-to-four vote, the U.S. Supreme Court held that the "extreme facts" presented in the *Caperton* case rendered the judge's refusal to recuse himself a deprivation of constitutional due process to the litigants.[10]

A. THE FACTS

Hugh Caperton, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales (collectively "Caperton") sued A.T. Massey Coal Company and its affiliates (collectively "Massey") in West Virginia state court for fraudulent misrepresentation, concealment, and tortious interference with contract, alleging that Massey's activities caused the destruction of Caperton's business.[11] The jury awarded Caperton $50 million in compensatory and punitive damages, the state trial court denied Massey's post-trial motions, and Massey appealed.[12]

After entry of the verdict but before the appeal, West Virginia conducted its judicial elections; one of the positions subject to this election was a Supreme Court of Appeals position in which attorney Brent Benjamin was challenging the incumbent justice.[13] Massey's chairman, president, and chief executive officer, Don Blankenship, poured money into Benjamin's campaign, and Benjamin won.[14] Blankenship's campaign contributions were extraordinary, exceeding "the *total* amount spent by *all* other Benjamin supporters,"[15] "three times the amount spent by Benjamin's *own* committee,"[16] and "$1 million more than the total amount spent by the campaign committees of *both* candidates *combined*."[17]

After the election, Caperton moved to disqualify newly installed Justice Benjamin from participating in deciding the appeal on the basis of

10. *Id.* at 2264.
11. *Id.* at 2257.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* (emphasis added).
16. *Id.* (emphasis added).
17. *Id.* (emphasis added).

Blankenship's contributions to Justice Benjamin's campaign; Justice Benjamin denied the motion.[18] In a three-to-two decision with Justice Benjamin in the majority, the Supreme Court of Appeals reversed the $50 million verdict against Massey.[19] Caperton sought a rehearing, and three of the five justices who participated in the original decision were the subjects of disqualification motions.[20] Massey sought the disqualification of Justice Starcher, who had voted to uphold the lower court's verdict; Justice Starcher agreed to recuse himself from the case.[21] Caperton sought the disqualification of Justices Benjamin and Maynard, who were two of the three justices who voted to reverse the lower court's verdict; Justice Maynard also agreed to recuse himself from the case.[22] Only Justice Benjamin refused to recuse himself.[23]

The Supreme Court of Appeals granted Caperton's motion for rehearing, and Caperton filed a third motion seeking to disqualify Justice Benjamin that, for the third time, Justice Benjamin denied.[24] The recusals of Justices Starcher and Maynard rendered Justice Benjamin the acting chief justice, thereby authorizing him to select their replacements for the rehearing.[25] On rehearing, again on a three-to-two vote with Justice Benjamin in the majority, the court again held for Massey, reversing the $50 million verdict.[26]

B. THE CAPERTON *MAJORITY*

Caperton's challenges to Justice Benjamin's participation in the case were based on both the Due Process Clause and West Virginia law.[27] On certiorari to the U.S. Supreme Court, the Court, in a five-to-four decision, relied on the Due Process Clause in holding that recusal was required. Emphasizing repeatedly that the facts of the case were extreme,[28] the Court concluded that "Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case,"[29] "Blankenship's extraordinary contributions were made at a time when he

18. *Id.* at 2257–58.
19. *Id.* at 2256–58.
20. *Id.* at 2258.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 2257, 2259.
28. *Id.* at 2265 ("On these extreme facts the probability of actual bias rises to an unconstitutional level."); *see also id.* at 2263 (noting that "this is an exceptional case"); *id.* at 2265 ("Our decision today addresses an extraordinary situation . . . ."); *id.* ("The facts now before us are extreme by any measure.").
29. *Id.* at 2264.

had a vested stake in the outcome,"[30] and accordingly "there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal."[31]

In reaching its conclusion, the Court articulated the applicable standard in determining whether the probability of actual bias rises to an unconstitutional level so as to violate the Due Process Clause:

> 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.[32]

Pursuant to this standard, the Court found "that Blankenship's significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—'offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'"[33]

The Court took pains to distinguish between judicial disqualifications based on the Due Process Clause and those based on codes of judicial conduct.[34] "The Due Process Clause demarks only the outer boundaries of judicial disqualifications;"[35] and "[s]tates may choose to 'adopt recusal standards more rigorous than due process requires.'"[36] The Court opined that the constitutional due-process standard that formed the basis for the *Caperton* decision would be implicated only in "rare instances" due to the greater protections afforded by the codes of judicial conduct.[37]

The *Caperton* decision is significant for four reasons. First, it is a decision of the U.S. Supreme Court and thus has nationwide applicability. Second, it is the Court's most recent judicial disqualification decision. Third, it carefully delineates the ultimate constitutional due-process standard from the greater protections under the codes of judicial conduct. Fourth, and finally, *Caperton* is significant for its four-justice dissent, to which we next turn.

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30. *Id.* at 2265.

31. *Id.*

32. *Id.* at 2260 (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)) (internal quotation marks omitted).

33. *Id.* at 2265 (alteration in original) (quoting Aetna Life Ins. Co v. Lavoie, 475 U.S. 813, 825 (1986)) (noting that "objective standards may . . . require recusal whether or not actual bias exists or can be proved").

34. *Id.* at 2266–67.

35. *Id.* at 2267 (quoting *Lavoie*, 475 U.S. at 828) (internal quotation marks omitted).

36. *Id.* at 2267 (quoting Republican Party of Minn. v. White, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring)).

37. *Id.*

C. THE CAPERTON *DISSENT*

The four dissenting Justices in *Caperton* took a dramatically different view of the case. The dissenters did not view the case as involving extreme facts[38] and emphasized the judicial "presumption of honesty and integrity."[39] In contrast to the majority's approach, the dissenters would have restricted judicial disqualifications pursuant to the Due Process Clause to the only two situations the Court had historically authorized:

> Until today, we have recognized exactly two situations in which the Federal Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts. . . .
>
> Today, however, the Court enlists the Due Process Clause to overturn a judge's failure to recuse because of a "probability of bias." . . . The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.[40]

The dissent expressed concern that the expansion of constitutional judicial recusal to include merely the probability of bias blurred the "clear line between when recusal is constitutionally required and when it is not."[41] The dissent then set out a list of forty questions aimed at undermining the practicalities of implementing the majority's decision to include the probability of bias as a potential violation of due process. As one commentator has observed:

> The Roberts dissent embraces an almost indefensible position (that the Court should just let it go when the public could reasonably suspect that a litigant succeeded on appeal by "buying" a key judge through massive campaign support) but nonetheless puts the majority on the defensive and convinces many observers that the majority's effort to right a wrong will cause more problems than it solves.[42]

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38. *Id.* at 2273–74 (Roberts, C.J., dissenting) ("[W]hy is the Court so convinced that this is an extreme case? . . . Blankenship's independent expenditures do not appear 'grossly disproportionate' compared to other such expenditures in this very election. . . . It is also far from clear that Blankenship's expenditures affected the outcome of this election.").

39. *Id.* at 2267 ("All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise.").

40. *Id.*

41. *Id.* at 2269.

42. Jeffrey W. Stempel, *Playing Forty Questions: Responding to Justice Roberts's Concerns in* Caperton *and Some Tentative Answers About Operationalizing Judicial Recusal and Due Process*, 39 SW. U. L. REV. 1, 6–7 (2009) (footnote omitted).

This same commentator concludes that the dissent's forty questions are "unpersuasive and alarmist" and that *Caperton* "is a correctly decided case announcing a workable rule of law."[43]

To some extent at least, the two *Caperton* views set up two very distinct approaches to judicial recusal: the dissent emphasizing bright-line rules and relying on both a presumption of judicial fairness and self-policing rules, and the majority emphasizing objective standards that depart from both a presumption of regularity and self-policing policies.

Unlike other commentators writing in the wake of *Caperton*, we are not here undertaking an analysis of judicial recusal in the context of due-process analysis.[44] Rather, our purpose is to employ *Caperton* as a backdrop to a wider range of recusal issues—all implicated within *Caperton*—to illustrate flaws with the current approach to judicial recusal. Before addressing these specific flaws, a summary of the bases of authority for judicial disqualification is necessary.

II. BASES OF AUTHORITY FOR JUDICIAL DISQUALIFICATION

Generally speaking, there are three bases of authority for judicial-disqualification motions. One such basis has already been discussed above in *Caperton*—that of the Constitution's Due Process Clause. As discussed in Part I, *Caperton* expanded the use of due-process considerations in the judicial-recusal context from a limited approach encompassing only two situations (the judge's financial interest in the outcome of the case and specific criminal contempt) to a more enhanced approach that additionally includes the probability of judicial bias. Despite the expanded reach of constitutional judicial recusal, due process is not implicated in most judicial-disqualification matters. Instead, as the Supreme Court has observed, "[b]ecause the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution."[45] Accordingly, we next turn to the remaining nonconstitutional authorities for judicial recusal.

The second basis of authority for judicial disqualification motions are the codes of judicial conduct referred to in the *Caperton* case. The two major codes of judicial conduct are the American Bar Association's *Model Code of Judicial Conduct* and the *Code of Conduct for United States Judges*. The ABA's *Model Code of Judicial Conduct*, of course, being merely a model code, carries no independent authority, but nearly all of the states have adopted all or

43. *See id.* at 8.

44. *See, e.g.*, Stempel, *supra* note 7; Stempel, *supra* note 42.

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

parts of the *Model Code*.[46] Its nearly universal adoption renders its provisions particularly relevant to our analysis.

Both the *ABA Model Code* and the *Code of Conduct* emphasize the importance of public confidence in the judiciary and the importance of impartiality to achieving that public confidence. The *ABA Model Code* states, "Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary."[47] Similarly, the *Code of Conduct* provides, "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[48]

Toward this end of achieving public confidence in the judiciary's impartiality, Rule 2.11(A) of the *ABA Model Code* and Canon 3C of the *Code of Conduct for United States Judges* address recusal and disqualification. Rule 2.11(A) of the *ABA Model Code* provides that "[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 [six specified] circumstances."[49]

The six specified circumstances include: (1) the judge's "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) situations in which the judge or a member of the judge's family is a party to the proceeding, is a lawyer in the proceeding, "has more than a de minimis interest that could be substantially affected by the proceeding," or is "likely to be a material witness in the proceeding"; (3) situations where the judge or a member of the judge's household "has an economic interest in the subject matter in controversy or in a party"; (4) the judge knows or learns that a party or lawyer in the proceeding made contributions to the judge's campaign at a particular level; (5) the judge's previous public statement "commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding"; and (6) the judge "served as a lawyer in the matter in controversy," "was a material witness concerning the matter," or "previously presided as a judge over the matter in another court."[50]

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46. Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 GEO. J. LEGAL ETHICS 55, 55 (2000) (stating that forty-nine states have adopted some form of the ABA *Model Code of Judicial Conduct*). In contrast, the *Code of Conduct for United States Judges*, adopted by the Judicial Conference of the United States, applies to "United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges." CODE OF CONDUCT FOR UNITED STATES JUDGES intro. (2011).

47. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 3 (2007).

48. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2A.

49. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A).

50. *Id.*

The language of Canon 3C of the *Code of Conduct for United States Judges* is nearly identical to Rule 2.11(A) of the *ABA Model Code*, except that it omits the reference to personal bias or prejudice concerning a party's lawyer.[51] In addition, subdivision (1)(c), while still referring to "any other interest that could be affected substantially by the outcome of the proceeding," omits the reference to "de minimis."[52]

One of the more significant differences between the *ABA Model Code* and the *Code of Conduct*—a difference that we analyze in greater detail in Part III[53]—is found in examining the test for an appearance of impropriety. The *ABA Model Code* applies a broader standard than the *Code of Conduct*. The *ABA Model Code* states that "[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."[54] In contrast, the *Code of Conduct* states that "[a]n appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired."[55] The reference in the *Code of Conduct* to "knowledge of all the relevant circumstances disclosed by a reasonable inquiry" thereby places additional limitations upon the situations in which judicial recusal is required and makes more room for judicial deference.

The third basis of authority for judicial disqualification motions is federal and state statutes. In the federal courts, §§ 47, 144, and 455 of Title 28 of the United States Code provide this statutory authority.[56] Section 47 prohibits judges from hearing on appeal any cases in which they served as the trial judge.[57] Section 144, by contrast, contains both a substantive and a procedural component, providing:

> 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

51. *Compare id.*, *with* CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C.

52. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C.

53. *See infra* notes 95–101 and accompanying text (discussing the tests for appearances of impropriety in the *ABA Model Code* and the *Code of Conduct*).

54. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 5.

55. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2A cmt.

56. A detailed history of the federal law concerning judicial disqualification is found in Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1223–29 (2002).

57. 28 U.S.C. § 47 (2006) ("No judge shall hear or determine an appeal from the decision of a case or issue tried by him.").

> 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.[58]

By its terms, § 144's restriction to "any proceeding in a district court" limits judicial disqualification motions on the basis of bias or prejudice to the disqualification of district court judges.[59]

In contrast to § 144, which applies only to federal district court judges, § 455 applies to both federal appellate and district court judges.[60] Subsection (a) of § 455 provides broadly that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[61] Subsection (b) then lists specific circumstances in which judges are required to recuse themselves.[62]

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58. *Id.* § 144.

59. *Id.*; *see also In re* Bernard, 31 F.3d 842, 843 n.3 (9th Cir. 1994) (noting § 144 "applies only to district judges, not appellate judges").

60. 28 U.S.C. § 455.

61. *Id.* § 455(a).

62. Section 455(b) provides:

> He shall also disqualify himself in the following circumstances:
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> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
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> (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;
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> (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;

Thus, the federal approach to judicial disqualification is one that fails to use the congressionally authorized preemptive procedure and instead relies solely on the self-policing of each individual judge. With this background, we now turn to how these pieces fit together.

III. PIECES OF A PUZZLE

The *Caperton* matter powerfully illustrates three specific issues arising in the judicial disqualification context: (1) the impact of the judge's background and connections, whether personal, community, or political; (2) the recusal standard and its implementation; and (3) psychology-based issues. This section examines each of these issues in turn.

A. *BRINGING BACKGROUNDS TO THE BENCH*

The context leading to the recusal issues in *Caperton* involved a litigant who made a $3 million investment in a judicial campaign—a contribution that "eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee"[63]—in order to elect a justice to the Supreme Court of Appeals of West Virginia. Judicial elections have repeatedly been criticized for their potential to lead to the very kinds of conflict-of-interest issues that arose in *Caperton*,[64] yet more than thirty states continue to hold elections in selecting their judges—and fifteen of those states employ partisan elections for at least one court.[65] Although federal judges are appointed rather than elected, the

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(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.

Id. § 455(b).

63. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2264 (2009).

64. *See, e.g.*, Bronson D. Bills, *A Penny for the Court's Thoughts? The High Price of Judicial Elections*, 3 NW. J.L. & SOC. POL'Y 29 *passim* (2008); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43 *passim* (2003); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 *passim* (2008); Ryan L. Souders, *A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States*, 25 REV. LITIG. 529 *passim* (2006); David K. Stott, *Zero-Sum Judicial Elections: Balancing Free Speech and Impartiality Through Recusal Reform*, 2009 BYU L. REV. 481 *passim*; Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449 *passim* (1988).

65. *See* FLAMM, *supra* note 4, § 9.4, at 237–38 ("As of 2003, thirty-three states employed some form of contested election for their trial courts of general jurisdiction, their appellate courts, or both; and, currently, some fifteen states maintain partisan judicial elections for at least some of their judges." (footnotes omitted)); Stanley A. Leasure, *Cash Justice and the Rule of Law: Post-*Caperton *Financing of Judicial Elections*, 46 IDAHO L. REV. 619, 639 (2010) (noting that "most states elect 'at least *some* judges to *some* benches at *some* stage of a judge's career'" (citing Brief of the Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 9, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45973)); *see also Caperton*, 129 S. Ct. at 2274 (Scalia, J., dissenting) (stating that thirty-nine states elect their judges).

appointment process is similarly political in nature.[66] Every recent presidential campaign has included pitches to voters on the basis of what sort of federal judges the candidate would select, or the dangers that his or her opponent would select judges with particular biases or inclinations, or both.[67] This same environment, to a lesser degree, can also be seen in gubernatorial contests at the state level.[68] Today there are also active campaigns to recall or impeach state-court judges because of politically charged rulings.[69]

In addition to a political background, every judge also necessarily brings to the bench a personal and community background from his or her experiences living in the world. Accordingly, we expect judges to bring their life experiences and common sense to the bench;[70] we expect judges to have participated in projects and activities within their communities and within

66. *See* JOSEPH C. GOULDEN, THE BENCHWARMERS: THE PRIVATE WORLD OF THE POWERFUL FEDERAL JUDGES 24 (1974) ("Lacking constitutional guidelines, the appointive system has evolved through custom. And an essential element of our custom is that political connections are as important to a prospective judge as is his legal ability."); Debra Lyn Bassett, *"I Lost at Trial—In the Court of Appeals!": The Expanding Power of the Federal Appellate Courts To Reexamine Facts*, 38 HOUS. L. REV. 1129, 1182–83 (2001) (noting that "the highly political nature of judicial appointments, and the corresponding political 'litmus test' approach often employed in selecting judicial candidates, virtually ensures judicial biases and prejudices of some sort"); Ifill, *supra* note 7, at 612 ("Nominations and confirmation hearings for federal court seats have become overtly hostile, political, and racial." (footnotes omitted)).

67. *See* NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 11–46, 108–32, 158–80 (2005) (examining the role of judicial selection in presidential campaigns). *See generally* William G. Ross, *The Role of Judicial Issues in Presidential Campaigns*, 42 SANTA CLARA L. REV. 391 (2002).

68. *See, e.g.*, David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 40 (1995) (noting that decisions of the California Supreme Court "became an issue in gubernatorial campaigns in California"); Peter M. Shane, *Interbranch Accountability in State Government and the Constitutional Requirement of Judicial Independence*, LAW & CONTEMP. PROBS., Summer 1998, at 21, 33 & n.52 (noting the potential for the judiciary to become an issue in gubernatorial campaigns and providing an example).

69. *See, e.g.*, David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2071 n.88 (2010) (noting that in 1986, three California Supreme Court justices "were unseated after an aggressive campaign attacked their low rate of affirmance in death penalty cases"); George W. Soule, *Judicial Elections 2010*, BENCH & B. MINN., Jan. 2011, at 28, 31–32 (2011) ("Iowans voted not to retain three Iowa Supreme Court justices. . . . The main issue in the election was the court's unanimous April 2009 decision striking down a state statute limiting civil marriage to a union between a man and a woman as violating the equal protection clause of the Iowa Constitution. Antiretention advocates framed the issue as judicial activism, but many saw the Iowa Supreme Court election as a referendum on gay marriage.").

70. *See* LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT, at x–xi (2d ed. 1992) ("Judges, after all, must live in the real world, and cannot be expected to sever all of their ties with it upon taking the bench. Nor would it be entirely beneficial to the judicial process for judges to live in ivory towers. Involvement in the outside world enriches the judicial temperament, and enhances a judge's ability to make difficult decisions. As Justice Holmes put it, 'the life of the law has not been logic: it has been experience.'").

the bar;[71] and we know that the process through which individuals are selected for judgeships is highly politicized.[72] Yet despite this, we demand that those experiences not impugn on the "absolute neutrality" that we expect from our judges once they reach the bench.[73]

Impartial generally means "favoring no one side or party more than another; without prejudice or bias; fair; just."[74] Accordingly, the *ABA Model Code* defines *impartial* as an "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge."[75]

Given the adversarial positions of the parties and of the lawyers retained by those parties, attaining a fair trial in a fair tribunal lies squarely with the judge. In our judicial system, it is the judge who bears the brunt of the burden of ensuring that judicial proceedings are fair and impartial. The named parties in litigation are self-interested, and parties typically retain lawyers that they expect will vigorously and aggressively pursue and protect their particular personalized interests. Although lawyers must conform to the professional ethics rules, and therefore cannot literally do *anything* to help a client's cause, the ethical rules largely seek to further client goals and to protect client interests. Due to the adversarial approach to litigation that we have adopted, the ethics rules are framed in terms of duties and responsibilities to clients; lawyers are not expected to be impartial.[76]

The goal of judicial impartiality is sufficiently central to, indeed crucial to, our system of justice that we have a number of procedures in place to safeguard it. All federal judges take an oath of impartiality before

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71. *See id.* at 24 ("Each judge brings to the bench a background with neighbors, friends and acquaintances, and business and social relations. The results of these associations and impressions they create in the judge's mind form a personality and philosophical disposition toward the world. . . . In short, a judge is expected to act according to his values. Indeed, proof that a judge's mind is a complete *tabula rasa* demonstrates lack of qualifications, not lack of bias.").

72. *See* Bassett, *supra* note 66, at 1182–83; Ifill, *supra* note 7, at 612; *see also* GOULDEN, *supra* note 66, at 22.

73. FLAMM, *supra* note 4, § 3.1, at 53 (noting that "a party has the right to have her case heard and decided by a judge who is absolutely neutral"); Jeffrey M. Shaman, *The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 605, 606 (1996) ("[J]udges do not live in ivory towers and are not immune to the foibles of the human condition. Nonetheless, we demand that they adhere to the highest degree of impartiality that is mortally possible.").

74. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 714 (4th ed. 2002).

75. MODEL CODE OF JUDICIAL CONDUCT Terminology, at 4 (2007).

76. *See* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 57 (2000) (noting that under the ethical rules, "the rights and autonomy of third parties barely figure"); Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 668 (1994) ("Although lawyers have certain obligations as officers of the court, these are quite limited and largely track the prohibitions on criminal and fraudulent conduct that govern all participants in the legal process."). *See generally* Debra Lyn Bassett, *Redefining the "Public" Profession*, 36 RUTGERS L.J. 721 (2005).

undertaking their judicial responsibilities.[77] Subject to limited exceptions, judicial proceedings are conducted publicly rather than conducted secretively out of public view. Through appellate procedures, litigants may secure review of rulings that deprived them of a fair trial. And litigants have the ability to seek the disqualification of a judge who lacks impartiality; indeed, "promot[ing] public confidence in the impartiality of the judicial process" is a primary purpose of judicial disqualification provisions.[78] Despite the *Caperton* dissenters' emphasis on the oath of impartiality, these procedures work together: none, standing alone, is considered sufficient to guarantee fairness and impartiality—not the oath alone, not the public trial alone, not the availability of appeal alone, not the option of filing a disqualification motion alone.[79]

As explained in Part I, *Caperton* represents the ultimate line in the sand—the line that, when crossed, constitutes a deprivation of constitutional due process. This type of judicial disqualification is rare and requires extraordinary circumstances. Accordingly, the vast majority of disqualification motions are grounded, not on deprivations of due process, but instead in codes of judicial conduct or statutes requiring recusal when necessary to avoid an "appearance of impropriety" or when the jurist's impartiality might reasonably be questioned. The recusal standard itself and the implementation of that standard present intertwined issues.

B. THE RECUSAL STANDARD AND ITS IMPLEMENTATION

The *Caperton* majority stated that the Due Process Clause "demarks only the outer boundaries of judicial disqualifications" and that such a due-process violation arises only in "rare instances" because state codes of judicial conduct provide greater restrictions and therefore greater protections.[80] The applicable recusal standard under West Virginia law,

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77. 28 U.S.C. § 453 (2006) ("Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of this office: 'I, ____ ____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ____ under the Constitution and laws of the United States. So help me God.'").

78. *See* H.R. REP. NO. 93-1453, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355 (listing public confidence as one of the purposes of the legislation); S. REP. NO. 93-419, at 5 (1974) (indicating that the purpose of § 455 is "to promote public confidence in the impartiality of the judicial process").

79. The Supreme Court has stated that there "is a presumption of honesty and integrity in those serving as adjudicators," Withrow v. Larkin, 421 U.S. 35, 47 (1975), and has previously emphasized the judicial oath of impartiality, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2267 (2009) (Roberts, C.J., dissenting). However, federal law requires federal judges both to take the oath, 28 U.S.C. § 453, and to recuse themselves under the conditions specified, *id.* § 455.

80. *Caperton*, 129 S. Ct. at 2267 (majority opinion) (quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986)).

where *Caperton*'s events occurred, was "whether 'a reasonable and prudent person, knowing [the] objective facts, would harbor doubts about [the judge's] ability to be fair and impartial.'"[81] *Caperton* also quoted from Justice Benjamin's concurring opinion in the case, in which he defended his decision not to recuse himself because he had no "'direct, personal, substantial, pecuniary interest' in [the] case"[82] and opined that employing "a standard merely of 'appearances' seems little more than an invitation to subject West Virginia's justice system to the vagaries of the day—a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations."[83]

Justice Benjamin's concurring opinion in the West Virginia Supreme Court of Appeals decision is twenty-five pages, with nearly twenty of those pages devoted to defending his decision to participate in the case.[84] A recurring theme throughout Justice Benjamin's opinion is the rejection of any consideration of "appearances" of impropriety, and instead, an insistence that only "actualities" matter.[85] Justice Benjamin's concurrence, taken together with the Supreme Court's *Caperton* decision, raises three issues implicating the recusal standard that we will discuss in this Part: (1) word play, (2) appearances and public perception, and (3) the duty to sit.

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81. *Id.* at 2258.

82. *Id.* at 2259 (quoting Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 301 (W. Va. 2008) (Benjamin, C.J., concurring), *rev'd*, 129 S. Ct. 2252 (2009)) (internal quotation marks omitted).

83. *Id.* (quoting *Caperton*, 679 S.E.2d at 306) (internal quotation marks omitted).

84. *Caperton*, 679 S.E.2d at 285–309. One is reminded of Professor Leubsdorf's observation that a judge's written opinion defending his denial of a disqualification motion "may prop up the judge's sense of [his] own rectitude; [but] reading it often increases one's dismay that the judge insists on sitting." John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 244 (1987).

85. *See, e.g.*, *Caperton*, 679 S.E.2d at 285 ("If the touchstone of a judicial system's fairness is *actual* justice, which I believe it is, its legitimacy is measured in actualities, not in the manipulation of appearances . . . ."); *id.* at 286 n.2 ("The notion of . . . 'appearance-driven' justice in West Virginia conveys the message that appearances and rhetoric—particularly when contrived—mean more than actualities . . . ."); *id.* at 292–93 ("[N]either the Dissenting opinion nor the Appellees herein point to any actual conduct or activity on my part which could be termed 'improper.' Rather both the Dissenting opinion and the Appellees focus on appearances . . . ." (footnote omitted)); *id.* at 292 n.12 ("The very notion of appearance-driven disqualifying conflicts, with shifting definitional standards subject to the whims, caprices and manipulations of those more interested in outcomes than in the application of law, is antithetical to due process."); *id.* at 293–94 ("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.'"); *id.* at 306 ("The determination of the composition of an appellate court panel by a standard merely of 'appearances' seems little more than an invitation to subject West Virginia's justice system to the vagaries of the day—a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations.").

1. Word Play

The general disqualification standard applies to "any proceeding in which [the judge's] impartiality might reasonably be questioned."[86] Lawyers—and thus judges—are wordsmiths, so perhaps it should come as no surprise that "might," "reasonably," and "questioned" all provide opportunities to challenge the standard's application. Word play, however, is employed only to narrow—never to expand—the circumstances in which recusal are required. Professor Freedman, for example, has explained the attempts to tinker with the standard's reference to "might" so as to avoid disqualification:

> [T]here is a tendency for some judges and commentators—and particularly for advocates opposing disqualification—to slip away from the statutory language, turning "might" into "could" or "would." The differences are important. The word "might" is used to express "tentative possibility"; "could" is used to express "possibility"; while "would" connotes what "will" happen or is "going to" happen. Accordingly, the word "would" requires significantly more than a tentative possibility of doubt regarding a judge's impartiality, and use of the word "would" therefore produces a subtle but substantial change in the meaning of the statute.[87]

Similarly, cases have relied on a lack of "reasonableness"[88] and failure to create any "question"[89] in declining to find recusal necessary.

Playing with the language of the standard limits the applicability of the recusal standard. Justice Benjamin's concurring opinion in the West Virginia *Caperton* decision employed word play of another sort, by attempting to import language from other provisions within the state code of judicial conduct to undermine the applicable recusal standard and to support his own desired interpretation. The first instance of word play occurred in his

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86. 28 U.S.C. § 455(a) (2006); *see also* MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007) (substantially similar language); CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C(1) (2011) (substantially similar language).

87. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS § 8.06, at 226–27 (4th ed. 2010).

88. *See, e.g.*, *In re* Beard, 811 F.2d 818 (4th Cir. 1987); Brody v. President & Fellows of Harvard Coll., 664 F.2d 10 (1st Cir. 1981); M.K. Metals, Inc. v. Nat'l Steel Corp., 593 F. Supp. 991 (N.D. Ill. 1984).

89. *See, e.g.*, Bauer v. Shepard, 620 F.3d 704, 714 (7th Cir. 2010) ("Making these views [on particular issues] known does not call [a judge's] impartiality into question."), *cert. denied*, 131 S. Ct. 2872 (2011); United States v. Smith, 352 F. App'x 84, 88 (7th Cir. 2009) ("[T]hat both Judge Castillo and court appointed counsel worked in different capacities at Northwestern University does not call Judge Castillo's impartiality into question."), *cert. denied*, 130 S. Ct. 2130 (2010); Williams v. Marshall, 319 F. App'x 764, 769 (11th Cir. 2008) (finding that the circumstances did "not create any question regarding the impartiality of the district court").

insistence that the state code of judicial conduct "specifically applies to activities or conduct of the judge, . . . not activities or conduct of third-parties or litigants which are outside the judge's control."[90] Justice Benjamin then continued, "While challenges to a judge because of the independent activities of a third-party may be an acceptable practice in a system focused on 'political or appearance-based justice,' it finds no basis in Canon 2A."[91]

Word play arose a second time when Justice Benjamin opined that another provision in the state code of judicial conduct, one stating that "[a] judge shall be faithful to the law and . . . not be swayed by partisan interests, public clamor, or fear of criticism,"[92] served to "succinctly dispel[] any contention that appearance-based judging should supersede judging based on actualities."[93]

Both instances of word play employed contorted applications of other language within the state code of judicial conduct to the "appearance of impropriety" standard in an attempt to rewrite the recusal standard. Undermining the standard in this fashion permitted Justice Benjamin more readily to substitute his own interpretation of the standard, one he wanted to follow. Word play is an especially pernicious practice because it serves to subvert and disable the recusal standard while claiming to be engaged merely in properly interpreting the standard.

2. Appearances and Public Perception

As we observed in Part II, the *Code of Conduct for United States Judges* explains that "[a]n appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired."[94] We contrasted the impact of that definition with the definition found in the *ABA Model Code*, which states that "[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."[95] Because the *Code of Conduct* requires consideration "with knowledge of all the relevant circumstances disclosed by a reasonable inquiry"—language that does not appear in the *ABA Model Code*—the definition used by the *Code of Conduct* is more restrictive and seriously limits the effectiveness of recusal requests in the federal courts.

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90. *Caperton*, 679 S.E.2d at 293 n.13.

91. *Id.*

92. *Id.* at 294 (alteration in original) (quoting W. VA. CODE OF JUDICIAL CONDUCT Canon 3(B)(2) (1994)) (internal quotation marks omitted).

93. *Id.*

94. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2A cmt. (2011).

95. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 5 (2007).

The identified additional language has existed in the *Code of Conduct* since 1992.[96] The 1992 Code of Conduct was the first revision since the original 1973 Code of Conduct, which was adopted before Congress amended the federal disqualification standards in 1974.[97] Accordingly, this identified additional language may have been motivated by characterizations of § 455's recusal standard as shifting from a "subjective" standard to an "objective" standard in the 1974 amendments. If so, however, the language goes too far. The previous "subjective" standard in § 455 left recusal to the judge's personal discretion,[98] whereas the current "objective" standard was intended to adopt the approach of the *ABA Model Code*—which, of course, does not, and did not, contain this modifying language.

Justice Benjamin's concurring opinion provides an effective illustration of the impact of this additional language. Justice Benjamin's opinion quotes one of the state's judicial canons as stating "that '[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.'"[99] The opinion then continues, "The use of the qualifier, 'reasonably,' presupposes a knowledge of all facts material to an impartiality determination. It implies a thoughtful, impartial and well-informed observer."[100] Not only is this arguably a form of word play, but it also imports an additional consideration into the interpretation and application of the standard—one that pushes the standard toward actual impropriety rather than an appearance of impropriety—which, of course, was exactly the result that Justice Benjamin was seeking.

Similarly, the inclusion of "knowledge of all the relevant circumstances disclosed by a reasonable inquiry" in the *Code of Conduct* pushes the recusal standard toward actual impropriety, rather than an appearance of impropriety. The result is that the *Code of Conduct* standard serves to limit the

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96. *Cf.* CODE OF CONDUCT FOR UNITED STATES JUDGES intro (noting that "substantial revisions" were made in 1992).

97. *See* Andrew J. Lievense & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 JUST. SYS. J. 271, 277–78 (2007) (tracing the history of the federal disqualification statutes and the *Code of Conduct*).

98. The prior version of 28 U.S.C. § 455 provided:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

H.R. REP. NO. 93-1453, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6352.

99. Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 294 n.15 (W. Va. 2008) (Benjamin, C.J., concurring) (emphasis omitted) (quoting W. VA. CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (1994)), *rev'd*, 129 S. Ct. 2252 (2009).

100. *Id.*

situations requiring recusal[101] and ill-serves the underlying purpose of judicial disqualification identified by Congress—the purpose of preserving public confidence in the judiciary.[102] In particular, the "public" is highly unlikely to have the requisite "knowledge of all the relevant circumstances disclosed by a reasonable inquiry," and the judge whose impartiality is being questioned is likely to see himself or herself as possessing the most complete factual record with its attendant temptation to rule out bias.

Another consideration involving the public is public perceptions of judicial impartiality. Justice Benjamin's rejection of any consideration of appearances as a general matter set the tone for his complete indifference to public perceptions.[103] Caperton's disqualification motion had "included the results of a public-opinion poll, which indicated that over 67% of West Virginians doubted Justice Benjamin would be fair and impartial."[104] Not surprisingly, Justice Benjamin quickly dispatched the poll, characterizing it as a "push-poll"[105] and stating that the poll was "neither credible nor sufficiently reliable" to justify his disqualification.[106]

We certainly do not suggest using public-opinion polls as a general method of determining judicial disqualification. But appearances by their very nature include a perception component, as the *Caperton* majority recognized.[107] Requiring disqualification when the judge's impartiality "might reasonably be questioned," as required by the authorities explored in

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101. *Cf., e.g.*, United States v. Stewart, 378 F. App'x 773, 776 (10th Cir. 2010) ("[D]isqualification is appropriate only where a reasonable person, were he to know all the circumstances, would harbor doubts about the judge's impartiality." (quoting United States v. Mendoza, 468 F.3d 1256, 1261 (10th Cir. 2006)) (internal quotation marks omitted)); *In re* Linerboard Antitrust Litig., 361 F. App'x 392, 399–400 (3d Cir. 2010) ("If a reasonable observer aware of all the circumstances 'would harbor doubts about the judge's impartiality . . . then the judge must recuse.'" (alteration in original) (quoting *In re* Prudential Ins. Co. of Am. Sales Practice Litig., 148 F.3d 283, 343 (3d Cir. 1998))), *cert. denied*, 131 S. Ct. 84 (2010).

102. H.R. REP. NO. 93-1453, at 5, *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355; S. REP. NO. 93-419, at 5 (1974) ("This general standard [of § 455(a)] is designed to promote public confidence in the impartiality of the judicial process . . . .").

103. *See supra* notes 80–93 & 99–100 and accompanying text (discussing Justice Benjamin's criticisms of an appearance-based standard); *infra* notes 104–07 and accompanying text (same).

104. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2258 (2009).

105. *Caperton*, 679 S.E.2d at 292 n.11 (defining a "push-poll" as "a survey wherein limited and selective background information is conveyed to individuals, the purpose of which is to 'push' the individual being surveyed to a negative inference or response against a public individual"); *see also* Jeffrey W. Stempel, *Impeach Brent Benjamin Now!? Giving Adequate Attention to Failings of Judicial Impartiality*, 47 SAN DIEGO L. REV. 1, 51 (2010) ("A push poll is generally viewed as a poll in which the respondent is not asked for opinion in a vacuum or in a sufficiently neutral setting but instead is first given information that is clearly designed to bias the respondent toward a particular answer.").

106. *Caperton*, 679 S.E.2d at 292 n.11.

107. *See Caperton*, 129 S. Ct. at 2263 (concluding that there was a serious risk of bias "based on objective and reasonable perceptions").

Part II,[108] similarly imports public opinion through its use of a reasonableness standard. If the appearance-of-impropriety standard disregards public perception, the standard is converted to one requiring actual bias. We saw precisely this result as the impact of refusing to acknowledge perceptions in Justice Benjamin's opinion.[109]

3. The Duty To Sit

Justice Benjamin's concurring *Caperton* opinion includes reference to the duty to sit, noting that "[a]lthough federal judges arguably no longer have a 'duty to sit,'"[110] West Virginia has a "duty to judge" judicial system.[111] These references have direct applicability to the presumption that Justice Benjamin applied to the recusal motions because the duty to sit (or the duty to judge) again limits the situations requiring recusal.

Prior to 1974, federal judges were considered to have a duty to sit, "which was generally construed in such a way as to oblige the assigned judge to hear a case unless and until an unambiguous demonstration of extrajudicial bias was made."[112] In 1974, consistent with the then-existing version of the *ABA Model Code*, Congress eliminated the duty-to-sit doctrine from § 455.[113] Nevertheless, today, nearly forty years later, some judicial decisions continue to invoke the "duty to sit" in denying disqualification motions.[114] The duty to sit is a tempting counterweight to a motion seeking recusal for an appearance of impropriety. Reading the recusal standard together with the "duty to sit" doctrine serves to limit the standard's applicability and correspondingly limits the need to recuse.

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108. *See* 28 U.S.C. § 455(a) (2006); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007).

109. *See supra* notes 83–94, 100 & 104–07 and accompanying text (discussing Justice Benjamin's rejection of appearances as a basis for recusal).

110. *Caperton*, 679 S.E.2d at 296.

111. *Id.* at 293 n.13; *see also id.* at 294–95 ("West Virginia's judicial officers have a duty to hear such matters as are assigned to them except those in which disqualification is required. . . . This 'duty to sit' is not optional." (footnote and citation omitted)).

112. FLAMM, *supra* note 4, § 20.8, at 604. The duty to sit thus differs from the concept that judges must perform their judicial responsibilities. The latter obligates a judge to hear difficult or complex cases, and cases having potential political ramifications, despite the judge's personal desire to avoid such cases. *See* Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty To Sit*, 57 BUFF. L. REV. 813, 956–57 (2009) (urging that the ABA *Model Code of Judicial Conduct* adopt language clarifying this distinction).

113. *See* Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 673 (2005) ("Congress eliminated both the subjective standard and the 'duty to sit' doctrine in 1974."). "With the enactment of the 1974 amendments to §455, the duty to sit rule was displaced by a 'presumption of disqualification' such that, whenever a judge harbored any doubts as to whether his disqualification was warranted, he was to resolve those doubts in favor of disqualification." FLAMM, *supra* note 4, § 20.8, at 605 (footnote omitted).

114. *See* Stempel, *supra* note 112, at 816 ("[A]t least a half-dozen (and perhaps as many as twenty) state judiciaries continue to invoke the duty to sit concept, with occasional federal courts joining in despite the clear mandate of federal law."). *See generally id.*

Whereas the recusal standard, which mandates disqualification whenever the judge's impartiality "*might* reasonably be questioned," imposes a presumption of disqualification in close cases, the duty-to-sit doctrine, which requires judges to decide borderline recusal questions in favor of participating in the case,[115] creates a presumption against disqualification, again limiting the situations requiring recusal and undermining the intended impact of the recusal standard.

C. PSYCHOLOGY-BASED ISSUES

The *Caperton* matter also implicates two interrelated psychology-based issues: (1) the practice of directing the recusal motion to precisely that judge who is alleged to lack impartiality, and (2) issues involving self-perceptions of one's ability to be impartial.

1. Presenting the Recusal Motion to the Challenged Judge

As we have seen in *Caperton*'s underlying facts, judicial disqualification motions are directed to, and ruled upon by, the very judge whose impartiality is being questioned[116]—which in net effect authorizes the subject of the disqualification motion to serve as the judge of his own case. Caperton's recusal motions were directed to, and denied by, Justice Benjamin himself, despite the fact that Caperton was challenging Justice Benjamin's own participation in the case. If the challenged judge denies the motion, the moving party may seek appellate review, but immediate appellate review typically is not available,[117] and even once the matter reaches the appellate court, the appellate court reviews the disqualification

115. Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 604 (1987) ("[Under the duty to sit doctrine,] where the challenged judge faces a serious and close disqualification decision, the judge should decide in favor of sitting and against recusal . . . .").

116. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2257–58 (2009) (explaining that Caperton unsuccessfully moved three times to disqualify Justice Benjamin); *see also* United States v. Morris, 988 F.2d 1335, 1337 (4th Cir. 1993) (noting that it is the challenged judge who rules on a disqualification motion); Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 536 (2005) (noting that the recusal decision "is almost always made in the first instance by the very judge being asked to disqualify himself"); Leubsdorf, *supra* note 84, at 242 (noting the "bizarre rule" requiring "the very judge whose acts are alleged to be warped by unconscious bias to decide whether there is an adequate showing of bias"); Stempel, *supra* note 115, at 633 (noting that "the recusal motion is ruled upon by the district judge whose ability to decide fairly is the very subject of the motion").

117. *See* Stempel, *supra* note 115, at 634 ("The denial of a disqualification motion is never a final order subjecting the case to immediate appeal since the case remains to be decided on the merits. Ordinarily, then, the unsuccessful recusal movant must wait until the conclusion of trial court proceedings and use the judge's recusal decision as a point for appeal from a loss on the merits." (footnote omitted)). Such appeals may be interlocutory, by writ of mandamus, or on direct appeal of a final order. *See* Moore, *supra* note 4 (discussing circumstances in which interlocutory appeal is appropriate); Stempel, *supra* note 115, at 636 (noting that "[t]raditionally, the most likely avenue for interlocutory review of recusal orders has been the writ of mandamus").

ruling pursuant to the highly deferential abuse-of-discretion standard rather than de novo.[118] When the subject of a judicial disqualification motion is not the trial-level judge but instead is an appellate judge, particularly a federal appellate judge or a state supreme court justice (such as Justice Benjamin in the *Caperton* case), the motion is still directed to, and ruled upon by, the judge being questioned, but the likelihood of review by the U.S. Supreme Court is remote and will only occur in extreme cases and in the context of constitutional due process.

The practice of filing disqualification motions with the challenged judge implicates more than merely the difficulty of appellate review. Also implicated are potential issues of intentional or unintentional self-deception in assessing one's actual, or perceived, ability to be impartial, which we examine in the next section, and potential issues of retribution or retaliation, which we examine here. As one commentator has observed:

> [W]hile not all judges take umbrage at the filing of disqualification motions, there have been many examples of cases in which judges who have been accused of possessing a disqualifying interest or bias have taken such an accusation both personally and very seriously. . . .
>
> . . . It must be acknowledged . . . that filing a disqualification motion has the potential to antagonize the challenged judge, either consciously or subconsciously, with the result that the moving litigants and their counsel may suffer.[119]

Even if the judge does not engage in overtly retaliatory behavior affecting the outcome of the litigant's case, other retribution tactics, although relatively rare, nevertheless occur. In one recent case, a judge recommended criminal charges against lawyers who questioned his impartiality.[120] And although much lower-key, Justice Benjamin included a rebuke of Caperton's lawyers in his opinion denying disqualification.[121]

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118. *See, e.g.*, *In re* Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1312 (2d Cir. 1988) (stating that "[t]he judge presiding over a case is in the best position to appreciate the implications of those matters alleged in a recusal motion"); Chitimacha Tribe v. Harry L. Laws Co., 690 F.2d 1157, 1166 (5th Cir. 1982) (finding that on an appeal of a recusal motion under 28 U.S.C. § 144 or § 455, "we ask only whether [the district judge] has abused [his or her] discretion").

119. FLAMM, *supra* note 4, § 1.7, at 18 (footnotes omitted).

120. *See* Debra Cassens Weiss, *Federal Judge Recommends Criminal Charges for Lawyers Who Questioned His Impartiality*, A.B.A. J. (Jan. 11, 2011), http://www.abajournal.com/news/article/federal_judge_recommends_criminal_charges_for_lawyers_who_questioned_his_im.

121. *See* Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 308 (W. Va. 2008) (Benjamin, C.J., concurring) ("I would be remiss if I did not acknowledge my disappointment in the material omissions from the motions for disqualification filed herein against myself. . . . The absence of such a critical analysis here, indeed the lack of even an acknowledgement of the motions' actual weaknesses, is directly relevant to the legal credibility of the said motions. It is

2. Self-Perceptions of Impartiality

A major roadblock in seeking a more effective recusal process is the human tendency to see oneself as unbiased or able to disregard any possible bias or other improper influence.

Some potential bases for disqualification are more socially acceptable than others. Recusal on the basis of stock holdings in a corporate litigant is one of the most readily acknowledged, least resisted, and commonly invoked bases for recusal.[122] When an alleged lack of impartiality (or appearance of lack of impartiality) is less objectively quantifiable or more personalized, the risk of denial and self-deception increases. By definition, disqualification motions suggest an actual or perceived lack of impartiality, and the human tendency is to want to believe that we can be fair and objective. Every litigator has witnessed, if not actually participated in, attempts to "rehabilitate" a potential juror by asking the juror if she can be fair—a question typically answered in the affirmative.[123] The same phenomenon of objectivity bias occurs with judges. "People believe they are objective, see themselves as more ethical and fair than others, and experience a 'bias blind spot,' the tendency to see bias in others but not in themselves. . . . These tendencies make it difficult for judges to identify their own biases."[124]

One of the recurring problems in judicial disqualification is that a judge's belief in his or her own impartiality misses the point. "[P]ublic confidence in the judiciary does not result from the *judiciary's* perception of impartiality; it results from the *public's* perception of impartiality. Thus, a

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my purpose here to remind counsel appearing before this Court of their obligations to this Court and this judicial system." (footnote omitted)), *rev'd*, 129 S. Ct. 2252 (2009).

122. *See, e.g.*, Jeff Bleich & Kelly Klaus, *Deciding Whether To Decide*, 48 FED. LAW. 45, 46 (Feb. 2001) ("In practice, each individual justice makes the call on what sort of 'participation' or 'interest' qualifies [for recusal]. And judging by the cases where this has come up publicly, the governing principle remains that it all comes down to money."). Bleich & Klaus continue:

> The only consistent exception to the Court's generally laissez-faire attitude toward disqualification continues to be . . . money. Each year the greatest number of recusals is logged by Justice O'Connor, who, it appears, has investments in several U.S. corporations (most notably, AT&T) that have sought Court review. The frequency with which she has recused herself in cases involving these parties has caused Court-watchers to give such cases the acronym "OOPS" (O'Connor Owns Party Stock).

Id. See generally Bassett, *supra* note 56, at 1242 (noting that "[t]he attractiveness of financial self-interest as a determining standard is the objective nature of its determination").

123. *See, e.g.*, Flowers v. Flowers, 397 S.W.2d 121 (Tex. Civ. App. 1965).

124. Jennifer Robbennolt & Matthew Taksin, *Can Judges Determine Their Own Impartiality?*, MONITOR ON PSYCHOL., Feb. 2010, at 24, 24 (citations omitted); *see also* FLAMM, *supra* note 4, § 1.7, at 18 (noting that judges "are typically less than eager to acknowledge the existence of situations that may raise questions about their impartiality"); Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 5 (1994) ("[J]udges are typically appalled if their impartiality is called into question[,] . . . . believ[ing] themselves to be consistently objective, impartial and fair." (footnote omitted)).

judge's belief that he or she is not biased is simply of little consequence to a recusal determination."[125] The recusal standard is based on promoting public confidence in the judiciary and thereby goes to an "appearance" of impropriety, not actual impropriety. As a Seventh Circuit decision explained:

> Judges asked to recuse themselves hesitate to impugn their own standards; judges sitting in review of others do not like to cast aspersions. Yet drawing all inferences favorable to the honesty and care of the judge whose conduct has been questioned could collapse the appearance of impropriety standard under § 455(a) into a demand for proof of actual impropriety. So although the court tries to make an external reference to the reasonable person, it is essential to hold in mind that these outside observers are less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be.[126]

Jurists' perceptions of their own impartiality also suffer from the failure to acknowledge the existence of unconscious motivations.[127] Human psychology complicates assessments of impartiality. Bias is notoriously difficult to recognize within ourselves.[128] Psychological studies have repeatedly confirmed that individuals may harbor unconscious stereotypes, beliefs, biases, and prejudices.[129] In addition, other psychological processes,

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125. Bassett, *supra* note 56, at 1245–46 (emphasis added) (footnote omitted).

126. *In re* Mason, 916 F.2d 384, 386 (7th Cir. 1990).

127. *See generally* Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61 (2000) (noting that judges are susceptible to various biases).

128. *See id.* at 65–66 (noting that "biases are easier to spot in others than in oneself"); *see also* Justin Kruger & Thomas Gilovich, *"Naive Cynicism" in Everyday Theories of Responsibility Assessment: On Biased Assumptions of Bias*, 76 J. PERSONALITY & SOC. PSYCHOL. 743, 743–44 (1999) (noting tendency to see bias in others more readily than in ourselves).

129. *E.g.*, Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 181, 181 (1995) (finding unconscious "gender stereotyping in fame judgments," and finding "that explicit expressions of sexism or stereotypes were uncorrelated with the observed [unconscious] gender bias"); Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142, 1142 (1996) (concluding "that stereotypes may be automatically activated"); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1989) (finding that stereotypes are "automatically activated in the presence of a member (or some symbolic equivalent) of the stereotyped group and that low-prejudice responses require controlled inhibition of the automatically activated stereotype"); John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 512 (1997) (noting that "[a]versive racism has been identified as a modern form of prejudice that characterizes the racial attitudes of many Whites who endorse egalitarian values, who regard themselves as nonprejudiced, but who discriminate in subtle, rationalizable ways" (citations omitted)); Kerry Kawakami et al., *Racial Prejudice and Stereotype Activation*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 407, 407 (1998) ("[H]igh prejudiced participants endorsed cultural stereotypes to a greater extent than low prejudiced participants. Furthermore, for high prejudiced participants, Black category labels facilitated

such as framing effects and confirmation bias, may impact decision-making.[130] The existence of such unconscious motivations means that honest and well-intentioned judges cannot necessarily trust in their own subjective belief that they are and will remain impartial.[131]

These issues regarding the recusal standard, taken together with the procedure whereby the challenged judge decides the recusal motion, highlight serious problems with the implementation of the recusal provisions and help to illustrate why the goal of impartiality is elusive. The next section proposes four potential reforms to aid in achieving this goal.

IV. PROPOSALS FOR REFORM

The vast majority of judges, when presented with a recusal motion or when evaluating whether they should participate in a case without facing a recusal motion, attempt to apply the appropriate standard to the best of

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stereotype activation under automatic and controlled processing conditions."). *See generally* Bassett, *supra* note 56, at 1249–50 & nn.179–83 (discussing these and other psychological studies on unconscious motivations and bias); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (discussing unconscious bias). The ABA Section of Litigation recently created the Task Force on Implicit Bias, which "will partner with the National Center of State Courts to address implicit bias in the judicial system." *See* Mark A. Drummond, *ABA Section of Litigation Tackles Implicit Bias*, LITIG. NEWS, Feb. 1, 2011, http://apps.americanbar.org/litigation/litigationnews/top_stories/020111-implicit-bias-research.html.

130. *See generally* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000) (discussing psychological processes in the work of judges and lawyers); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784–821 (2001) (presenting a study of magistrate judges and concluding that judges rely on the same cognitive decision-making processes as laypersons and other experts, including framing effects, egocentric biases, anchoring effects, errors caused by the representativeness heuristic, and hindsight bias, leaving judges vulnerable to cognitive illusions that can produce poor judgments); Rachlinski, *supra* note 127, at 99–100 ("Courts identify cognitive illusions that might affect juries and adapt to them, but fail to identify cognitive illusions that affect judges and fall prey to them. . . . [R]esearch indicates that judges, like everyone else, are susceptible to illusions of judgment."); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 595–602 (1998) (discussing hindsight bias and its effects on the judiciary).

131. *See* ABRAMSON, *supra* note 70, at xi ("[I]nstances of judicial preconception often are innocent in intent. Most judges genuinely believe that, despite their connections to a lawsuit, they can put aside their bias or interest, and decide the suit justly. What this ignores, unfortunately, is that partiality is more likely to affect the unconscious thought processes of a judge, with the result that he or she has little conscious knowledge of being swayed by improper influences. Furthermore, even if a judge were able to put aside bias and self-interest in a particular case, the appearance of impropriety remains, and is itself a serious problem that casts disrepute upon the judiciary."); *see also* Leubsdorf, *supra* note 84, at 277 (noting that "even honest judges . . . may be swayed by unacknowledged motives"); Nugent, *supra* note 124, at 3 ("[A]ll judges, as a part of basic human functioning, bring to each decision a package of personal biases and beliefs that may unconsciously and unintentionally affect the decisionmaking process."); W. Bradley Wendel, *The Behavioral Psychology of Judicial Corruption: A Response to Judge Irwin and Daniel Real*, 42 MCGEORGE L. REV. 35, 41 (2010) (noting that "a judge with the best of intentions may believe herself to be making her best efforts to put aside feelings of partiality or loyalty, but may be unable to override the influence of unconscious biases").

their ability and, in close cases, err on the side of recusing themselves from the case. However, as *Caperton* ably illustrates, there are exceptions—sometimes egregious exceptions. Despite not one, not two, but three disqualification motions, Justice Benjamin continued to decline to recuse himself under facts described by *Caperton*'s majority as "extreme." Had the Supreme Court not granted certiorari, this situation involving extreme facts and a violation of constitutional due process would not have been remedied; yet it is not the role of the U.S. Supreme Court to police disqualification motions.

In accordance with the goals of providing a fair tribunal and promoting public confidence in the judiciary, we offer four proposals to modify existing disqualification practices to make them meaningful in actual implementation and not just in theory—two pertaining to the standard and two pertaining to procedures.

A. THE RECUSAL STANDARD

As we discussed in Part III.B, the *Caperton* matter illustrated issues pertaining to the recusal standard and its implementation.[132] Specifically, *Caperton* exemplified the potential for circumventing the recusal standard through interpretive manipulations. Our proposals affecting the recusal standard go to (1) unnecessarily restrictive language in the *Code of Conduct for United States Judges*, and (2) the duty to sit.

1. "Knowledge of All the Relevant Circumstances Disclosed by a Reasonable Inquiry"

We first observe that most of the problems that arose in *Caperton* were due to intentional obfuscation rather than any genuine interpretive ambiguity. Both the *ABA Model Code* and the *Code of Conduct* expressly refer to recusal on the basis of an "appearance" of impropriety,[133] yet in *Caperton*, Justice Benjamin repeatedly rejected the idea that "appearances" constituted a legitimate basis for disqualification.[134] Similarly, the West Virginia judicial code provision applicable in *Caperton* mirrors the federal judicial disqualification statute, providing that judges "*shall*" recuse themselves when their impartiality "*might* reasonably be questioned."[135] The recusal is

132. *See supra* notes 80–115 and accompanying text (discussing the recusal standard and its implementation).

133. *See* MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 5 (2007); CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2A cmt (2011).

134. *See supra* notes 83–86, 90–93, 99 & 104–07 and accompanying text (providing examples from Justice Benjamin's opinion).

135. *Compare* W. VA. CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (1994), *with* 28 U.S.C. § 455(a) (2006) (emphasis added).

mandatory; the bias is not. Yet in *Caperton*, Justice Benjamin insisted that actual bias was required before recusal was mandated.[136]

Although not expressly raised by the *Caperton* matter, we do observe, however, that the standard expressed in the *Code of Conduct* is potentially problematic. The inclusion of "knowledge of all the relevant circumstances disclosed by a reasonable inquiry," as explained in Part III above, runs contrary to the general recusal standard and undermines the identified goals of judicial disqualification by inviting private judicial analysis with its attendant danger of bias and self-deception.

Some courts and commentators have noted potential difficulties regarding the use of a reasonableness standard in assessing an appearance of impropriety.[137] We do not see an overarching problem with the statutory reference to reasonableness. As the legislative history to § 455 explains, disqualification is required when there is "*any* reasonable factual basis for doubting the judge's impartiality."[138] However, we view the determination of whether a judge's impartiality "might reasonably be questioned"[139] as being potentially very different from a determination of whether "reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry,"[140] would find an appearance of impropriety.

As explained in Part III.B.2, appearances are based on perceptions rather than full and complete information.[141] The possession of full and complete information would be the basis for determining the existence of actual bias or partiality rather than the mere appearance of bias or partiality.[142] The current *Code of Conduct* standard, examining whether

136. *See supra* notes 83–86, 90–93, 99 & 104–07 and accompanying text (providing examples).

137. *See, e.g.*, Roberts v. Ace Hardware, Inc., 515 F. Supp. 29, 30 (N.D. Ohio 1981) ("It is not so easy as the Congress and the Court of Appeals seem to think it is to determine what 'a reasonable person knowing all the relevant facts' would think about anything, much less about the impartiality of a judge."); FLAMM, *supra* note 4, § 5.7, at 130 ("Even when it is accepted that a judge's impartiality is to be determined from the standpoint of the fictitious 'reasonable person,' . . . problems may and often do arise in determining precisely who this so-called 'reasonable person' is, and how she would determine an appearance of bias or impropriety." (footnote omitted)); Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914, 1943 (2010) ("The reasonable person . . . was conceived and designed to determine facts, not appearances.").

138. H.R. REP. NO. 93-1453, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355 (emphasis added).

139. 28 U.S.C. § 455(a); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007).

140. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2A cmt (2011).

141. *See supra* notes 94–109 and accompanying text (discussing appearances and perceptions).

142. *See* Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1360 (2006) ("[I]f it is not an impropriety, how can it look like an impropriety . . . ?"); *see also* McKoski, *supra* note 137, at 1945 ("[T]he person who is fully informed of all facts and circumstances surrounding a suspect act of a judge knows whether or not an actual impropriety occurred, so mere appearances of impropriety cannot

"reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry," would find an appearance of impropriety, skates too dangerously close to requiring full information, thereby undermining the idea of "appearances" in perceptions of impropriety. Therefore, we propose amending the *Code of Conduct* to conform to the language of the *ABA Model Code of Judicial Conduct*.

2. Duty To Sit

Our second proposal concerning the recusal standard pertains to what Professor Stempel has called "the problematic persistence" of the duty to sit.[143] As we noted earlier, although Congress abolished the duty-to-sit doctrine nearly four decades ago, there are courts that continue to rely on the discredited doctrine to limit recusals.[144] Invoking the duty to sit permits the challenged judge to engage in a balancing of recusal with the duty to sit, thereby limiting recusal to only those circumstances where the appearance of impropriety offsets the duty to sit—a determination susceptible to the judge's characterization of the circumstances and to the judge's thumb on the scale. This balancing of the recusal standard against the duty to sit thus allows the judge to evade the intended effect of the recusal standard, particularly in close cases.

The discredited duty-to-sit doctrine subverts the recusal standard, and for federal courts, Congress abolished the doctrine sufficiently long ago that any attempt to revive it should not be excused or tolerated. Indeed, our proposal in this regard is that courts should adopt perhaps the single most effective means of rejecting the duty to sit: by holding that the invocation of the duty-to-sit doctrine constitutes a presumption that the challenged judge improperly denied the disqualification motion.

B. RECUSAL PROCEDURES

Our remaining two proposals concern recusal procedures, because the overarching problem in recusal is not the underlying standard itself, but the implementation of the standard. As *Caperton* illustrates, judges will, from time to time and for various reasons, either intentionally or unconsciously subvert the recusal standard. The adoption of one, or both, of two procedures can reduce the incidence of this problem: (1) the institution of a peremptory challenge procedure, and (2) the use of alternative or additional decision-makers in reviewing disqualification motions.

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logically be gauged from the perspective of a fully informed reasonable person." (emphasis omitted)).

143. *See* Stempel, supra note 112.

144. *See supra* notes 110–15 and accompanying text (discussing the duty-to-sit doctrine).

1. Peremptory Challenges

A number of state judiciaries employ a peremptory-disqualification procedure at the trial court level.[145] Eighteen state judiciaries, including California and Texas, are subject to such peremptory challenge provisions.[146] The judicial peremptory challenge procedure in some of these states is of very long standing; for example, Indiana has had a judicial peremptory challenge procedure since the early 1900s.[147] Indeed, Indiana's judicial peremptory-challenge procedure was the model for congressional legislation in 1911 for the federal district courts.[148] Congress recodified the 1911 statute without significant change in 1948 as § 144.[149] Section 144 still provides today that:

> 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 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.[150]

Although § 144 reads as a judicial peremptory challenge provision and "there is little doubt that it was originally intended to be one,"[151] federal judges, in a series of judicial opinions, had begun eviscerating the statute's peremptory intent more than two decades before its recodification in § 144,[152] such that Congress's intention to create a judicial peremptory challenge approach in the federal courts was never realized.[153]

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145. *See* FLAMM, *supra* note 4, § 26.1, at 753 (noting that "a substantial minority of states have adopted statutes or court rules that permit a party to seek judicial disqualification on a peremptory basis").

146. *See id.* ch. 27, at 789–822 (detailing the peremptory challenge procedures of each state).

147. *See* Fid. & Cas. Co. v. Carroll, 117 N.E. 858, 859 (Ind. 1917) ("Under this statute, when a proper affidavit has been made and filed, the court has no discretion, but must grant the change [of judge].").

148. *See* 46 CONG. REC. 2626–27 (1911) (providing that upon the filing of an affidavit alleging bias, "such judge shall proceed no further therein, but another judge shall be designated").

149. *See* Act of May 24, 1949, Pub. L. No. 81-72, § 65, 63 Stat. 89, 99 (codified at 28 U.S.C. § 144 (2006)) (making a slight change in wording).

150. 28 U.S.C. § 144.

151. FLAMM, *supra* note 4, § 23.3, at 682.

152. *See, e.g.*, Berger v. United States, 255 U.S. 22, 36 (1921) (authorizing the challenged judge to decide the merits of a disqualification motion); FLAMM, *supra* note 4, § 23.41, at 674–75.

153. *See* Bassett, *supra* note 56, at 1224–25 & n.58.

The pros and cons of a judicial peremptory challenge procedure have been explored by a number of commentators,[154] but the most common objection to such a procedure is the fear of potential judge-shopping.[155] Judge-shopping

> is said to occur when a peremptory disqualification motion has been made not out of any legitimate fear of judicial bias, but because the challenged judge's reputation or prior rulings suggest that he may oppose a particular litigant's interests in a particular case. Thus, judge-shopping may be said to occur where a peremptory challenge is used not to get rid of a biased judge, but to increase the litigant's odds of obtaining a judge who may be more favorably inclined towards her position.[156]

The judge-shopping rationale for opposing a judicial peremptory-challenge procedure sounds reminiscent of some of the rationalizations offered in Justice Benjamin's opinion, in which he worried about "manipulation by partisan elements (including litigants)"[157] and the potential that "litigants [could] hold a near-veto power over the composition of a publicly-elected court."[158] We do not mean to make light of the potential for judge-shopping; certainly nearly any procedure can be misused or abused. However, the benefits of a judicial peremptory challenge procedure would appear to outweigh this potential danger, and if only one peremptory challenge is possible, there are seriously limiting bounds to misuse of the procedure because the lawyer needs to be sure that the next randomly chosen judge will be less biased than the one challenged.

> The underlying issue is one of power: whether to vest complete power in the judiciary, despite the known existence of unconscious bias and despite some judges' reluctance to recuse themselves, or whether to vest a small fragment of power in the litigants, which likely will provide some increase in litigants' [and the public's] confidence in the judiciary but may also result in some peremptory challenges that would not pass statutory muster.[159]

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154. *See, e.g.*, FLAMM, *supra* note 4, § 26.1–.2, at 754–62 (detailing the arguments of judicial peremptory challenge advocates and detractors); Bassett, *supra* note 56, at 1254; Frank, *supra* note 4, at 65–68; Peter A. Galbraith, Comment, *Disqualifying Federal District Court Judges Without Cause*, 50 WASH. L. REV. 109 (1974). *See generally* ALAN J. CHASET, FED. JUDICIAL CTR., DISQUALIFICATION OF FEDERAL JUDGES BY PEREMPTORY CHALLENGE (1981).

155. *See* CHASET, *supra* note 154, at 39 (citing one study in which 45.4% of respondents—presiding judges—thought judge-shopping was the main reason for abusing the preemptory-challenge statute); FLAMM, *supra* note 4, § 26.2, at 757; Bassett, *supra* note 56, at 1254.

156. FLAMM, *supra* note 4, § 26.2, at 757 (footnote omitted).

157. Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 293 n.14 (W. Va. 2008) (Benjamin, C.J., concurring), *rev'd*, 129 S. Ct. 2252 (2009).

158. *Id.* at 296.

159. Bassett, *supra* note 56, at 1254.

In light of §144's plain language, it would appear possible that federal district courts could elect to employ a judicial peremptory challenge procedure without the need for additional authorizing legislation, subject only to any limitations imposed by a particular jurisdiction's case law. Another potentially helpful procedure would be the use of alternative or additional decision-makers in reviewing disqualification motions.

2. The Use of Alternative or Additional Decision-makers

As we explained in Part III.C, the practice of filing a disqualification motion with the challenged judge raises a number of issues, including the desirability of authorizing the subject of the disqualification motion to serve as the judge of his own case; self-perception and objectivity bias in assessing one's actual, or the perceived, ability to be impartial; potential fears of retribution; and potential difficulties in obtaining appellate review of such a motion's denial.[160]

Any number of alternative procedures is possible, but some federal case law already supports the discretionary transfer of a disqualification motion to another judge;[161] some state courts require such a transfer.[162] And even when transfer to another judge is not mandated, "some judges will do so sua sponte unless the motion, on its face, is either frivolous or clearly intended to serve only a tactical purpose."[163] This offers an obvious and readily implemented option that in most jurisdictions would require no authorizing legislation or court rule.

For judges or jurisdictions not interested in a relatively automatic transfer of disqualification motions to a neutral judge, a potential modified procedure achieving the same ultimate goal might provide that parties would submit disqualification motions to the clerk of the court for that jurisdiction. The clerk would forward a copy of the motion to the challenged judge for his or her initial review. If the challenged judge agreed that recusal was appropriate and accordingly recused himself from the case, no further action would be necessary. If, however, the challenged judge declined to recuse himself, the clerk would forward a copy of the motion to another judge within that jurisdiction for review.

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160. *See supra* notes 116–21 and accompanying text (discussing the issues raised by the practice of presenting recusal motions to the challenged judge).

161. *See, e.g.*, *In re* United States, 158 F.3d 26, 37 n.10 (1st Cir. 1998) (Torruella, C.J., dissenting); Doddy v. Oxy USA, Inc., 101 F.3d 448, 458 n.7 (5th Cir. 1996); United States v. Feldman, 983 F.2d 144, 144 (9th Cir. 1992); Rademacher v. City of Phx., 442 F. Supp. 27 (D. Ariz. 1977); Bradley v. Milliken, 426 F. Supp. 929 (E.D. Mich. 1977); United States v. Zagari, 419 F. Supp. 494 (N.D. Cal. 1976); *see also In re* Lieb, 112 B.R. 830 (Bankr. W.D. Tex. 1990).

162. *See, e.g.*, TEX. GOV'T CODE ANN. § 74.059 (West 2005); UTAH R. CIV. P. 63(b), *construed in* Anderson v. Anderson, 368 P.2d 264, 265 (Utah 1962); People v. Mercado, 614 N.E.2d 284, 287–89 (Ill. App. Ct. 1993); State v. Thompson, 544 So. 2d 421, 428 (La. Ct. App. 1989); City of Columbus v. Bonner, 440 N.E.2d 606, 609 (Ohio Ct. App. 1981).

163. FLAMM, *supra* note 4, § 17.7, at 507 & n.65 (footnote omitted) (citing examples).

Although the use of an alternative or additional decision-maker could be helpful for judges at all levels, such a proposal is perhaps particularly important for recusal motions challenging a federal appellate judge or state supreme court justice, due to the extraordinarily limited potential for subsequent review.

CONCLUSION

The majority opinion in *Caperton* quoted from the Federalist Papers, "No 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."[164] Motions for judicial disqualification and standards for recusal far too often contain this very flaw. When the decision to recuse rests with the judge whose integrity is being challenged, we should expect the courts to apply to themselves the rules they regularly invoke for others and recognize they cannot be the judge in their own cases. Judges are like the rest of us. They have a difficult time separating their own—often legitimate—abilities to put aside bias and a partiality from the need to avoid the public appearance of impropriety. We recommend removing this temptation from them. In order to overcome the record of inadequate attention to the recusal standards and procedural deficiencies in their implementation, we can begin to repair both the effectiveness of judicial recusal and public confidence in the judiciary. Consistently recognizing "appearances" or perceptions as a legitimate reason requiring judicial disqualification and insisting on a procedure authorizing the review of a disqualification motion by a judge other than the one who is the subject of that motion are important steps to restoring the public's faith in the judiciary and enhancing respect for its judgments. As *Caperton* reminded us, "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."[165]

164. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2259 (2009) (alteration omitted) (quoting THE FEDERALIST NO. 10, at 59 (James Madison) (J. Cooke ed., 1961)) (internal quotation marks omitted); *see also In re* Murchison, 349 U.S. 133, 136 (1955) (stating that "no man can be a judge in his own case").

165. *Caperton*, 129 S. Ct. at 2266–67 (quoting Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)) (internal quotation marks omitted).