No. 33350 *Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation, Sovereign Coal Sales, Inc. v. A. T. Massey Coal Company, Inc., Elk Run Coal Company, Inc., Independent Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc.*

FILED
July 28, 2008
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, Acting C.J., concurring:

Roscoe Pound offered the following pertinent comments as to a judge's responsibility when setting forth an opinion:

> The opinions of the judge of a highest court of a state are no place for intemperate denunciation of the judge's colleagues, violent invective, attributings of bad motives to the majority of the court, and insinuations of incompetence, negligence, prejudice, or obtuseness of fellow members of the court.

Roscoe Pound, *Cacoethes Dissentiendi: The Heated Judicial Dissent*, 39 A.B.A. J. 794, 795 (1953). There is an important difference between a thoughtful, well-reasoned separate opinion or order and one which is grounded in the political manipulation of legal doctrine; and in the case of ensuring a stable, predictable and fair judicial system, that difference matters. Judges who use their opinions and orders simply as sensationalistic bombast by which to convey partisan agendas or who pander to emotion rather than legal reason do a disservice to the rule of law and to the institution they serve.

It is a testament to the strength of our justice system that judges may disagree and do so openly in separate opinions. A well-reasoned and legally sound separate opinion

carries with it the opportunity for pointing out differences with the opinions of the other members of the court without undermining public confidence in the judiciary. Hon. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U.L. Rev. 1185, 1196 (1992). By furthering positive progress in the development of law, a well-honed opinion serves as an invaluable instructional tool to judges, lawyers, legal scholars, law students and even to a judge's colleagues. "[T]he effective judge . . . strives to persuade, and not to pontificate. [He] speaks in 'a moderate and restrained' voice, engaging in a dialogue with, not a diatribe against . . . [his] own colleagues." *Id.* at 1186 (internal quotations omitted). A separate opinion should never "generate more heat than light," but rather should "'stand on its own footing,' . . . spell[ing] out differences without jeopardizing collegiality or public respect for and confidence in the judiciary." *Id.* at 1194, 1196 (internal quotations omitted).

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 or the vagaries of sensationalism.[1] Actual justice derives from actual impartiality in decision-

[1] As a basic premise of this concurrence, I submit that the goal of any legitimate judicial system is actual justice. Actual justice presupposes stability and predictability in the judicial system by the measured application of the rule of law. Actual justice is not measured by whether the end-result of the case, *i.e.*, who wins and who loses, meets with the acceptance of partisan constituencies or those with vested interests in specific outcomes in given cases. Rather, it is justice firmly rooted in the rule of law. Appearance- or politically-driven judging is subject to the manipulation of information and opinion via innuendo, half-truths, suggestive claims, and so on. Such judging is contrary to a judge's duty to resist public clamor and fear of criticism. W. Va. Rules of Judicial Conduct, Canon
(continued...)

making and is conveyed in well-written *legal* opinions which are founded in the rule of law – not in orders, opinions or public pronouncements by judicial officers reflecting partisanship, contempt for other members of this Court, or their staff, bias toward or against the parties, or a pre-judging of the issues.[2]

It is an unfortunate truth that judicial officers in West Virginia must stand for office in political elections.[3] Notwithstanding this political selection method, the public's confidence in our system of justice is necessarily undermined and the stability and predictability of the rule of law is compromised when politics cross the threshold of our

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[1](...continued)
3B(2) ("A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.").

[2] The politicization of one's judicial office is perhaps the gravest threat to the independence of the judiciary, because the use of one's judicial office for partisan purposes utterly destroys the impartiality and fairness which is necessary for actual justice. A judicial officer's public actions in ridiculing selected litigants or fellow jurists, particularly during the pendency of a case or an election, necessarily conveys to the public a fundamental bias within the Court incompatible with fairness. The notion of "political" or "appearance-driven" justice in West Virginia conveys the message that appearances and rhetoric – particularly when contrived – mean more than actualities, that the manipulation of facts is more important than the facts themselves, that cases are decided to a predetermined politically-correct result, and that ends justify means. Public confidence is directly affected by the manner in which a judge or justice accords himself or herself in public, by the collegiality which he or she shares with other judicial officers, and by the quality of his or her legal reasoning.

[3] The West Virginia Constitution requires that judicial officers in West Virginia be elected by the People. *See* W. Va. Const. art. VIII, §§ 2, 5, 10 and 16. The West Virginia Legislature has, by statutory law, required such elections to be partisan. W. Va. Code § 3-5-4.

Court. The most important factors therefore affecting the public's perception of actual justice in this Court necessarily are the actual decisions of this Court, and its members, over time, the professional demeanor of this Court's members, and the quality of the written opinions and orders which we produce in specific cases.[4]

By baiting emotions, I believe the Dissenting opinion adopts a distinctly "political voice" rather than a "judicial voice." With due respect to my dissenting colleagues, this case does not present a close call on the basis of the rule of law. Because the Majority decision possesses such a deep strength of legal authority, I do not believe that the Dissenting opinion in any way weakens the authority or substance of the Court's decision.

The law governing the Court's decision of this case is clear. Accordingly, the focus of this concurrence is limited to four specific topics: the proper view of the facts on appeal, the transactional approach to *res judicata*, the proper standard of review for a forum-selection clause, and the issue of recusal.[5]

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[4] *See* Charles S. Trump IV, *The Case in Favor of the Nonpartisan Election of Justices of the Supreme Court of Appeals of West Virginia*, The West Virginia Lawyer, 24 (May 2000) ("Upon the bench we hope to see jurists who will decide cases upon a dispassionate reading of the law and the reasoned application of the law to the facts before them.")

[5] As an aside, I pause briefly to note that the Dissenting opinion begins by quoting from the Majority opinion that was filed in this action on November 21, 2007, prior to the rehearing of this case. Notably, however, that opinion no longer has any force or (continued...)

I.

REVIEWABLE FACTS LIMITED TO PRE-TRIAL RECORD

Turning first to the more substantive issues of the case, the Dissenting opinion launches into a lengthy, twenty-two page discussion of the evidence admitted during the trial of this matter and certain determinations made by the circuit court based upon that evidence. The dissent then uses this trial evidence and associated court rulings to justify its position on how the instant case should have been resolved. I do not believe this analysis by the dissent to be legally sound. Due to the posture of the instant appeal, *i.e.*, the dispositive matters actually before this Court on appeal, this Court's review is limited. As a court of appeals, this Court simply cannot consider issues not appealed by the parties or the evidence that was admitted during trial on such non-appealed issues. Specifically, there were two dispositive issues before this Court for review: (1) the circuit court's denial of the Massey defendants' *pre-trial* motion to dismiss for improper venue in light of the forum-selection clause contained

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[5](...continued)
effect. *See State ex rel. Moats v. Janco*, 154 W. Va. 887, 901, 180 S.E.2d 74, 83 (1971) ("As a general rule, when a rehearing is granted, the status of the case is the same as though no hearing had occurred. . . . The granting of a rehearing withdraws an opinion previously rendered and destroys its force and effect unless it is subsequently adopted by the same tribunal. . . . By reason of the rehearing heretofore granted[,] the Majority opinion[, the concurring,] and the dissenting opinions heretofore filed in this case are withdrawn and held for naught." (internal citations omitted)). *See also Miller v. Burley*, 155 W. Va. 681, 698, 187 S.E.2d 803, 813 (1972) (same); *Atlantic Greyhound Corp. v. Public Serv. Comm'n of W. Va.*, 132 W. Va. 650, 665, 54 S.E.2d 169, 177 (1949) ("The granting of a rehearing withdraws an opinion previously rendered and destroys its force and effect unless it is subsequently adopted by the same tribunal.").

in the 1997 CSA, and (2) the Massey defendants' motion for summary judgment based upon the doctrine of *res judicata*.

With respect to the Massey Defendants' pre-trial motion to dismiss based upon the forum-selection clause, the Majority opinion correctly limits its review to the facts that were before the circuit court at the time of its ruling on the motion. Indeed, the Majority opinion correctly observes that "the forum-selection clause issue was addressed below in the context of a motion to dismiss; therefore, we consider the claims as they were asserted in the complaint." Maj. op. at 32. *See also* Maj. op. at 49 n.30 ("The proper question . . . is whether enforcement of the forum-selection clause was unjust or unreasonable *at the time of the Massey Defendants' motion to dismiss based upon the forum-selection clause*." (emphasis added)).[6] *Cf. Powderidge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W. Va. 692, 700, 474 S.E.2d 872, 880 (1996) ("Although our review of the record from a summary judgment

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[6] The Majority opinion further points out that

> only three of the claims asserted in the amended complaint were ultimately presented to the jury for a verdict, indicating that there was insufficient evidence to support the remaining claims. Accordingly, in deciding whether the claims asserted below were "brought in connection with" the 1997 CSA, we will limit our consideration to only those three claims that ultimately went to the jury. Those three claims, all sounding in tort, were (1) tortious interference; (2) fraudulent misrepresentation; and (3) fraudulent concealment.

Maj. Slip. op. at 32.

proceeding is *de novo*, this Court for obvious reasons, will not consider evidence or arguments that were not presented to the circuit court for its consideration in ruling on the motion. *To be clear, our review is limited to the record as it stood before the circuit court at the time of its ruling*." (emphasis added)).

With respect to the Massey defendants' motion for summary judgment based upon the doctrine of *res judicata*, the Majority opinion correctly observes that the circuit court properly denied the Massey Defendants' original motion for summary judgment as there was no final order in the Virginia action at the time that the original summary judgment motion was made to the circuit court. However, the Majority opinion goes on clearly to explain that the summary judgment issue could be raised for the first time on appeal, and appropriately addresses the issue in the same manner that the circuit court would have had the Virginia case been final at the time the Massey Defendants' original summary judgment motion was made before the circuit court. Therefore, the Dissenting opinion's reliance upon facts developed during the eventual trial of this matter to support its position herein is simply wrong because those facts were not before the circuit court at the time the summary judgment motion was filed and ruled upon.

II.

TRANSACTIONAL APPROACH TO *RES JUDICATA*

In ascertaining the proper test to be applied to the element of *res judicata* requiring identity of the cause of action, the Majority properly applies the transactional test, which was in place in Virginia at the time the complaint in the action underlying this appeal was filed in the Circuit Court of Boone County: October 1998.[7]

[7] Nevertheless, I note that Virginia has a long history of applying the transactional approach, beginning as early as 1884. *See Wohlford v. Compton*, 79 Va. 333, ___, 1884 WL 5056, *4 (Va. 1884) ("When a matter is adjudicated and finally determined by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends, and it therefore prevails, with very few exceptions, throughout the civilized world. This principle embraces not only what was actually determined, but also extends to every other matter which the parties might have litigated in the suit."). *See also Blackwell's Adm'r v. Bragg*, 78 Va. 529, ___, 1884 WL 5003, *5 (Va. 1884) ("'The doctrine of res judicata applies to all matters which existed at the time of giving the judgment, or rendering the decree, *and which the party had the opportunity of bringing before the court*. . . . There is no relief prayed for in this which the appellants could not have obtained in that suit, if entitled thereto. There are no material averments in the bill in this case which could not have been investigated and passed on in that, and which in effect were not passed on by the final decree in that case.'" (citations omitted) (emphasis added)); *McCullough v. Dashiell*, 6 S. E. 610, 612 (Va. 1888) ("[A]lthough this court may be of opinion that it is only necessary to notice certain questions as they are decisive of the case, yet all questions involved in the appeal are finally adjudicated, whether distinctly raised and passed on below and here or not. If they are involved, and might have been passed on, it is enough. . . . *The doctrine of res judicata applies to all matters which existed at the time of giving the judgment or rendering the decree, and which the party had the opportunity of bringing before the court.*" (emphasis added) (citations omitted)); *Fishburne v. Furguson*, 7 S.E. 361, 362-63 (Va. 1888) ("It is necessary, first, to consider whether this suit is concluded by the suit referred to in Franklin county; for, if the question is res adjudicata, the whole matter ends there; for, when a matter is adjudicated and finally determined by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends, and it therefore prevails with very few exceptions throughout the civilized world. *This principle not only embraces what actually was determined, but also extends to every other matter which the parties might have litigated in* (continued...)

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the case; and when the facts which constitute the cause of action or defense have been between the same parties submitted to the consideration of the court, and passed upon by the court, they cannot again be the proper subjects for an action or defense, unless the finding and judgment of the court are opened up or set aside by competent authority. This principle of law extends still further in quieting litigation. A party cannot relitigate matters which he might have interposed, but failed to do in a prior action between the same parties, or their privies, in reference to the same subject-matter." (emphasis added) (citations omitted)); *Beale's Adm'r v.Gordon*, 21 S.E. 667, 669 (Va. 1895) ("When a judgment or decree has been rendered by a court of competent jurisdiction in a suit, it is a bar to any further action between the same parties upon the same matter of controversy. . . . The decree in the first cause is not only final as to the matters actually determined, but *as to every matter which the parties might have litigated, within the scope of the pleadings in the cause, and which might have been decided*." (emphasis added) (citations omitted)); *Brunner v. Cook*, 114 S.E. 650, 651 (Va. 1922) ("'When the second suit is between the same parties as the first, and on the same cause of action, the judgment in the former is conclusive on the latter not only as to every question which was decided, but also as to every other matter which the parties might have litigated and had determined, within the issues as they were made or tendered by the pleadings or as incident to or essentially connected with the subject-matter of the litigation, whether the same, as a matter of fact, were or were not considered. As to such matters a new suit on the same cause of action cannot be maintained between the same parties.'" (quoting 15 R. C. L. "Judgments," § 438, p. 962)); *Gimbert v. Norfolk S.R. Co.*, 148 S.E. 680, 689-90 (Va. 1929) (same); *Choate v. Calhoun*, 149 S.E. 470, 471 (Va. 1929) (same); *Kemp v. Miller*, 186 S.E. 99, 103 (Va. 1936) (same); *Jones v. Morris Plan Bank of Portsmouth*, 191 S.E. 608, 610 (Va. 1937) ("The well established rule forbidding the splitting of causes of action is clearly stated in 1 Am. Jur., 'Actions,' § 96. It is there said: 'One may bring separate suits on separate causes of action even if joinder of the separate causes in one action is permissible, subject, however, to the power of the court to order consolidation. On the other hand, one who has a claim against another may take a part in the satisfaction of the whole, or maintain an action for a part only, of the claim, although there is some authority to the effect that a part of a demand cannot be waived for the purpose of giving an inferior court jurisdiction. But after having brought suit for a part of a claim, the plaintiff is barred from bringing another suit for another part. The law does not permit the owner of a single or entire cause of action or an entire or indivisible demand, without the consent of the person against whom the cause or demand exists to divide or split that cause or demand so as to make it the subject of several actions. The whole cause must be determined in one action. If suit is brought for a part of a claim, a judgment obtained in that action precludes the plaintiff from bringing a second action for the residue of the claim, notwithstanding the second form of

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action is not identical with the first, or different grounds for relief are set forth in the second suit. This principle not only embraces what was actually determined, but also extends to every other matter which the parties might have litigated in the case. The rule is founded upon the plainest and most substantial justice, namely, that litigation should have an end and that no person should be unnecessarily harassed with a multiplicity of suits.'"); *Pickeral v. Federal Land Bank of Baltimore*, 15 S.E.2d 82, 85 (Va. 1941) ("'Hence, when an issue going to the merits of two or more actions arising from the same transaction is determined upon the hearing of the first action, judgment therein may be pleaded as res judicata to the subsequent ones.'" (quoting American and English Encyclopedia of Law, Second Edition, volume 24, page 779)); *Royall v. Peters*, 21 S.E.2d 782, 787 (Va. 1942) ("There must at some time be an end to controversies. Courts are for the purpose of furnishing a speedy end to litigation and not as a forum for endless contentions. Carelessness or after-thought on the part of litigants ought not to be allowed to affect the conclusiveness of a proceeding which has been determined after ample opportunity for a hearing of every question which might have been litigated."); *Griffin v. Griffin*, 32 S.E.2d 700, 703 (Va. 1945) ("The appellant not only had the opportunity of bringing this ground for divorce between the court in the first suit but she had the opportunity, and *it was her duty to bring before the court in the first suit any other ground for divorce that existed at that time*. There was a final decree in the first cause rendered by a court of competent jurisdiction on the merits. It necessarily bars the appellant from conducting a subsequent suit involving the same cause of action."); *Shepherd v. Richmond Eng'g Co.*, 36 S.E.2d 531, 534-35 (Va. 1946) ("The law does not permit the owner of a single or entire cause of action or entire indivisible demand, without the consent of the person against whom the cause or demand exists, to divide or split that cause or demand so as to make it the subject of several actions. The whole cause must be determined in one action. If suit is brought for a part of a claim, a judgment obtained in that action precludes the plaintiff from bringing a second action for the residue of the claim, notwithstanding the second form of action is not identical with the first, or different grounds for relief are set forth in the second suit. This principle not only embraces what was actually determined, but also extends to every other matter which the parties might have litigated in the case. . . . That appellee must stand or fall by its election of remedies is fundamental."); *Eason v. Eason*, 131 S.E.2d 280, 282 (Va. 1963) ("When the second suit is between the same parties as the first, and on the same cause of action, the judgment in the former is conclusive of the latter, not only as to every question which was decided, but also as to every other matter which the parties might have litigated and had determined, within the issues as they were made or tendered by the pleadings, or as incident to or essentially connected with the subject matter of the litigation, whether the same, as a matter of fact, were or were not considered. As to such matters a new suit on the same cause of action cannot be maintained between the same
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Indeed, in April 1996, relatively close in time to the period pertinent to this action, the Supreme Court of Virginia applied the transactional approach to the issue of *res judicata* in the case of *Waterfront Marine Construction, Inc. v. North End 49ers Sandbridge Bulkhead*

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[7](...continued)
parties . . . ." (quotations and citation omitted)); *Hagen v. Hagen*, 139 S.E.2d 821, 823 (Va. 1965) (same); *Bates v. Devers*, 202 S.E.2d 917, 920-21 & n.8 (Va. 1974) ("A valid, personal judgment on the merits in favor of defendant bars relitigation of the same cause of action, *or any part thereof which could have been litigated*, between the same parties and their privies." (citing Restatement of Judgments §§ 47, 62 & 83 (1942)); and "A 'cause of action', for purposes of res judicata, may be broadly characterized as an assertion of particular legal rights *which have arisen out of a definable factual transaction*." (emphasis added)); *Allstar Towing, Inc. v. City of Alexandria*, 344 S.E.2d 903, 905 (Va. 1986) ("When the second suit is between the same parties as the first, and on the same cause of action, the judgment in the former is conclusive of the latter, not only as to every question which was decided, but also as to every other matter which the parties might have litigated and had determined, within the issues as they were made or tendered by the pleadings, or as incident to or essentially connected with the subject matter of the litigation, whether the same, as a matter of fact, were or were not considered. As to such matters a new suit on the same cause of action cannot be maintained between the same parties . . . ." (quotations and citation omitted)); *Flora, Flora & Montague, Inc. v. Saunders*, 367 S.E.2d 493, 495 (Va. 1988) ("A valid, personal judgment on the merits . . . bars relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies. . . . A claim arising from an indivisible contract cannot be split and made the subject of separate actions, . . . but, being a single cause of action, must be litigated in one suit. . . . The law does not permit the owner of a single or entire cause of action or an entire or indivisible demand . . . to divide or split that cause or demand so as to make it the subject of several actions. The whole cause must be determined in one action. If suit is brought for a part of a claim, a judgment obtained in that action precludes the plaintiff from bringing a second action for the residue of the claim, notwithstanding the second form of action is not identical with the first, or different grounds for relief are set forth in the second suit. This principle not only embraces what was actually determined, but also extends to every other matter which the parties might have litigated in the case." (quotations and citations omitted)); *Waterfront Marine Constr., Inc. v. North End 49ers Sandbridge Bulkhead Groups A, B & C*, 468 S.E.2d 894, 904 (Va. 1996) ("[E]ven though the first demand described only specific defects, the doctrine of res judicata applies to all claims which could have been brought, thereby preventing a party from splitting his cause of action.").

Groups A, B and C, 468 S.E.2d 894, 904 (Va. 1996), wherein the Supreme Court of Virginia observed that "even though the first demand described only specific defects, the doctrine of res judicata applies to *all claims which could have been brought*, thereby preventing a party from splitting his cause of action." (Emphasis added). Furthermore, Virginia courts have recognized that, both traditionally and during the period of time relevant to this case, Virginia has applied the transactional approach.

> The Virginia Supreme Court applies the . . . transactional analysis in considering the scope of a transaction for the application of res judicata . . . . In *Trout v. Commonwealth Transp. Commissioner*, 241 Va. 69, 73, 400 S.E.2d 172 (1991), the Supreme Court discussed this broad transactional concept:
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> > An "action" and a "cause of action" are quite different. "Action" is defined by Code § 8.01-2, as noted above.[8] We defined "cause of action" in *Roller v. Basic Construction Co.*, 238 Va. 321, 327, 384 S.E.2d 323, 326 (1989), as "a set of operative facts which under the substantive law, may give rise to a right of action."
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> Virginia follows the transaction rule set forth in the Restatement of Judgments 2d, § 24 for purposes of defining "cause of action." One "cause of action" may give rise to myriad rights of action, *e.g.*, breach of contract, breach of warranty, negligence, and statutory claims; however, if the rights of action arise from the same operative set of facts and could legally be asserted therein, they are all the same "cause of action" for purposes of the application of the doctrine of res judicata.

Lake Holiday Country Club, Inc. v. Teets, Nos. 00-44, 00-46, 00-47, & 00-70, 2001 WL

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[8] Pursuant to Va. Code Ann. § 8.01-2, "'Action' and 'suit' may be used interchangeably and shall include all civil proceedings whether upon claims at law, in equity, or statutory in nature and whether in circuit courts or district courts."

34037926, at *7 (Va. Cir. Ct. 2001). *See also Cherokee Corp. of Linden, Virginia, Inc. v. Richardson*, Chancery No. 95-130, Chancery No. 96-34, now Law No. L-96-148, 1996 WL 1065553, at *1 (Va. Cir. Ct. June 5, 1996) ("As can be seen, Virginia follows the transaction rule set forth in the Restatement of Judgments 2d, §24 for purposes of defining 'cause of action.'"); *Davis v. Marshall Homes, Inc.*, 576 S.E.2d 504, 515 (Va. 2003) (Kinser, J., dissenting) (observing, in case which post-dated the present action, that majority opinion overruled transactional approach that previously applied, commenting "[i]n truth, the effect of the majority's explicit rejection of a transactional approach is to overrule our decision in *Allstar Towing*. However, the majority does not explain why this precedent should be cas[t] aside.").

The dissent argues that the transactional approach was not so clearly established in Virginia; however, the dissent points to no case that would apply to the instant action and require application of a rule other than the transactional approach. Furthermore, the dissent contains notable error. For example, the dissent represents that the case of *Flora, Flora & Montague, Inc. v. Saunders*, 367 S.E.2d 493 (Va. 1988), applied the best evidence test. To the contrary, *Saunders* actually set out the transactional approach as the appropriate test:

> A valid, personal judgment on the merits . . . bars relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies. . . . . A claim arising from an indivisible contract cannot be split and made the subject of separate actions, . . . but, being a single cause of action, must be litigated in one suit. . . . The law does not permit the owner of a single or entire cause of action or an entire

> or indivisible demand . . . to divide or split that cause or demand so as to make it the subject of several actions. The whole cause must be determined in one action. If suit is brought for a part of a claim, a judgment obtained in that action precludes the plaintiff from bringing a second action for the residue of the claim, notwithstanding the second form of action is not identical with the first, or different grounds for relief are set forth in the second suit. This principle not only embraces what was actually determined, but also extends to every other matter which the parties might have litigated in the case.

Saunders, 367 S.E.2d at 495 (quotations and citations omitted).

The dissent also incorrectly implies that *Bates v. Devers*, 202 S.E.2d 917 (Va. 1974), utilized the same evidence test. *Bates*, in fact, applied the transactional approach as demonstrated by that Court's finding that "[a] valid, personal judgment on the merits in favor of defendant bars relitigation of the Same [sic] cause of action, *or any part thereof which could have been litigated*, between the same parties and their privies." (Citing Restatement of Judgments §§ 47, 62, 83 (1942)). 202 S.E.2d at 920-21. In a footnote, the *Bates* Court went on to state that "[a] 'cause of action', for purposes of res judicata, may be broadly characterized as an assertion of particular legal rights *which have arisen out of a definable factual transaction*." 202 S.E.2d at 921 n.8 (emphasis added).[9]

[9] The dissent is also erroneous in its assertion that "[i]t was in the 1974 case of *Bates v. Devers* . . . that the Virginia Supreme Court first referred in a footnote to the term 'transaction' in relation to the res judicata element of cause of action." Dissent. op. (Albright, J.) at 50. Instead, the Virginia Supreme Court utilized the term "transaction" in this manner as early as 1941. *See Pickeral v. Federal Land Bank of Baltimore*, 15 S.E.2d 82, 85 (Va. 1941) ("'Hence, when an issue going to the merits of two or more actions arising (continued...)

As the Majority opinion correctly notes, the Boone County action is barred by *res judicata* under the transactional approach that is applied pursuant to Virginia law, because the claims asserted in the instant action arise from the same operative set of facts involved in the earlier Virginia action.

III.

DE NOVO REVIEW OF FORUM-SELECTION CLAUSES[10]

The Dissenting opinion also finds fault with the *de novo* standard of review set out by the Majority opinion. Again, the Dissenting opinion is incorrect. To the extent that a determination of the applicability of a forum-selection clause may require this Court to review factual determinations made by a circuit court, our review of those specific determinations is under the "clearly erroneous standard." Syl. pt. 2, in part, *Walker v. West Virginia Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997) ("[W]e review the circuit court's underlying factual findings under a clearly erroneous standard."). Nevertheless, this Court often applies multi-faceted standards of review. Thus, while certain elements of an

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[9](...continued)
from *the same transaction* is determined upon the hearing of the first action, judgment therein may be pleaded as res judicata to the subsequent ones.'" (emphasis added) (quoting, American and English Encyclopedia of Law, Second Edition, volume 24, page 779)).

[10] In addition to criticizing the standard of review applied to forum-selection clauses, the Dissenting opinion takes issue with various other aspects of the forum-selection clause analysis of the Majority opinion. Though I choose to clarify this particular point, the Dissenting opinion's analyses of other issues appear to be more result-driven than legally meritorious, and will therefore not be discussed herein.

analysis, should they exist, might require deferential scrutiny, our overarching review of the general "applicability and enforceability" of a forum-selection clause is *de novo*. Syl. pt. 2, Maj. op.; *See also Phillips v. Audio Active Ltd.*, 494 F.3d 378, 384 (2d Cir. 2007) ("Where the district court has relied on pleadings and affidavits to grant a Rule 12(b)(3) motion to dismiss on the basis of a forum selection clause, our review is *de novo*. In analyzing whether the plaintiff has made the requisite prima facie showing that venue is proper, we view all the facts in a light most favorable to plaintiff. Contract interpretation as a question of law is also reviewed *de novo* on appeal." (internal citations omitted)); *Cowatch v. Sym-Tech Inc*., No. 07-2582, 2007 WL 3257238, at *1 (3d Cir. 2007) ("Our review of the District Court's construction of the forum selection clause is plenary." (quoting *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1216 (3d Cir.1991))); *Kochert v. Adagen Med. Int'l, Inc.*, 491 F.3d 674, 677 (7th Cir. 2007) ("The district court's order granting Adagen's Rule 12(b)(3) motion for improper venue based on the contractual forum-selection clause is subject to de novo review." (citation omitted)); *Calix-Chacon v. Global Int'l Marine, Inc*., 493 F.3d 507, 510 (5th Cir. 2007) ("[T]he enforcement of a forum selection clause is an issue of law, and we review the district court's conclusions of law de novo." (quoting *MacPhail v. Oceaneering Int'l, Inc*., 302 F.3d 274, 278 (5th Cir.2002))); *Preferred Capital, Inc. v. Associates in Urology*, 453 F.3d 718, 721 (6th Cir. 2006) ("We also note that 'the enforceability of a forum selection clause is a question of law that we review de novo.'" (quoting *Baker v. LeBoeuf, Lamb, Leiby & Macrae*, 105 F.3d 1102, 1104 (6th Cir.1997))); *American Soda, LLP v. U.S. Filter Wastewater Group, Inc*., 428 F.3d 921, 925 (10th Cir. 2005) ("We review the enforceability of a forum

selection clause de novo." (citing *K & V Scientific Co. v. BMW*, 314 F.3d 494, 497 (10th Cir.2002))); *Silva v. Encyclopedia Britannica, Inc.*, 239 F.3d 385, 387 (1st Cir. 2001) ("We review a district court's dismissal based on a forum-selection clause de novo."); *Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 119 F.3d 688, 691-92 (8th Cir. 1997) ("In the case at hand, neither party challenges the validity of the forum selection clause; rather, they contest the specific meaning of the language used in the forum selection clause. . . . [W]e conclude that de novo review is the appropriate standard for reviewing a district court's interpretation of the specific terms contained in a forum selection clause. . ."). In the instant case, the forum-selection clause was reviewed in the context of a motion to dismiss. In this context, there simply were no factual determinations made by the circuit court that required deferential review. Thus, the Majority's *de novo* review of the circuit court's forum-selection clause ruling is proper.

IV.

DISQUALIFICATION AND DUE PROCESS

In footnote 16 of the Dissenting opinion, reference is made to the motions filed by the Appellees seeking my disqualification from this case – especially the last such motion filed by Appellees.[11] Specifically, the Dissenting opinion contends that "both actual *and*

[11] This last motion seeking my disqualification was filed March 28, 2008, three-and-a-half years after my 2004 election, over seventeen months after the filing of this appeal on October 24, 2006, over four months after the initial decision of this Court on (continued...)

apparent conflicts can have due process implications on the outcome of cases affected by *such* conflicts" and "[i]t is now clear, especially from the last motion for disqualification . . . that there are now [such] due process implications" in this case. Dissenting Slip Op., at 55 (emphasis added). The Dissenting opinion provides no legal analysis for this contention. Nor does the Dissenting opinion, or the Appellees herein, claim any actual bias or prejudice on my part in this case.[12] Indeed, neither the Dissenting opinion nor the Appellees herein point to

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[11](...continued)
November 21, 2007 (in which I voted with the majority against the interests of the Appellees), and over two weeks after oral arguments were heard on the reconsideration of this appeal. The primary basis of this last disqualification motion was a survey taken by the Appellees which can best be described as a "push-poll"; *i.e.*, a survey wherein limited and selective background information is conveyed to individuals, the purpose or result of which is to "push" the individual being surveyed to a negative inference or response against a public individual. "Push-polls" are unlawful in West Virginia when used in elections. W. Va. Code § 3-8-9(a)(10) (1999). The motion was denied as being untimely and because "push-poll"-type surveys of this kind, are, as a matter of law, neither credible nor sufficiently reliable to serve as the basis for an elected judge's disqualification.

[12] The Dissenting opinion uses the phrase "both actual and apparent conflicts" in describing the type of conflict to which the Dissenting opinion believes that due process implications may attach. The Dissenting opinion, however, omits any legal analysis to define what it contends is meant by the term "apparent." If "apparent" means "obvious," the phrase would simply mean those conflicts which are *both* actual *and* obvious. Such a meaning comports with a legitimate concern for "actual" conflicts (such as *actual* biases and prejudices which directly implicate due process) which are also plainly evident to the judicial officer and the public (implicating a duty to recuse and a concern for public confidence). Conversely, though, the Dissenting opinion may instead intend the term "apparent" to be a wholly separate form of conflict, distinct from an *actual* conflict. In that sense, the Dissenting opinion's footnote would refer to either of two separate and distinct types of conflicts which may implicate due process considerations: actual conflicts and appearance-driven conflicts (conflicts subjectively-defined according to criteria which may vary from observer to observer). The very notion of appearance-driven disqualifying conflicts, with shifting definitional standards subject to the whims, caprices and manipulations of those
(continued...)

any actual conduct or activity on my part which could be termed "improper."[13] Rather both the Dissenting opinion and the Appellees focus on appearances – some generated by the media, some generated by a recused member of this Court with a history of verbal

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[12](...continued)
more interested in outcomes than in the application of law, is antithetical to due process.

Although the Dissenting opinion provides no legal analysis to define the phrase, it would seem that the dissenters advance an inconsistent subjective standard. Because both the Dissenting opinion and the Appellees in essence concede that there is no objective "actual" conflict or improper actions or conduct herein with respect to me, the Dissenting opinion proposes that a conflict sufficient to implicate due process considerations for which disqualification is necessary may be *either* an "actual objective conflict" (which is not applicable herein) or a "conflict created by or defined by subjective appearances" (which they perceive is present herein).

[13] Canon 2A, of the W. Va. Code of Judicial Conduct, prohibits judges from engaging in activities which are improper or which give the appearance of impropriety. Often, this term is taken out of context by omitting reference to the term "activities." That some form of action by a judge is necessary in context with the term "appearance of impropriety," is evident from the Commentary to Canon 2A which focuses on "irresponsible or improper *conduct* by judges." (Emphasis added.) Furthermore, Canon 2A specifically applies to activities or conduct of the judge, himself or herself, not activities or conduct of third-parties or litigants which are outside the judge's control. 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. Unless the dissenters or Appellees herein contend that the act of lawfully running for elective office or the required duty of judging a case is an activity within the purview of Canon 2A, the dissenters and Appellees must necessarily contend that appearances caused by the past activities of third-parties over which a judge or a judicial candidate exercises no control, from which he or she seeks no benefit, and for which he or she will obtain no current or future benefit may nevertheless serve as a basis for disqualification. *See* Footnote 15, *infra* (West Virginia is a "duty to judge" judicial system). *See also State ex rel. Billings v. City of Point Pleasant*, 194 W. Va. 301, 460 S.E.2d 436 (1995) (running for office is a fundamental right). Such a scenario, particularly where the supposed conflict occurred in the past with no potential for current or future benefit to the judge based upon his or her decision, would serve to open the judicial system to easy manipulation by external forces and would lead to a destruction of public confidence in our judiciary.

discourtesies toward Appellant Massey, and some generated herein by the Appellees, themselves.

By its inclusion of Footnote 16, one must conclude that the Dissenting opinion advocates that the concept of "appearance-driven" judging should bring about a different substantive outcome in this matter. That is disappointing. Justice should not be determined more by the popularity, or lack thereof, of a given litigant or a given result than by the rule of law. Rather, justice must always emphasize the importance and definiteness of the law in the resolution of disputes. In that manner, my participation herein was wholly consistent with due process.[14] Because of the reference to the disqualification issue in Justice Albright's Dissenting opinion, I feel obligated to comment on this matter of "apparent conflict."

[14] In a judiciary founded on the rule of law rather than political artifice, it is an extraordinary and unprecedented argument which contends that "*apparent* conflicts" alone can have such an effect on the outcome of a case that due process considerations are implicated. While appearances should be considered in a discussion of public confidence in the judiciary, appearances alone, subject as they are to manipulation by partisan elements (including litigants), should never alone serve as the basis for a due process challenge to an otherwise well-founded legal opinion of a court of law. Public confidence is enhanced by a system founded on actualities and the rule of law. Appearance-based criteria for judicial disqualification emphasizes the importance of "public confidence" in the judiciary as its most important value, not judicial independence, the accuracy of justice, or stability and predictability in our judicial system. Public confidence is a legitimate concern for our judicial system – but not in a vacuum. Concerns within the judicial system must be balanced. In the long run, I believe that judicial independence, the accuracy of justice and the stability and predictability of our judicial system are far more important to the public's long-term confidence in our judicial system.

A. The Measure of Fairness: Actual Justice

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." The latter is dependent on the quality of the law applied by a court and is measured by the critical analyses of a court's written decisions. Actual justice is based on actualities. Through its written decisions, a court gives that transparency of decision-making needed from governmental entities. Apparent or political justice is based instead on appearances and is measured not by the quality of a court's legal analysis, but rather by the political acceptability of the case's end-result as measured by dominant partisan groups such as politicians and the media, or by the litigants, themselves. Apparent or political justice is based on half-truths, innuendo, conjecture, surmise, prejudice and bias. Since all cases will generally have a winner and a loser, a system based upon "apparent or political justice" will be the subject of constant criticism – all partisan, little academic.

To assuage attacks on itself, a court immersed in "apparent or political justice" will find it necessary to curry favor with those groups or individuals with the loudest or shrillest voices, as well as those groups or individuals with the most radical means of gaining public attention. In doing so, decisions not only will be biased toward certain groups and their favored positions, but decision-making will necessarily take on an inductiveness, where the desired end-result for a case determines the manner in which the court conducts its legal analysis. Since justice then would be determined by the ebb and flow of political opinion,

justice will become more actively policy-driven, and our judges, like terriers jumping for treats, will promote a judicial system decidedly unstable and unpredictable.

In direct opposition to the drive to appearance-based judging is Canon 3B(2), of the Code of Judicial Conduct, which requires that "[a] judge shall be faithful to the law and . . . not be swayed by partisan interests, public clamor, or fear of criticism." This ethical admonition succinctly dispels any contention that appearance-based judging should supercede judging based on actualities. Simply stated, a decision which is firmly rooted in legal substance should not yield to a collateral partisan attack which manipulates appearances. Rather, it should rise or fall on its own substantive merits.

Proper legal decisions should never be mere rationalizations fronting for political correctness. Nor should actual justice be fettered by the political expediencies of the day. Partisan rhetoric and resorts to emotion-laden rants betray a contempt for the judiciary's role in a constitutional government. Sadly, such political considerations have, it seems from recent behaviors, institutionalized and entrenched themselves in our Court. This politicization of our judiciary must be ended. Our judicial system should be resolutely founded on the rule of law, administered by conscientious and dispassionate judges, and legitimized through well-reasoned legal opinions. We must do *actual* justice to achieve *actual* justice. Public confidence requires no less.

B. Recusal and Due Process

West Virginia's judicial officers have a duty to hear such matters as are assigned to them except those in which disqualification is required. Canon 3B(1).[15] This "duty to sit" is not optional. As Judge John Sirica eloquently stated:

> [T]he Court cannot overlook the fact that it has an obligation to deny insufficient recusal motions. There is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is. . . . After such study as I could give the matter, I reached the conclusion that whether a judge should recuse himself in a particular case depends not so much on his personal preferences or individual views as it does the law. I have no choice in this case . . . In the absence of a valid legal reason, I have no right to disqualify myself and must sit.

U.S. v Mitchell, 377 F.Supp. 1312, 1325-26, (D.C. Cir. 1974) (internal citations omitted), *aff'd*

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[15] Canons 3A and 3B(1) of the W. Va. Code of Judicial Conduct require that "[a] judge shall hear and decide matters assigned to the judge except those in which disqualification is required" and that the "judicial duties of a judge take precedence over all the judge's other activities." Canon 3E(1) provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might *reasonably* be questioned. . ." (Emphasis added.) 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. Furthermore, this qualifier helps to ensure that illegitimate attempts to remove an elected judge are unsuccessful. *See* Footnotes 11, *supra*, and 48, *infra* (use of push-poll-type survey conveying limited information legally insufficient as basis for disqualification of publicly-elected judge). Although some specific examples are given of situations in which a judge should recuse himself or herself, the standard itself is indefinite in recognition of the balancing of interests which must occur when a judge considers recusal. Extreme cases are clear under any standard. The key consideration appears to be that a judicial officer should not judge a case where his or her own personal interests could be preferred over the rule of law. The rule is certainly not an invitation for litigants to attempt to manipulate the system for strategic reasons, nor is it a means by which judges may avoid difficult cases.

sub nom. Mitchell v. Sirica, 502 F.2d 375 (D.C. Cir. 1974) (*en banc*), *cert denied*, 418 U.S. 955, 94 S.Ct. 3232, 41 L.Ed.2d 1177 (1974).

Matters related to a state's method for selection and disqualification of its judicial officers belong appropriately to the individual states. "[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level." *FTC v. Cement Inst.*, 333 U.S. 683, 702, 68 S.Ct. 793, 804, 92 L.Ed. 1010 (1948). *See Turney v. Ohio*, 273 U.S. 510, 523, 47 S.Ct. 437, 411, 71 L.Ed. 749 (1927) ("[M]atters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion."); *Bracy v. Gramley*, 520 U.S. 899, 904-05, 117 S.Ct. 1793, 1797, 138 L.Ed.2d 97 (1997) ("[M]ost questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard."). *See also Wheeling v. Black*, 25 W. Va. 266, 270 (1884) (disqualification of judicial officer from duty to judge because of an actual interest in a cause of action deemed to be a matter of legislative discretion). The focus is on what actually affects a judge's decision-making.

The Due Process Clause simply does not establish a "uniform standard," such as the Appellees and the Dissenting opinion seek to portray herein. It establishes a "constitutional floor." *Bracy*, 520 U.S. at 904-05, 117 S.Ct. at 1797. This due process "floor" is "a 'fair trial in a fair tribunal,' before a judge with no *actual* bias against the defendant *or*

interest in the outcome of his particular case." *Id.*, at 904-05 (quoting *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975) (citations omitted) (emphasis added).[16]

It has long been recognized that there is "a presumption of honesty and integrity in those serving as adjudicators." *Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464. Due process therefore requires recusal only in those rare cases wherein a judge or justice has a "direct, personal, substantial [or] pecuniary interest" in the outcome of the case. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-22, 106 S.Ct. 1580, 1585, 89 L. Ed. 2d 823 (1986) (quoting *Tumey*, 273 U.S. at 523, 47 S.Ct. at 441).

The Dissenting opinion's conjoining of real and apparent conflicts mistakenly suggests an equality between actual conflicts and appearance-driven conflicts unsupported by the law with respect to claims of constitutional violations. A proper ordering of claimed

[16] "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 494 (1972). It is "not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). Thus, its "very nature . . . negates any concept of inflexible procedures universally applicable to every imaginable situation." *Id*. Here, the Appellees and the Dissenting opinion would render all relevant facts and policies related to an individual judge's recusal consideration and a state's balancing of interests in election laws and judicial ethics immaterial in favor of a static rule of disqualification determined by appearances which are themselves subject to ready manipulation by litigants and third persons with an interest in the outcome of a given case.

conflicts is necessary to define a due process framework that separates legitimate claims of actual constitutional impairment from illegitimate claims; especially where illegitimate claims serve to divert attention from the legal certainty of a court's decision and the inability substantively to challenge that decision. Under the self-serving due process standard of disqualification proposed by the Appellees and the Dissenting opinion herein, the actual purpose of due process would be frustrated by litigants who would hold a near-veto power over the composition of a publicly-elected court, by those who could wage public relations campaigns designed to malign judicial officers in order to manufacture "apparent conflicts," and by those who would challenge a decision not by its legal correctness, but by its political correctness. The long-lasting negative effect on public confidence in our courts caused by an appearance-driven due process standard for disqualification of a judicial officer would be incalculable.

The Dissenting opinion's passing reference, without analysis, to *Aetna* and *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), fails to support its contention that there are due process implications herein based simply on subjective perceptions of "appearances." *See Aetna*, 475 U.S. at 822-24, 106 S.Ct. 1585-87 (due process required disqualification of state supreme court justice because he had a "direct, personal, substantial, [and] pecuniary interest" in deciding a case in such a manner as to "enhanc[e] both the legal status and the settlement value of" the judge's own similar pending lawsuits); *In re Murchison*, 349 U.S. at 133-39, 75 S.Ct. at 624-27 (due process required disqualification of

judge who served as a "one-man grand jury" and then presided over the criminal trial of the man whom he had prosecuted). *See also, Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954) (due process implicated where a judge who harbored actual bias against an attorney nevertheless sat in judgment of the attorney in a contempt proceeding); *Tumey*, 273 U.S. at 523, 535, 47 S.Ct. at 441, 445 (due process violated where mayor who presided over mayor's court had a direct financial interest in convicting defendants and in imposing fines). Indeed, the phrase used by the Dissenting opinion, "both actual and apparent conflicts," appears nowhere in either *Aetna* or *In re Murchison*.

Neither Appellees nor the Dissenting opinion have presented any evidence consistent with the *Aetna* standard for implication of the Due Process Clause of the Fourteenth Amendment. Rather, they rely on subjective, after-the-fact speculations and assumptions. "The decision whether a judge's impartiality can 'reasonably be questioned' is to be made in light of the facts as they existed, and not as they were surmised or reported." *Cheney v. United States District Court*, 541 U.S. 913, 914, 124 S.Ct. 1391, 1392, 158 L.Ed. 225 (2004) (Scalia, J.) (Memorandum on Motion for Disqualification) (quoting *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302, 121 S.Ct. 25, 147 L.Ed.2d 1048 (2000) (Rehnquist, C.J.) (Memorandum regarding recusal). Reliance on cases such as *Aetna* and *In re: Murchison* for the contention that disqualifications of a publicly elected judicial officer may be based solely upon after-the-fact appearance-based or politically-driven conflicts is consequently misplaced. Unlike the judges in *Aetna and Tumey*, I have no pecuniary interest in the outcome of this

matter. Unlike the prosecutor/judge in *In re Murchison*, or the judge/mayor in *Tumey*, I have no conflicting dual role in this matter. Unlike the judge in *Offutt*, I have no personal involvement with nor harbor any personal antipathy toward any party or counsel herein.

Nor do the due process contentions of the Appellees and the Dissenting opinion find support in other venues. Although federal judges arguably no longer have a "duty to sit,"[17] the federal recusal statute at 28 U.S.C. § 455(a) (1990) does reference "appearances of impropriety." *See* Footnote 13, *supra*. Federal courts have consistently rejected the contention that appearance-driven conflicts, without more, raise due process implications. As recently recognized by the Third Circuit, no decision "has held or clearly established that an appearance of bias on the part of a judge, without more, violates the Due Process Clause." *Johnson v. Carroll*, 369 F.3d 253, 262 (3d Cir. 2004), *cert. denied*, 544 U.S. 924, 125 S.Ct. 1639 (2005); *accord Callahan v. Campbell*, 427 F.3d 897, 928-29 (11th Cir. 2005); *Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1371-82 (7th Cir. 1994) (*en banc*). In *Johnson*, the Third Circuit concluded that, absent some other disqualifying conflict, appearances alone do not implicate due process considerations. In *Del Vecchio*, the Seventh Circuit similarly held that "bad appearances alone do not require disqualification" pursuant

[17] Although it has been asserted that changes in 1974 to the federal recusal statute, 28 U.S.C. § 455 (1990), were designed to eliminate a judge's "duty to sit" (*See Baker v. City of Detroit*, 458 F.Supp. 374 (E.D. Mich. 1978), federal judges continue to have a duty not to disqualify themselves without a reasonable basis. *See, e.g., Hall v. Small Business Admin.*, 695 F.2d 175 (5th Cir. 1983).

to the due process clause because "only a strong, direct interest in the outcome of a case is sufficient to overcome [the] presumption of [the judge's] evenhandedness." *Del Vecchio,* 31 F.3d at 1372-74. "[T]he United States Supreme Court has never rested due process on appearance." *Id*. at 1372 n. 2. As pointed out in a concurrence in *Del Vecchio,* disqualification based upon appearance-based conflicts "is a subject for statutes, codes of ethics, and common law, rather than a constitutional command." *Id*. at 1391 (J. Easterbrook, concurring).[18]

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[18] The "apparent conflict" standard advanced by the Appellees and the Dissenting opinion would also lead to the rather bizarre situation in which a judge with an actual bias or interest in the outcome of a case would nevertheless sit in the case, while a judge with absolutely no bias, prejudice or interest in the outcome of a case could be forced off of the case by the manipulation of appearances outside of the judge's control. For example, if a judge develops an actual animosity toward a litigant or to counsel during a case, recusal is not required. *Liteky v. United States*, 510 U.S. 540, 550-51, 114 S.Ct. 1147, 1155, 127 L.Ed. 2d 474 (1994). Therefore, under the standard set forth by the Dissenting opinion, a judge without any bias whatsoever could be disqualified so long as it could be claimed that there was an "apparent conflict", but a judge who had an actual bias could remain on a case so long as that bias developed during the pendency of the case. The same scenario is presented by the Rule of Necessity, in which justices with actual interests in the outcome of a case may nevertheless be required to hear the case. *See* (Syl. pt. 7), *State ex rel. Brown v. Dietrick*, 191 W. Va. 169, 444 S.E.2d 47 (1994)("The rule of necessity is an exception to the disqualification of a judge. It allows a judge who is otherwise disqualified to handle the case to preside if there is no provision that allows another judge to hear the matter.") Such inconsistencies highlight the fundamental flaws of the "apparent conflict" standard posed by the Dissenting opinion.

Furthermore, the only limitation to recusal motions based upon an appearance standard would be the imagination of a party. Would judges who are former legislators be subject to disqualification motions when reviewing legislation passed while they were members of the legislature? Would judges who are church members be subject to disqualification in cases involving issues such as abortion or "church and state"? Would former prosecutors be subject to disqualification in criminal cases because they were "law

(continued...)

C. West Virginia Has Chosen to Select Judges in Partisan Elections

Historically, West Virginia has exercised its prerogative to regulate its judiciary and to elect judges and justices in partisan judicial elections through the enactment of constitutional and legislative standards, as well as by the Supreme Court of Appeals' adoption of ethical rules, that weigh and accommodate the competing interests at stake.[19] Incumbent in any state system which selects its judicial officers through the electoral process, particularly

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[18](...continued)
and order" prosecutors?

[19] *See* Footnote 3, *supra*. *See also Matter of Starcher*, 193 W. Va. 470, 475, 457 S.E.2d 147, 152 (1995) (reprimand of judge for violation of judicial ethics regarding improper *ex parte* communications with party during trial), wherein then-Chief Justice Neely, in dissent, stated, "In this State, judges get to be judges because they are political leaders . . ." *Matter of Starcher*, 193 W. Va. at 475, 457 S.E.2d at 152 (Neely, C.J., dissenting). While there may be disagreement within this State on the proper method for selection of its judicial officers, especially on whether elections should be partisan, it is, I believe, a decision for the people of this State to make. I must disagree, however, with those who believe that politics and partisanship, particularly during an election cycle, have any place in this Court or anywhere in West Virginia's judicial system. *See contra State ex rel. Rist v. Underwood*, *infra*, 206 W. Va. 258, 282, 524 S.E.2d 179, 203 (Starcher, C.J., concurring, at Appendix A, n. 8: "[J]udges make policy as a matter of choice as well as function, for most know that sweeping issues are involved and they act upon their personal values in resolving those issues.") *See also State ex rel. Carenbauer v. Hechler*, *infra*, 208 W. Va. 584, 609, 542 S.E.2d 405, 430 (Starcher, J., dissenting: "It is utterly absurd to suggest that judges just 'apply the law,' and do not make decisions that are influenced by their philosophies – or their 'prejudices' – the unfortunate term that the majority chooses to use."). In a system wherein judicial officers believe it appropriate to harbor political biases and prejudices and to bring those "personal values" to bear in the determination of cases, one might question whether public pronouncements by such judicial officers are politically-driven and are designed not to serve the rule of law but rather to affect the outcome of litigation or an election thereby elevating "apparent- or political-justice" over actual justice. The long-term negative impact on the public's perception of the judiciary caused by judicial officers who use their offices to serve political ends or who pander to partisan prejudices is deeply troubling. *See IV. A. "The Measure of Fairness: Actual Justice"* herein.

through partisan elections, are potential problems. In spite of such potential problems, the citizens of West Virginia, like the citizens of many other states,[20] have decided that all state judicial offices must be subject to the electoral process. *See* W. Va. Const. art. VIII, § 2 (Supreme Court Justices must be elected by voters); W. Va. Const. art. VIII, § 5 (circuit court judges must be elected by voters); W. Va. Const. art. VIII, § 10 (magistrate court magistrates must be elected by voters); W. Va. Const. art. VIII, § 16 (family court judges must be elected by voters). Insofar as all state judicial offices are filled through the electoral process, every judicial officer in this state is subject to having to decide the merits of a case that involves a party or attorney who contributed to or supported, or, conversely, opposed his or her campaign for office. This now includes those who contribute to or support so-called Independent Expenditure Groups who engage in political campaigns completely independent of candidates of office.

West Virginia has a compelling and permissible interest in regulating its elections, the political activities of its judicial officeholders and candidates, and the manner in which its judicial offices are filled. *State ex rel. Carenbauer v. Hechler*, 208 W. Va. 584, 599, 542 S.E.2d 405, 420 (2000). In fashioning its rules regarding judicial campaigns, West Virginia's legislature and this Court have balanced the necessary contributions and mechanisms for support which are involved in all public elections with the need to protect the

[20] *See generally Adair v. State, Department of Education*, 709 N.W.2d 567 (Mich. 2006).

system through rules of conduct to guard against improprieties in the election process. *See Carenbauer*, *supra*.

For example, Canon 5 of the West Virginia Code of Judicial Conduct establishes specific limitations on a judge's or judicial candidate's political activity. Included in these limitations is a specific limitation which prohibits a judge or judicial candidate from personally soliciting or accepting campaign contributions. Canon 5C(2), W. Va. Code of Judicial Conduct. A similar limitation is placed on judges and judicial candidates seeking publicly stated endorsements. *Id*. Judges and judicial candidates may instead use committees within their campaigns, independent from personal knowledge or involvement of the judge or judicial candidate, to solicit campaign contributions and endorsements.[21] *Id*. *See In re Tennant*, 205 W. Va. 92, 516 S.E.2d 496 (1999) (judicial candidate admonished for personally soliciting campaign contributions); *Matter of Starcher*, 202 W. Va. 55, 501 S.E.2d 772 (1998) (admonishment of judge seeking election to Supreme Court of Appeals for personally soliciting publicly stated support); *In re: Hill*, 190 W. Va. 165, 437 S.E.2d 738 (1993) (political endorsement of another judicial candidate by judge running for reelection not prohibited under Canon 7A(1)(b) of former-Judicial Code of Ethics (conduct now proscribed

[21] A"Finance Committee" was used by all of the Supreme Court judicial candidates for the 2004 election. There were no allegations of any ethical issues related to the funding of any of such candidates' campaigns. Campaign finance reports from the 2004 Supreme Court election may be viewed at the website of the West Virginia Secretary of State. *See* http://www.wvsos.com.

by Canon 5A(1)(b) of the current-Code of Judicial Conduct, effective January 1, 1993)).

West Virginia has adopted other limitations on judicial elections. For example, in *Carenbauer*, this Court ruled that a sitting justice is ineligible to run for a different seat on the Supreme Court prior to the expiration of his or her term. *Carenbauer*, 208 W. Va. at 598-600, 542 S.E.2d at 419-21. In *Carenbauer*, former-Justice Warren McGraw, who had been elected in 1998 to complete the remaining half of his judicial office's term, sought to run again in 2000 for another seat on the Court with a full twelve-year term. In ruling former-Justice McGraw ineligible to run for a separate seat on the same court on which he was already sitting, this Court concluded that the State had a compelling and permissible interest in regulating political activities in judicial offices. *Id*. *See also Matter of Codispoti*, 190 W. Va. 369, 438 S.E.2d 549 (1993) (public censure of judicial officer for violating Judicial Code of Ethics related to misleading campaign advertisements).

In *State ex rel. Rist v. Underwood*, 206 W. Va. 258, 524 S.E.2d 179 (1999), this Court considered a challenge to the Governor's appointment of the then-current Speaker of the House of Delegates as a Justice on this Court pursuant to the Governor's appointment powers for vacancies on this Court. *See* W. Va. Const. art. VIII, § 7. This Court ruled that, under the Emoluments Clause of the West Virginia Constitution, the appointment was prohibited where, during the Speaker's current term of office, the Legislature had enacted a pay increase with respect to such judicial office. W. Va. Const. art. VI § 15.

West Virginia has enacted other rules applicable to judicial races.[22] For example, committees for candidates for the office of Justice of the Supreme Court of Appeals must file periodic verified financial statements detailing campaign contributions and expenditures with the Secretary of State. W. Va. Code § 3-8-5 (2007). West Virginia limits the contribution which an individual may give to a campaign to $1000 per election cycle. W. Va. Code § 3-8-12(f) (2005). Campaign contributors who contribute $250 or more must be identified by more detailed information, including address and business affiliation. W. Va. Code § 3-8-5a(a)(3) (2007). West Virginia, thus, achieves a measure of transparency in campaign funding in judicial races. Anonymous contributions are prohibited. W. Va. Code § 3-8-5a(I) (2007). Furthermore, corporations are prohibited from contributing to a candidate's campaign. W. Va. Code § 3-8-8(a) (2006). So-called Independent Expenditure Groups (or Section 527 Groups) are also subject to regulation, including registration requirements. W. Va. Code § 3-8-12(g) (2005).[23]

D. The 2004 West Virginia Supreme Court of Appeals Election

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[22] Candidates for the office of judge of the circuit court must have at least five years of active practice within the State. W. Va. Const. art. VIII, § 7; *State ex rel. Haught v. Donnahoe*, 174 W. Va. 27, 321 S.E.2d 677 (1984). Candidates for the office of justice of the Supreme Court of Appeals must have at least ten years of active practice within the State. *Id.*

[23] *See Rist*, 206 W. Va. at 285, 524 S.E.2d at 206 (J. Starcher, concurring: "West Virginians are ahead of the curve in judicial campaign finance regulation. . . . [C]ampaign finance committees insulate judicial candidates from fundraising.")

The Appellees and the dissenters take the position that, notwithstanding a judge's duty to hear cases in West Virginia and the lack of any actual disqualifying basis, due process compels my disqualification because of "appearances" they contend exist from my election some four years ago. Specifically, the Appellees and the dissenters contend the following: (I) in 2004, a political Independent Expenditure Group (or "527" Group) called And for the Sake of the Kids ("ASK") independently campaigned against former-Justice McGraw, in part with contributions made to it by Mr. Blankenship; (ii) I won election; and (iii) this case involves Mr. Blankenship's employer, Appellant Massey. While this self-serving and oversimplified account of the 2004 election may advance an "apparent conflict" standard, its omission of material facts of what actually occurred in 2004 is disturbing.

The Appellees fail to consider the following: (I) the decision herein was issued over three years after my election[24]; (ii) in West Virginia, elected judges have a duty to hear cases unless disqualification is required[25]; (iii) I neither have, nor at any time have ever had, any direct, personal, substantial or pecuniary interest, real or otherwise, in the outcome of this case; (iv) my campaign was completely independent of any independent expenditure group

[24] Massey sought appeal of this case on October 24, 2006, nearly two years after my election. On March 15, 2007, this Court deferred consideration of Massey's petition seeking appeal. The said appeal was unanimously granted by the Court on April 5, 2007.

[25] W. Va. Code of Judicial Conduct, Canons 3A, 3B(1). This "duty to hear" is also referred to as a "duty to sit."

or individual, such as ASK[26]; (v) the outcome of the 2004 election was due primarily to my campaign's message of fairness, stability and predictability in decision-making, the importance of the rule of law to courts, and the need for judges to exercise civility, integrity and personal professionalism[27]; (vi) the campaign of my opponent, former-Justice McGraw, was devastated by a speech which he gave at Racine, West Virginia, on Labor Day, and by the effective publication of this speech to the people of West Virginia by the Benjamin campaign[28]; (vii) no improper act or conduct, and no appearance of an improper act or conduct with respect to this case, or any other case, has occurred on my part; (viii) nothing in my history as a jurist (including a number of cases involving Massey and/or its subsidiaries) reveals any bias or prejudice for or against any of the parties in this case;[29] (ix) no attorneys,

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[26] Appellees merely presume the positive effectiveness of ASK and omit consideration of ASK's campaign against Attorney General Darrell McGraw's race in 2004 – which apparently came from the same budget. They give no consideration to the negative reaction which ASK may have had on many voters. Because they are independent, groups such as ASK and Consumers for Justice can both help and hurt candidates.

[27] Additional significant material factors regarding the 2004 Supreme Court race were omitted from the Appellees' motions seeking my disqualification. For example, regarding the respective candidates' qualifications for office, *see* West Virginia State Bar Survey, http://www.wvbar.org/barinfo/announce/04JudQualPoll.htm. Furthermore, challenger Benjamin was endorsed over former-Justice McGraw by every major daily newspaper in West Virginia which did an endorsement in the race, except one newspaper. Former-Justice McGraw's refusal to debate was also a significant factor in his defeat.

[28] In this speech, former-Justice McGraw made a number of controversial claims which became a matter of statewide discussion in the media, on the internet, and elsewhere. *See* Footnotes 35 and 38, *infra*.

[29] The Dissenting opinion would contend that due process considerations apply here, a case in which I voted for Massey's position, but strangely the Dissenting opinion (continued...)

other than the counsel in this case,[30] have ever sought my recusal in a matter involving Massey – including the current administration and West Virginia's Attorney General[31]; and (x) former-Justice McGraw was, and had been for several decades, a colorful and

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[29](...continued)
makes no mention of its application in the other significant Massey cases wherein I voted against Massey's position. Indeed, the instant case may represent the only decision in which I have voted in favor of Appellant Massey's position and certainly does not represent the highest dollar value at issue for a case involving Massey. *See U.S. Steel Mining Co., LLC v Helton*, 219 W. Va. 1, 631 S.E.2d 559 (2005); *Helton v. Reed*, 219 W. Va. 557, 638 S.E.2d 160 (2006); *Massey Energy v Wheeling-Pittsburgh Steel Corp.*, No. 080182 (05/22/08). *See also Conflict*, Charleston Gazette, 02/26/08 ("Four times since 2005, [Justice Benjamin] has voted against Massey's interest in cases.")

[30] Since I have been a Justice on this Court, the attorneys involved in this case are the only counsel who have sought my recusal in a Massey matter (noting that counsel for Appellee Harmon Mining is also counsel of record in *Wheeling-Pittsburgh Steel Corp*., see Footnote 29 above, and, with local counsel, also moved for my disqualification therein on same grounds as set forth herein.)

[31] Although the same facts upon which the Appellees seek my disqualification in this case have been present at all times since my election, the State of West Virginia, by the Attorney General, Hon. Darrell McGraw, has never sought my disqualification. *See, e.g.*, *Helton v. Reed*, *supra* or *U.S. Steel Min. Co., LLC v. Helton*, *supra*. Attorney General McGraw is a former member of this Court and is the brother of former-Justice Warren McGraw. Furthermore, the Department of Environmental Protection of the State of West Virginia has also declined to seek my disqualification in potential appellate environmental litigation involving Massey. According to a 11/03/2005 article by Ken Ward, Jr., in The Charleston Gazette, one year after my election, state regulators saw "no reason" to ask me to recuse myself. According to Perry McDaniel, chief of the Department of Environmental Protection's Office of Legal Services, DEP Secretary Stephanie Timmermeyer told him that she "would not have entertained" the idea of seeking my disqualification. Mr. McDaniel stated, "There are clearly no grounds . . . for us to ask a Supreme Court justice elected by the people to step down in this matter." Such conclusions, as well as a jurist's actual record of decisions and behavior in office, are arguably material to a "perception" argument regarding recusal.

controversial politician[32] in West Virginia and had an extremely contentious Democratic primary race in 2004 where significant electoral support went to his opponent, Circuit Judge Jim Rowe.[33] The law simply does not support the Appellees' position. As such, the disqualification issue herein gives the appearance of being a diversion away from the solid basis for the majority's opinion herein.

Under the rules of this Court, the determination of whether a Justice should recuse him/herself from a case is left to the discretion of the individual Justice.[34] Of course,

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[32] "[McGraw] is one of the most polarizing figures in West Virginia politics today." Hoppy Kercheval, *Hoppy's Commentary for Tuesday*, MetroNews, April 20, 2004.

[33] This primary race was controversial. *See* Footnote 47, *infra*. "According to media reports published just after the May 11 primary election, [Independent Expenditure Group] Consumers for Justice was identified as having 'attacked' Greenbrier County Circuit Judge Jim Rowe, who was seeking to unseat incumbent . . . Justice Warren McGraw." Juliet Terry, *Political Groups' Donations Questioned – Consumer Attorneys Group Gave More than $500,000 to state 527 Organization*, The State Journal, 09/03/04. *See also* Footnote 41, *infra*. Former-Justice McGraw defeated Circuit Judge Jim Rowe in the Democrat primary by a margin of 147,030 (56.7%) to 112,199 (43.3%). *See* West Virginia Secretary of State, http://www.wvsos.com/elections/history/results/04%democrat_statewide%20offices.pdf. Immediately after the primary, Forest J. Bowman, professor *emeritus* of the West Virginia School of Law, stated, "Benjamin does have a shot against McGraw because he stands to capture much of the 'Rowe vote.'" Juliet Terry, *McGraw Looks to November; Benjamin Faces Uphill Battle*, The State Journal, 05/14/04. This sentiment was echoed by Steve Roberts, president of the West Virginia Chamber of Commerce, "The latest numbers indicate about 110, 000 Democrats said 'no thank you' to McGraw. That sends a very strong message that they are dissatisfied with the direction the McGraw court has taken." *Id*. According to one political commentator, if the general election were held immediately after the primary, "Benjamin could already expect to have about 40 percent of the vote." Chris Stirewalt, *Surprises are hard to come by*, Charleston Daily Mail, June 8, 2004.

[34] *See* Rule 29 of the West Virginia Rules of Appellate Procedure.

this discretion is tempered by the decision in *Aetna*, which held that "'it certainly violates the Fourteenth Amendment . . . to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.'" *Aetna*, 475 U.S. at 821-22, 106 S. Ct. at 1585 (quoting *Tumey*, 273 U.S. at 523, 47 S.Ct. at 441). Although I declined to recuse myself from this case, this Court did not invoke its authority under *Aetna* to remove me from the case. Simply put, I do not have, nor was there any evidence to show that I had a "direct, personal, substantial, pecuniary interest" in this case.

1. The Speech at Racine, West Virginia

During the 2004 general election, I ran as the Republican nominee for a seat on this Court. My incumbent opponent, former-Justice Warren McGraw, was the Democratic nominee. In the election, I received 382,036 votes (or 53.3%) and former-Justice McGraw received 334,301 votes (or 46.7%). *See*, West Virginia Secretary of State, http://www.wvsos.com/elections/history/results/allgeneral04.pdf.

Contrary to some who seek to minimize or dismiss it, the pivotal moment of the 2004 campaign was a Labor Day speech delivered by former-Justice McGraw at Racine, West Virginia. During that speech, Justice McGraw spoke in a screaming and unflattering

manner.[35] Excerpts from the Racine speech were extensively aired as campaign advertisements by the Benjamin campaign throughout the State.[36] In the relevant text of the speech, Justice McGraw was screaming that people were following him "looking for ugly."[37] The McGraw speech at Racine soon became the subject of much conversation around West Virginia.[38] In the final analysis, former-Justice McGraw simply could not defend himself

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[35] In this speech, former-Justice McGraw said, among other things: "My opponents want to portray the people of my party as if we are evil people. They want to tell you that the issue of abortion is one which is promoted by the Democrats. I say to you that's false! They want to tell you that members of my party have opposed school prayer. False! Not so! It's the Republican Party! The members of the Republican Party on the United States Supreme Court, and President of the United States, who gave you those issues when they control the Court and the people over in Washington. Not the Democrats. And just this year, not more than six months ago, the United States Supreme Court approved gay marriage! Not Democrats! And you people ought to know that! And the Republicans ought to know that!" The entire Racine speech by former-Justice McGraw is available on the internet. *See* http://hillary.repeatable.com/watch-video/TQ6nQaE2FM8/WVCALA/warren-mcgraws-rant-in-racine.html

[36] The Benjamin campaign's advertisement may be heard at http://easylink.ovsmedia.com/onlinevideoservice/aapc/2005/ovs51-RacineRant.wax.

[37] An analysis of the 2004 campaign is available at Hon. Brent Benjamin, Speech at the Annenberg Public Policy Center Symposium: Judicial Advertising, National Press Club, 05/25/07 (pp. 41-51). *See* http://www.annenbergpublicpolicycenter.org/NewsDetails.aspx?myId=219.

[38] Shortly after political advertisements focusing on former-Justice McGraw's Racine speech was aired, the following observations of the speech were given by a statewide radio host and political commentator:

> . . . Last week, Supreme Court Justice Warren McGraw gave a campaign speech at the annual Labor Day picnic in Boone County that has given his opponents ammunition. Gant and Dean gave their opponents short sound bites; McGraw gave his opponents a whole speech. McGraw sounded as though he was

(continued...)

against his own words.[39]

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[38](...continued)

> coming unhinged as he ranted about his opponents following him around to take pictures of him to make him look ugly. He charged, erroneously, the "U.S. Supreme Court had approved gay marriage."
>
> A political consultant I talked with, known to be supportive of McGraw, told me the tirade by McGraw was "deeply disturbing." The consultant said the speech was "way over the top."
>
> In fact, it was. . . . McGraw's rants sound deranged, not passionate. His normally populist tone has been replaced by an angry tirade.
>
> . . . Yesterday when I talked about the speech on "Talkline" and played the GOP commercial, the phone lines were jammed with callers, mostly agreeing McGraw sounded on the verge of losing his mind.

Hoppy Kercheval, *Warren McGraw Unhinged*, MetroNews Talkline, September 15, 2004, http://www.freerepublic.com/focus/f-news/1263046/posts. *See also* Matt Bieniek, *Commentary: Paranoid Politics*, The Martinsburg Journal, September 27, 2004 ("[McGraw] said that the United States Supreme Court (which he pointed out is dominated by Republicans) had approved gay marriage. A complete falsehood coming from a man who obviously knew better [sic]. . . . But then when McGraw is given an opportunity to speak to the public and debate his opponent, he doesn't take advantage of it.")

[39] Prior to the speech at Racine, former-Justice McGraw declined an invitation to a debate sponsored by the League of Women Voters. Shortly after the speech, a spokesman for former-Justice McGraw defended the remarks at Racine: "[T]hey don't understand that that's just the southern way of campaigning.. . . Criticizing him for the way he talks is pure Yankeeism. He's not insane or losing his mind. That's just campaigning, southern-style." Juliet Terry, *Benjamin Camp Says McGraw Defeat Possible*, The State Journal, 09/24/04.

> Former-Justice McGraw, himself, has acknowledged the impact which his (continued...)

2. Section 527 Independent Expenditure Groups

The primary thrust of the Appellees' argument is not that I should be disqualified because a party or attorney to the instant case directly contributed to my campaign. The Appellees' argument is that I should be disqualified because, without my knowledge, direction or control, an independent nonparty organization, ASK, received contributions from people or groups that included an employee of a party in this case, and ASK independently used its contributions to wage a campaign against my opponent four years ago.[40] If the Appellees' argument became the law, every judicial officer in this state would

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[39](...continued)
speech at Racine had on his campaign. During the primary, Justice McGraw was involved in an automobile accident. Subsequent to his defeat, Justice McGraw filed a personal injury lawsuit against the other driver in which he claimed that this accident caused him to act as he did at Racine four months later: :

> Due to the defendants' negligence in causing the automobile accident and severely injuring the plaintiff, plaintiff was portrayed in an extremely negative light due to the footage [from] the political rally filmed after the accident. Due in part to defendants' actions, Mr. McGraw lost the election, whereby [sic] losing his job and his yearly salary for the 12-year term.

Chris Dickerson, *Former Supreme Court Justice McGraw Suing Active Member of Navy*, West Virginia Record, September 6, 2006.

[40] The Appellees focus upon the amount of the contributions that Mr. Blankenship made to ASK. All such contributions and expenditures were completely independent of the Benjamin campaign, were lawful, were limited to the judicial election, and were apparently fully reported. Assuming, for the sake of argument, that the amount of a contribution given to a Section 527 political organization is to be the yardstick for *per se* disqualification, what amount should act as the minimum necessary for disqualification? Should that amount be $1 million dollars, $500 thousand dollars, $100 thousand dollars, $50
(continued...)

be disqualified from any and every case in which an independent nonparty organization over which the judicial officer had no control received contributions from individuals or groups which included a person or entity affiliated with a party or an attorney in the case, when the independent nonparty organization used its contributions to wage a campaign against the judicial officer's electoral opponent. Conversely, such a standard would likely require a judge also to recuse himself or herself when an independent expenditure group operated against the judge or supported the judge's opponent. Our judicial system would break down under such a standard for disqualification.

Two primary "Section 527 " Independent Expenditure Groups operated during the 2004 Supreme Court election. The first, Consumers for Justice, stridently opposed my candidacy.[41] Five weeks after Consumers for Justice filed its first campaign finance report,

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[40](...continued)
thousand dollars, $10 thousand dollars, or $1 thousand dollars? Further, should any purported minimum amount be the same for both Supreme Court Justices, who must run a state-wide campaign, and other state judicial officers, who only have to run in a few counties at most? Finally, if such a minimum amount is to be established, who should set this minimum amount, the judiciary or the legislature? In addition, should any such contribution require disqualification forever? Or for only a certain period? Or for only those cases actually pending before the Supreme Court of Appeals at the time of the contribution? Or for only those cases pending somewhere in the West Virginia judicial system at the time of the contribution? Or for those cases which *might* be contemplated to be filed somewhere in the West Virginia judicial system at the time of the contribution?

[41] The first Section 527 independent expenditure group formed during the 2004 Supreme Court race was a group which called itself, Consumers for Justice. Although it later turned out that Consumers for Justice was created as early as April 1, 2004, and began (continued...)

IRS documents indicate that ASK was founded on August 20, 2004, as a Section 527 independent political organization by Carl Hubbard and Dr. Daniel J. McGraw. *See* 26 U.S.C.A. § 527 (Supp. 2008). The United States Supreme Court has made the following observations regarding Section 527 political organizations:

> Section 527 political organizations are, unlike § 501(c) groups, organized for the express purpose of engaging in partisan political activity. They include any party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures for the purpose of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office.

McConnell v. Federal Election Comm'n, 540 U.S. 93, 174 n.67, 124 S. Ct. 619, 678 n.67, 157 L. Ed. 2d 491 (2003) (internal quotations and citation omitted). A Section 527 "political organization need not declare contributions, dues, or fund-raising proceeds as income if the

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[41](...continued)
collecting and spending funds as early as April 13, 2004 (a few weeks before the end of the primary election), Consumers for Justice did not file its required paperwork notifying the IRS of its tax-exempt 527 status until June 30, 2004. Juliet Terry, *527 Groups to Play By New Rules*, The State Journal, 02/03/06. IRS rules require a 527 group to generally file its paperwork within 24 hours of being established. *Id*. According to a campaign finance report dated July 12, 2004, corporate contributions were the largest source of contributions to Consumers for Justice. Juliet Terry, *Political Groups' Donations Questioned – Consumer Attorneys Group Gave More Than $500,000 to state 527 Organization*, The State Journal, *supra*. Five weeks after this filing, by Consumers for Justice, ASK established itself as a 527 group on August 20, 2004. Juliet Terry, *527 Groups to Play by New Rules*, The State Journal, *supra*. Consumers for Justice raised and spent approximately $2 million in the 2004 campaign against opponents of former-Justice McGraw. *See* http://forms.irs.gov/politicalOrgsSearch/search/gotoSearchDrillDown.action?pacId='22659'&criteriaName='West+Virginia+Consumers+for+Justice'.

organization uses this money for the influencing or attempting to influence the selection, nomination or appointment of any individual to any Federal, State or local public office." *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1359 (11th Cir. 2003) (internal quotations and citation omitted).

According to documents filed by ASK with the IRS, during the period from August 20, 2004, to December 31, 2004, ASK received contributions that totaled $3,623,500.[42] Public records show that out of the total contributions received by ASK, Mr. Blankenship personally contributed $2,460,500. The remaining contributions, totaling $1,163,000, were given by other individuals and organizations. According to ASK founder, Dr. Dan McGraw, "We are transparent about who we are and who we receive money from. . . . We are allowing Warren McGraw's record to come under scrutiny." Juliet Terry, *Attack Ads Dominate Court Race*, The State Journal, 10/22/04.

ASK spent an unknown amount of its contributions during the general election period "running ads assailing [Justice] McGraw's vote in a 3-2 court edict that reinstated probation for convicted child rapist Tony Dean Arbaugh." Mannix Porterfield, *For the Sake*

[42] This information is available to the public through the website of the Internal Revenue Service. *See* http://forms.irs.gov/politicalOrgsSearch/search/gotoSearchDrillDown.action?pacId='22903'&criteriaName='And+For+The+Sake+Of+The+Kids.'

of Kids gets $2.5 Million, Register-Herald, October 15, 2004.[43] In *Arbaugh* , the Court's majority opinion indicated that defendant would be allowed to work as a janitor in a local Catholic school, but after school officials learned of the defendant's sexual assault record, he was prevented from working at the school. *See State v. Arbaugh*, 215 W. Va. 132, 595 S.E.2d 289 (2004).[44]

As a result of ASK's efforts to defeat Justice McGraw[45], and because of Mr. Blankenship's contributions to ASK, the Appellees contend that these indirect and independent acts constitute grounds for my recusal from the instant case. I disagreed with the Appellees' motions seeking to have me recuse myself because I had no role and no control in anything that ASK did during the campaign; nor did I have any role in causing Mr. Blankenship or anyone else to contribute to ASK or otherwise do or not do anything in the 2004 Supreme Court election. The federal statute under which ASK operated expressly permitted it to obtain donations that could be used to attempt to defeat anyone running for a local, state, or federal office. *See McConnell v. Federal Election Comm'n*, 540 U.S. at 174

[43] Reproduced at http://www.wvcag.org/news/fair_use/2004/10_15.htm.

[44] Although the *Arbaugh* case had an impact, the speech at Racine had a more fundamental impact on the general election. The *Arbaugh* decision was used during the Democratic Primary by those opposed to former-Justice McGraw's election, but former-Justice McGraw nevertheless defeated his opponent, Circuit Judge Jim Rowe, in the Democratic Primary.

[45] In failing to understand the fundamental role which the speech at Racine had in former-Justice McGraw's defeat, Appellees simply presume the absolute effectiveness of ASK's campaign.

n.67, 124 S. Ct. at 678 n.67, 157 L. Ed. 2d 491. The fact that ASK invoked its federal right to take a position against Justice McGraw is not a valid evidentiary basis upon which to establish that I could not fairly and impartially decide the merits of the instant case.

E. Lawful Campaign Contributions by Party or Attorney Not Sufficient to Disqualify Judicial Officer from Case

In this case neither ASK nor Mr. Blankenship are parties. Even if they were, the mere fact that they contributed money to defeat Justice McGraw is an insufficient reason alone to disqualify me, much less to require disqualification on a constitutional basis. On this point, the law is clear.

"[C]ampaign contributions by parties with cases pending before the judicial candidate or by attorneys who regularly practice before them is not so irregular or 'extreme' as to violate the Due Process Clause of the Fourteenth Amendment." *Public Citizen, Inc. v. Bomer*, 115 F. Supp. 2d 743, 746 (W.D. Tex. 2000).[46] This is to say that "a judge is not required to disqualify himself or herself based solely on an allegation that a litigant or counsel

[46] Courts considering disqualification motions related to direct contributions to the campaigns of judicial candidates have consistently recognized that ". . . judges are not required to disqualify themselves based solely upon the allegation that an attorney or litigant has made a campaign contribution to the political campaign of the judge or the judge's spouse. As long as the citizens . . . require judges to face the electorate, either through election or retention, ' the resultant contributions to those campaigns . . . are necessary components of our judicial system." *Nathanson v. Korvick*, 577 So.2d 943, 944 (Fla. 1991) (quoting *MacKenzie v. SuperKids Bargain Store, Inc.*, 565 So.2d 1332, 1335 (Fla. 1990).

for a litigant has made a legal campaign contribution to the political campaign of the trial judge." *Bissell v. Baumgardner*, 236 S.W.3d 24, 29 (Ky. Ct. App. 2007) (citation omitted). *See also Cherradi v. Andrews*, 669 So. 2d 326, 327 (Fla. Ct. App. 1996) ("Judges are not required to disqualify themselves solely upon an allegation that an attorney for a party had made a campaign contribution to the judge's political campaign."); *City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 640, 644-45, 5 P.3d 1059, 1062 (2000) ("In the context of campaign contributions, we have recognized that a contribution to a presiding judge by a party or an attorney does not ordinarily constitute grounds for disqualification. Indeed, we commented that such a rule would 'severely and intolerably' obstruct the conduct of judicial business in a state like Nevada where judicial officers must run for election and consequently seek campaign contributions."); *In re Disqualification of Burnside*, 113 Ohio St.3d 1211, 1212-13, 863 N.E.2d 617, 619 (2006) ("[E]lected judges are generally not required to recuse themselves from cases in which a party is represented by an attorney who has contributed to or has raised money for the judge's election campaign."); *Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex. App. 1993) ("If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts. Perhaps the next step would be to require a judge to recuse himself in any case in which one of the lawyers had refused to contribute or, worse still, had contributed to that judge's opponent.")

The issue of lawful direct contributions to a judicial candidate's campaign was exhaustively addressed in *Adair v. State, Department of Education*, 474 Mich. 1027, 709 N.W.2d 567 (2006), as follows:

> That a judge has at some time received a campaign contribution from a party, an attorney for a party, a law firm employing an attorney for a party, or a group having common interests with a party or an attorney, cannot reasonably require his or her disqualification. For there is no justice in Michigan in modern times who has not received campaign contributions from such persons. Nor is there a justice whose opponents have not received campaign contributions from such persons. And, increasingly, "opposition" campaigns have arisen in which contributions are specifically undertaken against particular justices. It is simply impossible for the Supreme Court, as well as most other courts in Michigan, to function if a lawful campaign contribution can constitute a basis for a judge's disqualification. For if a contribution to a judicial candidate can compel a judge's disqualification, then a contribution to an opponent, or the funding of an opposition campaign, must operate in a similar fashion. If so, it would be a simple expedient for a party or a lawyer to "mold" the court that will hear his or her cases by tailoring contributions and opposition contributions.
>
> Even more fundamentally, however, "We, the people, of the State of Michigan," through the Constitution, have created a system of judicial selection in our state in which candidates are nominated by, and elected through, a political process. It is a different system of judicial selection than that which exists in other states and in the federal system, and reasonable persons can debate the merits and demerits of this system. Each of us in different forums has urged various reforms of this system. Nonetheless, the present system has been ordained by our Constitution, and it defines the environment in which those aspiring to judicial office must undertake their efforts.
>
> The premise of our system of judicial selection in Michigan is that judges will periodically be held accountable for their performance. There are no lifetime appointments to judicial

positions, and there are no unaccountable committees who determine whether judges should be maintained in office. Thus, the most notable strength of our system of judicial selection is that it requires candidates for judicial office to go out among the electorate and explain why they should be placed in office. This system fosters communication with the electorate, speech-making, debate, the search for support and endorsements, campaign advertising, expressions of judicial philosophy, and efforts to persuasively explain why the election of one or the other candidate ought to be preferred.

Such campaigns must be directed toward an electorate. . . . In the case of Supreme Court justices, such campaigns will typically involve the expenditure of hundreds of thousands, or even millions, of dollars on television, radio, newspaper, and other advertising, with opposition campaigns expending similar amounts. These expenditures are not funded magically, but are raised from among the electorate, and from organizations that represent those among the electorate.

Indeed, given the premise of our system of judicial selection that there *should* be periodic elections for judicial office, it would seem that it is better that campaigns be well-funded and informative, and that candidates be afforded the fullest opportunity to explain their differing perspectives on the judicial role, than that campaigns be poorly funded and result in candidates securing election on the basis of little more than a popular surname.

There will simply be no end to the alleged "appearance of impropriety" if every contribution to a candidate, or every contribution to an opposing candidate, or every independent opposition campaign, is viewed as raising an ethical question concerning a judge's participation in a case in which a contributor or an opposition contributor is involved. Again, while cogent arguments have been made in favor of judicial selection reform, until such reforms are adopted by the people of Michigan, there is little alternative to active judicial participation in the electoral process and the concomitant need to raise funds in order to effectively participate and communicate in this process. If justices of the Supreme Court, in particular, were to

> recuse themselves on the basis of campaign contributions to their or their opponents' campaigns, there would be potential recusal motions in virtually every appeal heard by this Court, there would be an increasing number of recusal motions designed to effect essentially political ends, and there would be a deepening paralysis on the part of the Court in carrying out its essential responsibilities.

Adair, 474 Mich. at 1041-42, 709 N.W.2d at 579-81.

Direct contributions to a judicial candidate's campaign are an insufficient basis, alone, to require disqualification. Therefore, contributions by a third-person to a completely independent campaign – with no ties to the judicial candidate – do not rise to a due process requirement of disqualification.

F. Conclusion

The integrity of judicial decisions is a direct extension of the integrity of the judicial role. The simple invitation to guess about hidden motivations of judges or colleagues on the bench caused by a selective recounting of facts or by the trafficking of innuendo and half-truths serves only to indulge suspicions and doubts concerning the integrity of elected officials. It serves only politics. It is drama. It is a diversion.

In many cases, including this one, publicity adverse to the judge or justice is a virtual certainty no matter what decision he or she makes. In such cases, judges insufficiently attuned to their judicial responsibilities might readily welcome a baseless request for

disqualification as an escape from a difficult case – particularly in a state which selects its judges in partisan elections. The public is legitimately entitled to more – they are entitled to judicial integrity and courage. To surrender to such recusal temptations would justly expose the judiciary to public contempt. It is the obligation of officers of the court system to ensure that professionalism, not partisanship, guides their actions and that cases are decided on the basis of the law, not in spite of it.

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. Actual justice would be replaced by a justice borne of political gimmickry such as push-polls and media campaigns – all designed to replace judicial independence and integrity with something more to the liking of individual litigants or others with vested interests in specific outcomes. The rule of law would be replaced by the rule of expediency; judges would be forced to practice a "defensive" form of politically correct jurisprudence; and those without money or standing would be at the mercy of those with the power to manipulate and the willingness to impugn judges not to their liking.

It is perhaps an unfortunate aspect of timing that the pendency of the rehearing of this appeal has coincided with the pendency of a rigorous political campaign for two of five

seats on this Court. During periods when change is possible in the philosophical direction of the Court, the temptation by pundits, members of the media, litigants, candidates, special interest groups, or even members of this Court to politicize this Court and its decision is present. Although this Court has endured for 145 years, election cycles can be unsettling to the stability and predictability of the rule of law.[47] This puts a heavy burden on the members

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[47] Recent election cycles involving seats on this Court have highlighted some of the difficulties incumbent in a system which incorporates partisanship or politics in its selection method, particularly when political rhetoric is generated from within this Court during an election cycle in which the Justice is not running. *See generally Matter of Starcher*, *supra* (admonishment of judicial candidate for Supreme Court of Appeals for personal solicitation of public support in violation of Code of Judicial Conduct) during 1996 election cycle; *State ex rel. Carenbauer v. Hechler*, 208 W. Va. at 600, 542 S.E.2d at 421 (Starcher, J., dissenting, n. 1: "As I file this dissent, there are eerie parallels between the majority's creation of a rule in the instant case that deprives the voters of West Virginia of their right to vote for a candidate – and the decision by a 5-to-4 majority of the United States Supreme Court to create a rule that prohibits the hand count of machine-rejected ballots in the Florida Presidential election, a procedure that is clearly authorized by state law and is as established and as American as apple pie!") during the 2000 election cycle; *Starcher Defends Behavior at Forum – Candidate Debate Turns Into Argument at State Bar Association Gathering*, The State Journal, March 25, 2004 (recounting shouting outburst from the back of the room by non-candidate Justice during 2004 Supreme Court candidate forum directed against candidate Judge Jim Rowe before members of the West Virginia Bar Association and the Kanawha County Bar Association, and also separate confrontation between same sitting Justice and candidate Judge Rowe in public mall. "'I've got to admit. It kind of threw me a little. Starcher's back there screaming, so what do you do? You move on,' Rowe said, 'I think it was totally inappropriate. And, in my opinion, it made him look bad.'" "The following week, Starcher said he does not regret speaking up the way he did. . . . Starcher believes his actions were completely within his rights. 'As a sitting justice, I don't park my rights at the courthouse,' he said.") during the 2004 election cycle**.**

Indeed, the frustrations caused to dedicated jurists by political rhetoric and partisan machinations from within the judiciary is not new, as reflected by Justice Scott, joined in the majority by Judges Jolliffe, Fox and Keadle (all imminently well-respected senior- and current-circuit court judges in this State):

(continued...)

of this Court to act in the highest standard of judicial professionalism, to refrain from exacerbating tensions, to avoid the highly emotional, to abstain from that which is deeply divisive, and to work judicially and judiciously.

Resort to appearance-based criteria alone in judging simply encourages the excesses often wrought on a judicial system during times of political struggle. "Especially ought the Court not reenforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance – for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors." *United States v. Rabinowitz*, 339 U.S. 56, 86, 70 S.Ct. 430, 444, 94 L.Ed. 653 (1950) (J. Frankfurter, dissenting), *overruled, in part, Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d

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[47](...continued)

> Finally, we would be less than forthright if we did not acknowledge the effects this candidacy has had on the ability of this Court to conduct its constitutionally-required duties with the element of collegiality necessary to properly effect judicial decision-making. While the process of judicial decisions implies disagreement, it also implies that the parties to such decisions must approach dispassionately the business of dispute resolution without personal animosity and with a healthy respect for honest differences of opinion. Unfortunately, this candidacy has brought with it an unhealthy pall of partisanship. [Footnote omitted.] The author of this opinion has experienced first-hand that the loss of collegiality can only serve to promote disharmony and impede rational discourse.

State ex rel. Carenbauer v. Hechler, 208 W. Va. at 420, 542 S.E.2d at 599. Justice Starcher dissented.

685 (1969). *See also Rogers v. Bellei*, 401 U.S. 815, 837, 91 S.Ct. 1060, 1072, 28 L.Ed. 2d 499 (1971) (J. Black, dissenting) (legal standards "should not be blown around by every passing political wind that changes the composition of this Court.").

Just as judges have a duty to the system, so too do counsel in cases appearing before the courts of this State. While counsel must endeavor to represent their clients zealously, they should do so with due regard to the profession they serve. I would be remiss if I did not acknowledge my disappointment in the material omissions from the motions for disqualification filed herein against myself. While such filings are appropriate when warranted, counsel should do so within the framework which has long served this judicial system. Such motions should include all facts material to the recusal decision. Omitted from the motions herein was any objective consideration of my actual record, my decisions and my behavior in over three years on this Court – the truest measure of a judge. Further, while the use of the term "support" is certainly permissible in a motion, the term, in a vacuum, can be misleading and its connotation remarkably subjective and indefinite. It is a term better given to political punditry and press releases than, in the context of this case, the objective certainty needed in legal discourse. The well-drafted motion should acknowledge and discuss not only the motion's perceived strengths, but also the motion's actual weaknesses. The absence of such a critical analysis here, indeed the lack of even an acknowledgment of the motions'

actual weaknesses, is directly relevant to the legal credibility of the said motions.[48] It is my purpose here to remind counsel appearing before this Court of their obligations to this Court and this judicial system.[49]

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[48] In a system dedicated to seeking actual justice, the absence of something so material as my actual record on this Court, my decisions and my behavior as a judge is so common-sense that its omission is disappointing. Further, the use of a survey which sounded more like a "push-poll", particularly long after the deadline for filing such a motion had passed and after the case was argued orally before this Court on rehearing, was not only disappointing, but also problematic if the purpose of the motion was legal in nature.

[49] This election period saw a great deal of misinformation. For example, it was erroneously reported that this Court diverted from its traditional rotation for the position of Chief Justice. Specifically, it was reported that members of this Court improperly rotated myself into the Chief Justiceship after current-Chief Justice Maynard when that position should have instead gone to Justice Albright. Attached as Exhibit 1 is a chart by the Court's Clerk, Rory Perry, detailing the rotation and dispelling any contention that I was improperly placed in rotation before Justice Albright. Indeed, the contrary argument simply makes no sense. Since this rotation has been in place, no justice has waited more than four years before becoming Chief Justice in their fifth year. As set forth by the current rotation, next year, my first as Chief Justice, will be my fifth year. Furthermore, the moment I took my place in rotation, Justice Albright became Chief Justice in 2005. At that point, the rotation was C.J. Albright (2005), J. Davis (2006), J. Starcher (2007), J. Maynard (2008) and J. Benjamin (2009). To contend that somehow Justice Albright should have left his Chief Justiceship at the end of 2005 and somehow moved to the middle of the rotation line to place him as Chief Justice in 2009 is, frankly, absurd.

Unfortunately, this misinformation has taken on a life of its own. Moreover, some have insinuated that there was some form of conspiracy to place me behind Justice Maynard in rotation to affect the selection of replacement judges herein for those justices who have recused themselves. Such assertions are disturbing and grossly unfair to the two outstanding jurists, Judges Fox and Cookman, who served on this case and who are among the most highly-regarded jurists this State has ever produced. Judges and attorneys have an obligation to deal in facts, not conspiracy theories, lest their motives in pleadings and pronouncements come into question.

In conclusion, I observe the note of caution expressed by now-Justice Stephen Breyer, who, while a judge on the First Circuit Court of Appeals, noted that "the disqualification decision must reflect *not only* the need to secure public confidence through proceedings that appear impartial, *but also* the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking." *In re Allied-Signal, Inc.*, 891 F.2d 967, 970 (1st Cir. 1989) (emphasis in original) (citations omitted). For this reason, a "judge must still tread cautiously, recognizing, on the one hand, the great importance to the judicial institution of avoiding the appearance of partiality, while simultaneously remaining aware of the potential injustices that may arise out of unwarranted disqualification." *Id.*

For these reasons, I concur in the Majority opinion.

Membership of Supreme Court of Appeals Each Year, 1972 - present

Names in **CAPITALS** denote Chief Justice for that year

(1980 was first year of CJ rotation by seniority, per attached order of Dec. 6, 1979)

Year	Members of the Court				
1972	Berry	Caplan	Calhoun/Haden	Kessel	Carrigan
1973	Berry	Caplan	Haden	Sprouse	Neely
1974	Berry	Caplan	Haden	Sprouse	Neely
1975	Berry	Caplan	**HADEN**	Flowers	Neely
1976	**BERRY**	Caplan	Wilson	Flowers	Neely
1977	Miller	**CAPLAN**	McGraw	Harshbarger	Neely
1978	Miller	**CAPLAN**	McGraw	Harshbarger	Neely
1979	Miller	**CAPLAN**	McGraw	Harshbarger	Neely
1980	Miller	Caplan	McGraw	Harshbarger	**NEELY**
1981	Miller	McHugh	McGraw	**HARSHBARGER**	Neely
1982	**MILLER**	McHugh	McGraw	Harsharger	Neely
1983	Miller	McHugh	**McGRAW**	Harshbarger	Neely
1984	Miller	**McHUGH**	McGraw	Harshbarger	Neely
1985*	**MILLER**	McHugh	McGraw	Brotherton	**NEELY**
1986	**MILLER**	McHugh	McGraw	Brotherton	Neely
1987	Miller	McHugh	**McGRAW**	Brotherton	Neely
1988	Miller	**McHUGH**	McGraw	Brotherton	Neely
1989	Miller	McHugh	Workman	**BROTHERTON**	Neely
1990	Miller	McHugh	Workman	Brotherton	**NEELY**
1991	**MILLER**	McHugh	Workman	Brotherton	Neely
1992	Miller	**McHUGH**	Workman	Brotherton	Neely
1993	Miller	McHugh	**WORKMAN**	Brotherton	Neely
1994*	Miller/Cleckley	McHugh	Workman	**BROTHERTON**	**NEELY**
1995*	Cleckley	**McHUGH**	Workman	~ Albright	**NEELY**/Recht
1996	Cleckley/Davis	**McHUGH**	Workman	Albright	Recht
1997	Davis	McHugh	**WORKMAN**	Starcher	Maynard
1998	**DAVIS**	McCuskey	Workman	Starcher	Maynard
1999	Davis	McGraw	Workman/Scott	**STARCHER**	Maynard
2000	Davis	McGraw	Scott	Starcher	**MAYNARD**
2001	Davis	**McGRAW**	Albright	Starcher	Maynard
2002	**DAVIS**	McGraw	Albright	Starcher	Maynard
2003	Davis	McGraw	Albright	**STARCHER**	Maynard
2004	Davis	McGraw	Albright	Starcher	**MAYNARD**
2005	Davis	Benjamin	**ALBRIGHT**	Starcher	Maynard
2006	**DAVIS**	Benjamin	Albright	Starcher	Maynard
2007*	**DAVIS**	Benjamin	Albright	Starcher	Maynard
2008	Davis	Benjamin	Albright	Starcher	**MAYNARD**
2009	Davis	**BENJAMIN**	Albright		
2010	Davis	Benjamin	**ALBRIGHT**		
2011	Davis	Benjamin	Albright		
2012	Davis	Benjamin	Albright		
2013		Benjamin			
2014		Benjamin			
2015		Benjamin			
2016		Benjamin			

*Notes on 1985, 1994-1995 and 2007: In 1985, Richard Neely served as Chief Justice through June 28, when Thomas Miller took over for the remainder of the year. In 1994, William Brotherton served as Chief until he suffered a heart attack in September. Richard Neely was Acting Chief for the remainder of 1994, and continued as Chief in 1995 until his resignation on April 15, when Thomas McHugh took over as Chief for the remainder of the year. On October 26, 2006, the rotation order was changed when Robin Davis was designated as Chief for a second year (2007) and Elliott Maynard was designated as Chief for 2008.

Other notes: As of November 20, 2007, the Chief Justice has been designated through the close of 2010, to-wit: Maynard 2008; Benjamin 2009; Albright 2010. When a current Chief Justice is unable to act, the next chief in line serves as the Acting Chief Justice.

Compiled by Rory Perry
Updated on November 20, 2007

Exhibit 1