The Review of Litigation

Winter 2010 Pages 249 to 470 Vol. 29, No. 2
Published by The University of Texas School of Law

THE REVIEW OF LITIGATION

VOLUME 29 WINTER 2010 NUMBER 2

ARTICLES

NOTES

FORTHCOMING IN ISSUE THREE

SYMPOSIUM 2010

ARTICLES

Ask the State Solicitor General: Can the State File a Reply Brief When it Takes an Exception in an Original Jurisdiction Case in the Supreme Court of the United States?
Stephen R. McAllister

A Decade of Representing the Interests of Texas: The Office of the Solicitor General
James C. Ho

Observations on the Rise of the Appellate Litigator
Thomas G. Hungar and Nikesh Jindal

TRANSCRIPTS

The Rise of Appellate Litigators & State Solicitors General
January 22–23, 2009

THE REVIEW OF LITIGATION

VOLUME 29 WINTER 2010 NUMBER 2

ACKNOWLEDGEMENTS

The Review of Litigation wishes to recognize and thank the following sponsors for their generous financial support of our journal during the 2009–2010 academic year:

Associates
Vinson & Elkins
Dobrowski L.L.P.

SUBSCRIPTIONS

The Review of Litigation is published by The University of Texas School of Law Publications, four times a year: Winter, Spring, Summer, and a Symposium Edition. Annual subscriptions to *The Review* are available at the following rates:

$30.00 for all United States residents
$35.00 for subscribers outside the United States
$15.00 for single copies of the current volume

The Review offers a discount on the regular subscription rate to the following individuals:

Alumni members of *The Review of Litigation*
Students, faculty, and staff of The University of Texas School of Law
Members of the Litigation Section of the Texas Bar

To subscribe to *The Review of Litigation*, inquire into discounts, or to indicate a change of address, please write to:

The University of Texas at Austin
School of Law Publications
P.O. Box 8670
Austin, TX 78713-8670

www.texaslawpublications.com

For any questions or problems concerning a subscription, please contact our Business Manager, Paul Goldman, at (512) 232-1149. Subscriptions are renewed automatically unless timely notice of termination is received.

REPRINTS AND BACK ISSUES

William S. Hein & Co. has purchased the back stock and reprint rights to all previous volumes of *The Review of Litigation*. Please direct reprint requests by written inquiry to:

William S. Hein & Co., Inc.
1285 Main Street
Buffalo, NY 14209

www.wshein.com

Tel: (800) 828-7571 / Fax: (716) 883-8100
Back issues can also be found in electronic format for all your research needs on HeinOnline: http://heinonline.org.

Issue and article copies of *The Review of Litigation* are available on 16mm microfilm, 35mm microfilm, and 105mm microfiche. Send written requests to:

University Microfilms
300 North Zeeb Road
Ann Arbor, MI 48106

COPYRIGHT

The Review of Litigation
The University of Texas School of Law
727 East Dean Keeton Street
Austin, TX 78705-3299

Tel: (512) 471-4386

MANUSCRIPT SUBMISSIONS AND EDITORIAL POLICIES

The Review of Litigation is published four times annually by The University of Texas School of law Publications. The editorial board and The University of Texas are not in any way responsible for the views expressed by the contributors.

The Review welcomes articles on litigation-related issues of a national or international scope. All submissions are reviewed throughout the year on a rolling basis.

Please send article submissions, accompanied by a curriculum vitae and a cover letter, to the attention of the Chief Articles Editor. Manuscripts should conform to *The Bluebook: A Uniform System of Citation* (18th ed. 2005), published by the Harvard Law Review Association. Additionally, submissions should, to the extent feasible, follow *The Chicago Manual of Style* (15th ed. 2003). Manuscripts should be typewritten and footnoted where necessary. *The Review* welcomes electronic submissions, which may be emailed to: thereview@law.utexas.edu.

In conformity with the standard practice of scholarly legal publications in the United States, *The Review* holds copyrights to its published works.

All submissions inquiries and requests for review should be directed to the articles editor at:

The Review of Litigation
The University of Texas School of Law
727 East Dean Keeton Street
Austin, TX 78705-3299

Tel: (512) 471-4386
Email: thereview@law.utexas.edu
www.thereviewoflitigation.org

DONATIONS

Please consider supporting *The Review* this year with a financial contribution. In order to successfully hold and promote major events, such as our annual symposium, we require financial support. Some other projects that require support include expanding our online presence with an abstract database, and acquiring a new content management system.

Our official levels of sponsorship are $5,000, $4,000, $2,500, and $1000. The donor of any amount will be recognized in every issue of Volume 29. Even a small contribution will help us ensure that *The Review* remains a premier specialty journal. Please view our fundraising document at:

http://www.utexas.edu/law/journals/trol/sponsors.html

THE REVIEW OF LITIGATION

2009 Volume 29 2010

Completing *Caperton* and Clarifying Common Sense Through Using the Right Standard for Constitutional Judicial Recusal

Jeffrey W. Stempel*

---

* Doris S. & Theodore B. Lee Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas. Thanks to Janette Bloom, Bill Boyd, George Kuhlman, Doris Lee, Ted Lee, Bill Maupin, Ann McGinley, Jim Rogers, Tuan Samahon, John White, and the members of Nevada's Judicial Code Commission for ideas and continuing support (but not necessarily agreement with the suggestions in this article). Thanks also to Jeanne Price, Shannon Rowe, David McClure, Jennifer Gross, and Chad Schatzle for valuable research assistance.

I. INTRODUCTION

In *Caperton v. A.T. Massey Coal Co.*,[1] the U.S. Supreme Court vacated a state supreme court decision in which a justice who had received $3 million in campaign support from a litigant cast the deciding vote to relieve the litigant of a $50 million liability.[2] The Court reached this result, one I view as compelled by common sense, through a 5–4 vote,[3] with the dissenters, led by Chief Justice John Roberts and Justice Antonin Scalia, minimizing the danger of biased judging presented by the situation[4] and questioning the practical

1. 129 S. Ct. 2252 (2009).

2. *See infra* text accompanying notes –. Technically, the campaign contributor was not a formal party to the litigation. He was, however, the CEO of litigant Massey as well as the personification of the company.

3. *See Caperton*, 129 S. Ct. 2252 (Kennedy, J., joined by Stevens, Souter, Ginsburg & Breyer, JJ., forming the majority voting to vacate West Virginia Supreme Court decision where state court justice casting deciding vote had received $3 million in campaign aid from CEO of defendant Massey; and Roberts, C.J., joined by Scalia, Thomas, & Alito, JJ., voting to let the decision stand in spite of key participation by challenged state court justice); *id.* at 2274–75 (Scalia, J., dissenting) (shorter dissent criticizing majority for extending due process review to cases of judicial recusal based on campaign activity).

4. *See id.* at 2273 (Roberts, C.J., dissenting) ("And why is the Court so convinced that this is an extreme case? It is true that Don Blankenship spent a large amount of money in connection with this election. But this point cannot be emphasized strongly enough: Other than a $1,000 direct contribution from Blankenship, [disqualified West Virginia Supreme Court of Appeals] *Justice* [Brent] *Benjamin and his campaign had no control over how this money was*

feasibility of the Court's approach as well as the wisdom of expanding review of state court judicial disqualification pursuant to the Due Process Clause.[5]

Although its critics see *Caperton* as an unwise intrusion into state elections and state disqualification practice,[6] *Caperton*'s biggest problem is that it did not go far enough and make due process congruent with prevailing state and federal disqualification standards. By crafting an "serious risk of actual bias" test for due process-based constitutional disqualification that differs (albeit perhaps not greatly) from the well-established general approach to disqualification of a judge when his or her impartiality may be reasonably questioned, the Court has been unduly tentative and confusing in setting the parameters of judicial impartiality. The Court should recognize that any error in failing to recuse[7] deprives

---

spent."); *see also id.* at 2273 ("Moreover, Blankenship's [$3 million in] independent expenditures do not appear 'grossly disproportionate' compared to other such expenditures in this very election."); *id.* at 2275 (Scalia, J., dissenting) ("The Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution. Alas, the quest cannot succeed—which is why some wrongs and imperfections have been called nonjusticiable.").

5. *See id.* at 2267 (Roberts, C.J., dissenting) (contending that the "end result [of the majority's decision favoring disqualification] will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case" and raising a list of specific questions regarding application of majority's standards for judicial impartiality satisfying constitutional due process); *id.* at 2274 (Scalia, J., dissenting) ("In the best of all possible worlds, should judges sometimes recuse even where the clear commands of our prior due process law do not require it? Undoubtedly. The relevant question, however, is whether we do more good than harm by seeking to correct this imperfection through expansion of our constitutional mandate in a manner ungoverned by any discernable rule. The answer is obvious.").

More precisely, the Roberts dissent posed 40 questions in defense of its view that the majority's invocation of the Due Process Clause to require judicial disqualification due to receipt of enormous campaign contributions was not a sustainably practical approach to policing the judicial integrity of state courts. *Id.* at 2267, 2269–72 (Roberts, C.J., dissenting). Forty enumerated questions, that is, with many containing subparts or follow-up questions. If one calculates the total number of questions in the Roberts dissent as one would in reviewing litigation interrogatories, the total number of questions actually totals 80 queries.

6. *See infra* Part III.C.

7. This article treats the words "disqualification" and "recusal" as synonyms. Some courts and commentators have historically distinguished the terms, suggesting that disqualification is a judge's mandatory obligation to avoid participation in a case while recusal is a more voluntary, discretionary act

the affected litigant of a fundamental constitutional right—the right to have the case heard by a neutral adjudicator. Consequently, any erroneous rejection of a request to recuse is at least technically one of constitutional dimension that should be potentially subject to U.S. Supreme Court review and correction.[8]

However, the Court need not become mired in the flood of disqualification cases predicted by the dissenting justices in *Caperton*. Insistence upon review of disqualification decisions by a neutral body of judges can be used to ensure that litigants receive sufficient procedural due process. The constitutional question surrounding judicial recusal is primarily one of procedural due process. If states put in place adequate procedures for deciding and reviewing disqualification motions, few *Caperton*-like situations compelling high court intervention are likely to ensue.[9] Where erroneous recusal decisions occur in spite of such safeguards, U.S. Supreme Court review should be at least potentially available as necessary to vindicate the strong constitutional interest in neutral courts and fair adjudication, an interest sounding in substantive due process.[10] The Court need exercise this potential power only in relatively egregious cases, thereby promoting judicial economy while nonetheless discouraging disqualification abuses.

In making its assessments regarding whether review of non-disqualification is required, the Court should generally consider the five factors set forth in this article[11] and, in cases involving campaign support as a basis for recusal, the considerations outlined in the amicus brief of the Conference of Chief Justices.[12] Using these

---

informed by the judge's own preferences as well as prevailing law. *See* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 20.8, at 604–12 (2d ed. 2007) (noting traditional distinction but using terms interchangeably throughout the treatise); JAMES J. ALFINI, STEVEN LUBET, JEFFREY M. SHAMAN & CHARLES GARDNER GEYH, JUDICIAL CONDUCT AND ETHICS, § 4.04 at 4–11 (2007) (tending to use disqualification as preferred term but using recusal as acceptable synonym); Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 460 (2004) (outlining traditional distinction between the terms); Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213 (2002) (using terms interchangeably).

8. *See infra* Part III.D.

9. *See infra* Part IV.B.

10. *See infra* Part IV.A.

11. *See infra* Part IV.E.2.

12. *See infra* note 48 and accompanying text. This amicus brief, which will generally be referred to as the Chief Justices' brief, should be distinguished from

yardsticks, the Court can, as necessary, make infrequent forays into judicial disqualification matters without unduly burdening the Court or creating either uncertainty or paranoia among state judges and justices.

Part I of this article reviews the *Caperton* case and the Court's decision. Part II assesses *Caperton* and criticisms of the decision, including comparison of *Caperton*'s constitutional standard (existence of an objective probability of bias by the judge or justice under review) with the nonconstitutional standard for judicial neutrality under federal law and state law patterned after the ABA Code of Judicial Conduct (existence of a reasonable question as to the challenged jurist's impartiality). Finding that the latter standard better protects litigants and can be employed without undue strain on the judicial system, Part III advocates that *Caperton*'s constitutional due process disqualification standard be harmonized with the prevailing nonconstitutional standards. It also examines the issues of procedural and substantive due process and outlines the factors for use in recusal cases growing out of campaign support and those applicable to Supreme Court policing of state court disqualification decisions generally.

Rather than maintaining a separate standard for policing judicial disqualification pursuant to the Due Process Clause, the Court should recognize that any erroneous failure to recuse deprives a litigant of due process and makes a resulting judgment subject to review. However, the Court, using its broad discretion in controlling its docket, need not give serious consideration to every claim of inadequate judicial disqualification but should grant review only in cases such as *Caperton* where permitting a tainted jurist to sit constitutes a clear and serious violation of the norms of judicial ethics.

---

two other additional amicus briefs, one submitted by 27 former chief justices in support of Caperton and another one supporting Massey filed by ten former state justices. *See infra* note , which lists the amicus briefs. I shall resist the temptation to refer to the first two briefs as the "good" justices' briefs and the latter as the "bad" justices' brief, but that would not be an unfair characterization. *See infra* Part III.D (finding *Caperton* clearly correctly decided on the merits).

II. THE ROAD TO *CAPERTON*

A. The Underlying Action

The *Caperton v. Massey* drama began when Hugh Caperton purchased the Harman Mine in southwestern Virginia in 1993. The mine contained "high-grade metallurgical coal, a hot-burning and especially pure variety that steel mills crave to fuel the blast furnaces used to make coke needed in their production process."[13] A.T. Massey Coal Company, led by CEO Don L. Blankenship, wanted to acquire the Harman Mine and its high-grade coal, but Caperton was unwilling to sell.[14] Through a series of commercial and legal initiatives, which Caperton viewed as fraudulent and predatory but Massey characterized as merely aggressive business, Massey eventually drove the Harman Mining Corporation and other Caperton corporate entities into bankruptcy.[15] "Through a series of complex, almost Byzantine transactions, including the acquisition of Harman's prime customer and the land surrounding the competing mine, Massey both landlocked Harman with no road or rail access and left Caperton without a market for his coal even if he could ship it."[16] In 1998, Caperton agreed to sell the Harman Mine to Massey but the deal collapsed down the home stretch as Massey insisted on changes that Caperton contended reflected bad faith and an attempt to ruin the Caperton interests.[17]

Caperton's companies (Harman Mining Corporation, Harman Development Corporation, and Sovereign Coal Sales, Inc.),[18] filed for Chapter 11 bankruptcy in 1998 facing $25 million in claims.[19] Caperton, who had personally guaranteed $1.9 million of his companies' debt,[20] sued Massey in West Virginia,[21] alleging fraud

---

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

14. Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 232 (W. Va. 2008).

15. *Id.* at 229–33 (providing extensive background of case in opinion written by three state court justices who ruled for Massey), *rev'd*, 129 S. Ct. 2252 (2009).

16. Gibeaut, *supra* note , at 52; *see also Caperton*, 679 S.E.2d at 230–33 (providing factual background).

17. Gibeaut, *supra* note , at 52.

18. The relation of the Caperton companies and Mr. Caperton is discussed at *Caperton*, 679 S.E.2d at 230.

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

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

and tortious interference with contract, obtaining a $50 million jury verdict in 2002 that survived vigorous post-trial attack by Massey.[22] The trial court rejected Massey's new trial and remittitur motions in June 2004 and in March 2005 denied Massey's motion for judgment as a matter of law.[23]

B. The 2004 West Virginia Supreme Court Elections

Elections for the West Virginia Supreme Court[24] were slated for November 2004, with Justice Warren McGraw seeking re-

---

21. Other plaintiffs in the West Virginia action were Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. *Id.* at 2. In addition to Massey, other defendants in the case were Massey subsidiaries Elk Run Coal Co., Inc., Independence Coal Co., Inc., Marfork Coal Co., Inc., Performance Coal Co., Inc., and Massey Coal Sales Co., Inc. *Id.* at 3. Unless otherwise noted, these plaintiffs will generally be referred to as "Caperton," as the U.S. Supreme Court did in its opinion. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2257 (2009).

Harman Mining and Sovereign Coal also sued Wellmore, a Massey subsidiary, in Virginia for breach of contract and bad faith in connection with Wellmore's failure to purchase Harman coal as promised, which was based on Massey's assertion of a force majeure excuse from contract performance due to the closing of an LTV steel plant that was Wellmore's primary customer. Caperton v. A.T. Massey Coal Co, 679 S.E.2d 223, 233 (W. Va. 2008). According to Massey counsel, Harman Mining "voluntarily withdrew" the tort claim originally pleaded "prior to trial in the Virginia action with assurances that [Harman] would not later assert such a claim." Appellant Brief of A.T. Massey Coal Company, Inc. at 9, *Caperton*, 679 S.E.2d 223 (No. 33350), 2007 WL 2886508. The jury in the Virginia breach of contract action rendered a jury verdict of $6 million for Harman. "The appeal to the Virginia Supreme Court was refused on technical grounds." *Id.* The parties' dispute over the preclusive effect, if any, of the Virginia action over the West Virginia action was perhaps the key issue before the West Virginia Supreme Court and was the basis for Massey's success in the case when it involved Justice Benjamin. *See infra* note and accompanying text.

22. *See, e.g.*, Caperton v. A.T. Massey Coal Co., No. 98-C-192, 2005 WL 5679073 (W. Va. Cir. Ct. Mar. 15, 2005) (entitled "Final Order: Denying Defendants' Rule 50(b) Motion for Judgment as a Matter of Law; Rule 50(c)/59 Motion for New Trial, or in the Alternative, Motion for Remittitur"—a 17-page opinion denying Massey motions and awarding post-judgment interest at ten percent annual rate from date of August 15, 2002 judgment for Caperton).

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

24. The proper name of the state's highest court is the Supreme Court of Appeals of West Virginia. For ease of reference, this article will generally refer to it as the West Virginia Supreme Court.

election. Massey CEO Blankenship threw his support to challenger Brent Benjamin.[25] Blankenship contributed the statutory maximum of $1,000 to the Benjamin campaign committee and also donated nearly $2.5 million to a political organization named "And For The Sake Of The Kids," which opposed Justice McGraw and advocated Justice Benjamin's election.[26] In addition, Blankenship spent more than $500,000 independently on television and newspaper advertisements favoring Justice Benjamin as well as for fundraising on behalf of Justice Benjamin.[27] As the U.S. Supreme Court summarized, "Blankenship's $3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee. Caperton contends that Blankenship spent $1 million more than the total amount spent by the campaign committees of both candidates combined."[28]

Justice Benjamin won with slightly more than 53% of the more than 700,000 votes cast.[29] Although Justice McGraw appears to have had some significant electoral baggage that may have more than offset the advantage incumbents traditionally possess,[30] the

---

25. Elliot G. Hicks, Editorial, *Merit selection, not elections, must be how we choose justices*, CHARLESTON GAZETTE, Dec. 14, 2004, at 5A; *Millions spent to defeat Warren McGraw*, CHARLESTON GAZETTE, Dec. 4, 2004, at 3A; Cecil E. Roberts, Editorial, *Blankenship's hollow rhetoric; His money defeated McGraw, now he must help miners*, CHARLESTON GAZETTE, Dec. 13, 2004, at 5A.

26. *See* Paul N. Nyden, *U.S. SUPREME COURT; They are not friends dinner; Campaign report shows connections between Blankenship, Benjamin*, CHARLESTON GAZETTE, Feb. 15, 2009, at 1A (noting that And For the Sake of The Kids "specialized in running negative ad[vertisements]" targeting Justice McGraw); Marcia Coyle, *Amici Urge Recusals in Cases of Substantial Election Contributions*, TEX. LAW., Jan. 12, 2009, at 5, 5 (noting that And For The Sake of The Kids worked to defeat Justice McGraw).

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

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

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

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

consensus of observers appears to be that Blankenship's heavy financial support was a key factor in Justice Benjamin's election.[31]

C. *Review and Recusal*

After the election and adjudication of post-trial motions in *Caperton v. Massey*, Massey sought review of the $50 million judgment. Caperton sought Justice Benjamin's recusal, which he denied in April 2006.[32] According to Justice Benjamin, there was "no objective information . . . to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters

---

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

Id. at 2274 (Roberts, C.J., joined by Scalia, Thomas, & Alito, JJ., dissenting) (alteration in original) (internal citations omitted).

Although Justice Roberts's confidence in the electorate is touching, it is at considerable odds with a substantial amount of political science literature finding that voters are extremely ill-informed in low-visibility races such as judicial elections and that advertising and campaign spending play a particularly pivotal role in such races. *See* Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 18–26 (2003) (arguing that voters in judicial elections get little information and tend to make uninformed decisions); GOLDBERG ET AL., *supra* note , at 40 (commenting that low voting rates allow special interest groups to swing campaigns and suggesting judicial voter guides as a solution); Jeffrey W. Stempel, *Malignant Democracy: Core Fallacies Underlying Election of the Judiciary*, 4 NEV. L.J. 35, 45–46 (2003) (noting that the media affects judicial elections).

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

31. *See* sources cited *supra* note .

32. *Caperton*, 129 S. Ct. at 2257.

which comprise this litigation, or that this Justice will be anything but fair and impartial."[33]

In November 2007, the West Virginia high court reversed the $50 million judgment against Massey in a 3–2 decision in which Justice Benjamin joined two others for the decisive vote.[34] The dissenting justices characterized the majority's pro-Massey opinion, based on a forum selection clause and res judicata, as "new law" at odds with prior Court precedent—a convenient instance of law reform to assist Justice Benjamin's major benefactor.[35]

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

> Photos had surfaced of [majority opinion, pro-Massey] Justice Maynard vacationing with Blankenship in the French Riviera while the case was pending. Justice Maynard granted Caperton's recusal motion. On the other side Justice Starcher granted Massey's recusal motion, apparently based on his public criticism of Blankenship's role in the 2004 elections. In his recusal memorandum Justice Starcher urged Justice Benjamin to recuse himself as well.[36]

---

33. *Id.* at 2258 (alteration in original); *see also* Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223 (W. Va. 2008) (full Benjamin opinion refusing disqualification), *rev'd*, 129 S. Ct. 2252 (2009).

34. Caperton v. A.T. Massey Coal Co., No. 33350, 2007 WL 4150960 (W. Va. Nov. 21, 2007), *superseded on reh'g*, 679 S.E.2d 223 (W. Va. 2008).

35. The West Virginia Court reasoned:

> [F]irst, that a forum-selection clause contained in a contract to which Massey was not a party barred the suit in West Virginia, and second, that res judicata barred the suit due to an out-of-state judgment to which Massey was not a party. Justice Starcher dissented, stating that the "majority's opinion is morally and legally wrong." Justice Albright also dissented, accusing the majority of "misapplying the law and introducing sweeping 'new law' into our jurisprudence that may well come back to haunt us."

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

36. *Id.*

Justice Starcher also characterized Blankenship's sociopolitical electioneering activities as a "cancer" on the West Virginia high court.[37]

Justice Benjamin again refused to recuse and also rejected a third Caperton motion for disqualification.[38] In his capacity as acting chief justice, he was not only free to participate in the rehearing, but also replaced the two recused justices.[39] In April 2008, the West Virginia Supreme Court again ruled 3–2 in Massey's favor, with Justice Benjamin again in the slim majority.[40] The two justices appointed to the case by Justice Benjamin split their votes.[41] Again, the two-justice dissent was strong, raising serious questions about the majority's rulings on the substantive law[42] and complaints

---

37. *Id.*

38. *Id.*

39. *Id.*

40. Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 285 (W. Va. 2008).

41. *Caperton*, 129 S. Ct. at 2258.

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

What distressed Justices Albright and Cookman was the Benjamin majority's ruling that Caperton's West Virginia claims were barred because of the prior Harman Mining litigation in Virginia against Wellmore. *See* discussion *supra* note . Although the West Virginia and Virginia cases are connected by virtue of the Blankenship–Massey machinations aimed at taking control of the Harman Mine, the cases largely involved different legal claims and arguments, different facts and evidence, and different parties. Consequently, only the broadest view of the "logical relationship" test for assessing res judicata would bar the West Virginia action due to Harman's success in the Virginia lawsuit. Further, as *Caperton* was argued, the controlling Virginia precedent on res judicata (applicable to the West Virginia case via choice of law principles), purported to follow the same–law–facts–evidence test rather than the logical relationship test. *See Caperton*, 679 S.E.2d at 281–82 (Albright & Cookman, JJ., dissenting) (citing Virginia caselaw on res judicata, including Davis v. Marshall Homes, Inc., 576 S.E.2d 504 (Va. 2003)), *rev'd* 129 S. Ct. 2252 (2009); *see generally* FLEMING JAMES, GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE 671–739 (5th ed. 2001) (comprehensive review of res judicata); RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 1094–97 (5th ed. 2009) (outlining established approaches to determining res judicata). The other successful ground in Massey's challenge to the $50 million verdict was the assertion that a forum selection clause in a Wellmore–Harman Mining contract controlled and that Massey, which was not a party to that contract, had standing to enforce the clause. *See Caperton*, 679 S.E.2d at 234–35. The clause in question provides that the Wellmore–Harman Mining

about Justice Benjamin's refusal to recuse pursuant to the West Virginia Code of Judicial Conduct and the Due Process Clause.[43]

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

Id. at 234 (alterations in original).

A full discussion of the merits of Massey's res judicata and forum selection arguments lies beyond the scope of this article. However, even a brief look at these issues suggests that the West Virginia decision favoring Massey is problematic and open to criticism. For example, the West Virginia Supreme Court majority's discussion of the forum selection clause issue, despite its length, is shockingly bad in that it fails to grapple with the key question: Is the Caperton fraud and tortious interference action brought in West Virginia sufficiently closely connected to the Wellmore–Harman Mine breach of contract action that it also was required to be brought in Buchanan County, Virginia?

The West Virginia *Caperton* majority simply glosses over this question in a manner that would dismay a law professor reading student exams in that it resembles twenty pages of a mediocre student answer that fails to address the determinative and most difficult question posed. Rather than reflect seriously on the issue, the West Virginia majority instead opts for the "C" student's trick of showering the reader with statements of doctrine unmoored from the context of the case. My own view is that the term "in connection with," although perhaps not narrow, is far less sweeping than phrases such as "relating to" or "arising out of" typically found in forum selection clauses. Consequently, it is to me not at all obvious that the Caperton fraud action needed to be brought in Buchanan County, Virginia.

More substantively, the issue is whether the Virginia contract action, which involved Massey and Blankenship's allegedly unfounded assertion of a force majeure exception to performing the Wellmore contract with Harman Mine, was sufficiently intertwined with the larger Massey–Blankenship efforts to bring down Caperton to require that the second suit be subject to the Buchanan County forum requirement. Although there was of course a connection between Massey's alleged improper breach of contract and other Massey actions against Caperton (they were all part of a "get Caperton" effort), many or perhaps most courts would view the West Virginia court's enforcement of the forum selection clause as an example of the Wellmore contract "tail" wagging the Massey-conspiracy-against-Caperton "dog" and would not find the clause to reach so far (even if one gets over the substantial hurdle of letting Massey, a nonparty to the Wellmore–Harman contract, enforce the clause).

On the merits, the West Virginia majority's decision is open to serious question and will appear to be downright wrong to many civil procedure scholars and practicing lawyers. *Caperton* was thus not a case in which it could be said that the correct result was so clear that it precluded concern that lack of neutrality by a judge may have played a critical role in the outcome.

43. *See infra* Part III.A.

D. *The Supreme Court Intervenes*

Caperton successfully sought certiorari.[44] By this time, the case had become widely discussed in the media.[45] It was thoroughly briefed,[46] including amicus briefs from the American Bar Association (which supported Caperton)[47] and the Conference of Chief Justices, which suggested a list of relevant factors for consideration in assessing due process recusal claims (and that effectively provided tacit support to Caperton)[48] as well as 15 other

---

44. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 593 (2008).

45. *See, e.g.*, Marcia Coyle, *Review Sought on Judicial Recusals; W. Va. Case Triggers Key Ethical Query*, NAT'L L.J., Aug. 4, 2008, col. 3 (discussing *Caperton* generally and the implications of possible holdings by the U.S. Supreme Court); Lawrence Messina, *Legal groups blast W. Va. Justice in Massey case*, CHARLESTON DAILY MAIL, Aug. 5, 2008, *available at* http://www.dailymail.com/News/200808050215 (discussing the facts of the *Caperton* case generally); Paul J. Nyden, *ABA, groups urge high court to grant Harman appeal; Benjamin shouldn't have heard Massey case, groups argue*, CHARLESTON GAZETTE, Aug. 5, 2008, at 1A (explaining the conflict of interest in *Caperton* and the ABA's request that the U.S. Supreme Court decide the case in a manner mandating judicial recusal in similar cases); Editorial, *Too Generous*, N.Y. TIMES, Sept. 7, 2008, at WK8 (urging the U.S. Supreme Court to "add the Massey case to its docket").

46. *See* Brief for Petitioners, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009) (No. 08-22), 2008 WL 5433361 (authored by counsel at prominent firms Berthold, Tiano & O'Dell (Charleston, W. Va.), Buchanan Ingersoll & Rooney, PC (Pittsburgh), Reed Smith LLP (Pittsburgh), and Gibson Dunn & Crutcher LLP (Washington, D.C.) and, most notably, former U.S. Solicitor General Theodore B. Olson); Brief for Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 216165 (authored by counsel at prominent firms Offutt Nord, PLLC (Huntington, W. Va.), Hunton & Williams LLP (including Lewis F. Powell III), and Mayer Brown LLP (Washington, D.C.) (most notably, veteran Supreme Court advocates Andrew L. Frey and Evan M. Tager as well as UCLA law professor Eugene Volokh)).

47. Brief for American Bar Association as Amicus Curiae in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 3199726 [hereinafter Brief for American Bar Association].

48. *See* Brief of the Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 4–5, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45973 [hereinafter Brief of the Conference of Chief Justices]. The Chief Justices took the position that:

> A judge may be constitutionally disqualified from presiding over a particular matter for reasons other than actual bias or a financial interest in the outcome. These two categories alone are simply not broad enough

amici.[49] Although the Chief Justices' brief stopped short of endorsing reversal, it connotatively favored Caperton in that it listed

---

> to assure the due-process guarantee, which protects the right to a fair hearing if extreme facts create a "probability of actual bias . . . too high to be constitutionally tolerable," encompasses concerns about "possible temptation to the average . . . judge," "probability of unfairness," and not being "likely to maintain that calm detachment" necessary for a judge to deliver a fair adjudication. In particular, political support for a judge may be so extremely extraordinary that due-process concerns are implicated.

Id. (internal citations to Withrow v. Larkin, 421 U.S. 35, 47 (1975); Tumey v. Ohio, 273 U.S. 510, 532 (1927); *In re* Murchison, 349 U.S. 133, 136 (1955); and Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971) omitted).

In particular, the Chief Justices suggested that the Court consider the following "Criteria for evaluating whether due process requires recusal for campaign spending in a particular case":

- Size of the Expenditure
- Nature of the Support
- Timing of the Support
- Effectiveness of the Support
- Nature of Supporter's Prior Political Activities
- Nature of Supporter's Pre-existing Relationship with the Judge
- Relationship Between the Supporter and the Litigant

Id. at 25–29 (capitalization removed). The ABA Amicus Brief supported a similar use of similar factors. *See* Brief for American Bar Association, *supra* note , at 19–20 (factors include contribution size, importance, timing, and relationship of judge and supporter). In addition, the ABA Brief noted former Justice Sandra Day O'Connor's strong concern over the issue. *See id.* at 7 n.12 (citing Sandra Day O'Connor, Op-Ed., *Justice for Sale*, WALL ST. J., Nov. 15, 2007, at A25). Justice O'Connor was sufficiently interested in the outcome of the case that she attended the *Caperton* oral argument. *See* Steve Hooks, *Industry mostly mum on Manchin's judicial reform effort*, PLATT'S COAL OUTLOOK, June 22, 2009 at 6 (discussing *Caperton* and noting that the "retired O'Connor attended the oral arguments on Caperton v. Massey before the US Supreme Court in March. She has been vocal in discussion of issues regarding the judiciary and campaign contributions."); Kashmir Hill & David Lat, *Jon Stewart Goes 'Behind the Robes' of Sandra Day*, http://www.abovethelaw.com/2009/03/jon_stewart_sandra_day_oconnor.php ("The retired justice was present in the courtroom to attend argument in *Caperton v. A.T. Massey Coal Company* (a case involving judicial independence, an issue near and dear to her heart).").

Although the Chief Justices' brief did not expressly support either side, its overall message is one favorable to Caperton and it clearly had substantial influence on the majority opinion.

49. Of the twenty-one amicus briefs relating to the merits, fourteen expressly supported Caperton while five expressly supported Massey, with the Chief

Justices' and the Louisiana Supreme Court's amicus briefs not taking a position. The fourteen briefs supporting Caperton were filed by 12 different amici:

> Brief for 27 Former Chief Justices and Justices as *Amicus Curiae* in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45979 (former Chief Justices and Justices C.C. Torbert (Ala.); David Newbern (Ark.); Norman Fletcher (Ga.), Charles McDevitt (Idaho); Byron Johnson (Idaho); Harry T. Lemmon (La.); Conrad L. Mallett, Jr. (Mich.); A.M. Keith (Minn.); Kathleen Blatz (Minn.); Russell Anderson (Minn.); Edward D. Robertson, Jr. (Mo.); Jean A. Turnage (Mont.); John Sheehy (Mont.); Robert Rose (Nev.); James Exum (N.C.); I. Beverly Lake, Jr. (N.C.); Herbert L. Meschke (N.D.); Beryl Levine (N.D.); Herbert R. Brown (Ohio); Edwin J. Peterson (Or.); John P. Flaherty (Pa.); Raul Gonzalez (Tex.); Robert Utter (Wash.); Vernon Pearson (Wash.); Richard Guy (Wash.); Richard Neely (W. Va.); and Louis Butler (Wis.));
>
> Brief of Amicus Curiae Public Citizen in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45975;
>
> Brief of Amicus Curiae the Committee for Economic Development in support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 3165832 (Intel Corp., Lockheed Martin Corp., Pepsico, Wal-Mart Stores, Inc., Defense Trial Counsel of Indiana, Illinois Ass'n of Defense Counsel, Transparency Int'l-USA);
>
> Brief of the Center for Political Accountability and the Carol and Lawrence Zicklin Center for Business Ethics Research as Amici Curiae in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45977;
>
> Brief Amicus Curiae of the Washington Appellate Lawyers Association in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 3199727;
>
> Brief of the American Academy of Appellate Lawyers, Amicus Curiae, in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 815213;
>
> Brief for Justice at Stake et al. as Amici Curiae in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45976;
>
> Brief of the American Bar Association as Amicus Curiae in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45978;
>
> Brief of American Bar Association as Amicus Curiae in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 3199726;

Brief of Amici Curiae the Brennan Center for Justice at NYU School of Law, the Campaign Legal Center, and the Reform Institute in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45972;
Brief of Amici Curiae the Brennan Center for Justice at NYU School of Law, the Campaign Legal Center, and the Reform Institute in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 3165831;

Brief of American Association for Justice as Amicus Curiae Supporting Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45971;

Brief of National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 27299;

Brief of Amici Curiae in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45974 (corporations and organizations committed to maintaining public confidence in the judicial system in order to promote economic growth and development).

The four briefs supporting Massey were

Brief of Amicus Curiae Center for Competitive Politics in Support of Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 298463;

Brief of Law Professors Ronald D. Rotunda and Michael R. Dimino as Amici Curiae in Support of Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 298468;

Brief of Amicus Curiae James Madison Center for Free Speech in Support of Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 298468;

Brief of Ten Current and Former Chief Justices and Justices as Amici Curiae in Support of Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 298467 (Perry O. Hooper, Sr., (Ala.), Harold F. See, Jr. (Ala.), Raoul G. Cantero, III (Fla.), Maura D. Corrigan (Mich.), Clifford W. Taylor (Mich.), Robert P. Young, Jr. (Mich.), Burley B. Mitchell, Jr. (N.C.), Evelyn Lundberg Stratton (Ohio), Craig T. Enoch (Tex.), Richard B. Sanders (Wash.)).

Brief of the States of Alabama, Colorado, Delaware, Florida, Louisiana, Michigan, and Utah as Amici Curiae in Support of Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 298466.

The two briefs that did not support either side were

Brief of the Conference of Chief Justices, *supra* note ;

as an important factor the magnitude of collective campaign support for a challenged judge.[50] Caperton's case was argued by former U.S. Solicitor General Theodore Olson[51] while Massey retained prominent Supreme Court advocate Andrew Frey.[52]

In June 2009, the Court by a 5–4 majority sided with Caperton and vacated the decision, reversing the $50 million judgment.[53] The Court observed:

> that there is serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.
>
> Applying this principle, we conclude that Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case.[54]

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

The Blankenship–Benjamin situation violated the Due Process Clause, according to the majority, in that it raised for the reasonable lay observer the significant probability that Justice Benjamin could not be fair in assessing such an important case

---

Brief of Amicus Curiae the Supreme Court of the State of Louisiana as Amicus Curiae in Support of Neither Party, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 434720.

50. *See* Brief of the Conference of Chief Justices, *supra* note .

51. *See supra* note . Transcript of Oral Argument, *Caperton*, 129 S. Ct. 2252.

52. *See supra* note . Transcript of Oral Argument, *Caperton*, 129 S. Ct. 2252.

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

54. *Id.* at 2263–64.

implicating his sponsor Blankenship's finances.[55] Reviewing the Court's due process disqualification precedents, the Court found that Blankenship's campaign support was of sufficient magnitude to be uncomfortably close to the type of personal, judicial, financial self-interest in past cases that had merited judicial recusal.[56]

The majority reviewed the key precedents and concluded they supported recusal in *Caperton*.[57] It divided past Court precedent on due process disqualification into two broad categories. The first was where a judge had a "direct, personal, substantial pecuniary interest" in a case, a situation reflected in the long-standing Anglo-American axiom that no person should be "allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and not improbably, corrupt his integrity."[58] This basis for disqualification, embracing a recusal standard going back to Blackstonian England, has been expressly recognized since *Tumey v. Ohio* was decided in 1927.[59] Operationalizing the standard in *Tumey*, the Court stated that where the judge "had a financial interest in the outcome of a case, although the interest was less than what would have been considered personal or direct at common law" he must recuse.[60] The second established category where due process required recusal was "where a judge had no pecuniary interest in the case but was challenged because of a conflict arising from his

55. *Id.* at 2262–64.

56. *See id.* at 2262–64 (noting that his "campaign efforts had . . . significant and disproportionate influence").

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

58. *Id.* at 2259 (citing *Tumey*, 273 U.S. at 523; THE FEDERALIST NO. 10, at 59 (James Madison) (J. Cooke ed., 1961)).

59. *Id.* (citing *Tumey*, 273 U.S. at 520 as the seminal case in this category). In *Tumey*, the village mayor sat as a judge in trying alcohol violations, receiving extra compensation from his judicial duties that was funded by fines assessed for conviction. 273 U.S. at 520. The *Tumey* Court concluded that this presented the mayor with an unconstitutional conflict of interest. *Id.* at 532.

60. *See, Caperton*, 129 S. Ct. at 2259–60 (discussing *Tumey*, 273 U.S. at 520 and *Ward*, 409 U.S. at 60 as examples).

participation in an earlier proceeding."[61] This approach has been recognized since *In re Murchison* in 1955.[62]

Although the Court had not previously found due process to require recusal due to election campaign support, the *Caperton* result is quite consistent with *Tumey* and its progeny. For example, in the 1986 *Aetna v. Lavoie* decision,[63] the Court found that an Alabama Supreme Court justice's participation in a case that could set favorable precedent for his similar suit against an insurer was the type of financial interest that merited disqualification under the Due Process Clause.[64] The *Caperton* majority viewed campaign financial

---

61. *Id.* at 2261 (citing *Murchison*, 349 U.S. at 133).

62. *See Aetna*, 475 U.S. at 822 (citing *Murchison*, 349 U.S. at 136).

63. Commentators generally supported the *Lavoie* holding and rationale. *See, e.g.*, Ignazio J. Ruvolo, *California's Amendment to Canon 3E of the Code of Judicial Conduct Requiring Self-Recusal of Disqualified Appellate Justices—Will it be Reversible Error Not to Self-Recuse?*, 25 T. JEFFERSON L. REV. 529, 551 (2003); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 640 (1987); S. Matthew Cook, Note, *Extending the Due Process Clause to Prevent a Previously Recused Judge from Later Attempting to Affect the Case from Which He was Recused*, 1997 BYU L. REV. 423, 441–42 (1997). The decision, however, caused comparatively little stir when rendered, which arguably suggests that the *Caperton* dissenters (*see infra* Part III.B) are excessively concerned that *Caperton* will create a huge upsurge in recusal motions and related appeals and certiorari petitions.

64. *Aetna*, 475 U.S. at 822. Arguably, however, Justice Benjamin's non-recusal did violate this norm. Judges who are not re-elected lose their jobs and their income. Although the Court focused on Justice Benjamin's potential gratitude toward Blankenship, the opposite side of the coin is relevant. Just as Blankenship could be instrumental in advancing a Benjamin candidacy, he could also just as easily turn and help defeat a Benjamin re-election campaign if displeased with Benjamin's failure to perform as anticipated. Career objectives are pecuniary objectives. Even though Justice Benjamin would not directly benefit from the outcome of *Caperton v. Massey* on the merits, it is only a small step to an impact on his career and compensation should he support an outcome adverse to Blankenship or a similarly well-heeled contributor. Obviously, this reverse side of the coin can be pushed too far. A judge should not be disqualified, for example, simply because a litigant with whom there is no prior relationship is powerful and might oppose the judge in an ensuing election. But where the judge has already enjoyed vast sums of support from an interested party, both the gratitude and retaliation concerns become sufficiently concrete to counsel recusal.

I acknowledge the inconvenient fact that many judges leaving the bench, even involuntarily, will often, or even perhaps usually, be able to make more money in private practice. But even these judges ordinarily want very badly to retain their judicial posts. They left practice for the bench for a reason and their set of preferences is unlikely to have changed. In addition, there are some judges who, if

support as something other than the type of direct pecuniary interest that made a jurist a "judge in his own case."[65] Nonetheless, the majority found the Benjamin non-recusal fell easily within the zone of cases requiring recusal on due process grounds:

> The proper constitutional inquiry is "whether sitting on the case then before the [court] would offer a possible temptation to the average judge to . . . lead him not to hold the balance nice, clear, and true."[66]

By this standard, Justice Benjamin's recusal was clearly required. The average judge presiding over a very important ($50 million) case to a very substantial benefactor ($3 million) would of course be tempted to be biased in favor of the benefactor and prejudiced against his litigation opponent.

III. ASSESSING *CAPERTON*

A. The "Reasonable Question as to Impartiality" Standard for Nonconstitutional Recusal under Federal and State Law as Contrasted with the Constitutional Due Process Standard of an "Serious Risk of Actual Bias"

Justice Benjamin was also clearly disqualified under then-operative Canon 3(E)(1) of the West Virginia and ABA Codes of Judicial Conduct (now Rule 2.11 in the 2007 revision to the ABA Judicial Code) in that his impartiality was subject to reasonable question. Rule 2.11, the substance of which has been essentially the

---

defeated, might not do as well in practice. One common criticism of direct election of judges is that it can result in the election of lawyers who pursue the bench because their practices have not been successful. By contrast, nearly all appointed judges, whatever their other talents or shortcomings, have enjoyed success in private practice or government lawyering. For former government lawyers, ascension to the bench may be a net gain in compensation, especially if pension benefits and health insurance are considered.

65. *Caperton*, 129 S. Ct. at 2260–61 (discussing *Aetna*, 475 U.S. at 825; *Ward* 409 U.S. at 60; *Tumey*, 273 U.S. at 532).

66. *Id.* at 2261 (quoting *Aetna*, 475 U.S. at 825; *Ward*, 409 U.S. at 60; and *Tumey*, 273 U.S. at 532).

same since the 1972 Model Code, provides that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might be reasonably questioned,"[67] enumerating specific examples of when disqualification is required.[68] The ABA has in

---

67. ABA MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007); *see* John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43 (1972) (describing history of judicial recusal and evolution of ABA Model Code); Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813 (2009) (same); *see also* FLAMM, *supra* note , § 5.5 (2d ed. 2007) (describing the standard for determining judicial bias); Bassett, *supra* note , at 1223–31 (summarizing federal and state law on recusal).

68. Rule 2.11 listed the "following circumstances" in which the judge shall recuse:

> (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.
>
> (2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:
>
> (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
>
> (b) acting as a lawyer in the proceeding.
>
> (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or
>
> (d) likely to be a material witness in the proceeding.
>
> (3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or is a party to the proceeding.
>
> (4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer, has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than $[insert amount] for an individual or $ [insert amount] for an entity [is reasonable and appropriate for an individual or an entity].

effect stated that in the enumerated situations, many of which seem far less troublesome than Blankenship's campaign support of Justice Benjamin, reasonable question as to impartiality is a given. Impartiality is defined as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge."[69]

---

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

(6) The judge:

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

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

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

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

ABA MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(1)–(6) (2007) (asterisks for defined terms eliminated) (the terminology section of the Model Code defines terms such as "aggregate," "domestic partner," "fiduciary," "impartiality," "know," and "personal knowledge"). Rule 2.11(B) requires the judge be kept reasonably informed about his and his family's financial interests. *Id.* R. 2.11(B). Rule 2.11(C) permits the parties to agree to the judge's continued participation in the case, provided that there is no Rule 2.11(A)(1) ground for disqualification on the basis of personal bias or prejudice toward attorney or litigant or the judge's personal knowledge of disputed facts. *Id.* R. 2.11(C).

69. ABA MODEL CODE OF JUDICIAL CONDUCT, Terminology Section (2007); *accord* Republican Party of Minn. v. White, 536 U.S. 765, 775–79 (2002) (noting possible definitions of impartiality, including "openmindedness," and that "root meaning" of impartiality "is the lack of bias for or against either *party* to the proceeding"); *see also id.* at 775–76:

> Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to

Case law interpreting the ABA Code's "reasonable question regarding impartiality" standard and equivalent language in the federal judicial code generally views a judge as disqualified if a reasonable layperson aware of the relevant facts would harbor significant doubt about the judge's ability to be impartial.[70] Consequently, disqualification based on a violation of due process is somewhat different than disqualification under the ABA Judicial Code and state analogs or under 28 U.S.C. § 455(a) (the general federal disqualification statute), which, in language similar to the ABA Model Code, states that "[a]ny justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[71] In a manner similar to the Model Code's disqualification provision,

---

> him in the same way he applies it to any other party. This is the traditional sense in which the term is used. . . . It is also the sense in which it is used in the cases cited by respondents [the State of Minnesota defendants] and amici for the proposition that an impartial judge is essential to due process.

(internal citations omitted).

70. *See, e.g.*, LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT 13–16 (2d ed. 1992) (providing general discussion of the appearance of partiality); ALFINI, ET AL., *supra* note , Ch. 4 (providing general discussion of disqualification and conflicts of interest); FLAMM, *supra* note , §§ 5.6.3, 5.7 (offering definition of the "reasonable" layperson); Bassett, *supra* note , at 1238 n.127 (comparing several federal cases dealing with the reasonable layperson); John Leubsdorf, *Theories of Judging and Judicial Disqualification*, 62 N.Y.U. L. REV. 237, 243–44 (1987) (stating that a judge should step down if there are reasonable reasons to question his or her partiality); Stempel, *supra* note , at 822 ("The locus of case law on disqualification adopts an objective reasonably informed lay observer test mandating disqualification when [a] mythical reasonable viewer would harbor serious doubts regarding a judge's impartiality."); *see also* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 858–62 (1988) (applying this standard to disqualify federal trial judge who sat on board of university that stood to profit from land sale if particular party prevailed in dispute over right to build hospital); Potashnick v. Port City Const. Co., 609 F.2d 1101, 1111 (5th Cir. 1980) (stating that judge faced with disqualification motion should consider how participation in a given case appears to average citizen); United States v. Ferguson, 550 F. Supp. 1256, 1259–60 (S.D.N.Y. 1982) ("The issue [of impartiality] . . . is not the Court's own introspective capacity to sit in fair and honest judgment with respect to controverted issues, but whether a reasonable member of the public at large, aware of all the facts, might fairly question the Court's impartiality.").

71. 28 U.S.C. § 455(a) (2008).

§ 455(b) lists a number of specific instances (essentially the same as those of the Model Code) where disqualification is required, codifying particular circumstances that create a per se question as to a judge's impartiality.[72]

Again, as with the Model Code, the particular instances where disqualification has been required under federal statutory law present circumstances that, for many a reasonable observer, must seem to pose far less risk of bias than Justice Benjamin's receipt of $3 million in campaign aid from the CEO of a litigant appearing before him in an important case. Put another way, one might ask which is more troubling: Justice Benjamin's situation or Mrs. Benjamin owning a share of stock in Massey? Although the latter should not be minimized (particularly if she owned a large amount of stock or a significant percentage of company stock) disqualification of Justice Benjamin would have been required had there been any spousal stock ownership that amounted to more than a de minimis financial interest. Yet Justice Benjamin saw no problem participating in *Caperton* when the problem was not a modest investment but instead involved $3 million in key campaign support.

Although there are some minor differences between the Model Code and § 455(a),[73] they are the same regarding the core

---

72. *See id.* § 455(b)(1)–(5) (requiring recusal in essentially the same specific circumstances delineated in Rule 2.11 of the Model Code); ABA MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(1)–(6) (listing similar factors), quoted in full *supra* note 68. Section 455(e) provides that where these enumerated grounds apply, the parties may not agree to let the judge preside but, like Rule 2.11(C), federal law permits the parties to waive disqualification and agree to permit the judge to preside even if his impartiality might be subject to question. 28 U.S.C. § 455(e).

73. For example, 28 U.S.C. § 455(d) defines several key terms such as "fiduciary" and "financial interest" in the statute itself rather than referring to a terminology section. Regarding waiver, 28 U.S.C. § 455(e) permits the parties to agree to let a judge subject to § 455(a) hear the case but forbids such stipulations if one of the § 455(b) grounds for recusal applies, most of which involve financial interest of the judge or a family member. The strong federal bar to litigant consent when a judge has even modest financial conflict is in part a legacy of now-disparaged past practice in which a judge would announce that he owned stock in a litigant company and then actively seek litigant consent to his continued involvement, placing lawyers and parties in an awkward position should they refuse to consent. *See* JOHN P. MACKENZIE, THE APPEARANCE OF JUSTICE 96–97 (1974) (discussing this situation and describing it as a game of "velvet blackjack," wherein a litigant "must weigh the consequences of betraying apparent distrust and the risks of offending the other party"). The great Learned Hand, for example, used this "velvet blackjack" approach regularly. *See id.* at 95–97 (detailing how

standard governing a judge's eligibility to hear and decide cases. Under the Judicial Code and § 455(a), the reviewing court asks whether the judge's impartiality may be reasonably questioned. Under a due process analysis, the inquiry is similar, but disqualification is harder to obtain in that the Court's precedents appear to require not just reasonable question as to impartiality but a probability of bias. At least this appears to be the *Caperton* majority's approach:

> In defining these standards [for required due process recusal rather than general disqualification] the Court has asked whether, "under a realistic appraisal of psychological tendencies, and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."[74]
>
> Applied to the instant matter, the Court found:
>
> that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing

---

Judge Hand owned twenty-five shares of Westinghouse stock and would disclose that fact to counsel, yet litigants would never object to his participation in the case); *see also* Stempel, *supra* note , at 631 n.170 (describing Judge Hand's use of "velvet blackjack" and inferring that litigants refused to ask for his recusal because "they wanted Judge Hand's mind on the case or because they feared offending him, or both").

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

74. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263 (2009) (citing Withrow v. Larkin, 421 U.S. 35, 47 (1975) and drawing upon Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986); Gibson v. Berryhill, 411 U.S. 564 (1973); Ward v. Monroeville, 409 U.S. 57 (1972); Mayberry v. Pennsylvania, 400 U.S. 455 (1971); *In re* Murchison, 349 U.S. 133 (1955); FTC v. Cement Inst., 333 U.S. 683 (1948); and Tumey v. Ohio, 273 U.S. 510 (1927)).

> the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.
>
> Applying this principle, we conclude that Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case.[75]

Responding to the dissent's criticism that a decision favoring Caperton would open the floodgates to vast tracts of recusal litigation, the majority noted that earlier due process disqualification decisions had not had this effect[76] and emphasized the particularities of the instant case:

> Our decision today addresses an extraordinary situation where the Constitution requires recusal. Massey and its amici predict that various adverse consequences will follow from recognizing a constitutional violation here—ranging from a flood of recusal motions to unnecessary interference with judicial elections. We disagree. The facts now before us are extreme by any measure. The parties point to no other instance involving judicial campaign

---

75. *Id.* at 2264.

76. *Id.* at 2266:

> It is worth noting the effects, or lack thereof, of the Court's prior decisions. Even though the standards announced in those cases raised questions similar to those that might be asked after our decision today, the Court was not flooded with *Monroeville* or *Murchison* motions. That is perhaps due in part to the extreme facts those standards sought to address. Courts proved quite capable of applying standards to less extreme situations.

The Court also noted that the trend in state judicial reforms has strengthened disqualification law, and cited the West Virginia Code of Judicial Conduct Canon 3E(1) and 28 U.S.C. § 455(a) as examples. *Id.*

> contributions that presents a potential for bias comparable to the circumstances in this case.[77]

While acknowledging that "extreme cases often test the bounds of established legal principles" and that "sometimes no administrable standard may be available to address the perceived wrong," the majority concluded that in extreme cases intervention was required to protect the integrity of the legal system.[78] Referring to three "illustrative" past cases of such intervention, the majority found that "[i]n each case the Court dealt with extreme facts that created an unconstitutional probability of bias that 'cannot be defined with precision'" but that in each case "the Court articulated an objective standard to protect the parties' basic right to a fair trial in a fair tribunal" with the Court "careful to distinguish the extreme facts of the cases before it from those interests that would not rise to a constitutional level."[79]

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

> "The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today." Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances.[80]

---

77. *Id.* at 2265.

78. *Id.*

79. *Id.* at 2265–66 (citing *Aetna*, 475 U.S. at 825–26; *Mayberry*, 400 U.S. at 465–66; and *Murchison*, 349 U.S. at 137).

80. *Id.* at 2267 (quoting *Aetna*, 475 U.S. at 828). The *Caperton* majority opinion can be properly criticized as less than crystal clear regarding the differences between recusal under 28 U.S.C § 455(a) and the Judicial Code. At times the opinion appears to suggest that the general "reasonable question as to impartiality" standard used in nonconstitutional disqualification motions also

Further, in announcing its campaign support recusal position, the Court greatly emphasized whether a case was "pending" or "imminent" at the time an interested party supported the judge under scrutiny.[81] For example, Justice Benjamin's recusal might not have been required had *Caperton v. Massey* commenced after his election, even though Don Blankenship would be just as interested in the case outcome and would have been just as pivotal a figure in Benjamin's career. Further, Blankenship would have had just as much potential to extract vengeance against Justice Benjamin if Blankenship was displeased with Benjamin's vote. A benefactor wealthy enough to provide $3 million presumably has the wherewithal to provide a similar amount to a future opponent thought more hospitable to his or his company's interests.

Given the narrowness of the *Caperton* holding and the majority's repeated attempts to set the decision in a far corner of the field of judicial disqualification, it is unsurprising that one leading authority on judicial ethics characterized the decision as "declaring that a judge's decision not to recuse violates due process 'when it's a cold day in hell.'"[82] Former Texas Supreme Court Chief Justice Thomas Phillips likewise viewed *Caperton* as unlikely to open the floodgates, emphasizing the majority's "very narrow standard" and the unusual facts of the case.[83] Professor Roy Schotland, co-author of the Chief Justices' amicus brief, called it "preposterous" to predict an explosion of recusal motions based on *Caperton*.[84] In particular, as another co-author of the Chief Justices' brief observed, although *Caperton* may permit more due process-based recusal arguments than could have been made prior to June 2009, parties seeking recusal have always possessed the option of seeking disqualification

---

governs the inquiry into whether due process has been violated. At other junctures, the majority states that something more (probability of bias as opposed to reasonable question of impartiality) is required to support recusal on due process grounds as opposed to nonconstitutional recusal.

81. *See id.* at 822 (stating that a serious risk of bias exists when financial or electoral support is provided while a case [is] "pending or imminent").

82. *Caperton Ruling May Spur States to Enhance Their Process for Judges' Recusal*, 25 LAW. MAN. ON PROF. CONDUCT (ABA/BNA) 335 (2009) (quoting University of Indiana law professor Charles Geyh).

83. *Id.* (quoting Phillips).

84. *Id.* (quoting Georgetown law professor Roy Schotland).

based on the ABA Model Code or federal statute,[85] both of which provide broader grounds and a lower threshold for recusal.

B. The Dissenters' Perspective in Caperton

Notwithstanding its rather restrained approach to the problem of when failures of judicial disqualification violate due process, *Caperton* divided the Court, engendering dissents by Chief Justice Roberts (joined by Justices Scalia, Thomas, and Alito)[86] and Justice Scalia.[87] The dissenters appear to have a dramatically different view of human nature and the risk that a judge will be influenced by even massive political and economic support by a litigant appearing before the judge. Largely, however, the Roberts dissent attacks the majority approach as too indeterminate and unpredictable,[88] which the dissent contends is a sufficient problem to augur in favor of refusing to intervene in state court disqualification decisions of this type, no matter how bad it may look to a casual newspaper reader.[89]

In his dissent, Chief Justice Roberts outlines a long series of particular questions. Notwithstanding the important line-drawing point at the center of the dissent, it appears that all of these forty questions can be adequately addressed.[90] Although precise lines

---

85. *Id.* (quoting Washington, D.C. attorney George Patton, Jr.).

86. *Caperton,* 129 S. Ct. at 2267 (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., dissenting).

87. *Id.* at 2274 (Scalia, J., dissenting).

88. *See id.* at 2269 (Roberts, C.J., dissenting) ("[A]t the most basic level, it is unclear whether the new probability of bias standard is somehow limited to financial support in judicial elections, or applies to judicial recusal questions."). Chief Justice Roberts also noted "other fundamental questions as well" and listed forty such questions, eighty if one counts subparts. *Id.* at 2269–74; *see* discussion *supra* note .

89. *Id.* at 2267 ("The Court's new 'rule' provides no guidance to judges and litigants about when recusal will be constitutionally required. This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.").

90. *See* Jeffrey W. Stempel, *Playing Forty Questions: A Brief Response to Justice Roberts' Concerns in* Caperton *and Some Tentative Answers About Operationalizing Judicial Recusal and Due Process*, 39 SOUTHWESTERN L. REV. (forthcoming Dec. 2009) (responding to Roberts's questions); *see also Caperton Ruling May Spur States*, *supra* note , at 5 (law professor Charles Geyh, a Reporter for the 2007 ABA Model Judicial Code, describing concerns raised in the Roberts dissent questions as "alarmist," contending there is only "remote" risk of

cannot be drawn in the absence of concrete cases, a series of presumptive guidelines suggest themselves for application of due process disqualification.[91] One might also criticize the Roberts dissent for engaging in a bit of "straw man" argumentation[92] in that it announces an unnecessary goal (laying out an encyclopedic view of due process qualification that enunciates particularized rules of application for every conceivable future dispute on the matter)[93] and then criticizes the majority for not meeting the dissenters' perhaps unwise goal. In another context, judicial conservatives like Justices

---

difficulties concerning the dissenters); *id.* at 4 (law professor Schotland viewing dissent's prediction of doom as "preposterous" but conceding that the Roberts dissent posed some reasonable questions that may need to be answered in future cases).

91. *See* Stempel, *supra* note , at text accompanying notes 81–85 (laying out recusal guidelines including "where a judge had a 'direct, substantial pecuniary interest' in a case, . . . a financial interest in the outcome of a case," or where a judge was challenged "because of a conflict arising from his participation in an earlier proceeding").

92. Straw man is defined as "[a] tenuous and exaggerated counterargument that an advocate puts forth for the sole purpose of disproving it." BLACK'S LAW DICTIONARY 1461 (8th ed. 2004). Having erected a straw man that is less attractive or compelling than the actual argument opposed, the speaker then proceeds to "knock down" this weaker target but in doing so is largely destroying something other than the argument that was supposed to be at issue.

93. During the past decade, the concept of judicial minimalism has gained a substantial following. *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) (exploring the connection between judicial minimalism and democratic self-government); Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454 (2000) (explaining that a resurgence in judicial minimalism has been endorsed by former and current judges and has sparked scholarly debate); Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298 (1998) (explaining the virtues of judicial minimalism). The concept has also become part of the public discussion surrounding Judge Sonia Sotomayor's nomination to the U.S. Supreme Court. *See, e.g.*, David D. Kirkpatrick, *Judge's Mentor: Part Guide, Part Foil*, N.Y. TIMES, June 22, 2009, at A1 (portraying Judge Sotomayor as a judicial minimalist and quoting former Yale Law Dean and Second Circuit Judge Guido Calabresi, who described Sotomayor's approach in a controversial case as one of "judicial minimalism"). This is an image the Obama administration appeared interested in promoting in order to help her ultimately successful confirmation by refuting charges that she was a judicial activist. *See* Richard Brust, *No More Kabuki Confirmations*, A.B.A. J. Oct. 2009 at 39 (noting emphasis in Sotomayor confirmation and others in presenting nominee as simply work-a-day judge following the law).

Roberts, Scalia, Thomas, and Alito might well label such a project as an impermissible advisory opinion.[94]

In addition to questioning the feasibility of Supreme Court policing of campaign-related state court failures to recuse, the Roberts dissent is a utilitarian attack, contending that whatever benefit is derived from correcting Justice Benjamin's ethical myopia is outweighed by the anticipated avalanche of less meritorious disqualification motions, both because it will add to judicial workload and because it will create in the public unfounded concern about the neutrality of judges.[95] Concluding, Chief Justice Roberts expressed his view that "opening the door to [due process-based] recusal claims" based on an "amorphous 'probability of bias,' will itself bring our judicial system into undeserved disrepute, and

---

94. Under the ground rules of justiciability, courts (in particular the U.S. Supreme Court), are to refrain from rendering advisory opinions. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 2.12 (7th ed. 2004) (providing overview of justiciability doctrines and general prohibition on advisory opinions). Conservative jurists are generally viewed as particularly supportive of this doctrine because it tends to reduce the degree to which judicial decisions may amplify or contradict actions of the legislative or executive branch. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962) (prominent conservative law professor argues for use of justiciability and related doctrines to prevent Court from becoming involved in policy choices better left to other branches of government); RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 328 (1997) (noting Scalia's use of doctrines such as justiciability to reduce federal court involvement in cases involving issues of public policy); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1204–05 (2002) (applying this analysis to "institutional" conservative judges but finding that "political" conservative justice may be quite willing to interfere with legislation they oppose ideologically). *But see* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL. L. REV. 393, 458–60 (1996) (noting that during New Deal era liberal justices invoked justiciability concepts in attempt to restrain Supreme Court from interfering with legislation); Daniel C. Hulsebosch, *The New Deal Court: Emergence of a New Reason*, 90 COLUM. L. REV. 1973, 2016 (1990) (same).

95. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2267, 2272–73 (2009) (Roberts, C.J., dissenting) (stressing presumption of judicial impartiality and need to foster respect for courts as well as citing "cautionary tale" of Court's short-lived willingness to permit double jeopardy attacks in civil litigation, leading to many novel claims that forced retreat on the issue and confinement of double jeopardy issues to criminal proceedings).

diminish the confidence of the American people in the fairness and integrity of their courts."[96]

Justice Scalia's lone dissent expressed similar cost–benefit concerns in more strident terms. Rejecting the contention that there was a net benefit to setting aside the tainted Massey victory, Justice Scalia argued that the majority "decision will have the opposite effect."[97] He contended, without benefit of any cited empirical evidence, that:

> [w]hat above all else is eroding public confidence in the Nation's judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice.[98]

According to Justice Scalia, the majority opinion "will reinforce that perception, adding to the fast arsenal of lawyerly gambits what will come to be known as the *Caperton* claim"[99] producing an attendant sharp rise in disputing costs and further drain on the judicial system.[100] To Justice Scalia, "[t]he relevant question . . . is whether we do more good than harm by seeking to correct this imperfection through expansion of our constitutional mandate in a manner ungoverned by any discernable rule [and the] answer is obvious."[101]

---

96. *Id.* at 2274.

97. *Id.* at 2274–75 (Scalia, J., dissenting).

98. *Id.* at 2274.

99. *Id.*

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

101. *Id.* at 2275.

C. *The Unpersuasive Criticisms of* Caperton

Although commentators generally approved the *Caperton* holding,[102] several prominent commentators, echoing the arguments of the dissents, challenged its prudence and practicality, as well as the correctness of its decision to vacate the West Virginia Supreme Court's decision in which the justice receiving $3 million in campaign support cast the deciding vote.[103] Initial criticisms of

---

102. *See, e.g.*, Editorial, *Honest Justice*, N.Y. TIMES, June 9, 2009, at A22 (praising *Caperton* holding, its "recognition of the threat posed by outsize contributions," and its "crucial statement that judges and justice are not for sale" while finding problems raised by Roberts dissent "exaggerated"); Editorial, *No tolerance for bias; Supreme Court issues sound ruling that instructs judges to remain impartial*, LAS VEGAS SUN, June 11, 2009, at 4 (arguing that "Justice Anthony Kennedy, writing for the majority, used common sense" and praising the Court for being "appropriately careful not to put all contributors to judicial campaigns in the same basket. The decision that judges should recuse themselves applies only to cases in which an interested party was a substantial campaign contributor."); Editorial, *The Supreme Court raises the bar for judges*, L.A. TIMES, June 9, 2009, at A18 (approving *Caperton* holding and finding Roberts's dissent "wrong to bewail a decision that will force judges, including members of his own court, to take apparent conflicts of interest more seriously").

103. *See, e.g.*, Editorial, *Judges and 'Bias': The Supremes Trample on State Courts*, WALL ST. J., June 9, 2009, at A18 ("The march away from a credible, accountable judiciary took another leap yesterday."); Editorial, *Judicial Impartiality: Decision Could Cause More Problems than it Solves*, LAS VEGAS REV.-J., June 11, 2009, at 6B (*Caperton* "ruling unfortunately fails to define at what level recusal is mandatory—leaving the field wide open for all kinds of new court challenges as creative lawyers put 'judge shopping' on steroids."); Hoppy Kercheval, *The High Court Made Hash of the Bias Issue; Supreme Supremes Have Actually Eroded Confidence in Courts*, CHARLESTON DAILY MAIL, June 16, 2009, at A4 (arguing that the court's decision in *Caperton* was too vague to be a guide for recusal); Political Cartoon, LAS VEGAS REV.-J., June 9, 2009, at 9B (Underneath text stating "**News Item**: U.S. Supreme Court rules that elected judges must recuse themselves in cases where large campaign contributions might create the **perception** of bias" is picture of litigant attempting to enter courtroom but stopped at toll booth by guard stating, "Hey—it's now the only way the judge can rake in a few campaign bucks."); *see also* David Kihara, *Court Rules on Elected Judges*, LAS VEGAS REV.-J., June 9, 2009, at 1A (including phrases "*Opinion: Recusal might be need to avoid appearance of bias*" and "*Dissenters see downside to ruling*," and also attributing to State Bar president that "it's very common for parties to complain that a judge is biased, but it's rarely true," and quoting law professor that lawyers will "push the envelope" with *Caperton* recusal claims).

The *Wall Street Journal* editorial, in addition to trumpeting states' rights federalism ("[r]ecusal standards are better handled at the state level, where

individual judges are presumed to be impartial in their courtrooms. . . . Allowing federal courts to second-guess state judges opens the door to unprecedented federal meddling."), followed the Roberts dissent script of raising concerns of unpredictability and arbitrariness in the application of *Caperton*-style recusal:

> Heretofore, judges needed to recuse themselves on due process grounds only if they had a direct financial interest in a case, and in criminal contempt cases in which the judge provoked the original courtroom outburst. Under Justice Anthony Kennedy's *Caperton* standard, judges must now recuse if there is a "probability of bias." But this would seem to be open to, well, judicial interpretation. . . .
>
> In his dissent, Chief Justice John Roberts lists 40 questions that represent only "a few uncertainties that quickly come to mind." The majority opinion "requires state and federal judges simultaneously to act as political scientists (why did candidate X win the election?), economists (was the financial support disproportionate?) and psychologists (is there likely to be a debt of gratitude?)."
>
> [The majority's attempt] to limit any judicial chaos [by characterizing *Caperton* as a rare case is unpersuasive and] . . . support for this position by such opponents of judicial elections as the Brennan Center for Justice and the George Soros-funded Justice at Stake gives away the game.
>
> . . . The ultimate goal of these groups is to have all judges selected by a club of lawyers and insiders that makes judges less accountable to average citizens.

See Judges and 'Bias' supra, at A18.

Responding to the *Journal* editorial lies beyond the scope of this article, but the editorial demands at least a brief reply regarding its fallacious premise. According to the *Journal*, appointed judges are antidemocratic and deprive the "average citizen" of voice. But as reflected in the actual facts of *Caperton* (rather than the *Journal*'s imaginary view of the world), the mythical average citizen had far less to do with Justice Benjamin's election than did $3 million contributor Don Blankenship. Fears of insider dominance in an appointed judiciary are of course legitimate. But could any insider's club of the legal establishment be smaller than one wealthy corporate CEO? The *Journal*'s attack on *Caperton*, to use the *Journal*'s own words, "gives away the game."

See also Editorial, *Bias on the Bench; The Supreme Court weighs in on the corrosive impact of money in judicial elections*, WASH. POST, June 10, 2009, at A18 (taking a relatively moderate and balanced view that the *Caperton* decision "raised more questions than it answered, but it should serve as a call for states to tighten judicial ethics standards and rethink judicial elections altogether."); Dahlia Lithwick, *The Great* Caperton *Caper; The Supreme Court talks about judicial bias. Kinda.*, SLATE, June 8, 2009, http://www.slate.com/id/2220031 (noting apparent introspection of majority opinion and its retreat from traditional mythology that judging is a formal process detached from personal experiences and views, finding portion of the opinion "strikingly resonant with [Supreme Court

Caperton fall roughly into three categories: (1) states' rights federalism; (2) concerns about limits on free expression in elections; and (3) questions about practical problems with *Caperton*.

1. States' Rights Federalism

The states' rights critique argues that *Caperton*, by expanding federal constitutional scrutiny of state court proceedings via the Due Process Clause, intrudes too greatly into a core state function of adjudication. Justice Scalia's dissent states this most strongly[104] but there are elements in the Roberts dissent as well.[105] Justices Scalia and Thomas have been reasonably consistent on this point in that they also have steadily resisted the Court's expanded review of state court punitive damages judgments for compliance with due process.[106] In its simplest form, their view is that the Constitution should not be used as a roving license to correct state court error. While the occasional adjudication by judges who should have recused or the ridiculously large punitive damages award may be regrettable, these are seen by Justices Scalia and Thomas largely as

---

nominee Judge Sonia] Sotomayor's much-maligned Berkeley speech, about how the average judge goes about deciding a case," and asking whether including "empathy" in factors relevant to judicial outcomes can be far behind).

104. *See Caperton*, 129 S. Ct. at 2274–75 (Scalia, J., dissenting) ("[T]he principal consequence of today's decision is to create vast uncertainty with respect to a point of law that can be raised in all litigated cases in (at least) those 39 states that elect their judges. . . . The Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution.").

105. *See id.* at 2267–68 (Roberts, C.J., dissenting) ("Court's new 'rule' provides no guidance to judges and litigants about when recusal will be constitutionally required.").

106. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (Scalia, J., dissenting) ("[T]he Due Process Clause provides no substantive protections against 'excessive' or 'unreasonable' awards of punitive damages."); *id.* (Thomas, J., dissenting) ("I continue to believe that the Constitution does not constrain the size of punitive damages awards."); BMW of N. Am. v. Gore, 517 U.S. 559, 598 (1996) (Scalia, J., joined by Thomas, J., dissenting) ("Today we see the latest manifestation of this Court's recent and increasingly insistent 'concern about punitive damages that run wild.' Since the Constitution does not make that concern any of our business, the Court's activities in this area are an unjustified incursion into the province of state governments." (internal citation omitted)).

mere error—and the U.S. Supreme Court's role is not to correct error but to resolve questions of federal and constitutional law.[107]

The Scalia–Thomas perspective has much to recommend it and may strike a particularly responsive chord with those who found the Court's punitive damages precedents problematic.[108] There are even some signs that the Court, which intervened to save large businesses from punitive damages awards it disliked,[109] has been partially moved by their concerns. The Court recently declined to review an $80 million punitive damages award in a tobacco liability case after initially expressing interest.[110] Roving Court intervention pursuant to the Due Process Clause could, at worst, become the substitution of the judgment of five justices for that of an entire state court system (jury, trial judge, appellate panel, and state supreme court). Even if prudently invoked, due process review on what essentially are fairness grounds arguably misapplies scarce judicial resources.

---

107. *See, e.g.*, *BMW*, 517 U.S. at 598 (Scalia, J., joined by Thomas, J., dissenting) (finding that the Fourteenth Amendment does not guarantee reasonable damages); *State Farm*, 538 U.S. at 429–30 (Scalia & Thomas, JJ., dissenting) (finding no limit to punitive damages in the constitution).

108. *See* Thomas Galligan, Jr., *Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence and Punishment*, 71 TENN. L. REV. 117 (2003) (criticizing Court's foray into punitive damages field); *see also* JEFFREY W. STEMPEL, LITIGATION ROAD: THE STORY OF CAMPBELL V. STATE FARM chs. 22–25 (2008) (suggesting that Court's decision to vacate large punitive damages award for insurer bad faith failed to appreciate length, magnitude, willfulness, and wrongfulness of insurer's behavior).

109. *See* Exxon v. Baker, 128 S. Ct. 2605 (2008) (vacating $2.5 billion punitive damages award in oil spill case and, in essence, capping maximum award at $500 million); Philip Morris USA v. Williams, 549 U.S. 346 (2007) (vacating $79.5 million punitive damages award in tobacco product liability and fraud claim); *State Farm*, 538 U.S. at 408 (vacating $145 million punitive damages award against insurer in bad faith claim); *BMW*, 517 U.S. at 559 (vacating $4 million dollar punitive damages award against major automobile manufacturer for failing to disclose touch-up paint job on new car); Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) (overturning $5 million punitive damages award in product liability case).

110. *Phillip Morris,* 549 U.S. at 346. After the 2007 remand of this case, the Oregon Supreme Court reaffirmed its support for the jury's $80 million punitive damages award, prompting the tobacco company to again seek U.S. Supreme Court review. *See* Williams v. Phillip Morris Inc., 176 P.3d 1255, 1263 (Or. 2008) (reaffirming the damages award against the tobacco company). After granting certiorari, the Court subsequently dismissed the writ as improvidently granted. *See* Philip Morris USA Inc. v. Williams, 129 S. Ct. 1436 (2009) (mem.).

But if the states' rights critique of *Caperton* is correct, it argues for declining to ever overturn a state court decision on disqualification grounds. Once the Court's majority has determined that due process concerns permit some policing of state outcomes involving improperly participating jurists, the Rubicon has been crossed. The Court will be intervening in some state proceeding where a judge has failed to recuse. Indeed, the Court has been engaged in some form of this enterprise since the 1927 *Tumey v. Ohio* decision[111] and has steadily, if infrequently, intervened to vindicate fairness concerns for more than 80 years in cases like *Ward v. Monroeville*,[112] and *Aetna v. Lavoie*,[113] which arguably involved far less judicial self-interest and threat to public confidence than that faced by Justice Benjamin in *Caperton*.[114]

The issue is not whether the Due Process Clause permits the policing of judicial impartiality. That question is now settled, by however slim a vote, in favor of giving the Court at least the power to intervene. Logically as well, the guarantee of due process, if it is to mean anything, must mean that citizens of the states will not be subject to "kangaroo courts" where judges are viewed as compromised or even corrupt because of the substantial campaign support they have received from litigants or lawyers.[115]

---

111. *See* Tumey v. Ohio, 273 U.S. 510, 531–32 (1927) (finding due process violation where mayor presided over alcohol violations court where funds from fines he imposed funded the court and supplemented his salary).

112. *See* Ward v. Monroeville, 409 U.S. 57, 59–60 (1972) (finding due process violation where mayor presided over court that imposed fines that became part of general town funds and stating that mayor's pecuniary interest in case outcomes was too great even though his salary was not directly increased or funded by fines collected).

113. *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 824 (1986) (finding due process violation where Alabama Supreme Court justice whose case-deciding vote against insurer in bad faith case himself had pending bad faith action presenting similar issues in claim against different insurer and where justice could create favorable precedent that would enhance his monetary claim in violation of constitutional fairness).

114. *See also* Gibson v. Berryhill, 411 U.S. 564, 564–65 (1973) (holding that administrative board of optometrists had sufficient financial interest in cases involving competing optometrists to violate due process in board's adjudication of claims against competitors).

115. *See* Jeffrey W. Stempel, *Keeping Arbitrations From Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 256 (2007) (setting forth definition of term "kangaroo court" and discussing its origin).

The relevant question that should concern the judiciary going forward is the standard that should be used in guiding the Court's occasional interventions. *Caperton*'s "probability of bias" standard, although a seemingly higher threshold than simple error in recusal, is sufficiently malleable that it provides relatively little protection to the states' rights concerns of the dissenters. The Court nonetheless retains the power to upset a state court decision using an unacceptable risk of bias standard just as it could vacate a state court decision using a reasonable question as to impartiality standard.

Further, because the unacceptable risk of bias standard is apparently reserved only for due process disqualification matters rather than judicial recusal generally, it also creates the problem of applying a different standard, seldom deployed, while adoption of the more straightforward reasonable question as to impartiality, error-in-recusal standard provides the court with a far larger body of precedent for determining the propriety of a judge's refusal to recuse.

Adoption of the broader but more familiar "reasonable question as to impartiality" standard for assessing due process violations can provide greater consistency without leading to the flood of litigation feared by the *Caperton* dissenters. As outlined at greater length below, the power to intervene in non-disqualification cases is, like all the Supreme Court's power, almost entirely discretionary.[116] In *Caperton*, the majority tacitly used considerations for intervention suggested in the Chief Justices' brief.[117] If combined with the additional considerations set forth in this article,[118] the Court would possess a template adequate for continuing to vindicate due process fairness where necessary without becoming a court of omnibus error correction in disqualification matters.

---

116. *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 220–21 (8th ed. 2002) (stating that the Judiciary Act of 1925 gave the Supreme Court "firm control over the main body of its work").

117. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263–64 (2009) (utilizing the approach advocated in the chief justices' amicus brief of assessing factors such as relative size of campaign contribution, magnitude of election spending, and impact of contribution to determine whether campaign support was sufficient to raise due process concerns).

118. *See infra* Part IV.E.2.

2. Limits on Free Expression

The free expression objection to *Caperton* contends that the decision conflicts with Court precedent resisting certain types of electoral regulation due to First Amendment concerns. *Caperton* is thus seen as in some tension with *Buckley v. Valeo*;[119] *Republican Party of Minnesota v. White*, which struck down at least a portion of efforts to restrict campaign activity on constitutional grounds;[120] and *New York State Board of Elections v. Lopez Torres*, which upheld the challenged state procedures but reiterated the concerns expressed in *Buckley* and *White*.[121] These cases can be read as standing for the proposition that the constitutional right of free speech in the political arena makes all but the most narrowly tailored restrictions on campaign activity impermissible. In particular, because *Buckley v. Valeo* found campaign contributions to be a form of protected speech, it would seem to support Massey's argument that it should not be penalized (by having a favorable decision vacated) merely because it expressed its support for one of the jurists through campaign contributions.

The persuasiveness of the free expression critique of *Caperton* lies in the eye of the beholder. To those favoring wide open campaigning and tending to dislike any regulation of the process, *Caperton* is indeed in some tension with prior caselaw. However, unlike *New York Times Co. v. Sullivan*, which provided a zone of liability protection for the news media,[122] the "electoral freedom" First Amendment cases are regarded as problematic by many observers. Many have long harbored concerns that *Buckley v.*

---

119. *See* Buckley v. Valeo, 424 U.S. 1, 58 (1976) (striking down certain limits on campaign contributions and activity as violating the First Amendment).

120. *See* Republican Party of Minn. v. White, 536 U.S. 765, 789 (2002) (striking down Minnesota judicial code's "announce" clause prohibiting candidate from stating position on legal issues and past court decisions as violative of First Amendment).

121. *See* N.Y. State Bd. of Elections v. Lopez Torres, 128 S. Ct. 791, 798 (2008) (discussing a state's power to proscribe party use of primaries or conventions as "not without limits").

122. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (holding that First Amendment set constitutional limits on prosecution of defamation matters, including requirement that if defamation plaintiff is a public figure such as a politician, recovery can be had only if media defendant knew published statement defaming plaintiff was false or acted with "reckless disregard" of its truth or falsity).

Valeo was wrongly decided and helped foster significant electoral pathology, including special interest group domination of American politics by monied interests.[123] *Republican Party v. White*, like *Caperton*, was a 5–4 decision that many view as having accelerated the trend to judicial elections that look more like *All the King's Men*[124] or American Idol and less like reflective selection of serious jurists.[125] At a minimum, one can answer the free expression

---

123. *See, e.g.*, Robert F. Bauer, *The Demise of Reform:* Buckley v. Valeo, *the Courts and the "Corruption Rationale,"* 10 STAN. L. & POL'Y REV. 11 (1998) (pointing to Courts' refusal to close "loopholes" allowing "today's 'issue ads' financed by special interest groups with soft money"); Peter M. Shane, Commentary, *Back to the Future of the American State: Overruling* Buckley v. Valeo *and Other Madisonian Steps*, 57 U. PITT. L. REV. 443 (1996) (stating that contributions "facilitate corrupt quid pro quo arrangements between candidates and special interests"); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976) (asserting that the campaign reform legislation reviewed in *Buckley* can be seen as an attempt to free decision makers "from imperative obligations to special interest money-providers."). One commentator has even characterized *Buckley v. Valeo* as the U.S. Supreme Court's "worst" decision ever. Sanford Levinson, *Parliamentarianism, Progressivism, and 1937: Some Reservations About Professor West's Aspirational Constitution*, 88 NW. U. L. REV. 283, 292 (1993).

124. *See* ROBERT PENN WARREN, ALL THE KING'S MEN (1946) (describing rough-and-tumble world of electoral politics in novel presenting main character similar to Louisiana governor Huey P. Long); *see also* EDWIN O'CONNOR, THE LAST HURRAH (1956) (a thinly veiled portrayal of Boston Mayor James Michael Curley).

125. *See, e.g.*, Jessica Gall, *Living with* Republican Party of Minnesota v. White*: The Birth and Death of Judicial Campaign Speech Restrictions*, 13 COMM. L. & POL'Y 97 (2008) (discussing judicial canons regulating behavior of judicial candidates as a limitation on the information voters can obtain to make informed decisions); Leita Walker, *Protecting Judges from* White*'s Aftermath: How the Public-Employee Speech Doctrine Might Help Judges and the Courts in Which They Work*, 20 GEO. J. LEGAL ETHICS 371 (2007) (indicating that *White*'s holding that Minnesota's "announce clause" was unconstitutional threatens "a comprehensive loss of public faith in the capacity of elected judges" to act fairly and impartially). The dissents in *White*, of course, also take this view. *See* 536 U.S. at 803 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting) ("[D]isposition of this case on the flawed premise that the criteria for the election to judicial office should mirror the rules applicable to political elections is profoundly misguided."); *id.* at 821 (Ginsburg, J., joined by Stevens, Souter & Breyer, JJ., dissenting) ("For more than three-quarters of a century, States like Minnesota have endeavored, through experiment tested by experience, to balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary. . . . [Reasonable restrictions on judicial candidate speech are] an essential component in Minnesota's accommodation of

critique of *Caperton* by invoking the Due Process Clause, which has at least as much historical pedigree and power as the First Amendment.

But, like the states' rights concern about *Caperton*, the free expression issue affects only the question of whether the Supreme Court should even become involved with review of disqualification matters. Once the Court does so (as it has for approximately 80 years), some sort of standard for intervention is required. Requiring something more than mere error below arguably reduces such intervention and correspondingly reduces the posited free expression or states' rights "harm." But there is no way of knowing whether an "unacceptable risk of bias" standard will result in significantly fewer interventions than a "reasonable question as to impartiality" standard. Certainly, a reasonable reader of U.S. Supreme Court decisions can be forgiven for being unsure of whether *Caperton*'s undue risk of bias standard is in practice much different from a simple rule that improper failure to recuse violates due process—at least if the Court finds the failure sufficiently egregious.[126]

---

the complex and competing concerns in this sensitive area." (internal citation omitted)).

126. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 775–76 (2002) (noting the argument made by state defending limitations on judicial candidate speech and its supporters "that an impartial judge is essential to due process"). Justice Scalia, the author of *White*, then summarizes the precedents invoked as follows:

> Tumey v. Ohio, 273 U.S. 510, 523, 531–534 (1927) (judge violated due process by sitting in a case in which it would be in his financial interest to find against one of the parties); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822–825 (same); Ward v. Monroeville, 409 U.S. 57, 58–62 (1972) (same); Johnson v. Mississippi, 403 U.S. 212, 215–216 (1971) (per curiam) (judge violated due process by sitting in a case in which one of the parties was a previously successful litigant against him); Bracey v. Gramley, 520 U.S. 899, 905 (1997) (would violate due process if a judge was disposed to rule against defendants who did not bribe him in order to cover up the fact that he regularly ruled in favor of defendants who did bribe him); *In re* Murchison, 349 U.S. 133, 137–139 (1955) (judge violated due process by sitting in the criminal trial of defendant whom he had indicted).

Id. at 776 (parallel citations and italics removed).

Reviewing this summary of the established pre-*Caperton* case law concerning recusal required on due process grounds, one is struck by the difficulty of determining whether the Court has historically imposed due process recusal

In the end, it will still be the Court's case-specific exercise of discretion that determines whether cases like *Caperton* are rare or relatively common on the Court's docket. Weighed against any possible reduction in federal intrusion that would presumably please the *Caperton* dissenters are the questions of application surrounding the probability of bias standard, which also troubled the dissenters. If the Court is to be in the due process disqualification business in any event, employment of a yardstick for review that comports with the general recusal standard promises the prospect of more consistent application, perhaps with no greater frequency of Court intervention.

3. Practical Problems of Implementation

The practical problems critique of *Caperton*, which is the focus of the Roberts dissent,[127] argues more directly that expanded due process review of disqualification decisions will substantially increase the workload of the Supreme Court and other courts, in large part because of the alleged difficulty of determining when an unacceptable risk of actual bias exists. To a degree, the practical problems criticism of *Caperton* is an argument that the Court should not police state court disqualification failures at all.[128] Like the free expression and states' rights criticisms of *Caperton*, this part of the practical problems critique is not relevant to the question of what test should be used in determining when non-disqualification violates due process. Hard-core critics of *Caperton* do not want the Court in the recusal review business at all, save perhaps only in cases of very direct personal financial interest and matters in which the judge was also effectively the accuser of a litigant.[129]

---

because the judge's impartiality was subject to question or whether it was requiring that, beyond this, the reasonable lay viewer must also think that the judge is "probably" biased or prejudiced. If the *Caperton* dissenters (such as Justice Scalia) are correct that the due process recusal standard lacks sufficient clarity, this appears to be a problem that predates *Caperton*.

127. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2267–74 (2009) (Roberts, C.J., dissenting) (arguing that due process review of disqualification will increase court caseloads); *see also supra* Part III.B, discussing Roberts's dissent.

128. *See Caperton*, 129 S. Ct. at 2274 ("[S]ometimes the cure is worse than the disease.").

129. *See Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting) (joined by Scalia, Thomas, and Alito, JJ.) ("Until today, we have recognized exactly two situations in which the Federal *Due Process Clause* requires disqualification of a

But, as with the other critiques of *Caperton*, the hard-core practicality critique appears to be fighting a rearguard action. Although pre-*Caperton* cases had not dealt specifically with campaign support in judicial elections and arguably only involved direct financial stakes, cases like *Aetna v. Lavoie*[130] and *Gibson v. Berryhill*,[131] if read realistically, show that the Court has for decades been willing to set aside cases involving compromised jurists even if the judge's interest in a matter was attenuated and did not directly implicate payment of funds to the judge. Once the *Tumey* Court[132] correctly found that doubts about a judge's neutrality implicated the Due Process Clause, there was logically no turning back and the Court has correspondingly refused to turn back (although its frequent

---

judge: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts. Vaguer notions of bias or the appearance of bias were never a basis for disqualification, either at common law or under our constitutional precedents. Those issues were instead addressed by legislation or court rules. Today, however, the Court enlists the *Due Process Clause* to overturn a judge's failure to recuse because of a 'probability of bias.' Unlike the established grounds for disqualification, a 'probability of bias' cannot be defined in any limited way.") (italics in original); Editorial, *Judges and "Bias,"* WALL ST. J., June 9, 2009 at 18A (condemning *Caperton* decision as providing unprecedented and unwise federal oversight of state courts and representing liberal groups' agenda for seeking to eliminate elective judgeships); Bradley A. Smith & Jeff Patch, *Can Congress Regulate All Political Speech*, WALL ST. J., March 3, 2009 at 13A (contending that those seeking recusal of Justice Benjamin in *Caperton* improperly and unconstitutionally attempt to ban political participation through independent campaign expenditures). *See also* Editorial, *On the money: Our view—Efforts to buy justice should be thwarted*, ST. LOUIS POST-DISPATCH, June 9, 2009 at A12 (defending Caperton holding and accusing right-wing political forces "cheered on by the Federalist Society and The Wall Street Journal editorial page" of attempting to politicize judicial selection process).

130. *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986) (holding that state court justice's participation in case violated due process not because he was or would be directly compensated by either litigant but because his decision could result in court precedent favorable to him in a pending insurance coverage and bad faith case presenting similar issues).

131. *See* Gibson v. Berryhill, 411 U.S. 564, 581 (1973) (due process was violated where administrative board of optometrists conducted regulatory-disciplinary hearings involving competing optometrists).

132. *See* Tumey v. Ohio, 273 U.S. 510, 532 (1927), discussed *supra* at text accompanying notes --.

5–4 decisions on matters of judicial ethics do not place this beyond the realm of possibility).[133]

For purposes of this article, the relevant question regarding the practical problems attack on *Caperton*, like the states' rights and free expression attacks, is the content of the standard for determining when judicial non-disqualification violates due process. Of all the criticisms of *Caperton*, the practical problems attack is most easily accommodated by this article's suggestion that it be considered a due process problem whenever a state jurist erroneously fails to recuse. The potentially broader scope of this standard (as compared to *Caperton*'s probability of bias standard) may lead to more litigation, but the litigation can be more easily resolved because the standard is clearer, easier to apply, informed by more precedent and experience, and—like the probability of bias standard—still requires the support of at least four justices before it can become a basis for overturning a state court judgment.

Consequently, whatever the merits of the arguments of *Caperton* critics on the "should the Court be doing this at all?" question, there is no reason not to use the most efficacious test for policing state court non-disqualification once the Court has entered the thicket in the first place. At least until the working five-justice majority of *Caperton* shifts or the Court abandons due process disqualification review in general, it should use the better standard of reasonable question as to a state court jurist's impartiality.

D. The Correctness of the Caperton *Holding and the Legitimacy of Concerns about It*

Notwithstanding the criticisms, *Caperton* was clearly correctly decided on the merits of the case itself. Although, as J. Paul Getty famously remarked, "a billion dollars isn't what it used to be,"[134] three million dollars (the amount West Virginia Justice Brent Benjamin received in campaign support from Massey CEO Don

133. In addition to *Caperton*, other 5–4 decisions concerning judicial ethics include Republican Party of Minn. v. White, 536 U.S. 765 (2002); Liteky v. United States, 510 U.S. 540 (1994) (although there was no dissent, five justices were in the majority and four joined the concurring opinion); and Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988).

134. Stephanie Mansfield, *Billionaire Behavior*, ST. PETERSBURG TIMES, Nov. 8, 1992, at 5D.

Blankenship) remains a lot of money, particularly to a lawyer seeking election to statewide judicial office.[135] Fifty million dollars, the amount at stake in Massey's case, is even more money. Allowing Justice Benjamin to sit in judgment on Massey's appeal and to cast the deciding vote in favor of Massey looks too much like a bribe to be countenanced by a system that aspires to judicial impartiality. Even non-alarmist laypersons (who do not see every campaign contribution as a quid-for-future-quo) would reasonably be alarmed to see such large sums directed by an interested litigant to a single judge pivotal to the resolution of the litigant's large case. As well-put in a leading magazine, Justice Benjamin "found he was unbiased after deliberating with himself"; "[w]hat happened in West Virginia would have been unthinkable in most other countries."[136]

Lawyers, even if more jaded than lay observers about the world of judicial politics, might have additional reason to question the neutrality of Justice Benjamin (and the West Virginia Court 3–2 majority in the case). The majority's legal grounds for granting victory to Massey rested on what many, if not most, observers would deem a strained view of both res judicata and enforcement of arbitration clauses.[137] Although the majority's legal rationale for

---

135. Although Brent Benjamin, Esq., appears to have been a reasonably successful private practitioner, there is nothing in his background to suggest that he had the large personal wealth that certain "superlawyers" (e.g., the late Johnnie Cochran, Mark Geragos, Joe Jamail, Fred Bartlitt, or David Boies) might bring with them to an election campaign—the type of personal wealth that could arguably place them beyond potential dependence on campaign supporters.

136. *The* Caperton v. Massey *case: Not for sale*, THE ECONOMIST, June 13, 2009, at 80.

137. *See supra* note and accompanying text (discussing the forum selection and res judicata issues in *Caperton*).

On remand, the West Virginia Court declined to decide the res judicata issue and focused on the forum selection argument, again holding—this time by a 4–1 vote—that the choice of forum clause in the Wellmore–Harman Mining coal sales contract, which specified Buchanan County, Virginia, as the location for trial of any contract disputes, was sufficiently broad to require that all of Caperton's West Virginia claims be brought along with Harman Mining's earlier successful action against Wellmore for breach of contract. *See* Caperton v. A.T. Massey Coal. Co., Inc., 2009 W. Va. LEXIS 107 (W. Va., Nov. 12, 2009).

Although the Court's ruling is perhaps defensible, it is a very broad, literalist reading of a clause designed to ensure merely that all contract-related disputes between the parties be tried in a particular location. Although Wellmore's breach of the Harman Mining contract was a significant part of the Massey strategy for wresting the Harman Mine from Caperton, many would find it a stretch to label

saving Massey from a multi-million dollar adverse judgment may not have been completely laughable, neither was it clearly correct nor even within the mainstream of preclusion law or arbitration law.[138] Further, even the West Virginia Justices supporting Massey conceded that the trial record reflected predatory conduct by Massey.[139] In other words, Massey's victory was based on what a

---

Massey's entire campaign, including alleged bad faith and deceit and many actions apart from the breach of the Wellmore contract, to be a matter sufficiently "in connection with" the Harman coal sales contract to Wellmore that it required erasing Caperton's $50 million victory against Massey.

Cynics might be forgiven for concluding that the Court's resolute adherence to its earlier forum selection clause ruling was perhaps motivated by defensiveness about the U.S. Supreme Court's disqualification of Justice Benjamin and implicit indictment of the West Virginia Court's recusal practices.

138. *Id.*

139. *See* Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 265 (W. Va. 2008) (Albright, J., joined by Cookman, J., dissenting) (noting that entire state supreme court appeared to agree with trial court finding that Massey engaged in illegal predatory and fraudulent behavior but bemoaning the majority's unwillingness to state this explicitly in its second decision on the merits), *rev'd*, 129 S. Ct. 2252 (2009):

> This case is before the Court on rehearing granted after the five elected Justices on the Court, while disagreeing about the proper ultimate outcome of the case, unanimously agreed that defendant "**Massey's conduct warranted the type of judgment rendered [below] in this case.**"
>
> . . .
>
> Today's "new" opinion of the Court rests on the same indefensible legal grounds [regarding forum selection and res judicata] as the original opinion—supplemented by even more extended discussion of some of the points—but, strangely, omitting the clearly correct assertion in the original majority opinion that "**Massey's conduct warranted the type of judgment rendered [below] in this case.**" This time the majority stands silent regarding any disdain of Massey's conduct. Once again it bends the law to deny Plaintiffs the proper "**result that clearly appears to be justified.**"
>
> For the record, we wholeheartedly embrace the determination of this Court in the original, now withdrawn, opinion that "**Massey's conduct warranted the type of judgment rendered [below] in this case.**" Likewise, we do not shrink from saying without reservation that this Court should now affirm the judgment against the Massey Defendants for the reasons outlined in this dissent. Moreover, the failure of the Court now to even acknowledge the justice of Plaintiffs' case below, as it had in the previous opinion, underlines the result-driven nature of the current majority opinion.

layperson might label a "technicality" unrelated to the merits. Observers, both legal and lay, could thus reasonably wonder whether Massey's West Virginia victory was the product of showering so much cash upon Justice Benjamin.

But, just as hard cases can make bad law, easy cases can arguably do the same, a point stressed by the dissenters[140] and their allies in the media and the public.[141] Even if one concedes that the facts of *Caperton* are sufficiently outrageous to cry out for intervention by the Court, one can credibly argue that the cure of the Court's intervention could be worse overall than the disease of perceived judicial bias. Put another way: just because Justice Benjamin made a bad mistake does not necessarily mean that the system as a whole is awash in such ethical lapses. Permitting the Court to episodically intervene on due process grounds may thus, at a minimum, be administrative overkill, leading to unwarranted logistical burdens on the system (e.g., de rigour claims of failure to recuse, weak certiorari petitions, increased cost and delay). Beyond this, the "I know it when I see it" quality of the *Caperton* test for due process recusal may encourage unwise substantive second-guessing by the Court merely because the challenged decision reached a result disfavored by five members of the court (or at least review if four members of the Court held such concerns).

Although these criticisms of *Caperton* are justified, they are also overwrought. Although the Roberts dissent lists some forty questions largely attacking the practicality of the *Caperton* test (eighty questions if one counts subparts), this exercise in Monday

---

Id. (internal citations omitted).

140. As the Roberts dissent stated:

> [E]xtreme cases often test the bounds of established legal principles. There is a cost to yielding to the desire to correct the extreme case, rather than adhering to the legal principle. That cost has been demonstrated so often that it is captured in a legal aphorism: "Hard cases make bad law."

Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2272 (2009) (Roberts, C.J., dissenting).

141. *See, e.g.*, Joshua Mayes, *Elected Judges Under Fire: New Supreme Court Case Expands Grounds for Judicial Recusal*, MONDAQ, July 20, 2009 (discussing *Caperton*'s expansion of bases for judicial recusal).

morning quarterbacking largely submits to reasonable answers.[142] While the *Caperton* approach cannot be reduced to a robotic formula, most fair readers of the opinion understand what it means. Henceforth, a state judge or justice should be reluctant to sit on any case involving the litigant or a closely interested party where that person or entity has been a major campaign supporter of the jurist in question—or at least more reluctant than before *Caperton*.[143]

Consequently, much of the criticism of *Caperton* based on practical application and consistency should be viewed as insufficient to undermine the decision, and certainly insufficient to suggest that it should have come out the other way. But it nonetheless should be acknowledged that *Caperton*'s standard for invoking the Due Process Clause could be clearer. By adopting a new test for due process disqualification, *Caperton* probably will spur more disqualification litigation, some of it strategic rather than valid. But the response to these fears should not be retreat from the goal of judicial neutrality. More constructively, the Court can clarify *Caperton*'s application through a few well-chosen decisions providing guidance on due process-based constitutionally required recusal as well as consistently and quickly denying certiorari petitions based on strained recusal arguments.

IV. MAKING *CAPERTON* BETTER THROUGH CLARITY AND EXPANSION RATHER THAN RETRENCHMENT

A. The Value of Harmonizing Constitution-Based Disqualification and Recusal Based on Rule or Statute

Rather than being criticized as too great a federal constitutional intervention in the state judiciary, observers should

142. *See* Stempel, *Forty Questions*, *supra* note , at text accompanying notes 75–215.

143. *See Caperton Ruling May Spur States*, *supra* note ; *The* Caperton v. Massey *case: Not for sale*, *supra* note (stating that *Caperton*, whatever its ambiguity, will make judges more reluctant to sit on cases affecting large campaign contributors); *see also* Amanda Bronstad, *Stage Set for Litigation Over Judicial Recusal*, NAT'L L.J., June 22, 2009, at 1 (same, but emphasizing uncertainty of decision, tension with Court's First Amendment precedent, and likelihood of additional litigation to test the limits of *Caperton*).

recognize that *Caperton*'s tentative and case-specific approach did not go far enough and failed to enunciate the type of more sweeping due process recusal standard necessary to restore and maintain confidence in state judiciaries. The past twenty years have witnessed a disturbing increase in expensive, highly electioneered state judicial races in which under-informed voters in low-turnout contests are subjected to misleading campaign advertisements largely financed by interest groups. Money has begun to talk in a disturbing dialect in state judicial elections.[144]

What is needed is not a cautious or reluctant *Caperton* doctrine but one that matches well with sound prevailing attitudes on judicial recusal as expressed in the 2007 ABA Code of Judicial Conduct. Due process-based recusal should not only be available when there is an objective probability of bias in a judge, but should be available whenever the judge's impartiality may be reasonably questioned, in particular whenever the challenged judge has received inordinate campaign support from a litigant, lawyer, or entity highly interested in the outcome of a pending case.

The standards of Rule 2.11 of the Model Judicial Code and federal disqualification law set forth in 28 U.S.C. § 455(a) should be harmonized with the Constitution's mandate that state action (and adjudication is, of course, state action) accord disputants due process

144. *See The* Caperton v. Massey *case; Not for sale*, *supra* note ("Between 2000 and 2007 state Supreme Court contests raised $168 [million], more than twice the amount raised in the 1990s."); Terry Carter, *Mud and Money: Judicial Elections Turn to Big Bucks and Nasty Tactics*, 91 A.B.A.J. 40, Feb. 2005, at 40 (noting national epidemic of expensive, shrill, and misleading judicial election campaigns but spotlighting McGraw–Benjamin race); Brad McElhinny, *State Bar May Advise End to Judicial Elections*, CHARLESTON DAILY MAIL, July 20, 2005, at P1C (describing McGraw–Benjamin race as "the most expensive and possibly the nastiest in state history."); Paul J. Nyden, *Court Race Nation's Most Negative: Two-fifths of TV Attack Ads in Battles for Bench Aired in W. Va., Study Says*, CHARLESTON GAZETTE, June 28, 2005, at 1C (reporting study by NYU Law School Brennan Center for Justice and Institute for Money in Politics finding forty-three percent of all attack ads in judicial races in America in 2004 were aired in West Virginia); Kavan Peterson, *Costs of judicial races stirs reformers*, STATELINE.ORG, Aug. 5, 2005, http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=47067 (noting that West Virginia "is considering scrapping judicial elections altogether after state voters were bombarded by more than 4,000 TV attack ads in 2004 during the most expensive high court race in state history," and that the executive director of West Virginia state bar had stated that "[n]o one in West Virginia was pleased with the kind of campaigning we saw in last year's Supreme Court race").

of the law. The solution to the *Caperton* dissenters' operational concerns lies in recognizing that all recusal errors violate due process and that all such mistakes by the state bench are at least potentially subject to reversal by the U.S. Supreme Court on due process grounds.

At first glance, this proposition may seem excessive. The *Caperton* majority took pains to state that it regarded the Due Process Clause as having less expansive reach than federal and state law regarding judicial disqualification.[145] As outlined by the majority, Congress and the states are free to require recusal even where failure to require disqualification would not rise to the level of a due process violation.[146] To illustrate, 28 U.S.C. § 455(a) and Rule 2.11 of the Model Judicial Code both require a judge to step aside if his or her impartiality "might be reasonably questioned."[147] However, under *Caperton*, a judge's failure to properly apply this standard does not rise to the level of a due process violation unless there is not only a reasonable question as to the judge's impartiality but also a probability or unacceptable risk that the non-recusing judge is also in fact biased or prejudiced.

The *Caperton* standard is thus too skittish about interfering in state judicial miscarriages of justice because it fails to acknowledge an essential truth: when a party's claim is heard by a judge who improperly failed to recuse, that party has been denied due process even if the erring judge's participation does not create the probability of actual bias. It is enough that the erring judge's impartiality was subject to reasonable question and yet the judge continued to participate in the case. Now that the "no reasonable question regarding impartiality" standard has governed disqualification for more than thirty-five years, the *Caperton* majority is incorrect to suggest that failure to meet this standard could somehow satisfy due process. To talk of a lower bar set by the Constitution as compared to essentially uniform national law (via state adoption of the Model

145. *See supra* Part III.A.

146. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2267 (2009) (noting that states may choose to adopt disqualification standards "more rigorous than due process requires" (quoting Republican Party of Minn. v. White, 536 U.S. 765, 794 (2002) (Kennedy, J., dissenting)) and that the Due Process Clause "demarks only the outer boundaries of judicial disqualification" (quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986))).

147. 28 U.S.C. § 455(a) (2008); ABA MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007).

Judicial Code) seems inapt and incorrect when the question is about judicial neutrality rather than amount of public benefits or length of a limitations period.

The U.S. Supreme Court's due process jurisprudence, although nuanced and reasonably complex, essentially devolves to the position that in order to satisfy due process, a litigant's claim or defense must be adjudicated by a neutral decision maker following uniform procedure even-handedly applied to the litigants.[148] The modern concept of a neutral decision maker is one whose impartiality is not subject to reasonable question. Where the judge's impartiality is subject to reasonable question, Section 455(a) and Rule 2.11 have been violated. When this occurs, the proceeding is by definition one lacking a neutral decision maker and the litigant has been denied a basic pillar of due process.

In any case involving a judge lacking neutrality as defined by the modern norm, due process is absent. Although the precise contours between procedural due process and substantive due process are often blurred, it seems inarguable that adjudication by a judge that erred in failing to disqualify violates procedural due process in that the aggrieved litigant did not receive the type of neutral tribunal guaranteed by the Constitution. A logical extension of this assessment therefore recognizes that there is a due process violation every time a disqualified judge nonetheless presides in a case.

B. Fear Not the Floodgates

Whether the Supreme Court wishes to intervene in every such case is yet another question. As a practical matter, there will always be strong de facto limits on *Caperton*-style review of judicial

148. *See* BARBARA ALLEN BABCOCK & TONI M. MASSARO, CIVIL PROCEDURE: CASES AND PROBLEMS 48–53 (2d ed. 2001) (exploring implication of having a neutral and passive decision maker); NOWAK & ROTUNDA, *supra* note , at chs. 10–11 (discussing constitutional issues regarding individual liberties and substantive due process); *see, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 271 (1970) ("[A]n impartial decision maker is essential."); Matthews v. Eldridge, 424 U.S. 319, 325 n.4 (1976) (citing *Goldberg*'s discussion of an impartial decision maker); *see also* STEPHEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN & THOMAS O. MAIN, CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 21–58 (2d ed. 2004) (reproducing and summarizing cases with illustrative commentary taking similar view regarding necessity of neutral decision maker to satisfy due process).

recusal decisions. The Court decides fewer than 100 cases a year[149] and has nearly complete control over its docket.[150] Only if four justices find non-recusal sufficiently outrageous will the Court grant certiorari and review the matter.[151] As the *Caperton* dissents reveal, four current justices would prefer that the Court never review such cases. Realistically, the Court will in the foreseeable future review only very suspicious, seemingly outrageous failures to recuse. Fairly debatable decisions declining disqualification are effectively immune from U.S. Supreme Court review.

Although this may disappoint those who see the system as too lax regarding recusal, it is almost a complete refutation of the dissenters' lament that *Caperton* will usher in a flood of certiorari petitions alleging failure to recuse sufficient to violate due process. Although there will indeed probably be an uptick in the number of such certiorari arguments, this creates at most a somewhat greater logistical burden on the Court, which is a small price to pay for making the Court and the Constitution available to police judicial impartiality in important or outrageous cases. Further, because the Court already has moved away from individual-Justice assessment of certiorari petitions through use of a "cert pool" in which all Justices but Justice Stevens participate,[152] the additional screening work per Justice or per chamber would seem minimal.

Consequently, moving from a "probability of bias or prejudice" or "unacceptable risk of bias" test for due process

---

149. *See* Supreme Court of the United States, Opinions, http://www.supremecourtus.gov/opinions/opinions.html (last visited Oct. 18, 2009) (providing, among other things, links to 2006–2009 opinions of the court, which when followed list 83 decisions in the OT 08 Term, 74 in the OT 07 Term, and 75 in the OT 06 Term).

150. *See* STERN ET AL., *supra* note 116, at 220–21; LexisNexis.com, Landmark Supreme Court Cases, http://wiki.lexisnexis.com/academic/index.php?title=Landmark_Supreme_Court_Cases (last visited Oct. 18, 2009) (stating that the court has discretionary review over all but a small number of cases where it has original jurisdiction).

151. *See* Jonathan Remy Nash, *The Majority that Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements*, 58 EMORY L.J. 831, 846–47 (2009) ("[A]t least four Justices must concur before the Court may hear most cases.").

152. David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 953 (2007); Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 630–31 (2009).

disqualification to a test asking whether the court erroneously applied applicable federal or state disqualification law is unlikely to unleash any greater number of recusal-based requests for certiorari because the *Caperton* test is not all that different from the "erroneous failure to recuse" test I advocate. To the extent there is no great difference in court workload under either standard, adoption of this article's suggested broader test can bring the benefits of consistency (the general recusal standard and the due process recusal standard would be the same) and greater predictability (there are many general recusal cases by which litigation outcomes can be predicted but comparatively few due process disqualification cases, making predictability problematic under that standard). Most important, however, shifting from the *Caperton* probability of bias standard to the error-in-recusal standard would signal greater systemic commitment to judicial neutrality. Even if, as a practical matter, only the most egregious failures to recuse will be heard by the high court, the possibility sets a standard requiring greater care throughout the judicial system.

If the legal system wants to give more than lip service to the idea of judicial neutrality, it should acknowledge that every erroneous recusal decision denies due process. A due process violation occurs when the judge presides over a case under circumstances where his or her impartiality is subject to reasonable question. The additional *Caperton* requirement of the "probability" of actual bias is unnecessary.

C. Procedural and Substantive Due Process Regarding Disqualification

Adjudication involving a judge who should have been disqualified from presiding violates both procedural and substantive due process. At a minimum, a disputant appearing before a disqualified judge has not had fair procedural process. These circumstances also violate substantive due process in that a litigant not only has the procedural right to a neutral forum but also that judicial neutrality is itself a substantive right of which litigants should not be divested.

I realize this is perhaps a radical assertion, one that if accepted poses some danger of expansive substantive due process review that might actually lead to some of the negative implications

outlined in the Roberts and Scalia dissents to the *Caperton* holding.[153] However, unless the Court is willing to repudiate its punitive damages precedents, my logic seems unassailable. The Court has now repeatedly stated that substantive due process permits the Court to overturn punitive damage awards that are the product of full and procedurally fair adjudication under applicable state law.[154] The Court has not been this blunt about the substantive due process basis for its punitive damages policing,[155] and one can argue that the punitive damages awards suffered from procedural irregularities are sufficient to justify the Court's intervention.[156] Fairly read, however,

---

153. *See supra* Part III.B.

154. *See supra* note and accompanying text.

155. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S 408, 416 (2003) (majority only mentioning that there are "procedural and substantive constitutional limitations" on punitive damages awards states can give); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 598–99 (1996) (Scalia, J., dissenting) ("I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against 'unfairness'—neither the unfairness of an excessive civil compensatory award, nor the unfairness of an 'unreasonable' punitive award. What the Fourteenth Amendment's procedural guarantee assures is an opportunity to contest the reasonableness of a damages judgment in state court . . . .").

156. For example, in the 2003 *Campbell* decision, discussed in notes and , *supra*, the Court vacated the $145 million punitive award against the insurer in part because the state courts had permitted plaintiffs to introduce evidence of defendant's wrongdoing in other states involving other types of insurance policies. *See* 538 U.S. at 422 ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."). This troubling assessment restricting the scope of judicial inquiry into defendant wrongdoing is arguably a procedural due process analysis and arguably could have been enough to support the Court's eradication of the punitive award. However, the *Campbell* opinion centers on setting forth a substantive template for due process review of punitive damages awards, most infamously the Court's admonishment that punitive assessments exceeding nine times the compensatory award were usually constitutionally infirm. *See id.* at 425 ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."); *see also* STEMPEL, *supra* note , at ch. 22 (summarizing and criticizing Court's analysis of procedural and substantive issues). As a whole, *Campbell* thus seems clearly to be a substantive due process opinion.

Other Supreme Court opinions striking down punitive damages on due process grounds also often have some procedural aspect as well. For example, the 2007 *Philip Morris v. Williams* decision directed substantial focus to the jury instructions used in the case. 549 U.S. 346, 352, 357 (2007); *see also supra* note . But *Williams* also contained substantial discussion of substantive due process

the Court's punitive damage due process cases appear to stand for the proposition that a state court litigation outcome violates due process if the end result is sufficiently unfair. This is a substantive due process argument (and pretty clear judicial activism), no matter how reluctant the Justices may be to admit it.

Procedural due process is fairness in the process by which a case is adjudicated.[157] If a statute or rule is under procedural due process review, the question is whether the law does not provide adequately fair process to a litigant.[158] Substantive due process means that the case outcome or legal regime affecting a litigant was substantively unfair, as the name implies.[159]

---

limitations on the size of punitive damages awards. *Id.* at 361 (Stevens, J., dissenting) ("[T]he Court should be 'reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.'" (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992))). In addition, *BMW*, the case that started the Court down the road of punitive damages review, appears not to have been based on any procedural deficiencies below but only on the Court's perceived unfairness of awarding a doctor $4 million because the paint on his BMW had been retouched. *See BMW*, 517 U.S. at 575–76 (stating that "elementary notions of fairness" indicate that the punitive damages award was "grossly excessive"); *see also supra* note .

157. *See* JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW 197–99 (6th ed. 2003) (outlining the tests for whether a violation of procedural due process has occurred, and defining key terms); NOWAK & ROTUNDA, *supra* note , § 10.6(a) (comparing procedural due process and substantive review); Mark T. Fennell, Note, *Preserving Process in the Wake of Policy: The Need for Appointed Counsel in Immigration Removal Proceedings*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 261, 269 (2009) (discussing the need for procedural reform in immigration representation because of currently unfair procedures).

158. NOWAK & ROTUNDA, *supra* note , § 10.6(a); *see* Kelly v. Wyman, 294 F. Supp. 893, 901 (S.D.N.Y. 1968) ("[W]e hold that due process requires an adequate hearing before termination of welfare benefits, and the fact that there is a later constitutionally fair proceeding does not alter the result."); Kimberly N. Brown, *Justiciable Generalized Grievances*, 68 MD. L. REV. 221, 258–59 (2008) (noting that a procedural due process violation can create an Article III case or controversy even without a showing of separate concrete harm to the plaintiff); Michelle M. Mello et al., *Policy Experimentation with Administrative Compensation for Medical Injury: Issues Under State Constitutional Law*, 45 HARV. J. ON LEGIS. 59, 73 (2008) (comparing the tests for procedural due process and equal protection).

159. NOWAK & ROTUNDA, *supra* note , § 10.6(a); *see* Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 519 (2008) (defining substantive due process and discussing how federal courts can use substantive due process review as a layer of appeal over state courts).

Advocates of limited federal constitutional intrusion into state matters may resist any sort of procedural due process review but are generally more concerned about case-specific review, as this puts the Supreme Court in the position of acting as another layer of appeal over state courts, while due process review of the face of a statute is a more generalized, arguably less intrusive, form of due process scrutiny.[160] Generally, advocates of constitutional restraint are more troubled by the use of substantive due process than of procedural due process.[161] The latter inquiry is less intrusive in that it only insists that states operate a procedurally fair system, without becoming involved in the outcomes that emerge from that procedurally fair system. By contrast, a substantive due process inquiry asks not only whether a litigant received a fair process but also evaluates the case result and sets it aside if it is deemed sufficiently substantively unfair.

Substantive due process review of state law received a particularly bad name because of its use in the late nineteenth and early twentieth century to strike down progressive social legislation on the ground that this violated the substantive constitutional rights of the regulated, including the "right" of workers to toil for endless hours under unsafe conditions for low pay.[162] The apogee of this use of substantive due process is generally seen as *Lochner v. New York*, a case in which the Court used substantive due process to strike down a labor law modestly protective of workers.[163] Within a few

---

160. NOWAK & ROTUNDA, *supra* note , § 10.6.

161. NOWAK & ROTUNDA, *supra* note , §10.6; *see* ROBERT M. COVER, OWEN M. FISS & JUDITH RESNIK, PROCEDURE 101 643 (1988) (noting that substantive due process has a "somewhat negative connotation"); William Ray Huhn, *In Defense of the Roosevelt Court*, 2 FLA. A & M U. L. REV. 1, 25 n.136 (2007) (calling substantive due process "an oxymoron of the law"); Herbert L. Packer, *The Aims of the Criminal Law Revisited: A Plea for a New Look at "Substantive Due Process,"* 44 S. CAL. L. REV. 490, 490 (1971) ("That 'substantive due process' is a dirty phrase is well recognized by lawyers and law students.").

162. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1, 26 (1915) (holding unconstitutional a state law prohibiting railroad employees from becoming union members); Adair v. United States, 208 U.S. 161, 166, 180 (1908) (holding unconstitutional a similar federal law); Lochner v. New York, 198 U.S. 45, 62–64 (1905) (holding that the state abused its police power when it enacted a law limiting the number of hours a bakery employee could work per week because such a regulation violated due process rights by depriving citizens of their liberty to contract with employers for their livelihood).

163. 198 U.S. at 62–64.

years, the Court was moving away from this perspective, arguably rejecting it altogether by the New Deal era.[164] However, more recent case law is often characterized as sounding uncomfortable with notions of substantive due process. For example, *Roe v. Wade*, which struck down state abortion regulation,[165] is often characterized as a problematic substantive due process decision of the left akin to *Lochner*'s use of substantive due process by the right.[166] Other decisions upholding individual rights against state regulation, such as *Griswold v. Connecticut*, suggest that substantive due process did not disappear when *Lochner* fell from favor.[167]

Despite controversy over its use and a certain whose-ox-is-getting-gored quality to the debate over its use, judicial review on substantive due process grounds remains part of the constitutional fabric. But it is almost uniformly regarded as more problematic than judicial review based only on procedural due process grounds.[168]

---

164. *See* David N. Mayer, *The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract During the* Lochner *Era*, 36 HASTINGS CONST. L.Q. 217, 226 (2009) (stating that the New Deal "transformed substantive due process"); Stephen O'Hanlon, *Justice Kennedy's Short-Lived Libertarian Revolution: A Brief History of Supreme Court Libertarian Ideology*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 1, 22 (2008) (noting that the New Deal era ended the precedent of using substantive due process to guarantee freedom of contract); David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 859 (2009) (noting difference between the last 40 years of substantive due process decisions and pre-New Deal decisions).

165. Roe v. Wade, 410 U.S. 113, 166 (1973).

166. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 212 n.57 (1980) [hereinafter ELY, DEMOCRACY AND DISTRUST] (criticizing *Roe* on these grounds); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 944–45 (1973) (using the term "Lochnering" to describe the Court's decision in *Roe v. Wade* as "ramming its personal preferences down the country's throat"); V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 974 (2009) (referring to the *Lochner* and *Roe v. Wade* decisions as twins).

167. *See* Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (striking down Connecticut law banning use of contraceptives, even by married persons); BARRON & DIENES, *supra* note , at 195–234 (providing additional examples of use of substantive due process reasoning in support of individual rights in conflict with government regulation).

168. *See* ELY, DEMOCRACY AND DISTRUST, *supra* note , at 18 (referring to substantive due process as a "contradiction in terms"); John F. Basiak, Jr., *The Roberts Court and the Future of Substantive Due Process: The Demise of "Split-the-Difference" Jurisprudence?*, 28 WHITTIER L. REV. 861, 902 (2007) (arguing against substantive due process as judicial overreaching and lacking historical

The prevailing sentiment in the legal community is that judicial intervention to ensure fair procedure is necessary for a functional legal system but that, beyond this, the U.S. Supreme Court should be reluctant to second-guess the substantive outcomes that emerge from a procedurally adequate state legal system.[169]

The aversion to constitutional supervision of particular state court outcomes is part of the Roberts dissent[170] in *Caperton* and forms the focus of the Scalia dissent.[171] The vehemence of the Scalia dissent in particular suggests that he saw the *Caperton* majority as engaging in substantive due process review. One reasonable response to this concern is a judicial preference for making procedural due process the primary focus of review of disqualification decisions, using substantive due process only in extreme cases (such as *Caperton*). Better yet, as described below, *Caperton* could have been decided solely on procedural due process grounds in that the challenged jurist had unfettered, absolute, and final authority to evaluate his own impartiality,[172] a judge-as-king system that violates procedural due process.

1. Primarily a Problem of Procedure

Characterizing the right to a neutral magistrate as primarily one of procedural due process provides a means of placing de jure limits on *Caperton*-style review by the U.S. Supreme Court. If the right to a neutral judge is one of procedural due process, the constitutional requirement would seem to be satisfied whenever the disqualification decision in question is subject to sufficiently

---

foundation); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 121 (2005) (stating that the Supreme Court's use of substantive due process to overrule punitive damages awards "appears to be textually untethered").

169. *See generally* NOWAK & ROTUNDA, *supra* note , § 10.6 (providing an overview of procedural and substantive due process review); Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 833–34 (2003) (noting that even the Supreme Court does not seem completely comfortable with the notion of substantive due process); Zipursky, *supra* note , at 120 (discussing Justice Scalia's constitutional theory and his reproach of substantive due process cases).

170. *See supra* text accompanying notes – (summarizing Roberts dissent).

171. *See supra* text accompanying notes – (summarizing Scalia dissent).

172. *See supra* Parts II.B & II.C (discussing case history and Justice Benjamin's sole authority over the issue of his participation in the case).

disinterested review. To the extent states provide this, they would effectively insulate their disqualification decisions from review on procedural due process grounds.

Consider, for example, the typical disqualification case in which a litigant challenges a trial judge's impartiality. Although the trial judge himself makes the initial decision as to whether he will sit, that decision is subject to review through appeal, usually to both an intermediate appellate court and the state supreme court.[173] Although appellate review of the trial judge's decision normally must await final resolution of the case at the trial court level, an aggrieved litigant may also make an interlocutory challenge to the non-recusing judge through a writ of mandamus or prohibition.[174]

Increasingly, states also provide that the trial judge's decision refusing recusal will be examined by the chief judge of the district or by another disinterested judge in the district.[175] Thus, trial court recusal decisions, although heavily influenced by the target judge's own views as to his or her impartiality, are not in the final instance decided by the judge whose neutrality is at issue. It would thus seem that the litigant always receives procedural due process in such cases, even if the reviewing tribunal perpetuates a target judge's error in failing to order recusal. However, if the right to a neutral adjudicator is one of substantive due process, one can argue that even after layers of review, it is possible that the participation of a tainted judge violates the Due Process Clause.

---

173. *See* FLAMM, *supra* note , at 823–906 (providing state-by-state summary of disqualification for cause); Stempel, *supra* note , at 645–46 (discussing disqualification procedure as applied to trial judges and finding it acceptable).

174. *See* FLAMM, *supra* note , at 823–906 (providing review of state substantive recusal law); *Id.* at 959–82 (discussing appellate remedies, including extraordinary writs such as mandamus); ROGER S. HAYDOCK, DAVID F. HERR & JEFFREY W. STEMPEL, FUNDAMENTALS OF PRETRIAL LITIGATION § 11.5.2 (7th ed. 2008) (discussing motions for the disqualification of a judge); Stempel, *supra* note , at 634 ("Ordinarily . . . the unsuccessful recusal movant must wait until the conclusion of trial court proceedings and use the judge's recusal decision as a point for appeal from a loss on the merits. . . . [But] recusal denial can become a proper interlocutory appeal in three ways . . . .").

175. *See* Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 516–25 (2007) (stating that elected courts need to restore public trust by enacting recusal reform). This is, for example, the procedure in Nevada courts. *See* note 205, *infra*.

At the intermediate appellate level, a similar situation occurs. In most states, it appears that a challenge to an appellate judge's impartiality is first decided by the challenged judge and the decision is then reviewed by at least another judge or panel of the court if not the full court.[176] Beyond this, any state supreme court review of the case will necessarily include review of the disqualification determination if it reviews the case at all.[177] Because the challenged appellate judge does not have the final say concerning participation in the case, it would appear that procedural due process has been satisfied, even in cases where the challenged judge and the initially reviewing court have erred.

At the state supreme court level, recusal practice is more problematic. Many courts, perhaps a majority, appear to follow the U.S. Supreme Court's defective model of allowing the challenged judge to be the first and last word on impartiality.[178] Motions to recuse in such states are, as with the U.S. Supreme Court, addressed to the individual challenged justice, with no right to demand review before the entire court or even another justice or panel of the court.

---

176. *See* FLAMM, *supra* note , at 823–906 (outlining individual state requirements for judicial disqualification); Goldberg et al., *supra* note , at 516–25 ("Some courts require the challenged judge to transfer these motions immediately to a colleague . . . .").

177. *See, e.g.*, *In re* Anderson, 814 P.2d 773, 776 (Ariz. 1991) (finding that judge should not preside over cases involving a hospital because judge sat on hospital's board); Gillum v. United States, 613 A.2d 366, 369–70 (D.C. Cir. 1992) (per curiam) (requiring recusal of judge after a "heated" exchange between the judge and counsel during the trial); *In re* Blake, 912 So. 2d 907, 917–18 (Miss. 2005) (holding that a trial judge was so obviously biased against an attorney that she must disqualify herself from all seven cases on her docket involving the attorney); Commonwealth v. Stevenson, 393 A.2d 386, 394 (Pa. 1978) (finding that where record reveals ongoing bitter controversy between judge and defendant, recusal was required in summary contempt proceedings).

178. *See* Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 692 n.172 (2005) ("The problem is that, whether a justice is right or wrong, ultimately he or she is right by definition. Once a justice decides that he or she is fit to hear a case, there is no process for challenging that conclusion and it becomes the law . . . ."); Stempel, *supra* note , at 868–73 (explaining that though the "duty to sit" doctrine, which pushes judges to "resolve close disqualification issues against recusal," was eliminated in 1974, "a surprising number of relatively recent federal cases . . . treat the duty to sit as a continuingly viable concept."); Stempel, *supra* note , at 642 ("[E]ach Justice is an island, an autonomous final decisionmaker on questions of his or her own fitness to decide a matter impartially.").

In these situations, it would seem that the litigant moving for disqualification is always denied procedural due process due to error in recusal because the final determination is not made by a neutral magistrate, panel, or entity.

The problem is well-illustrated in *Caperton v. Massey* itself. As the Massey challenge to Caperton's $50 million lower court award made its way to the state supreme court, Caperton made at least three requests for recusal to Justice Benjamin.[179] All were denied—by Justice Benjamin himself—who also wrote at length to defend his non-recusal,[180] a response that tended to give credence to the challenge as Justice Benjamin "protested too much" and seemed excessively eager to continue to participate in an important case affecting his largest campaign benefactor.

Given the history of the *Caperton* litigation and the judicial politics of West Virginia, one can never be sure, but it seems a safe bet that Justice Benjamin would have been off the case had the full state supreme court (minus Justice Benjamin, of course) been permitted to rule on the question of the Benjamin disqualification. Even if the four other members of the West Virginia court had erred and denied the recusal motion, one can make a strong case that Caperton would have then at least received adequate procedural due process. His motion to recuse would have been evaluated by a group of four "neutral" state supreme court justices. Moral of the story: state supreme courts can largely eliminate the threat of *Caperton*-style U.S. Supreme Court interference in state court proceedings by simply providing a reasonably fair mechanism for deciding recusal motions, one in which the target justice is excluded from being a judge in his own disqualification case.

2. The Practical Problems of a Purely Procedural Approach

Although it is clearly better to have the full state supreme court decide a recusal question than to leave it exclusively in the hands of the challenged justice, one can make a convincing argument that the full court is not a completely disinterested body unaffected by bias or prejudice. One powerful influence on any state supreme

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

180. Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223 (W. Va. 2008), *rev'd*, 129 S. Ct. 2252 (2009).

court is collegiality. The justices are disinclined even to appear to question one another's judicial propriety.[181] Consequently, where a challenged justice is slow to grant credence to a recusal motion or opposes it altogether, this puts the other state justices in a most uncomfortable position. Should they disagree with the challenged justice, they are in the position of at least being perceived as having besmirched the integrity of a colleague. In any small organization working in close quarters, members will be disinclined to create these sorts of inter-court frictions.[182] As a result, full court review of a single justice's refusal to recuse may be a relatively weak check on the challenged justice's self-interest and self-perception.

One disturbing (to me, at least) example of such collegiality is the U.S. Supreme Court's implicit attitude to a high profile disqualification error made by then-Justice William Rehnquist. Justice Rehnquist refused to recuse himself in *Laird v. Tatum*, an action challenging Defense Department surveillance of civilians suspected of opposing the Vietnam War. [183] Prior to joining the Court, Justice Rehnquist had, as head of the Justice Department's Office of Legal Counsel ("OLC") in the Nixon Administration, been involved in assessing and approving the surveillance program's legality and had supported the program, both as OLC head and in testimony at his confirmation hearings.[184] Nonetheless, he refused to remove himself from the case when it reached the Supreme Court, casting a deciding vote that effectively ended the legal challenge to the surveillance program.[185]

---

181. *See* Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)*, 33 PEPP. L. REV. 575, 592 n.122 (2006) (arguing that putting recusal decisions to a vote among court members might "destroy the necessary collegiality of [the] small group"); R. Matthew Pearson, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV. 1799, 1835 (2005) ("En banc determination also risks inserting artificial animosity into a collegial and respectful environment by asking Justices to rule on the propriety of a colleague's conduct.").

182. *See supra* note .

183. *See* Laird v. Tatum, 408 U.S. 1 (1972) (decision on the merits dismissing claim on justiciability grounds); Laird v. Tatum, 409 U.S. 824 (1972) (mem.) (Justice Rehnquist explaining and defending his decision not to recuse in case).

184. Stempel, *supra* note , at 851–52.

185. *Id.*; Stempel, *supra* note , at 589–604.

In the aftermath of the case and criticism of his role, Justice Rehnquist drafted a memorandum attempting to defend his decision and sought comment from Chief Justice Warren Burger and Justices Byron White and Potter Stewart.[186] Although they varied in their advice about the wisdom of revisiting the issue in a written memorandum, all appeared to support Justice Rehnquist's decision to sit on the case.[187] After publication of the Rehnquist memorandum, Justice Powell sent a note of congratulatory approval.[188]

Unfortunately, however, Justice Rehnquist's participation in *Laird v. Tatum* was erroneous and indefensible, and his explanatory memorandum was misleading and unpersuasive.[189] Nonetheless, it

---

186. Stempel, *supra* note , at 858 n.126.

187. *See id.* at 813 (describing hand-written note from Justice Potter Stewart to "Bill" stating that he agreed with [Justice] "Byron" [White] that "publication of the [Rehnquist] memo [explaining and defending his decision not to recuse] would be basically healthy—it is informative, thoughtful, persuasive, and educational" although it will not "satisfy the *N.Y. Times*, *Washington Post*, or other critics" of Rehnquist's decision to participate in *Laird v. Tatum*). With all due respect to the well-regarded Justice Stewart, his assessment of the Rehnquist memorandum is clearly incorrect. The vast bulk of scholarly opinion has concluded that the Rehnquist participation in *Laird v. Tatum* was completely unjustified, primarily because of his involvement in the very conduct under review. *See* Stempel, *supra* note , at 851–63 (collecting assessments, including those of noted judicial ethics experts Stephen Gillers and Geoffrey Hazard); Stempel, *supra* note , at 589–632 (same plus finding additional flaws in Rehnquist memorandum). That Justice Stewart, even in a personal note, was not more willing to take issue with Justice Rehnquist's mistakes illustrates the difficulty of an isolated court reviewing the disqualification decisions of colleagues.

Worse, the Court continues to cite the Rehnquist memorandum in seeming obliviousness to its flaws and tainted history. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 777–78 (2002) (favorable citation to Rehnquist memorandum in majority opinion). In fairness to the Court and Justice Scalia, author of the *White* opinion, I note that the portion of the Rehnquist memorandum cited focused on a judge's general judicial philosophy, correctly concluding that it ordinarily was not a basis for disqualification. Not every word of the Rehnquist memorandum is wrong. But it remains to me odd and disturbing that the Court would continue to look for guidance in the largely disgraced work product of a single Justice making a very incorrect decision regarding recusal.

188. *See* Stempel, *supra* note , at 858 n.126 (describing hand-written note from Justice Lewis Powell that stated "your splendid memorandum on 'disqualification' constitutes a conclusive answer to the motion.").

189. *See id.* at 851–63 (discussing Justice Rehnquist's decision not to recuse in detail); Stempel, *supra* note , at 589–604 (first discussing and then criticizing that decision in detail).

received the de facto support of four justices, suggesting that even a very bad decision not to disqualify could have been rubber stamped had the Rehnquist recusal been reviewed by the full court.

Even in the *Caperton* opinion itself, one can see the impact of judicial collegiality. Justice Kennedy's majority opinion, despite its disapproval of what happened below, takes pains to dispel any notion that it is accusing Justice Benjamin of wrongdoing.[190] In particular, the majority tries to make clear that it does not see Justice Benjamin as having taken a bribe or having become embroiled in a quid-pro-quo arrangement with benefactor Blankenship.[191] Readers might conclude that this is merely good manners on Justice Kennedy's part and an aversion to kicking Justice Benjamin when he is down. But the *Caperton* majority opinion nonetheless suggests that jurists are very slow to make negative conclusions about one another. The dissenters, of course, essentially thought Justice Benjamin did nothing wrong,[192] another illustration of the practical reluctance judges have toward finding error or wrongdoing in another judge's disqualification.[193]

---

190. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263–64 (2009) ("Justice Benjamin was careful to address the recusal motions and explain his reasons why, on his view of the controlling standard, disqualification was not in order. In four separate opinions issued during the course of the appeal, he explained why no actual bias had been established. . . . [B]ased on the facts presented by Caperton, Justice Benjamin conducted a probing search into his actual motives and inclinations; and he found none to be improper. We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias."); *see also id.* at 2265 ("Justice Benjamin did undertake an extensive search for actual bias.").

191. *See id.* at 2262 ("Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected.").

192. *See supra* Part III.B .

193. The same problem was manifested in *Liljeberg v. Health Services Acquisition Corp.*, in which the Court narrowly (5–4) found disqualification required pursuant to 28 U.S.C. § 455 of a judge whose behavior as jurist and trustee of a university with a land deal at stake in litigation was eyebrow-raising to many, although not to the dissenting justices. 486 U.S. 847 (1988). Several years later, the trial judge in question was convicted of "bribery, conspiracy, and obstruction of justice in connection with his judicial duties" and sentenced to almost seven years imprisonment. STEPHEN GILLERS, REGULATION OF LAWYERS 602 (8th ed. 2009). *Liljeberg*, like *Caperton*, suggests that the Court is slow to think anything but the best about a judge under challenge.

The majority acknowledges, as would any reasonable observer, that $3 million is a lot of money.[194] But rather than blaming Benjamin for failing to see how receipt of such large sums made his participation in *Caperton* problematic, the *Caperton* majority blames Blankenship for injecting the specter of influence peddling into judicial elections.[195] "It takes two to tango" is a cliché, but one with some bite in this situation. Although Justice Benjamin could not prevent Blankenship individually or Blankenship-funded special interest groups from supporting the Benjamin candidacy, Justice Benjamin could have easily refused to assist Blankenship in overturning a $50 million liability.

Justice Benjamin deserves more than a little scorn. Instead, even the majority that found his participation to violate due process treated him with kid gloves. Worse yet, four members of the Court (Justices Roberts, Scalia, Thomas, and Alito) defended Justice Benjamin's grotesquely bad error in judgment. Although the U.S. Supreme Court's practice of giving each justice unfettered control over his or her participation in a case is close to disgraceful, the brutal, sad truth is that full Court review over the Court's own recusal matters might not change things much. If the Justices are this reluctant to criticize a state court judge they have never met, how likely are they to effectively police one another?

Likewise, although full state supreme court review of disqualification motions affecting individual justices would be an improvement over West Virginia's system, it should not be viewed as a panacea. Once again, evidence of the limits of this approach is right under our figurative noses. In *Caperton* itself, the West Virginia high court divided 3–2, with Justice Benjamin in the majority and the dissenters criticizing his decision to participate.[196] Consequently, the seemingly likely result of full state supreme court review in *Caperton* itself would have been a 2–2 deadlock concerning Justice Benjamin's participation, a result that would

194. *See Caperton*, 129 S. Ct. at 2257 ("To provide some perspective, Blankenship's $3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee.").

195. *Id.* at 2256–59 (directing most implicit criticism for problematic nature of case and 2004 West Virginia Supreme Court election at Blankenship as contributor and activist rather than at Justice Benjamin for failing to recuse).

196. *Id.* at 2258–59.

leave Justice Benjamin on the case notwithstanding the extreme facts supporting disqualification.

Moreover, in some cases, full state supreme court review of disqualification may produce the other extreme. Some members of the full court could have substantially different judicial views than the challenged justice and may wish to use the recusal motion as an opportunity to remove the challenged justice from the case for strategic reasons. Although the default cultural norm in courts and similar small organizations (e.g., law firms, faculties, legislatures, or city councils) is one of getting along and going along, the dynamic may occasionally shift to one of intense partisanship or personal dislike that creates the opposite effect. Instead of bending over backwards not to imply any ethical lapse in a colleague, some justices may grope to find reasons to support even a weak recusal motion.

For example, the Texas Supreme Court decisions of the 1990s produced a number of decisions reflecting sharp ideological splits.[197] Although a solid conservative working majority dominated court decisions of the decade, there was a vocal minority of liberals usually in dissent. The apparent leaders of the warring factions were Republican John Cornyn, a former state attorney general and current U.S. Senator generally regarded as one of the body's most conservative members,[198] and Democrat Lloyd Doggett, currently a U.S. Representative as liberal as Cornyn is conservative.[199] Their

197. *See* cases cited *infra* note .

198. Senator Cornyn attended St. Mary's School of Law in San Antonio, Texas, and received a Masters of Law from the University of Virginia Law School. United States Senator John Cornyn, Biography, http://cornyn.senate.gov/public/index.cfm?FuseAction=AboutSenatorCornyn.Biography (last visited Oct. 18, 2009). He served as a Texas District Court Judge as well as state attorney general and Texas Supreme Court Justice. *Id.* As a political figure, Cornyn has been a supporter of the OPEN Government Act, a reform of the Freedom of Information Act. *Id.* In his second year in the Senate, he served on the Deputy Whip team. *Id.* In the Senate, Cornyn has served as the Vice Chairman of the Senate Republican Conference as well as the Chairman of the National Republican Senatorial Committee. *Id.* Cornyn now serves on the Budget, Senate Finance, and Judiciary Committees. *Id.* The National Journal recently ranked Cornyn as the 17th most conservative member of the Senate. *Senate Ratings*, NAT'L J. MAG., Feb. 28, 2009, *available at* http://www.nationaljournal.com/njmagazine/cs_20090228_4726.php.

199. Congressman Doggett graduated from the University of Texas School of Law. Congressman Lloyd Doggett, About Lloyd Doggett, http://doggett.house.

opinions provide some sharp exchanges from which a neutral observer would rather quickly note their opposing world views.[200] Without implying that either man is particularly Machiavellian,[201] one can easily imagine that justices of such opposing views would be tempted to vote strategically on recusal matters in hopes of having a resulting court makeup more likely to render decisions to their liking. One could reasonably assume that a Cornyn-like judge would want to see a Doggett-like judge disqualified and vice versa, at least

---

gov/index.php?option=com_content&view=article&id=43&Itemid=54 (last visited Oct. 18, 2009). Afterwards, beginning at the age of twenty-six, Doggett served in the Texas Senate for 11 years. *Id.* While there, he helped to create the Texas Commission on Human Rights. *Id.* Doggett began serving on the Texas Supreme Court in 1988 and was elected to the House of Representatives in 1994. *Id.* He serves as a member of the House Budget Committee as well as a senior member of the House Ways and Means Committee. *Id.* On the Ways and Means Committee, Doggett fought the privatization of Social Security. *Id.* Doggett has been referred to as the "Lone Star antithesis of [GOP member Tom] DeLay." John Nichols, *Hammered*, NATION, Nov. 22, 2004, at 8.

200. *See, e.g.*, Union Bankers Ins. Co. v. Shelton, 889 S.W.2d 278, 286 (Tex. 1994) (Cornyn, J., dissenting in part) (Cornyn calling Doggett's majority opinion "just plain wrong" in a case involving a bad faith insurance dispute); Natividad v. Alexsis Inc., 875 S.W.2d 695 (Tex. 1994) (Doggett joining dissent from Cornyn's majority opinion holding that contractual privity is required for the duty of good faith and fair dealing to extend to an insurance company's adjuster); Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Dominguez, 873 S.W.2d 373, 377 (Tex. 1994) (Doggett, J., dissenting) (Doggett dissenting from Cornyn's majority holding that there was no evidence of bad faith denial on the part of the insurer and stating that "[t]his decision merely represents a predetermined result in search of a rationale").

201. Niccolo Machiavelli was a political adviser in Renaissance Italy who is generally viewed as amoral, unemotional, rational, and ruthless in part because he was thought willing to use most any means to achieve desired ends. *See* Peter R. Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. DISP. RESOL. (forthcoming 2009) (summary description of Machiavelli and his perceived legacy); Niccolo Machiavelli Biography, http://people.brandeis.edu/~teuber/machiavellibio.html (last visited Oct. 18, 2009) (providing biography and commentary of Machiavelli's life and works); *see also* NICCOLO MACHIAVELLI, THE PRINCE (Leo Paul S. de Alvarez trans., 1981) (1532) (providing guidance on how a prince can acquire a throne or retain power and advocating that the greatest moral good comes from having a stable state, even if cruel means must be used to achieve necessary ends). Arguably, Machiavelli has received an unduly negative reputation in that his views can be characterized more charitably. Nonetheless, the term "Machiavellian" has come to signify ruthless and calculating commitment to advancing one's personal agenda.

if a case was close and possessed at least some ideological dimension.

The 1990s also provided an example of a less ideological or political, but more personal, conflict. The Nevada Supreme Court was involved in an intense internal battle rooted in part in personality clashes and overtly launched when trial judge Jerry Carr Whitehead was accused of judicial improprieties.[202] To oversimplify, two members of the five-member Court sympathized with Judge Whitehead's plight, tended to believe he was innocent, and wished to limit public reporting of the investigation surrounding him, while two and sometimes three other justices viewed Judge Whitehead less favorably and sought greater public access of his and other judicial discipline proceedings.[203] The result was several years of backbiting among the justices, including battles over recusal that many saw as proxies reflecting the larger battle rather than dispassionate analysis of disqualification matters.[204]

---

202. *See* Mark Hansen, *Nevada Supreme Court Investigated: Ethics experts criticize its decision to stay disciplinary probe of Reno judge*, 80 A.B.A. J. 26, 26 (June 1994) (describing "legal battle" in Whitehead matter as "bitter"); Paul M. Barrett, *Discipline Case Divides Nevada's Supreme Court*, WALL ST. J., Jan. 22, 1996, at B1, col. 3 (noting throughout the article intense personal clashes of justices); sources cited in note 204, *infra*. In a footnote to history, Judge Whitehead also briefly achieved some notoriety as the trial judge in a well-publicized case in which claims against the rock group Judas Priest for allegedly causing the suicide of two fans was rejected by Whitehead and upheld by the Nevada Supreme Court. *See Court Ruling on Judas Priest Upheld*, BILLBOARD, June 12, 1993, at 81; *Rock band cleared in suicide*, DAILY VARIETY, June 1, 1993 at 6 (after four-week trial, Whitehead found that subliminal messages existed on group's "Stained Class" album but were unintentional and did not create liability for suicides). Judge Whitehead subsequently resigned from the bench and practiced as a successful mediator but continues on occasion to attract controversy. *See, e.g.*, A.D. Hopkins, *Ousted judge not forgotten*, LAS VEGAS REV.-J., Dec. 11, 2006, at 1B (seminar room named in honor of Whitehead at UNLV's Boyd School of Law at donor's request criticized by former Nevada Supreme Court Justice Robert Rose, who while on Court was part of anti-Whitehead faction of the Court).

203. *See* Barrett, *supra* note 202 and other sources cited in note 202 and *infra* note 204. *See also* Sean Whaley, *Springer ready to leave court*, LAS VEGAS REV.-J., Jan. 2, 1999, at 1B (retiring Justice Charles Springer, a member of the pro-Whitehead characterizes as "unfair and counterproductive" some reporting about the case, which article notes "split the court and gave its public image a black eye from which it has yet to fully recover.").

204. *See, e.g.*, Whitehead v. Nev. Comm'n on Judicial Discipline, 920 P.2d 491, 508 (Nev. 1996) (concluding that "the opinion and writ of prohibition issued by the three justices . . . are void and of no legal force or effect whatsoever"),

D. *Continuing Concern over Substantive Due Process and Disqualification*

Faced with the realistic limits of full state supreme court review of recusal matters, one can make a strong case that procedural due process requires that a neutral judicial body other than the state supreme court itself decide whether recusal is required. For example, the state supreme court could appoint a panel of judges to hear such motions. A state might also create a judicial disqualification commission that would hear such motions directed at supreme court justices. Although these mechanisms could pose state constitutional problems (particularly separation of powers if a non-judicial group is involved), they are well worth exploring as an alternative to allowing a usually tight-knit group of colleagues to sit in back-scratching judgment of one another.

But, despite the practical concerns surrounding recusal at the state supreme court level, it appears that with modest tweaking, the state judicial systems can largely avoid the *Caperton* problem—even if *Caperton* disqualification is made congruent with recusal under the ABA Judicial Code—simply by putting in place better mechanisms for reviewing the self-interested decision making of

---

stricken as void by Del Papa v. Steffen, 920 P.2d 489 (Nev. 1996); Whitehead v. Nev. Comm'n on Judicial Discipline, 893 P.2d 866, 946 (Nev. 1995) ("When a newspaper was asked to correct public misstatements, the request for journalistic fairness, quite remarkably, was used by the commission as a basis for trying to disqualify two members of this panel), *superseded by constitutional amendment*, NEV. CONST. art. VI, § 21(amended 1998), *as stated in* Mosley v. Nev. Comm'n on Judicial Discipline, 22 P.3d 655 (Nev. 2001); *see also* Stephen Magagnini, *Nevada's Top Court Hogtied by Feud: Justices Tangle Over Probe of Reno Judge*, SACRAMENTO BEE, Mar. 17, 1996, at A1 ("The court is split 3–2 over the judicial discipline case of Jerry Carr Whitehead, a Reno judge accused of bullying lawyers who wanted him removed from cases."); Ed Vogel, *High Court Rejects Attorney's Request*, LAS VEGAS REV.-J., Oct. 2, 1997, at 3B ("Fitzsimmons wanted [Justice Bob] Rose booted off a city of Las Vegas condemnation case involving her client, Whiteacre Investment Co. . . . [B]ut Justice Cliff Young, writing for the majority said the court 'simply cannot afford to further dissipate its limited resources on these disqualification matters.'"); Todd Woody, *Nevada's No-Holds-Barred Politics and Casino Culture has Made Serving on the State's Supreme Court a Dicey Proposition*, RECORDER (SAN FRANCISCO), Oct. 6, 1997, at 1 ("[H]erself deeply involved in the judicial jihads that have roiled Nevada's small legal community, Fitzsimmons currently is engaged in a running battle to disqualify Rose from the cases she represents due to his alleged "extreme animus" toward her.").

justices facing recusal motions.[205] Coupled with the generally good supervision of disqualification decisions made by lower court judges, this suggests that a broader form of constitutional due process disqualification consistent with Model Judicial Code recusal would rarely require *Caperton*-style intervention by the U.S. Supreme Court. Consequently, one can, with little effort, imagine a world where state courts treat judicial disqualification more seriously, with relatively little instance of U.S. Supreme Court supervision.

There still would remain the nagging problem of occasional miscarriages of justice in which a state supreme court (or a body

---

205. *See* Goldberg et al., *supra* note , at 526–32 (outlining procedural devices by which state courts can minimize the risk of error in denial of disqualification). A preliminary variant of this sort of review can take place if recusal motions at the trial level are decided in the first instance by a trial judge other than that under challenge. This can occur either in the first instance or as an intermediate check on the challenged judge's decision prior to any eventual appellate review. For example, in Nevada state court, recusal motions based exclusively on Canon 3(E) are in the first instance decided by the challenged judge while motions based on the disqualification statute (NEV. REV. STAT. §1.230, which differs from the "reasonable question as to impartiality" standard of the Judicial Code and requires "actual bias or prejudice" as well as covering the financial or family connections set forth in the Code) require an affidavit and are heard "by another judge agreed upon by the parties or, if they are unable to agree, by a judge appointed" by the district's chief judge, the chief judge, or the most senior judge of the district (where the chief judge is disqualified). NEV. REV. STAT. § 1.235(5)(b). Where there is only one judge in the district, a possibility in rural areas, the Supreme Court may hear statutorily based disqualification motions. NEV. REV. STAT. § 1.235(5)(b). Although judges hearing recusal motions under the Code based on reasonable question as to impartiality may of course simply recuse, where the judge refuses to recuse, the challenged judge's decision is then reviewed by the chief judge of the judicial district in a manner similar to that for statutory disqualification. *See* STATE BAR OF NEVADA, NEVADA CIVIL PRACTICE MANUAL § 2.09 (5th ed. 2001 & Supp. 2008) (Sal Gugino, Esq., Chapter author). Thereafter, of course, an alleged error in failing to recuse may be the subject of an appeal after final judgment or interlocutory review via a petition for mandamus. *See, e.g.*, People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd., 894 P.2d 337 (Nev. 1995). *See generally* NEVADA CIVIL PRACTICE MANUAL, *supra*, §§ 2.08, 2.09. In addition, Nevada provides each side in a civil action a right of peremptory challenge to the original assigned judge. *See* NEV. S. CT. R. 48.1(3) (regulating the procedure for a change of a judge by peremptory challenge); FLAMM, *supra* note , §§ 27.11, 28.30 (providing peremptory disqualification provisions for Nevada); *see also* NEV. REV. STAT. § 1.225(5) (2008) (stating that where state supreme court justice is disqualified, "a district judge shall be designated to sit in his place as provided in Section 4 of Article 6 of the Constitution of the State of Nevada").

reviewing the court's recusal decisions) refuses to disqualify a judge or justice who clearly had no business participating in a particular case. In these cases, it would appear that the disappointed litigant seeking recusal received full procedural due process but nonetheless was denied the fundamental right to have only impartial jurists involved in deciding the merits of the litigant's case. In these situations, one might reasonably view the litigant as having been denied substantive due process.

The question remains, however, whether the U.S. Supreme Court should reach such situations through *Caperton*-style invocation of the Due Process Clause. My view is that due process can properly be invoked to support such Supreme Court policing of the state courts. Where a state judicial system's disqualification determination, despite procedural review that seems fair ex ante, produces grotesquely wrong recusal decisions, the litigant has been denied a fundamental constitutional guarantee and U.S. Supreme Court intervention and correction is in order.[206]

As discussed above, there is certainly similarity between Supreme Court policing of state court punitive damages awards and policing of state court decisions involving participation of a judge who should have been disqualified.[207] More importantly, participation of a tainted jurist goes right to the heart of the legal system's aspiration for fair adjudication in which outcomes are not determined by the status of a litigant or lawyer. By contrast, a large damages award, even if unfair, remains the product of the system's normal and "fair" operation, provided that the defendant received adequate procedural due process. But when a tainted judge participates, the litigant has suffered a per se denial of fair adjudication, regardless of the outcome. In such cases, the entire adjudication becomes infirm and a reviewing court is left wondering the degree to which the tainted judge's participation may have made a difference.

206. *See supra* Part IV.C (outlining rationale for viewing disqualification error as denial of due process).

207. *Id.*

E. Guidelines for Invoking Substantive Due Process Disqualification

1. In Campaign Support Cases

To be sure, intervention in state proceedings due to allegedly erroneous recusal should occur only sparingly. In determining whether to review such situations stemming from campaign support, the Court can continue to be guided by the factors set forth in *Caperton* and amplified in the Chief Justices' amicus brief, which sets forth the following "Criteria for evaluating whether due process requires recusal for campaign spending in a particular case:"

- Size of the Expenditure;
- Nature of the Support;
- Timing of the Support;
- Effectiveness of the Support;
- Nature of Supporter's Prior Political Activities;
- Nature of Supporter's Pre-existing Relationship with the Judge; and
- Relationship Between the Supporter and the Litigant.[208]

Fleshing out the former chief justices' list of considerations logically requires considering both the absolute and relative size of not only the cash outlays but also other, "in kind" campaign support such as signs, literature, volunteer workers, mailing or registration lists, phone banks, office space, and the like.

---

208. *See* Brief of the Conference of Chief Justices, *supra* note , at 24–29. The Brief for the American Bar Association supported a similar use of similar factors. *See* Brief for the American Bar Association, *supra* note , at 19–20 (including factors such as contribution size, importance, timing, and relationship of judge and supporter).

2. In General

In addition, the Court should consider the following factors relevant to the questions of (a) whether a litigant has been denied the fundamental right of adjudication before a neutral tribunal and (b) whether the denial of due process merits expenditure of the Court's limited judicial resources:

- egregiousness of the error in refusing disqualification;
- importance of the underlying case (financially, socially, or politically);
- defensibility of the outcome in the underlying case;
- degree to which poor recusal decisions are part of a pattern in the particular state or court; and
- presence or absence of state-based corrective measures such as impeachment, revision of state judicial ethics codes, or removal of the offending judge or judges through election, retirement, or other means.

Using these templates to help determine the existence and magnitude of the failure to recuse as a denial of substantive due process, the Court can act as an important backstop protecting litigant rights without unnecessarily entangling itself in state court disqualification practice. Applied to *Caperton*, these factors augur in favor of the result reached by Justice Kennedy and the majority.

The first factor for filtering disqualification cases for the Court should be the apparent egregiousness of the error in refusing disqualification. In *Caperton*, the error was enormous.[209] Even if

209. In addition to his due process error, Justice Benjamin's opinion is remarkable in that it never grapples with the most salient legal issue regarding his participation—whether he was, pursuant to Canon 3(E) of the West Virginia Judicial Code of Conduct, a judge whose impartiality could be reasonably

Justice Benjamin's clearly incorrect defense of his continued participation had been subject to fairer procedures such as full court review, it should not have been allowed to stand. A *New York Times* editorial succinctly encapsulated my substantive reaction to the protests of the four *Caperton* dissenters:

> Indeed, the only truly alarming thing about [the *Caperton*] decision was that it was not unanimous. The case drew an unusual array of friend-of-court briefs from across the political spectrum, and such an extreme case about an ethical matter that should transcend ideology should have united all nine justices.
>
> Chief Justice Roberts is fond of likening a judge's role to that of a baseball umpire. It is hard to imagine that professional baseball or its fans would trust the fairness of an umpire who accepted $3 million from one of the teams.[210]

Applying the standard of 28 U.S.C. § 455(a) and Rule 2.11 of the Model Judicial Code, it seems inarguable that a reasonable lay observer would reasonably question Justice Benjamin's ability to be impartial in an important case involving a company headed by his seven-figure campaign contributor.

Next, if one considers the financial, social, and political importance of the underlying case, *Caperton*'s intervention seems justified. The underlying fraud and tortious interference litigation obviously involved a good deal of money, resulting in a $50 million judgment. It also involved a leading business in the state (coal mining) and at least one large and economically important litigant (Massey). It further attracted the attention of the state's most important labor union, the United Mine Workers, which weighed in on Caperton's side[211] (Caperton had operated the Harman Mine as a

---

questioned. *See* Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 286–309 (W. Va. 2008) (Benjamin, J., concurring) (never dealing with the issue), *rev'd*, 129 S. Ct. 2252 (2009).

210. *Honest Justice*, *supra* note .

211. *See* Brief of Amicus Curiae Filed on Behalf of the United Mine Workers of America, *Caperton*, 679 S.E.2d 223 (W. Va. 2008) (No. 33350), 2008 WL 793475 (Supporting Caperton in the West Virginia Supreme Court).

union mine; when Massey wrested control, union jobs were lost).[212] Further, the underlying case had significant implications for the manner in which business is conducted in the state. A victory for Massey logically would have, at least at the margins, encouraged sharper practices in the Blankenship mold.

Beyond this, the West Virginia Supreme Court's acceptance of Massey's res judicata and forum selection arguments on appeal created the possibility of rather substantial changes in state procedural doctrine with attendant impact on future litigation. The West Virginia high court's determination on these issues, at least until set aside by the U.S. Supreme Court, clearly expanded both the potential application of preclusion doctrine and the interpretative scope given to forum selection clauses.

A third filtering factor is the substantive outcome in this case involving participation by a tainted jurist whose partiality is subject to substantial question. Applied to *Caperton*, this factor supports the majority's decision to intervene on due process grounds. Recall that in two decisions, the West Virginia court did not question the substantive outcome on the merits.[213] Particularly in the first of its two decisions, the court essentially acknowledged that Massey had engaged in wrongful conduct toward Caperton. But on the basis of a technical legal defense problematically applied, the West Virginia Supreme Court threw out a sizeable judgment against an apparently conceded wrongdoer. In addition, in *Caperton*, the tainted jurist cast the deciding vote.

The fourth filtering factor—the degree to which poor recusal decisions are part of a pattern in the particular state or court—is less clear. However, there seems to be at least some significant evidence suggesting that West Virginia has not been particularly vigilant in ensuring that jurists do not participate in cases raising questions as to their impartiality. Without doubt, the state has been a hotbed of judicial politics that raise concerns about whether the judiciary has become excessively politicized.[214]

---

212. *See* Gibeaut, *supra* note , at 52 (describing how Caperton had replaced contract workers with 150 union miners, only to later succumb to bankruptcy due to Massey's actions).

213. *Caperton*, 679 S.E.2d at 265 (Albright, J. and Cookman, J., sitting on special assignment for disqualified justice, dissenting).

214. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2257–58 (2009) (noting substantial campaign expenditures and politicized race for state high court); Opinion, *Politics v. Justice*, CLEVELAND PLAIN DEALER, June 29,

The fifth factor is presence or absence of state-based corrective measures such as impeachment, revision of state judicial ethics codes, or removal of the offending judge or judges through election, retirement, or other means. As of June 2009, Justice Benjamin was, unsurprisingly, still on the West Virginia high court, with his term running through 2016.[215] There appears to have been no serious talk of his impeachment or retirement. Neither has there been suggested any amendment to the state's judicial code to ensure that future jurists in his position must recuse.[216]

In sum, the five suggested factors for guiding Supreme Court invocation of substantive due process recusal point quite overwhelmingly in the direction of ejecting Justice Benjamin from the case, even if his participation had been permitted after full state supreme court review. In addition, since the grounds for the Benjamin disqualification are campaign-related, consideration of the chief justices' factors (i.e. amount of contribution, impact, recency, and relation to the case) also strongly supports Justice Benjamin's disqualification.

When facing future certiorari petitions involving due process disqualification, the Court can apply these factors (as well as those of the chief justices' amicus brief in cases involving campaign support) to determine which cases, if any, present sufficiently serious disqualification problems to justify Supreme Court intervention in state judicial outcomes. Armed with these considerations, the Court need not accept an inordinate number of such cases. The Court would then be free to move from *Caperton*'s potentially problematic "probability of bias" standard to one mirroring the general norm: a

---

2009, at A9 ("The U.S. Supreme Court's ruling that a West Virginia Supreme Court judge should have recused himself from a case involving a big campaign contributor raises a caution sign for many states."); Editorial, *Virtues of an Appointed Judiciary*, 196 N.J.L.J. 898, 898 (2009) ("The trumpet of judges raising money from eventual litigants, delivering speeches to special interest groups, airing campaign commercials and generally worrying about whether they enjoy sufficient popularity to remain in office is, happily an anathema to [New Jersey]. Not so in states like West Virginia . . . ."); sources cited *supra* note .

215. West Virginia Supreme Court of Appeals, Justices and Staff, http://www.state.wv.us/wvsca/Justices.htm (last visited Oct. 18, 2009).

216. In fact, West Virginia has not even put together a committee to review the American Bar Association's 2007 revisions to the Judicial Code of Conduct. Status of State Review of ABA Model Code of Judicial Conduct (2007), AMERICAN BAR ASSOCIATION, Oct. 7, 2009, *available at* http://www.abanet.org/cpr/jclr/jud_status_chart.pdf.

litigant is denied due process when a state has insufficient procedural guarantees of correct disqualification decisions or when, despite procedural protections, a clearly disqualified judge participates in a matter.

V. CONCLUSION

Although its critics see *Caperton* as an unwise intrusion into state elections and state disqualification practice, *Caperton*'s biggest problem is that it did not go far enough and make due process congruent with prevailing state and federal disqualification standards. In particular, the Court should recognize that any error in failing to recuse deprives the affected litigant of a fundamental constitutional right—the right to have the case heard by a neutral magistrate. Consequently, any rejection of a request to recuse is at least technically one of constitutional dimension that should be potentially subject to U.S. Supreme Court review and correction.

Although there are good reasons to hesitate in creating or recognizing rights of substantive due process, the impartiality of the bench lies at the core of our notions of law and justice. When a case is heard by a judge who should have recused, this deprives the litigants of the very essence of fair adjudication and constitutes a type of error greater in kind and magnitude than other judicial mistakes. If the Court is to make any forays into the field of substantive due process, the case for such intervention is greater here than in perhaps any other area of law.

Adopting the more straightforward reasonable-question-as-to-impartiality standard in lieu of the more problematic probability of bias standard should not strain judicial resources. The Court need not become mired in the flood of disqualification cases predicted by the dissenting doomsayers in *Caperton*. Insistence upon review of disqualification decisions by a neutral body of judges will largely ensure that litigants receive sufficient procedural due process. Where erroneous recusal decisions occur in spite of such safeguards, U.S. Supreme Court review should be available as necessary to vindicate the strong constitutional interest in neutral courts and fair adjudication, an interest sounding in substantive due process.

In making its assessments regarding whether review of non-disqualification is required, the Court should consider the five factors

set forth in this article and the considerations outlined in the *Caperton* amicus brief submitted by the Conference of Chief Justices. Using these yardsticks, the Court can, as necessary, make infrequent forays into judicial disqualification matters without unduly burdening the court or creating either uncertainty or paranoia among state judges and justices.

Even if one accepts the implicit assertion of the *Caperton* dissenters that the decision was something like using a "nuclear option," both the constitutional interest in fair courts and the facts of the case justified this heavy artillery. So deployed, *Caperton* seems likely to have a positive effect in deterring poor disqualification decisions by state courts. Better still, the Court in *Caperton* could have harmonized the disqualification standards required by the Constitution with those required under federal and state law modeled on the ABA Model Judicial Code. As shown in this article, unifying the constitutional and nonconstitutional standards for judicial disqualification is feasible and can improve future Court supervision of recusal.

Contractual Waiver of the Right to Remove to Federal Court: How Policy Judgments Guide Contract Interpretation

David S. Coale, Rebecca L. Visosky, and Diana K. Cochrane[1]

I. INTRODUCTION

Federal statutes allow a state court defendant to remove many kinds of cases to federal court. A party may waive the right to remove, either by a procedural default during litigation, or by contractually waiving the right before litigation starts. When a court finds waiver of removal rights by contract, it often relies upon a

1. David Coale is a partner with K&L Gates LLP in Dallas, Texas. Rebecca Visosky is a partner, and Diana Cochrane is an associate, with Carrington, Coleman, Sloman & Blumenthal, L.L.P. in Dallas. Each author practices in the area of complex commercial litigation. Mr. Coale and Ms. Visosky were counsel for the appellant in *Collin County v. Siemens Business Services, Inc.*, and Mr. Coale was counsel for the movant in *Ondova Ltd. Co. v. Manila Industries*, both of which are discussed in this article. This article represents the authors' work alone and not the position of any firm or client.

venue or forum selection clause, which may not expressly mention removal. Litigation about how to interpret such clauses in the removal context has surged in recent years as awareness of the issue has spread. This article analyzes recent trends in this area, including the start and growth of a circuit split.

Part I examines when courts will employ a heightened standard that requires clear and unequivocal evidence of a party's intent to waive the right to remove, an issue on which a circuit split is developing. Part II considers the effect of forum selection language on the waiver analysis, such as a clause giving a party the right to choose the forum, or a contractual consent to the jurisdiction of a particular court. Parts III and IV review judicial treatment of seemingly minor, but substantively significant word choices in venue and forum selection clauses. Finally, Part V examines how, in addition to contract terms, the physical location of a federal courthouse may affect the analysis of whether a defendant has waived the right to remove an action from state court.[2]

Each aspect of this article illustrates how courts apply a general analytical framework in the context of specific policy goals. A court must, on the one hand, apply settled principles of contract interpretation, while at the same time giving weight to the policy judgments that removal statutes are strictly construed and forum selection clauses are favored. The highly practical question posed in this area—"what court should this case be in?"—also offers instructive examples of how courts approach significant theoretical and policy issues.

II. STANDARDS OF INTERPRETATION

The federal circuits are split as to the overall standard to apply when determining whether parties have contractually waived the right of removal. The Eleventh Circuit states that it applies

2. Cases that rely on several topics discussed in this article are discussed in more than one place, and for ease of reference the text of the forum selection clauses at issue may be repeated. Additionally, for easier comparison of circuit splits, district courts have been annotated as to which circuit they belong when it is not clear from the context.

"ordinary contract principles,"[3] while the Fifth, Sixth, and Tenth Circuits say they require a higher standard of "clear and unequivocal" language to find waiver, although they apply that standard in distinct ways.[4] The remaining circuits have not directly addressed this issue[5] or are split among their district courts as to the applicable standard.[6]

---

3. *See, e.g.*, City of W. Palm Beach v. VisionAIR, Inc., 199 F. App'x 768, 769 (11th Cir. 2006) (per curiam) (interpreting forum selection clause to be unambiguous and therefore not construing it against the drafter); Priority Healthcare Corp. v. Chaudhuri, No. 6:08-CV-425-Orl-KRS, 2008 WL 2477623, at *2 (M.D. Fla. June 18, 2008) (finding the plain language of the forum selection clause to be ambiguous and therefore construing it against the drafter); Smyrna Plumbing Co. v. MDH Builders, Inc., No. 107CV126 (AAA), 2008 WL 410365, at *1 (S.D. Ga. Feb. 12, 2008) (stating that ordinary contract principles govern a contractual waiver of the right to remove and expressly rejecting the "clear and unequivocal" standard).

4. *See, e.g.*, City of New Orleans v. Mun. Admin. Servs., Inc., 376 F.3d 501, 504 (5th Cir. 2004) ("A party may waive its rights by explicitly stating that it is doing so, by allowing the other party the right to choose venue, or by establishing an exclusive venue within the contract."); Milk 'N' More, Inc. v. Beavert, 963 F.2d 1342, 1346 (10th Cir. 1992) (stating that the clause's use of "shall" limited venue to Johnson County and thus waived the right to remove); Regis Assocs. v. Rank Hotels (Mgmt.) Ltd., 894 F.2d 193, 195 (6th Cir. 1990) (stating that a party must set forth intent of such a waiver, "not the intent to rely on the statute"); Weltman v. Silna, 879 F.2d 425, 427 (8th Cir. 1989) (holding that clause that did not address removal did not constitute a waiver of the right to remove).

5. *See, e.g.*, Spenlinhauer v. R.R. Donnelley & Sons Co., 534 F. Supp. 2d 162, 164 (D. Me. 2008) (First Circuit district court declining to decide whether waivers of a right to removal must be clear and unequivocal).

6. Second Circuit: *Compare* Hilb Rogal & Hobbs Co. v. MacGinnitie, No. Civ.A.3:04CV1541(JCH), 2005 WL 441509, at *3 (D. Conn. Feb. 14, 2005) (stating that waiver of the right to remove to federal court must be "clear and unequivocal"), *with* Wells Fargo Century, Inc. v. Brown, 475 F. Supp. 2d 368, 371 (S.D.N.Y. 2007) (stating that "principles of contractual interpretation" are used in scrutinizing forum selection clauses). Fourth Circuit: *Compare* Grubb v. Donegal Mut. Ins. Co., 935 F.2d 57, 59 (4th Cir. 1991) ("[D]efendant may . . . waive its . . . right to removal by demonstrating a 'clear and unequivocal' intent to remain in state court."), *with* Welborn v. Classic Syndicate, Inc., 807 F. Supp. 388, 390–91 (W.D.N.C. 1992) (stating that contractual waivers of the right to remove do not have to be "clear and unequivocal"). Seventh Circuit: *Compare* Specialty Cheese Co. v. Universal Food & Dairy Prods., Inc., No. 07-CV-970, 2008 WL 906750, at *3 (E.D. Wis. Apr. 1, 2008) (strongly suggesting rejection of the clear and unequivocal standard), *with* Cont'l Cas. Co. v. LaSalle Re Ltd., 500 F. Supp. 2d 991, 994–95 (N.D. Ill. 2007) (stating that while principles of standard contract

A. "Lower" Standard

Eleventh Circuit courts have rejected the higher standard demanding clear and unequivocal waiver, and instead rely on "ordinary contract principles" to analyze a waiver issue.[7] The principle of interpretation most frequently cited in this circuit on this point is the construction of an ambiguous clause against its drafter. Unlike cases decided under what courts in other circuits call "ordinary contract principles" (discussed *infra*), the Eleventh Circuit has not easily found waiver of the right to remove even under the "lower" standard for proving waiver. In *Priority Healthcare*, for example, the forum selection clause read in part, "[the] customer shall be subject to personal jurisdiction of the State of Florida and accept venue in Seminole County, Florida."[8] The court found no waiver because it held this language was ambiguous and construed it against the plaintiff who drafted it.[9]

The Eleventh Circuit again found no waiver in *Global Satellite*, based on a venue clause that could amount to waiver under the "lower" contract interpretation standard as applied by other circuits.[10] The clause stated, "[v]enue shall be in Broward County,

---

interpretation are used to decide whether a forum selection clause is enforceable, a defendant's waiver of the right to remove must be clear and unequivocal).

Courts in the Third and Ninth Circuits have not squarely addressed the issue, although some opinions hint at their positions. *Compare* Nascone v. Spudnuts, Inc., 735 F.2d 763, 773–74 (3d Cir. 1984) (considering whether transfer was appropriate under a forum selection clause and noting that Utah would "examine whether the forum selection clause was reasonable or not" rather than follow the "more restrictive attitude toward forum selection clauses" of Texas and Missouri—states in the Fifth and Eighth Circuits respectively, which apply the clear and unequivocal standard), *with* Docksider, Ltd. v. Sea Tech., Ltd., 875 F.2d 762, 764 (9th Cir. 1989) (failing to mention either standard, but requiring that "clear" language must designate an exclusive forum to find that the defendant waived the right to remove).

7. *See, e.g.*, Global Satellite Commc'n Co. v. Starmill U.K. Ltd., 378 F.3d 1269, 1272 (11th Cir. 2004) ("This circuit has held that the determination of whether such a clause constitutes a waiver . . . is to be determined according to ordinary contract principles, and need not meet the higher threshold of a 'clear and unequivocal' waiver.").

8. *Priority Healthcare*, 2008 WL 2477623, at *1.

9. *Id.* at *2.

10. 378 F.3d at 1272.

Florida . . . [and] [t]he parties . . . expressly waive the right to contest any issues regarding venue or in personam jurisdiction and agree in the event of litigation to submit to the jurisdiction of Broward County, Florida."[11] The court found that while the clause waived objections to venue and personal jurisdiction, it was "simply ambiguous" as to removal.[12] The court again construed the forum selection clause against the drafter and admonished drafters to state their objective more precisely to create an effective waiver.[13]

In one instance when a court found waiver under the Eleventh Circuit's standard, the forum selection clause provided that "the parties consent[ed] to venue in, and the exercise of jurisdiction by, the state courts located in Richmond County, Georgia and waive[d] any jurisdictional or venue rights they may have [had] otherwise."[14] The Southern District of Georgia in *Smyrna Plumbing* described this clause as "much broader" than others and found waiver from the reference to "*any* jurisdictional rights."[15]

By contrast, district courts in other circuits stating that they are applying standard interpretation principles often find waiver. The Eastern District of Wisconsin,[16] for example, found waiver of removal rights from a forum selection clause that said, "any suit . . . may only be brought in a court of competent jurisdiction located in Dodge County in the State of Wisconsin."[17] The defendant argued that the agreement did not waive the right to remove so long as the

---

11. *Id.* at 1271.

12. *Id.* at 1274.

13. *Id.* at 1271–74.

14. Smyrna Plumbing Co. v. MDH Builders, Inc., No. 107CV126 (AAA), 2008 WL 410365, at *1 (S.D. Ga. Feb. 12, 2008).

15. *Id.* at *2. Although the court used the word "broader," the forum selection clause was actually more specific than other cases in that circuit, referring to the selected courts by name. *Id.*

16. The Eastern District of Wisconsin is in the Seventh Circuit.

17. Specialty Cheese Co., Inc. v. Universal Food & Dairy Prods., Inc., No. 07-CV-970, 2008 WL 906750, at *2–3 (E.D. Wis. Apr. 1, 2008). Notwithstanding the holding in *Specialty Cheese*, most district courts in the Seventh Circuit apply the clear and unequivocal standard. *See generally* Progressive Publ'ns., Inc. v. Capital Color Mail, Inc., 500 F. Supp. 2d 1004, 1005 (N.D. Ill. 2007) ("[A]s our Court of Appeals regularly reminds those of us who labor in the District Court vineyards and all the rest of the legal universe, do not make precedent, so that such opinions have value only to the extent that others may find their reasoning persuasive.").

suit was first "brought" in Dodge County, but the court disagreed.[18] Instead, it found that the "more plausible construction of the clause" under usual interpretative principles was waiver because the parties agreed to litigate only in the Dodge County Circuit Court.[19]

Likewise, the Southern District of New York[20] used standard principles of contract interpretation to examine a forum selection clause which stated that the defendant "expressly submit[ted] and consent[ed] to the jurisdiction of the Supreme Court of the State of New York, in the County of New York."[21] This language was found to waive the right to remove, in part because that was a "reasonable" interpretation of the provision.[22]

B. "Higher" Standard

As with courts using the "lower" standard, courts applying the "higher" standard of clear and unequivocal waiver can do so unevenly. While the Fourth Circuit has not clearly chosen a standard, courts in that circuit that apply the clear and unequivocal standard do so rigorously and often do not find waiver. For example, in *London Manhattan Co. v. CSA-Credit Solutions of America, Inc.*, the District of South Carolina examined a forum selection clause that stated, "venue for any action or dispute under this Agreement shall be in the Courts of Charleston County, South Carolina."[23] The court found no waiver,[24] even though it noted *sua sponte* that the plaintiff could have argued that the clause "set[] venue exclusively in state court such that it [would be] a waiver of Defendant's right to

18. *Specialty Cheese*, 2008 WL 906750, at *1–2.

19. *Id.* at *2.

20. The Southern District of New York is in the Second Circuit, where the district courts have applied both the "higher" and "lower" standards without express guidance from the Second Circuit. *See supra* note 6.

21. Wells Fargo Century Inc. v. Brown, 475 F. Supp. 2d 368, 370 (S.D.N.Y. 2007).

22. *Id.* at 372. By contrast, examination of similarly worded clauses under the higher "clear and unequivocal" standard has at times not resulted in waiver. *See infra* Part II.B.

23. No. 2:08-cv-00465-PMD, 2008 WL 2077554, at *1 (D.S.C. May 9, 2008) (emphasis added).

24. *Id.* at *3.

remove."[25] While the court said that it was not choosing the standard to apply, it noted that the "[d]efendant ha[d] not . . . waived its statutory right to remove [*clearly and unequivocally.*]"[26]

Similarly, the Fourth Circuit court of the Middle District of North Carolina considered a clause in *Basu v. Robson Woese, Inc.*, which stated that "any suit shall be filed in the North Carolina General Court of Justice in Durham County or in the United States District Court for the Middle District of North Carolina and parties . . . consent to the exclusive jurisdiction and venue in said Courts."[27] The court suggested that the word "or" may have supported a waiver finding if the case was first filed in state court.[28] Nonetheless, the court found no waiver because this argument did not satisfy the clear and unequivocal standard.[29]

Like the courts of the Fourth Circuit, the Seventh Circuit courts apply the higher standard to find waiver. For example, in *Rochester Community School Corp. v. Honeywell, Inc.*, the Northern District of Indiana strictly applied the clear and unequivocal standard to a clause stating "the claim shall be decided by a court of competent jurisdiction of Fulton County, Indiana."[30] Although no federal court sits in Fulton County, the court found no "clear and specific" waiver, stating: "had [the plaintiff] wanted to preclude litigation in federal court, it should have stated that intention more clearly."[31] While courts, regardless of the standard applied, have found that similarly worded clauses waive removal rights, particularly if no federal court sits in the specified county, *Rochester* found that a contractual waiver should provide for litigation to be

25. *Id.* at *1.

26. *Id.* at *3.

27. Basu v. Robson Woese, Inc., No. Civ.1:03CV00098, 2003 WL 1937119, at *2–4 (M.D.N.C. Apr. 22, 2003).

28. *Id.* at *3–4.

29. *Id.* at *4.

30. Rochester Cmty. Sch. Corp. v. Honeywell, Inc., No. 3:06-CV-351 RM, 2007 WL 2473464, at *3 (N.D. Ind. Aug. 27, 2007). The court's holding was also based on the unenforceability of the addendum in which the clause was contained. *Id.* at *6. However, the court noted that "even if the Addendum were enforceable, the language of [the forum selection clause] wouldn't warrant the granting of [Plaintiff]'s motion [to remand]" because removal rights were not waived. *Id.*

31. *Id.*

conducted in either a specifically named state court, or at the very least in "a *state* court."[32]

Likewise, the Northern District of Illinois (also in the Seventh Circuit) found that removal rights were not waived by a clause stating "'[t]he Parties hereby consent to the jurisdiction of the courts of the State of Illinois.'"[33] The court found that the clause contained "[no] evidence of the parties' intent to make the venue provision exclusive."[34] Applying the clear and unequivocal standard perhaps even more strictly than the district court in Indiana, the court further noted that waiver of the right to remove does not result from a "general" consent to the jurisdiction of a specified court.[35]

The Sixth Circuit has uniformly adopted the clear and unequivocal waiver standard,[36] and its courts have followed that lead and applied it strictly. The clause before the Sixth Circuit in *Regis* stated, "[t]he interpretation and application of this Agreement shall be governed by the law of the State of Michigan and the parties hereby submit to the jurisdiction of the Michigan Courts."[37] *Regis* applied the clear and unequivocal standard strictly to find that "nothing in the language . . . suggests any intent on the part of anyone to waive the right of removal from state to federal court."[38] The court reasoned that waiver should not result from the lack of language expressing an intent to rely on the removal statute, but should be set forth expressly.[39]

The Sixth Circuit recently confirmed its strong adherence to the "clear and unequivocal" standard in *EBI-Detroit v. City of Detroit*, where the clause at issue read, "[t]he Contractor agrees to submit to the exclusive personal jurisdiction of, and not commence any action in other than, a competent State court in Michigan."[40] Despite the express reference to state court, the court found that the

32. *Id.*

33. Cont'l Cas. Co. v. LaSalle Re Ltd., 500 F. Supp. 2d 991, 993 (N.D. Ill. 2007).

34. *Id.* at 995.

35. *Id.*

36. Regis Assocs. v. Rank Hotels (Mgmt.) Ltd., 894 F.2d 193, 195 (6th Cir. 1990).

37. *Id.* at 194.

38. *Id.* at 195.

39. *Id.*

40. 276 F. App'x 340, 346 (6th Cir. May 22, 2008) (internal citation omitted).

clause did not create waiver because the right to remove was not addressed in the clause, and because only the plaintiff ("The Contractor") was mentioned, not the defendant (the City of Detroit).[41] The court concluded, "[a] clause that does not even mention either removal or the party seeking to remove cannot be a clear waiver of removal."[42]

The Eighth Circuit has also adopted the clear and unequivocal standard for finding waiver of removal rights, but it is not yet clear whether its application will be as forceful as that of the Sixth Circuit. While the Eighth Circuit addressed waiver of the right to remove in *Weltman v. Silna*, it declined to discuss even the text of the forum selection clause at issue.[43] The court did note that while the defendants "consented to subject matter jurisdiction and venue in the state court in the City of St. Louis" in an agreement, the agreement did not address removal.[44] Stating that waiver of removal rights must be "clear and unequivocal," the court found no waiver resulting from the agreement.[45]

The Eastern District of Missouri in the Eighth Circuit recently bemoaned in *Citimortgage, Inc. v. Loan Link Financial Services* that "[t]he concept of 'clear and unequivocal' is a fluid concept left up to this Court's discretion with little guidance from the Eighth Circuit."[46] The court did find a clear and unequivocal waiver based on a forum selection clause that stated in part:

> [T]hat any action . . . shall be brought in St. Louis County Circuit Court or the United States District Court for the Eastern District of Missouri and each party irrevocably submits to the jurisdiction of either forum and waives the defense of an inconvenient forum . . . in such state or federal court and any other substantive or procedural rights or remedies it may have with respect to . . . any such action.[47]

41. *Id.* at 346–47.
42. *Id.* at 347.
43. 879 F.2d 425, 427 (8th Cir. 1989).
44. *Id.*
45. *Id.*
46. No. 4:07CV1989SNL, 2008 WL 695392, at *2 (E.D. Mo. Mar. 12, 2008).
47. *Id.* at *1–2.

The court concluded that the parties waived the right to remove to federal court, because, had it not so held, the clause would have been "render[ed] . . . meaningless."[48]

The Tenth and Fifth Circuits have also both adopted the clear and unequivocal standard, but, unlike the Sixth and Eighth Circuits, they take a less demanding approach to its application.[49] The Tenth Circuit said that it adopted the "clear and unequivocal" standard in *Milk 'N' More, Inc. v. Beavert*, when it considered a forum selection clause stating, "venue shall be proper under this agreement in Johnson County, Kansas."[50] The court found that the defendant waived the right to remove because the provision "seem[ed] *reasonably clear*"[51]—a comment that seems more fitting in an analysis under the "lower" standard of basic contract interpretation principles. The court noted that an attorney for the plaintiff had drafted the clause[52] but declined to construe the clause against the drafter, which would likely be a threshold issue under the lower standard.

The District of Kansas followed the Tenth Circuit's construction of the clear and unequivocal standard when it found waiver in *Red Mountain Retail Group, Inc. v. BCB, L.L.C.*[53] The forum selection clause stated, "any litigation shall have venue only in Wyandotte County, Kansas."[54] The Tenth Circuit's liberal application of the clear and unequivocal standard, and its reliance on the distinction between "county" and "judicial district," are especially evident in this case where the federal court in Wyandotte County found waiver even though the federal court was located in the agreed-upon county.[55] The Tenth Circuit reached a similar result in *Excell v. Sterling Boiler & Mechanic, Inc.*—while the court did

48. *Id.* at *3.

49. The Tenth Circuit often distinguishes the word "county" from "judicial district" to find that use of "county" makes state court the exclusive forum. *See infra* note 175. Because venue or forum clauses often reference a county, the Tenth Circuit thus often finds that a defendant has waived the right to remove. *See infra* notes 179–83.

50. 963 F.2d 1342, 1346 (10th Cir. 1992).

51. *Id.* (emphasis added).

52. *Id.* at 1346 n.1.

53. No. 05-2557-KHV, 2006 WL 1128685, at *1–2 (D. Kan. Apr. 27, 2006).

54. *Id.* at *1.

55. *Id.* at *2.

not say what standard applied, the court found waiver based on a clause specifying that "[j]urisdiction shall be in the State of Colorado, and venue shall lie in the County of El Paso, Colorado."[56]

When district courts in the Tenth Circuit have not found waiver under that circuit's application of the clear and unequivocal standard, the clauses at issue expressly placed venue in both the state and federal courts of a specified locale. For example, in *QFA Royalties LLC v. Bogdanova*, the District of Colorado found that a clause placing venue "in the District Court for the City & County of Denver, Colorado, or the United States District Court for the District of Colorado" did not waive the defendant's right to remove because the federal court was an exclusive forum designated in the contract.[57]

Like the Tenth Circuit, the Fifth Circuit has adopted the clear and unequivocal standard but applied it with lenience, although under a different framework than the Tenth Circuit. While the Fifth Circuit has expressly rejected the Tenth Circuit's position that reference to a particular county makes state court the only appropriate forum,[58] the Fifth Circuit does tend to find waiver when a county is specified with no federal courthouse physically located within it.[59]

Recent cases suggest that the Fifth Circuit is moving toward stronger reliance on standard principles of contract interpretation rather than requiring clear and unequivocal evidence of waiver. In an unusual application of the clear and unequivocal standard, the Fifth Circuit found waiver in *Collin County* based on a clause stating that "venue . . . shall lie exclusively in Collin County, Texas."[60] When the case was decided, no federal courthouse was located in

56. 106 F.3d 318, 320 (10th Cir. 1997).

57. No. 06-CV-01776-LTB, 2006 WL 3371641, at *2–4 (D. Colo. Nov. 21, 2006); *see also* Knight Oil Tools, Inc. v. Unit Petroleum Co., No. CIV 05-0669 JB/ACT, 2005 WL 2313715, at *10 (D.N.M. Aug. 31, 2005) (holding that a specific statement in a forum selection clause that a case may be brought in a state *or* federal court—either generally or a specifically named federal court—generally preserves the defendant's right to remove to that court).

58. *See* Collin County v. Siemens Bus. Servs., Inc., 250 F. App'x 45, 51 (5th Cir. 2007) (distinguishing Tenth Circuit case law in concluding that "use of the term 'county' rather than 'district' at the very least falls short of a clear and unequivocal waiver of federal jurisdiction").

59. *See infra* Part IV.D.

60. *Collin County*, 250 F. App'x at 47.

that county, but plans were underway for its construction, in accordance with federal law.[61] Because no federal courthouse was in the county at the time of litigation, the court, citing the higher "clear and unequivocal" standard, found that the defendant had waived the right to remove, even though in a few months there would be such a courthouse.[62]

Most recently, the Fifth Circuit examined a forum selection clause in *Alliance Health Group LLC v. Bridging Health Options LLC*.[63] As in *Collin County*, the clause at issue stated, "exclusive venue for any litigation related hereto shall occur in Harrison County."[64] Because Harrison County has a federal courthouse, the court found no waiver.[65] Notably, the court did not place great reliance on the clear and unequivocal standard, and seemed to purposefully include an analysis based on general contract principles.[66] The court's only mention of the clear and unequivocal standard was when it quoted from *Collin County*'s "county" versus "judicial district" analysis, which did not support the court's holding in that case.[67] Even after the court in *Alliance* followed other Fifth Circuit precedent and found that the presence of a federal court in the specified county prevented waiver, it went on to analyze "an alternative basis" for finding no waiver, invoking the *contra proferentem* doctrine and interpreting the clause against the appellant who drafted it.[68]

The stated general standards for finding that a defendant has waived the right to remove are applied differently. Courts analyzing

---

61. *Id.* at 52–53. The federal courthouse in Plano, Collin County, Texas, opened on August 2008. Press Release, U.S. Congressman Sam Johnson, http://www.samjohnson.house.gov/News/DocumentSingle.aspx?DocumentID=99999.

62. *Collin County*, 250 F. App'x at 48, 52. The court noted that these facts "present[ed] a very narrow, one-time question." *Id.* at 54.

63. 553 F.3d 397, 397 (5th Cir. 2008).

64. *Id.* at 401 (emphasis omitted).

65. *Id.*

66. *See id.* (looking to the language of the clause and noting its general lack of specificity).

67. *Id.* at 400 (citing *Collin County*, 250 F. App'x at 52 (stating that the court cannot find waiver from a distinction between use of the word "county" rather than "district" in the forum selection clause at issue)).

68. *Id.* at 402.

waiver under the "lower" standard of ordinary contract interpretation often do not find waiver, while courts using the "higher" clear and unequivocal standard can find waiver with little difficulty. Moreover, multiple courts applying the "same" standard have reached different decisions about clauses with remarkably similar language.

C. Standard Choice and Policy Judgment

The Fourth and Seventh Circuits foster a policy favoring access to federal courts in the strict application of the "clear and unequivocal" standard in determining waiver.[69] Other federal courts, however, appear to favor contractual waiver of removal regardless of whether the contract does so explicitly.[70] This approach may flow from a general disfavor of removal as a policy matter.

For example, in *Specialty Cheese, Inc. v. Universal Food and Dairy Products, Inc.*, the Eastern District of Wisconsin in the Seventh Circuit observed that prevailing law requires a narrow construction of removal statutes and that "any doubts . . . should be resolved against allowing removal."[71] The court relied on the Third Circuit's instructions in *Foster v. Chesapeake Insurance Co.* that, especially in light of contractual rather than litigation-based waiver of removal rights, the right to remove is a constrictive rather than an expansive right.[72] The court in *Foster* further warned that applying a high standard for finding waiver of removal rights would erode what it saw as a firmly established principle of the right to freedom of contract.[73]

---

69. *See supra* Part II.B.

70. *See supra* Part II.A.

71. No. 07-CV-970, 2008 WL 906750, at *1 (E.D. Wis. Apr. 1, 2008) (citing Wirtz Corp. v. United Distillers & Vintners N. Am. Inc., 224 F.3d 708, 715 (7th Cir. 2000)).

72. *Id.* at *3 (quoting Foster v. Chesapeake Ins. Co., 933 F.2d 1207, 1218 n.15 (3d Cir. 1991)).

73. Foster, 933 F.2d at 1218 n.15. The Second Circuit and a Nevada district court in the Seventh Circuit likewise agree that the interplay of the limited jurisdiction of federal courts with the rights of states requires strict construction of removal jurisdiction, and thus any doubts against removability will waive the right to remove. California v. Atlantic Richfield Co., 488 F.3d 112, 124 (2d Cir. 2007); Jetstar, Inc. v. Monarch Sales, 652 F. Supp. 310, 312 (D. Nev. 1987) (citing

The issue is also couched as a procedural one. Some courts hold that the removing defendant bears the burden of proving a right to remove,[74] while other courts hold that the plaintiff bears the burden to show waiver.[75] Courts across circuits, however, agree that the drafter of the forum selection clause has the burden not to leave ambiguity on the issue.[76]

III. SUBSTANTIVE AGREEMENTS IN THE FORUM SELECTION CLAUSE

A. Plaintiff's Right to Choose the Forum

As the law has increasingly favored enforcement of forum selection clauses, courts have grown less skeptical about the general

---

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941)); *see also Shamrock*, 313 U.S. at 107 (stating that Congress's then-recent alterations to the removal statute "indicat[ed] the Congressional purpose to narrow the federal jurisdiction on removal").

74. *See, e.g.*, Yakin v. Tyler Hill Camp, Inc., 2007 WL 3353729 (E.D.N.Y. Nov. 6, 2007) at *1 (holding that once the plaintiff has moved to remand, the removing defendant "bears the burden of demonstrating the propriety of removal").

75. *See, e.g.*, Global Satellite Commc'n Co. v. Starmill U.K. Ltd., 378 F.3d 1269, 1274 (11th Cir. 2004) (finding that forum clause was ambiguous and noting that plaintiff could have easily stated its intention precisely); Rochester Cmty. Sch. Corp. v. Honeywell, Inc., No. 3:06-CV-351 RM, 2007 WL 2473464, at *6 (N.D. Ind. Aug. 27, 2007) (concluding that if the plaintiff, which had drafted the clause, had wanted to create a waiver of the defendant's right to remove, "it should have stated that intention more clearly"); Truserv Corp. v. Prices Ilfeld Hardware, Co., Inc., No. 01 C 50271, 2001 WL 1298718, at *2 (N.D. Ill. Oct. 24, 2001) (finding that had the plaintiff wanted a contractual waiver of the right of removal, "it should have stated so more clearly" when it drafted the clause); Fed. Gasohol Corp. v. Total Phone Mgmt., 24 F. Supp. 2d 1149, 1151 (D. Kan. 1998) (finding that "[a] declaration that jurisdiction is proper in one forum does not necessarily mean it is improper in another," and any ambiguity in the clause should have been eliminated by clearer drafting by the plaintiff).

76. *See* Alliance Health Group, LLC v. Bridging Health Options, LLC, 553 F.3d 397, 402 (5th Cir. 2008) (adopting the interpretation least favorable to the drafter and noting that the draft "easily could have eliminated any question in that regard by writing the forum-selection clause differently").

idea of contractually waiving the right to remove to federal court.[77] In particular, a clear provision giving the plaintiff the right to choose the forum for litigation can waive the defendant's right to remove. Likewise, if the forum selection clause fails to give the plaintiff the right to choose the forum, courts may use this omission as evidence that the parties did not intend a waiver of removal rights.

On the one hand, in *Continental Casualty v. LaSalle Re Ltd.*, the Northern District of Illinois in the Seventh Circuit found that a forum selection clause did not waive the right to remove, in part, because the clause at issue had only a general choice of law provision that fell short of "vest[ing] in the plaintiff the right to choose a particular court."[78] Likewise, the District Court of Maine found a clause allowing both parties to choose from one of four possible forums, in state or federal court, did not preclude removal to one of the other "chosen courts."[79] On the other hand, in *Citimortgage*, the Eastern District of Missouri in the Eighth Circuit found that the defendant waived the right to remove, precisely because the forum selection clause gave the plaintiff the right to choose the forum.[80] The court found that once the plaintiff chose a jurisdiction, the parties agreed to be bound to it.[81] Since the plaintiff chose state court, the defendant had no right to then remove the case.[82] Similarly, the Third Circuit, as well as a district court within that circuit, found waiver of removal rights based on clauses giving the plaintiffs the choice of forum.[83]

---

77. *See* Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9–10 (1972) (noting that while forum selection clauses have historically not been favored by American courts as being contrary to public policy, they are prima facie valid and should be enforced unless unreasonable).

78. 500 F. Supp. 2d 991, 995 (N.D. Ill. 2007).

79. Spenlinhauer v. R.R. Donnelley & Sons Co., 534 F. Supp. 2d 162, 163 (D. Me. 2008) (discussing a forum selection clause that does not deal with the removal issue).

80. Citimortgage, Inc. v. Loan Link Fin. Servs., No. 4:07CV1989SNL, 2008 WL 695392, at *2 (E.D. Mo. Mar. 12, 2008).

81. *Id.*

82. *Id.* at *3.

83. Foster v. Chesapeake Ins. Co., 933 F.2d 1207, 1219 (3d Cir. 1991); Conn. Bank of Commerce v. Republic of Congo, 440 F. Supp. 2d 346, 354 (D. Del. 2006). The clause in *Connecticut Bank* read "nothing shall preclude [plaintiff] from bringing any proceeding . . . in the courts of any . . . competent jurisdiction." *See* 440 F. Supp. 2d at 353. Another court may have found this clause ambiguous

The Fifth Circuit appears to agree with the Third Circuit that a forum selection clause that gives the plaintiff the right to choose the forum can result in the defendant's waiver of the right to remove. In *GP Plastics v. Interboro Packaging Corp.*,[84] the forum selection clause was arguably clearer regarding the plaintiff's right to choose the forum than that in *Connecticut Bank*. The clause at issue in *GP Plastics* provided that "the state or federal court of Texas selected by [the plaintiff] shall have jurisdiction over . . . [the defendant]."[85] The court held that because the clause gave the plaintiff the right to choose state or federal court, it "constitute[d] a valid waiver of Interboro's removal rights" once the plaintiff sued in state court.[86]

Similarly, in *Waters v. Browning-Ferris Industries, Inc.*, the Fifth Circuit found that the defendant waived removal rights because the plaintiff bargained for the right to "irrevocably" choose the forum for any suit to be "filed and heard."[87] The clause said,

> [Defendant] irrevocably (i) agrees that any such suit . . . may be brought in the courts of [the State of Texas] or the courts of the United States for [Texas], (ii) consents to the jurisdiction of each such court . . . and (iii) waives any objection it may have to the laying of venue of any such suit . . . in any of such courts.[88]

The court concluded from this clause that to let the defendant remove, after the plaintiff had chosen to sue in state court, would revoke the choice of forum given to plaintiff in the contract.[89]

---

as to whether the plaintiff really had the right to choose the forum, and such ambiguity could have been cause to construe the clause against the drafter to find that no waiver had occurred.

84. 108 F. App'x 832 (5th Cir. 2004).
85. *Id.* at 833.
86. *Id.* at 836.
87. 252 F.3d 796, 798 (5th Cir. 2001).
88. *Id.* at 797.
89. *Id.* at 798.

B. *Consent to a Specific Court's Jurisdiction*

The use—or omission—of limiting terms in a forum selection clause can directly affect whether a court will find that a defendant has waived its removal rights. For example, the Northern District of Illinois[90] in *Continental Casualty Co. v. LaSalle Re Ltd.*, found no waiver, in part, because the forum selection clause did not use limiting terms.[91] The court noted that other forum selection clauses that required a defendant to submit to a particular court limited the defendant to that court with words such as "only."[92] The court concluded that, without any limiting terms, the forum selection clause was only a general consent to the jurisdiction of the plaintiff's choosing, which the court found did "not adequately demonstrate a waiver of [defendant's] statutory right to remove."[93]

In *Alliance Health Group*, the clause at issue before the Fifth Circuit contained the word "exclusive,"[94] which some courts have considered a limiting term.[95] The court found that the clause did not have enough other limiting words to keep the parties from federal court.[96] The court instructed that stronger limiting language in the clause could have helped find waiver.[97]

Courts in the Second Circuit have differed in their treatment of limiting terms, or the lack thereof, in forum selection clauses. In *Rabbi Jacob Joseph School v. Province of Mendoza*, the clause at issue contained no limiting words.[98] The court in *Rabbi Jacob Joseph* took this absence further than the Fifth Circuit did in *Alliance*: Not only did New York's Eastern District say that limiting words would have helped find waiver, but it also implied that

90. The Northern District of Illinois is in the Seventh Circuit.

91. 500 F. Supp. 2d 991, 995 (N.D. Ill. 2007).

92. *Id.*

93. *Id.* at 995–96.

94. Alliance Health Group, LLC v. Bridging Health Options, LLC, 553 F.3d 397, 401 (5th Cir. 2008).

95. *See, e.g.*, Docksider Ltd. v. Sea Tech., Ltd., 875 F.2d 762, 763–64 (9th Cir. 1989) (treating "exclusive" as a limiting term).

96. *Alliance Health*, 553 F.3d at 401.

97. *Id.*

98. 342 F. Supp. 2d 124, 125–26 (E.D.N.Y. 2004).

limiting language is required to find waiver in the Second Circuit.[99] By contrast, the Southern District of New York in *Wells Fargo Century v. Brown* considered a forum selection clause that also lacked limiting language, but the court did not find that fact dispositive.[100] The clause stated that the defendant "expressly submits and consents to the jurisdiction of the Supreme Court of the State of New York, in the County of New York."[101] While the court found that the defendant had waived the right to remove, it based its decision on the identification of a specific court to which the defendant "expressly submit[ted] and consent[ed] to."[102] The court pointed out that limiting language, such as "'shall' or 'exclusive' in the forum selection clause, is not dispositive" of the waiver issue.[103]

The Ninth Circuit, in *Docksider Ltd. v. Sea Technology, Ltd.*, found waiver in a clause that stated, "[v]enue of any action brought hereunder shall be deemed to be in Gloucester County, Virginia."[104] The court noted that the clause did not contain any limiting terms like "exclusively."[105] Apparently, it did not consider the word "shall" to be a limiting term. Nevertheless, the Ninth Circuit stated that the absence of a limiting term does not prevent a court from finding waiver of removal rights.[106]

---

99. *See id.* at 128 (noting that courts in the Second Circuit have generally only found waiver if the forum selection clause contains explicit language evidencing waiver).

100. 475 F. Supp. 2d 368, 372 (S.D.N.Y. 2007).

101. *Id.* at 370.

102. *Id.* at 371.

103. *Id.* at 372.

104. 875 F.2d 762, 763–64 (9th Cir. 1989).

105. *Id.* at 763; *see also Wells Fargo*, 475 F. Supp. 2d at 372 (finding use of the word "shall" or "exclusive," while often indicative of a mandatory forum clause, not dispositive, especially when coupled with clauses indicating non-exclusive jurisdiction).

106. *Docksider*, 875 F.2d at 763–64.

IV. WORD CHOICE

A. "Of" v. "In": Waiver by Preposition

Using the prepositions "of" or "in" when designating a particular geographical location for litigation can have differing effects on the waiver analysis. Drafting a forum selection clause to place litigation in the courts "*of* [a named *state*]" often supports a finding of waiver.[107] If the forum selection clause places litigation in the courts "*of* [a named *county*]," however, courts are less consistent in their findings regarding waiver.[108] A court may be more likely to find waiver by virtue of a clause selecting courts "of" a particular county if no federal court sits in the specified county.[109] Presence of a federal courthouse in the specified county can change that result.[110]

If the forum selection clause is drafted to require litigation to be in a court "*in* [named county]," the right to remove, again, often depends on whether a federal court sits in that county.[111] The absence of a federal courthouse in the chosen county can strengthen a waiver claim, although often not as much as when the clause uses the phrase "*of* [named county]."[112]

B. "Of [named state]"

In *Dixon v. TSE International, Inc.*, the Fifth Circuit relied on the phrase "of [named state]" in a forum selection clause to find waiver.[113] The forum selection clause at issue said that "[t]he Courts of Texas, U.S.A., shall have jurisdiction over all controversies with respect to . . . this Agreement, and the parties waive any other venue to which they may be entitled by virtue of domicile or otherwise."[114] Because the parties consented to forum in the "Courts *of* Texas," the court found waiver, reasoning that "Courts of Texas" means state,

107. *See infra* Part IV.B.
108. *See infra* Part IV.C.
109. *See infra* Part IV.D.
110. *See infra* Parts IV.E, V.
111. *See infra* Parts IV.D, V.
112. *See infra* Part IV.C.
113. 330 F.3d 396, 397–98 (5th Cir. 2003).
114. *Id.* at 397 (emphasis omitted).

not federal courts.[115] The court explained that while federal courts are *located* in particular geographic regions such as the State of Texas, they find their *origin* in the federal government and are therefore "Courts of the United States."[116]

In *American Soda LLP v. U.S. Filter Wastewater, Inc.*, the Tenth Circuit considered "[w]hether the U.S. district courts are courts *of* the various states in which they are located," as an issue of first impression.[117] The clause stated that the "[parties] hereby submit to the jurisdiction of the courts of the State of Colorado and agree that the courts of the State of Colorado . . . shall be the exclusive forum for the resolution of any disputes."[118] The court looked to *Dixon* and agreed, "the federal court located in Colorado is not a court *of* the *State* of Colorado but rather a court of the *United States of America*."[119] The Tenth Circuit also noted limiting language in the clause that stated that Colorado state courts "shall be the *exclusive* forum."[120] While the court acknowledged that the parties "went a step further" with this limiting language, the court also suggested that the analysis could have been complete with the "of [named state]" discussion, as it was in *Dixon*.[121]

In *Celerant Technology Corp. v. Overland Sheepskin Co.*, the Southern District of New York in the Second Circuit considered a forum selection clause that placed suit "exclusively in the courts of the State of New York, County of New York."[122] The court found that the clause "unequivocally committed" the parties to the state courts of New York.[123] Although the Southern District of New York sits in the named county, the court found waiver of the right to remove to that court because it is not a court "of" the State of New York.[124] As in *Dixon*, the court in *Celerant* focused its analysis on the "of [named state]" phrase, and refrained from analyzing the use

115. *Id.* (emphasis added).
116. *Id.* at 397–98.
117. 428 F.3d 921, 925 (10th Cir. 2005).
118. *Id.* at 924.
119. *Id.* at 926–27.
120. *Id.* at 924, 927 (emphasis added).
121. *Id.* at 926–27.
122. No. 06 Civ. 13457 LAK, 2007 WL 431879, at *1 (S.D.N.Y. Jan. 29, 2007) (emphasis omitted).
123. *Id.*
124. *Id.*

of "exclusively" as limiting language in the clause also favoring waiver.[125]

In *Genesis Services Group, Inc. v. Culi-Services, Inc.*, the Eastern District of North Carolina in the Fourth Circuit considered a clause which read, "the exclusive forum . . . shall be the courts of the State of North Carolina," and "venue . . . shall lie in any court of competent jurisdiction in Wake County, North Carolina."[126] The court followed an analysis similar to those discussed above to find that the "of [named state]" language waived the defendant's right to remove to federal court[127] and then took the discussion further. The court held that the phrase "*of* North Carolina" showed the parties' intent to litigate only in state court, but added that if the clause had placed litigation "*in* North Carolina," removal rights would not have been waived.[128]

Recently, the Middle District of Florida in the Eleventh Circuit came to an unconventional conclusion when it considered a forum selection clause that stated, "[the parties] shall be subject to personal jurisdiction of the State of Florida and accept venue in Seminole County."[129] Rather than analyzing the respective origins of state and federal courts, the court, in *Priority Healthcare*, found that even the language "*of* [named state]" did not waive the defendant's right to remove.[130] Rather, the court found that the language that the parties would "accept venue in Seminole County" was ambiguous and should be construed against the drafter, who was requesting remand.[131] That party argued that because Seminole County had no federal court, the language was not ambiguous; but

125. *Id.*

126. No. 4:98-CV-145-BO(3), 1999 WL 1939986, at *1 (E.D.N.C. Mar. 30, 1999).

127. *Id.*

128. *Id. But see* Cont'l Cas. Co. v. LaSalle Re Ltd., 500 F. Supp. 2d 991, 994–96 (N.D. Ill. 2007) (notwithstanding the use of the word "of" in a clause stating the parties "consent[ed] to the jurisdiction of the courts of the state of Illinois," finding no waiver of the right to remove based on the lack of any deference to the plaintiff's choice of forum or any language limiting the forum to the specified jurisdiction).

129. Priority Healthcare Corp. v. Chaudhuri, No. 6:08-cv-425-Orl-KRS, 2008 WL 2477623, at *2 (M.D. Fla. June 18, 2008).

130. *Id.*

131. *Id.*

the court still found no waiver and dismissed the argument in a footnote.[132]

C. *"Of [named county]"*

The court's reasoning in *Priority Healthcare* is not the general rule. When a forum selection clause uses the phrase "of [named county]," waiver analysis often turns on whether a federal court sits in the specified county. Recently, in *London Manhattan*, the District of South Carolina in the Fourth Circuit considered a forum selection clause that stated that "venue . . . shall be in the Courts of Charleston County, South Carolina."[133] Instead of examining the respective origins of state and federal courts, the court reasoned that because it sat in Charleston County, the defendant did not waive its right to remove to that particular federal court.[134]

Along those same lines, the Eleventh Circuit, in *Global Satellite Communication Co. v. Starmill U.K. Ltd.*, considered a clause in which the parties agreed "to submit to the jurisdiction of Broward County, Florida," but the court did not find that the "of [named county]" phrase limited the parties to state court.[135] Rather, the court found the clause too "vague and imprecise" to waive the right to remove, since the specified county contained both state and federal courts.[136]

In *Rochester Community School Corp. v. Honeywell Inc.*, the Northern District of Indiana in the Seventh Circuit came to the same conclusion, but under different circumstances and without much analysis in the opinion.[137] The clause at issue stated, "the claim shall be decided by a court of competent jurisdiction of Fulton County, Indiana."[138] Fulton County does not contain a federal courthouse.[139]

---

132. *Id.* at *2 n.1.

133. London Manhattan Co. v. CSA-Credit Solutions, Inc., No. 2:08-cv-00465-PMD, 2008 WL 2077554, at *1 (D.S.C. May 9, 2008) (emphasis omitted).

134. *Id.* at *2–3.

135. 378 F.3d 1269, 1271, 1274 (11th Cir. 2004).

136. *Id.* at 1273–74.

137. No. 3:06-CV-351 RM, 2007 WL 2473464, at *6 (N.D. Ind. Aug. 27, 2007).

138. *Id.* at *2.

139. *Id.* at *6.

Even so, the court found that nothing in the language of the clause excluded proper venue in federal court, so the defendant had not waived the right to remove.[140]

D. *"In [named county]"*

When a forum selection clause requires that litigation proceed *in* a particular county, the deciding factor regarding removal rights is often whether a federal court sits in that county. The presence of a federal courthouse helps preserve the right to remove, while the absence of one can support a finding of waiver. While this general rule also applies to clauses that indicate the courts *of* a particular county, the likelihood that the right to remove will be preserved is higher with clauses using the phrase "*in* [a named county]" (discussed in this Section) as opposed to "*of* [a named county]" (discussed above).

In *Yakin v. Tyler Hill Camp, Inc.*, the Eastern District of New York in the Second Circuit considered a forum selection clause requiring that any litigation "shall be in Nassau County, New York."[141] When the contract was executed in 1999, a federal court sat in the specified county, but at the time of the litigation that federal court had relocated and at that point only encompassed the selected county.[142] The court noted that the suit should have been allowed in either court, but because there was no longer a federal court option in that county, the court found waiver.[143] The court's decision implied that had the federal courthouse still been located "in Nassau County" at the time of removal, removal would have been proper. This analysis is similar to the Fifth Circuit's emphasis in

140. *Id.*

141. No. 07-CV-2444 (SJF) (WDW), 2007 WL 3353729, at *1 (E.D.N.Y. Nov. 6, 2007).

142. *Id.* at *2; *see infra* Part V (discussing a federal court being *in* versus *encompassing* a specified county).

143. *See id.* (remanding case to state court because former presence but current absence of federal courthouse created ambiguity that had to be resolved in favor of the non-drafter, the plaintiff moving for removal to state court).

Collin County on whether a federal court *currently* existed in the county at the time of litigation.[144]

More recently, the Fifth Circuit relied upon the "in [named county]" analysis in *Alliance Health Group*.[145] The clause at issue required that "exclusive venue for any litigation related hereto shall occur in Harrison County, Mississippi."[146] The court found that the plaintiff had not waived the right to file its lawsuit in federal court, in part, because the specified county for exclusive venue contained a federal court.[147] The court further pointed out that the forum selection clause did not require that courts be "of" a certain county (or state), which, if it had, presumably could change the court's decision.[148] The defendant tried to persuade the court that there was no difference between the two propositions, to which the court wholeheartedly "reject[ed the] attempt to render 'in' and 'of' synonymous."[149]

Applying similar analysis in *Power Marketing Direct, Inc. v. Clark*, the Southern District of Ohio in the Sixth Circuit considered a clause stating that suit "shall be filed in Franklin County, Ohio"—where a federal court is located.[150] The court found this language lacked specificity, but the court held that the federal court's presence in Franklin County satisfied the ordinary meaning of the clause's language, "in Franklin County."[151] The court further said that a defendant's mere consent to jurisdiction in "a particular geographic location" (which, in forum selection clauses is frequently a county)

144. *See* discussion *supra* notes – and accompanying text; *see also* Berry v. WPS, Inc., No. CIV.A.H-05-2005, 2005 WL 1168412, at *2 (S.D. Tex. May 16, 2005) (finding under Fifth Circuit authority that a similar clause, stating that "jurisdiction shall lie exclusively *in* Houston, Harris County, Texas"—where a federal court sits—did not require litigation to be in state rather than federal court) (referring to City of New Orleans v. Mun. Admin. Servs., 376 F.3d 501, 505 (5th Cir. 2004)).

145. Alliance Health Group, LLC v. Bridging Health Options, LLC, 553 F.3d 397, 398–402 (5th Cir. 2008).

146. *Id.* at 399.

147. *Id.* at 399–400.

148. *Id.* at 400.

149. Id.

150. Power Mktg. Direct, Inc. v. Clark, No. 2:05-CV-767, 2006 WL 1064058, at *2 (S.D. Ohio Apr. 20, 2006).

151. *Id.*

does not waive the right to remove so long as a federal court sits in that location.[152]

By contrast, a district court in the Fourth Circuit found that a clause requiring litigation "in Wake County, North Carolina" resulted in waiver.[153] The analysis did not hinge on whether a federal court was in that county, however, but rather on the fact that the clause also stated that "the exclusive forum . . . shall be the courts *of* the State of North Carolina."[154] Analyzing the "of [named state]" phrase, along the lines discussed previously, caused the court to find the federal forum was excluded.

If there is no federal court "in [the named county]," courts often find waiver. For example, the Northern District of Illinois, in *Progressive Publications, Inc. v. Capital Color Mail, Inc.*, found that the phrase "in [named county]" waived the right to remove if the selected county has no federal court in it.[155] The clause at issue said, "venue shall be situated in Kane County, [Illinois]."[156] The court found this provision waived removal rights, citing the fact that the geographical designation of Kane County, Illinois only lends to one meaning—state court—as that county has no federal court.[157] While the jurisdiction of the Northern District of Illinois includes Kane County, the court observed, "this District court does not rest its figurative bottom (and this Court does not rest its literal bottom) in Kane County."[158]

The Eastern District of Wisconsin in *Specialty Cheese* considered a forum selection clause that placed litigation "in Dodge County in the state of Wisconsin."[159] The court hinted that the

152. *Id.*

153. Genesis Servs. Group, Inc. v. Culi-Services, Inc., No. 4:98-CV-145-BO(3), 1999 WL 1939986, at *1–2 (E.D.N.C. Mar. 30, 1999).

154. *Id.* at *1 (emphasis added).

155. Progressive Publ'ns, Inc. v. Capital Color Mail, Inc., 500 F. Supp. 2d 1004, 1005–06 (N.D. Ill. 2007).

156. *Id.* at 1005.

157. *Id.*

158. *Id.*

159. Specialty Cheese Co. v. Universal Food & Dairy Prods., Inc., No. 07-CV-970, 2008 WL 906750, at *1 (E.D. Wis. Apr. 1 2008); *see also* Se. Commc'n Serv., Inc. v. Allstate Tower, Inc., No. 4:08CV-13M, 2008 WL 1746638, at *2–3 (W.D. Ky. Apr. 14 2008) (mem.) (holding, under Sixth Circuit authority, that when "the exclusive forum . . . shall be in Henderson County, Kentucky," there

forum selection clause could have been considered ambiguous, but instead found that because Dodge County has no federal court, the "more plausible" meaning of the "in [named county]" phrase was that the parties intended to litigate only in state court.[160]

More than once, the Northern District of Texas[161] has held that when a forum selection clause places litigation "in" a certain county, and that named county does not have a federal courthouse, then the defendant has contractually waived the right to remove.[162] While the outcome has remained consistent, that district's analysis of the "in [named county]" phrase has refined over time. The court held in *Greenville Electric*, that a clause stating, "[v]enue . . . shall lie in Greenville, Hunt County, Texas," waived the defendant's right to remove.[163] Because no federal courthouse was located in the specified location (a city in this instance), the court found no ambiguity, but rather that it was "clear" that parties intended to only litigate in state court.[164]

A year later, the Northern District of Texas followed and expanded that holding in *Peavy*. The court considered a clause that placed litigation "only in Collin County, Texas."[165] The court agreed with the reasoning from *Greenville* that the clause was a "clear" waiver because no federal courthouse sat in the specified county.[166] And this analysis has made its way into other circuits: Like the Northern District of Texas, the Western District of Kentucky in the Sixth Circuit found waiver based primarily on the "'in [named

would not be a waiver if there was a federal court in that county, but finding waiver because there was not a federal court in that county) (emphasis omitted).

160. *Specialty Cheese*, 2008 WL 906750, at *2.

161. The Northern District of Texas is in the Fifth Circuit.

162. *E.g.*, Greenville Elec. Util. Sys. v. N. Pac. Group, Inc., No. 3-01-CV-0758-BD, 2001 WL 804521, at *1–2 (N.D. Tex. July 6, 2001); First Nat'l N. Am., LLC v. Peavy, No. 3-02-CV-0033BD(R), 2002 WL 449582, at *1 (N.D. Tex. Mar. 21, 2002).

163. *Greenville Elec.*, 2001 WL 804521, at *1–2.

164. *Id.* at *2.

165. *Peavy*, 2002 WL 449582, at *1.

166. *Id.* at *2. The court also relied on the Tenth Circuit's position that the designation of a county rather than a judicial district prevented federal venue. *Id.* This expanded basis for waiver, however, has not been embraced by subsequent Fifth Circuit opinions. *See* Collin County v. Siemens Bus. Servs., Inc., 250 F. App'x 45 (5th Cir. 2007) (holding that the clause's reference to "county" rather than "district" did not waive removal).

county]' language used in the clause: 'the exclusive forum . . . shall be in Henderson County, Kentucky.'"[167] Kentucky's Western District concluded that such a clause clearly and unequivocally waived the plaintiff's right to litigate in federal court because no federal court sat "in Henderson County, Kentucky."[168]

Some courts take a different approach to this language. For example, the forum selection clause at issue in *Priority Healthcare Corp. v. Chauduri* had both the "of [named state]" and "in [named county]" phrases,[169] as did the clause in *Genesis Services Group, Inc. v. Culi-Services, Inc.*[170] However, while the Eastern District of North Carolina[171] in *Genesis Services* relied on the "of [named state]" phrase to find waiver,[172] the Middle District of Florida[173] in *Priority Healthcare* did not find that either the phrase "of the State of Florida" or "in Seminole County" restricted the parties to state court, even though no federal court sits in that county.[174]

E. "County" v. "Judicial District"

A similar analysis distinguishes the words "county" and "judicial district." The Tenth Circuit in particular uses this distinction, reasoning that if a clause specifies a county, the parties likely agreed to state court, and similarly concluding that parties should reference a judicial district to best preserve the right to remove.[175] The Tenth Circuit in *Excell* considered a clause that

167. Se. Comm'n Serv., Inc. v. Allstate Tower, Inc., No. 4:08CV-13-M, 2008 WL 1746638, at *1 (W.D. Ky. Apr. 14, 2008) (mem.).

168. *Id.*

169. *See* Priority Healthcare Corp. v. Chauduri, No. 6:08-cv-425-Orl-KRS, 2008 WL 2477623, at *1 (M.D. Fla. June 18, 2008) (including a clause providing that "customer shall be subject to personal jurisdiction of the State of Florida and accept venue in Seminole County, Florida.").

170. *See* Genesis Servs. Group, Inc. v. Culi-Servs., Inc., No. 4:98-CV-145-BO(3), 1999 WL 1939986, at *2 (E.D.N.C. Mar. 30, 1999) (analyzing forum selection clause's reference to "courts of the state of North Carolina" and "in Wake County").

171. The Eastern District of North Carolina is in the Fourth Circuit.

172. Genesis Servs. Group, Inc., 1999 WL 1939986, at *2.

173. The Middle District of Florida is in the Eleventh Circuit.

174. *Priority Healthcare*, 2008 WL 2477623, at *2–3.

175. *See, e.g.*, Excell, Inc. v. Sterling Boiler & Mech., Inc., 106 F.3d 318, 321 (10th Cir. 1997) ("Because the language of the clause refers only to a specific

stated, "[j]urisdiction shall be in the State of Colorado, and venue shall lie in the County of El Paso, Colorado."[176] The court found that the defendant had waived the right to remove, but not because of the reference in the clause to the jurisdiction of Colorado.[177] Rather, the court reasoned that the clause could not refer to federal courts because "[f]or federal court purposes, venue is not stated in terms of 'counties,'" and hinted that to preserve the right to remove, the clause would need to refer expressly to a specific judicial district.[178]

More recently, the District of Kansas in the Tenth Circuit applied this distinction in *Top Flight Steel, Inc. v. CRR Builders, Inc.*[179] The forum selection clause stated that "[v]enue . . . will be in Johnson County, Kansas."[180] The court found that this language waived the right to remove because federal law describes venue by judicial districts, not counties, and said that a clause should specify venue in a judicial district to avoid waiver.[181] The same court made the point again in *Red Mountain Retail Group v. BCB, L.L.C.*, where the clause stated, "any litigation shall have venue only in Wyandotte County, Kansas."[182] While it used reasoning familiar to the Tenth Circuit's to find waiver because the clause referred only to a county and not a judicial district,[183] the holding is even more remarkable because the District of Kansas has a courthouse in Wyandotte County.[184]

---

county and not to a specific judicial district, we conclude venue is intended to lie only in state district court.").

176. Id. at 320.

177. *Id.* at 321.

178. *See id.* (relying on Milk 'N' More, Inc. v. Beavert, 963 F.2d 1342, 1346 (10th Cir. 1992) (finding that a clause stating "venue shall be proper under this agreement in Johnson County, Kansas" constituted waiver of the right to remove because language "strongly point[ed] to the *state* court of that county")).

179. No. 06-2498-CM, 2007 WL 1018764, at *1 (D. Kan. Apr. 2, 2007) (mem.).

180. *Id.*

181. *Id.* at *2.

182. No. 05-2557-KHV, 2006 WL 1128685, at *1 (D. Kan. Apr. 27, 2006) (mem.).

183. *Id.* at *2.

184. *See* The U.S. Department of Justice, The District of Kansas, http://www.justice.gov/usao/ks/ (Kansas City location); Kansas Department of Transportation, County Maps, http://www.ksdot.org/burtransplan/maps/

Courts outside the Tenth Circuit have followed its distinction between counties and judicial districts. In *Genesis Services Group, Inc. v. Culi-Services, Inc.*, the Eastern District of North Carolina[185] relied on *Excell* to analyze a forum selection clause stating that "venue . . . shall lie in any court of competent jurisdiction in Wake County, North Carolina."[186] In addition to comparing the words "in" and "of," the court agreed with *Excell* that a reference to a county, with no reference to a judicial district, "evinces a clear intent that only state courts will have jurisdiction and necessarily rules out the jurisdiction of a federal court."[187]

The Northern District of Illinois[188] in *Progressive Publications, Inc. v. Capitol Color Mail, Inc.*, found waiver from a forum selection clause that stated, "venue shall be situated in Kane County, [Illinois.]"[189] The court relied both on the "in [named county]" analysis as discussed above (no federal court was located in the specified county) and the Tenth Circuit's county–judicial district distinction, finding both analyses to be "fully instructive on the subject at hand and [to] strongly support remand" from the federal to the state court.[190]

Other courts have placed less reliance on the distinction between a county and a judicial district. For example, the recent case of *Southeastern Communication*, the Western District of Kentucky[191] applied the distinction with some reservation.[192] The clause at issue stated that "the exclusive forum . . . shall be in Henderson County, Kentucky."[193] While the bulk of the court's analysis focused on the "in [named county]" phrase, the court cited

---

Mapscounties.asp (showing map of Wyandotte County including Kansas City, Kansas).

185. The Eastern District of North Carolina is in the Fourth Circuit.

186. Genesis Servs. Group, Inc. v. Culi-Servs., Inc., No. 4:98-CV-145-BO(3), 1999 WL 1939986, at *1–2 (E.D.N.C. Mar. 30, 1999).

187. *Id.* (citing Excell, Inc. v. Sterling Boiler & Mech., Inc., 106 F.3d 318, 321 (10th Cir. 1997)).

188. The Northern District of Illinois is in the Seventh Circuit.

189. 500 F. Supp. 2d 1004, 1005 (N.D. Ill. 2007).

190. *Id.* at 1005–06.

191. The Western District of Kentucky is in the Sixth Circuit.

192. Se. Comm'n Serv., Inc. v. Allstate Tower, Inc., No. 4:08CV-13-M, 2008 WL 1746638, at *1 (W.D. Ky. Apr. 14, 2008).

193. *Id.*

the Tenth Circuit in *Excell* and said that because "[t]he clause refers to a specific county and contains no reference to the federal courts," litigation was allowed only in state court.[194] Unlike other courts applying the county–judicial district distinction, however, the Kentucky district court gave primacy to the "in [named county]" phrase, suggesting that if a federal court was located in Henderson County, there would not have been a waiver;[195] in effect, the court made the county–judicial district analysis superfluous.

The Eleventh Circuit in *Global Satellite*, when considering a clause placing venue and jurisdiction in (and of) "Broward County, Florida," rejected the position that by referencing a "county," the parties exclusively designated state court.[196] While the court found that litigation must occur in that specified county, it also found that use of the word "county" allowed litigation in either state or federal court.[197] Although a "geographic unit" was specified, the word "county" did not designate a particular *forum*.[198] Therefore, the court found that suit could proceed in either the Seventeenth Judicial District of Florida or the Fort Lauderdale Division of the Southern District of Florida.[199]

Until recently, courts in the Fifth Circuit frequently noted the Tenth Circuit's county–judicial district distinction, probably because both circuits apply a "clear and unequivocal" standard overall.[200] For example, in *Ondova Ltd. v. Manila Industries, Inc.*, the Northern District of Texas considered a forum selection clause in which the parties agreed to "the exclusive jurisdiction of any Court of competent jurisdiction sitting in and for the County of Dallas."[201] Given that this clause required not only that the court be "in" the

194. *Id.* at *2.

195. *Id.* at *3; *see also* Power Mktg. Direct, Inc. v. Clark, No. 2:05-CV-767, 2006 WL 1064058, at *2 (S.D. Ohio Apr. 20, 2006) (finding reference to a particular county can be considered in a waiver analysis but does not alone waive the right to remove).

196. Global Satellite Comm'n Co. v. Starmill U.K. Ltd., 378 F.3d 1269, 1271 (11th Cir. 2004).

197. *Id.* at 1273–74.

198. *Id.* at 1274.

199. *Id.* at 1272.

200. *See supra* Part II.B.

201. Ondova Ltd. Co. v. Manila Indus., Inc., 513 F. Supp. 2d 762, 769 (N.D. Tex. 2007).

county but also "for" that county, the clause seems to lend itself to the "of [named county/state]" analysis, but the court did not support its holding in that way. Instead, the court stated that a federal district court is never referred to as a court "for the County of Dallas," and that "venue in the federal system is stated in terms of judicial districts, not counties."[202] Relying on the Tenth Circuit's analysis in *Excell v. Sterling Boiler & Mechanic, Inc.*, this court adopted the position that the designation of "a particular county," as opposed to a judicial district, left only state courts as proper venue and resulted in a waiver of the right to remove.[203]

The Fifth Circuit has since rejected the Tenth Circuit's county–judicial district analysis, regardless of whether a federal courthouse sits in the designated county.[204] In *Alliance Health Group LLC v. Bridging Health Options LLC*, the court stated that the distinction used by the Tenth Circuit "would be more persuasive were the federal courts organized in total disregard of state counties; if, for instance, federal judicial districts were defined by metes and bounds."[205] The court then noted that federal judicial districts are in fact defined by reference to counties, while state courts are sometimes defined by ways other than by county.[206] The court went on to conclude that the parties had not waived the right to litigate in federal court, mainly because a federal district court was located in the selected geographic area.[207]

---

202. *Id.* at 773.

203. *Id.* (citing First Nat'l N. Am., LLC v. Peavy, No. 3-02-CV-0033BD(R), 2002 WL 449582, at *2 (N.D. Tex. Mar. 21, 2002) (holding that "where a forum selection clause merely designates a particular county, venue lies only in state courts in that county") (citing Excell, Inc. v. Sterling Boiler & Mech., Inc., 106 F.3d 318, 321 (10th Cir. 1997))); *see also* ENSCO Int'l Inc. v. Certain Underwriters at Lloyd's, No. 3:07-CV-1581-O, 2008 WL 958205, at *2–3 (N.D. Tex. Apr. 8, 2008) (analyzing a forum selection clause which made "[a]ny disputes . . . subject to the exclusive jurisdiction of the Courts of Dallas County, Texas," and finding waiver in part because reference to venue "in a particular county" required that the parties litigate only in the state courts of the selected county).

204. Alliance Health Group, LLC v. Bridging Health Options, LLC, 553 F.3d 397, 400–01 (5th Cir. 2008).

205. *Id.*

206. *Id.* at 401.

207. *Id.* at 401–02. This same conclusion was reached a year earlier by the Fifth Circuit in *Collin County v. Siemens Business Services, Inc.*, where, as

V. COURTS "IN" OR "ENCOMPASSING" A FORUM

Some courts, rather than parsing the specific language of a forum selection clause, look for the physical presence of a federal courthouse in the specified county. These courts require that the relevant federal court be *in* the selected county, and find that if that court merely *encompasses* the county, it falls outside the scope of the clause and bars removal.

The Fifth Circuit in *Paolino* considered a clause that mandated "exclusive jurisdiction of the courts sitting in Kendall County, Texas."[208] While the applicable federal court encompassed Kendall County, it sat in Bexar County, and thus did not satisfy the clause.[209] The court clarified that a "district court 'sits' where it regularly holds court, not in the potentially infinite number of places in the . . . District . . . where it *could* hold a special session."[210] The Fifth Circuit went on to emphasize in *Collin County* that courts sitting "in" a particular county should not be "lump[ed] . . . together" with courts "encompassing" a county to determine removal rights.[211]

Other courts, particularly in the Seventh Circuit, do not find waiver if the relevant federal court encompasses the selected county. For example, in *Rochester Community School*, the Northern District of Indiana found no waiver from a clause that read, "the claim shall be decided by a court of competent jurisdiction of Fulton County, Indiana."[212] Even though the clause contained the phrase "of [named county]" that many courts cite to support a waiver finding,[213] this

---

mentioned above, the clause at issue stated that venue "shall lie exclusively in Collin County, Texas." 250 F. App'x 45, 47 (5th Cir. 2007). The Eastern District of Texas found that the defendant had waived the right to remove for two reasons: first, because no federal court sat in the selected county, and second, because the agreement "stated venue in terms of a county as opposed to a federal district." *Id.* The Fifth Circuit did not agree with the district court's second reason, and clarified that a distinction between the terms "county" and "district" "falls short of a clear and unequivocal waiver of federal jurisdiction." *Id.* at 52.

208. Argyll Equities LLC v. Paolino, 211 F. App'x 317, 318 (5th Cir. 2006).

209. *Id.* at 319.

210. *Id.* (emphasis added).

211. *Collin County*, 250 F. App'x at 52.

212. Rochester Cmty. Sch. Corp. v. Honeywell, Inc., No. 3:06-CV-351 RM, 2007 WL 2473464, at *2 (N.D. Ind. Aug. 27, 2007).

213. *See supra* Part IV.C.

court reasoned that the clause did not make jurisdiction exclusive to state courts within Fulton County.[214] Thus, while no federal court sits in Fulton County, the clause did not waive the defendant's right to remove to federal courts that encompassed that county.[215] The court interpreted the phrase "of [named county]" more broadly than the phrase "in [named county]," and insinuated that had the clause required a court "in" Fulton County, the result could have been a waiver of the right to remove.[216]

An earlier case from the Northern District of Illinois in the Seventh Circuit used a similar but expanded analysis. In *Truserv Corp.*, the court considered a forum selection clause which stated that "[the] Agreement shall be enforced . . . only in courts located in Cook County or any Illinois county contiguous to Cook County, Illinois."[217] The federal district court to which the action was removed was located in Winnebago County, which is not contiguous to Cook County or even any other county contiguous to Cook County.[218] Relying on a dictionary definition of "locate" as including "the limits of a place," the court reasoned that its "limits extend to and include McHenry County, which is contiguous to Cook County; thus, this division falls within the ambit of the forum selection clause."[219]

VI. CONCLUSION

The law about contractual waiver of the right to remove is both practical and theoretical. The many recent cases about waiver issues have developed several instructive lines of authority.

First, the federal circuits that have considered what general standard to use are divided on what that standard should be and then on how to apply a standard once chosen. While those trends suggest that choice of an overall standard may not be that important to the

214. *Rochester Cmty. Sch. Corp.*, 2007 WL 2473464, at *2.
215. *Id.*
216. *Id.*
217. Truserv Corp. v. Prices Ilfeld Hardware Co., No. 01 C 50271, 2001 WL 1298718, at *1 (N.D. Ill. Oct 24, 2001) (internal citations omitted).
218. *Id.* at *2.
219. *Id.*

ultimate result, the process of selecting a standard does give guidance through opinions on how to weigh the relevant policies. And, while the circuits have significant inconsistencies in their application of general standards, each individual circuit that has binding appellate precedent is largely consistent internally. The choice of an overall standard seems to help guide the organization of precedent within a circuit, even if it is not necessarily helpful in other circuits applying a facially similar standard.

Second, when a forum selection clause contains a substantive agreement, such as a provision giving the plaintiff the right to choose the forum, or one consenting to jurisdiction in a particular location, the policy issue before the court is sharpened to one that focuses on the principle that forum selection clauses are favored. Accordingly, there are areas of agreement across circuits about this topic.

Third, certain word choices are important to the waiver analysis. The key words include *of*, *in*, *county*, and *judicial district*. While prevailing approaches have developed about some of these terms, individual courts will readily make their own policy judgments about them when there is no binding authority. Many courts certainly find these terms helpful, but the continuing diversity of opinions suggests that their analysis is part of a broader policy evaluation.

Finally, and similarly, the presence of a federal court in a specified county is often influential on the waiver analysis. Here again, while many courts reason that the presence of a federal court in the county weighs against a waiver finding, other courts do not find that fact determinative in their view of the judicial structure. Further development of the law in all of these areas may bring more consensus, develop more diversity, or both, as the issues themselves evolve.

HALL STREET, JUDICIAL REVIEW OF ARBITRAL AWARDS, AND FEDERAL PREEMPTION

Nicholas R.Weiskopf and Matthew S. Mulqueen *

I. INTRODUCTION

The United States Supreme Court's 2008 decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, in resolving a direct conflict amongst the circuits, holds that where the judicial review provisions of the Federal Arbitration Act ("FAA") apply, they provide the "exclusive" grounds for vacation or modification of an award.[1]

---

* Nicholas R. Weiskopf is Professor of Law, St. John's University School of Law. Matthew S. Mulqueen, a *summa cum laude* graduate of the class of 2009, contributed significantly to the preparation and researching of this article.

1. Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1406 (2008). The split involved at least eight of the circuits. *Id.* at 1403 n.5. The circuits ruling or expressing the view that arbitral parties could not expand judicial review

These provisions limit the bases for refusal to confirm awards to gross abuses of process,[2] and the bases for modification of awards to essentially mechanical errors apparent on the face of the award.[3] They do not provide for review on the merits.[4] The parties in *Hall Street*, however, had attempted to provide for a reasoned arbitral

---

standards under the FAA generally focused on the inability of litigants to expand the subject matter jurisdiction of the federal courts. Bowen v. Amoco Pipeline Co., 254 F.3d 925, 937 (10th Cir. 2001); Chicago Typographical Union v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991). The Supreme Court's opinion in *Hall Street* did not rely on these grounds.

2. *See infra* note 4.

3. *Id.*

4. Section 10 of the FAA provides for an award to be vacated on the following grounds:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10 (2006).

Section 11 of the FAA provides for modification or correction of an award on the following grounds:

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. § 11 (2006).

award to be reviewed judicially for errors of law and for fact-findings which were not supported by substantial evidence.[5]

In *Hall Street*, the Supreme Court was faced with entrenched policy considerations which were impossible to reconcile in dealing with the issue at hand. Pointing in favor of permitting parties to opt for broadened review was that, under the FAA, arbitration, as a creature of contract, is to be conducted in keeping with the provisions of the arbitration agreement.[6] Pointing against giving the parties such latitude was that expedited judicial review of awards is important if arbitration is to provide the desired economies without undue interference from the courts.[7] When policies such as these collide, confusion may result, and that is what happened here.

In a 7–2 decision, the *Hall Street* majority would read as mandatory[8] the provision in section 9 of the FAA that an award "must" be confirmed absent the highly limited statutory bases to refuse found in sections 10 and 11.[9] Perhaps this strict statutory

---

5. *Hall Street*, 128 S. Ct. at 1400–01.

6. Under § 2 of the FAA, arbitration is a creature of contract so that written arbitral agreements may be invalidated only "upon such grounds as exist in law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2006). Under § 4 of the FAA, a party may obtain an order directing that "arbitration proceed in the manner provided for in [the parties'] agreement." *Id.* § 4. As noted in *Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior University*, the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." 489 U.S. 468, 478 (1989); *see also* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985) (stating that federal arbitration was designed "first and foremost, by a congressional desire to enforce agreements").

7. *Hall Street* itself references "a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straight-away." 128 S. Ct. at 1405. The legislative history of the FAA repeatedly emphasizes that court litigation is too cumbersome, and that arbitration is designed to avoid its pitfalls. *See, e.g.*, S. REP. NO. 68-536, at 3 (1924) ("The desire to avoid the delay and expense of litigation persists.").

8. *Hall Street*, 128 S. Ct. at 1405 ("There is nothing malleable about 'must grant,' which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies.").

9. Section 9 reads:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is

construction approach was designed to avoid the conceptual trap created by the competing arbitral policies just identified. However, in dissent, Justice Stevens, joined by Justice Kennedy, contended with considerable force that the "must" imperative was only designed to prevent a judiciary traditionally hostile to arbitration from being overly intrusive at the review stage absent party invitation to look at the merits of the award.[10]

The *Hall Street* majority acknowledged that the FAA left the parties free to fashion their own arbitral procedures, but then drew a distinction between the contractual shaping of arbitral matters left unspecified by statute (choice of arbitrators, discovery, arbitral forum) and party attempts to abrogate statutory directives in section 9.[11] Furthermore, when faced with the predictable argument that the FAA bases for review could not be "exclusive" because of its prior recognition of "manifest disregard" as grounds to refuse confirmation,[12] the Court distinguished between that highly restrictive exception as fashioned by the courts and the broadscale review on the merits sought to be arranged by the parties in the case before it.[13] The Court added that "manifest disregard" could well be nothing more than a subspecies of the "abuse" of arbitral power actually specified by section 10 of the FAA as grounds to refuse confirmation.[14] Finally, the Court acknowledged that frustrating

---

> made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

9 U.S.C. § 9 (2006).

10. *Hall Street*, 128 S. Ct. at 1408–10.

11. *Id.* at 1404 ("[T]he FAA lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law.").

12. *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 436–37 (1953) ("[T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.").

13. *Hall Street*, 128 S. Ct. at 1404. The Court did not explain its suggestion that the judiciary has more authority to expand statutory review provisions than do private parties.

14. *Id.* "Manifest disregard" was first referenced by the Court in *Wilko v. Swan*, 346 U.S. 427 (1953). In dictum, the Court contrasted errors of law, which were not a basis to vacate, with arbitral "manifest disregard" of the law. *Id.* at 436.

arbitral parties desiring broadened judicial review, perhaps to assuage lingering distrust of arbitration, might not be universally viewed as a good thing.[15] The majority referred to the possibility of arbitral parties arranging for what might be broader review available under state arbitral statutes or in common law arbitration.[16] Just how parties might arrange this was left unsaid. The specter raised, however, appeared to be that of an arbitral claim governed by the FAA for some purposes, such as compelling arbitration, but not for purposes of judicial review.[17]

Hall Street has thus left parties and courts with a number of uncertainties. One is whether "manifest disregard" really remains viable as a basis to refuse confirmation under the FAA, and, if so, how it is to be applied once conceptualized as a form of abuse of arbitral power.[18] After the scope of review under the FAA is defined or refined, however, one must compare it to review standards under state statutory law,[19] and federal and state so-called common law,[20] to determine if there is any real difference. While there are some exceptions, many of them nuanced, it will be seen that the scope of review under state statutory and state and federal common law rubrics is not very different from that under the FAA.[21] What can be quite significant, however, is that these sources of authority, unconstrained by the exclusionary "must" in section 9 of the FAA, may be more accepting of party attempts to contract for broader

---

There have been subsequent references by the Court to "manifest disregard," but with no further explanation as to meaning. *See, e.g.*, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (noting the "very unusual circumstances" in which a court will set aside an arbitrator's decision).

15. *See Hall Street*, 128 S. Ct. at 1406 ("We . . . cannot say whether the exclusivity reading of the statute is more of a threat to the popularity of arbitrators or to that of courts.").

16. *See id.* ("The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.").

17. *See infra* Part IV.

18. *See infra* Part II.

19. *See infra* Part III.B.2.

20. *See infra* Part III.B.1.

21. *See infra* Part III.B.

review.[22] There would then still remain very complicated issues as to how parties may opt for application of such potentially broader standards—questions as to what the parties would have to say (or not say) in their arbitration agreement,[23] and questions as to whether state law deemed to permit contracting for such standards might nonetheless run afoul of principles of federal preemption because of a federal policy perception that judicial review on the merits is inconsistent with desired expedition.[24] Federal preemption paints with a very broad brush because the FAA is treated as an exercise of congressional power under the Commerce Clause.[25] Under increasingly broad Supreme Court constructions of what it means to "involve" interstate commerce under the FAA, most arbitral disputes fall under the so-called "federal law of arbitration" set by the federal courts in applying that statute.[26] In part because the FAA does not automatically vest subject matter jurisdiction in the federal courts,[27]

---

22. *See infra* Part III.B.

23. *See infra* Part IV.

24. It is clear that the parties, by contract, can incorporate aspects of a given state's law of arbitration which, absent specific incorporation, would be preempted under the FAA. In such instances, according to *Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989), the state arbitral ground rule would apply unless it "would undermine the goals and policies of the FAA." *Volt* permits parties to adopt a California statutory rule authorizing a court to refuse to compel arbitration where one of the parties was also involved in court litigation centered on the same transaction, but with a different party not bound to arbitrate, thus avoiding conflicting issues the two matters have in common. *Id.* at 477–78.

25. Section 2 of the FAA provides that the statute covers written agreements to arbitrate in "maritime" transactions or contracts "evidencing a transaction involving commerce." 9 U.S.C. § 2 (2006). *See generally* Allied-Bruce Terminix Co. v. Dobsen, 513 U.S. 265, 268 (1995) (holding that the FAA extends "to the limits of Congress' Commerce Clause power").

26. The Court has held that "involving commerce," for purposes of FAA coverage, covers largely localized transactions in which the parties do not actually contemplate interstate activity. *See Allied-Bruce Terminix Co.*, 513 U.S. at 270 (concluding that the broader reading of the FAA is correct). The Court has also ruled that even seemingly entirely localized matters fall within the preemptive ambit of the FAA so long as they involve business activity subject to significant federal control. *See* Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56–57 (2003) (holding that debt-restructuring agreements executed in Alabama by Alabama residents represent a "general practice" subject to federal control).

27. *See, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 7 (1983) (noting that subject matter jurisdiction was based on diversity of

proceedings in connection with FAA arbitrations often wind up in state courts which are then expected to follow at least certain essential aspects of the pro-arbitrability policies read into the FAA by those federal courts asked to apply it.[28]

First, however, there is the threshold issue of whether awards may still be reviewed for "manifest disregard," and, if so, how this test is to be applied. The courts are beginning to provide some answers, but they are inconsistent and vague. If parties are to have some flexibility in setting merits-oriented judicial review parameters, it will first be important to know what the surviving default rule is on that subject.

II. IS "MANIFEST DISREGARD" STILL GROUNDS UNDER THE FAA TO VACATE AN AWARD?

Starting in 1953, the Supreme Court, in dictum, has said that "manifest disregard" of the law is a basis for judicial vacation of awards.[29] While the Court has made it clear that this concept entails far more than a mere error of the law,[30] it has never defined it. Nonetheless, there are about 2,700 cases which reference "manifest disregard."[31] Even before *Hall Street*, certain courts, most notably those in the Second Circuit, defined "manifest disregard" in terms of deliberate arbitral rejection of what a party has demonstrated to be a fundamental legal principle which would govern a matter were it in

---

citizenship); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (same).

28. This concept of federal preemption has very broad application. *E.g.*, Southland Corp. v. Keating, 465 U.S. 1 (1984) (reversing state court construction of state statute so as to bar arbitration of claims arising under it because of preemption); and *Cone*, 460 U.S. 1 (holding state courts must follow the federal law of arbitrability under FAA).

29. *See* Wilko v. Swan, 346 U.S. 427, 436–37 (1953) (stating that arbitrators' interpretations of the law, "in contrast to manifest disregard," are not subject to judicial review for error in federal court).

30. *Id.*

31. Westlaw Search (search all federal and state cases for "manifest disregard") (last visited Dec. 3, 2009).

court.[32] This approach—premised on the by no means universal notion that arbitrators have no discretion to reject deliberately fundamental rules of law—provides a stepping-stone to characterizing "manifest disregard" as an abuse of arbitral power. Actual employ of the concept is very rare. It does not extend to factual error,[33] is generally thought not to apply even to bizarre arbitral construction of contractual language,[34] and rarely has been used even in arbitrations of those "public" statutory claims for discrimination, antitrust, or securities violations thought by many to require the broadest post-award scrutiny.[35] One of the problems is that "manifest disregard," at least under the typical formulation, does not distinguish the deliberate ignoring of strict legal rules to accomplish what is perceived as fundamental equity from the deliberate reaching of clearly "wrong" decisions out of ulterior motivation or even sheer ignorance.[36] Also, many courts have pointed to the difficulties posed by any attempt to apply "manifest disregard" to unreasoned awards.[37] All this said, there is still a sense

32. *See, e.g.*, Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12–13 (2d Cir. 1997) ("Manifest disregard of the law may be found . . . if the arbitrator understood and correctly stated the law but proceeded to ignore it." (quoting Siegel v. Titan Indus. Corp., 779 F.2d 891, 892 (2d Cir. 1985)) (omissions in original)); *see also, e.g.*, Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp., 548 F.3d 85, 93–95 (2d Cir. 2008) (identifying "three components" for "manifest disregard"—the law which was misapplied must be "clear" and "explicitly applicable"; that law must be "improperly applied"; and, as a "subjective element," the arbitrator, having been told what the law was, must "intentionally" reject it, such intent, assuming no explicit rejection, to be inferred from how obvious that law is), *cert. granted*, 29 S. Ct. 2793 (2009). The Supreme Court, which has granted certiorari in *Stolt-Nielsen*, 29 S. Ct. 2793 (2009), may wind up classifying the status of "manifest disregard."

33. *E.g.*, Hardy v. Walsh Manning Sec., L.L.C., 341 F.3d 126, 131 (2d Cir. 2003) (noting arbitral findings of fact are conclusive). At times, however, the cases are less emphatic, particularly where issues of burden of proof blur the legal with the factual. *See generally*, Nicholas R. Weiskopf, *Arbitral Injustices & Rethinking the Manifest Disregard Standard for Judicial Review of Awards*, 46 U. LOUISVILLE L. REV. 283, 303–05 (2007).

34. *E.g.*, Bernhardt v. Polygraphic Co. of Amer., 350 U.S. 198, 203 n.4 (1956) ("Whether the arbitrators misconstrued a contract is not open to judicial review."). *See generally*, Weiskopf, *supra* note 33 at 309–10.

35. Weiskopf, *supra* note 33, at 306–07.

36. *Id.* at 302–03.

37. *See* Pervini Corp. v. Great Bay Hotel & Casino, Inc., 610 A.2d 364, 392 (Wilentz, C.J., concurring) ("There are no reasons, no findings of fact, no

that "manifest disregard" polices the extremes—that it is "law at the margins" at work because it is a vehicle to get awards before a court, and hence serves as a check on arbitral mayhem. Still, the concept is quixotic. Indeed, if, at least optimally, arbitral decisions are to conform to basic rules of law, it could well be argued that it makes little sense to outlaw provision for substantive review of awards for such compliance.

As noted, when faced in *Hall Street* with the argument that "manifest regard" was a non-statutory ground to reject an award, the Supreme Court, after boxing itself in with the statement that FAA grounds were "exclusive," could only wiggle. Perhaps the statutory grounds "could be supplemented to some extent," said the Court, or "manifest disregard" was but a subspecies of arbitral abuse of power, as expressly condemned by the FAA.[38] While the court did not reject "manifest disregard" out of hand, there is already indication that some courts view *Hall Street* as that doctrine's total or virtual death knell. For instance, the First Circuit, in dictum, has referenced "the Supreme Court's recent holding in *Hall Street* . . . that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award" under the FAA.[39] Other circuits, however, such as the Second,[40] the Fifth,[41] and the Ninth,[42] have retained "manifest disregard" but strictly as a form of arbitral abuse of power specifically condemned by section 10 of the FAA. These cases,

---

conclusions of law . . . . For all we know, the arbitrators concluded that the sun rises in the west, the earth is flat . . ."). *See generally*, Weiskopf, *supra* note 33 at 300.

38. Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1404 (2008). This portion of the *Hall Street* opinion, and its aftermath, are discussed in great detail in Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103 (2009).

39. Ramos-Santiago v. United Parcel Serv., 524 F.3d 120, 124 n.3 (1st Cir. 2008).

40. *See, e.g.*, Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp., 548 F.3d 85, 93–95 (2d Cir. 2008) (agreeing with courts that reconceptualize manifest disregard as a "judicial gloss" on the grounds for vacatur in § 10).

41. *See, e.g.*, Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349, 350 (5th Cir. 2009) (concluding that manifest disregard is no longer an independent ground for vacating awards).

42. *See, e.g.*, Comedy Club Inc. v. Improv W. Assocs., 553 F.3d 1277, 1290 (9th Cir. 2009) (stating that manifest disregard is "shorthand" for § 10(a)(4)).

however, do not explicitly redefine "manifest disregard." Finally, certain state courts, purportedly relying on *Hall Street*, have either banished "manifest disregard" or else relegated it to a subspecies of arbitral abuse of power.[43]

Under the "abuse of power" approach just discussed, not even the most absurd results would likely constitute "manifest disregard" absent a finding of purposeful arbitral rejection of basic law. Yet arbitrators rarely announce such an intention, so prior decisions have frequently left a finding of such intention to inference when there is no other imaginable explanation for the result reached.[44] Whether courts will continue to be willing to draw such inferences is unclear.

III. ARBITRATION UNDER COMMON LAW OR STATE STATUTE AND THE POSSIBILITY OF EXPANDED JUDICIAL REVIEW

A. Common Law Arbitration and the Enactment of State Statutes

Arbitration has its roots in the common law,[45] under which a predispute agreement to arbitrate was revocable up until the time of

43. *See, e.g.*, Hereford v. D.R. Horton, Inc., 13 So. 3d 375, 381 (Ala. 2009) (holding that manifest disregard is not a valid ground for relief from an award); *see also* William H. Hardie, Jr., *Judicial Review of Arbitration Awards in the Alabama Courts*, 69 ALA. LAW. 434, 435 (2008) (discussing the Alabama Supreme Court's abandonment of manifest disregard in *Hereford*).

44. *E.g.*, *Willemijn*, 103 F.3d at 12 ("[A] court may infer that the arbitrators manifestly disregarded the law if it finds that the error made . . . is so obvious . . .").

45. 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:7 (4th ed. 2001). While the exact origins of arbitration are unclear, some have asserted that it emerged as a dispute resolution process for priests in ancient Egypt. *E.g.*, *id.* § 57.2. Other likely sources appear to be canon law and the Ecclesiastical courts, ancient Roman law, Greek law, organic development among the English citizenry, and mercantile guilds. *See id.* (Greek law); Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 854–56 (1961) (English citizenry and mercantile guilds); Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 597–98 (1928) (Roman law, canon law, and Ecclesiastical courts).

award.[46] Such was the case in England,[47] even though agreements to submit existing controversies to arbitration were enforced.[48] By no later than the middle of the eighteenth century, it was not unusual for courts to view predispute arbitration agreements as against public policy because they "oust[ed] the jurisdiction of the courts."[49] Judicial hostility to arbitration carried over into the United States.[50]

In an effort to combat this judicial hostility to arbitration, states began enacting statutes making written agreements to arbitrate present or future disputes as valid, enforceable, and irrevocable as any other contract.[51] New York was the first to take the leap in 1920, with many states and the federal government soon following suit.[52] Judicial attitudes softened so that the federal and most state courts ultimately pursued policies favoring arbitration as an alternative to judicial dispute resolution.[53] In the last twenty-five years or so, the United States Supreme Court struck down virtually all barriers to the arbitrability of certain types of claims, including those enacted at the state level.[54]

While all but two of the states have enacted laws dealing with arbitration, the statutes tend to fall within three different categories.[55] Some states have simply implemented, or slightly modified, the

---

46. *See* King v. Beale, 96 S.E.2d 765, 769 (Va. 1957) (finding that "by the great weight of authority" a common-law arbitration agreement "may be terminated and the authority of the arbitrator ended by either party at any time before an award has been made").

47. Kulukundis Shipping Co., S/A, v. Amtorg Trading Corp., 126 F.2d 978, 982 (2d Cir. 1942)

48. LORD, *supra* note 45, § 57:2.

49. *Kulukundis Shipping Co.*, 126 F.2d at 983.

50. *Id.* at 983–84.

51. 1 DOMKE ON COMMERCIAL ARBITRATION § 7:01 (rev. 3d ed. 2002).

52. *Id.*

53. *See, e.g.*, Rembert v. Ryan's Family Steak Houses, Inc., 596 N.W.2d 208, 212–13 (Mich. Ct. App. 1999) ("Our legislature has expressed a strong public policy favoring private voluntary arbitration, and our courts have historically enforced agreements to arbitrate disputes."); Prudential Sec. Inc. v. Marshall, 909 S.W.2d 896, 898 (Tex. 1995) (citing the strong preference for arbitration under state and federal law in rejecting an argument that arbitration had been waived).

54. Perry v. Thomas, 482 U.S. 483 (1987); and Southland Corp. v. Keating, 465 U.S. 1 (1984).

55. LORD, *supra* note 45, § 57:7.

common law of arbitration.[56] Other states have enacted substantive arbitration statutes—often codifications of the Uniform Arbitration Act—that exist alongside common law arbitration.[57] Finally, the courts in some states have held that legislative enactments of statutory arbitration schemes departed so much from the common law of arbitration that the latter is no longer available to parties.[58] While the distinctions between the first two groups of statutes are not always clear, the demise of common law arbitration in several states is much easier to identify.

Common law arbitration may be incorporated into and explicitly governed by a state's statutes. Pennsylvania, for example, has two Subchapters in Chapter 73 of the Pennsylvania Judicial Code dealing with arbitration.[59] Subchapter A constitutes the Pennsylvania Uniform Arbitration Act,[60] while Subchapter B governs common law arbitration.[61] Subchapter A expressly provides that

> [a]n agreement to arbitrate a controversy on a nonjudicial basis shall be conclusively presumed to be an agreement to arbitrate pursuant to Subchapter B (relating to common law arbitration) unless the agreement to arbitrate is in writing and expressly provides for arbitration pursuant to this subchapter or

56. *See, e.g.*, Thomasville Chair Co. v. United Furniture Workers of Am., 62 S.E.2d 535, 537 (N.C. 1950) ("The arbitration in this case was not instituted under the provisions of the statute, G.S. § 1-544 et seq., but it was said in *Copney v. Parks* 'that the statutory methods of arbitration are to be regarded merely as constituting an enlargement on the common law rule, and that the provisions of the statute are cumulative and concurrent rather than exclusive.'" 212 N.C. 217, 193 S.E. 21, 22 (N.C. 1937))

57. *See, e.g.*, *Copney*, 193 S.E. at 22 ("While there is some support in other jurisdictions for the view that statutory provisions for arbitration exclude the common-law remedy for the settlement of disputes by arbitration, it has been generally held that statutes relating to arbitration, unless expressly exclusive of other methods, do not abrogate the common-law right, by contract, to submit matters in controversy to arbitration, and that the statutory methods of arbitration are to be regarded merely as constituting an enlargement on the common-law rule, and that the provisions of the statute are cumulative and concurrent rather than exclusive.").

58. *See infra* notes 68–74 and accompanying text.

59. 42 PA. CONS. STAT. ANN. §§ 7301–7342 (1956).

60. *Id.* §§ 7301–7320.

61. *Id.* §§ 7341–7342.

> any other similar statute, in which case the arbitration shall be governed by this subchapter."[62]

Alternatively, in other states that have enacted comprehensive arbitration statutes, the common law can "fill interstices that legislative enactments do not cover."[63] Parties may also fall into common law arbitration when they fail to comply with the requirements of a state's arbitration statute—such as failing to put their agreement in writing,[64] failing to specify that a state court can render judgment on an award,[65] or failing to somehow indicate that arbitration is to be pursuant to statute.[66] In a limited number of jurisdictions, courts will apparently honor a party provision that common law rules shall govern their arbitration.[67]

On the other hand, common law arbitration—intentional or by default—is no longer an option in several states. For example, The Georgia Arbitration Code[68] provides "the exclusive means by which agreements to arbitrate disputes can be enforced."[69] Enactment of the statute "repealed common law arbitration in its

---

62. *Id.* § 7302(a).

63. *E.g.*, Dep't of Soc. and Health Servs. v. State Personnel Bd., 812 P.2d 500, 504 (Wash. Ct. App. 1991).

64. *See, e.g.*, Koscove v. Peacock, 317 P.2d 332, 333 (Colo. 1957) (applying common law arbitration because arbitration agreement was not in writing); Eagle Laundry v. Fireman's Fund Ins. Co., 46 P.3d 1276, 1279–80 (N.M. Ct. App. 2002) ("Although preferably any agreement to arbitrate should be placed in writing, New Mexico continues to recognize common law arbitration. Common law applies when arbitration agreements fail to meet statutory formalities." (quoting Lyman v. Kern, 995 P.2d 504, 507 (N.M. App. 1999))).

65. *See, e.g.*, City of Ferndale v. Florence Cement Co., 712 N.W.2d 522, 526–27 & n.8 (Mich. Ct. App. 2006) (applying common law arbitration because written agreement did not specify a state circuit court that could render judgment as required for Michigan statutory arbitration).

66. *E.g.* City of Ferndale v. Florence Cement Co., 712 N.W.2d 522, 527 (Mich. Ct. App. 2006) ("Because the agreement does not provide for statutory arbitration," the award is subject to common law review).

67. *See, e.g.*, Park Constr. Co. v. Indep. Sch. Dist. No. 32, Carver County, 296 N.W. 475, 185 (Minn. 1941) (stating that, under Minnesota law, when parties set up common law arbitration such an agreement substitutes a common law proceeding for a statutory proceeding).

68. GA. CODE ANN. § 9-9-1 to -18 (2007).

69. *Id.* § 9-9-2(c).

entirety," and the Supreme Court of Georgia has held that the statute must be strictly construed.[70] The same fate has sounded for common law arbitration in Washington[71] and California;[72] elsewhere, there are some signs of judicial unease with a dual system.[73] Even where common law arbitration has seemingly been cast to the side, however, parties should carefully investigate whether it might continue to survive in small pockets to fill in any gaps left by the statute—particularly where the statute is silent as to the availability and substance of judicial review.[74]

B. *Judicial Review of Arbitration Awards under the Common Law and State Statutes*

Once the parties to an arbitration agreement find themselves unhappy with an award rendered under the common law or under a state statute, various sets of rules concerning judicial review may apply. While the specific labels of the many standards of review may differ in name from state to state, certain threads of continuity can be found.

---

70. Greene v. Hundley, 468 S.E.2d 350, 352 (Ga. 1996).

71. *See, e.g.*, Godfrey v. Hartford Cas. Ins. Co., 16 P.3d 617, 621 (Wash. 2001) ("We have said on numerous occasions arbitration in Washington is exclusively statutory.").

72. *See, e.g.*, Crofoot v. Blair Holdings Corp., 260 P.2d 156, 169 (Cal. Dist. Ct. App. 1953) (concluding that adoption of "comprehensive all-inclusive statutory scheme" abolished common law arbitration).

73. *See, e.g.*, Tony Andreski, Inc. v. Ski Brule, Inc., 475 N.W.2d 469, 473 (Mich. Ct. App. 1991), where Judge Griffin wrote a concurring opinion "to express [his] disagreement with Michigan's anachronistic doctrine of common-law arbitration that allows the unilateral revocation of common-law arbitration contracts." The majority agreed with the more neutral notion that "common-law arbitration is an area which would benefit from renewed consideration by the Supreme Court." *Id.* at 471 n.1.

74. *See* Grays Harbor County v. Williamson, 634 P.2d 296, 299–300 (Wash. 1981) (noting that prior cases had "indeed sounded the death knell of common law arbitration as such," but also remarking that none had "discussed either the availability of review or the subject of review in the context of a statutory and contractual void," and suggesting that the common law might be of help in such situations).

1. Common Law Review

Judicial review of arbitral awards under the common law is typically "extremely limited."[75] Arbitrators are considered the final judges of both law and fact, and review is unavailable for a mistake of either.[76] Arbitrators are generally allowed to dole out their own unique sense of justice without the fear of their award being overturned by a court.[77] On the other hand, when arbitral activity rises to the level of fraud, partiality, bias, or other misconduct, a court will step in to vacate an award.[78] Similarly, an arbitrator who denies a party a hearing[79] will find his conduct reviewed by the

---

75. *See, e.g.*, Clark County Pub. Util. Dist. No. 1 v. Int'l Bhd. of Elec. Workers, 76 P.3d 248, 250, 253 (Wash. 2003) (refusing to reach merits of arbitrator's legal conclusions because of "extremely limited review" afforded courts under common law arbitration).

76. *See, e.g.*, Burchell v. Marsh, 58 U.S. 344, 349 (1854) (noting that after a full and fair hearing, courts will not review arbitration awards for mistakes of law or fact); Carey v. Herrick, 263 P. 190, 193 (Wash. 1928) (stating that there is no review of arbitral awards for mistake of law or fact); *see also* 4 AM. JUR. 2D *Alternative Dispute Resolution* § 207 (2009) (observing that at common law an arbitration award is not reviewable for mistake of law or fact).

77. *See, e.g.*, Port Huron & N.W. Ry. Co. v. Callanan, 34 N.W. 678 (Mich. 1887) (noting arbitrators decide "on broad views of justice, which may sometimes deviate from the strict rules of law. It is not expected that after resorting to such private tribunals either party may repudiate their action and fall back on the courts.").

78. *See, e.g.*, Ferndale v. Florence Cement Co., 712 N.W.2d 522 (Mich. Ct. App. 2006) ("[J]udicial review of a common-law arbitration award is limited to bad faith, fraud, misconduct, or manifest mistake" (citing Emmons v. Lake States Ins. Co., 484 N.W.2d 712, 715 (Mich. Ct. App. 1992))); Yazdchi v. Am. Arbitration Ass'n, No. 01-04-00149-CV, 2005 WL 375288, (Tex. App. 2005) (stating a court may only overturn a common law arbitration award based on "fraud, misconduct, or gross mistake" (quoting IPCO-G.&C. Joint Venture v. A.B. Chance Co., 63 S.W.3d 252, 256 (Tex. App. 2001))).

79. *See, e.g.*, E. Nottingham Twp. v. Fisher, 482 A.2d 291, 292–93 (Pa. Commw. Ct. 1984) ("The decision of the arbitrator in a common law arbitration is binding and cannot be attacked unless it can be shown that a party was denied a hearing . . . ." (citing Friedman v. Friedman, 419 A.2d 1221 (Pa. Super. Ct. 1980))).

courts. Finally, an award may be rejected if it is against public policy.[80]

Judicial modification of an award in common law arbitration has traditionally been available, but typically only to correct clerical errors or obvious miscalculations.[81] In Rhode Island and several other states, an error of law appearing on the face of a common law award also allows a court to overturn an award.[82] This facial error standard appears mostly relegated to older cases. Some state courts have also applied a narrow "gross mistake"[83] or "manifest mistake"[84] formulation in reviewing common law awards. In Texas, for instance, the courts have found "gross mistake" when concluding that there has been arbitral "bad faith or [a] failure to exercise honest judgment rendering the award arbitrary and capricious."[85] An honest

80. *See, e.g.*, City of Ferndale v. Florence Cement Co., 712 N.W.2d 522, 527 (Mich. Ct. App. 2006) (listing violation of public policy as a ground for judicial review of an award under Michigan law).

81. *See, e.g.*, Fudickar v. Guardian Mut. Life Ins. Co., 62 N.Y. 392, 392 (N.Y. 1875) ("[Awards] may be set aside for a palpable mistake of fact in the nature of a clerical error, such as a miscalculation of figures or for an error of law appearing on the face of the award . . . .").

82. *See, e.g.*, Bradford Dyeing Ass'n v. J. Stog Tech GmbH, 765 A.2d 1226, 1232 n.8 (R.I. 2001) ("At common law an arbitration award could be vacated when a 'mistake in the law appears on the face of the award.'").

83. *See, e.g.*, Dore v. S. Pac. Co., 124 P. 817, 823 (Cal. 1912) (citing, favorably, lower courts' declarations that award is conclusive unless procured by fraud or "made under gross mistake"); Sweeney v. Jackson County, 178 P. 365, 371 (Or. 1919) (stating that an arbitrator's award is binding "in the absence of fraud or . . . gross mistake"); Joint Sch. Dist. No. 10, City of Jefferson v. Jefferson Educ. Ass'n, 253 N.W.2d 536, 547 (Wis. 1977) (listing "gross mistake by the arbitrator" as one of the few grounds for setting aside an arbitration award under common law rulings).

84. *See* Pfleger v. Renner, 13 Ohio App. 96, 103 (Ohio Ct. App. 1920) ("Where parties make an agreement to arbitrate and provide that the award of the arbitrator shall be final and conclusive upon them, and a trial is had pursuant to the terms of the agreement, and an award is rendered, which in all respects conforms to the requirements of the submission, such award, in the absence of fraud or of such manifest mistake as naturally works a fraud, is binding upon the parties." (citing Corrigan v. Rockefeller, 66 N.E. 95 (Ohio 1902))).

85. *E.g.*, Ascension Orthopedics, Inc. v. Curasan, AG, No. H-07-4033, 2008 WL 2074058, at *3 (S.D. Tex. May 14, 2008) (quoting Callahan & Assocs. v. Orangefield Indep. Sch. Dist., 92 S.W.3d 841, 844 (Tex. 2002)).

judgment made after due consideration will not provide a basis for vacatur, no matter how erroneous the decision actually is.[86]

Similarly, some states allow review for "manifest disregard" of the law.[87] The manifest disregard standard is likewise limited: "[T]he issue is not whether the arbitrator correctly interpreted the law, but whether the arbitrator, knowing the law and recognizing that the law required a particular result, simply disregarded the law."[88] The manifest disregard standard, despite its different label, appears largely analogous to the "gross mistake" and "manifest mistake" standards found in other states.[89]

One big difference in any type of review under the common law is that the aggrieved party will have to bring an original contract action to enforce the agreement,[90] rather than use the expedited

---

86. *Id.*; *see also Pfleger*, 13 Ohio App. at 104 ("To warrant a court in setting aside an award on the ground of manifest mistake it must appear that there is a mistake of such character that the arbitrator, had it been called to his attention, would have corrected it himself."); Iowa City Cmty. Sch. Dist. v. Iowa City Educ. Ass'n, 343 N.W.2d 139, 142 (Iowa 1983) ("Put most simply, the arbitrator is the parties' officially designated 'reader' of the contract. He (or she) is their joint *alter ego* for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omissions of the initial agreement. Thus, a 'misinterpretation' or 'gross mistake' by the arbitrator becomes a contradiction in terms. In the absence of fraud or an overreaching of authority on the part of the arbitrator, he is speaking for the parties, and his award *is* their contract." (quoting St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny*, 75 MICH. L. REV. 1137, 1140 (1977))).

87. *See, e.g.*, Clark County Educ. Ass'n v. Clark County Sch. Dist., 131 P.3d 5, 7 (Nev. 2006) (Nevada); Cap City Products Co., Inc. v. Louriero, 753 A.2d 1205, 1208, 1210 (N.J. Super. Ct. App. Div. 2000) (deciding a case under the New Jersey arbitration statute, but finding that the same standards would apply "regardless of the characterization used to describe" the arbitration); Joint Sch. Dist. No. 10, City of Jefferson v. Jefferson Ed. Ass'n, 253 N.W.2d 536, 547 (Wis. 1977) (Wisconsin).

88. *Clark County Educ. Ass'n*, 131 P.3d at 8 (quoting Bohlmann v. Byron John Printz and Ash, Inc., 96 P.3d 1155, 1158 (Nev. 2004)).

89. *See, e.g.*, Int'l Bank of Commerce-Brownsville v. Int'l Energy Dev. Corp., 981 S.W.2d 38, 47–48 (Tex. App.—Corpus Christi 1998, pet. denied) (finding similarity between the manifest disregard and gross mistake standards of review).

90. There are old cases involving "actions at law," which are plenary. *See* Davy's Ex'rs v. Faw, 11 U.S. 171 (1812) (original contract action brought to challenge arbitration agreement); Newland v. Douglass, 2 Johns 62 (N.Y. Sup. Ct.

review processes available under the FAA and many state statutes, which contemplate proceeding by motion or petition.[91] It is unclear what practical impact, if any, this has on review standards.

2. State Statutory Review

Most of the state statutes governing arbitration are modeled after the Uniform Arbitration Act ("UAA") and have review provisions that mirror those found in sections 10 and 11 of the FAA. Section 12(a) of the UAA provides that a "court shall vacate an award where:

> (1) The award was procured by corruption, fraud or other undue means;
>
> (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> (3) The arbitrators exceeded their powers;
>
> (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party; or
>
> (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the

---

1806) (holding that "where arbitrators, chosen by the parties, make a mistake in the calculation of the sum to be awarded, an action at law will not lie to correct the mistake.").

91. Section 12 of the FAA provides for proceeding by motion, as do many states. In New York, post-award proceedings are typically by petition. N.Y. C.P.L.R. 7502(a) (McKinney 2005).

> arbitration hearing without raising the objection . . . .[92]

"[T]he fact that the relief was such that it could not or would not be granted by a court of law or equity," on the other hand, "is not ground for vacating or refusing to confirm the award."[93] The Revised Uniform Arbitration Act of 2000 ("RUAA") added the ground that "the arbitration was conducted without proper notice of the initiation of an arbitration . . . so as to prejudice substantially the rights of a party to the arbitration proceeding."[94] While many states have adopted the UAA, some have liberalized its provisions for judicial review. In Iowa, for example, courts will vacate an award where "[s]ubstantial evidence on the record as a whole does not support the award."[95]

Many state courts have asserted the power to upset awards in extreme instances not specified by applicable statute. Manifest disregard of the law, for example, may be available as an extra-statutory standard of review,[96] although the case law is unclear as to the exact standard to be applied in such cases.[97] Violations of public policy may also give rise to review.[98] On the whole, review under state statutes, as under the common law, is very limited.[99]

---

92. UNIF. ARBITRATION ACT § 12(a) (1956).

93. *Id.*

94. REVISED UNIF. ARBITRATION ACT § 23(a)(6) (2000).

95. Humphreys v. Joe Johnston Law Firm, P.C., 491 N.W.2d 513, 515–16 (Iowa 1992) (citing IOWA CODE § 679A.12(1)(f) (1992)).

96. *See, e.g.*, Pier House Inn, Inc. v. 421 Corp., 812 A.2d 799, 803 (R.I. 2002) (analyzing whether award of punitive damages constituted manifest disregard of the law); Detroit Auto. Inter-Ins. Exch. v. Gavin, 331 N.W.2d 418, 433–34 (Mich. 1982) (stating that Michigan arbitration statute was unclear as to when arbitrators had "exceeded their powers" and adopting "manifest disregard" standard over a "clear error of law" standard).

97. LORD, *supra* note 45, § 57:137.

98. *See, e.g.*, Schoonmaker v. Cummings and Lockwood of Connecticut, P.C., 747 A.2d 1017, 1024–25 (Conn. 2000) (listing violation of public policy as one of three grounds recognized for vacating an award); Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc., 640 A.2d 788, 796 (N.J. 1994) (noting that a court may vacate an arbitration award for public policy reasons "in rare circumstances").

99. LORD, *supra* note 45, § 57:129.

IV. THE POSSIBILITY OF EXPANDED REVIEW UNDER STATE STATUTE OR COMMON LAW

In *Hall Street*, after the traditional briefing had taken place, the Supreme Court directed the parties to file supplemental briefs dealing with whether there was authority "outside the Federal Arbitration Act . . . under which a party to litigation begun without reliance on the FAA may enforce a provision for judicial review . . . ."[100] The outgrowth of this rather unexpected inquiry was a series of party submissions which were not all that responsive.[101] That did not stop the Supreme Court from making the following statement in its majority opinion: "The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable."[102]

What does this mean? As noted, the FAA governs any dispute involving interstate commerce within the fullest possible reach of the Commerce Clause.[103] How, then, can parties escape the expedited judicial review procedures for awards found in the FAA, as now read to bar even party provision for merits-oriented review? One possible implication is that the federal law of arbitration, to the extent it involves judicial review rather than arbitrability, applies only in the federal courts. Even if this is so, as previously noted, the parties would still have to circumvent the similar prohibitions against review on the merits ordinarily applicable in state courts (and, for that matter, under the federal common law of arbitration). We have seen in Part III that neither the common law nor the typical state statutory scheme recognizes even fundamental error as a reason to

---

100. Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 644, 644 (2007) (mem.).

101. *See* Supplemental Brief for Respondent at 1–2, Hall St. Assocs., L.L.C. v. Mattel, Inc., 127 S. Ct. 2875 (2007) (No. 06-989), 2007 WL 4244685, at *1–2 (blaming the need for supplemental briefing on Petitioner's failure to provide a valid means of enforcement of the arbitration clause outside the FAA); Petitioner's Supplemental Brief at 1, Hall St. Assocs., L.L.C. v. Mattel, Inc., 127 S. Ct. 2875 (2007) (No. 06-989), 2007 WL 4244684, at *1 (blaming the need for supplemental briefing on Respondent's failure to provide any federal or state law basis for not enforcing the arbitration agreement).

102. Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1406 (2008).

103. *See supra* note 25.

deny confirmation. What becomes important, we shall see, is that these legal rubrics might be accepting of party attempts to broaden review by express contractual provision. *Hall Street* would simply not control.

A. Contracting for Common Law Arbitral Review on the Merits

The FAA does not apply to common law arbitrations or common law confirmation procedures. While case law on the subject is scant, common law confirmation by plenary action is not subject to the "must confirm" mandate of section 9 of the FAA, and accordingly could well be more subject to expansion by contract. Indeed, Justice Story so held in a federal case way back in 1814:

> If the parties wish to reserve the law for the decision of the court, they may stipulate to that effect in the submission . . . . If no such reservation is made in the submission, the parties are presumed to agree, that every thing, both as to law and fact, which is necessary to the ultimate decision, is included in the authority of the referees.[104]

In a recent Pennsylvania lower court case, however, a Court of Common Pleas refused to enforce a contractual clause that provided for de novo review of an arbitration award.[105] The court discussed several state court decisions and the pre-*Hall Street* federal circuit split before concluding that allowing parties to dictate the court's level of review would bypass the arbitrator and sap judicial resources.[106] Importantly, though, Pennsylvania common law review standards are statutory.[107] In most other states, where common law review standards are governed exclusively by case law, enforcement of agreements to expand the scope of review is possibly more likely

104. Klein v. Catara, 14 F. Cas. 732, 735 (C.C.D. Mass. 1814) (No. 7869).

105. Trombetta v. Raymond James Fin. Servs., Inc., 71 Pa. D. & C.4th 12, 33–36 (Pa. Ct. Com. Pl. 2005).

106. *Id.*

107. 42 PA. CONS. STAT. ANN. § 7341 (2007).

to succeed.[108] How, then, might the parties arrange, in a case otherwise governed by the FAA, to have the common law govern confirmation? One possibility might be simply to so provide in the arbitration provision itself. Another intriguing possibility is to omit the language seemingly required by FAA section 9 to invoke review under that statute "that a judgment of the court shall be entered upon the award."[109]

This latter requirement has provoked incredible inconsistency in the cases. Early on, for instance, in 1932, the Supreme Court ruled that provision for an award to be "final and binding" suffices to invoke review under FAA sections 10 and 11 even where it fails to provide for entry of judgment.[110] Following this lead, the Seventh Circuit has held that "finally settled" language, without provision for entry, is enough.[111] Not all decisions have been so lenient. Certain cases require the specific statutory language providing for entry of

---

108. *See* Judge Gray H. Miller & Emily Buchanan Buckles, *Reviewing Arbitration Awards in Texas*, 45 HOUS. L. REV. 939, 960 (2008) (noting that since arbitration statutes in Texas do not seem to preempt common law arbitration, which is governed by contract law, parties should be able to contract for expanded review).

109. 9 U.S.C. § 9 (2006). As with many other issues in this area, no one seems quite sure of the exact implications of leaving out this language. *See, e.g.*, P & P Indus., Inc. v. Sutter Corp., 179 F.3d 861, 866–67 (10th Cir. 1999) (finding that FAA applies where the arbitration agreement incorporates agreements or rules that deem the parties to have consented to entry of an award in federal or state court, despite the absence of an explicit agreement that judgment shall be entered on an award); Okla. City Assocs. v. Wal-Mart Stores, Inc., 923 F.2d 791, 795 (10th Cir. 1991) (stating that arbitration clause must contain an explicit or implicit demonstration of an intent of the parties to have judgment entered on an arbitration award for FAA to apply); Booth v. Hume Publ'g, Inc., 902 F.2d 925, 930 (11th Cir. 1990) (observing that FAA applies where parties agreed that arbitration would be final and binding); Home Ins. Co. v. RHA/Pa. Nursing Homes, Inc., 113 F. Supp. 2d 633, 634 (S.D.N.Y. 2000) (saying that FAA only applies where arbitration agreements "provide for the entry of judgment confirming awards" or "incorporate . . . arbitration rules that so provide"); Dan River, Inc. v. Cal-Togs, Inc., 451 F. Supp. 497, 501 (S.D.N.Y. 1978) (stating that FAA applies when the arbitration agreement incorporates rules that deem the parties to have consented to entry of an award by a court, even though the arbitration agreement itself does not explicitly provide for entrance of judgment upon an award).

110. Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 276 (1932).

111. Daihatsu Motor Co. v. Terrain Vehicles, Inc., 13 F.3d 196, 202–03 (7th Cir. 1993).

judgment on the award.[112] Also, before the American Arbitration Association Rules were amended to explicitly provide for entry of judgment on awards, their incorporation by reference in an arbitration clause was held by the Second Circuit not to suffice for invoking FAA confirmation procedures.[113] It would now appear that where arbitral forum rules incorporated by reference provide for entry of judgment on an award, that will be enough.

All in all, attempting to take a common law route to confirmation, and then coupling it with express provision for expanded review, is a possible but by no means certain route to avoidance of the *Hall Street* restriction.

B. Contracting for Merits-Oriented Review under State Statute

In Part III, we saw that judicial review provisions in state arbitral statutes, despite exceptions, tend to track those in the FAA. Accordingly, significant expansion of grounds for vacation or modification where review is governed by state statute would seemingly require that the parties adopt a specific provision for the type of broadened review desired which the court will be willing to enforce.

Once again, as would be true with attempted broadening of review at common law, there are several actual and potential obstacles, and little in the way of precedent permitting such a tactic. For one thing, certain states do treat their own statutory review predicates as exclusive, even in the face of attempted agreement to the contrary.[114] For another, one would think that state courts, whether pursuant to state statute or otherwise, lack subject matter jurisdiction over awards on claims involving almost any sort of federal question, just as they would lack such jurisdiction over

---

112. *See, e.g.*, Lehigh Structural Steel Co. v. Rust Eng'g Co., 59 F.2d 1038, 1039 (D.C. Cir. 1932) ("Section 9 is predicated upon an agreement . . . to confirm their awards in courts."); United Food and Commercial Workers Local 951, AFL-CIO and CLC v. Mulder, 31 F.3d 365, 371 (6th Cir. 1994) (holding that the FAA requires a "written agreement to arbitrate and to enforce a final judgment").

113. Varley v. Tarrytown Assocs., Inc., 477 F.2d 208, 210 (2d Cir. 1973).

114. *See supra* notes 68–74 and accompanying text.

lawsuits involving such claims in the first instance. This alone is a significant limitation because many see the strongest arguments for expanded review to be in connection with so-called "public" federal statutory claims, such as those involving employment discrimination.[115] Also, and despite possible indication to the contrary in *Hall Street*,[116] there is the issue of whether any attempt to broaden review by contract in an FAA case would be subject to federal preemption.

A threshold question, as basic as it might seem, is whether a state's arbitration statute or the FAA governs post-award proceedings in state court in an FAA case (in the sense that interstate commerce is involved). Several FAA provisions specifically reference only proceedings in federal court. These include sections 3 (stay of court proceedings in favor of arbitration)[117] and 4 (compelling arbitration),[118] as well as sections 10 (vacation of awards)[119] and 11 (modification of awards).[120] With respect to sections 3 and 4, despite their references to federal court, the Supreme Court has made it very clear that state law attempts to limit arbitrability of a claim covered by the FAA are preempted.[121] State courts do not have to mimic federal court procedures, but they are bound by federal standards of arbitrability.[122] Hence, a state statute providing that claims under it are not arbitrable, even for public policy reasons, will not negate the arbitrability of such a claim so long as interstate commerce is involved, as it invariably is. In that

---

115. *See, e.g.*, Arizona Elec. Power Co-op., Inc. v. Berkeley, 59 F.3d 988, 992 (9th Cir. 1995) (denying review of arbitration award granting attorney fees on public policy grounds); PaineWebber, Inc. v. Agron, 49 F.3d 347, 350 (8th Cir. 1995) (reviewing arbitration award challenged on policy grounds).

116. *See* Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1406 (2008) ("The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.").

117. 9 U.S.C. § 3 (2006).

118. *Id.* § 4.

119. *Id.* § 10.

120. *Id.* § 11.

121. *See supra* notes 28 and 54.

122. *See* Matter of Propulsora Ixtapa Sur, S.A. De C.V. (Omni Hotels Franchising Corp.), 621 N.Y.S.2d 569, 571 (N.Y. App. Div. 1995) ("Federal law in the field of arbitration pre-empts state law only to the extent that the two bodies of law conflict . . . ." (citation omitted)).

sense, it has been said that sections 3 and 4 of the FAA bind the states and their courts by preempting state law, statutory or otherwise, which contravene them.[123]

Are state courts similarly bound by sections 10 and 11 of the FAA in the sense that they are subject to FAA restrictions on interfering with awards? Review in an FAA case will wind up in state court where the parties, pursuant to section 9, designate state court as the exclusive venue for review and enforcement, or, more significantly, where the federal courts lack subject matter jurisdiction over the award for want of diversity or a federal question. Whether a state court can depart from FAA standards of review is a question which may be posed in two ways: Do the FAA's review standards apply in an FAA case in state court? Alternatively, is the federal policy favoring limited review, such as it is, sufficient to preempt state law providing for expanded review or else permitting the parties to do so? The Supreme Court has not ruled on whether federal or state standards govern state court post-award proceedings in an FAA case. Litigators in this practice area will tell you that little focus is placed on this issue, because the potentially competing ground rules are actually very similar. This may change in a post-*Hall Street* era in which parties wanting expanded review seek enforcement by a state court of an express agreement to that effect.

It is, of course, possible to read the statement in *Hall Street* that the FAA "is not the only way into court for parties wanting review of arbitration awards"[124] as suggesting that state law governs post-award proceedings in state court. A number of state courts have so held.[125] However, there is also a fairly recent case originating in the New York state courts[126] in which the United States Supreme Court, after granting certiorari,[127] remanded with instructions to treat

123. *See supra* notes 28 and 54.

124. Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1406 (2008).

125. *E.g.*, Cable Connection, Inc., v. DIRECTV, Inc., 190 P.3d 586, 597–98 (Cal. 2008); Trombetta v. Raymond James Fin. Servs., Inc., 907 A.2d 550, 568 (Pa. Super. Ct. 2006); DeBaker v. Shah, 522 N.W.2d 268, 271 (Wis. Ct. App. 1994), rev'd on other grounds, 533 N.W.2d 464 (Wis. 1995); Flexible Mfg. Sys. Pty Ltd. v. Super Prod. Corp., 874 F.Supp. 247, 249 (E.D. Wis. 1994).

126. Wien & Malkin LLP v. Helmsley-Spear, Inc., 846 N.E.2d 1201 (N.Y. Ct. App. 2006).

127. Wien & Malkin LLP v. Helmsley-Spear, Inc., 540 U.S. 801 (2003).

the dispute as falling within the FAA because of involvement with interstate commerce.[128] New York's Court of Appeals treated that remand as an instruction to apply FAA section 10 to attempts in state court to vacate the award up for confirmation.[129] Proceeding, however, on the assumption that state law, and not the FAA, governs arbitral review in state court, there is potentially an additional layer of inquiry. The Supreme Court has held that party attempts via contract to avail of a state's law of arbitration in an FAA case will be preempted if the result would otherwise be hostile to the federal pro-arbitral policy.[130] To the extent that broadened review under state law will require party provision for expanded review, is it wholly clear from *Hall Street* that a perceived federal policy in favor of a streamlined arbitral process will not carry the day via preemption? A post-*Hall Street* case by the California Supreme Court, about to be discussed, deals with that very issue.

C. *State Law Cases on Contracting For Broadened Review under State Statute*

Even prior to *Hall Street*, some courts balked at the idea of private parties "dictat[ing] a role for *public* institutions" in arbitration proceedings.[131] These states, such as North Dakota[132] and Illinois,[133] thus ruled that their state statutes provided the exclusive bases for refusing confirmation means of arbitration awards. On the other hand, states like Connecticut allowed parties to expand the

128. *See Wien & Malkin*, 846 N.E.2d at 1204 n.8 ("The Supreme Court's remand, therefore, meant that if the subject matter of an arbitration merely affected interstate commerce, the FAA would apply.").

129. *Id.* at 1205.

130. Volt Info. Servs., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ., 489 U.S. 468, 478–79 (1989).

131. *E.g.*, Brucker v. McKinlay Transp., Inc., 557 N.W.2d 536, 540 (Mich. 1997).

132. *See, e.g.*, John T. Jones Constr. Co. v. City of Grand Forks, 665 N.W.2d 698, 702 (N.D. 2003) (stating that under North Dakota law parties may not agree to expand judicial review of arbitration awards).

133. *See, e.g.*, Chicago SouthShore and S. Bend R.R. v. N. Ind. Commuter Transp. Dist., 682 N.E.2d 156, 159 (Ill. App. Ct. 1997) ("[P]arties may not, by agreement or otherwise, expand [a court's] limited jurisdiction."), *rev'd on other grounds*, 703 N.E.2d 7 (1998).

scope of judicial review,[134] and the Rhode Island Supreme Court similarly assumed without deciding that parties could do the same.[135] Moreover, under Comment B to section 23 of the Revised Uniform Arbitration Act, the right to contract for expanded review is said to be "inherent."[136] Over ten states have adopted the RUAA.[137]

In *Hall Street*'s wake, state courts have again taken divergent paths. In *Cable Connection, Inc. v. DirectTV, Inc.*, the California Supreme Court held that the FAA review provisions do not apply in state court, that broader state law grounds for review are not subject to federal preemption, and that appropriately worded contractual provisions for broader review than found in either the FAA or the similarly restrictive California Arbitration Act are enforceable.[138] The provision in question, besides requiring a reasoned award, deprived the arbitrators of "the power to commit errors of law or legal reasoning," and further provided that such an award could be "vacated or corrected on appeal to a court of competent jurisdiction for any such error."[139] The California Supreme Court refused to express any opinion as to the adequacy of a provision not framed both in terms of a restriction on arbitral power and a requirement for commensurate judicial review.[140]

A Texas Court of Appeals, on the other hand, recently quoted *Hall Street* reassuringly in finding that the Texas Arbitration Act

---

134. *See, e.g.*, Maluszewski v. Allstate Ins. Co., 640 A.2d 129, 132 (Conn. App. Ct. 1994) ("If the parties engaged in voluntary, but restricted, arbitration, the trial court's standard of review would be broader depending on the specific restriction.").

135. *See, e.g.*, Bradford Dyeing Ass'n v. J. Stog Tech GmbH, 765 A.2d 1226, 1233 (R.I. 2001) ("Notwithstanding the observation we make concerning the ability of the parties by their private agreement to enlarge the scope of appellate review . . . we will for purposes of this case assume they may, without deciding the validity of their agreement.").

136. REVISED UNIF. ARBITRATION ACT § 23 cmt. B.6. (2000).

137. Lynn P. Burleson, Family Law Arbitration: Third Party Alternative Dispute Resolution, 30 CAMPBELL L. REV. 297, 297 (2008) (stating that as of 2007, twelve states adopted the RUAA: Alaska, Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington).

138. 190 P.3d 586, 599–606 (Cal. 2008).

139. *Id.* at 589.

140. *Id.* at 604.

("TAA") provided the exclusive grounds for judicial review.[141] "In light of the similarities between the TAA and FAA," said the court, "'it would stretch basic interpretive principles to expand the [statutory] grounds to the point of evidentiary and legal review generally.'"[142] The court therefore held that parties could not contract to provide for expanded judicial review under the TAA.[143]

Whether other states, especially those that have previously found their own statutory grounds to refuse confirmation to be exclusive, will follow the lead of California or Texas remains to be seen. What is clear is that parties face a rather bewildering crazy quilt of conflicting and potentially conflicting authorities should they attempt to broaden review by resort to state arbitral statute.

V. CONCLUSION

Before the dust settles, *Hall Street* will probably provoke considerable litigation as to whether "manifest disregard" survives and, if so, what it takes to demonstrate that arbitrable error rises to the level of an abuse of arbitral power. As to expansion of review by contract, results will certainly not be uniform. Parties desiring to increase the chances that such provision will be honored, at least in cases not involving federal questions, will make state court the exclusive venue for post-award proceedings. Where parties do not set an exclusive venue, whether party provision for expanded review will work in a diversity case may depend on whether there is removal to federal court. One recent case in the Southern District of New York, for example, held that the court was bound to apply the FAA's strict review standards even though the parties had contracted for a different standard of review and the petitioner had brought her petition to vacate in state court prior to removal.[144] There may also be intrajurisdictional variances based on the specific wording of

141. Quinn v. Nafta Traders, Inc., 257 S.W.3d 795, 798–99 (Tex. App.—Dallas 2008), *pet. granted*, 2009 Tex. LEXIS 233 (Tex. 2009).

142. *Id.* at 798 (quoting Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1404 (2008)).

143. *Id.*

144. McQueen-Starling v. UnitedHealth Group, No. 08 Civ. 4885(JGK), 2009 WL 755290, at *6–7 (S.D.N.Y. Mar. 20, 2009).

provisions aimed at expanded review. Must they, for instance, be put in terms of restraint on arbitral power? Must parties desiring expanded review provide for reasoned awards, and will arbitrators comply to the extent necessary?

Whether parties ought be able to require expanded review is a very difficult policy issue, and one which possibly ought to take into account the type of case involved. It seems unlikely that Congress, when it enacted the FAA, had that issue in mind. If that is so, *Hall Street*'s heavy reliance on literalistic statutory construction of the word "must" in section 9 of that statute appears unwarranted and formalistic. Moreover, if "manifest disregard" has become even more difficult, if not impossible, to establish, and party provision for expanded review is not permitted, there will be no party recourse no matter how indefensible and ridiculous an arbitral determination might be. At a time when there is already intense scrutiny of arbitration, particularly in adhesory employment and consumer settings, such a result would appear to be particularly unfortunate and could fuel attempts at the federal level to outlaw arbitration in non-arm's length party relationships.

No Shelter from the Storm: Dangers from the Fair Debt Collection Practices Act to Mortgage Industry Attorneys and a Call for Legislative Action

Andrea M. Bergia*

I. INTRODUCTION

As the year 2009 nears its end, the international community is continuing to realize the devastating effects of what began as a subprime mortgage crisis that has developed into a worldwide financial crisis of historic proportions. Attorneys representing the mortgage industry are finding themselves on the front lines of this economic fallout and the ensuing litigation

* B.A., University of Texas at Austin, 2006; J.D. expected, University of Texas School of Law, 2010. I would like to thank Professor Jett Hanna.

presents seemingly infinite causes of action and potential for liability. The bulk of this litigation is likely to be comprised of consumer class actions and shareholder lawsuits against the mortgage securitization industry and its counsel for their actions in constructing what has turned out to be a house of cards. The results of this ensuing litigation will undoubtedly inform legislative efforts to devise laws aimed at preventing a reoccurrence of a credit crunch. However, as the economic crisis continues, mortgage industry attorneys will be facing unfamiliar challenges and the scope of the crisis will require many more attorneys to become familiar with the relevant practice areas.

During the good times of the housing bubble, attorneys handling foreclosures for a client were likely to encounter very few obstacles. Many borrowers in default lack the resources and sophistication that is necessary to challenge a foreclosure proceeding under a consumer protection statute. However, in response to the dramatic increase in foreclosures, borrower attorneys and even municipalities have been evoking consumer protection statutes with success.[1] Of these consumer protection statutes, the Fair Debt Collection Practices Act of 1977[2] ("FDCPA" or "the Act") is of particular importance to attorneys who will be involved in the estimated 4.3 million foreclosures anticipated to take place before the end of 2010.[3] While many attorneys have long thought of the FDCPA as a statute designed to arrest the abusive behavior of bill collectors, such as harassing phone calls to a debtor's place of employment, the expansive language of the Act and an examination of recent case law should lead more housing industry attorneys to examine whether they are subject to the Act's provisions. In reality they often are, although the provisions of the FDCPA usually do not apply to the

1. *See generally* Stuart T. Rossman, *The Foreclosure Crisis: Can Impact Litigation Provide a Response*, 1656 PLI/CORP. 195 (2008) (detailing various causes of action in cases in which borrowers and municipalities were successful in obtaining foreclosure relief).

2. Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1693 (2006).

3. Bill Rice, *Breaking the Cycle of Foreclosures without Economic Recovery is Daunting*, Oct. 27, 2008, http://www.mortgageloan.com/breaking-the-cycle-of-foreclosures-without-economic-recovery-is-daunting-2547.

mortgage lenders and servicers they represent.[4] The expansion of the Act's application to attorneys has become an onerous regulation on the legal industry, presenting many traps for the unwary. As we undertake the somber task of examining the failures of policy and regulation that led us to our current economic state, we should revisit the FDCPA. This Note posits that the asymmetric regulation of the legal industry and non-regulation of the credit industry is failing to achieve the policy goals underpinning the Act's existence.

II. INTRODUCTION TO THE FAIR DEBT COLLECTION PRACTICES ACT

The Act provides remedies against "debt collectors"[5] for specified legal acts and omissions towards borrowers who undertake a "consumer debt," which is defined as being for primarily personal, family, or household purposes.[6] The Act does not apply to commercial debts used for the purposes of business operations or investments. The Act's application is determined by whether the obligation that is sought from the plaintiff meets the statutory definition of "debt" and whether the defendant meets the statutory definition of "debt collector." A "debt collector" under the Act is a person who uses the instrumentality of interstate commerce or the mails in the business of collecting debts, or one who regularly collects or attempts to collect debts owed to another.[7] For purposes of § 1692f(6) of the Act, the term "debt collector" also includes any person who uses any instrumentality of interstate commerce or the mails in the business of enforcing security interests.[8] Section 1692f(6), referenced in the definition of "debt collector," prohibits

4. 15 U.S.C. § 1692(a)(4)(6) (2006).
5. *Id.* § 1692a(5).
6. *Id.*
7. *Id.* § 1692a(6).
8. *Id.*

> "[t]aking or threatening to take any non-judicial action to effect dispossession or disablement of property if . . . there is no present right to possession of the property; . . . if there is no present intention to take possession of the property; or [if] the property is exempt by law from dispossession or disablement."

If one meets the statutory definition of "debt collector" under the Act, there are many provisions and requirements regulating their conduct and communications to the consumer.[9]

On the other hand, the Act specifically exempts "creditors"[10] from many of its provisions. However, for purposes of the FDCPA, creditors must avoid communicating with a consumer under a name that might mislead the consumer into thinking a third party is attempting to collect on the debt.[11] Additionally, creditors are required to bring real property actions in the "judicial district or similar legal entity" where the property is located.[12] This language has led the courts to hold that mortgage lenders and servicers are not "debt collectors" under the Act when foreclosing on their notes or assignments.[13] However, if a mortgage servicer obtains an assignment that is already in default, the courts have consistently held that the Act is triggered and will apply to the servicer's efforts to collect or foreclose.[14]

---

9. *See, e.g.*, 15 U.S.C. § 1692g(a)(1)–(2) (requiring the debt collector to send a written notice within five days of its initial communication with the consumer, stating the amount of the debt and the name of the creditor to whom the debt is owed); *see also id.* at § 1692e(2)(A) (prohibiting the "false representation" of the "character, amount, or legal status of any debt").

10. *Id.* § 1692a(4).

11. *Id.* § 1692a(6).

12. *Id.* § 1692a(1).

13. Fouché v. Shapiro & Massey L.L.P., 575 F. Supp. 2d 776, 783 (S.D. Miss. 2008) (citing § 1692a(4) (noting that "creditors, mortgagees and mortgage servicing companies are not debt collectors and are statutorily exempt from liability")).

14. *See* Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1995) (holding that mortgage servicer was not a "debt collector" when obtaining mortgage that was not in default while assigned); *see also* Games v. Cavazos, 737

A. *The Development of the FDCPA's Application to Attorneys*

When Congress enacted the FDCPA in 1977, it was aimed specifically at third party debt collectors. The definition of "debt collector" under the Act expressly exempted attorneys who were "collecting a debt as an attorney on behalf of and in the name of a client."[15] This led to many abuses by attorneys attempting to capitalize on the exemption by advertising their services as debt collectors who "could do with impunity what other collectors could no longer do."[16] In 1986, Congress addressed these concerns by deleting the exemption from the Act's language.[17]

After the deletion of the exemption it was unclear for a number of years whether or not the Act retained a litigation exception for attorneys providing legal services for their clients.[18] In 1995, the Supreme Court answered this question in the negative in *Heintz v. Jenkins*, holding that lawyers who regularly collect on the debts of others, even if the collection attempts are through litigation efforts only, are "debt collectors" subject to the Act.[19] However, on remand to the Seventh Circuit, the court in *Jenkins v. Heintz* held the Act did not require attorneys to investigate the validity of the debt before filing an action, and

---

F. Supp. 1368, 1384 (D. Del. 1990) (noting that mortgage company receiving mortgage in default would be subject to the Act).

15. RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 10:8 (5th ed. 2008) (citing 15 U.S.C.A. § 1692a(6)(F) and noting its repeal in 1986).

16. *Id.*

17. *See id.*

18. *See, e.g.*, Fireman's Ins. Co. of Newark, N.J. v. Keating, 753 F. Supp. 1137, 1142–43 (S.D.N.Y. 1990) (holding the Act intended for a litigation exception for attorneys); *see also* Green v. Hocking, 792 F. Supp. 1064 (E.D. Mich. 1992), *abrogated by* Heintz v. Jenkins, 514 U.S. 291, 294 (1995) (concluding the Act contained exemption for litigating attorneys), *aff'd*, 9 F.3d 18 (6th Cir. 1993); Crossley v. Lieberman, 868 F.2d 566, 569–73 (3d Cir. 1989) (rejecting the argument that the Act contained a litigation exception and rendering judgment for $2,000 against the attorney); Littles v. Lieberman, 90 B.R. 700, 707 (E.D. Pa. 1988) (finding that the Act applies to a general practitioner whose practice includes regular, though minor, services in debt collection); MALLEN & SMITH, *supra* note 15, § 10:8.

19. Heintz v. Jenkins, 514 U.S. 291, 294 (1995).

attorneys could rely on the representation from a client that the amount sought was owed.[20] The courts have struggled to harmonize the precedent of *Heintz* with the defined terms under the Act in applying it to attorneys who represent creditors such as mortgage lenders. The task of determining whether foreclosure activities are debt collection activities under the Act has proven itself to be especially difficult for the courts. As mentioned previously, a determination of whether or not the Act applies to the case at hand requires an inquiry into whether the obligation meets the statutory definition of "debt" and whether the defendant meets the statutory definition of "debt collector." In the context of foreclosure proceedings, there has been great confusion surrounding the questions of whether or not a security interest, such as a mortgage, is encompassed within the statutory definition of "debt," and whether the activities involved in handling foreclosure proceedings bring attorneys within the statutory definition of "debt collector."

B. Is a Mortgage a "Debt" under the Act?

The courts are currently split on the issue of whether a security interest such as a mortgage constitutes a "debt" under the Act.[21] This question is of paramount importance because if there is no "debt" under the Act then there can be no "debt collection" activities for the Act to regulate. A line of cases has concluded that the definition of "debt" under the FDCPA encompasses only

20. *See* Jenkins v. Heintz, 124 F.3d 824, 826 (7th Cir. 1997) (granting defendant attorneys protection from liability under the bona fide error defense).

21. *See* Gray v. Four Oak Court Ass'ns Inc., 580 F. Supp. 2d 883 (D. Minn. 2008) (holding lien enforcement activities are not covered by the FDCPA); *see also* Hulse v. Ocwen Fed. Bank, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002) (holding that a mortgage as a security interest is not a "debt" under the Act). *But see* Piper v. Portnoff Law Assocs., 396 F.3d 227 (3d Cir. 2005) (stating that securing a debt does not change its character under the Act); *see also* Jolly v. Shapiro, 237 F. Supp. 2d 888 (N.D. Ill. 2002) (holding that a mortgage is an obligation arising out of a transaction primarily for personal, family or household purposes and constitutes a "debt" under the Act).

those debts that are unsecured (hereinafter "*Rosado* camp").[22] These cases are influenced by the fact that under the statutory definition, the FDCPA distinguishes "debt collectors" on the one hand and "enforce[rs] of security interests" on the other.[23] In 2004, an Indiana district court in *Rosado v. Taylor* endorsed this position, holding that "[s]ecurity enforcement activities fall outside the scope of the FDCPA because they aren't debt collection practices."[24] Thus, the court found that the foreclosure summons and complaint served on the plaintiff were not governed by the Act.[25] The rationale behind the differing treatment of security interests and unsecured debts is attributed by the *Rosado* court to the target's ability to comply with the request made of her.[26]

> One receiving debt collection letters may agonize that she cannot comply with them, hence she needs the Act's protection. One asked to comply with a security interest enforcement request, on the other hand, has the security that she can return . . . . This distinction may wane in the context of real property, since turning over one's house is unlikely to ever be easy. Regardless, the law is rather clear that enforcing a security interest is not debt collection.[27]

The Third and Fourth Circuits have reached the opposite conclusion in interpreting the definition of what constitutes a

---

22. *See Gray*, 580 F. Supp. 2d at 888; *Hulse*, 195 F. Supp. 2d at 1204; Kaltenbach v. Richards, 464 F.3d 524 (5th Cir. 2006) (statutes' plain language distinguishes between debts and security interests).

23. 15 U.S.C. § 1692a(6); *see* Heinemann v. Jim Walter Homes, Inc., 47 F. Supp. 2d 716, 722 (N.D. W. Va. 1998) (finding that "merely foreclosing on the property pursuant to deed of trust" does not fall within the "debt collector" definition in § 1692a(6)); *see also Kaltenbach*, 464 F.3d at 527 (indicating that the plain language of the statute only states that a person enforcing security interests is included in "debt collector" in § 1692a(6)).

24. Rosado v. Taylor, 324 F. Supp. 2d 917, 924 (N.D. Ind. 2004).

25. *Id.* at 925.

26. *See id.* at 924 (citing Jordan v. Kent Recovery Servs., Inc., 731 F. Supp. 652, 656 (D. Del. 1990)).

27. *Id.* at 924–25.

"debt" under the Act. In 2005, the Third Circuit held in *Piper v. Portnoff Law Associates* that securing an obligation does not change its character as a "debt" within the meaning of the FDCPA.[28] The court in *Piper* found that the plaintiff's obligation, arising from the use of municipal water and sewage services, was a transaction primarily for personal, family, and household purposes and was therefore a "debt . . . *whether or not such obligation has been reduced to a judgment*," as contained in the definition of "debt" under the Act.[29] The court affirmed liability under the Act for the attorneys and law firm who secured a lien on the plaintiff's property and communicated with the plaintiff in an attempt to collect on the overdue obligation for the municipality.[30] At first blush, the split among the courts on the issue seems to hinge on the distinction between one who secures a loan at its inception versus one who secures a debt after the obligation has already manifested. However, the inclusion of the phrase, "whether or not such obligation has been reduced to a judgment" has led to courts on both sides of the definition of a "debt" debate to consistently equate lien enforcement activities with the enforcement of security interests.

In 2006, the Fourth Circuit in *Wilson v. Draper & Goldberg P.L.L.C.*,[31] analyzed the issue and cited *Piper* in concluding that a mortgage falls within the FDCPA's definition of a "debt."[32] The court further held that foreclosing on a mortgage constitutes a "debt collection" activity, concluding that a foreclosure is a method of collecting on a debt by acquiring and selling the property in order to satisfy the debt.[33] The court reasoned that to conclude differently would create a giant loophole within the Act, allowing people to avoid its application by choosing to proceed *in rem* rather than *in personam*.[34] As discussed in the previous section, once the court in *Wilson* found the existence of a "debt" and a "debt collection" activity, they

28. *Piper,* 396 F.3d at 236.
29. *See id.* at 232–33 (citing 15 U.S.C. § 1692a(5)) (emphasis added).
30. *Id.*
31. Wilson v. Draper & Goldberg, 443 F.3d 373 (4th Cir. 2006).
32. *Id.* at 377.
33. *Id.* at 379.
34. *Id.* at 376.

were required to determine whether the defendant attorneys qualified as "debt collectors" under the Act.

C. *When Is a Foreclosing Attorney a "Debt Collector" under the FDCPA?*

The defendant attorneys in *Wilson* argued that an exemption found under the statutory definition of "debt collectors" applied to them.[35] The exemption covers "any person collecting or attempting to collect on any debt . . . due another to the extent such activity . . . is incidental to a bona fide fiduciary obligation."[36] The court rejected this argument, finding the attorneys' foreclosure activities were central to their fiduciary obligations to their client rather than incidental.[37] The court also relied on Official FTC Staff Commentary that explained the exemption was intended to cover "entities such as trust departments of banks, and escrow companies" and that "[i]t does not include a party who is named as a debtor's trustee solely for the purpose of conducting a foreclosure sale."[38]

Additionally, the defendant attorneys referred to the construction of the definition of "debt collector" that states, "[f]or the purpose of §1692f(6) . . . such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests."[39] They claimed that because the principal purpose of their business was the enforcement of security interests, they were only subject to the provisions under § 1692f(6), which regulates non-judicial actions taken in connection with the enforcement of security interests.[40] The court disagreed.

---

35. *Id.* at 377.
36. 15 U.S.C. § 1692a(6)(F)(i) (2006).
37. *Wilson*, 443 F.3d at 377.
38. *Id.* (quoting Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097–02 (FTC Dec. 13, 1988)).
39. *Id.* at 378 (quoting 15 U.S.C. § 1692a(6)).
40. *Id.*

> This provision applies to those whose *only* role in the debt collection process is the enforcement of a security interest. . . . In other words, this provision is not an exception to the definition of debt collector, it is an inclusion to the term debt collector. It serves to include as debt collectors, for the purposes of § 1692f(6), those who only enforce security interests. It does not exclude those who enforce security interests but who also fall under the general definition of "debt collector." . . . ("Section 1692a(6) thus recognizes that there are people who engage in the business of repossessing property, whose business does not primarily involve communicating with debtors in an effort to secure payment of debts.").[41]

The *Wilson* court remanded the case for a determination of whether the attorneys fell under the general definition of "debt collector."[42]

Also in 2006, the Fifth Circuit was presented with the task of analyzing the Act and its application to foreclosing attorneys. In *Kaltenbach v. Richards*,[43] the court accepted without discussion the proposition that the defendant attorney was enforcing a security interest rather than collecting on a debt in filing the foreclosure proceeding.[44] However, the court questioned the statutory treatment given in precedents such as *Rosado*. The *Kaltenbach* court posited that these cases stopped short in their analysis in determining that section 1692f(6) was the only provision that applied to those enforcing a security interest.[45] The court pointed to another provision in the Act, section

41. *Id.* at 377.

42. *Id.* at 379.

43. Kaltenbach v. Richards, 464 F.3d 524, 527 (5th Cir. 2006).

44. *Id.* at 526–27.

45. *Id.* at 528 ("Several courts have held that § 1692f(6) is the only section of the statute that regulates the enforcement of security interests. . . . However, none of their decisions are able to reconcile the fact that § 1692i(a)(1) is directed at persons enforcing security interests with their holdings that only § 1692(f) was intended to regulate the enforcement of security interests.") (internal citations omitted).

1692i(a)(1), which requires those enforcing a security interest in real property to bring their action only in the county where the real property is located.[46] The court reasoned that "[u]nless we conclude that the FDCPA's regulation of the enforcement of security interests by those actors that meet the more general definition of 'debt collector' extends beyond the purview of § 1692f(6), then § 1692i(a)(1) would be without effect."[47] The court also admonished the precedents in the *Rosado* camp for failing to realize that the question of whether one meets the general definition of "debt collector" under the Act should not be confined to an inquiry of whether one was acting as a "debt collector" in the particular instance that is being challenged.[48] The Fifth Circuit reminded these courts that "a party's general, not specific, debt collection activities are determinative of whether they meet the statutory definition of a debt collector."[49] The court held that if an enforcer of a security interest otherwise meets the general definition of "debt collector" then he is subject to the entire FDCPA.[50]

Despite the lack of consensus among the courts, an attorney is safe to assume that if he is operating in a jurisdiction that follows the precedents set in the Third and Fourth Circuits, he must comply with the FDCPA in all foreclosure filings. The issue gets murkier in jurisdictions falling in line under the Fifth Circuit's precedent. In August of 2008, a district court in Mississippi, following *Kaltenbach,* recognized a distinction between filing a non-judicial foreclosure as opposed to a judicial

---

46. 15 U.S.C. § 1692i(a)(1) (2006).

47. *Kaltenbach*, 464 F.3d at 528.

48. *Id.* at 528–29.

> [T]he courts fail to recognize that the entire FDCPA can apply to a party whose principal business is enforcing security interests but who nevertheless fits § 1692a(6)'s general definition of a debt collector. Instead, they posit that a party is a debt collector outside of § 1692f only if they were collecting a debt in the particular instance that gave rise to the dispute.

49. *Id.* at 529.

50. *Id.*

foreclosure.[51] In *Fouché v. Shapiro & Massey L.L.P.*,[52] the court noted the fact that almost all of the *Rosado* camp cases involved a non-judicial foreclosure proceeding.[53] "In contrast to non-judicial foreclosures, which are intended only to enforce the lender's security interest and not to collect the underlying debt, a typical judicial foreclosure usually does involve seeking a personal judgment against the debtor for a deficiency and hence would likely amount to debt collection."[54] In *Fouché*, the plaintiff pointed to the defendant attorney's website, which listed judicial foreclosures as an offered service. The court found this evidence insufficient to support an inference of *regularity* and relied on the defendant attorney's testimony that he only *occasionally* filed judicial foreclosures.[55]

In a suffering economy, there is a high likelihood that a non-judicial foreclosure will reap insufficient return to the mortgage lender or servicer thus necessitating the pursuit of a deficiency judgment. As indicated in the *Fouché* holding, the pursuit of a deficiency is likely to be deemed a "debt collection" activity. When pursued with sufficient regularity, this will subject the attorney to the Act. Furthermore, attorneys operating in jurisdictions following Fifth Circuit precedent may not have the luxury of choosing to proceed with a non-judicial foreclosure versus a judicial foreclosure to avoid implication of the FDCPA.

---

51. Fouché v. Shapiro & Massey L.L.P., 575 F. Supp. 2d 776, 785–86 (S.D. Miss. 2008).

52. *Id.*

53. *Id.* at 785–86.

54. *Id.* at 786.

55. *Id.* at 784, 788. Defendant's affidavit,

> [D]escrib[ed] the nature of his and the firm's practice belies plaintiff's assertion. Massey declares: My law practice and that of Shapiro & Massey . . . is exclusively centered upon the representation of mortgage lenders or servicers in enforcing security interests securing real estate loans. Approximately 80% of my practice and that of Shapiro & Massey, L.L.P. involves foreclosing on deeds of trust, primarily through non-judicial foreclosures and occasionally through judicial foreclosures. . . . [In sum the] plaintiff here has offered no evidence to the contrary.

There are many factors that lead to a higher percentage of judicial foreclosure proceedings being filed in a "down" economy.

III. JUDICIAL FORECLOSURES IN ECONOMIC RECESSIONS

While a non-judicial foreclosure offers many benefits to creditors by providing a cheaper and more expedient process, falling home values in a depressed market mean a foreclosure sale is unlikely to reap satisfaction for the loan. Additionally, the deep economic recession and sheer numbers of empty foreclosed properties may prevent a mortgagee from being able to sell the home at all, often resulting in the mortgagee purchasing the property at the foreclosure sale in order to maintain it until the economic tide changes. Complicating matters is the fact that many states have "Anti-Deficiency" statutes which aim "to relieve the mortgagor of personal responsibility for some or all of the difference between either 1) the outstanding debt and the foreclosure sale price, or 2) the fair market value of the property and the foreclosure sale price."[56] It is interesting to note that these types of statutes were first enacted during the Great Depression when the United States was experiencing a similar housing and economic crisis.[57]

The first category of anti-deficiency statutes is commonly referred to as "non-recourse" legislation.[58] Within this category there are statutes prohibiting the pursuit of deficiency judgments when the property is sold in a non-judicial foreclosure proceeding.[59] In these jurisdictions an attorney and its mortgagee client will be incentivized to pursue a judicial foreclosure in order to maintain a deficiency action. Other statutes in the first category prohibit deficiency judgments when the mortgagee is the purchaser at the foreclosure sale.[60] This category also includes

56. James B. Hughes, Jr., *Taking Personal Responsibility: A Different View of Mortgage AntiDeficiency and Redemption Statutes*, 39 ARIZ. L. REV. 117, 125–28 (1997).

57. *Id.* at 124.

58. *Id.*

59. *Id.* at 125 (citing ALASKA STAT. § 34.20.100 (1995)).

60. *Id.* (citing ME. REV. STAT. ANN. tit. 14, § 6324 (1995)).

statutes that prohibit deficiency judgments based on the type of property or use of the loan proceeds.[61] These statutes are effective, for example, only in the case of purchase money mortgages or mortgages encumbering certain residential properties.[62] The second category of anti-deficiency legislation is referred to as "fair value" statutes. Under these statutes "deficiency judgments are available only to the extent the debt exceeds the appraised or fair market value of the property."[63]

The ability to bring a non-judicial foreclosure action is governed by state law. Currently, about thirty states allow a lender and borrower to agree in the contract to allow the lender to proceed without judicial intervention in the case of default.[64] Thus, a prerequisite to bringing a non-judicial foreclosure is that a "power of sale" clause must be contained in the mortgage note.[65] In states that offer a non-judicial foreclosure process the use of judicial foreclosures is normally resorted to only in the instance of a defect in the financing documents.[66] Unfortunately for the attorneys representing the mortgage industry, the subprime mortgage crisis has revealed that defects in the financing documents are less of an exception than they are the rule.[67] The subprime mortgage crisis has spurred consumer protection efforts in providing legal assistance to distressed home borrowers who are likely have strong claims of malfeasance in

---

61. *Id.* at 124.

62. *Id.* (citing ARIZ. REV. STAT. ANN. § 33-729(A) (1995); CAL. CIV. PROC. CODE §580(b) (1996); OR. REV. STAT. § 88.070-.75 (1995)).

63. *Id.* at 126 (citing ME. REV. STAT. ANN. tit. 14, § 6324). The Texas statute falls within this category of anti-deficiency legislation. TEX. PROP. CODE ANN. § 51.003 (1995).

64. THE NATIONAL MORTGAGE SERVICER'S DIRECTORY 89 (22d ed. 2005).

65. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 7.19 (West Group ed., 4th ed. 2001).

66. *Fouché*, 575 F. Supp.2d at 786.

67. *See In re* Foreclosure Cases, 521 F. Supp. 2d 650, 654 (N.D. Ohio 2007) (citing KATHERINE M. PORTER, MISBEHAVIOR AND MISTAKE IN BANKRUPTCY MORTGAGE CLAIMS 3–4 (2007) ("[H]ome mortgage lenders often disobey the law and overreach in calculating the mortgage obligations of consumers . . . Many of the overcharges and unreliable calculations . . . raise the specter of poor recordkeeping, failure to comply with consumer protection laws, and massive, consistent overcharging.")).

the origination process of their loan.[68] Statutes governing the origination of consumer loans (such as the Truth in Lending Act) provide borrowers with the right to rescind the loan agreement if its provisions are not strictly adhered to.[69] Finally, judicial foreclosure is the exclusive remedy for a mortgagee in approximately forty percent of the states.[70] These factors, combined with the projection of an estimated 4.3 million foreclosures before the end of 2010, could easily launch the "security enforcing" attorney who only occasionally files a judicial foreclosure squarely into the "regular debt collector" range.

A. When Is Debt Collection Activity "Regular"?

An attorney's or firm's debt collection activities do not need to be a substantial part of their practice in order to be deemed regular; although again the courts have struggled to find consistency in applying this provision. For example, the "Fifth Circuit has held that a law firm that prepared 639 demand letters over a nine-month period functioned as a debt collector" despite the fact that it constituted only .5% of its practice.[71] Similarly, a Pennsylvania district court held that ten debt collection matters over several years that constituted less than 1% of the firm's gross income subjected the firm to the Act.[72] However, in general, if debt collection matters account for less than 2% of an attorney or firm's practice, then the Act is not applied.[73]

---

68. *See supra* note .

69. 15 U.S.C. §§ 1692–1693 (2006).

70. *See* GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 7.19 (4th ed. 2001) (noting judicial foreclosure is available in every jurisdiction but the "exclusive or generally used method" in forty percent of states); *see also* FORECLOSURE LAW & RELATED REMEDIES: A STATE-BY-STATE DIGEST (Sidney A. Keyles ed., 1995) (cataloging state procedures).

71. RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 10:7 (5th ed. 2008) (citing Garrett v. Derbes, 110 F.3d 317, 318 (5th Cir. 1997)).

72. *Id.* (citing Silva v. Mid Atl. Mgmt. Corp., 277 F. Supp. 2d 460 (E.D. Pa. 2003)).

73. *Id.* (citing Schroyer v. Frankel, 197 F.3d 1170 (6th Cir. 1999); Nance v. Petty, Livingston, Dawson & Devening, 881 F. Supp. 223 (W.D. Va. 1994); Mertes v. Devitt, 734 F. Supp. 872 (W.D. Wis. 1990)).

In 2004, the Second Circuit Court of Appeals provided a detailed and helpful analysis on the issue. In remanding a case for a determination of a firm's regularity in debt collection activities, the court stated that the district court erred in placing too much emphasis on the proportionality of the attorneys' debt collection practices rather than focusing on the regularity of such practices.[74] The court offered the following criteria:

> Most important in the analysis is the assessment of facts closely relating to ordinary concepts of regularity, including (1) the absolute number of debt collection communications issued, and/or collection-related litigation matters pursued, over the relevant period(s), (2) the frequency of such communications and/or litigation activity, including whether any patterns of such activity are discernable, (3) whether the entity has personnel specifically assigned to work on debt collection activity, (4) whether the entity has systems or contractors in place to facilitate such activity, and (5) whether the activity is undertaken in connection with ongoing client relationships with entities that have retained the lawyer or firm to assist in the collection of outstanding consumer debt obligations. Facts relating to the role debt collection work plays in the practice as a whole should also be considered to the extent they bear on the question of regularity of debt collection activity (debt collection constituting 1% of the overall work or revenues of a very large entity may, for instance, suggest regularity, whereas such work constituting 1% of an individual lawyer's practice might not). Whether the law practice seeks debt collection business by marketing itself as having

74. *Id.* (citing Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 155 F. Supp. 2d 60 (S.D.N.Y. 2001), *vacated*, 374 F.3d 56 (2d Cir. 2004)).

> debt collection expertise may also be an indicator of the regularity of collection as a part of the practice.[75]

IV. THE COSTS OF NON-COMPLIANCE WITH THE FDCPA

The costs associated with an adverse judgment under the Act can be severe, and unfortunately much of these costs will be absorbed by the individual attorneys and the firms sued under the Act. The FDCPA provides for an award of actual damages, such as loss of employment and mental distress, and additional damages as allowed by the court not to exceed $1,000 in the case of an individual bringing a civil case under the Act.[76] The statute also provides for an award of court costs and "reasonable attorney's fee[s] as determined by the court."[77] The Act identifies factors that should be considered when deciding what penalty is appropriate. The court should consider "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional."[78]

The relatively small sums awarded for a violation of the FDCPA against a single plaintiff can add up to significant financial exposure to attorneys in the instance a class action is brought under the Act. In a class action case the named plaintiff can be awarded up to $1,000 in statutory damages, the class attorneys can recover reasonable fees and costs, and the class can recover the lesser of $500,000 or one percent of the defendant's net worth.[79] The defendant's net worth is determined by ordinary accounting principles, not a fair-market appraisal, and does not include goodwill.[80] In the case of a partnership, one court has

---

75. *Goldstein*, 374 F.3d at 62–63.
76. 15 U.S.C. § 1692k(a)(2)(A) (1998).
77. *Id.* § 1692k(a)(3).
78. *Id.* § 1692k(b)(1).
79. *Id.* § 1692k(a)(2)(B)–(a)(3).
80. Sanders v. Jackson, 33 F. Supp. 2d 693 (N.D. Ill. 1998), *aff'd*, 209 F.3d 998 (7th Cir. 2000).

noted that the net worth of the partnership could include the net worth of each partner, but did not decide the issue.[81]

The attorney or firm's mortgagee client cannot be held vicariously liable for their violations of the Act because they do not fall within the statutory definition of "debt collector."[82] Although, it has been held in at least one case that a creditor may be liable for common law negligence based on a lack of care in selecting, instructing, and supervising a third-party debt collector.[83] Moreover, as mentioned previously, a mortgage servicer is transformed into a "debt collector" for purposes under the Act if it obtains a mortgage assignment that is already in default.[84] In this circumstance, the client will most likely be deemed vicariously liable and they could then pursue a legal malpractice claim against the attorney if their actions result in an adverse judgment.

The losses incurred by an attorney in an FDCPA action may not be covered by their legal malpractice insurance policy. Many insurers do not include coverage for judicial sanctions such as those authorized by the Act.[85] Also, many insurers specifically exclude punitive and exemplary damages awarded under consumer protection statutes such as the FDCPA.[86] Many policies also include an exclusion for personal injuries and

---

81. Wilkerson v. Bowman, 200 F.R.D. 605 (N.D. Ill. 2001).

82. *See* Fouché v. Shapiro & Massey L.L.P., 575 F. Supp. 2d 776, 783 (S.D. Miss. 2008) (granting summary judgment to mortgage servicer client under the Act); *see also* Bates v. Novastar/Nationstar Mortgage L.L.C., No. 1:08-CV-1443-TW, 2008 WL 2622810, at *6 (N.D. Ga. June 24, 2008) (holding that actions of attorney hired to collect debt could not be imputed to creditor); Conner v. Howe, 344 F. Supp. 2d 1164, 1170 (S.D. Ind. 2004) (holding that a creditor who hired attorney as debt collector was not vicariously liable with attorney for damages arising from attorney's FDCPA violation).

83. Freeman v. CAC Fin., Inc., No. 3:04CV981WS, 2006 WL 925609, at *1 (S.D. Miss. Mar. 31, 2006).

84. Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1985).

85. RONALD E. MALLEN, THE LAW OFFICE GUIDE TO PURCHASING LEGAL MALPRACTICE INSURANCE § 2.26 (2008).

86. Andrew S. Hansen & Jett Hana, *Legal Malpractice Insurance: Exclusions, Selected Coverage and Consumer Issues*, 33 S. TEX. L. REV. 75, 115 (1992).

property damage arising out of an attorney's legal services.[87] Mental anguish is commonly asserted in FDCPA actions and is unlikely to be covered by insurance if the court awards damages for it.[88] Therefore, attorneys handling foreclosures should review their policy carefully and might consider negotiating with their insurers about the possibility of obtaining additional coverage for FDCPA actions.

V. PREVENTION STRATEGIES FOR FORECLOSING ATTORNEYS

A. The Engagement Letter

Attorneys who represent mortgage servicers would be wise to avoid representation of these clients if they obtained the mortgage assignment while in default. These instances increase the probability that a legal malpractice claim will be pursued if the client is held vicariously liable for their attorney's violations of the FDCPA. Determining whether or not the assignment was made while in default is an incredibly difficult task in the current economic crisis due to the complicated structure of mortgage securitization. Mortgage securities are typically bundled and assigned in bulk.[89] As such, an engagement letter may provide a powerful defense to an attorney who inadvertently handles a foreclosure where the client qualifies as a "debt collector" under the Act.[90] It may also be desirable for an attorney to limit the number of foreclosure actions she agrees to handle for a client in order to reduce the probability that she will be deemed a "regular debt collector" if practicing in *Kaltenbach* jurisdictions or in order to reduce the likelihood of class action certification.

---

87. *Id.* at 91.

88. *Id.* at 92.

89. Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185, 2255 (2007).

90. SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW PROBLEMS & PREVENTION 390–91 (2008).

B. *Avoid Class Actions*

Attorneys should be mindful of the requirements for class action certification. An attorney who handles a large amount of foreclosures for a single mortgage servicer is more likely to be exposed to class action liability if the plaintiffs can demonstrate a common cause and interest. For example, class certification was deemed not appropriate regarding alleged FDCPA violations because hundreds of different condominium associations were involved, each with different contracts.[91] If an attorney or firm desires to maintain a high volume of foreclosure cases they should attempt to expand their client base in order to contain the size of the potential class in a class action.

C. *Know State Law*

The Act specifically provides for state laws that are more protective of consumers than the Act itself.[92] For example, some state statutes require debt collectors to be licensed.[93] "A New Jersey law firm, which was not licensed in Connecticut, could be liable for misrepresentation violations of the FDCPA because the collection letter to a Connecticut debtor threatened legal action, which the law firm could not pursue in Connecticut."[94] At least one author has suggested that attorney debt collectors no longer exempt from the provisions of the FDCPA might also be subject to state licensing provisions.[95] In two Florida cases, the relevant state statute was held to cover all creditors collecting debts and

---

91. RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 10:15 (5th ed. 2008) (discussing Tyrell v. Robert Kaye & Assocs., 223 F.R.D. 686, 688 (S.D. Fla. 2004)).

92. 15 U.S.C. § 1692d (2006).

93. DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER CREDIT AND THE LAW § 12:37 (2008–2009).

94. RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 10:2 (5th ed. 2008) (citing Goins v. JBC & Assocs., 352 F. Supp. 2d 262 (D. Conn. 2005)).

95. Arthur J. Sabin, *Complying with the Federal Fair Debt Collection Practices Act*, 76 ILL. B.J. 339, 342 (1988).

not just collection agencies.[96] Interestingly, in North Carolina the state statute has produced results that are wholly contrary to those produced under the FDCPA. In one case, the North Carolina statute was applied to a lender, but the court found the bank's collection methods did not violate the statute.[97] On the other hand, a North Carolina court has held that attorneys collecting debts on behalf of their clients are exempt from the state debt collection statute under the "learned profession" exemption.[98] This may also be an area in which an attorney may limit their services in an engagement letter. It is easier to achieve an expertise in the laws of only a few states rather than many. Thus, the engagement letter might specify jurisdictions where the attorney is comfortable with her ability to comply with the law.

D. Meaningful Involvement

The Act prohibits the "false representation or implication that any individual is an attorney or that any communication is from an attorney."[99] This provision has generated numerous cases where the extent of the attorney's involvement in the collection process has come under scrutiny.[100] In large-scale operations, the processing and mailing of information to debtors is routinely mechanized and delegated. These conditions could trigger an allegation that the attorney or firm whose name is contained in the letter is not actually "from" the attorneys at all. Another provision of the Act prohibits a lawyer from furnishing a form letter that creates a false and misleading impression that the law firm is involved in the process of debt collection.[101] Therefore, attorneys should avoid the use of mass mail-outs of

96. RICHARD M. ALDERMAN, 1 THE LAW OF DEBTORS AND CREDITORS § 5:60 (2008) (citing Williams v. Streeps Music Co., 333 So. 2d 65, 69 (Fla. Dist. Ct. App. 1976); Heard v. Mathis, 344 So. 2d 651, 654 (Fla. Dist. Ct. App. 1977)).

97. PRIDGEN & ALDERMAN, *supra* note 93, § 12:37 (citing Wilkes Nat'l Bank v. Halvorsen, 484 S.E.2d 582, 584 (N.C. Ct. App. 1997); Reid v. Ayers, 531 S.E.2d 231, 235 (N.C. Ct. App. 2000)).

98. *Id.*

99. 15 U.S.C. § 1692e(3) (2006).

100. MALLEN & SMITH, *supra* note 94, § 10:20.

101. 15 U.S.C. § 1692j.

form letters and should not, under any circumstances, provide a client with a form letter bearing their name.

In 1996, the Seventh Circuit found that, "an attorney sending dunning letters must be directly and personally involved in the mailing of the letters in order to comply with the strictures of the FDCPA."[102] Therefore, attorneys handling foreclosures must be sure to review the debtor's files before sending out any notices or communications related to the foreclosure process.

E. Comply with the FDCPA in Every Case

Unfortunately, in these unsettled times, the wisest course of action is to assume the FDCPA will apply to every foreclosure—non-judicial and judicial. Attorneys handling non-judicial foreclosures should be sure to contain the necessary "*Miranda*-type" disclosures and debt validation notice required under the Act.[103] Also, threatening to take non-judicial action when there is: (1) no right to foreclose; (2) no present intention to foreclose; or (3) when the property is exempt from dispossession by law.[104] Unfortunately, even in the jurisdictions where the communication provisions of the Act would not apply to the attorney because she qualifies as a "security enforcer," these communications are still vulnerable to being challenged as misleading or non-compliant with the Act's strictures in some form. However, due to the unsettled nature of the law the courts are often unwilling to subject an attorney to liability under the Act merely for sending out an FDCPA notice as a prophylactic measure and will often grant the defendant protection under the *bona fide* error defense under the Act.[105]

---

102. Avila v. Rubin, 84 F.3d 222, 228 (7th Cir. 1996).

103. *See* 15 U.S.C. § 1692g(a)(1)–(4) (requiring the debt collector to inform the consumer of his right to dispute the debt and seek verification, requiring the debt collector to send a written notice within five days of its initial communication with the consumer, and stating the amount of the debt and the name of the creditor to whom the debt is owed); *see also* § 1692e(2)(A) (prohibiting the false representation of the character, amount, or legal status of the debt).

104. 15 U.S.C. § 1692f(6)(a)–(c).

105. *See* Fouché v. Shapiro & Massey L.L.P, 575 F. Supp. 2d 776, 778 (S.D. Miss. 2008) (rejecting plaintiff's argument that defendant attorney was estopped

F. *Know the Available Defenses*

While the Act provides a defense to the strict liability imposed under its provisions for *"bona-fide* errors," this defense requires the attorney/debt-collector to demonstrate "by a preponderance of evidence that the violation was not intentional and resulted from a *bona-fide* error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."[106] Thus, it is important for attorneys to implement and maintain a system that will aid in assuring compliance with the Act and can be presented to the court in the case of a suit. For example, a Nevada law firm was not liable for filing suit in the wrong venue because it had a procedure that determined venue based on the last known address for the debtor after checking with the U.S. Postal Service.[107] Furthermore, the holding in *Jenkins v. Heintz*[108] allows attorneys to rely on the information provided by their clients, even if that information turns out to be erroneous.

VI. CONCLUSION AND A CALL FOR LEGISLATIVE ACTION

As demonstrated by this Note, the FDCPA has evolved into an onerous, expensive, and highly confusing statute for attorneys who represent creditors. Indeed, the costs and time expended in complying with the Act could easily rival those

---

from denying that he was a "debt collector" by virtue of sending the FDCPA notice with the foreclosure sale notice); *see also* Chomilo v. Shapiro, Nordmeyer & Zielke, L.L.P., No. 06-3103, 2007 WL 2695795, at *6 (D. Minn., Sept. 12, 2007) ("The court will not penalize SNZ for having to make a Hobson's choice in this unsettled area of law."); Alexander v. Omega Mgmt., Inc., 67 F. Supp. 2d 1052, 1056 (D. Minn. 1999) (finding inclusion of FDCPA language in notices does not estop a defendant from denying that it is a debt collector).

106. 15 U.S.C. § 1692k(c) (emphasis added).

107. MALLEN & SMITH, *supra* note 94, § 10:16.

108. *See* Jenkins v. Heintz, 124 F.3d 824 (7th Cir. 1997) (granting defendant attorney's protection from liability under the bona fide error defense); *see also In re* Cooper, 253 B.R. 295 (Bankr. N.D. Fla. 2000) (holding that the FDCPA imposes no liability on a law firm that had no involvement in alleged debt collection).

associated with compliance with the ethics rules that regulate attorneys. We must ask ourselves whether this level of federal regulation of the legal profession is desirable. How have we come to this state? And why is there an exemption in the Act for creditors in the first place?

The stated purpose for the enactment of the FDCPA by Congress in 1977 is to "eliminate abusive debt collection practices by debt collectors."[109] Congress recognized the devastating effects abusive debt collection practices have on society.[110] Undoubtedly, a looming foreclosure produces these same devastating effects. In fact, the magnitude of these effects is exponentially greater in the context of a foreclosure, as a mortgage is likely to be the largest and most important debt an individual undertakes. The news regarding the mental health toll that the housing crisis has taken on Americans has been devastating. For example, in October of 2007, a retired couple was found dead along with their dogs in the home they had lived in for over two decades.[111] After failing in their efforts to save their home from foreclosure the couple committed suicide by carbon monoxide poisoning.[112] Also in October of 2007, a thirty-nine-year-old chemist in Houston was facing foreclosure and had to vacate his home.[113] When deputies arrived with eviction papers the chemist engaged them and a SWAT team in a stand-off that lasted ten hours and ended when the man shot himself inside the home.[114] Surely these horrific situations are something that society would like to avoid, so why did Congress provide an exemption for mortgage lenders and servicers in the first place?

---

109. 15 U.S.C. § 1692(e).

110. "Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." *Id.* § 1692(a).

111. Stephanie Armour, *Foreclosures Take an Emotional Toll on Many Homeowners*, USA TODAY, May 16, 2008, *available at* http://www.usatoday.com/money/economy/housing/2008-05-14-mortgage-foreclosures-mental-health_N.htm.

112. *Id.*

113. *Id.*

114. *Id.*

This anomaly is likely explained by the fact that the FDCPA preceded the modern mortgage securitization structure by almost a decade.[115] In 1977, the concept of a mortgage servicer was one who in large part communicated directly with the borrower and originated, maintained, and serviced the loan for the life of the debt.[116] There was a notion that these mortgage lending entities would refrain from abusive debt collection practices in order to maintain the goodwill of the community so as to avoid alienating future business from their borrowers.[117]

Today's mortgage lenders and servicers no longer resemble the definition of "creditor" contained in the Act. Today mortgages are virtually assigned away at the moment of closing.[118] Contemporary asset-backed securities conduits often have eleven or more integral parties: a borrower, a broker, an originator, a seller, an underwriter, a trust, a trustee, multiple servicers, a document custodian, an external credit enhancer, a securities placement agent, and investors.[119] Contemporary mortgage servicers never "obtain" a loan as the term is commonly understood. Rather, servicers obtain the right to receive a commission and fee revenue based on the success they have in extracting payment from debtors—which is precisely the role of a traditional third party debt collection agency.[120] Significantly, a borrower "does not have the right to refuse to do business with a company granted servicing rights by a securitization pooling and servicing agreement."[121]

The costs of non-compliance with the Act are disproportionately borne by attorneys who are merely providing legal services to their clients and whose malpractice insurance is unlikely to insulate them from the loss. In contrast, their clients

---

115. Peterson, *supra* note 89, at 2255.
116. *Id.* at 2262.
117. *Id.* at 2261.
118. *Id.*
119. *Id.* at 2256.
120. *Id.* at 2261.
121. Peterson also notes that consumers "typically never see or even learn of the existence of the pooling and servicing agreement which will control the company with which they must interact with on a monthly basis for as long as thirty years." *Id.* at 2261.

are often immune from liability despite the fact that the mortgage industry has come to commonly being referred to as predatory. In fact, the very abuses that have resulted in the industry being labeled predatory are the actions that will result in an increase in judicial foreclosures as they are challenged by borrowers. In turn, these judicial foreclosures will compound the exposure to liability their attorneys face under the Act. The status quo is falling miserably short of achieving the goals of stemming the "abusive practices of debt collectors."[122] Congress must revisit the FDCPA and should delete the exemption for "creditors" just as they did in 1986 in the wake of widespread attorney abuses.[123]

A deletion of the exemption will advance the Act's goal by increasing the costs associated with communicating with a debtor in default. This is likely to incentivize the industry to avoid predatory practices that lead to high default rates. Moreover, since the Act applies to servicers who obtain a loan that is already in default, many servicers are likely implementing procedures to aid in compliance with the FDCPA's strictures. It is undoubtedly no larger an economic burden to comply with the Act in all cases than it is to investigate each and every assignment to determine when to comply with the FDCPA and when to avoid it. In fact, despite the fact that Florida's state statute governs the behavior of all creditors, Florida has had one of the strongest local economies throughout the country.[124]

Until the FDCPA is revisited by the legislature, the courts should be mindful of the policy goals underpinning the FDCPA. We must avoid making attorneys who represent the mortgage industry sacrificial lambs in an environment where emotions are high. An attorney who is truly acting in an abusive, harassing, and misleading manner should be held liable for his conduct. On the other hand, an attorney who is attempting to comply with the Act in good faith and against a backdrop of contradictory and confusing precedent should be granted the *bona-fide* error defense whenever warranted.

---

122. 15 U.S.C. § 1692(e).
123. Peterson, *supra* note 89, at 2279.
124. *Id.*

Not Worth the Paper it's Printed On: EMTALA Should be Repealed and Replaced with a Federal Malpractice Statute

Ryan J.W. Cicero

I. INTRODUCTION

Imagine you are sixteen weeks pregnant, experiencing severe abdominal pain. The hospital's triage nurse tells you that you are not an emergent patient and thus will likely wait for up to two hours before you see a physician. While waiting, you suffer a spontaneous miscarriage in the emergency room bathroom.[1] Put yourself in the shoes of a woman whose husband went to the ER three times over the course of four days with heavy breathing, chest pains, and

1. Barrios v. Sherman Hosp., No. 06 C 2853, 2009 WL 935750 (N.D. Ill. Apr. 3, 2009) (discussed *infra* Part II).

dizziness. Due to a history of psychiatric problems, your husband is never properly treated for his true medical problem and has a fatal heart attack brought on by drug toxicity.[2]

Meanwhile, a physician is getting a phone call to an already fairly swamped ER and he or she must make a split second decision on whether or not the staff can handle the patient; the doctor decides they can't and tells the ambulance driver to go elsewhere. If the driver ignores the doctor, the hospital must treat the patient; if the patient goes elsewhere, the doctor can be held liable for failure to treat.[3] Well-meaning physicians trying their best are being held liable, whilst doctors who are clearly not doing a good enough job are exempt from culpability. How did we get to this point, and, more importantly, how can we fix it?

In 1986, Congress enacted the Emergency Medical and Labor Treatment Act[4] ("EMTALA") in an effort to curb patient "dumping."[5] Patient dumping is "the practice of transferring a patient from one hospital to another before stabilization, refusing to treat a patient or delaying care . . . discriminatorily, usually because of the patient's indigency or lack of insurance."[6] Over the last two decades, however, a myriad of court decisions have muddied the waters. On the one hand, critics argue there are cases that expand the statute, quite possibly past Congress's intent.[7] Conversely, some courts have read the statute more literally. Of course, the more the statute is expanded, the greater the prospective liability for hospitals and physicians; the more narrowly EMTALA is read, the greater the risk of a return to patient dumping, or at the least, insufficient care. Courts have failed to adequately balance these two tensions in each particular case. Rather, it appears courts have employed an inconsistent, piecemeal approach—giving the defendant hospitals a

2. Jackson v. E. Bay Hosp., 246 F.3d 1248 (9th Cir. 2001) (discussed *infra* Part II).

3. *See generally* Arrington v. Wong, 237 F.3d 1066 (9th Cir. 2001).

4. 42 U.S.C. § 1395dd (2006).

5. Heather K. Bardot, *COBRA Strikes at Virginia's Cap on Malpractice Actions: An Analysis of* Power v. Arlington Hospital, 2 GEO. MASON INDEP. L. REV. 249, 250 (1993).

6. *Id.*

7. *See, e.g.*, Tricia J. Middendorf, *Ambulances: Hospital Property or Not? Interpreting the Expanding Boundaries of EMTALA through* Arrington v. Wong, 46 ST. LOUIS U. L.J. 1035, 1058 (2002) (arguing that courts and Congress alike "need to define the boundaries of this ever expanding statute").

free ride in some cases and easing the plaintiff patients' (or would-be patients) burden of proving their case other times.

EMTALA sets forth two basis requirements: (1) the hospital must screen a patient who comes to the ER to determine if he or she has an emergency medical condition, and (2) if an emergency medical condition is detected, the hospital must stabilize or transfer the patient accordingly.[8] The second prong requires actual knowledge of the medical condition.[9] The statute does not prescribe adequate medical screening requirements—instead it merely requires uniform treatment amongst individuals who come to the emergency room.[10] The statute also remains mum on certain definitions—notably what it means to "come to" the ER, instead leaving courts to grapple with the issue.[11] It has been these oversights that have prompted a judicial odyssey through the land of EMTALA.

This Note will explore the statutory stretching and shrinking of EMTALA through judicial decisions of the last fifteen years and argue that a fresh start to the problem of patient dumping may well be the best answer. Part II of the Note looks at the lack of substantive screening requirements placed on hospitals and determines how this statutory eroding of the Hippocratic Oath has endangered patients. Part III of the Note critiques the Supreme Court decision in *Roberts v. Galen*[12] and queries whether it flies in the face of Congressional intent. Part IV examines a recent First Circuit case, *Morales v. Sociedad Espanola de Auxilio Mutuo Beneficencia*[13] dealing with the physical presence requirement (or lack thereof) in terms of how it juxtaposes with certain regulations prescribed in 1994, and amended in 2003, by the Centers for Medicare and Medicaid Services ("CMS") "amid rising discontent

8. Michael J. Frank, *Tailoring EMTALA to Better Protect the Indigent: The Supreme Court Precludes One Method of Salvaging a Statute Gone Awry*, 3 DEPAUL J. HEALTH CARE L. 195, 202–03 (2000).

9. Alicia K. Dowdy, Gail N. Friend & Jennifer L. Rangel, *The Anatomy of EMTALA: A Litigator's Guide*, 27 ST. MARY'S L.J. 463, 491 (1996).

10. Correa v. Hosp. San Francisco, 69 F.3d 1184, 1192 (1st Cir. 1995) ("The essence of [EMTALA's screening] requirement is that there be some screening procedure, and that it be administered even-handedly.").

11. Middendorf, *supra* note , at 1040.

12. 525 U.S. 249 (1999).

13. 524 F.3d 54 (1st Cir. 2008).

about vagueness in the statute."[14] Finally, Part V explores possible reasons for this judicial soup and offers a suggestion for going forward—namely, scrapping the original Act and starting over.

II. A FAILURE TO DIAGNOSE THE CORRECT PROBLEM IS NOT A PROBLEM (FOR THE HOSPITALS)

A. The Facts of Jackson and Barrios

In *Jackson v. East Bay Hospital*, the court was called upon to decide "whether a hospital violates [EMTALA] if it fails to diagnose the cause of a patient's emergency condition, but treats the symptoms identified, and concludes the patient has been stabilized."[15] In *Jackson*, the decedent, Robert Jackson, originally visited the Lake County Mental Health Department, where he was told to go to the Redbud emergency room so as to receive a medical clearance.[16] Upon arrival at Redbud's ER Jackson was examined by both a nurse and a physician; he was diagnosed as suffering from no emergency medical condition, but rather acute psychosis.[17] In accordance with Redbud's policy, Jackson was "referred to a psychiatrist . . . for an appropriate psychiatric follow-up."[18] Two days later, Jackson returned to Redbud.[19] Once again, both a triage nurse and a physician conducted thorough tests on Jackson, who was complaining of a sore throat, chest pain, and dry heaves.[20] Once again, Jackson was released and told to go to a hospital offering psychiatric services.[21] Early the next morning, Jackson returned yet again, presenting no physical symptoms, but very agitated.[22] Yet again, no emergency medical condition was detected and a transfer to a psychiatric hospital, East Bay Hospital, was deemed appropriate

14. Lawrence Bluestone, Note, *Straddling the Line of Medical Malpractice: Why There Should be a Private Cause of Action against Physicians via EMTALA*, 28 CARDOZO L. REV. 2829, 2835 (2007).

15. 246 F.3d 1248, 1251–52 (9th Cir. 2001).

16. *Id.* at 1252.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 1253.

22. *Id.*

and effectuated.[23] Less than twelve hours later, Jackson was dead of a massive heart attack brought on by acute psychotic delirium, which was caused by Anafranil toxicity.[24]

In *Barrios v. Sherman Hospital*,[25] the story is sadly familiar. Elvia Barrios was nearly sixteen weeks pregnant when her family took her to Sherman Hospital's ER because she had been experiencing severe abdominal pain.[26] The examining nurse placed her into the mid-level category of urgent (as opposed to emergent), a category which requires physician care within two hours.[27] Less than two hours later, Barrios suffered a miscarriage in the bathroom of the hospital emergency room.[28] Within an hour of this, Barrios was seen by a physician, who gave her a blood test and a pelvic examination.[29] The attending physician administered Vicodin and discharged her.[30] The whole process—from triage to miscarriage to discharge—*took less than four hours*. The next night, Barrios returned to the ER due to vaginal bleeding and was treated.[31]

B. The Courts' Holdings

In both cases the court was asked to determine if hospital error in the screening process amounts to a violation of EMTALA. In both cases, the answer was a resounding no. Both courts offered similar reasoning: EMTALA does not impose a national standard of care in screening patients,[32] nor is it a federal malpractice statute.[33] Well, what is it then? Congressional intent was clearly preventing patient dumping, which appears to be failing.[34] A study concluded that between the time of EMTALA's passage in 1986 and 1998 patient dumping had increased by 683%.[35] Obviously, some of the increase can be chalked up to a greater awareness of the problem and

23. *Id.*
24. *Id.* at 1252–53 (Anafranil is a brand name for tricyclic, an antidepressant).
25. 2009 WL 935750 (N.D. Ill. Apr. 3, 2009).
26. *Id.* at *1.
27. *Id.*
28. *Id.*
29. *Id.* at *2.
30. *Id.*
31. *Id.*
32. Eberhardt v. City of Los Angeles, 62 F.3d 1253, 1258 (9th Cir. 1995).
33. Curry v. Advocate Bethany Hosp., 204 F. App'x 553, 556 (7th Cir. 2006).
34. Bluestone, *supra* note 14, at 2839.
35. *Id.*

thus more reporting, but it also shows that Congressional goals have not been met.

C. *Commentators' Proposals*

Various proposals to "fix" EMTALA have been set forth. One commentator has suggested a three part test to determine if a patient received an adequate medical screening under EMTALA: (1) the patient must show he or she received a materially different screening from other patients; (2) the hospital must then prove there was a justifiable reason for changing the screening protocol; and (3) the plaintiff has an opportunity to provide expert testimony.[36] According to Professor Cohen, "plaintiffs can establish an EMTALA screening violation whenever they can prove that there is no believable medical basis for the hospital's departure from its standard screening protocols."[37] This sounds a lot like what Elvia Barrios' lawyer argued—that her screening was so faulty, it essentially amounted to no screening at all.[38] The court, however, dismissed this in hand, arguing that EMTALA only requires similar treatment. The court *never reached the medical basis* for Barrios' allegedly shoddy treatment. Thus, it appears Professor Cohen is unwittingly putting a medical basis back into EMTALA, which courts have so painstakingly carved out.

Another proposal Bluestone offers is to allow private causes of action against individual physicians, as opposed to merely going after the hospitals.[39] Of course, at first glance this would appear to be exactly what Congress *didn't* want when it passed EMTALA—a federal malpractice suit and thus a floodgate of litigation over malpractice on the federal level. Bluestone, however argues that his proposal stops short of being a federal malpractice statute.[40] This

---

36. Beverly Cohen, *Disentangling EMTALA from Medical Malpractice: Revising EMTALA's Screening Standard to Differentiate Between Ordinary Negligence and Discriminatory Denials of Care*, 82 TUL. L. REV. 645, 682 (2007).

37. *Id.* at 689.

38. Barrios v. Sherman Hosp., No. 06 C 2853, 2009 WL 935750, at *4 (N.D. Ill. Apr. 3, 2009).

39. *See* Bluestone, *supra* note 14, at 2858 (arguing that financial repercussions will dissuade physicians from dumping whereas even with punishment looming, it is still financially beneficial for hospitals to dump indigent patients).

40. *Id.* at 2863–64.

proposal puts a lot of faith in the court system to properly make a distinction between claims for failure to treat or stabilize as opposed to claims for malpractice.[41] Further, "the aim of this proposal is to place the control of enforcement back into the hands of the private individuals who were wronged in the first place."[42] Once again, this smacks of allowing laypeople to determine if they were *medically* wronged, and not seeing if they were discriminated against because of indigence or some other faulty reason. If there isn't a national standard of care and there aren't federal guidelines for screening patients, what is to prevent a deluge of litigation at the federal level that will require a case by case analysis of a particular hospital's screening protocols and whether they were followed? What basis for determining whether it was malpractice or a failure to follow standard protocol will the district courts use? It seems to be a slippery slope—one that can be avoided by not allowing private causes of action at all; of course, this is what Congress intended. This note will argue later that by establishing federal guidelines, Congress could, and should, allow for a federal malpractice suit. Bluestone's suggestion was on the right path, he just didn't take it far enough.

III. MOTIVE

A. Is EMTALA a Strict Liability Statute?

"Cruel and cold is the judgment of man / Cruel as winter and cold as the snow; / But by-and-by will the deed and the plan / Be judged by the motive that lieth below."[43] This tenet holds true in most American jurisprudence, save for strict liability statutes. The question then becomes, is EMTALA a strict liability statute? Why would it even matter?

In *Roberts v. Galen* the United States Supreme Court laid to rest any question regarding whether a plaintiff had to show an

41. *Id.* ("If . . . the district courts are vigilant in permitting only those actions that allege a failure to treat or stabilize, the traditional issues associated with malpractice tort recovery will be minimized.").

42. *Id.* at 2864.

43. Lewis J. Bates, *By-and-By*, *in* WAIFS AND THEIR AUTHORS 25–26 (Alphonso A. Hopkins ed., 1876).

improper motive.[44] In ruling that a plaintiff did *not* have to show improper motive, did the Supreme Court effectively make EMTALA into a strict liability statute? And, if so, does this fly in the face of Congressional intent—to curb patient dumping *based on discriminatory purposes*? Without a showing of improper motive requirement, how can a court gauge whether a patient was not admitted for medical reasons or for discriminatory reasons? A closer look at *Roberts* opens the door to more remonstrance vis-à-vis EMTALA.

B. The Lower Courts' Decisions

In May of 1992, Wanda Johnson was hospitalized for treatment of horrific injuries sustained in a major accident.[45] Just over two months later, Johnson was transferred from a Humana hospital in Louisville to a long-term care facility called Crestview Health Care Facility.[46] The very next day "Johnson's condition deteriorated significantly."[47] She was transferred again to Midwest Medical Center where she proceeded to rack up nearly $400,000 in medical bills.[48] A guardian for Johnson filed suit a year later, alleging an EMTALA violation on the part of Humana.[49]

The appellate court, in affirming the district court's decision, ruled that a showing of improper motive was required in order for a patient to state a claim for which relief could be granted.[50] It held "[t]o distinguish an EMTALA claim from a state law claim for negligence, a plaintiff must establish something more than a hospital's breach of the applicable standard of care . . . [t]o interpret [EMTALA] in any other manner would effectively reduce the EMTALA to nothing more than a federal remedy for medical malpractice."[51]

---

44. 525 U.S. 249, 253 (1999).

45. Roberts v. Galen of Va., 111 F.3d 405, 406–07 (6th Cir. 1997).

46. *Id.* at 407.

47. *Id.*

48. *Id.*

49. *Id.* (Roberts, the guardian, specifically alleged "that Humana failed to comply with EMTALA in the transfer of Johnson to a skilled nursing facility.").

50. *Id.* at 409–10.

51. *Id.*

C. *The Supreme Court's Decision*

The Supreme Court, however, reached a different conclusion. Prior to its ruling in *Roberts*, there "was a split of opinion among the judicial circuits as to whether an improper motive was required for an EMTALA violation to exist."[52] The Court read the statute quite literally and found no such requirement in its text.[53] In a per curiam decision, the Court held that the lower courts' reading of "appropriate" medical screening to include the showing of improper motive was incorrect.[54]

D. *Arguing in Favor of the Improper Motive Requirement*

Without the requirement that a plaintiff show an improper motive, it appears this statute is swaying "dangerously" close to a federal malpractice law. "By imposing an improper motivation requirement, the Sixth Circuit was trying to prevent 'liability for EMTALA claims merely alleging physician negligence, and not the intentional dumping of indigent individuals.'"[55] If courts are not to look to a physician's or nurse's motive for denying care, what else can they look to? The statute was written to curb patient dumping due to an inability to pay, lack of medical insurance, or any other discrimination on the part of the hospital or its staff. If motive is not a factor, what is? It is apparent from the Supreme Court's decision that EMTALA is—or at least has become—a strict liability statute. If EMTALA is to be a strict liability statute, then Congress, or the Court, has an obligation to establish national standards of care. Protocols need to be enforced, otherwise EMTALA will be a strict liability statute without any guidelines.

---

52. Tiana Mayere Lee, *An EMTALA Primer: The Impact of Changes in the Emergency Medicine Landscape on EMTALA Compliance and Enforcement*, 13 ANNALS HEALTH L. 145, 161 (2004).

53. Roberts v. Galen of Va., 525 U.S. 249, 253 (1999).

54. *Id.* at 252–53.

55. Bluestone, *supra* note 14, at 2851 (quoting Frank, *supra* note 8, at 233).

IV. WHEN IS ONE "IN" THE ER?

A. *Trying to Make Things More Clear . . . and Failing*

In 2003, CMS attempted to clarify, among other things, the meaning of "comes to" the ER:[56]

> [T]he individual is on the hospital property. . . . An individual in a nonhospital-owned ambulance on hospital property is considered to have come to the hospital's emergency department. An individual in a nonhospital-owned ambulance off hospital property is not considered to have come to the hospital's emergency department, even if a member of the ambulance staff contacts the hospital. . . . In such situations, the hospital may deny access if it is in "diversionary status," that is, it does not have the staff or facilities to accept any additional emergency patients. If, however, the ambulance staff disregards the hospital's instructions and transports the individual onto hospital property, the individual is considered to have come to the emergency department.[57]

The first two sentences are clear enough: if a patient is on the grounds of the hospital, they must be screened; if a patient is in an ambulance on hospital grounds, they also must be screened. However, the rest of the "clarification" leaves much room for judicial interpretation—ironically, the exact result the regulation was trying to circumvent. CMS' intentions were good: "CMS imposed this broad interpretation of EMTALA so that hospitals could not turn patients away simply because they entered through the wrong door or . . . stopped at the driveway."[58] Their good intentions, however, were spoiled by faulty statutory construction. The third sentence says that if an individual is in a nonhospital-owned ambulance *off* the hospital grounds, he or she has *not* come to the ER, even when calling ahead. Had the regulation stopped there, it would be

56. Middendorf, *supra* note 7, at 1042.
57. *Id.* at 1042 (quoting 42 C.F.R. § 489.24(b)(4) (2000)).
58. *Id.* at 1043.

elucidative. Alas, the regulation continues by saying a hospital can deny a person in the aforementioned position if they are in diversionary status (i.e. don't have the resources necessary to treat the patient). However, if the ambulance disregards the doctor or nurse's instructions, then the individual has indeed "come to" the ER and the hospital can face liability under EMTALA. This has proven to be more confounding than helpful. Has the patient come to the ER, and thus implicated EMTALA, if he or she is in an ambulance and calls ahead, or, has he or she only satisfied the "comes to" requirement if the hospital is not in diversionary status? What, then, is the point of calling ahead? If the ambulance staff calls ahead and they are told to come, they can proceed (and EMTALA's provisions start to toll); if they are told to go elsewhere, they can still go and the hospital must screen the patient (once again, implicating EMTALA). Under this preposterous construct, it appears hospital ERs would do well to rid themselves of telephones and save precious time.

B. Morales

In March of 2004, Carolina Morales was diagnosed as having a nonviable pregnancy.[59] Two days later, she began experiencing severe abdominal pain and vomiting while at work; her fellow employees called an ambulance.[60] The ambulance, which was neither owned nor staffed by the hospital, set out for Hospital Espanol Auxilio Mutuo de Puerto Rico, where Morales' obstetrician practiced.[61] While on their way to the hospital, the ambulance crew called ahead and spoke to the director twice.[62] The first time the director "seemed worried that the plaintiff might have voluntarily induced an abortion . . . [and] also stated that he was very busy."[63] The second time, the director asked if Morales had any medical insurance, either through the hospital or on her own; when he did not get the response he was apparently looking for, he "abruptly terminated the call."[64] The ambulance staff, believing this to be a denial of care, took Morales to a different hospital where she was

59. Morales v. Sociedad Espanola de Auxilio Mutuo y Beneficencia, 524 F.3d 54, 55 (1st Cir. 2008).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 55–56.

treated.[65] The director, the court noted, "at no time claimed that the hospital was in diversionary status."[66] The district court dismissed Morales' suit against the hospital for violating EMTALA, holding "the statute did not apply because [Morales] had never come to [the hospital's] emergency department."[67]

The appellate court reversed, holding that "a reasonable factfinder could conclude that [Morales] had come to the Hospital's emergency department within the purview of EMTALA; that a request for examination or treatment had been rendered on her behalf; and that the request had been rebuffed because of her uninsured status."[68] The court attempts to clarify the statute's "comes to" language by using Webster's dictionary.[69] Determining that "comes to" could mean either moving towards or arriving at, the court determines that Webster's will not settle this case, and as such, the regulations need to be consulted.[70] Of course, as the dissent deftly points out, the statute does not say a patient *coming* to the ER, but rather, a patient who *comes* to the ER.[71] "[W]e cannot simply ignore the verb conjugation chosen by Congress."[72] It seems painfully obvious had Congress wanted the statute to apply to both patients *in* the ER and patients *on their way* to the ER, they would have worded the statute accordingly (e.g. "patients who come to or are coming to the ER . . ."). Courts have paid a great amount of lip service to Congressional intent (in not imposing national standards of care) and not reading extra meaning into EMTALA (in not requiring improper motive on the part of the hospital), yet here the court both eschews Congressional intent *and* provides for an end run around a prong of the statute—namely, physical presence in the ER.

The court excuses itself from actual legal reasoning: "[r]egulatory construction . . . is not an exact science, and there are times when contortionistic strivings at seamless interpretation must yield to common sense. This is such a time: the regulation is a hodge-podge and, despite assiduous interpretive efforts, its overall

65. *Id.* at 56.
66. *Id.*
67. *Id.*
68. *Id.* at 62.
69. *Id.* at 58.
70. *Id.*
71. *Id.* at 63.
72. *Id.*

meaning remains obscure."[73] In plain English, the court resorts to an equitable construction of EMTALA—the court felt bad for Morales and reached into its bag of tricks to produce a definition of "comes to" that includes "on the way." The court's decision in Morales demonstrates how moral and ethical concerns enter into judicial analysis in interpreting EMTALA.

In addition, the *Morales* court goes too far in stating, "if the crew of an ambulance fears refusal because of, say, the absence of medical insurance, the crew may well decide to approach under the cover of silence. Upon arrival, the emergency room would be required to examine and/or treat the individual, but precious time would have been lost."[74] While helping out already taxed emergency departments is a wonderful objective, it is not EMTALA's objective. EMTALA's objective was, and ought to be, to stop the discriminatory practice of patient dumping.[75] If courts are unwilling to impose national standards of care and hold physicians accountable for lackadaisical screenings, then they ought not reach decisions with an eye toward improving ER efficiency. EMTALA is a non-discriminatory statute; much as the Civil Rights Act ensures equal protection for everyone under the law, EMTALA ensures that everyone, even the indigent, will be uniformly treated. To read into the statute a provision, or in this case, a construction, which seeks to improve emergency services, is beyond Congressional intent. The court, however, is not entirely to blame as EMTALA's ambiguities allow courts the flexibility to stray away from congressional intent, in order to interpret EMTALA in a manner they find equitable.

V. HOW DID WE GET HERE AND WHERE DO WE GO?

A. Does EMTALA Decrease the Care Available in Emergency Rooms?

Many have argued EMTALA actually decreases the care available for low-income Americans at emergency rooms.[76]

---

73. *Id.* at 59–60.

74. *Id.* at 61.

75. *See supra*, Introduction.

76. Vivian L. Regehr, Comment, *Please Resuscitate! How Financial Solutions May Breathe Life into EMTALA*, 30 U. LA VERNE L. REV. 180, 195–96

Obviously, if this is the case, EMTALA is not only ineffectual, it is an unmitigated disaster. Because these statements often sound a lot like anecdotal evidence, perhaps caution is appropriate in using such unscientific data, as there are those that believe it was that very thing that led to the passage of EMTALA in the first place.[77]

On the other hand, doctors themselves are making similarly disturbing declarations.[78] Apparently, Congress was also worried; they expressed reservations as far back as EMTALA's passage.[79] If the legislators and, effectively, the implementers (the emergency personnel) of the Act are expressing concern, a closer look is mandated. In crafting a strategy for how to fix EMTALA or, more generally, how to fix the problem of patient dumping, it is imperative that the discussion begins with a look at possible reasons for judicial inconsistency with regard to EMTALA.

(2008) (quoting Ron Paul who argues, "EMTALA could actually decrease the care available for low-income Americans at emergency rooms. This is because EMTALA discourages physicians from offering any emergency care. Many physicians . . . have told me that they are considering curtailing their practices, in part because of the costs associated with the EMTALA mandates. Many other physicians are even counseling younger people against entering the medical profession because of the way the Federal Government treats medical professionals.").

77. *See, e.g.*, Bluestone, *supra* note 14, at 2866 n.9 (*quoting* David A. Hyman, *Patient Dumping and EMTALA: Past Imperfect/Future Shock*, 8 HEALTH MATRIX 29, 32 (1998) ("The case for EMTALA was built on a foundation of heart-rending anecdotes in which hospital emergency departments (EDs) callously denied life-saving care to those in need.")).

78. *See, e.g.*, Damon Dietrich, *EMTALA: A Lesson in the Inevitable Futility of Forced Ethics*, MEDSCAPE TODAY (Nov. 20, 2008), *available at* http://www.medscape.com/viewarticle/583456 ("In effect, the alarming irony of EMTALA is staggering. The law's intent and purpose was to ensure access for an [emergency medical condition]; however, in reality, EMTALA actually impedes access for an [emergency medical condition] by overwhelming resource capacity.").

79. *See, e.g.*, Hardy v. New York City Health & Hosp. Corp., 164 F.3d 789, 794 (2d Cir. 1999) ("Significantly, EMTALA's legislative history demonstrates that Congress questioned 'the potential impact' of EMTALA on 'the current medical malpractice crisis'; Congress also expressed concern that an unbridled EMTALA could unduly burden hospitals and thereby 'result in a decrease in available emergency care' rather than the intended increase in such care.") (citing H.R. REP. No. 99-241, pt. 1, at 27 (1986)).

B. Why Courts Are All over the Place

What is it about EMTALA that makes it so challenging for courts to accurately adjudge Congressional intent? Actually, there are a number of reasons; these reasons may have doomed EMTALA from the start. First of all, the statute itself is exceedingly vague.[80] In addition to not outlining a federal standard of care or defining "comes to" properly there are other areas in which the statutory construction leaves something to be desired. For instance, the term "stabilization" is also not defined.[81] These terms of art in the statute ought to be defined. Finally, "there was initially great judicial confusion as to whether EMTALA applied to 'all' individuals or solely to the poor."[82] It isn't hard to fathom why a statute "contain[ing] undefined terms and ambiguities"[83] would produce a checkered legislative past.

Another possible reason for courts' apparent mishandling of EMTALA is the fact that the statute itself is loaded with public policy implications, specifically moral and ethical obligations. As some have argued, "EMTALA is a perfect example of *forced ethics by statutory regulation.*"[84] Indeed, some courts—like the *Morales* court discussed earlier—have been willing to make decisions based on ethical considerations as opposed to legal rationale. One commentator goes so far as to place the blame squarely on the shoulders of the doctors.[85] But even conceding this point, the commentator still argues courts should not rob us of our "moral imagination."[85] Further, "[w]ith acceptance of moral and ethical

---

80. *See* Lee, *supra* note 52, at 153 (outlining why EMTALA's complexity and vagueness make for a confusing statute).

81. *Id.* at 160 n.107 (citing David A. Ansell & Robert L. Schiff, *Patient Dumping: Status, Implications, and Policy Recommendations,* 257 JAMA 1500, 1502 (1987) (stating that "stabilization" is a vague term that needs clarification)).

82. Thomas A. Gionis, Carlos A. Camargo, Jr. & Anthony S. Zito, Jr., *The Intentional Tort of Patient Dumping: A New State Cause of Action to Address the Shortcomings of the Federal Emergency Medical Treatment and Active Labor Act*, 52 AM. U. L. REV. 173, 183–84 (2002).

83. *Id.* at 183.

84. Dietrich, *supra* note 78 (emphasis in original).

85. *Id.* (telling a horror story of an obdurate physician refusing to treat an indigent patient, and remarking, "[t]his egregious, irresponsible and unprofessional behavior did transpire and led to the creation of EMTALA. For these doctors are the true forefathers of the EMTALA . . . .").

86. *Id.*

obligation, the creation and evolutionary misinterpretations of the EMTALA law would never have transpired."[87] Looking at courts' fickle decisions regarding EMTALA, one possible explanation, then, is that they have struggled to rectify judicial obligations of interpreting a statute by emulating congressional intent and outside pressures in the form of moral indignation on the part of the public.

A third factor promoting judicial inconsistency is embedded in the Act itself. Bluestone remarks that "the courts have noted two specific goals of EMTALA: (1) to prevent patient dumping; (2) to accomplish the first without burdening the medical community and the courts with the creation of a federal malpractice action."[88] Courts are loath to increase their dockets and, as such, they've aggressively combated calls for federal standards of care, as well as imposed a strict ban on individual doctor liability.[89] While this comports with congressional intent, it clearly limits EMTALA's effectiveness. It is possible, then, that courts overcompensate in other areas—to fill the public policy gap, so to speak—in order to avoid siding with the medical personnel a large majority of the time.

C. Prior "Failed" Proposals

The next logical question is, of course, if EMTALA is ineffectual and unsatisfying, what then is the alternative? The answer is simple: repeal EMTALA and replace it with a federal malpractice cause of action. Naturally, this solution seems *too* simple, too straightforward. Therefore, before addressing this possible solution, a look at a few previous suggestions, and why they are inadequate, is in order.

One such academic proffer is to limit EMTALA and its enforcement only to those who *are* uninsured or indigent.[90] Indeed,

---

87. *Id.*

88. Bluestone, *supra* note 14, at 2847.

89. *See, e.g.*, Heimlicher v. Steele, 442 F. Supp. 2d 685, 692 (N.D. Iowa 2006) (holding that an individual does not have a private cause of action against a doctor under EMTALA); *see also* King v. Ahrens, 16 F.3d 265, 271 (8th Cir. 1994) (holding that EMTALA does not allow for a private cause of action against a physician employed at a private clinic).

90. *See, e.g.*, Thomas L. Stricker, Jr., *The Emergency Medical Treatment & Active Labor Act: Denial of Emergency Medical Care Because of Improper Economic Motives*, 67 NOTRE DAME L. REV. 1121, 1150 (1992) (arguing that

this concept can be found in dicta even in early court decisions.[91] Of course, this wasn't the answer then, and it isn't now. EMTALA was designed to limit patient dumping due to any discrimination, not merely the inability to pay.[92] Simply removing the insured from the Act's scope will do nothing to alleviate hospitals' burdens, save time in the ER, or make sure everyone has access to emergency medical care. If EMTALA is only for the uninsured, those who struggle to make ends meet so they can afford insurance, or stay at a job they hate for the benefits, will be penalized if they are denied emergency care for other discriminatory reasons. Their penalty will come in the form of not having a federal cause of action against the hospital for failure to treat due to race or some other irrelevant factor; surely this isn't an equitable result.

Another proposal, mentioned earlier, is to allow for private causes of action against individual physicians.[93] In addition to courts already ruling against this idea,[94] it fails for an additional reason—it tries to have its cake and eat it too. If the primary goal of EMTALA is to stop patient dumping, then preventing a federal malpractice action is a subset of that overarching goal.[95] However, simply because this wasn't the *main* goal of EMTALA doesn't mean it can be ignored. Had Congress wanted a stronger EMTALA, they would have created a federal malpractice action; they would have drafted national standards of care into the statute. What this proposal forgets, or conveniently overlooks, *is that Congress didn't write these things*

Congress ought to narrow the scope of EMTALA only to include those who are denied care because of their indigence).

91. *See, e.g.*, Cleland v. Bronson Health Care Group, 917 F.2d 266, 270 (6th Cir. 1990) (citing multiple examples of such cases).

92. *See, e.g.*, Hines v. Adair County Pub. Hosp. Dist. Corp., 827 F. Supp. 426, 428–29 (W.D. Ky. 1993) ("Although the plights of the indigent and uninsured, not to mention public hospitals who ultimately bear the brunt of patient dumping, clearly prompted this litigation, the Sixth Circuit has interpreted [EMTALA's] sweeping language to proscribe the discriminatory failure to treat *paying* patients upon the basis of sex, race, national origin, politics, or social status, among others.") (emphasis in original) (citation omitted).

93. *See* Bluestone, *supra* note 14, at 2852–66 (proposing, even in the face of judicial decisions going the other way, allowing individuals not only to sue the hospitals, but also doctors).

94. *See, e.g.*, Harry v. Marchant, 291 F.3d 767, 773 (11th Cir. 2002) ("The legislative history of EMTALA makes it clear the statute was not intended to be a federal malpractice statute . . . .") (emphasis added).

95. Bluestone, *supra* note 14, at 2852.

into the statute. Thus, it seems a stretch to say, merely because it wasn't the primary aim of the statute, that it is reversible. Finally, Congress considered this when they drafted the Act and concluded that "actions for damages may be brought *only against the hospital* which has violated the requirements of [the Act]."[96] The argument that Congress overlooked this when they enacted the law is therefore void and as such the whole argument fails.

The American Hospital Association ("AHA") has thrown its hat into the ring as well when it comes to trying to make EMTALA more effective. Its plan would differentiate between critical and noncritical patients.[97] Clearly, this is an effort to assuage crowded emergency rooms and burnt-out personnel. At least one hospital director agreed, saying, "[t]he change would allow caregivers to provide other options to noncritical patients during times of severe emergency department overcrowding."[98] This is an awfully dangerous suggestion; it sounds like Orwellian doublespeak for "noncritical patients who are indigent will be dumped." What then is to stop a doctor or triage nurse from pushing the indigents into the "noncritical" category regardless of their actual needs? This would effectively eliminate EMTALA and its purpose. Congress would be better off repealing EMTALA and avoiding the crush of litigation this amendment would incite.

D. Repeal EMTALA and Create a Federal Malpractice Action

This Note will now argue that Congress should repeal EMTALA and replace it with a federal malpractice action. Of course, as has been mentioned numerous times in this Note, Congress did not want this end result. They did, however, want a statute with enough teeth to stop patient dumping. It is an issue of balancing needs—can the federal court system handle the crush of litigation expected to come its way if EMTALA were a federal malpractice statute, or, if Congress enacted such an Act in its stead to

96. *Id.* at 2847 (citing H.R. REP. No. 99-241, pt. 3, at 6–7 (1986)) (emphasis added).

97. Thomson Healthcare Company, *AHA Pushes for Change in EMTALA Regulations*, Apr. 1, 2002, http://www.accessmylibrary.com/coms2/summary_0286-25249863_ITM.

98. *Id.*

combat the problem of patient dumping? In this author's humble opinion, the needs of indigents ought to outweigh an increased docket. While frivolous suits need to be avoided, the establishment of a national standard of care; national screening standards; definitions of not only who the Act covers, but of all the terms in the Act (such as stabilization and appropriate); and the declaration of required methods of transfer will alleviate the anticipated burden of the federal court system. With a national framework in place, courts' duties will be minimized—threshold questions will need to be answered and cases can proceed on the merits from there. Further, it is a far cry from American ideals of justice to say that because there may be many cases in the courts, we shouldn't have a law that seeks to protect our defenseless in the best possible manner. Revising EMTALA into a mock federal malpractice statute will not work; this will cause confusion in emergency departments and courtrooms alike. Congress would do well, therefore, to simply repeal the original noble effort, and move on in the form of a nationally articulated standard of care in a federal malpractice cause of action.

As one doctor argued, professional standards ought to be enough to guide physicians, nurses, and other emergency medical personnel.[99] There aren't equivalent laws in place for other service industries, from fire departments to restaurants, because they are covered in other ways. One such way is through basic human decency. As professionals, medical personnel should be held accountable for not upholding the Hippocratic Oath; as human beings they should be held accountable for being morally repugnant. Another way we protect the indigent and sometimes helpless is through the Equal Protection Clause, tort actions, and the Civil Rights Act. These standards have worked, or at least have been a work in progress, for decades. To foist a law on a specific sector like this implies that they are incapable of policing themselves and that without it, a sub-standard level of care will ensue. Doctors and other health professionals need to take greater ownership of their craft, rise to the occasion, follow the national structure in place for screening and admitting, and prepare to face the consequences if they don't—a federal malpractice suit in which they themselves, and not merely the hospitals, are the defendants.

---

99. *See* Dietrich, *supra* note 78 (arguing that moral obligations and ethical considerations should make EMTALA unnecessary).

A way to facilitate the eradication of EMTALA is for Congress to subsidize emergency departments. This can be accomplished through a variety of ways. First of all, Congress can give grants to medical suppliers and equipment manufactures to provide emergency departments with much-needed provisions for less cost. With an eye towards Paul's statements,[100] Congress can offer a loan forgiveness program from student debt for physicians and nurses that go into the emergency room. This will help attract more top talent as well as simply *more* qualified professionals. If personnel specifically and hospitals generally can better afford to treat indigent patients, EMTALA becomes unnecessary.

A final justification for repealing EMTALA and replacing it with a federal malpractice suit can be found in tort law. What are torts for, if not for policing this kind of behavior? What is the purpose of having a toothless statute that judges are constantly grappling with and substituting their will into when a penumbra approach will do the trick better? Rather than subject indigent and uninsured (remember this term also often includes underinsured as well[101]) people to an ever-expanding, ever shrinking, amorphous statute, Congress can streamline the process by implementing national standards and letting patients and emergency personnel alike know where they stand.

E. Final Remarks

Over twenty years ago, Congress realized, and rightly so, that there was a problem with patient dumping. The problem continues to this day—recent studies showed over five hundred hospitals were penalized for violating EMTALA[102]—thus one can only imagine how much higher the actual incidence of patient dumping is. Congress attempted to thwart this devious practice by enacting a law that would require patients to be seen, regardless of ability to pay. As time wore on, however, court decisions have both stretched this statute to the brink and narrowed its scope more finely than was originally intended. Part of the blame lies at the feet of the

100. *See* Regehr, *supra* note 76.

101. *See* Gionis et al., *supra* note 82, at 184 n.53 ("uninsured" should be read to include "underinsured").

102. Lee, *supra* note 52, at 178 (citing a study done by Public Citizen Health Group showing 527 hospital violations of EMTALA between 1996 and 2000).

legislators, part of it can be attributed to the judiciary, and part of it lies with hospital administration and personnel. The victims of this are not only the indigent and uninsured, but also anyone who goes to an emergency department seeking care. Various proposals have been suggested and tried. This Note has argued for a simplistic approach: repeal EMTALA and replace it with a federal malpractice statute. With a national standard of care articulated for the screening and treating of emergent patients, dumping will decrease, care will improve, and ultimately, the burden on the courts will subside. The only way to effectuate this is not, as courts have been trying for the last two decades, to go through the Act and pick and choose what to apply and how to apply it, but rather, to start anew. It is only through this statutory purging that we can combat a truly terrible stain on the record of our medical care.

The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*

Cortney C. Thomas

I. INTRODUCTION

Foreign bribery has long been a concern of peoples and countries. The United States finally made a public declaration against foreign bribery in 1977 with Congress' enactment of the Foreign Corrupt Practices Act ("FCPA"). Despite this statement, the Act had little to no effect in its first twenty-five years of existence.[1] Then, in the early twenty-first century, the Department of Justice and Securities Exchange Commission ("SEC") began an exponential

---

* B.A., with high honors, University of Texas, 2006; J.D. expected, University of Texas School of Law, 2010. I would like to thank my wife Kelsey for her love and support and Professor Susan Klein for her guidance and insight.

1. Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT'L L. & COM. REG. 83, 93 (2007) (saying that enforcement during this time was "sporadic" at best).

increase in the Act's enforcement.[2] This same time period also saw an important development in the means by which a prosecutor might bring an FCPA enforcement action: the use of diversion agreements. Diversion agreements are essentially contracts wherein a potentially culpable defendant agrees to follow certain compliance requirements (most notably a fine) for a set period of time (usually a number of years). Meanwhile, the prosecutor promises to withhold and potentially waive either indictment (through a non-prosecution agreement) or prosecution of an indictment (through a deferred prosecution agreement).

In the face of a growing amount of scholarly criticism,[3] this paper attempts to defend the FCPA's expansion, particularly the use of diversion agreements. Part II focuses on the historical and technical development of the Act. Part III then examines the rise and use of diversion agreements in FCPA enforcement actions in the last decade. Part IV concludes with a response to the many concerns leveled against the Act's recent expansion, ultimately determining that the current system of enforcement sufficiently satisfies the goals of the FCPA (to deter foreign bribery and to create a level playing field)[4] with very little collateral consequences (harms and abuses suffered due to exorbitant prosecutorial power and discretion).

II. THE FOREIGN CORRUPT PRACTICES ACT: ITS CREATION, PROVISIONS, AND DEVELOPMENT TO THE PRESENT DAY

A. The Problem of Corruption and the U.S.'s Response

2. *See infra* Part II.C.

3. *See* Part IV, *infra*.

4. This paper frames its analysis by labeling these as the two primary goals of the FCPA. Although the goals of the Act are not explicitly stated in the statute, there is a body of evidence to support this framework. *See* Krever, *supra* note 1, at 85 (measuring the efficacy of the FCPA by its ability to discourage international bribery and the "cost to U.S. corporations' competitiveness" that this deterrence has caused); Statement by President William J. Clinton Upon Signing S. 2375, 33 WEEKLY COMP. PRES. DOC. 2290 (Nov. 10, 1998), *also available at* http://www.usdoj.gov/criminal/fraud/fcpa/history/1998/amends/signing.html [hereinafter Clinton Signing Statement] (stating that bribery is "contrary to basic principles of fair competition").

Bribery inhibits economic growth by two primary mechanisms: economic inefficiency and reduced investment.[5] The inefficiencies and reductions in investment occur on both a national and corporate scale. Nationally, bribery is inefficient because a bribed official will likely make decisions based upon what is best for his own well-being, not what would best serve the needs of his fellow countrymen.[6] Thus, a bid accompanied by a comparatively small bribe has the ability to trump a bid that would confer a much greater benefit upon the nation and its people. Bribery also reduces national investment because companies are leery of investing capital in nations known to be corrupt.[7] If bribes are demanded at the beginning of a project, companies will be unable to predict what future bribes might be expected during and after completion of a project. With large amounts of capital hinging on the government's cooperation, a company will be averse to laying itself at the mercy of a corrupt official whose demands are highly unpredictable.

Bribery also leads to *corporate* inefficiency and reduced investment. By definition, bribery directs valuable resources away from areas of investment such as research and development, and instead places those resources in foreign officials' pockets.[8] Bribery can also have the undesired effects of damage to a company's image,

---

5. Krever, *supra* note 1, at 85. *See* Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419, 446 (1999) (reporting that economic inefficiencies can be "so severe that losses attributable to corruption sometimes exceed a country's foreign debt"); Lisa H. Randall, Note, *Multilateralization of the Foreign Corrupt Practices Act*, 6 MINN. J. GLOBAL TRADE 657, 659 (1997) (stating that bribery is economically inefficient for a variety of reasons, including that the winning bidder will often not be the one who can produce the best product the fastest and for the least money, and that public prices will be affected because the winning company was not necessarily the lowest bidder); John Hogarth, *Bribery of Officials in Pursuit of Corporate Aims*, 6 CRIM. L.F. 557, 559 (1995) (observing that bribery can create long-term economic and social costs, including reduced investor confidence in countries known to have widespread corruption); Editorial, *Corruption: World Bodies Assault Helps Poor, U.S. Business*, DALLAS MORNING NEWS, Sept. 9, 1997, at 14A (stating that bribery and other forms of corruption creates "economic inefficiencies, breed[s] poverty, reward[s] illegality, and inhibit[s] democratization").

6. Krever, *supra* note 1, at 85; Randall, *supra* note 5, at 659.

7. Krever, *supra* note 1, at 86; Hogarth, *supra* note 5, at 569.

8. Aaron Einhorn, *The Evolution and Endpoint of Responsibility: The FCPA, SOX, Socialist-Oriented Governments, Gratuitous Promises, and a Novel CSR Code*, 35 DENV. J. INT'L L. & POL'Y 509, 513 (2007).

costly lawsuits, and the cancellation of contracts.[9] In essence, companies shift their financial focus, at least in part, away from efficiency and competitiveness and toward corrupt payments.[10]

National and corporate inefficiency has the potential to spiral out of control in what has been termed a "race to the bottom."[11] This "race" consists of competing corporations that will continue to pay larger and larger bribes to win contracts over their competitors and thus are likely to give into the demands of the increasingly greedy foreign official. This process spirals downward until "the marginal benefit of new payments decreases to zero."[12] In other words, the company's profits become so small that it is no longer wise to invest in that country. At the same time, as the ventures become increasingly less profitable, the winning bidder will try to maximize profits by taking advantage of the comparative weaknesses of the host nation that the foreign official represents and its people.[13] The host nation will face diminishing benefits as the race gets closer and closer to the bottom. In the end, it seems the only parties that truly profit from international bribery are the corrupt officials.

Prior to the late 1970s, international bribery was the norm.[14] However, two events caught Congress' eye and moved it toward action: the Watergate scandal and the SEC's voluntary disclosure program of the 1970s.[15] In addition to the famous break-in of the

---

9. *Id.* The damage to the company's image comes from the negative public perception of bribery. Costly lawsuits develop, for example, when the government brings an enforcement action under the FCPA. Bribery causes the cancellation of contracts because foreign officials will have the urge to cancel current contracts and enter into new ones in order to receive additional bribes.

10. Krever, *supra* note 1, at 86.

11. Einhorn, *supra* note 8, at 513; Marie M. Dalton, Note, *Efficiency v. Morality: The Codification of Cultural Norms in the Foreign Corrupt Practices* Act, 2 N.Y.U. J. L. & BUS. 583, 623 (2006).

12. Einhorn, *supra* note 8, at 513.

13. *See* Dalton, *supra* note 11, at 623–24 (noting that some of the costs suffered by developing nations include imposition of social and market costs).

14. *See* Krever, *supra* note 1, at 87 (reporting that 527 companies had self-reported acts of international bribery); Barbara C. George & Kathleen A. Lacey, *A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks, and Non-Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives*, 33 CORNELL INT'L L.J. 547, 558 (2000) (stating that prior to 1977, bribes were viewed as "expected and necessary").

15. Krever, *supra* note 1, at 87; H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1988 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed Its Grasp?*, 26 N.C.J. INT'L L. & COM.

Watergate office complex of 1972, the Nixon Administration engaged in several other illegal activities including the creation of overseas "slush funds" that were used to fund illegal contributions to several political campaigns (including Nixon's re-election bid).[16] These "slush funds" were also used to fund international bribery, prompting Congress to criminalize such behavior.[17] In 1977, the SEC issued a report detailing the results of a voluntary disclosure program wherein companies were asked to self-report violations of U.S. securities laws to have the possibility of avoiding punishment by the SEC.[18] This report listed 527 U.S. companies that had self-reported over $300 million in "questionable," though still as of yet legal, overseas payments to foreign government officials.[19] Companies included Exxon Mobil, Boeing, Gulf Oil, and several other large corporations.[20]

Despite these motivating factors, the passage of the FCPA through Congress was not effortless. The Act began as separate bills under different titles from the House and Senate.[21] These differences were resolved at conference on December 6, 1977,[22] and, after passing through both houses of Congress, the Foreign Corrupt Practices Act was signed into law by President Carter on December 19, 1977.[23]

REG. 239, 241 (2001). For the possibility of a third event catching Congress's eye, *see* United States v. Kay, 200 F. Supp. 2d 681, 681–83 (S.D. Tex. 2002), *rev'd on other grounds*, 359 F.3d 738 (5th Cir. 2004) (describing the "United Brands" scandal wherein Honduran government officials were bribed in order to reduce taxes on banana exports).

16. Brown, *supra* note 15, at 241.

17. *Id.*

18. *Id.* at 243.

19. Krever, *supra* note 1, at 87.

20. *Id.*

21. *See* H.R. 3815, 95th Cong. (1977) (proposing the "Unlawful Corporate Payments Act of 1977"); S. 305, 95th Cong. (1977) (proposing their form of the legislation entitled "corporate bribery of foreign officials").

22. H.R. Rep. No. 95-831, at 9 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 4121, at 4121.

23. Ned Sebelius, *Foreign Corrupt Practices Act*, 45 AM. CRIM. L. REV. 579, 580 n.5 (2008).

B. The Provisions of the FCPA

The FCPA as enacted in 1977 consisted of two primary "prong[s]":[24] the accounting provisions[25] and the anti-bribery provisions.[26] This paper focuses on the trends and development of the anti-bribery provisions,[27] which comprise the "heart" of the FCPA.[28] These provisions essentially forbid issuers and domestic concerns[29] from making payments to a foreign official in exchange for her help in securing or maintaining work.[30] More specifically,

> [It is] a crime to (1) "willfully;" (2) "make use of the mails or any means or instrumentality of interstate commerce;" (3) "corruptly;" (4) "in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to;" (5) "any foreign official;" (6) "for purposes of [either] influencing any act or decision of such

---

24. Krever, *supra* note 1, at 87.

25. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 103, 14 Stat. 1494 (1977) (codified in 15 U.S.C. §78m(b)(2)(A)–(B) (2000)).

26. *Id.*; Pub. L. No. 95-213, § 102, 14 Stat. 1494 (1977) (codified in 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3 (2000)).

27. While the accounting provisions are a key component of the FCPA, this Note focuses on Department of Justice ("DOJ") enforcement of the Act. The SEC has typically been the safeguard of the accounting provisions, using civil actions such as injunctions to enforce the Act when the DOJ might not be able to bring criminal charges under the anti-bribery provisions. Stephen Fishbein, *Recent Trends and Patterns in FCPA Enforcement*, *in* CORPORATE GOVERNANCE 2008: COUNSELING YOUR CLIENTS FOR THE 2008 PROXY SEASON 227, 233–34 (2008). Though not precluded by statute, the DOJ does not enforce the accounting provisions often, if ever.

28. Einhorn, *supra* note 8, at 516.

29. The FCPA defines "domestic concern" as "any individual who is a citizen, national, or resident of the United States; and . . . any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States. 15 U.S.C. §78dd-2(h)(1) (2000). This is the same definition as originally enacted in 1977. Foreign Corrupt Practices Act of 1977, Pub. L. 95-213, § 103, 14 Stat. 1494 (1977).

30. Krever, *supra* note 1, at 88.

> foreign official in his official capacity, including a decision to fail to perform his official functions [or] inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality[;]" (7) "in order to assist such [corporation] in obtaining or retaining business for or with, or directing business to, any person."[31]

While each of these elements presents its own issues, the subject matter of this Note deals particularly with the last four elements.

Similar to the accounting provisions, the FCPA also imposes both criminal and civil penalties upon violators of the anti-bribery provisions.[32] Defendant corporations face up to $2 million in criminal fines,[33] while individuals are subject to potential criminal fines of $100,000 and imprisonment of up to five years.[34] On the civil side, defendants face fines of up to $10,000 per violation.[35] While the SEC is responsible for enforcing the accounting

---

31. This quote is a variation of the seven elements the Fifth Circuit later provided in United States v. Kay, 513 F.3d. 432, 439–40 (5th Cir. 2007) (citing 15 U.S.C. §§ 78dd-2, 78ff (2000)). The quote varies in that it uses the original text of the 1977 Act. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 103, 14 Stat. 1494 (1977).

32. Sebelius, *supra* note 23, at 595.

33. 15 U.S.C. §§ 78dd-2(g)(1)(A) (2000) (for domestic concerns), 78dd-3(e)(1)(A) (2000) (for defendant corporation that is neither a domestic concern nor an issuer), 78ff(c)(1)(A) (2000) (for issuers).

34. 15 U.S.C. §§ 78dd-2(g)(2)(A) (2000) (for domestic concerns), 78dd-3(e)(2)(A) (2000) (for defendant corporation that is neither a domestic concern nor an issuer), 78ff(c)(2)(A) (2000) (for issuers).

35. 15 U.S.C. §§ 78dd-2(g)(1)(B) (2000) (for domestic concerns), 78dd-2(g)(2)(B) (2000) (for employees of domestic concerns), 78dd-3(e)(1)(B) (2000) (for defendant corporation that is neither a domestic concern nor an issuer), 78dd-3(e)(2)(B) (2000) (for defendant individual that works for a company that is neither a domestic concern nor an issuer), 78ff(c)(1)(B) (2000) (for issuers), and 78ff(c)(2)(B) (2000) (for employees of issuers). Note that potential repercussions for violating the accounting provisions are much higher across the board than violations of the anti-bribery provisions. *See* 15 U.S.C. §78ff(a) (2000) (providing maximum criminal fines of $25 million for corporations and $5 million for individuals, and also subjecting individuals to potentially twenty years in prison).

provisions, both the SEC and DOJ are responsible for violations of the anti-bribery provisions.[36]

The FCPA has been amended twice, as part of the Omnibus Trade and Competitiveness Act of 1988[37] and with the International Anti-Bribery and Fair Competition Act of 1998.[38] Together, these amendments served to refine the Act and broaden its scope.[39]

The 1988 amendment made several important changes to the FCPA. First, it clarified the FCPA's exception for "grease payments."[40] The original act attempted to incorporate this exemption by attaching it to the definition of "foreign official," stating that an individual whose duties were "essentially ministerial or clerical" could not constitute a "foreign official" for purposes of the Act.[41] The amendment provides a much more lucid exemption, framing it as an "[e]xception for routine governmental action" in its own section of the Act.[42] This section explicitly provides that the Act does "not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or secure the performance of a routine governmental action by a foreign official, political party, or party official."[43]

The 1988 amendment also added two affirmative defenses for defendants.[44] First, there is no violation if the payment was "lawful under the written laws and regulations of the [foreign] country."[45] The second affirmative defense provides that no violation occurs when the payment "was a reasonable and bona fide expenditure, such as travel and lodging expenses, [that] was directly related to [either] the promotion, demonstration, or explanation of products or

---

36. Krever, *supra* note 1, at 89. Interestingly, the DOJ also has jurisdiction to civilly enjoin domestic concerns under the anti-bribery provisions. Brown, *supra* note 15, at 258; 15 U.S.C. §§ 78dd-1(d), 78dd-2(d), 78dd-3(d).

37. Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, § 5003(a), 102 Stat. 1107, 1425 (1988).

38. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998).

39. Einhorn, *supra* note 8, at 514.

40. Krever, *supra* note 1, at 88–89.

41. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 103, 14 Stat. 1494 (1977).

42. Pub. L. No. 100-418, §5003(a), 102 Stat. 1107, 1425 (codified, with minor changes, in 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (2000)).

43. *Id.*

44. *Id.*

45. *Id.*

services [or] the execution or performance of a contract with a foreign government or agency thereof."[46] This second affirmative defense has been increasingly invoked by defendants, though not necessarily with any measure of success.[47] Defendants do not seem to invoke the "lawful under the laws" defense commonly.

In 1998, the House and Senate unanimously passed the International Anti-Bribery and Fair Competition Act,[48] which amended the FCPA to conform it to international standards.[49] This Act was the result of a long and arduous international process that began in 1977 when the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions promulgated a standard for international ratification of its suggested legislation.[50] Over the following decades, thirty-three nations, including the U.S., signed the Convention.[51] The ratifications of the Convention represented the "culmination" of many years of diplomatic effort to gain international support in the fight against international bribery.[52]

The 1998 amendment greatly expanded the Act's substantive scope and jurisdiction.[53] It widened the scope of the Act in two ways.[54] First, it reframed the anti-bribery provisions' sixth element by providing that, "[F]or purposes of [either] influencing any act or decision of such foreign official in his official capacity [or] inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official [or] *securing any improper advantage*."[55]

---

46. Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, §5003(a), 102 Stat. 1107 (codified in 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2) (2000)).

47. *See* Claudius O. Sokenu, *FCPA Insights: A Periodic Review of Recent Developments in FCPA Enforcement and Compliance*, *in* ADVANCED SECURITIES LAW WORKSHOP 2008 571, 596–601 (2008) (providing the examples of Lucent, Syncor, Invision, and Ingeresoll-Rand, all of which attempted to use the reasonable and bona fide expenditure defense).

48. Brown, *supra* note 15, at 287–88.

49. Einhorn, *supra* note 8, at 518.

50. *Id.*

51. Clinton Signing Statement, *supra* note 4.

52. *Id.*

53. Brown, *supra* note 15, at 289.

54. *Id.* at 288.

55. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, §§ 2(a), 3(a), 112 Stat. 3302, 3306 (codified in scattered subsections of

Compared to the original wording of the provision ("to affect or influence any act or decision of such government or instrumentality"[56]), this language is much broader, focusing on what the bribing party sought to achieve, not how they intended to affect or influence the official. The second way in which the 1998 amendment broadened the scope of the Act was the inclusion of "persons employed by international organizations" to the definition of "foreign official" in the definitions section of the Act.[57] This addition also potentially brings more violations within the FCPA's realm, for additional individuals and their culpable conduct are punishable under the Act.

The 1998 amendment expanded the FCPA's jurisdiction in two ways as well.[58] First, it increased jurisdiction to "any person" who violates the anti-bribery provisions' seven elements "while in the territory of the United States."[59] Thus, even foreign nationals are potentially subject to prosecution. Second, the amendment also extended nationality-based jurisdiction to acts committed by U.S. nationals while outside of the United States.[60] This additional jurisdiction covers those very few acts of bribery committed by U.S. nationals that do not touch on use of the mails or interstate commerce.

C. *History of FCPA Enforcement*

During the first two decades of the FCPA, enforcement was "sporadic" at best.[61] The DOJ enforced the Act with great trepidation, fearing that the Act's enforcement would damage relations with allies,[62] presumably because such accusations against

---

15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3 (2000)) (emphasis added). Compare this with the original sixth element above.

56. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 103, 14 Stat. 1494 (1977).

57. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, §§ 2(b), 3(b), 112 Stat. 3302, 3306 (1998) (codified in 15 U.S.C. §§ 78dd-1(f)(1)(A) & (B), 78dd-2(h)(2)(A) & (B), 78dd-3(f)(2)(A) & (B) (2000)).

58. Brown, *supra* note 15, at 288–89.

59. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 4, 112 Stat. 3302, 3306 (codified in 15 U.S.C. § 78dd-3(a) (2000)).

60. *Id.* §§ 2(d), 3(d) (codified in 15 U.S.C. §§ 78dd-1(g), 78dd-2(i) (2000)).

61. Krever, *supra* note 1, at 93.

62. *Id.*

allied government officials would be far from diplomatic. As a result, the DOJ required U.S. Attorneys to receive permission from Washington before pursuing bribery charges.[63] Twenty years after the FCPA's passage, only seventeen companies and thirty-three individuals faced prosecution.[64]

However, in the last six years, there has been a dramatic increase in the amount of FCPA activity. Whereas there were only three open FCPA investigations in 2002, there were eighty-four open investigations at the end of 2007.[65] The increase in investigations occurred continually over this period.[66] The number of prosecutions has also increased since the beginning of the century: FCPA prosecutions brought between 2001 and 2006 numbered more than four times that of the previous five years.[67] Then, 2007 saw the number of FCPA prosecutions double those of 2006.[68] The DOJ's chief prosecutor of foreign bribery at the time, Deputy Chief Mark Mendelsohn, stated that this trend toward more prosecutions will only continue to grow.[69]

---

63. *Id.*

64. *Id.* at 94 (citing Henry H. Rossbacher & Tracy W. Young, *The Foreign Corrupt Practices Act Within the American Response to Domestic Corruption*, 15 DICK. J. INT'L L. 509, 530 (1997)). Although the means of obtaining this figure are uncertain, the data seems to be commonly accepted by several authors.

65. Russell Gold & David Crawford, *U.S., Other Nations Step Up Bribery Battle*, WALL ST. J., Sep. 12, 2008, at B1.

66. *See* Fishbein, *supra* note 27, at 231 (reporting the number of reported investigations filed between 2002 and 2007, with 2005 being the only year where prosecutions decreased slightly). Note that this figure does not account for any investigations that were not reported.

67. *Id.* at 233.

68. Corporate Crime Reporter, *Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007*, 22 CORP. CRIME REP. 36(1) (2008), http://www.corporatecrimereporter.com/mendelsohn091608.htm [hereinafter Corporate Crime Reporter I]. In all, sixteen FCPA prosecutions occurred in 2007. *Id.*

69. *Id.* 2008 data indicates that Mendelsohn's assertion is true: the number of prosecutions publicly reported through DOJ press releases alone totaled fourteen. *See* Office of Public Affairs Press Releases, U.S. Dep't of Justice, http://www.justice.gov/opa/press-releases.html (providing press releases by month from 1994 to January 19, 2009). Through the first ten months of 2009, there were already twenty-two reported prosecutions. *See* Justice News, U.S. Dep't of Justice, http://www.justice.gov/opa/pr/2009/january (follow links at top of page to obtain press releases from other months).

Lastly, the size of FCPA penalties has also increased substantially since 2003.[70] Of the ten largest FCPA penalties prior to 2006, half of them occurred between July 2004 and May 2005.[71] This trend has only continued to grow.[72] In fact, 2007 saw both the FCPA's then-biggest overall fine[73] and its biggest criminal fine.[74] Then, December 2008 brought a criminal fine against Siemens that was more than ten times the previous overall largest fine and seventeen times more than the largest criminal penalty.[75] When combined with the fines levied by the German government, the overall penalty placed upon Siemens is astronomical compared to earlier fines.[76]

In sum, the FCPA has continued to expand since its creation, both in terms of the reach of the Act itself as well as its enforcement. The 1988 and 1998 amendments expanded the substance and jurisdiction of the Act. The DOJ and SEC, in turn, ramped up enforcement in an exponential fashion. As the rest of this Note will demonstrate, these developments fit into an overall trend toward expansion that has continued to the present day.

---

70. Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1162 (2006).

71. *Id.* The authors also provide a list of these penalties and the date they were assessed. *Id.* at n.318.

72. *See* Fishbein, *supra* note 27, at 232 (listing six penalties that is each greater than the smallest of the penalties—$1.5 million—given for the period between July 2004 and May 2005).

73. *Id.* Baker Hughes agreed to a $44 million penalty, including a criminal fine of $11 million and a $33 million disgorgement. *Id.*

74. *Id.* Three subsidiaries of Vetco International were fined $26 million. *Id.*

75. *See* Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/December/08-crm-1105.html.

76. *See id.* (stating that the fines, penalties, and disgorgement of profits totaled $1.6 billion);Steven Pearlstein, *Cashing In on Corruption*, WASH. POST, Apr. 25, 2008, at D1 (calling the Siemens investigation the "mother of all corruption investigations" to which no other case "comes close . . . in scale").

III. EXPANDED TOOLS IN FCPA ENFORCEMENT

Along with the increased breadth of the FCPA's provisions themselves, the past decade has also seen an expansion in the tools available to prosecutors. The "most profound"[77] of these developments has been the proliferation of diversion agreements. This section examines the use of diversion in the context of the FCPA, beginning with the genesis of diversion agreements, then turning to their evolution, and finally examining additional, even less traditional ways in which prosecutors have used diversion agreements to expand the scope of their reach against international bribery.

A. Diversion Agreements Defined

Diversion essentially provides prosecutors with a third option when determining whether or not to prosecute a corporation. Traditionally, prosecutors were faced with a "binary decision":[78] to prosecute or not to prosecute. In the corporate context, prosecutors faced the unenviable decision to either indict and potentially destroy the company through adverse publicity alone,[79] or let a guilty defendant escape just consequences. Diversion, in the form of non-prosecution agreements ("NPAs") and deferred prosecution agreements ("DPAs"), however, punishes a culpable corporation while at the same time escaping the potential consequences of a full-scale prosecution. On their face, these agreements seem to benefit every party involved. A potentially culpable corporate defendant "avoids the severe collateral consequences of indictment" or prosecution.[80] Prosecutors are able to "punish" wrongdoing while at

77. Peter Spivack & Sujit Raman, *Regulating the "New Regulators:" Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 159 (2008).

78. *See* Corporate Crime Reporter I, *supra* note 68 (Mark Mendelsohn, Deputy Chief of the DOJ's fraud section within the Criminal Division, noting that NPAs and DPAs free the DOJ from this binary decision).

79. Richard A. Epstein, *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, at A14.

80. Spivack & Raman, *supra* note 77, at 160. These collateral consequences can be so grave as to force the corporation to close shop entirely. *See infra* Part III.B. (detailing Arthur Anderson's indictment and subsequent dissolution).

the same time conserving precious prosecutorial resources, thus allowing resources to be shifted toward other prosecutions.[81] Advocates claim that diversion also protects scarce judicial resources, reducing docket congestion and avoiding court costs.[82]

NPAs and DPAs essentially function as contracts between the DOJ and potentially culpable defendants. In an NPA, the government agrees to postpone indictment of the corporation for a certain duration of time, while the corporation agrees to meet certain compliance and pecuniary guidelines.[83] If the company fully complies with the terms of the contract, the government agrees not to indict the corporation.[84] A deferred prosecution agreement differs in that the contract revolves around deferral of the company's prosecution instead of indictment (the defendant has already been indicted), but with charges still being dismissed after successful completion of the agreement.[85]

Most diversion agreements share certain characteristics. They hold the corporation vicariously liable for the acts of its employees, whether or not the corporation authorized or condoned the activity.[86] They also often require that corporations "clean house" by either firing wrongdoers or adhering to strict government compliance programs.[87] Deferee corporations commonly waive any one or combination of their procedural rights.[88] The agreements usually require that the company pay a fine, reform its current

81. Spivack & Raman, *supra* note 77, at 160 n.8.

82. Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1866 (2005).

83. *See, e.g.*, Press Release, U.S. Dep't of Justice, Faro Technologies Inc. Agrees to Pay $1.1 Million Penalty and Enter Non-Prosecution Agreement for FCPA Violations (June 5, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/June/08-crm-505.html; Westinghouse (Feb. 2008), Chevron (Nov. 2007), Micrus (Feb. 2005), and InVision (Dec. 2004), agreements *available at* http://www.law.virginia.edu/html/librarysite/garrett_bycompany.htm.

84. *Id.*

85. Spivack & Raman, *supra* note 77, at 160.

86. Epstein, *supra* note 79.

87. Spivack & Raman, *supra* note 77, at 184.

88. *See* Greenblum, *supra* note 82, at 1867–68 (mentioning waiver of right to a speedy trial, right to presentment within applicable statues of limitations, and the right to challenge the admissibility of confessions in a later criminal proceeding).

system of operations, and, especially in recent years, hire an independent compliance monitor chosen by the government.[89]

B. *Development of Diversion Agreements*

The tool of diversion came about as an alternative, more effective means of rehabilitating juvenile and drug offenders, not as an instrument of corporate prosecution.[90] It was not until the early 1990s that prosecutors first demonstrated a willingness to use these agreements in the context of corporate enforcement actions.[91] Still, their use for such purposes was not widespread: only ten corporate NPAs and DPAs were executed in the 1990s.[92] After the corporate fraud scandals at the turn of the century, however, deferral agreements became more prevalent.[93]

One need only look at the example of Arthur Anderson, Enron's accounting firm, to see the potential repercussions of corporate indictment. When prosecutors approached the firm with a diversion agreement, it balked, refusing the deal and choosing instead to risk the litigation route.[94] The damage of the DOJ's subsequent indictment was "irreversible"—twenty-eight thousand people lost their jobs when the firm crumbled.[95] Even though Arthur

89. Krever, *supra* note 1, at 97.

90. Greenblum, *supra* note 82, at 1863. The Chicago Boys' Court first developed the idea of deferred prosecution in 1914 as a way to avoid "branding [juveniles] as criminals." *Id.* at 1866. It was then incorporated into the war on drugs in 1962. *Id.* at 1867.

91. *See* Spivack & Raman, *supra* note 77, at 163–64 (labeling the *Salomon* case as the first break from the traditional use of diversion and listing the *Prudential* case as another early example of corporate deferral).

92. *See Id.* at 164 (stating that in addition to *Salomon* (although not a formal NPA) and *Prudential* agreements, there were eight others in the 1990s).

93. *See Id.* at 159 (asserting that prosecutors entered into twice as many diversion agreements between 2002 and 2005 than they had in the entire previous decade).

94. Greenblum, *supra* note 82, at 1888.

95. *Id.* In other words, though 95 percent of the company had no involvement in any alleged misconduct, they were still left unemployed. Joan McPhee, *Deferred Prosecution Agreements: Ray of Hope or Guilty Plea by Another Name*, INSIDE LITIG., Winter 2006, *available at* http://www.ropesgray.com/files/Publication/a6d348fd-f6fd-4f4a-b38b-bd6de98836b7/Presentation/PublicationAttachment/4d1fdc14-3bcf-463a-b2b0-76204fc7f316/Article_Winter_2006_Deferred_Prosecution_Agreements_McPhee.pdf.

Anderson's subsequent conviction was later reversed by the Supreme Court,[96] the harm had already been done—the eighty-nine-year-old firm was out of business and the accounting industry had been transformed from the "Big 5" into the "Big 4."[97] Arthur Anderson's plight thus highlights the major dilemma that corporate corruption presents the DOJ: "aggressively [rooting] out corporate fraud while remaining sensitive to the considerable collateral consequences of moving criminally against an entire entity."[98] Perhaps Arthur Anderson would have averted this problem had it merely reached a diversion agreement.[99] Post-Enron, the DOJ no longer sees its role in the corporate context as solely that of indicting, prosecuting, and punishing.[100] Instead, it is a vehicle effecting widespread structural reform within corrupt corporate cultures.[101]

By 2008, the DOJ had completely "refashioned" diversion agreements from a tool in the corporate fraud context to an essential component of FCPA enforcement.[102] This transformation is largely the product of evolving prosecutorial conduct influenced by four consecutive DOJ memos. Prior to 1999, the DOJ had not provided any formal guidance with respect to corporate prosecutions.[103] In 1999 then-Deputy Attorney General Eric Holder issued a memorandum entitled *Federal Prosecution of Corporations* (the "Holder Memo"), which provided nonbinding "guidance" for

96. Greenblum, *supra* note 82, at 1888.

97. McPhee, *supra* note 95.

98. Spivack & Raman, *supra* note 77, at 166.

99. *See* Press Release, Corporate Crime Reporter, Webb, Keker, Weingarten, Sullivan Bennett, Green Are Top White Collar Criminal Defense Attorneys, Survey Shows (May, 27, 2003), http://www.corporatecrimereporter.com/05_27_03_pressrelease.html [hereinafter Corporate Crime Reporter II] (Dan Webb, former U.S. attorney and a top white collar defense attorney, implying that handling the case in a different manner would not have destroyed the company); *but cf.* Corporate Crime Reporter, *Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements*, 7, Dec. 28, 2005, http://www.corporatecrimereporter.com/deferredreport.htm [hereinafter Corporate Crime Reporter III] (arguing that even a diversion agreement would not have saved Arthur Anderson).

100. Spivack & Raman, *supra* note 77, at 161.

101. *Id.*

102. *See id.* at 179 (asserting that 2007 data indicated such a move). Diversion agreements from 2008 indicate that this pattern has held true, although mortgage fraud scandals might reopen the door for diversion in the corporate fraud context.

103. *Id.* at 164.

prosecutors in their decision of whether to indict.[104] The memo provided eight factors to consider but does not explicitly mention pretrial diversion as an option available to prosecutors.[105]

Four years later, then-Deputy Attorney General Larry Thompson revised the Holder Memo and circulated the Thompson Memo.[106] The Thompson Memo made several important changes to its predecessor. First, it stated that the factors delineated in the Holder Memo were mandatory in every corporate charging decision.[107] Second, this memo added a ninth factor to be considered by prosecutors in their decision: "the adequacy of the prosecution of individuals responsible for the corporation's malfeasance."[108] This additional factor reflects the DOJ's increased focus on culpable individuals.[109] Third, the Thompson Memo added "pretrial diversion" as a potential reward prosecutors may bestow upon corporations to incentivize their cooperation.[110] This idea of corporate cooperation, and more specifically the notion of "authentic" cooperation, comprised the fourth and final important

---

104. *See* Christopher A. Wray and Robert K. Hur, *The Power of the Corporate Charging Decision over Corporate Conduct*, 116 YALE L. J. POCKET PART 306, 308 (2007) (referring to the lack of guidance for organizational prosecutions), *available at* http://www.yalelawjournal.org/images/pdfs/529.pdf.

105. Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1719 (2007). The eight factors are as follows:

> (1) the nature and seriousness of the offense, (2) the pervasiveness of the wrongdoing, (3) the prior conduct of the company, (4) whether the company voluntarily disclosed the wrongdoing and its willingness to cooperate in the investigation of its agents, (5) the adequacy of the company's compliance program, (6) the remedial actions taken by the company to deal with the wrongdoing, (7) the impact a prosecution might have on innocent third parties, and (8) the alternative mechanisms prosecutors might choose to punish the company.

Id.

106. Wray & Hur, *supra* note 104, at 308.

107. *Id.*

108. Memorandum from Larry D. Thompson, Deputy Att'y Gen., to Heads of Dep't Components, U.S. Att'ys (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

109. *See infra* Part III.C. (discussing the expansion of FCPA's scope to cover prosecution of individuals).

110. Thompson, *supra* note 108, at §VI.B.2; Spivack & Raman, *supra* note 77, at 167.

addition made by the Thompson Memo. For one, the memo provided that prosecutors are allowed to consider a corporation's waiver of the attorney–client and work-product privileges in determining whether a company's cooperation is really authentic.[111] Waiver of these privileges allows prosecutors to use information discovered through a corporate suit against employees in their individual prosecutions.[112] Another factor prosecutors could consider in determining the authenticity of a corporation's cooperation was whether or not the corporation agreed to pay employees' attorney fees in related litigation.[113]

The next revision of the DOJ's recommendations in the prosecution of corporations was the McNulty Memo, issued by then-Deputy General Paul J. McNulty in December 2006.[114] The McNulty Memo did not make any substantive changes to the nine factors listed in the Thompson Memo, but it did build in specific "safeguards," such as requiring prosecutors to obtain approval from Main Justice in order to request that a corporation waive the attorney–client or work product privilege.[115] The effect of the McNulty Memo's safeguards was that it further built upon the Thompson Memo's increase of "fairness, discipline, and consistency" wherein prosecutors are forced to "justify discrepancies more rationally and persuasively."[116]

The latest revision of the directives on corporate prosecution is the "Principles of Federal Prosecution of Business Organizations," issued by former Deputy Attorney General Mark Filip.[117] This memo takes the McNulty Memo yet another step further by saying

---

111. Thompson, *supra* note 108, at §VI.B.4; Spivack & Raman, *supra* note 77, at 167.

112. *Id.*

113. *Id.*

114. Wray & Hur, *supra* note 104, at 308.

115. *Id.* at 308–09; *see also* Memorandum from Paul J. McNulty, Deputy Att'y Gen., to Heads of Dep't Components, U.S. Att'ys 8–10 (Dec. 12, 2006), *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf. Note that prosecutors must seek approval from the U.S. Attorney, who must in turn seek approval from either the Assistant Attorney General for the Criminal Division or the Deputy Attorney General, depending on the category under which the requested waiver falls. *Id.*

116. Wray & Hur, *supra* note 104, at 309.

117. Memorandum from Mark Filip, Deputy Att'y Gen., to Heads of Dep't Components, U.S. Att'ys (Aug. 28, 2008), *available at* http://www.justice.gov/dag/readingroom/dag-memo-08282008.pdf.

that a prosecutor may not seek a waiver of the attorney–client or work product privileges at all.[118] The only instance when a company may waive privileges is when it "voluntarily chooses to do so."[119]

Since the issuance of the Thompson Memo in 2003, the use of NPAs and DPAs has burgeoned, as the government has not filed criminal charges against a single major corporation without also having a diversion agreement in place.[120] This practice appears to be accelerating.[121] As diversion's use has burgeoned, its application has been increasingly limited to enforcement of the FCPA and healthcare fraud contexts.[122] Prosecutors' growing willingness to use NPAs and DPAs has led to larger DOJ and SEC penalties.[123] In sum, the overall trend toward FCPA enforcement expansion can be seen through the memos and the boom of prosecutions after the Thompson Memo in particular.

C. *Diversion Agreements Offer Expanded Tools*

Since DPAs and NPAs avoid the courtroom, very little case law has developed with respect to the terms or provisions of the FCPA. In other words, prosecutors have had near-unfettered abilities to push the prosecutorial envelope, creating new tools by means of diversion agreements and broadening the scope of the Act. This section focuses on three forms of expansion: prosecution of individuals, prosecution of foreign companies, and prosecution under an expanded definition of the term "assist in obtaining or retaining business."[124]

---

118. *Id.* at 8–9.

119. *Id.* at 9.

120. Spivack & Raman, *supra* note 77, at 166–67.

121. *See* Corporate Crime Reporter III, *supra* note 99, at 3 (stating that between the years 2002 and 2005, the DOJ used twice as many diversion agreements (23) as the previous decade (11)); Spivack & Raman, *supra* note 77, at 159 (noting that 37 NPAs and DPAs were reached in 2007, compared to thirteen in 2006).

122. Spivack & Raman, *supra* note 77, at 179.

123. Fishbein, *supra* note 27, at 232.

124. Note that this paper does not deal with the DOJs implementation of monitorships by means of diversion agreements. For a full discussion of this topic, *see* Fishbein, *supra* note 27, at 236; Khanna & Dickinson, *supra* note 105; and Spivack & Raman, *supra* note 77, at 184–87. It also does not focus on the recent development of the DOJ's bringing forfeiture actions against proceeds deemed to be the product of FCPA violations. *See* Press Release, U.S. Dep't of Justice,

As diversion agreements have evolved, prosecutors have increasingly focused prosecutions on the culpable individuals involved in the bribery.[125] The DOJ has deliberately sought such a move, reasoning that "to have a credible deterrent effect, people have to go to jail."[126] In the past, prosecutors sought to "save individuals and plead the corporation"; now, the DOJ's system "save[s] the corporation by sacrificing the individuals."[127] The waivers of privileges described above demonstrate this shift. Prior to the McNulty Memo, a corporation's waiver of privileges was an essential prosecutorial tool that used the corporation as a source of evidence against individual employees.[128] The frequency of this tool remains to be seen after the two most recent DOJ memos, though one definitely should not assume that the practice will cease completely.[129] No matter how prosecutors have obtained their information in cases against individuals, the number of prosecutions of individuals has continued to grow in recent years with more FCPA cases by far filed against individuals in 2007 than any previous year.[130]

Several cases present recent, important examples of the DOJ's focus on individual culpable conduct.[131] Particularly

---

Department of Justice Seeks to Recover Approximately $3 Million in Illegal Proceeds from Foreign Bribe Payments (Jan. 9, 2009), *available at* http://www.usdoj.gov/opa/pr/2009/January/90-crm-020.html (detailing a forfeiture action brought against funds in Singapore tied to bribes given to a Bangladeshi official by Siemens AG and China Harbor Engineering Company).

125. *See* Corporate Crime Reporter I, *supra* note 68.

126. *Id.*

127. Corporate Crime Reporter III, *supra* note 99, at 13.

128. *See supra* Part III.B.

129. *See* Corporate Crime Reporter, *Eliason Says Shift to Deferred Prosecution Agreements Unduly Favors Corporations*, 22 CORP. CRIME REP. 38(12) (2008), http://www.corporatecrimereporter.com/eliason100608.htm [hereinafter "Corporate Crime Reporter IV"] (opining that so long as a company may choose to waive privileges voluntarily, some will most certainly do so in order to authenticate their cooperation as much as possible). Thus, even though prosecutors may not solicit an offer of waiver of privileges, corporations still might offer it on their own accord to be seen as cooperative.

130. Corporate Crime Reporter I, *supra* note 68; *see* Sokenu, *supra* note 47, at 595–96 (stating that 2007 reported the then-largest number of FCPA prosecutions "by a country mile"). For a discussion of the continued expansion in prosecutions, see *supra* note 69.

131. *E.g.*, United States v. Kay, 200 F. Supp. 2d 681 (S.D. Tex. 2002) (criminal proceedings against president and vice president of a corporation);

interesting to this discussion, however, is the prosecution of Albert "Jack" Stanley, former chair of Halliburton subsidiary Kellogg Brown & Root (KBR).[132] Between 1995 and 2004, Stanley coordinated a bribery and kickback scheme wherein he convinced Halliburton and its predecessor firm to contract with "consulting firms" that would then bribe Nigerian officials in order to win liquefied natural gas projects.[133] All the while, the consultants were kicking millions of dollars back to Stanley's personal bank accounts.[134] In September 2008, Stanley signed a plea agreement with the DOJ that included recommendations of a seven-year sentence and $10.8 million in restitution.[135] A seven-year prison term would be the longest sentence in the history of the FCPA.[136] Federal officials believe this indictment will be the first of a "string of indictments," with Stanley serving as a "hammer" that cracks open cases against other defendants.[137] In other words, prosecutors hope that their agreement with Stanley will help them in much the

---

United States v. King, 351 F.3d 859 (8th Cir. 2003) (appeal of criminal conviction of a business investor); Press Release, U.S. Dep't of Justice, Six Former Executives of California Valve Company Charged in $46 Million Foreign Bribery Conspiracy (Apr. 8, 2009), *available at* http://www.usdoj.gov/opa/pr/2009/April/09-crm-322.html; Press Release, U.S. Dep't of Justice, Japanese Executive Pleads Guilty, Sentenced to Two Years in Jail for Participating in Conspiracies to Rig Bids and Bribe Foreign Officials to Purchase Marine Hose and Related Products (Dec. 10, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/December/08-at-1084.html; Press Release, U.S. Dep't of Justice, Former World Bank Employee Sentenced for Taking Kickbacks and Assisting in the Bribery of a Foreign Official (Apr. 25, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/April/08-crms-341.html; Press Release, U.S. Dep't of Justice, Film Executive and Spouse Indicted for Paying Bribes to a Thai Tourism Official to Obtain Lucrative Film Festival Management Contract (Jan. 17, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/January/08_crm_032.html.

132. Plea Agreement, United States v. Albert Jackson Stanley, No. H-08-597 (S.D. Tex. Sept. 3, 2008), *available at* http://news.lp.findlaw.com/hdocs/docs/kbr/20080903stanleyplea.pdf.

133. *Id.* at ¶ 22. Stanley also pled to improper conduct in conjunction with contracts in Egypt, Yemen, and Malaysia as well. *Id.* at ¶ 22(o), (p).

134. *Id.* at ¶ 22.

135. *Id.* at ¶¶ 3, 5, 19, 26. Note that the government will move for a downward departure if the defendant fully cooperates in ongoing investigations. *Id.* at ¶ 19.

136. ProPublica and PBS's "Frontline," *Bribery Scandal Rocks Big Oil*, MSN Money, Sept. 8, 2008, http://articles.moneycentral.msn.com/Investing/Extra/bribery-scandal-rocks-big-oil.aspx.

137. Gold & Crawford, *supra* note 65.

same way that they have used diversion in the past—these agreements will help open the door into prosecuting other, potentially more culpable defendants. Indeed, Stanley's guilty plea has been followed by multiple prosecutions.[138]

The DOJ has also become more aggressive in its prosecution of foreign entities.[139] Foreign issuers (foreign entities that trade on U.S. markets) have always been subject to the anti-bribery provisions of the FCPA.[140] Whether FCPA jurisdiction extends to foreign entities that do not trade on U.S. markets, however, is much less clear. The 1998 amendment to the FCPA extended the reach of the Act to acts by any foreigner or foreign entity who violated its provisions while in the territorial U.S.[141] However, the amendment simultaneously refused to expand jurisdiction to include acts committed by such entities outside of the U.S., indicating an intent on the part of Congress to affirm its original desire to avoid the diplomatic complications that might arise from those enforcement actions.[142] The few federal courts that have heard cases involving this question have chosen not to extend jurisdiction in such a manner.[143]

Despite such interpretations, the DOJ in recent years has entered into diversion agreements with foreign subsidiaries of U.S. companies whose criminal conduct consisted of acts outside of the U.S.[144] Many question whether these subsidiaries fall within the

---

138. *See* Press Release, U.S. Dep't of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009), *available at* http://www.usdoj.gov/opa/pr/2009/February/09-crm-112.html (reporting that KBR plead guilty to FCPA charges and agreed to pay a $402 million criminal fine in February 2009); Press Release, U.S. Dep't of Justice, Two UK Citizens Charged by United States with Bribing Nigerian Government Officials to Obtain Lucrative Contracts as Part of KBR Joint Venture Scheme (Mar. 5, 2009), *available at* http://www.justice.gov/opa/pr/2009/March/09-crm-192.html (detailing indictment of two individuals who were involved with Stanley in the kickback scheme).

139. Sokenu, *supra* note 47, at 590.

140. 15 U.S.C. §78dd-1 (2000); *see* Alice S. Fisher, Prepared Remarks at the ABA Nat'l Institute on the FCPA (Oct. 16, 2006) (Assistant Attorney General talking about the importance of the first such case, *Statoil*).

141. *See supra* Part II.B (provisions of the FCPA).

142. Sokenu, *supra* note 47, at 588, 590.

143. *Id.* at 589 (citing United States v. Castle, 925 F.2d 831 (5th Cir. 1991) and Dooley v. United Tech. Corp., 803 F. Supp. 428 (D.D.C. 1992)).

144. *See, e.g.*, Press Release, U.S. Dep't of Justice, Schnitzer Steel Industries Inc.'s Subsidiary Pleads Guilty to Foreign Bribes and Agrees to Pay a

purview of the FCPA, arguing that the DOJ, through diversion, has made into law what Congress refused to enact.[145] Of utmost importance to this note is the fact that diversion has allowed the DOJ to expand the reaches of the FCPA in such a manner without involvement of the legislative or judicial processes.

The DOJ has also recently taken a more expansive view of the term "assist in obtaining or retaining business," the seventh element of the anti-bribery provisions.[146] In *United States v. Kay*, the conduct at issue was whether or not defendants Kay and Murphy, executives at American Rice, Inc., had violated the FCPA by making payments to a Haitian official in order to reduce their customs duty and sales tax burden.[147] The district court held that such conduct could not violate the "assist in obtaining or retaining business" element of the FCPA, and granted defendants' motion to dismiss the indictment.[148] The Fifth Circuit reversed, however, finding that payments made to reduce a company's customs duty and sales tax burden could constitute an illegal bribe under the FCPA.[149] The court reasoned that "[a]voiding or lowering taxes reduces operating costs and thus increases profit margins, thereby freeing up funds that

---

$7.5 Million Criminal Fine (Oct. 16, 2006), *available at* http://www.usdoj.gov/criminal/pr/press_releases/2006/10/2006_4809_10-16-06schnitzerfraud.pdf (involving SSI Korea, the Korean subsidiary of U.S.-based Schnitzer Steel Industries); Press Release, U.S. Dep't of Justice, DPC (Tianjin) Ltd. Charged with Violating the Foreign Corrupt Practices Act (May 20, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/May/05_crm_282.htm (Tianjin is the Chinese subsidiary of U.S.-based Diagnostic Products Corporation).

145. *See* Laurence A. Urgeson & Audrey L. Harris, *Foreign Companies Prosecuted in the U.S. for Bribes Overseas*, 15 No. 2 BUS. CRIMES BULL. 1 (2007) *available at* 1665 PLI/Corp 359, at *362 (Westlaw) (arguing that DOJ is able to so challenge congressional intent because companies fear the consequences of not accepting the agreement, and noting that the DOJ appears to be embracing a definition of "any . . . agent"—15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a)—that is more expansive than that intended by Congress); Sokenu, *supra* note 47, at 592 (stating that charging foreign corporations as agents of their domestic parent nullifies congressional intent).

146. 15 U.S.C. §§ 78dd-1(a)(1)(B), 78dd-1(a)(2)(B), 78dd-1(a)(3)(B), 78dd-2(a)(1)(B), 78dd-2(a)(2)(B), 78dd-2(a)(3)(B), 78dd-3(a)(1)(B), 78dd-3(a)(2)(B), 78dd-3(a)(3)(B) (2000).

147. 200 F. Supp. 2d 681, 682 (S.D. Tex 2002).

148. *Id.* at 687.

149. United States v. Kay, 359 F.3d 738, 756 (5th Cir. 2004).

the business is otherwise legally obligated to expend," better enabling it to obtain and retain business.[150]

IV. EXPANSION OF FCPA AND ITS ENFORCEMENT TOOLS JUSTIFIED

Although the exact cause of the FCPA's enforcement surge is uncertain, its efficacy and effect are much more measurable. To perform such a task, one must examine how the Act has performed in deterring acts of international bribery, creating level domestic and international playing fields, and doing so in a manner that is just, proper, and without abuse. Most, if not all, commentators have criticized the FCPA's expansion on at least one of these three fronts, arguing that the Act's purposes of deterrence and equality have not been fulfilled and that the current system of expansion is wrought with real and potential prosecutorial abuse. This Part examines each of these concerns individually, first delineating the concerns themselves and then rebutting those concerns and responding with the benefits of the current system that are often overlooked or ignored. In the end, this Part demonstrates that the benefits of the current climate of FCPA enforcement far outweigh the concerns levied against it and that, generally, the DOJ is moving in the right direction.

A. Whether the Current System of FCPA Enforcement Encourages Prosecutorial Abuse

Some critics of the FCPA's expansion, particularly defense attorneys, decry the "tremendous imbalance" of power between a prosecutor and a corporate defendant as a source of large-scale prosecutorial abuse.[151] Such a concern is not unfounded. Post-Arthur Anderson, the prosecutor would seem to have the power to put a corporation out of business through indictment, whether or not

150. *Id.* at 749.

151. Brief for the Association of Corporate Counsel et al. as Amici Curiae Supporting Appellant at 20, United States v. Ionia Mgmt. S.A., No. 07-5801-CR (2d Cir. June 6, 2008), *available at* http://www.nacdl.org/public.nsf/newsissues/amicus_attachments/$FILE/Ionia_Mgmt_Amicus.pdf.

the company was culpable.[152] Faced with such a decision, a company will be very wary of "risking the farm" on any legitimate defense it might have, particularly when their alternative punishment is most likely merely a fine. Arthur Anderson had a legitimate defense, but that did not save it.[153] The result of this fear is a system in which "prosecutors reign supreme."[154] Critics say that this opens the door for prosecutorial abuse, and that prosecutors have all too willingly stepped through that door.[155] They bemoan the grossly excessive sanctions imposed on corporations.[156] Critics also claim that the DOJ prosecutes outside the scope of the FCPA in cases such as the prosecution of foreign subsidies.[157] Another criticism leveled against the current system of FCPA enforcement is that it demands too much of malleable corporate defendants who will gladly throw their own employees under the prosecutorial bus in order to cooperate "authentically" with prosecutors.[158] Still others accuse prosecutors of overstepping the proper bounds of justice through the cronyism and excessive compliance requirements sometimes associated with monitorships.[159] Lastly, the lodestar of much of

---

152. Greenblum, *supra* note 82, at 1888. *But cf.* Corporate Crime Reporter III, *supra* note 99 (stating that Arthur Anderson would have "died" whether or not it had been indicted). This latter assertion seems to be a minority view.

153. Greenblum, *supra* note 82, at 166.

154. Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 673–74 (2006).

155. *See Id.* (stating that though in general prosecutors can be trusted not to abuse the large amount of discretion entrusted to them, courts should construe statutes strictly so as to prevent abuses by those who might need the constraint).

156. *See* Greenblum, *supra* note 82, at 1878, 1894 (detailing two cases, one with DPA conditioned on the New York Racing Association's installation of slot machines inside race tracks so as to bring greater revenue to the state and another with diversion conditioned on WorldCom's creation of hundreds of jobs within the state of Oklahoma); Corporate Crime Reporter III, *supra* note 99, at 12 (prosecutor conditioning Bristol Meyer Squibb's diversion on its endowment of a chair in business ethics at Seton Hall School of Law, the prosecutor's alma mater); Spivack & Raman, *supra* note 77, at 182 (noting that some have criticized these sanctions because innocent shareholders and employees bear the costs of the wrongdoers' misdeeds).

157. *See supra* Part III.C (discussing the prosecution of foreign subsidies).

158. *See* Greenblum, *supra* note 82, at 1881 (noting how the waiver of privileges fosters "an atmosphere of mutual suspicion" between employees and the corporation).

159. *See* John Appezzato, *Lawmakers Seek Federal Probe on How Outside Monitors are Chosen*, N.J. STAR-LEDGER, Jan. 16, 2008, *available at*

these concerns is that the DOJ has already punished, and will continue to punish, innocent companies who fear the potential aftershocks of the filing of criminal charges and thus choose not to defend themselves.[160] In order to counteract potential and actual prosecutorial abuses, one commentator has advocated greater judicial oversight in the negotiation process of diversion.[161]

To some extent, abuse is to be expected in any governmental entity. The goal, therefore, is to minimize the frequency of abuse while maximizing the benefits whose protection is sought. Contrary to the opinions expressed above, the FCPA actually balances these goals very well. Take the "lodestar" of concerns, for example—coercing innocent companies into diversion agreements. At the current level of enforcement, the greatest harm such a corporation will suffer is a hefty fine. Although this seeming "extortion" by no means presents an ideal or pleasant option, it does not carry the same weight as taking away one's personal liberty through imprisonment or punishing innocent shareholders and employees through corporate indictment. In other words, while diversion has the potential to punish innocent corporations, its ability to protect innocent employees and shareholders far outweighs concerns over the levying of fines that are relatively small when compared to the size of the company. On top of this, every diversion agreement yet made public by the DOJ does not appear to be such an abuse on the merits.[162] So,

---

http://www.nj.com/news/index.ssf/2008/01/lawmakers_seek_federal_probe_o.html (Senator Leahy and Representative Conyers voicing concerns of too much prosecutorial power and discretion in monitorship, as well as relating accusations of political and personal favoritism in the "lucrative but secretive" contracts that are monitorships).

160. The idea is that the power disparity will encourage innocent defendants to enter a diversion agreement to avoid the consequences of prosecution. *See supra* note 152. Indeed, whereas charges in seven FCPA prosecutions were dismissed in 1990, only one case has been dismissed since then. Fishbein, *supra* note 27, at 235. In other words, the fear is that surely some innocent companies have acquiesced to government demands for diversion.

161. Greenblum, *supra* note 82, at 1897. This critic argues that the judiciary should have a defined role in interpreting and applying the terms of diversion agreements, thus helping to combat prosecutorial overreaching. *Id.* at 1900. In other words, this plan would create a judicial "backstop" that would help avert prosecutorial abuse. *Id.* at 1903.

162. *But see* Spivack & Raman, *supra* note 77, at 180 (noting that the DOJ has chosen not to publish an undefined number of diversion agreements). There is, of course, a chance that these secret agreements are rife with prosecutorial abuse.

instituting an alternative, such as mandatory judicial oversight in every NPA and DPA, would thus be an unnecessary and extremely inconvenient burden on judicial resources that are already scarce and needed elsewhere. The number of potentially valid claims is far inferior to the cost such a system would entail.

Of even greater importance in the abuse context is the fact that to date, the DOJ has done a commendable job policing itself. All signs indicate that the Department has embarked upon a clear system of vetting out abuses and potential abuses as soon as they are discovered. Take the example of the waiver of privileges. As discussed in the previous section, many people despise such a practice because it turns companies against their employees, fostering a great deal of distrust between the parties and enabling prosecutors to wield their power over companies' heads to get the information they want. On its own volition, the DOJ limited the practice greatly with the promulgation of the McNulty Memo and the August 2008 Memo promulgated by Deputy Attorney General Filip.[163] Whereas the majority of diversion agreements entered into between 2003 and 2006 required waiver of privileges, few did so in 2007.[164] Another example of the DOJ policing itself is the reforms in the implementation of monitorships. While prosecutors held virtually unbridled discretion in the beginning of the practice,[165] reforms in recent years have added requirements that prosecutors must obtain approval from various superiors before appointing a monitor.[166] One would assume that these superiors have input into not only the decision of whether to impose a monitorship, but also what form it will take.

Lastly, the opportunities for prosecutors to abuse their discretion should decrease in the near future. As the DOJ increasingly focuses on the prosecution of culpable individuals, its interpretations of the scope and jurisdiction of the FCPA will be exposed to the judicial process. This shift will allow case law to develop, because individuals have more to lose personally through

---

163. *See supra* Part III.B (discussing the development of diversion agreements).

164. Spivack & Raman, *supra* note 77, at 179–80.

165. *See Id.* at 184–85; *See* Khanna & Dickinson, *supra* note 105, at 1727 (calling monitors the "New Corporate Czars").

166. Memorandum from Craig S. Morford, Acting Att'y Gen, to Heads of Dep't Components, U.S. Att'ys (Mar. 7, 2008), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/doj_principles.pdf.

conviction and less to offer prosecutors. The DOJ will not offer and the individual defendants would not accept an opportunity to wholly avoid the judicial process through diversion. The development of case law, in turn, will give defense counsel greater certainty and uniformity upon which to base her advice and representation of her clients. *United States v. Kay*, though siding with the DOJ's expansive view of the scope of the FCPA, presents an example of judicial involvement through the prosecution of an individual.[167] Unless the DOJ purposefully avoids bringing cases with questionable practices against individuals in the future, one should expect issues such as whether the FCPA extends to foreign subsidiaries of U.S. companies in the near future.

B. Whether the Current System of FCPA Enforcement Deters Bribery

Critics also complain that the purposes of the Act have not been fulfilled. First, they argue that the expanded enforcement of the FCPA has not had a meaningful deterrent effect. In particular, they say that diversion "unduly favors corporations," teaching them that they can do "whatever [they] think [they] need or want to do, and if [they] get caught, [they] will be able to cut a deal and buy [their] way out of any potential criminal sanctions."[168] This message "undercuts the [FCPA's] deterrent force."[169] The Act's purposes are also diminished by the "murky or conflicting messages" often conveyed to defendants because of diversion agreements.[170] Without any binding uniformity, defendants cannot know what to expect or what to compare their offered agreement to. Seeing varying charging and sentencing practices as a potential "hamper" to deterrence, many scholars believe that charging decisions should instead be "fair, consistent, and predictable."[171]

However, these concerns fail to account for several important considerations. First, it is important to realize that the expansion of

---

167. *See* United States v. Kay, 200 F. Supp. 2d 681, 682 (S.D. Tex. 2002) (holding initially for the individual defendants in their motion to dismiss); United States v. Kay, 359 F.3d 738, 756 (5th Cir. 2004) (reversing but further developing case law in the process).

168. Corporate Crime Reporter IV, *supra* note 129.

169. *Id.*

170. Wray & Hur, *supra* note 104, at 307.

171. *Id.*

the FCPA has only occurred within the last five years. That means that prosecution-averse companies have only been aware of this upswing in investigations and prosecutions for an even shorter amount of time. Any argument that the expansion of the FCPA does not deter bribery should wait until the system is more established to pass final judgment on its deterrent effect.

Still, one can make strong arguments that the current system does deter violations of the Act both in theory and in fact. First, on the theoretical level, the DOJ's increased focus on individual prosecutions presents perhaps the greatest deterrent of all. Whereas a corporation might employ a simple cost-benefit analysis in whether to engage in bribery and merely suffer a large fine, an individual must choose whether the benefits of his actions are worth actual time in prison. The DOJ has sent a clear message that if an individual chooses to violate the Act, he will be put in prison.[172] With heightened attention devoted to individual defendants, one would expect corporate minions who once might have gladly chosen to serve the corporation in such an illegal manner to at least think twice before engaging in international bribery. This is deterrence at a grassroots level.

The best evidence that the DOJ's current enforcement of the FCPA deters bribery is in the sheer numbers of self-disclosers in recent years. While the government was the one initiating the vast majority of FCPA investigations prior to 2003, twenty-four of the twenty-seven newly disclosed FCPA investigations between 2005 and 2007 were the result of voluntary disclosures.[173] Corporate action does not merely include self-disclosures; many companies have gone so far as to ban all bribes and thus completely avoid any chance of an FCPA investigation altogether.[174]

C. *Whether the Current System of FCPA Enforcement Creates a Level Playing Field*

172. Corporate Crime Reporter I, *supra* note 68.

173. Fishbein, *supra* note 27, at 236.

174. *See* Press Release, Fulbright & Jaworski L.L.P., Fulbright's Litigation Trends Survey: U.S. Companies Prepare for Rise in Litigation at ¶ 21 (Oct. 14, 2008), *available at* http://www.fulbright.com/LitTrends08/LitTrendsReleases, then selecting the United States Press Release for 2008 (reporting that eighty percent of U.S. companies have now banned facilitating payments entirely).

A final concern voiced is that contrary to the purposes of the FCPA, the playing field has not leveled either domestically or internationally. In other words, the rule-breaker is still the party that benefits most even in the current system of expanded enforcement. On the international level, critics emphasize that U.S. companies walk away from business that foreign companies are all too happy to engage in.[175] Furthermore, critics also note that DOJ and judicial intervention in strictly interpreting restrictions on permissible payments to foreign officials makes American companies look "cheap, stingy, and inhospitable" when compared to other countries.[176] On the domestic level, critics argue that because the FCPA fails in its deterrent purpose, many companies still engage in violative behavior.[177] These companies will then have a competitive advantage over their law-abiding counterparts who feel their arms are tied.

Just as the relative newness of the FCPA's expansion makes a determination of its deterrent effect very difficult, it likewise is practically impossible to determine whether and to what extent the international and domestic playing fields have been leveled. However, as the deterrent effect proposed above takes on more and more of an effect, one would definitely expect the domestic playing field to level greatly. As companies and individuals increasingly comply with the Act's provisions, there is less and less competition with lawbreakers, and the DOJ's efforts will be increasingly focused on the ever-dwindling amount of wrongdoers. As to the international playing field, international efforts in the past decade are much greater than any other point in the past. From the OECD Convention that inspired the 1998 Amendment to the present, the general international trend has been toward additional curbs on

175. *See Id.* at ¶ 23 (reporting that twenty-three percent of all U.S. companies said that they decided to abstain from pursuing work in potentially corrupt countries).

176. *See* The FCPA Blog, *Looking Through the FCPA* (Oct. 17, 2008), http://fcpablog.blogspot.com/2008/10/looking-through-fcpa.html (looking particularly at requirement of the FCPA's affirmative defense for promotional expenses that the payments be "reasonable and bona fide").

177. *See* Corporate Crime Reporter IV, *supra* note 129 (asserting that because of diversion, companies receive messages that "you can buy your way out of criminal liability" and that this "undercuts the deterrent force of the criminal law").

bribery.[178] Though by no means completely leveled, the important point is that overall the field has been leveling gradually. Despite the current state of the global economy, it does not appear that anti-bribery efforts have tailed off, at least not in the United States.[179] On an international scale, no major policy decisions that would restrict the anti-bribery movement have been publicly announced as of yet. Practically, however, whether international enforcement continues at its past levels remains to be seen.

In short, many have claimed that the current enforcement of the FCPA is a failed system, plagued by rampant abuses and representing a hollow shell of what Congress envisioned in the Act's creation. However, the opposite is really the case: the current enforcement climate does deter companies from engaging in international bribery, has leveled the international and domestic playing fields, and has properly accounted for and corrected abuses as they have taken place.

V. CONCLUSION

Whether FCPA enforcement will continue to expand in size and scope is uncertain. Perhaps it will continue its current pattern of growth, with prosecutors potentially charging related crimes with larger maximum penalties,[180] charging under the accounting provisions of the FCPA as well,[181] and facing heightened

178. *See* Einhorn, *supra* note 8, at 520 (saying that 33 nations have ratified the suggestions of the OECD Convention).

179. *See supra* note 69.

180. Plea Agreement, United States v. Albert Jackson Stanley, Criminal No. H-08-597, ¶ 18 (S.D. Tex. Sept. 3, 2008), *available at* http://news.lp.findlaw.com/hdocs/docs/kbr/20080903stanleyplea.pdf. (charging Jack Stanley with conspiracy to commit wire and mail fraud under 18 U.S.C. §§ 1341, 1343, and 1346). Note that the maximum sentence under such a framework would be 5 years; however, if a prosecutor instead chose to bring the charge under 18 U.S.C. § 1349, a maximum sentence of 20 years could be imposed.

181. The DOJ would be stepping on the SEC's enforcement toes a bit, but the accounting provisions carry a much heftier penalty (twenty years instead of five), and violations of the anti-bribery provisions are almost always accompanied by a violation of the accounting provisions (violators will try to cover-up their criminal activities). *See generally* Selva Ozelli, *Is the Bribe Deductible? Tax Implications of the Foreign Corrupt Practices Act*, 48 TAX NOTES INT'L 1131 (2007).

occurrences of bribery in a much more competitive global economy.[182] Or maybe enforcement will begin a sudden decline, much like the corporate fraud and terrorism wars of the last decade. One year into the Obama administration, Attorney General Eric Holder seems to have continued to devote DOJ resources to enforcing the FCPA.[183] As it stands today, therefore, the FCPA will likely only continue to expand. Until the day that international bribery is no longer of importance to the DOJ, companies will have to continue to take adequate precautions to ensure enforcement.

182. *See* Nicholas Rummell, *Cash Crunch Could Result in More Corruption Cases*, FN. WK., Oct. 7, 2008, http://www.financialweek.com/apps/pbcs.dll/article?AID=/20081007/REG/810079983 (surmising that the current global cash crisis could lead to more corruption cases).

183. *See* Press Release, U.S. Dep't of Justice, Remarks of Attorney General Eric Holder at the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity (Nov. 7, 2009), *available at* http://www.justice.gov/ag/speeches/2009/ag-speech-091107.html (discussing the continuing need for concerted international action against foreign bribery); *see also supra* note 69 (detailing the continued growth in FCPA enforcement actions).