APRIL 2009
VOL. 12 NO. 4

A Congressional Digest Publication

Supreme Court Debates

A Pro & Con Monthly

Judicial Elections

Ethical Responsibilities of State Judges

Does the Constitution Require Elected State Judges to Withdraw From Cases Involving Large Campaign Donors?

Hugh M. Caperton, *et al.*, Petitioners

A. T. Massey Coal Company, Inc., *et al.*, Respondents

and others . . .

Pro & Con®

SUPREME COURT DEBATES, a Pro & Con Monthly
April 2009, Vol. 12, No. 4

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This issue of **Supreme Court Debates** provides a summary of key cases before the court, background on this month's debate topic, followed by the Pros (**14**) & Cons (**25**), and excerpts from arguments before the nation's highest tribunal. Article citations are at the end of each section.

Supreme Court Debates, April 2009, Vol. 12, No. 4 (ISSN 1099–5390) is an independent magazine featuring controversies before the Supreme Court, Pro & Con. It is not an official organ, nor is it controlled by any party, interest, class, or sect. Published monthly (except June, July, and August) and offered through Pro & Con Online, a multi-user database.

Published by **The Congressional Digest Corp.,** online http://congressionaldigestcorp.com/pcp

EDITORIAL: P.O. Box 240, Boyds, MD 20841–0240.

Page Thomas, Publisher | **Erika Fitzpatrick,** Executive Editor | **Anthony Zurcher,** Editor in Chief

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Judicial Elections

Ethical Responsibilities of State Judges

Does the Constitution Require Elected State Judges to Withdraw From Cases Involving Large Campaign Donors?

Federal judges — including those on the U.S. Supreme Court — are appointed by the president and serve until retirement or death. At the State level, however, many judges are elected by voters and have to campaign for office in much the same way that politicians do. Controversies most often associated with legislative and executive elections are increasingly arising during judicial elections as well, raising key questions about these individuals' independence on the bench.

Critics of the system of electing judges say it demeans the judiciary by subjecting it to the often-harsh rhetoric of the campaign trail and opens the door to corruption because judges are forced to raise large amounts of money to fund their candidacies. Supporters counter that elections make judges more accountable to the people they serve.

Stepping into the debate, the U.S. Supreme Court is now considering the issue of whether an elected judge must recuse himself from a lawsuit involving a large campaign donor.

The case of *Caperton,* et al. *v. Massey,* et al. began in 1998, when Hugh M. Caperton, a West Virginia coal industrialist, sued Massey Energy in State court for breach of contract and won $50 million. Massey appealed to the Supreme Court of Appeals for West Virginia, which reversed the lower court decision on a 3-to-2 vote.

One of the justices voting in favor of reversal was Brent Benjamin, who had unseated a sitting justice in a 2004 election. During the campaign, the chief executive officer of Massey Energy, Don Blankenship, gave $3 million to a group called *And for the Sake of the Kids*, which conducted a negative campaign against Benjamin's opponent.

During the State Supreme Court hearing, Caperton's lawyer repeatedly called for Benjamin to recuse himself because of Blankenship's involvement in his campaign, but Benjamin refused. In July 2008, Benjamin filed an additional concurring opinion, in which he defended his decision and called the arguments for his recusal "baseless."

Following the court's decision, Caperton, along with his Harman group of companies, appealed the West Virginia Supreme Court's decision to the U.S. Supreme Court, alleging that Benjamin's participation in the case violated the Due Process Clause of the 14th Amendment. The Supreme Court granted certiorari on November 14, 2008.

During oral arguments, Caperton's lawyer argued that Blankenship's campaign against Benjamin's opponent created a "constitutionally unacceptable appearance of impropriety." Benjamin won his seat on the Supreme Court of Appeals for West Virginia, he argued, largely because of Blankenship's massive financial contributions — and even if Benjamin did not side with Blankenship's company in this case because of the donation, the mere appearance that he did diminishes the public's faith in the impartiality of the judiciary.

The Court needs to step in, Caperton's lawyer contended, before the big money influence on State judicial elections truly gets out of hand. Judges cannot be viewed as beholden to moneyed interests lest the public see justice as being for sale, the lawyer argued.

Massey's lawyer countered that Massey's CEO gave money to a third party that then spent it in independently on advertising criticizing Benjamin's opponent — a series of connections that was hardly sufficient reason for Benjamin to recuse himself. If judges were forced to withdraw from every case in which employees of a participating company had donated money in support of a judicial candidate or to be used against a candidate's opponent, he argued, judges would be withdrawing from cases left and right.

Moreover, Massey's lawyer continued, the standard that Caperton is suggesting is unworkable. At what point does a contribution create an appearance of impropriety? Would judges who are endorsed by newspapers or trade unions have to recuse themselves from considering cases in which they are involved? It is better, he reasoned, to let the States handle the issues on their own. Many, in fact, have implemented laws that prohibit judges from participating in cases in which they have a direct financial interest, the lawyer said.

In the past, U.S. Supreme Court justices have recused themselves from cases involving companies in which they own stock or having to do with the appeal of decisions they participated in on a lower court. But other justices have generated controversy by refusing to do so — such as Justice Antonin Scalia, who declined to step down from consideration of a case involving his friend, Vice President Dick Cheney. So the issue of recusal is unsettled, even on the High Court.

While the validity of judicial elections themselves is not on trial, the case is an opportunity for the Court to weigh in on what has become a controversial subject and, perhaps, to provide some guidance for elected judges in States across the country.

Inside the Court
Status of Important Cases Before the Highest Tribunal

The following pages provide the status of key cases granted certiorari by the Supreme Court for consideration during the October 2008 term (October 6, 2008, through October 4, 2009) as of March 22. Cases are organized by certiorari date within each section.

Resolved

Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee — This case was granted certiorari on January 18, 2008, and reversed and remanded on January 26. For Holding, see *Inside the Supreme Court,* SUP. CT. DEBATES (Feb. 2009).

Wyeth v. Levine — This case was granted certiorari on January 18, 2008, and was affirmed on March 4, 2009. Federal prescription drug labeling laws do not preempt more stringent State regulations.

Herring v. United States — This case was granted certiorari on February 19, 2008, and was affirmed on January 14, 2009. Evidence obtained as a result of a search that was conducted by police who mistakenly believed the defendant had an outstanding arrest warrant is admissible in court.

***Gary Bartlett,* et al. *v. Dwight Strickland,* et al.** — This case was granted certiorari on March 17, 2008, and was affirmed on March 9, 2009. Redistricting a small, primarily minority congressional district into a larger, primarily white district does not violate the Voting Rights Act.

Negusie v. Holder — This case was granted certiorari on March 17, 2008, and was reversed and remanded on March 3, 2009. In an 8-to-1 decision, the Court held that a person who was forced to participate in the persecution of individuals is not barred from seeking asylum in the United States. Featured in *Asylum in America*, SUP. CT. DEBATES (Mar. 2009).

The following is excerpted from the summary of the majority opinion written by Justice Kennedy, as prepared by the Court Reporter of Decisions:

The Board of Immigration Appeals (BIA) and Fifth Circuit misapplied *Fedorenko v. United States* (1981) as mandating that whether an alien is compelled to assist in persecution is immaterial for prosecutor-bar purposes. The BIA must interpret the statute, free from this mistaken legal premise, in the first instance.

Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1984), the BIA is entitled to deference in interpreting ambiguous Immigration and Nationality Act (INA) provisions. When the BIA has not spoken on "a matter that statutes place primarily in agency hands," this Court's ordinary rule is to remand to allow "the BIA ... to address the matter in the first instance in light of its own experience." — *Immigration and Naturalization Service v. Orlando Ventura* (2002).

As there is substance both to Petitioner's contention that involuntary acts cannot implicate the persecutor bar because "persecution" presumes moral blameworthiness, and to the

Government's argument that the question at issue is answered by the statute's failure to provide an exception for coerced conduct, it must be concluded that the INA has an ambiguity that the BIA should address in the first instance. *Fedorenko*, which addressed a different statute enacted for a different purpose, does not control the BIA's interpretation of this persecutor bar.

In holding that voluntariness was not required with respect to such a bar in the Displaced Persons Act of 1948 (DPA), *Fedorenko* contrasted the omission there of the word "voluntary" with the word's inclusion in a related statutory subsection. Because Congress did not use the word "voluntary" anywhere in the persecutor bar at issue here, its omission cannot carry the same significance as it did in *Fedorenko*.

Moreover, the DPA's exclusion of even those involved in nonculpable, involuntary assistance in persecution was enacted in part to address the Holocaust and its horror, whereas the persecutor bar in this case was enacted as part of the Refugee Act of 1980, which was designed to provide a general rule for the ongoing treatment of all refugees and displaced persons.

Whether a BIA determination that the persecution bar contains no exception for coerced conduct would be reasonable, and thus owed *Chevron* deference, is a legitimate question; but it is not presented here. In denying Petitioner relief, the BIA recited a rule it has developed in its cases: An alien's motivation and intent are irrelevant to the issue whether he "assisted" in persecution; rather, his actions' objective effect controls. A reading of those decisions confirms that the BIA has not exercised its interpretive authority but, instead, has deemed its interpretation to be mandated by *Fedorenko*. This error prevented the BIA from fully considering the statutory question presented. Its mistaken assumption stems from a failure to recognize the inapplicability of the statutory construction principle invoked in *Fedorenko*, as well as a failure to appreciate the differences in statutory purpose. The BIA is not bound to apply the *Fedorenko* rule to the persecutor bar here at issue. Whether the statute permits such an interpretation based on a different course of reasoning must be determined in the first instance by the agency.

Because the BIA has not yet exercised its *Chevron* discretion to interpret the statute, the proper course is to remand to it for additional investigation or explanation, allowing it to bring its expertise to bear on the matter, evaluate the evidence, make an initial determination, and thereby help a court later determine whether its decision exceeds the leeway that the law provides.

Pleasant Grove City v. Summum — This case was granted certiorari on March 31, 2008, and was reversed on February 25, 2009. In a unanimous decision, the Court held that a city may deny the request of a religious group to place a monument in a city park that already contains a monument from a different religious group. Featured in *Free Expression in a Public Forum*, SUP. CT. DEBATES (Feb. 2009).

The following is excerpted from the summary of the majority opinion written by Justice Alito, as prepared by the Court Reporter of Decisions:

The placement of a permanent monument in a public park is a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.

Because that Clause restricts government regulation of private speech but not government speech, whether Petitioners were engaging in their own expressive conduct or providing a forum for private speech determines which precedents govern here.

A government entity "is entitled to say what it wishes," *Rosenberger v. Rector and Visitors of University of Virginia* (1995), and to select the views that it wants to express. It may exercise this same freedom when it receives private assistance for the purpose of delivering a government-controlled message. This does not mean that there are no restraints on government

speech. For example, government speech must comport with the Establishment Clause. In addition, public officials' involvement in advocacy may be limited by law, regulation, or practice; and a government entity is ultimately "accountable to the electorate and the political process for its advocacy." — *Board of Regents of University of Wisconsin System v. Southworth* (2000).

In contrast, government entities are strictly limited in their ability to regulate private speech in "traditional public fora." — *Cornelius v. NAACP Legal Defense & Education Fund, Inc.* (1985). Reasonable time, place, and manner restrictions are allowed, but content-based restrictions must satisfy strict scrutiny — i.e., they must be narrowly tailored to serve a compelling government interest. Restrictions based on viewpoint are also prohibited. Government restrictions on speech in a "designated public forum" are subject to the same strict scrutiny as restrictions in a traditional public forum. And where government creates a forum that is limited to use by certain groups or dedicated to the discussion of certain subjects, it may impose reasonable and viewpoint-neutral restrictions.

Permanent monuments displayed on public property typically represent government speech. Governments have long used monuments to speak to the public. Thus, a government-commissioned and government-financed monument placed on public land constitutes government speech. So, too, are privately financed and donated monuments that the government accepts for public display on government land. While government entities regularly accept privately funded or donated monuments, their general practice has been one of selective receptivity.

Because city parks play an important role in defining the identity that a city projects to its residents and the outside world, cities take care in accepting donated monuments, selecting those that portray what the government decisionmakers view as appropriate for the place in question, based on esthetics, history, and local culture. The accepted monuments are meant to convey and have the effect of conveying a government message and thus constitute government speech.

Here, the park's monuments clearly represent government speech. Although many were donated in completed form by private entities, the city has "effectively controlled" their messages by exercising "final approval authority" over their selection. — *Johanns v. Livestock Marketing Association* (2005). The city has selected monuments that present the image that the city wishes to project to park visitors; it has taken ownership of most of the monuments in the park, including the Ten Commandments monument; and it has now expressly set out selection criteria.

Respondent's legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain viewpoints does not mean that a government entity should be required to embrace publicly a privately donated monument's "message" in order to escape Free Speech Clause restrictions. A city engages in expressive conduct by accepting and displaying a privately donated monument, but it does not necessarily endorse the specific meaning that any particular donor sees in the monument. A government's message may be altered by the subsequent addition of other monuments in the same vicinity. It may also change over time.

"[P]ublic forum principles ... are out of place in the context of this case." — *United States v. American Library Association, Inc.* (2003). The forum doctrine applies where a government property or program is capable of accommodating a large number of public speakers without defeating the essential function of the land or program, but public parks can accommodate only a limited number of permanent monuments. If governments must maintain viewpoint neutrality in

selecting donated monuments, they must either prepare for cluttered parks or face pressure to remove longstanding and cherished monuments.

Were public parks considered traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. And if forum analysis would lead almost inexorably to closing of the forum, forum analysis is out of place.

Ysura v. Pocatello Education Association — This case was granted certiorari on March 31, 2008, and was reversed on February 24, 2009. A State legislature can prohibit local governments from making voluntary payroll deductions for a labor union's "political activities."

Chambers v. United States — This case was granted certiorari on April 21, 2008, and was reversed and remanded on January 13, 2009. For Holding, see *Inside the Supreme Court,* SUP. CT. DEBATES (Feb. 2009).

Fitzgerald v. Barnstable School Committee — This case was granted certiorari on June 9, 2008, and was reversed and remanded on January 21, 2009. For Holding, see *Inside the Supreme Court,* SUP. CT. DEBATES (Feb. 2009).

Arizona v. Johnson — This case was granted certiorari on June 23, 2008, and was reversed and remanded on January 26, 2009. For Holding, see *Inside the Supreme Court,* SUP. CT. DEBATES (Feb. 2009).

Winter v. Natural Resources Defense Council — This case was granted certiorari on June 23, 2008, and was reversed and vacated in part on November 12. Featured in *Navy Sonar Exercises*, SUP. CT. DEBATES (Nov. 2008). For Holding, see *Inside the Supreme Court,* SUP. CT. DEBATES (Dec. 2009).

Vermont v. Brillon — This case was granted certiorari on October 1, 2008, and was reversed and remanded on March 9, 2009. Delays caused by a public defender do not deprive a criminal defendant of his right to a speedy trial.

Certiorari Granted and Argued

Arizona v. Gant — This case was granted certiorari on February 25, 2008, and was argued on October 7. Before the Court is whether police may search a vehicle after arresting its owner if there is no threat to police safety and no need to preserve evidence, found in the vehicle, that was related to the crime of arrest.

***Federal Communications Commission (FCC),* et al. *v. Fox Television Stations,* et al.** — This case was granted certiorari on March 17, 2008, and was argued on November 3. To be decided is whether the FCC adequately explained why it changed policy and ruled that "fleeting and isolated utterances" of explicit content are prohibited on television broadcasts. Featured in *Broadcast Indecency*, SUP. CT. DEBATES (Dec. 2008).

Ashcroft v. Iqbal — This case was granted certiorari on June 16, 2008, and was argued on December 2. To be decided is whether current and former Federal officials can be sued because they knew of or condoned racial and religious discrimination against individuals detained following the September 11, 2001, attacks. Featured in *Treatment of the September 11th Detainees*, SUP. CT. DEBATES (Jan. 2009).

Haywood v. Drown — This case was granted certiorari on June 16, 2008, and was argued on December 3. Before the Court is whether a State can bar State courts from hearing Federal civil rights lawsuits against corrections officers.

Cone v. Bell — This case was granted certiorari on June 23, 2008, and was argued on December 9. To be decided is whether a Federal court can consider a case where it recognizes that a State court erred in interpreting State procedural law.

Harbison v. Bell — This case was granted certiorari on June 23, 2008, and was argued on January 12, 2009. Before the Court is whether indigent death row inmates seeking clemency have a right to Federal taxpayer-funded lawyers.

Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi — This case was granted certiorari on June 23, 2008, and was argued on January 12, 2009. At issue is whether an individual who accepts a payment from a government fund to compensate victims of Iranian terrorism is ineligible to pursue further monetary damages from the Iranian Government.

Kansas v. Ventris — This case was granted certiorari on October 1, 2008, and was argued on January 21, 2009. To be decided is whether a prosecutor can use in a trial statements made by a defendant to an undercover informant when the defendant has not waived his right to counsel.

Montejo v. Louisiana — This case was granted certiorari on October 1, 2008, and was argued on January 13, 2009. Before the Court is whether an indigent defendant must affirmatively "accept" the appointment of court-ordered counsel before the police are required to cease interrogation and wait for the lawyer to be present.

Flores-Figueroa v. United States — This case was granted certiorari on October 20, 2008, and was argued on February 25, 2009. To be decided is whether an individual who used a false means of identification but did not know it belonged to another person can be convicted of "aggravated identity theft."

District Attorney's Office for the Third Judicial District v. Osborne — This case was granted certiorari on November 3, 2008, and was argued on March 2, 2009. Before the Court is whether convicted criminals have a constitutional right to access evidence used in their trial in order to conduct DNA tests on it.

Caperton v. A.T. Massey Coal Company — This case was granted certiorari on November 14, 2008, and was argued on March 3, 2009. At issue is whether elected State judges must recuse

themselves from cases involving the financial interests of major campaign donors. Featured in *Judicial Elections*, SUP. CT. DEBATES (Apr. 2009).

Abuelhawa v. United States — This case was granted certiorari on November 14, 2008, and was argued on March 4, 2009. To be decided is whether a person who uses a cell phone to buy drugs solely for personal use (a misdemeanor) can be charged with the separate crime of using a phone to facilitate the sale of drugs (a felony).

Citizens United v. Federal Election Commission — This case was granted certiorari on November 14, 2008, and was argued on March 24, 2009. At issue is whether Federal campaign finance law prohibits a political interest group from broadcasting and promoting a movie critical of a candidate in the presidential primaries.

Dean v. United States — This case was granted certiorari on November 14, 2008, and was argued on March 4, 2009. Before the Court is whether the mere discharge of a firearm during a crime of violence or drug trafficking, even if accidental, is subject to a federally mandated 10-year sentencing enhancement.

Certiorari Granted and Argument Scheduled

Ali al-Mari v. Spagone — This case was granted certiorari on December 5, 2008, and is scheduled for argument on April 27, 2009. To be decided is whether a legal resident of the United States suspected of war crimes can be detained and held indefinitely without charges on domestic soil.

Horne v. Flores — This case was granted certiorari on January 9, 2009, and is scheduled for argument on April 20, 2009. At issue is whether Arizona is complying with Federal requirements to provide English-language instruction to non-native speakers.

Iraq v. Beaty — This case was granted certiorari on January 9, 2009, and is scheduled for argument on April 20, 2009. Before the Court is whether Iraq has sovereign immunity in U.S. courts from alleged misdeeds that occurred under Saddam Hussein.

Northwest Austin Municipal District No. 1 v. Mukasey — This case was granted certiorari on January 9, 2009, and is scheduled for argument on April 29, 2009. To be decided is whether exemptions can be granted to a provision of the Voting Rights Act requiring prior review of any changes to voting law for applicants who claim that racial discrimination no longer exists in their area.

Ricci v. DeStefano — This case was granted certiorari on January 9, 2009, and is scheduled for argument on April 22, 2009. At issue is whether municipalities may decline to certify results of a civil service exam that would make disproportionately more white applicants eligible for promotion than minority applicants, due to fears that certifying the results would lead to charges of racial discrimination.

Cuomo v. The Clearing House — This case was granted certiorari on January 16, 2009, and is scheduled for argument on April 2, 2009. Before the Court is whether Federal law prohibits States from investigating whether national banks discriminated against minorities applying for loans.

Certiorari Granted

Maryland v. Shatzer — This case was granted certiorari on January 26, 2009, and will be argued next term. To be decided is whether invocation of right to counsel in a prior investigation prevents initiation of further questioning after the first investigation is closed, more than two years pass, and a new investigation of the same crime is opened.

Alvarez v. Smith — This case was granted certiorari on February 23, 2009, and will be argued next term. At issue is whether police may seize and retain custody indefinitely of personal property without a court hearing on the lawfulness of the continued detention of the property.

Padilla v. Kentucky — This case was granted certiorari on February 23, 2009, and will be argued next term. Before the Court is whether defense lawyers must inform their noncitizen clients that they face deportation if they plead guilty to an aggravated felony.

Salazar v. Buono — This case was granted certiorari on February 23, 2009, and will be argued next term. To be decided is whether an act of Congress transferring ownership of a small plot of land that contains an eight-foot cross from a national preserve to private hands is a permissible accommodation to avoid a violation of the Establishment Clause of the U.S. Constitution.

The Selection and Removal of Judges
Recent Developments in the States

Special rules have always governed the selection and removal of Federal and State judges to ensure — even in the face of public opinion or political pressure to the contrary — that judges are sufficiently able to administer justice in accord with the rule of law and serve as effective guardians of people's individual rights. Although most State court judges are elected, special rules governing those elections have sought to ensure that judicial elections are conducted differently than elections for political office in ways that protect the integrity, fairness, and impartiality of the judiciary in performing its unique role under the American system of government.

Today, however, judges and the special rules that insulate them from politics are under political attack. State judicial elections have become increasingly like elections for political office: expensive, contentious, political, dominated by special interests, and partisan. There is every reason to think that recent trends will get much worse long before they ever get better.

Today's judicial elections present the following four critical challenges to the ability of elected State judges to fairly and impartially uphold the rule of law:

- The ever-rising tide of campaign spending, television advertising, and the influence of special interests.

- Political attacks on judges and courts based on disagreement with judicial decisions.

- A new politics of judicial elections ushered in by the freedom of — and pressure on — judicial candidates to announce their views on hot-button social and political issues.

- The threatened increase in partisan involvement in "nonpartisan" judicial elections.

Campaign contributions to candidates for State supreme courts increased over 750 percent between 1990 and 2004. Nearly three-fourths of the 2004 contributions came from business interests, lawyers, or political parties.

In one State, a company executive, with an appeal pending to the State supreme court from a $50 million verdict against his company, contributed $2.4 million to help defeat an incumbent supreme court justice perceived to be antibusiness. In 2004, television ads for judicial candidates appeared in 80 percent of the States with contested supreme court elections. The number of negative attack ads nearly doubled from 2000. Almost 90 percent of the attack ads were paid for by either special interest groups or a political party.

Seventy-one percent of the American public, and almost one-third of State judges subject to election, feel that campaign contributions from special interests influence judicial decisions. Challenges to the fairness and impartiality of State courts frequently occur in the context of contested judicial elections or take the form of well-publicized attacks on judges that are used to energize the political base of a political party or special interest group.

Increasingly, such challenges attack the courts themselves or seek to dramatically alter judicial selection processes or the nature of judicial office itself in a dangerous and misguided effort to hold judges more accountable to the public will for their specific judicial decisions.

Traditional notions that judges and judicial candidates should maintain the dignity appropriate to judicial office, uphold the impartiality and fairness of the judiciary, and be influenced by neither their personal views nor any partisan interest, public clamor, or social or political relationship are severely tested. Federal court decisions rejecting traditional restrictions on judicial campaign speech have spawned candidate questionnaires that regularly invite and pressure candidates to state their personal views on controversial legal and political issues, and candidates increasingly do so.

In order to better insulate elected State judiciaries from improper political influence, States have turned increasingly to "nonpartisan" elections in which judicial candidates are not nominated by a political party and ballots do not identify the candidates' party affiliations. The polarization of American politics and a recent Federal circuit court opinion threaten to convert all judicial elections into partisan affairs.

Excerpted from the November 2006 Judicial Council of California report State Judicial Elections: The Politicization of America's Courts. *http://www.courtinfo.ca.gov/jc/documents/ccr_warren.pdf. Accessed March 24, 2009.*

Lower Court Holding
Decision of the Supreme Court of Appeals of West Virginia

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

In many cases, including this one, publicity adverse to the judge or justice is a virtual certainty no matter what decision he or she makes. In such cases, judges insufficiently attuned to their judicial responsibilities might readily welcome a baseless request for disqualification as an escape from a difficult case — particularly in a State that selects its judges in partisan elections. The public is legitimately entitled to more — they are entitled to judicial integrity and courage. To surrender to such recusal temptations would justly expose the judiciary to public contempt. It is the obligation of officers of the court system to ensure that professionalism, not partisanship, guides their actions and that cases are decided on the basis of the law, not in spite of it.

The determination of the composition of an appellate court panel by a standard merely of "appearances" seems little more than an invitation to subject West Virginia's justice system to the vagaries of the day — a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations. Actual justice would be replaced by a justice borne of political gimmickry, such as push-polls and media campaigns — all designed to replace judicial independence and integrity with something more to the liking of individual litigants or others with vested interests in specific outcomes. The rule of law would be replaced by the rule of expediency; judges would be forced to practice a "defensive" form of politically correct jurisprudence; and those without money or standing would be at the mercy of those with the power to manipulate and the willingness to impugn judges not to their liking.

It is perhaps an unfortunate aspect of timing that the pendency of the rehearing of this appeal has coincided with the pendency of a rigorous political campaign for two of five seats on this court. During periods when change is possible in the philosophical direction of the court, the temptation by pundits, members of the media, litigants, candidates, special interest groups, or even members of this court to politicize this court and its decision is present. Although this court has endured for 145 years, election cycles can be unsettling to the stability and predictability of the rule of law. This puts a heavy burden on the members of this court to act in the highest standard of judicial professionalism, to refrain from exacerbating tensions, to avoid the highly emotional, to abstain from that which is deeply divisive, and to work judicially and judiciously.

Resort to appearance-based criteria alone in judging simply encourages the excesses often wrought on a judicial system during times of political struggle. "Especially ought the court not reinforce needlessly the instabilities of our day by giving fair ground for the belief that law is the expression of chance — for instance, of unexpected changes in the court's composition and the contingencies in the choice of successors." — *United States v. Rabinowitz* (1950).

Just as judges have a duty to the system, so too do counsel in cases appearing before the courts of this State. While counsel must endeavor to represent their clients zealously, they should do so with due regard to the profession they serve. I would be remiss if I did not acknowledge my disappointment in the material omissions from the motions for disqualification filed herein against myself. While such filings are appropriate when warranted, counsel should do so within the framework that has long served this judicial system. Such motions should include all facts

material to the recusal decision.

Omitted from the motions herein was any objective consideration of my actual record, my decisions, and my behavior in over three years on this court — the truest measure of a judge. Further, while the use of the term "support" is certainly permissible in a motion, the term, in a vacuum, can be misleading and its connotation remarkably subjective and indefinite. It is a term better given to political punditry and press releases than, in the context of this case, the objective certainty needed in legal discourse. The well-drafted motion should acknowledge and discuss not only the motion's perceived strengths, but also the motion's actual weaknesses. The absence of such a critical analysis here, indeed the lack of even an acknowledgment of the motions' actual weaknesses, is directly relevant to the legal credibility of the said motions. It is my purpose here to remind counsel appearing before this court of their obligations to this court and this judicial system.

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

The case of Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation, Sovereign Coal Sales, Inc. v. A.T. Massey Coal Company, Inc.; Elk Run Coal Company, Inc.; Independent Coal Company, Inc.; Marfork Coal Company, Inc.; Performance Coal Company; and Massey Coal Sales Company, Inc. *was heard by Judges Albright, Benjamin, Cookman, Davis, and Fox. Excerpted from Judge Benjamin's July 28, 2008, concurring opinion defending his decision not to recuse himself from participation in the case.* *http://www.state.wv.us/WVSCA/docs/fall07/33350c.pdf. Accessed March 24, 2009.*

Does the Constitution Require Elected State Judges to Withdraw From Cases Involving Large Campaign Donors?

PROS

Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc., Petitioners

Theodore B. Olson, Counsel of Record

In 1998, Hugh M. Caperton sued Massey Energy over a breach of contract and won $50 million in a West Virginia circuit court decision. Massey appealed the decision to the State Supreme Court, which reversed the lower court decision on a 3-to-2 vote. One of the justices voting in favor of reversal was Brent Benjamin, who had unseated a sitting justice in an election in 2004. During the campaign, the chief executive officer of Massey Energy, Don Blankenship, spent $3 million in a negative advertising campaign against Benjamin's opponent. During the Supreme Court hearing, Caperton's lawyer repeatedly called for Benjamin to recuse himself because of Blankenship's involvement in his campaign, but Benjamin refused to do so. Following the court's decision, Caperton, along with his Harman group of companies, appealed the West Virginia Supreme Court's decision to the U.S. Supreme Court, alleging that Benjamin's participation in the case violated the Due Process Clause of the Fourteenth Amendment. The Supreme Court granted certiorari on November 14, 2008. Theodore B. Olson is a partner with the law firm Gibson, Dunn & Crutcher, where he is co-chair of the firm's Appellate and Constitutional Law Group. He was Solicitor General of the United States from 2001 to 2004. The following is excerpted from the Brief for the Petitioners as submitted to the U.S. Supreme Court on December 29, 2008.

Justice Benjamin refused to recuse himself from Massey's appeal because he found that Petitioners had not proven "any actual bias" on his part. Justice Benjamin's self-serving conclusion that due process requires recusal only where there is definitive proof of a judge's actual bias against a party is inconsistent with this Court's well-settled precedent, which establishes that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." — *Commonwealth Coatings Corp. v. Continental Casualty Co.* (1968). Where, as here, the "appearance of bias" is serious enough to create a "probability" that the judge is actually biased against a litigant, due process requires the judge's recusal. — *In re Murchison* (1955).

I. Due Process Required Justice Benjamin to Recuse Himself From the Appeal of His Principal Financial Supporter.

This Court has emphasized that a "fair trial in a fair tribunal is a basic requirement of due process." — *Murchison*. A "neutral and detached judge" is an essential component of this due process requirement. — *Ward v. Village of Monroeville* (1972). Justice Benjamin's participation in this appeal denied petitioners this fundamental due process right.

A. Due Process Requires the Recusal of a Judge Who Is Actually Biased or Tainted by a Probability of Bias.

Justice Benjamin's primary basis for refusing to recuse himself from this case was his contention that due process requires the recusal of a judge only where there is definitive proof of "actual bias" on his part. This was an error.

It is a basic principle of due process that a judge may not participate in a case where he is actually biased against one of the parties. It is equally well-established that "our system of law has always endeavored to prevent even the probability of unfairness." — *Murchison*. This "stringent rule," the Court has explained, "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way justice must satisfy the appearance of justice."

In light of the importance of preserving the "appearance of justice," this Court has repeatedly held that, where an objective inquiry establishes a "probability" of bias on a judge's part, the judge is constitutionally barred from participating in a case even if there is insufficient evidence to establish that the judge is subjectively biased against a party.

In *Tumey v. Ohio* (1927), for example, the Court held that it violated due process for a village mayor to preside over a criminal proceeding where the mayor was only paid for his services if the defendant was convicted and where the village received a share of any fine that was levied against the defendant. The Court acknowledged that "[t]here are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it. ... [B]ut the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." Whether or not the mayor was actually biased against the defendant, due process prohibited him from presiding over the case because "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the State and the accused, denies the latter due process of law."

Similarly, in *Mayberry v. Pennsylvania* (1971), the Court held that a judge who had been subjected to repeated verbal abuse by a criminal defendant could not preside over the defendant's criminal contempt proceedings. Despite the absence of proof of actual bias on the judge's part, the Court concluded that recusal was constitutionally required because "[n]o one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication."

This constitutional prohibition upon adjudication by judges tainted by a probability of bias applies with equal force in the civil setting. In *Aetna Life Insurance Co. v. Lavoie* (1986), the Court held that it violated due process for a State supreme court justice to participate in the court's review of a verdict for bad-faith refusal to pay an insurance claim because the justice was pursuing his own bad-faith suit against an insurance company, and the supreme court's decision could have had a direct impact on the outcome of the justice's case. The Court explained that it was "not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear, and true." Justice Embry's ongoing pursuit of monetary damages through a cause of action identical to the one pending before the State supreme court offered just such a "temptation."

The due process prohibition upon adjudication by judges tainted by a probability of bias is essential to ensuring that all litigants receive their fundamental right to a "fair trial in a fair tribunal." — *Murchison*. It is often exceptionally difficult — if not wholly impossible — to present conclusive proof that a judge is subjectively biased. Indeed, it is extraordinarily rare for a judge to acknowledge that he harbors a bias against a litigant. And it is nearly equally rare for litigants to be afforded the opportunity for discovery to obtain evidence of a judge's bias because the availability of discovery generally rests in the "sound discretion" of the judge whose impartiality is being challenged. — *In re Martinez-Catala* (1st Cir. 1997). As in this case, then, most recusal motions must rely solely on the publicly available facts about a judge. In light of this evidentiary hurdle, the right of litigants to a fair trial before an unbiased judge can only be vindicated by mandating recusal where these publicly available facts create an objective "probability of actual bias on the part of the judge." — *Withrow v. Larkin* (1975).

A requirement that a litigant seeking a judge's recusal conclusively establish the existence of judicial bias would eviscerate the procedural protections afforded by due process and relegate parties to trial before judges who harbor a strongly suspected (but unprovable) bias against them. For this reason, the Court has repeatedly recognized that, "even if there is no showing of actual bias" on the part of a judge, "due process is denied by circumstances that create the likelihood or the appearance of bias" because such a possibility of judicial bias creates a constitutionally unacceptable risk of actual bias. — *Peters v. Kiff* (1972).

In *Lavoie*, for example, the Court held that Justice Embry's recusal was constitutionally required — despite the absence of proof of actual bias — because his pending suit against another insurance company created the probability that he was biased against Aetna. For similar reasons, Federal law and State judicial codes generally mandate recusal where a judge's "impartiality might reasonably be questioned."

Although these standards are more stringent than the constitutional floor established by the Due Process Clause — they require recusal whenever there is a "reasonabl[e]," objective basis for questioning a judge's impartiality, while due process mandates recusal only when the appearance of partiality is serious enough to generate an objective "probability of actual bias" — both the nonconstitutional and due process recusal standards are animated by the same concern about possible judicial bias.

The implications of permitting a judge to participate in a case while tainted by a probability of bias transcend the constitutional rights of the litigants in that particular case. It is axiomatic that the "legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." — *Mistretta v. United States* (1989). Tolerating the participation of a judge who is likely to harbor a bias against a litigant would do irreparable harm to the public's confidence in the judicial system.

Neither the litigant relegated to the tainted judicial proceeding nor the public evaluating the result of that proceeding is likely to take much solace from the fact that, despite the overwhelming appearance of bias, there was no definitive proof of actual bias. The legitimacy of the Judicial Branch — just as much as the constitutional rights of individual litigants — depends upon preserving the impartiality in judicial proceedings, in appearance and in actuality.

These constitutional principles are well-established and have been regularly reaffirmed. It is therefore not surprising that Massey itself has repeatedly acknowledged — in this litigation and closely related litigation — that due process prohibits the participation of a judge who is tainted by a probability of bias.

When Massey sought the recusal of Justice Starcher in this case based on his public

criticism of Blankenship, it did so on the ground that "Justice Starcher by his very public and derogatory comments has created an appearance of partiality." Moreover, in its ongoing Section 1983 action against the West Virginia Supreme Court of Appeals, Massey has argued that Rule 29 of the West Virginia Rules of Appellate Procedure "violates [its] rights to the appearance of justice under the Due Process Clause of the Fourteenth Amendment to the United States Constitution insofar as the rule ... permits a justice of the West Virginia Supreme Court who is the subject of a disqualification motion exclusively to determine the merits of that motion."

Massey's suggestion in this Court that due process requires recusal only "where the judge harbors some form of substantial actual bias" represents an abrupt about-face from the position it unambiguously staked both earlier in this litigation and in its related Section 1983 suit. Massey's conveniently timed reformulation of its views might have been necessary to facilitate its defense of Justice Benjamin, but Massey's artificially narrow understanding of due process cannot be reconciled with its own previous statements on the issue or with this Court's profound concern for "prevent[ing] even the probability of unfairness" in judicial proceedings.

B. Blankenship's Campaign Support for Justice Benjamin Created a Constitutionally Unacceptable Probability of Bias.

Blankenship's prodigious efforts on behalf of Justice Benjamin's campaign, all undertaken while he prepared to appeal this case to the State supreme court, generated an overwhelming probability that Justice Benjamin was biased in favor of Blankenship's company and against Petitioners in this case. Justice Benjamin's insistence on nevertheless participating in his principal financial supporter's appeal violated due process.

Judicial elections are a well-established and constitutionally permissible means of selecting State court judges, and it is certainly not the case that due process requires a judge to recuse himself every time a litigant or attorney contributed to or otherwise supported the judge's election campaign. This is particularly true where the contribution represents only a small fraction of the overall financial support for a judge's campaign. Absent other evidence, no reasonable observer would conclude that such modest campaign support creates a probability that the judge is biased in favor of the supporter.

But it is just as surely not the case that campaign support from a litigant or attorney is never sufficient to compromise a judge's impartiality and to require recusal. Maintaining the unassailable neutrality of judicial decisionmaking is exceptionally — and uniquely — important to the Judicial Branch because the public's "respect for judgments depends ... upon the issuing court's absolute probity." — *Republican Party v. White* (2002). Neutral decisionmaking does not carry the same importance to either of the political branches of government. Indeed, while this Court has recognized a compelling government interest in extirpating actual corrupt *quid pro quo* transactions, and the appearance of such transactions, from the political branches, politicians are under no obligation to maintain neutrality in their official acts and remain free to give preferential access and consideration to their campaign supporters. In contrast, due process absolutely prohibits a judge from according preferential treatment to any litigant appearing before him. Accordingly, if a litigant's or attorney's campaign support for a judge generates an objective probability of bias in favor of one of the parties to a case, due process requires the judge's recusal.

For at least five reasons, any reasonable observer would conclude that Blankenship's support for Justice Benjamin's campaign generated a constitutionally unacceptable probability

that Justice Benjamin was biased in favor of Massey in this case.

First, the sheer volume of Blankenship's financial support for Justice Benjamin's campaign is truly staggering. West Virginia law imposes a $1,000 limit on contributions to judicial campaigns. Through his donations to *And for the Sake of the Kids* and direct expenditures on campaign advertising, Blankenship spent 3,000 times that amount supporting Justice Benjamin.

The $3 million that Blankenship spent is three times the amount spent by Justice Benjamin's own campaign committee and $1 million more than the total amount spent by Justice Benjamin's committee and the committee of his opponent, Justice Warren McGraw. Indeed, the $2.5 million that Blankenship spent to fund *And for the Sake of the Kids*' campaign to elect Justice Benjamin is more than any other individual or group contributed to a 527 organization involved in any 2004 judicial election campaign. The next largest donor gave $600,000 less than Blankenship.

Second, the appearance of bias generated by the size of Blankenship's campaign expenditures is reinforced by the fact that his expenditures represent 60 percent of the total amount spent to support Justice Benjamin's campaign. Thus, this is not a case where the expenditures in question — even though large in absolute terms — were matched by equally large donations from other parties that could conceivably have diminished the probability of judicial bias in favor of one specific donor.

Third, Blankenship did more than spend vast sums of money to support Justice Benjamin's campaign. He also actively campaigned for Justice Benjamin and solicited donations on his behalf. Most notably, he distributed letters urging doctors to "send $1,000 to Brent Benjamin" because "[i]f Warren McGraw gets re-elected to the West Virginia Supreme Court your insurance rates will almost certainly be higher for the next 12 years than they will be if Brent Benjamin gets elected." Blankenship's letters are directly responsible for a portion of the more than $800,000 donated to Justice Benjamin's campaign committee.

Fourth, the timing of Blankenship's campaign support strongly suggests that it was intended to influence the outcome of this $50 million appeal. Blankenship's campaign expenditures and fundraising efforts were made between August 2004 and November 2004, when Blankenship was preparing to appeal this personally and professionally significant case to the court on which Justice Benjamin was seeking a seat. Indeed, after the jury returned its verdict against Massey in August 2002, Blankenship immediately made a public vow to appeal the verdict to that court. Although the appeal was delayed by Massey's post-trial motions, there was no doubt during the 2004 campaign that the case would ultimately be decided by the State supreme court and that, if elected, Justice Benjamin would have the opportunity to cast a vote in that appeal.

Fifth, Justice Benjamin's decision to participate in Massey's appeal was not subject to review by the other members of his court. Where a judge's decision not to recuse himself is endorsed by the court's other members, the likelihood of judicial bias may be diminished because the allegations of bias have been examined — and rejected — by the judge's colleagues. In this case, not only were the other justices of the West Virginia Supreme Court of Appeals precluded by State law from considering Petitioners' recusal motions, but three members of the court (two justices and a circuit judge appointed to replace one of the recused justices) expressed strong concerns about Justice Benjamin's participation in the case. His colleagues' discomfort with Justice Benjamin's refusal to recuse himself underscores the strong probability of bias generated by Blankenship's support for Justice Benjamin's campaign.

The probability that Justice Benjamin was biased in favor of Massey and against

Petitioners is at least as strong as the probability of bias in *Tumey*, *Mayberry*, and *Lavoie*.

Just as it is human nature for a judge to be biased against a criminal defendant whose conviction would benefit the judge financially or by whom he has been verbally abused, it is equally a part of human nature for a judge to be biased in favor of a party whose CEO facilitated his election through massive campaign expenditures that were larger than the combined amount spent by all of the judge's other supporters. Justice Benjamin won his seat on the West Virginia Supreme Court by a narrow 53 to 47 percent margin over Justice McGraw to become the first nonincumbent Republican to secure a seat on that court since the 1920s.

There can be little doubt that the extensive advertising that Blankenship funded through his direct expenditures and his contributions to *And for the Sake of the Kids* immensely improved Justice Benjamin's electoral prospects in this closely contested race. It would only be natural for Justice Benjamin to feel a debt of gratitude to Blankenship for his extraordinary efforts on the campaign's behalf.

Similarly, just as a judge is tainted by a constitutionally unacceptable "temptation" to decide a case in a manner that furthers his own interests where he is pursuing a lawsuit raising identical legal issues, such a "temptation" is equally acute where the judge is beholden to a corporation's CEO for the majority of the funds spent in support of his recent campaign — and where casting an outcome-determinative vote against the corporation in a multimillion-dollar case may foreclose the possibility of similar financial support when the judge seeks reelection. In light of the overwhelming probability that Justice Benjamin was biased in favor of Massey and against Petitioners, due process required Justice Benjamin to step aside from consideration of Massey's appeal.

C. Justice Benjamin's Reasons for Refusing to Recuse Himself Are Constitutionally Inadequate.

Although Justice Benjamin's primary ground for refusing to recuse himself was his erroneous assertion that due process requires recusal only where there is proof of "actual bias," he also attempted to dispel the appearance of bias created by Blankenship's extraordinary level of campaign support. None of Justice Benjamin's rationalizations is constitutionally sufficient, however, to excuse his participation in this case.

Justice Benjamin observed, for example, that he has voted against Massey's interests in other cases. But Justice Benjamin points to no case — and we are aware of none — in which he has cast an outcome-determinative vote against Massey. In any event, the fact that a judge might not vote in favor of a particular litigant in every case hardly means that he does not harbor a bias in favor of that litigant in any case. A judge tainted by a probability of bias cannot constitutionally immunize his actions by the simple expedient of failing invariably to vote in the manner suggested by that bias.

Justice Benjamin also suggested that the appearance of bias created by Blankenship's campaign support is minimized by the fact that Blankenship is "an employee of a party in this case" and not a party himself. But Blankenship is far more than a mere employee of Massey: He is the central figure in this litigation. Blankenship is not only the chairman, CEO, and president of Massey, but he also holds more than 250,000 shares of the company's stock. Blankenship's business reputation and personal finances therefore depend to a significant extent upon Massey's financial well-being, which was materially weakened by the $50 million verdict in this case. Moreover, Blankenship personally directed the business decisions that gave rise to Petitioners'

fraud claims, and he provided extensive testimony at trial about his business dealings with Petitioners.

The jury evidently found Blankenship to lack credibility because it rejected his version of events when it returned the fraud verdict against Massey. Blankenship therefore had a powerful personal and professional interest in securing the reversal of the jury's verdict, and Justice Benjamin had an equally powerful reason to repay his debt of gratitude to Blankenship by casting the outcome-determinative vote in Massey's favor in this important case.

Justice Benjamin also asserted that his "campaign was completely independent of any independent expenditure group," including *And for the Sake of the Kids*. But there is no reason to believe that Justice Benjamin is any less likely to feel a debt of gratitude to Blankenship because a majority of his financial support was provided through *And for the Sake of the Kids* — an organization formed for the express purpose of defeating Justice McGraw and electing Justice Benjamin — rather than directly to Justice Benjamin's campaign committee. The end result was the same: Justice Benjamin benefited from extensive advertising criticizing his sole opponent for office and highlighting Justice Benjamin's qualifications.

While Justice Benjamin contends that his victory over Justice McGraw was principally attributable to his campaign message and Justice McGraw's errors on the campaign trail, it strains credulity to suggest that the $3 million in financial support provided by Blankenship — to say nothing of his other campaign efforts on Justice Benjamin's behalf — did not have a meaningful role in disseminating Justice Benjamin's message or highlighting Justice McGraw's perceived flaws. Any reasonable observer would conclude that a justice who had benefited to such a significant extent from a litigant's campaign expenditures would feel indebted to that litigant for his support.

According to Justice Benjamin, the "long-lasting negative effect on public confidence in our courts caused by an appearance-driven due process standard for disqualification of a judicial officer would be incalculable." In fact, it is Justice Benjamin's participation in his principal financial supporter's $50 million appeal that could have an "incalculable" and "long-lasting negative effect" on West Virginia's judicial system.

As this case vividly illustrates, the increasing prevalence of massive campaign expenditures in State judicial elections has had a corrosive effect on the public's confidence in the integrity of State courts. Justice Benjamin's constricted understanding of due process — which holds that litigants' campaign expenditures can never create a probability of bias sufficient to mandate recusal — would hasten the loss of public confidence in the judiciary and irretrievably weaken the courts' "reputation for impartiality and nonpartisanship." — *Mistretta*. Although not every campaign contribution or expenditure by a litigant or attorney creates a probability of bias that requires a judge's recusal, there are exceptional cases where recusal is constitutionally required — both to ensure the litigants' right to a fair trial and to safeguard public confidence in the judicial system. This is such a case.

Reply Brief

The following is excerpted from the Reply Brief of the Petitioners as submitted to the U.S. Supreme Court on February 24, 2009.

"A fair trial in a fair tribunal is a basic requirement of due process." — *In re Murchison* (1955). That right requires not only "an absence of actual bias in the trial of cases," but also "prevent[s] even the probability of unfairness."

Massey contends that Petitioners received all the due process to which they were constitutionally entitled despite the fact that the decisive vote in this case was cast by the beneficiary of $3 million in campaign support from the chairman and CEO of their adversary at the very time when their case was headed to that judge's court.

Massey dismisses the manifest probability that any jurist would have a difficult time being evenhanded in the face of such immense and influential campaign support by asserting that bias is never a constitutional ground for recusal; that any such principle unaccompanied by a clear, bright line would be limitless and unmanageable; and that, in any event, the $3 million was expended by an individual who was not actually a party to the case, and not to elect Justice Benjamin, but to defeat his only opponent. Each of Massey's three defenses evaporates when scrutinized. The notion that there is no due process right to an unbiased judge has been rejected repeatedly by this Court. Massey knows that to be the case because in its brief in opposition it explicitly acknowledged that "a judge cannot constitutionally hear a case where the judge ... harbors some form of substantial actual bias."

Moreover, while the petition for certiorari was pending in this very case, but before it was granted, Massey filed its own petition in this Court seeking the recusal of another West Virginia Supreme Court justice on the ground that a "biased decisionmaker is 'constitutionally unacceptable.'" Massey therefore cannot credibly maintain that bias is not a constitutionally compelled basis for judicial recusal.

The absence of merit in Massey's absolutist position leads it to resort to a slippery-slope/parade-of-horribles argument. Massey contends that, unless there is a bright-line demarcation identifying when a judge may participate in a case where a litigant had a major and presumptively dispositive role in bankrolling his election, a constitutional recusal standard will be limitless and unworkable, and therefore does not exist. But those arguments are equally unavailing. The Court regularly establishes case-by-case constitutional standards in due process, equal protection, reasonable search and seizure, and comparable constitutional cases because no one bright line can ever be articulated to define every condition where such constitutional standards may come into play.

Indeed, in this very field, the Court has explained that a disqualifying interest "cannot be defined with precision," but that a "reasonable formulation" is whether the circumstances would make it difficult for a judge to "hold the balance nice, clear, and true." — *Aetna Life Insurance Company v. Lavoie* (1986).

The foregoing formulation, endorsed repeatedly by this Court, cries out for application here. Massey argues that Blankenship's generous checkbook could not have had any impact on Justice Benjamin's objectivity in this case because Blankenship was not himself a party. But that proposition is difficult to take seriously since Blankenship was not only Massey's chairman and CEO but also the principal figure in the events that gave rise to the jury's $50 million verdict against his company. Without Blankenship and his efforts to do what the jury found to be fraudulent and outrageous, this case would not exist. Of course he wanted his case to be decided by the jurist of his choosing.

And the notion that Blankenship's pervasive involvement in Justice Benjamin's election was less influential because Blankenship purportedly used his funds to undermine Justice Benjamin's opponent rather than to promote Justice Benjamin (which is demonstrably untrue) is

simply not sustainable. Blankenship wanted to unseat a judge whom he perceived to be unfavorable to his case and to replace him with a more congenial jurist. So he spent his money to advance precisely that goal in every way he could — support for the candidate he liked and opposition to the candidate he feared.

If, as this Court has said, "justice must satisfy the appearance of justice," *In re Murchison* (1955), and if a litigant need not definitively prove, as rarely could be proved, actual bias to disqualify a judge, then surely the overwhelming showing in this case of circumstances that would lead virtually any objective observer to perceive the probability of bias decisively fails that constitutional standard.

American Bar Association (ABA), *Amicus Curiae*

H. Thomas Wells, Jr., Counsel of Record

H. Thomas Wells, Jr., is president of the ABA and a partner and founding member of the law firm Maynard, Cooper & Gale. The following is excerpted from the Amicus Curiae *Brief for the Petitioners as submitted to the U.S. Supreme Court on January 5, 2009.*

The integrity of the judicial process requires that judges avoid both actual bias and the reasonable appearance of bias so as to preserve confidence in the fairness and impartiality of judicial determinations.

Few actions jeopardize public trust in the judicial process more than a judge's failure to recuse in a case brought by or against a substantial contributor to the judge's election campaign. The principle of an unbiased judiciary has been reflected in the ABA's Canons since at least 1908. Along with the Federal counterpart, the Canons focus on disqualification for both actual impropriety and the reasonable appearance of impropriety.

Yet recusal motions rarely succeed in State court cases where contributors appear as litigants, because judges typically self-enforce the governing disqualification standards. Where a judge's decision to remain on a case has been met with widespread public disagreement, the negative effects on the courts have been real and immediate, as shown by the present case. The ABA therefore suggests that this Court should identify those considerations that govern recusal on due process grounds when a contributor to the judge's election campaign is a party.

Based on its research and the experiences of its members in this field, the ABA suggests some of the factors that it believes are relevant to this issue.

Chief Justice C.C. Torbert, *et al.*

Charles K. Wiggins, Counsel of Record

The individuals in this suit are 27 former or retired chief justices or justices on 19 State supreme courts. Charles K. Wiggins is a member of the law firm Wiggins & Masters, where he specializes in civil appeals. The following is excerpted from the Amicus Curiae *Brief for the Petitioners as submitted to the U.S. Supreme Court on January 2, 2009.*

Amici uniformly believe that the participation of Justice Benjamin in this case created an appearance of impropriety. All *amici* participating in this brief would have recused if they had benefited from the level and proportion of independent expenditures by the CEO of a party to a case pending before the court. As the Court considers how the Due Process Clause applies to this case, *amici* suggest that the Court consider three basic propositions.

Substantial financial support of a judicial candidate — whether contributions to the judge's campaign committee or independent expenditures — can influence a judge's future decisions, both consciously and unconsciously. *Amici* believe that the only way to preserve a litigant's due process right to adjudication before an impartial judge is to require that a judge recuse from a case not only when the judge consciously perceives the judge's own partiality, but also when there exists a reasonable appearance of partiality or impropriety.

The relatively recent phenomenon of substantial independent expenditures in judicial elections has no precedent at the common law. But the Due Process Clause is sufficiently flexible to address novel practices, and the Court should hold that the ancient rule that a judge cannot sit on a case in which the judge is financially interested applies to a case in which a party has provided substantial financial support for the judge's election.

Applying the Due Process Clause to this case will allow State supreme courts to continue to develop rules to provide much-needed guidance on when a judge must recuse from a case where a party has provided financial support to elect the judge. Such rules will provide bright-line limitations guaranteeing an impartial judge well within the parameters of due process.

Center for Political Accountability and the Carol and Lawrence Zicklin Center for Business Ethics Research, *Amici Curiae*

Karl J. Sandstrom, Counsel of Record

Karl J. Sandstrom is a lawyer with the law firm Perkins Cole, where he specializes in political and Federal campaign finance law. The following is excerpted from the Amicus Curiae *Brief for the Petitioners as submitted to the U.S. Supreme Court on January 5, 2009.*

When a judge of a State's highest court casts the deciding vote in favor of a party whose chief executive officer spent millions of dollars supporting his election campaign, the opposing parties and observers should rightfully question whether the judge was impartial and whether all parties received due process. Under these circumstances, the Fourteenth Amendment's Due Process Clause demands that judges recuse themselves from cases involving persons or companies that supported their election through substantial campaign spending.

There is no effective legal constraint on the amount or source of money that a corporation or its directors, officers, or major shareholders may spend to influence the election of candidates for State judicial office. Many States prohibit direct corporate contributions to State and local candidates. But even where direct corporate contributions are prohibited, avenues remain for corporate money to find its way into the political process in the form of candidate-specific issue advocacy and independent expenditures that are protected by the First Amendment. Aware of this, corporate officers, directors, and major shareholders may rationally conclude that it is in their company's best interests to spend large sums of money to influence a judicial election.

The escalation of judicial campaign spending traps business leaders into a classic

"prisoner's dilemma." For ethical and financial reasons, most corporations would prefer to avoid spending money on an election that involves candidates for a seat on a court where it has a matter pending. An ethically centered company would seek to avoid being drawn into the sort of judicial politics that Massey Coal Board Chairman, CEO, and President Don L. Blankenship so aggressively waged in 2004 to elect Justice Brent Benjamin to the West Virginia Supreme Court of Appeals.

In today's election environment, however, a corporation must consider the likelihood that its opponent in high-stakes litigation may actively support one or more of the judges that will hear its case. Increasingly, corporations feel compelled to support their own candidates to guard against an adverse judgment that damages the company and its shareholders. Mandatory recusal is necessary to stanch this campaign spending arms race and maintain the integrity of the judicial system. The economy and the rule of law cannot thrive without robust safeguards of judicial impartiality. Mandatory recusal of judges who receive substantial support from the parties before them would ensure minimal due process while enabling individuals and corporations to freely exercise their First Amendment rights to engage in political speech.

Does the Constitution Require Elected State Judges to Withdraw From Cases Involving Large Campaign Donors?

CONS

A.T. Massey Coal Company, Inc., *et al.*, Respondents

Andrew L. Frey, Counsel of Record

In 1998, Hugh M. Caperton won $50 million in a West Virginia court case involving a lawsuit against Massey Energy and its subsidiary companies over supplying coal to a steel company. Massey appealed the decision to the State Supreme Court, which on April 3, 2008, reversed the lower court decision by a 3-to-2 vote. One of the justices voting in favor of reversal was Brent Benjamin, who had unseated a sitting justice in a 2004 election. During the campaign, the chief executive officer of Massey Energy, Don Blankenship, spent $3 million in a negative advertising campaign against Benjamin's opponent. During the Supreme Court hearing, Caperton's lawyer repeatedly called for Benjamin to recuse himself because of Blankenship's involvement in his campaign, but Benjamin refused. Following the court's decision, Caperton, along with his Harman group of companies, appealed the West Virginia Supreme Court's decision to the U.S. Supreme Court, contending that Benjamin's participation in the case violated the Due Process Clause of the Fourteenth Amendment. The Supreme Court granted certiorari on November 14, 2008. Andrew L. Frey is a partner with the law firm Mayer Brown, where he specializes in Supreme Court appeals. The following is excerpted from the Brief for the Respondents as submitted to the U.S. Supreme Court on January 28, 2009.

If the Court does not dismiss the writ, it should affirm, for three independent reasons. First, contrary to Petitioners' contention, "probability of bias" is not the constitutional standard for judicial disqualification. Second, even if "probability of bias" were the constitutional standard, it could not be satisfied by supposition that the judge might feel a "debt of gratitude" to a supporter. Third, there is here no sufficient "probability of bias" to support recusal.

I. "Probability of Bias" Is Not the Constitutional Standard.

Petitioners' due-process claim depends on the premise that, when there is "a 'probability' of bias on a judge's part, the judge is constitutionally barred from participating in a case." That premise is unsound. There is no basis in history, precedent, or the practice of this Court for the notion that a judge's "bias" in general — let alone a mere "probability of bias" — mandates disqualification under the Due Process Clause. On the contrary, a common law disqualification was required only when the judge had a pecuniary interest in the outcome of the case and in certain contempt proceedings. This Court has never held that a judge is constitutionally barred from sitting for any other reason.

And throughout the history of the Court, Justices have sat on cases in which they had no financial interest but a "reasonable observer" might think that there was a "probability of bias." Under the correct standard, Justice Benjamin had no constitutional obligation to recuse himself.

A. A "Probability of Bias" Standard Has No Basis in History.

"As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." — *Honda Motor Co. v. Oberg* (1994).

It was not until a few decades into the twentieth century that disqualification for bias enjoyed anything approaching widespread acceptance in the United States. Even then, disqualification on that ground was generally prescribed by statute rather than common law. In the Federal system, for example, district judges were not subject to disqualification for bias until 1911, when Congress amended the recusal statute.

Petitioners contend that the Due Process Clause should be interpreted to require disqualification for a "probability of bias" for the same reason: to preserve the "legitimacy of the Judicial Branch" and the "public's confidence" in it. That assertion finds no support in either history or logic. The Due Process Clause protects the rights of individuals, not the public reputation of State judiciaries. That is one of the reasons why questions of "bias" have historically been regulated by statute rather than the Constitution, and by the States rather than through Federal intervention.

B. A "Probability of Bias" Standard Has No Basis in Precedent.

In its first decision on the subject, *Tumey v. Ohio* (1927), this Court held that it was unconstitutional for a judicial officer to hear a criminal case when the officer personally received fees and costs only in the event of a conviction. The Court concluded that due process requires disqualification when the judge has "a direct, personal, substantial, pecuniary interest" in deciding the case against a party. "[I]n determining what due process of law is," the Court looked to "those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors."

Citing common law cases from England and the United States, the Court explained that "the general rule" in both countries was that judges were "disqualified by their interest in the controversy" and that, in England, a decision was "voidable" when the judge had a "pecuniary interest" in the outcome. The Court was careful to point out, however, that not "[a]ll questions of judicial qualification ... involve constitutional validity" — and, in particular, that "personal bias" is generally a matter of "legislative discretion."

Relying on *Tumey*, the Court applied the same constitutional rule in three cases in the 1970s. *Ward v. Village of Monroeville* (1972) (village mayor prohibited from adjudicating certain criminal cases when fines resulting from conviction constituted half of village's finances, for which mayor had responsibility); *Gibson v. Berryhill* (1973) ("pecuniary interest" disqualified members of administrative board from conducting license-revocation hearings); and *Connally v. Georgia* (1977) (due-process violation where justice of the peace was paid only if search warrant issued).

In its most recent due process decision on judicial disqualification, *Aetna Insurance Co. v. Lavoie* (1986), this Court applied both aspects of the common law rule. The challenged judge was found not constitutionally disqualified from participating in a case against an insurance company because of "bias or prejudice" arising from the judge's "hostility" towards insurance companies that were dilatory in paying claims. But the Court then ruled that the judge was

disqualified because of a "pecuniary interest" arising from the pendency of the judge's "very similar" lawsuit against another insurance company.

In finding no constitutionally disqualifying "bias," the Court repeated what it had said nearly 60 years earlier in *Tumey* — that "personal bias" is generally a matter of "legislative discretion" rather than "constitutional validity." The Court then cited "the traditional common-law rule ... that disqualification for bias or prejudice was not permitted."

While noting the "recent trend ... towards the adoption of statutes that permit disqualification for bias or prejudice," the Court emphasized that "that alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause." Due process is violated, the Court explained, only when a practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." The Court ultimately did not decide whether "bias or prejudice" could ever require disqualification under the Constitution, because, even assuming that it could, the "bias and prejudice" alleged there would not rise to the level of unconstitutionality.

In ruling that the judge did have a constitutionally disqualifying "interest," the Court applied the same principle as in *Tumey*. Disqualification was required because a decision against the insurance company could "enhanc[e] both the legal status and the settlement value of [the judge's] own case," thereby giving the judge a "direct, personal, substantial, pecuniary interest" in the outcome of the case in which he participated.

This Court has held recusal constitutionally required in only three cases not involving a pecuniary interest: *In re Murchison* (1955); *Mayberry v. Pennsylvania* (1971); and *Taylor v. Hayes* (1974). But the rules applied in those cases are limited to the specific context of contempt and lack applicability to an ordinary civil or criminal case. The decisions are also consistent with the common law distinction, recognized in the *Tumey-Lavoie* line of decisions, between personal "interest" and "bias."

Mayberry and *Taylor* held that due process bars a judge from adjudicating contempt charges when the contemptuous conduct occurred during a proceeding at which the alleged contemnor and the judge had become "embroiled in a running controversy." — *Mayberry*

That rule, which is ultimately traceable to *Cooke v. United States* (1925), a case involving this Court's supervisory authority, reflects the concerns that the exercise of the contempt power is "a delicate one" — that that power has a "heightened potential for abuse" — and that "care is needed to avoid arbitrary or oppressive conclusions" in contempt cases.

The rule adopted in *Murchison* is even narrower.

The holding of that case is that "a judge acting as a one-man grand jury investigating crime could not [try] for contempt witnesses who he believed testified falsely or inadequately before him in secret grand jury proceedings." — *Ungar v. Sarafite* (1964). Although *Murchison*'s holding rested in part on the view that "the judge in effect [had] bec[o]me part of the prosecution and assumed an adversary position," the decision "has not been understood to stand for the broad rule" that due process is violated in other contexts by the simultaneous exercise of prosecutorial and adjudicative powers. — *Withrow v. Larkin* (1975).

Apart from being contempt-specific, the rules applied in *Murchison*, *Mayberry*, and *Taylor* do not rest on any generalized acceptance of a constitutional "probability of bias" standard.

Insofar as *Murchison* applied a version of the rule that "prosecut[ors] [may not] be trial judges of the charges they prefer," that rule is a close relative of the no-pecuniary-interest rule applied in the *Tumey-Lavoie* line of cases, because a judge who is in effect a party to a case has

an interest in the outcome. Indeed, *Murchison* explicitly invoked the principle that "no man is permitted to try cases where he has an interest in the outcome."

What is true of *Murchison* is equally true of *Mayberry* and *Taylor*.

Petitioners' proposed standard is ultimately based on a single sentence from *Tumey* and a single sentence from *Murchison*. But neither can reasonably be read to have established the open-ended and ahistorical "probability of bias" test that Petitioners advocate.

The language from *Tumey* is this: "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the State and the accused, denies the latter due process of law." This was not a general observation about judicial bias, however, but a statement focused on an aspect of pecuniary interest disqualifications. By that point in the opinion, the Court had already established the constitutional rule that disqualification is mandated when a judge has a pecuniary interest in the outcome. The sentence at issue appeared in connection with defining the scope of an additional aspect of pecuniary interest disqualification: that the financial interest not be so "minute, remote, trifling, or insignificant" that it "may properly be ignored as within the maxim *de minimis non curat lex* [the law is not interested in trivial matters]."

Petitioner also relies on this language from *Murchison*: "[O]ur system of law has always endeavored to prevent even the probability of unfairness." Putting aside that this was *dictum* [nonbinding language in a decision], and that "unfairness" is not the same as "bias," this general language does not suggest a constitutional rule that a judge must recuse whenever there can be said to be a "probability of bias," as is clear from the very next sentence: "To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."

The Court's use of the "probability of unfairness" language may explain why disqualification is required when a judge has an interest in the outcome or would be judging his own case, but it cannot reasonably be understood to mean that a "probability of unfairness" requires disqualification even when those circumstances are not present.

Petitioners also rely on out-of-context quotations from *Withrow* and *Taylor*. *Withrow* — in which disqualification was found not required — said that a "probability of actual bias" is "constitutionally [in]tolerable," not in all cases, but in "various situations," specifying those in which the judge "has a pecuniary interest in the outcome" (the *Tumey-Lavoie* situation) or "has been the target of personal abuse or criticism from the party" (the *Mayberry-Taylor* situation). Similarly, *Taylor* described "likelihood of bias" as the relevant "inquiry," not in deciding whether disqualification is constitutionally required as a general matter, but in deciding whether particular "contemptuous conduct" that "embroil[s] [a judge] in controversy" requires disqualification.

C. A "Probability of Bias" Standard Has No Basis in the Practice of This Court.

If "probability of bias" were the constitutional standard, many members of this Court would quite likely have been acting unconstitutionally by participating in numerous cases decided over the past 200 years. Justices have also passed judgment on legislation they helped write. For example, Chief Justice Chase, who devised the greenback legislation, determined its legality in *The Legal Tender Cases* (1871); Justice Black, the principal author of the Fair Labor Standards Act, joined in upholding its constitutionality in *United States v. Darby* (1941); and Justice

Frankfurter, who played a critical role in drafting the Norris-LaGuardia Act, interpreted its scope in *United States v. Hutcheson* (1941). For more than a century after the first Judiciary Act, moreover, justices "hear[d] appeals from their own decisions on circuit." — *Del Vecchio v. Illinois Department of Corrections* (7th Cir. 1994). Even after the abolition of that practice, Justice Holmes "sat in several cases which reviewed decisions of the Supreme Judicial Court of Massachusetts rendered, with his participation, while he was Chief Justice of that court." — *Laird v. Tatum* (1972).

Although it could easily be said that members of this Court harbored a "probability of bias" in each of the cases described above, disqualification was thought to be unnecessary because the Justices had no pecuniary interest in the outcome.

It could just as easily be said that a "probability of bias" can arise from personal friendship with a party or counsel, political or religious affiliation or affinity, and the like. But members of this Court have never considered disqualification to be constitutionally required for such reasons.

D. Under the Correct Constitutional Standard, Recusal Was Not Required.

Because he had no pecuniary interest in the outcome, Justice Benjamin was not constitutionally barred from participating in the decision below. Nor is this case governed by *Murchison*, *Mayberry*, or *Taylor*, because it does not involve a charge of contempt; Justice Benjamin was not simultaneously serving as judge, prosecutor, and complaining witness; he was not a "victim" of anything that happened in the case; and he was not embroiled in a "running controversy" with any of the parties.

It is telling, in this connection, that one set of Petitioners' *amici* candidly acknowledges that Justice Benjamin was not required to recuse himself under the Due Process Clause as it has always been understood. Instead, on the basis of "[n]ovel practices" and "recent innovation[s]" in judicial elections that they consider problematic, these *amici* call for a "new paradigm of due process" and ask the Court to "extend the common law prohibition" embodied in the Due Process Clause.

But recusal statutes adopted by every State already go well beyond the "common law prohibition." If those statutes are thought inadequate to the challenges posed by judicial elections, then additional legislation may be appropriate; in fact, numerous reforms are already underway. But the developments that concern Petitioners' *amici* provide no warrant to say that the Constitution now means something it has never meant before.

II. Even If "Probability of Bias" Were the Constitutional Standard, a Judge's Supposed "Debt of Gratitude" to a Supporter Could Not Satisfy the Standard.

According to Petitioners, there was a "probability of bias" in this case because "it would only be natural for Justice Benjamin to feel a debt of gratitude to Blankenship" for his expenditures in opposition to Justice McGraw's reelection, and Justice Benjamin had "reason to repay his debt of gratitude to Blankenship" by voting in favor of Massey's subsidiaries.

Even if this Court's decisions could be thought to have swept aside the presumption of judicial impartiality in favor of "probability of bias" as the general standard for judicial disqualification under the Constitution, that standard would not be satisfied by the possibility that the judge would feel a "debt of gratitude" to a litigant.

Every lower court but one to consider the question has held that campaign expenditures by a party or attorney do not require disqualification under the Due Process Clause. The one case that reached a different conclusion employed a rationale — "appearance of bias" — that Petitioners no longer defend. Indeed, consistent with this Court's holdings, many lower courts have concluded that, whatever the precise constitutional standard, disqualification is required only when the judge has a pecuniary interest in the outcome, has a dual role, or has become embroiled in a running controversy with a party.

There is good reason for this judicial consensus. A feeling of "gratitude," which all candidates have towards their supporters, differs fundamentally from a feeling of "debt," especially debt of a kind to be repaid by distortion of the judicial task. Moreover, as we explain below, the theory that a "debt of gratitude" can create a constitutionally disqualifying "probability of bias" would have no limiting principle, would be entirely unworkable, and would create serious administrative problems for courts. Nor is Petitioners' broad constitutional rule even necessary, because the States have proven themselves quite capable of policing this area.

A. A "Debt of Gratitude" Theory Would Have No Limiting Principle.

A judge's "debt of gratitude" arising from an election expenditure is analytically indistinguishable from a "debt of gratitude" arising from countless other forms of support for a judge's election or appointment, many of which are as valuable as money — or more valuable. If expenditures could create a debt that necessitated recusal under a "probability of bias" standard, therefore, other debts would have to be treated the same way. But debts of this type are endemic, and Petitioners' "brand of argument" therefore "cannot be cabined." — *Del Vecchio*.

One obvious example of nonfinancial support for which an elected judge might be supposed to feel a strong "debt of gratitude" is a newspaper's endorsement. Indeed, a key endorsement may be worth more than large monetary expenditures. Yet it has never been thought that disqualification is necessary in a case in which a newspaper that endorsed the judge is a party, even under statutory recusal provisions broader in reach than the constitutional standard advocated by Petitioners.

Nor could the theory be limited to newspapers.

An important endorsement by a labor organization, trade association, or civic group could also be as valuable to a judicial candidate as substantial financial expenditures, and thus could likewise require disqualification under Petitioners' theory when the endorser is a party or *amicus*. The same is true of support from a political party or politician. For example, if a State's governor endorsed a judicial candidate, the candidate, if elected, would ordinarily feel a very strong "debt of gratitude" to the governor, and thus, under Petitioners' theory, would be disqualified from sitting at least in cases involving policies that were a high priority of the governor. The debt owed to a popular governor might well be far greater than that owed even to a large financial contributor, and yet it has never been thought that "sponsorship" or "other *indicia* [evidence] of political support" require disqualification — under any standard — when the sponsor or supporter comes before the court. — *In re Mason* (7th Cir. 1990).

Indeed, Petitioners' theory cannot be confined even to elected judges. The logic of the theory would lead to disqualifying appointed judges, including Federal judges, in many circumstances in which recusal has never been thought necessary.

If substantial financial support for an elected judge can create a constitutionally disabling "debt of gratitude," for example, then surely the act of nominating an appointed judge would do

so even more emphatically, given the indispensable role of the appointer in the process. Members of this Court, however, have not recused themselves merely because the president who nominated them was a party, even in cases in which the Court's decision was certain to be far more consequential to the president personally than the decision in this case was to Blankenship.

For example, three justices appointed by President Nixon participated in *United States v. Nixon* (1974), which led to the president's resignation. Two justices appointed by President Clinton participated in *Clinton v. Jones* (1997), which determined whether a sexual-harassment suit against him could go forward while he was in office.

And four justices appointed by President Truman participated in *Youngstown Sheet & Tube Co. v. Sawyer* (1952), which involved the government's seizure of steel mills, an issue of extraordinary importance to the president. Far from deeming themselves constitutionally disqualified from sitting in these cases, the justices did not believe that disqualification was necessary even under the broader recusal statute.

If a judge could be disqualified under the Due Process Clause from hearing a case in which he allegedly had an incentive to repay a "debt of gratitude" to a party for its support, then a judge should equally be disqualified from hearing a case in which he had an incentive to exact revenge against a party for its opposition. Here, for instance, it is at least as likely that McGraw is biased against Massey as a result of Blankenship's expenditures as that Benjamin is biased in its favor. McGraw was recently elected a circuit judge in Wyoming County. Accordingly, under Petitioners' theory, the Due Process Clause would require his recusal in all cases in which a Massey affiliate was a party.

In addition to advancing a backward-looking "debt of gratitude" theory, Petitioners stretch to suggest that there can be a "probability of bias" where a judge might fear that a vote against a financial supporter "may foreclose the possibility of similar financial support when the judge seeks reelection" in the future. But the possibility that a judge "may be tempted to defer unduly to the decisions or preferences of potential supporters ... does not require disqualification," even under the broader statutory standard. — *In re Mason*. That is particularly so when, as in this case, the judge would not be up for reelection for many years, has not announced any intention to run again, and has no basis to anticipate recurrence of the special circumstances that prompted the large expenditures in the prior election.

B. A "Debt of Gratitude" Theory Would Be Unworkable.

In addition to being limitless, Petitioners' "debt of gratitude" theory would be unworkable. Petitioners contend that campaign expenditures would be constitutionally disqualifying under their theory only in rare cases. They have no choice but to take that position because a broader disqualification rule would make it all but "impossible for [elected judiciaries] to function," *Adair v. Michigan Department of Education* (Mich. 2006), and thus would be tantamount to saying that States may not elect their judges. There is no remotely workable method, however, for distinguishing the "exceptional" cases in which expenditures would create a disqualifying "debt of gratitude" from cases in which they would not.

In opposing certiorari, we pointed out that the petition failed to offer "a workable constitutional standard" for when disqualification would be required. In reply, Petitioners defended that failure by asserting that "the articulation of a specific 'constitutional standard' is generally best left for a brief on the merits." Petitioners have now filed their brief on the merits, and still they offer no workable constitutional standard.

Indeed, one of the more remarkable features of Petitioners' brief is that it does not suggest any test for distinguishing what the Constitution prohibits from what it permits. Petitioners say merely that, "[w]hen viewed together, the facts surrounding" Blankenship's expenditures establish that Justice Benjamin probably felt a sufficient "debt of gratitude" to him to create an impermissible "probability of bias" in favor of Massey's subsidiaries. As far as a constitutionally disqualifying expenditure is concerned, in other words, Petitioners apparently "know it when [they] see it," *Jacobellis v. Ohio* (1964), and the expenditures here are to their eyes constitutionally disqualifying. Petitioners failed to deliver on their promise to provide a workable constitutional standard, not because they forgot, or because they changed their minds, but because they were unable to craft one.

In contrast to these proposed tests, and consistent with this Court's recusal decisions, the nearly uniform view of the lower courts has been that campaign expenditures by a party or attorney cannot disqualify a judge under the Due Process Clause.

"As against this approach, so familiar and ... easy, the proposed ... [multi]-factor test would be hard to apply, jettisoning ... predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a [lower] court and a virtually inevitable appeal." — *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.* (1995).

Even if the facts identified by Petitioners as supporting their recusal claim could be understood to suggest some sort of generally applicable test, and putting aside the problems associated with multifactor tests, the test still would not be a workable one.

As an initial matter, the facts on which Petitioners rely provide no principled basis for deciding when the circumstances of a particular case place it on the wrong side of the constitutional line.

Size. Petitioners rely mainly on the "sheer volume" and relative size of the financial support. They obviously take the position that the amount here was too high, but they offer no guidance for determining the point at which expenditures might become constitutionally disqualifying. Under these "standards," contributors, parties, attorneys, and judges will simply be left to guess how much is too much.

Solicitation. Petitioners also rely on the (asserted) fact that Blankenship "solicited donations" on behalf of the judge. Solicitation of donations obviously has some value, but it is hard to see how this can be considered a separate factor in the analysis rather than, at most, some additional amount to be added to the supporter's own expenditures. Whether or not "solicitation" was considered a separate factor, however, it would carry its own uncertainties, there being no obvious formula for allocating the contribution between the soliciting supporter and the contributor.

Timing. Petitioners also point to the fact that the expenditures here were made when an appeal was anticipated to the court on which the candidate would sit. If Petitioners' theory is that expenditures can cause a judge to feel a "debt of gratitude" to the person who makes them; however, it is very hard to understand why this should be a relevant consideration. Petitioners say that the proximity of expenditures to the filing of a case may "strongly suggest" that the expenditures were "intended to influence the outcome." Apart from the implausibility of such speculation here, any such intent on the part of a supporter is unrelated to whether the judge will

feel a "debt of gratitude." In short, Petitioners have here unwittingly lapsed into an "appearance" argument quite disconnected from any probability of actual bias.

Reviewability. Petitioners also point to the fact that the judge's decision to participate "was not subject to review by the other members of his court." This is the same practice followed by this Court. In any event, the availability of further review bears no relation to whether particular campaign expenditures will cause a judge to feel a "debt of gratitude" to the person who makes them, and in turn a bias to favor that person or his associates. At most, this consideration implicates a distinct procedural issue.

In the end, the only fact identified by Petitioners that has any real relevance to their "debt of gratitude" theory concerns the size of the expenditure, and neither Petitioners nor their *amici* offer a workable test for determining how much is too much.

If Petitioners' theory were adopted, therefore, courts would presumably have to devise separate tests to address whether each form of support was substantial enough to create a "debt of gratitude" that gave rise to a constitutionally disqualifying "probability of bias." For the support of a newspaper, for example, courts might take into account the circulation of the paper and whether the endorsement was unqualified. For the support of a politician, courts might consider how well-known the supporter was, how popular he or she was when the endorsement was made, and how strong the endorsement was. And so on. This is the antithesis of a workable constitutional standard.

C. A "Debt of Gratitude" Theory Would Create Administrative Problems for Courts.

Petitioners contend that, under their due process standard, campaign expenditures will only rarely require recusal. But because their "vague and malleable standard" cannot identify where the constitutional line should be drawn in any particular case, it would almost certainly "open the gates for a flood of litigation." — *Baze v. Rees* (2008).

Resolving disqualification motions consumes scarce judicial time and resources. Apart from slowing the judicial process, Petitioners' opaque standard seems bound to lead many judges to recuse themselves, either on motion or *sua sponte* (on their own behalf), even where it might ultimately have been determined that recusal was not constitutionally necessary. Particularly in smaller districts, staffing problems would frequently result.

And because the disqualification standard would rest upon Federal constitutional law, States would be unable to rectify the problems by adopting bright-line rules legislatively. Constitutionalizing this area of the law would also lead parties in recusal fights to beat a path to this Court's door, thereby increasing the workload of this Court as well.

The abolition of judicial elections appears to be the ultimate goal of some of Petitioners' *amici*. But the vast majority of States elect their judges, and have done so since the middle of the nineteenth century. Election of State judges became popular because judges have the power to "'make' common law" and "shape the States' constitutions." — *Republican Party of Minnesota v. White* (2002). And it remains popular today: No State that elects its judges has ever entirely abandoned the system.

Indeed, several States have rejected, by significant margins, referenda or proposed constitutional amendments that would have abolished judicial elections. West Virginia, in particular, has declined to alter its selection method. While reasonable arguments can be made

both for and against elected judiciaries, it is assuredly not the proper role of this Court to allow its resolution of the due process issue presented here to be swayed by any distaste for judicial elections.

D. The Broad Constitutional Rule Advocated by Petitioners Is Unnecessary.

A constitutional rule requiring disqualification whenever a judge can be deemed to have a sufficient "debt of gratitude" to a litigant cannot be justified as fulfilling an unmet need, because States are already addressing the issues that arise at the intersection of campaign finance and judicial disqualification. As Justice Kennedy has observed, "democracy" is its "own correctiv[e]." — *Republican Party of Minnesota.*

Many States have enacted or are now considering reforms that will mitigate whatever recusal problems are perceived to exist.

Alabama, Colorado, Delaware, Florida, Louisiana, Michigan, and Utah, *Amici Curiae*

Kevin C. Newsom, Counsel of Record

The parties in this brief are States concerned with Federal intervention in the judicial selection process. Kevin C. Newsom is a partner with the law firm Bradley Arant, where he is co-chair of the Appellate Litigation Group. Prior to joining the firm, he was Alabama's Solicitor General. The following is excerpted from the Amicus Curiae *Brief for the Respondents as submitted to the U.S. Supreme Court on February 4, 2009.*

States have an overriding interest in ensuring the fairness of their courts and the impartiality of their judges. Historically, States have been free to police judicial bias — both real and apparent — through statutes, rules, and bar codes. The Due Process Clause has not required recusal except in the most extreme cases — namely, where a judge either has a pecuniary "interest in the outcome of" a case or is "actually bias[ed]" against one of the parties. — *Bracy v. Gramley* (1997). Petitioners' position here — which would require recusal as a matter of Federal constitutional law whenever a judge might feel a "debt of gratitude" to an interested party that suggests a "probability of bias" — would carry the Court well beyond existing due process doctrine and make virtually every State court recusal dispute a "Federal case." Because Petitioners' proposed extension is neither necessary nor wise, the Court should reject it.

There is no pressing need to constitutionalize State recusal practice. The States (1) are uniquely well-situated to regulate recusal practice in their own courts and (2) have been both vigorous and innovative in doing so.

Review of the 50 States' court systems and judicial-selection methods — as well as the widely divergent public expectations that have grown up around them — reveals kaleidoscopic variety. Petitioners' attempt to shoehorn that variety into an overarching Federal constitutional standard makes little practical sense. It would be far better to leave the particulars of State recusal practice to State policymakers, who are intimately familiar with the often State-specific "facts and circumstances" that will control disqualification determinations.

Petitioners' proposed constitutional recusal rule is not only unnecessary, but also unwise. It would be hopelessly [unworkable], both doctrinally and practically.

The lone "principle" that petitioners identify — that recusal is constitutionally required where the circumstances indicate a "debt of gratitude" that may create a "probability of bias" — is really no principle at all. There are two key problems. First, Petitioners' position has no logical stopping point. For instance, although clearly aimed at elected judges, Petitioners' "debt"-based theory would seemingly apply to appointed judges, whose principal backers (starting with the executives who appointed them) are particularly conspicuous.

Second, rarely if ever will it be self-evident when the requisite "debt" exists, let alone when that "debt" gives rise to an impermissible "probability of bias." Rather, the constitutional determination will inevitably devolve into a multifactor morass. Indeed, Petitioners and their *amici* propose a series of different multifactor tests; altogether, they suggest nearly 20 pertinent (but nonexclusive) considerations. While that sort of hypercontextualism may well be appropriate to legislative policymaking on the State level, it is not the stuff of which constitutional doctrines should be made.

Even as matters stand now, judges face extraordinary psychological pressure to recuse. Introducing the Constitution into the equation would up the ante significantly. It seems scarcely debatable that if faced with accusations of oath-breaking for every supposed "debt," no matter how ill-defined, judges would defensively recuse, even in cases in which recusal is not appropriate.

Increasingly, litigants manipulatively employ the recusal procedure as a judge-shopping device. Far from helping to remedy that abuse, Petitioners' indeterminate "debt"-based due process rule would actually facilitate it.

Justice Maura D. Corrigan*, et al., Amici Curiae*

Patrick J. Wright, Counsel of Record

The individuals in this brief are 10 current and former chief justices and justices of State supreme courts. Patrick J. Wright is Senior Legal Analyst at the Mackinac Center for Public Policy, where he directs the Legal Studies Project. The following is excerpted from the Amicus Curiae *Brief for the Respondents as submitted to the U.S. Supreme Court on February 4, 2009.*

Many States in this country have a long tradition of electing judges, who, like their appointed counterparts, have been entitled to the strong presumption of integrity. These States with judicial elections have chosen the accountability model, which allows the public greater control over individual judges and judicial philosophy. Recently, many interest groups have discovered that judicial philosophy is an important factor in determining whether judges are amenable to, or hostile to, public policies enacted by the legislatures. This has led to increased spending in judicial elections. In essence, the question presented here is whether the increased spending in judicial races should overcome the historical presumption of judicial integrity.

Only in rare instances has this Court found that the Due Process Clause of the Fourteenth Amendment overcomes the strong presumption of judicial integrity. In such instances, this Court has set forth prophylactic rules against judicial participation in limited types of cases in order to prevent the possibility that the average judge would fail to "weigh the scales of justice equally between contending parties." — *Aetna Life Insurance Co. v. Lavoie* (1986). To date, most of this Court's constitutionally mandated recusals occurred because the judge had a direct pecuniary

interest in the outcome of the case.

Petitioners contend that a due process violation exists here because the expenditures made in a judicial election would create a debt of gratitude in a judge toward the individual that made those expenditures. Accordingly, they claim, public confidence in judicial integrity would be hurt if the judge failed to recuse in a case involving a party that employs the individual who made the expenditure.

The logic of such a debt-of-gratitude rule could not be limited in a principled way to the instant case; therefore, the entire process of judicial elections would be imperiled. Indeed, the logic of such a rule would apply when the judge is aware of the individual's preferred position, even if neither that individual nor any related entity or person were a party. The logic would also apply to nonmonetary political support like editorial page endorsements or in-kind contributions, such as get-out-the-vote efforts.

Were this Court to adopt a multifactored, amorphous due process rule, there are a number of likely consequences that would lead to decreased public confidence in the judiciary. Such a holding would endanger collegiality by creating the opportunity for political gamesmanship between different ideological factions on a court. "Weaponizing" the judicial disqualification process by importing a multifactored due process notion would create a tool for litigants to use to undermine the people's democratically expressed preference for a certain type of judicial philosophy. It could wreak havoc with *stare decisis* [respect for legal precedent], as "special" litigants would be able to create different compositions of a court by selectively targeting for disqualification judges whose judicial philosophy they deemed insufficiently congenial to the litigant's cause. By using disqualification as a weapon, litigants would be able to create a jurisprudence that would diverge from that which would have otherwise emerged from the court's duly elected judges.

Because the debt-of-gratitude argument has no logical stopping point and creation of an amorphous due process test will lead the public to holding the judiciary in lower esteem, this Court should not hold that lawful campaign activity creates a due process violation. Elected judges should retain their strong presumption of integrity.

James Madison Center for Free Speech, *Amcius Curiae*

James Bopp, Jr., Counsel of Record

James Bopp, Jr., is an attorney with the firm Bopp, Coleson & Bostrom, where he specializes in biomedical, tax, and election law. The following is excerpted from the Amicus Curiae *Brief for the Respondents as submitted to the U.S. Supreme Court on February 4, 2009.*

Requiring recusal based on campaign spending represents a break from longstanding American tradition. States have long preferred elections as the means of selecting their judges because of the special role that State judges play in developing a State's law.

With rare exceptions, judicial elections have been funded through campaign contributions. Yet, despite the fact that these elections have been funded almost exclusively through private spending, campaign spending has traditionally not been taken to justify mandatory recusal where the spending party appears before a judge as a litigant.

This is doubly true of mandatory recusal under due process, which sets only a minimal

standard for mandatory recusal and is limited to where a judge has a direct pecuniary interest in the case. Requiring judges to recuse themselves based on campaign spending would replace the presumption of impartiality traditionally accorded to judges with a presumption of corruption, and by basing recusal on past rather than present circumstances, would limit a judge's ability to control the circumstances under which she must recuse.

Attempts to justify mandatory recusal as a means of preventing corruption fail, as they typically confuse correlation with causation. Contributions might be used as a means of influencing judges, or it might be that people contribute to candidates who they believe share their values and views. There is no compelling evidence that judicial decisionmaking is improperly influenced by contributions, and the case that judges are improperly influenced by independent expenditures is even weaker. In any event, any risks posed to judicial impartiality by campaign spending are inherent in a State's choice to opt for judicial elections, so that any argument that such spending violates due process is functionally an argument that judicial elections are unconstitutional.

Nor can mandatory recusal be justified as a means of preserving public confidence in the judiciary. In addition to threatening actual impartiality, campaign spending is said to threaten the perception of impartiality by the general public. While polling data reveals a healthy skepticism from the public as to the role of money in politics, the same surveys indicate that this generalized cynicism has not translated into a loss of public confidence in the courts. The courts are consistently among the highest-ranked institutions in terms of public confidence.

Far from preserving judicial impartiality, mandating recusal based on campaign spending has the potential to impede the swift execution of justice and undermine public confidence in the judiciary. Mandating recusal based on campaign spending could increase exponentially the cases where recusal is required, which would not only pose severe burdens on litigants and judges, but could bring the judiciary into disrepute. Requiring mandatory recusal based on campaign spending also leaves judges vulnerable to strategic action by potential parties and their attorneys.

These problems cannot be avoided by requiring recusal only in exceptional cases. In fact, adopting an amorphous test for when recusal is required would add a new level of uncertainty to the legal process and could lead to an even greater increase in recusal requests. And if recusal is required based on campaign spending, then it is hard to see why the same principle would not require recusal of a judge based on the support they received during a confirmation battle or during the appointment process.

Before the Court
The Justices Weigh in During Oral Arguments

At 10:15 a.m. on March 3, 2009, the U.S. Supreme Court heard oral arguments for case number 08–22, *Hugh M. Caperton,* et al. *v. A.T. Massey Coal Company, Inc.,* et al. At 11:18 a.m., arguments concluded and the case was submitted for judgment. Following are excerpts from the arguments of Theodore B. Olson, counsel of record for Caperton, *et al.*, and Andrew L. Frey, counsel of record for A.T. Massey Coal Company, Inc., *et al*. Questions are presented from the nine Supreme Court Justices.

Argument on Behalf of Hugh M. Caperton, *et al.*

MR. OLSON: A fair trial in a fair tribunal is a fundamental constitutional right. That means not only the absence of actual bias, but a guarantee against even the probability of an unfair tribunal. In short—

JUSTICE SCALIA: Who says? Have we ever held that?

A: You have said that in the [*in re*] *Murchison* [1955] case and in a number of cases, Your Honor.

JUSTICE SCALIA: A guarantee against even—

A: Yes, the language of the *Murchison* case specifically says so. The Court said in that case: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases, but our system of law has always endeavored to prevent even the probability of unfairness." And in that paragraph, the Court goes on—

JUSTICE SCALIA: "Has always endeavored."

A: Pardon?

JUSTICE SCALIA: "Has always endeavored." And there are rules in the States that do endeavor to do that.

A: But the Court has said that frequently, not only the probability of bias, the appearance of bias, the likelihood of bias, the inherent suspicion of bias. The Court has repeatedly said that in a series of contexts or cases.

CHIEF JUSTICE ROBERTS: "Probability" is a loose term. What percentage is probable—

A: Well—

CHIEF JUSTICE ROBERTS: If you've a 50 percent chance of bias, a 10 percent chance? Probable means more than 50?

A: It's probable cause, Mr. Chief Justice. The Court frequently decides questions involving due process, equal protection, probable cause, speedy trial, on the basis not of mathematical certainty, but in this case where an objective observer, knowing all of the facts, would come to the conclusion that a judge or jurist would probably be biased against that individual or in favor of his opponent. That would be sufficient under the Due Process Clause, we submit. The Court—

JUSTICE GINSBURG: Does it mean the same thing as likelihood of bias?

A: The Court, Justice Ginsburg, has used the changes interchangeably. We think the "probable" standard is the one we would advance to this Court. But the seminal case, the *Tumey* [*v. Ohio* (1927)] case, said that even if there was a possibility, any procedure where there would

be a possible temptation for the judge not to hold the balance nice, clear, and true, would be the standard. But in the *Aetna v. Lavoie* [1986] case not very many years ago, the Court repeated that standard, and that standard has been repeated again and again: the likelihood or the possibility or even the temptation.

JUSTICE SCALIA: And you claim that there is such a temptation here because of gratitude?

A: Well—

JUSTICE SCALIA: You've been around Washington a long time. How far do you think gratitude goes in the general political world?

A: Well, let me put it this way, Justice Scalia. If an ordinary person would say that it would be very difficult for a judge to hold the balance nice, square, and true when that judge has just been put on the bench during the pendency of the trial of the case by his opponent's contribution of $3 million to his election—

JUSTICE SCALIA: Yes, but that person contributed money to my election because he expected me to be a fair and impartial judge. And I would be faithful to that contributor only by being a fair and impartial judge. That is showing gratitude. I should do what he expected me to do, and I have no reason to think he expected me to lie and distort cases in order to come out his way. What I expected he wanted me to do was to be a good judge, and I'm being faithful to him and I'm showing my gratitude by being a good judge.

A: Well, I would go back to the words of this court in the *Tumey* case, the seminal case: "Due process is not satisfied by the argument that men of highest honor and greatest self-sacrifice could carry it out without danger of injustice."

JUSTICE SCALIA: It isn't a matter of honor and sacrifice. You talk as though what gratitude consists of is coming out in favor of this fellow, but that is not necessarily what gratitude consists of. Gratitude consists of performing the way this person would like me to perform. Now, in this case, I will acknowledge that you seem to have a contribution based upon more. This contributor never even met the judge, did he?

A: Well, it's not clear. There is a—

JUSTICE SCALIA: They're certainly not good buddies.

A: We're not claiming that there is a basis based on personal relationship, Your Honor.

JUSTICE SCALIA: And his contributions, as I understand it, were mainly based upon his opposition to the incumbent, who he thought was an activist judge that was distorting the tort law of the State, all in favor of the plaintiffs' bar. And if the contribution were to engender any gratitude, it seems to me it would simply be that this other candidate would do what he promised in his campaign and that is not be an activist judge and not distort the tort law of the State.

Argument on Behalf of A.T. Massey Coal Company, Inc., *et al.*

JUSTICE GINSBURG: How is it this Court's decision in the *Republican Party of Minnesota* [*v. White* (2002)] said that judges could say anything, just as a legislator? Are you extending that notion that an election is an election to this area of the appearance of impropriety? I mean, is it your position that the judge is elected just like a legislator is elected, and legislators all the time are beholden to interest groups?

MR. FREY: Well, of course, I don't agree that Justice Benjamin was in the least beholden to anybody in this case. But the *Republican Party* case was a case about the First Amendment right of candidates in an election to speak their position on issues. I'm not sure that I

follow what this has to do with this case. But I will say that this is not a case about appearances. The petition was about appearances. The other side has withdrawn or it has abandoned an appearance argument, and with good reason because the Due Process Clause—

JUSTICE STEVENS: Mr. Frey, is it your position that the appearance of impropriety could never be strong enough to raise a constitutional issue?

A: Well, we might have appearance of impropriety overlapping with conditions that would justify—

JUSTICE STEVENS: I'm assuming appearances only. Are you saying that appearances without any actual proof of bias could never be sufficient as a constitutional matter?

A: I think we are.

JUSTICE STEVENS: Is that your position?

A: We are saying that the Due Process Clause does not exist to protect the integrity or reputation of the State judicial systems.

JUSTICE STEVENS: That's not an answer to my question. Supposing, for example, the judge had campaigned on the ground that he would issue favorable rulings to the United Mine Workers, and the United Mine Workers campaigned, raising money saying, we want to get a judge who will rule in our favor in all the cases we're interested in. Would that create an appearance of impropriety?

A: Well—

JUSTICE STEVENS: Or take another example. The Chief Justice asked what if there are 10 members of a trade association and they all contributed to get a judge to vote in their favor in a case that charged the 10 of them for violations of the Sherman Act, something like that. And if all 10 of them raise money publicly for the very purpose of getting a judge who would rule favorably in their favor, that would clearly create a very extreme appearance of impropriety. Would that be sufficient, in your judgment, to raise a constitutional issue?

A: If you thought there was no basis for believing there was actual bias, but it looked bad—

JUSTICE STEVENS: No, it would meet the test in the judges' brief of an average judge would be tempted under the circumstances. That's the test that the Conference of Chief Justices judges. And do you think that just appearance could ever raise a due process issue?

A: No, I don't think just appearance could ever raise a due process issue.

JUSTICE STEVENS: No matter how extreme the facts?

A: The question is whether there is actual bias of a kind that is recognized as disqualifying. The Court has recognized—

JUSTICE STEVENS: The whole point of this case is it has not been recognized. We have never confronted a case as extreme as this before. This fits the standard that [Justice] Potter Stewart articulated when he said, "I know it when I see it."

A: I would take exception to the characterization of this case.

JUSTICE SCALIA: I don't think we adopted his principle, did we, in the obscenity area?

JUSTICE STEVENS: The question is not whether we have, but whether we should.

A: I hope to address that question. Let me start off by pointing out, as Justice Benjamin said in his opinion on discussing the recusal issue, his July opinion, which I commend to the Court, he is being asked to recuse on the basis of activities of a third party over which he had no control, in a case whose disposition offers him no current or future personal benefit, and where he has no personal connection with the parties or their counsel, has expressed no opinion about any of them. He has done nothing that would call into question his objectivity, his impartiality. I

think that's a very important point.

JUSTICE SOUTER: Well, as I understand it, although I don't think you ever directly answered it, I understood you to imply in response to Justice Stevens that there would be no appearance problem that would ever justify a constitutional standard.

A: Yes, but appearance is a nonconstitutional statutory standard for recusal in virtually every State and in the Federal system, so—

JUSTICE SOUTER: Yes. And we have an appearance standard under the ABA [American Bar Association] Canons, but I think it would be difficult to make a very convincing argument that that standard was effective in this case.

A: Well, that's a matter of opinion.

JUSTICE SOUTER: Well, it's the matter of opinion that brings the case before us. I am not asking you to agree that the ABA standard was violated. That's not what you're here for. But would you agree that the ABA standard is certainly implicated by the facts of this case, whatever the ultimate recusal decision should have been?

A: I think I would agree that reasonable people could have a different view one way or the other about whether there is an appearance of impropriety for Justice Benjamin sitting. I would agree with that. I don't think I would go further than that because my personal view is that there was no impropriety, that it was reasonable, and if you read his opinion I think you'll see a fair, balanced, thoughtful statement of the reasons why he feels he could sit.

Supreme Court of the United States

John D. Roberts, Chief Justice
State: Maryland
Appointed by: G.W. Bush
Appointment Date: September 29, 2005

John Paul Stevens
State: Illinois
Appointed by: Ford
Appointment Date: December 19, 1975

Antonin Scalia
State: Virginia
Appointed by: Reagan
Appointment Date: September 26, 1986

Anthony M. Kennedy
State: California
Appointed by: Reagan
Appointment Date: February 18, 1988

David H. Souter
State: New Hampshire
Appointed by: G. Bush
Appointment Date: October 9, 1990

Clarence Thomas
State: Georgia
Appointed by: G. Bush
Appointment Date: October 23, 1991

Ruth Bader Ginsburg
State: New York
Appointed by: Clinton
Appointment Date: August 10, 1993

Stephen Breyer
State: California
Appointed by: Clinton
Appointment Date: August 3, 1994

Samuel A. Alito, Jr.
State: New Jersey
Appointed by: G. W. Bush
Appointment Date:
January 31, 2006

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