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SUPREME COURT OF THE STATE OF WASHINGTON

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| In re | ) | NO. 200,577-2 |
| | ) | |
| BRADLEY R. MARSHALL, | ) | ADDITIONAL AUTHORITIES |
| | ) | IN SUPPORT OF |
| | ) | SUPREME COURT |
| Lawyer, | ) | DISQUALIFICATION |
| | ) | |
| | ) | |
| WSBA No. 15830 | ) | |

COMES NOW the appellant Bradley R. Marshall and submits the document described below and attached hereto as additional authority under Rule 10.8 of the Rules of Appellate Procedure:

> *Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. v. A.T. Massey Coal Company, Inc., et al.* **(BRIEF AMICI CURIAE OF 27 FORMER CHIEF JUSTICES IN SUPPORT OF PETITIONERS)**

The opinion of the Supreme Court of Appeals of West Virginia is not yet published but is electronically reported at 2008 W. Va. LEXIS 22. J.A. 485a. This matter was argued in March, 2009 before the United States Supreme Court on certiorari and the opinion of the Court is expected in July, 2009.

DATED: April 14, 2009.

BRADLEY R. MARSHALL
Appellant



ORIGINAL

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DECLARATION OF SERVICE AND FILING

On this day I provided a copy of the foregoing Additional Authorities in Support of Supreme Court Disqualification via email and posted a copy on April 15, 2009 with the U.S. Postal Service addressed to:

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On this date the said document was sent via email for filing with the Clerk of Court as follows:

Mr. Ronald Carpenter, Clerk
Washington State Supreme Court
Email address: supreme@courts.wa.gov

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Seattle, Washington on April 14, 2009.

Kay Gordon, Assistant to
Bradley R. Marshall, Appellant

American Bar Association
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No. 08–22

IN THE

# Supreme Court of the United States

HUGH M. CAPERTON, HARMAN DEVELOPMENT CORPORATION, HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.,

*Petitioners,*

v.

A.T. MASSEY COAL COMPANY, INC., ET AL.,

*Respondents.*

On Writ of Certiorari to
the Supreme Court of Appeals of West Virginia

## BRIEF *AMICI CURIAE* OF 27 FORMER CHIEF JUSTICES AND JUSTICES IN SUPPORT OF PETITIONERS

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## STATEMENT OF INTEREST[1]

This brief is filed by 27 former chief justices and justices of 19 state supreme courts, all but one of which states elect their supreme court justices.[2] *Amici curiae,* all now former or retired judges, are:

| | |
|---|---|
| Alabama: | Chief Justice C.C. Torbert |
| Arkansas: | Justice David Newbern |
| Georgia: | Justice Norman Fletcher |
| Idaho: | Chief Justice Charles McDevitt, Justice Byron Johnson. |
| Louisiana: | Justice Harry T. Lemmon |

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or counsel for amici contributed monetarily to the preparation and submission of this brief. Counsel for petitioners and counsel for respondents have each filed with the Court a letter of consent to filing of amicus curiae briefs.

[2] Missouri uses the eponymous Missouri plan for initial selection, with periodic retention elections. The states of all other amici are election states.

| | |
|---|---|
| Michigan: | Chief Justice Conrad L. Mallett, Jr. |
| Minnesota: | Chief Justice A.M. Keith, Chief Justice Kathleen Blatz, Chief Justice Russell Anderson |
| Missouri: | Chief Justice Edward D. Robertson, Jr. |
| Montana: | Chief Justice Jean A. Turnage, Justice John Sheehy |
| Nevada: | Chief Justice Robert Rose |
| North Carolina: | Chief Justice James Exum, Chief Justice I. Beverly Lake, Jr. |
| North Dakota: | Justice Herbert L. Meschke, Justice Beryl Levine |
| Ohio: | Justice Herbert R. Brown |
| Oregon: | Chief Justice Edwin J. Peterson |
| Pennsylvania: | Chief Justice Emeritus John P. Flaherty |
| Texas: | Justice Raul Gonzalez |

| | |
|---|---|
| Washington: | Chief Justice Robert Utter, Chief Justice Vernon Pearson, Chief Justice Richard Guy |
| West Virginia: | Chief Justice Richard Neely |
| Wisconsin: | Justice Louis Butler |

*Amici*[3] have been candidates in contested supreme court elections. The states in which *amici* were elected use a variety of elections. Some *amici* were elected in non-partisan elections and some in partisan elections. Most *amici* campaigned in elections in which applicable canons of judicial conduct prohibited them from directly soliciting campaign contributions while others were permitted to directly solicit campaign contributions and did so. Some *amici* declined to accept any campaign contributions while others accepted contributions through campaign committees formed in support of their election.

The respective merits of the different systems for selecting judges and justices are not at issue here. But *amici* hold a variety of views on the ideal method of selection, some preferring partisan

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[3] The experiences and opinions of these former chief justices and justices are many and varied. When this brief recites the experience of "*amici*," the reference is to two or more *amici*. If all *amici* are intended, the brief makes this clear through "all *amici*" or similar wording.

election, some non-partisan election, while others prefer an appointive process, either with or without the involvement of a commission. Whatever system may be ideal, *amici* submit that it would be extremely difficult to alter the method of selection within their respective states, and most *amici* estimate the chances of change within their respective states as non-existent or very small.

Some *amici* served in states in which spending in supreme court elections had already spiraled out of control. Even in states in which judicial election spending remains at traditionally modest levels, *amici* believe that a careful decision from this Court will help to limit judicial campaign support to reasonable levels, serving as something of a vaccination against the plague of massive campaign fund raising and spending by special interests.

All *amici* view with alarm the increasing expense of mounting a serious campaign for election to a state supreme court, and with even greater alarm the increasing level of independent expenditures in these elections. Having devoted a significant part of their professional careers to the public service of administering justice, *amici* deeply care that the courts on which they served continue to decide cases with scrupulous impartiality. *Amici* offer their views based on personal experience to assist this Court in applying the due process clause to these issues.

## SUMMARY OF ARGUMENT

*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* suggests 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.

## ARGUMENT

### A. The appearance of fairness is an essential component of a judge's determination of the judge's own subjective ability to be fair.

A judge considering whether to recuse from a case considers first the judge's own subjective opinion whether he or she can decide fairly. But every judge is first and foremost a human being, not a detached and unemotional law machine. We are all fundamentally incapable of complete impartiality and indifference. The inescapable consequence is that there is a class of cases in which the judge incorrectly believes himself or herself to be impartial, blind to some innate or long-standing bias. The appearance of fairness guards against this unintended bias by requiring a judge to recuse from a case when a reasonable person would perceive an appearance of impropriety.

Legal writers have commented on the biases that can infect a judge's decisions.[4] One observed:

> [A] judge does not shed the attributes of common humanity when he assumes the ermine. The ordinary human mind is a mass of prepossessions inherited and acquired, often none the less dangerous because unrecognized by their possessor . . . .[A judge] must purge his mind not only of partiality to persons, but of partiality to arguments, a much more subtle matter, for every legal mind is apt to have an innate susceptibility to particular classes of arguments.

Lord MacMillan, *Law and Other Things* 217-18 (1937). Jerome Frank noted the peculiarly individual factors that can influence decisions: "these uniquely, highly individual, operative influences are far more subtle, far more difficult to get at. Many of them, without possible doubt, are unknown to anyone except the judge. Indeed, often the judge himself is unaware of them." Jerome Frank, *Courts on Trial* 151 (1950). Justice Frankfurter similarly commented that, "judges are also human, and we know better than did our forebears how powerful is the pull of the

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[4] These examples come from Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 Iowa L. Rev. 1213, 1251 n. 175 (2002).

unconscious and how treacherous the rational process." *Pennekamp v. Florida*, 328 U.S. 331, 357 (1946) (Frankfurter, J., concurring).

More recently, researchers have commented on the unconscious nature of many biases, pointing out that even judges who believe themselves to be fair and unbiased may in fact harbor unrecognized prejudices.[5] Thus, biases may be explicit or implicit:

> Explicit measures of attitudes operate in a conscious mode and are exemplified by traditional self-report measures. Implicit attitudes, in contrast, operate in an unconscious fashion and represent introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects.[6]

A judge's subjective evaluation of impartiality protects only against explicit biases and attitudes. But a judge who bases recusal not only on a subjective evaluation of fairness, but also

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[5] Bassett, *supra* at 1248-50 and notes 176-84.

[6] *Id.* at 1249-50 (quoting John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. Experimental Soc. Psychol. 510, 511 n. 179 (1997)).

on a more objective appearance of fairness, preserves much more effectively the litigants' due process right to an impartial judge.

The appearance of impropriety is also an essential basis for recusal because it is difficult and awkward for a judge to admit actual bias. Admission of actual bias runs counter to the deeply ingrained obligation to be fair. Recusal based on the perception of impropriety allows a judge to avoid admitting actual bias, making recusal more acceptable.

*Amici* have recused from cases based on the appearance of impropriety, both on motion and *sua sponte*, even though they believed they could judge fairly. Recusal in such cases is an essential prophylactic to preserve the due process rights of the litigants. It is also an important means of preserving public confidence in the judiciary.

**B. Campaign contributions to elect judges were unknown to the common law and require a new paradigm for the application of due process.**

A judge's financial interest in the outcome of a case has for centuries been the clearest and most compelling, and at times only, basis for a judge to recuse from a case. *See* Brief *Amicus Curiae of Washington Appellate Lawyers Association in Support of Petitioners* at 11-15. In *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), this Court held that a defendant's right to due process of law was violated by trial by the mayor of the town without a jury

where the mayor was paid a portion of the fine in addition to his salary and the fines augmented the town's finances. In *Tumey*, this Court looked to the common law to define the contours of due process with respect to a judge whose compensation depended on a conviction. Finding no precedent for the practice, this Court found it contrary to due process of law. 273 U.S. at 524-26, 531-32.

Similarly here, there is no common law precedent for the practice of electing judges, let alone making substantial independent expenditures in support of the judge's election. This case thus presents a hybrid unknown to the common law—a party who spent money to benefit the judge, and a judge who did not actually receive the money, but did benefit by election to the office.

Novel practices call for new paradigms of due process analysis; otherwise, cleverly designed schemes and convoluted machinations would eviscerate the ancient protections of due process. But new paradigms should evolve from well-established precedents. The heart of the common law rule was disqualification of a judge who would enjoy a direct pecuniary benefit from the outcome of the case. The rule is based on a transfer of a pecuniary interest from a litigant to the judge. In this case, the Court is faced with a massive pecuniary expenditure by a party. But the judge is not the recipient of the money; rather, the judge benefits by obtaining judicial office or a renewed term of judicial office. The fact that the judge's

benefit is something other than money should not preclude the application of the due process clause.

Any candidate who undertakes to run for supreme court justice has a substantial interest in winning the election. Many of these elections are state-wide and all call for the investment of hundreds of hours of time gathering support, responding to questionnaires, appearing before editorial boards and judicial evaluation committees, seemingly endless speaking engagements across the state, making difficult decisions about spending limited campaign funds, attending candidate debates, and countless meetings and telephone calls with campaign supporters. Hundreds of hours of productive time are diverted from the candidate's employment or personal time, inevitably sacrificing family time and personal time. Most candidates invest at least some of their personal funds in their campaigns.

Substantial financial support for a judge's election benefits the judge as surely as, although less directly than, a direct pecuniary interest in litigation coming before the judge. And although the salary is far from the primary motivation for a judicial candidate to seek office, the salary gives the candidate a financial stake in winning the election. In short, the party that supports a judicial candidate invests money and the judge receives a benefit other than the money itself. This relationship raises the common law concern about pecuniary interest.

Substantial financial support for a judge's election also meets the test for recusal stated by this Court in *Tumey*, which does not require that the judge is actually influenced, but only that the procedure creates the danger:

> 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.

273 U.S. at 532.

*Amici* do not believe that due process requires a judge to recuse from any case in which a party gave any financial support to the judge's election (although some *amici* have refused to accept any financial contributions for their election campaigns). Rather, *amici* submit that due process is only triggered by substantial financial support for a judge's election. *Amici* do not believe it is necessary for the Court to define specifically what constitutes substantial financial support. Suffice it to say that the massive financial support provided by respondent Blankenship to the election of Justice Benjamin triggers due process concerns under any reasonable definition of substantial financial support.

It should make no difference to the analysis that the financial support was provided to Justice Benjamin before he heard the respondents' case, as opposed to contributions after Justice Benjamin decided the case favorably to respondents. This fact pattern is inherent in judicial elections—the judge must attain the office before hearing the supporter's case. Moreover, Justice Benjamin must stand for election again in the future. The continued support of respondents to his re-election is a factor that Justice Benjamin must eventually consider.

The ancient guarantee of due process is sufficiently flexible to extend to the recent innovation of massive independent expenditures in judicial elections. *Amici* respectfully submit that this Court should extend the common law prohibition against a judge sitting on a case in which the judge has a pecuniary interest to a case in which a party has supported the judge's election with massive independent expenditures.

### C. Applying the due process clause to this case will allow state supreme courts to adopt their own rules governing recusal where a party has provided substantial financial support for the judge's election.

The state supreme courts on which many *amici* sat have the responsibility to adopt the codes of ethical conduct governing judges and lawyers. Many of these courts are actively considering new

canons to provide much-needed guidance to judicial candidates and their supporters when financial support by a party becomes sufficiently high to require a judge or justice to recuse. Applying the due process clause to this case will allow the state supreme courts to proceed with this important rule-making function, and indeed, may even encourage it.

A holding by this Court will begin to define the due process limits for financial support by a party for the election of a judge. The state supreme courts can continue to craft rules establishing limits above which a sitting judge or justice would be required to recuse from sitting on the case and below which recusal would be entirely discretionary with the challenged judge or justice. Such rules would actually encourage reasonable financial support by providing a safe harbor within which a supporter could be reasonably confident that a judge would not be required to recuse from the supporter's cases.

Indeed, application of the due process clause may make it easier for state supreme courts to craft such rules. It can be difficult for state supreme courts to adopt rules that might discourage or diminish financial support to judicial candidates. All other things being equal, incumbent judges have a considerable advantage in judicial elections. Challengers argue that campaign contributions, the proverbial "mother's milk of politics," are essential to overcome the incumbent's advantage. Accordingly, when sitting judges consider any kind

of restriction on financial support, they may be accused of "protectionist" rules, an effort to protect their vested position and discourage any serious challenge. The opposite tendency can also be at work—an incumbent who expects substantial support from a particular interest group is loath to dissuade those supporters. These factors lead to a spiraling "arms race" in which competing interest groups invest more and more heavily in independent expenditures to elect justices they perceive as more sympathetic to their causes.

The Court should also make clear that states are free to set more stringent requirements than the limitations of the due process clause, so long as the financial support limits are high enough to permit a candidate to raise sufficient funds to mount a credible election campaign.

## CONCLUSION

*Amici* uniformly believe that the participation of Justice Benjamin in this case created an appearance of impropriety. *Amici* ask the Court to be mindful of the three underlying realities of recusal decisions discussed in this brief: no judge can be totally impartial and objective in considering a request that the judge recuse based on financial support during an election campaign; due process is sufficiently flexible to adapt to new developments that threaten judicial impartiality; and, application of the due process clause to this case will allow state supreme courts to continue to develop rules to provide much-needed guidance for

recusal decisions based on financial support for a judge's election.

Respectfully submitted.

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Dear Mr. Carpenter: Attached for filing is the third of six of appellant's Additional Authorities in Support of Supreme Court Disqualification, submitted under RAP 10.8 pursuant to your request.
Thank you for your courtesies.

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