

BRENNAN  
CENTER  
FOR JUSTICE

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October 9, 2009

**RECEIVED**

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**CLERK OF SUPREME COURT  
OF WISCONSIN**

Clerk of the Supreme Court  
Attn: Carrie Janto, Deputy Clerk  
Supreme Court of Wisconsin  
P.O. Box 1688  
Madison, Wisconsin 53701-1688

Re: Nos. 08-16 and 08-25,  
*In the matter of amendment of the Code of Judicial Conduct's rules on recusal*

Dear Ms. Janto:

On behalf of the Brennan Center for Justice at NYU School of Law<sup>1</sup>, I write to commend the Justices of the Supreme Court of Wisconsin for their leadership in examining when the financing and conduct of judicial campaigns may warrant recusal. Developing effective judicial disqualification rules is crucial to ensure continued public confidence in the judiciary's independence and impartiality – a need reflected by the U.S. Supreme Court's recent decision in *Caperton v. A.T. Massey Coal Co.*,<sup>2</sup> and by the growing number of state courts contemplating recusal practice reform. Against this backdrop, the Supreme Court of Wisconsin has an opportunity to provide national leadership by amending the Code of Judicial Conduct to include effective new recusal standards. To provide broader context for the Court's deliberations as it contemplates proposed new disqualification rules, the Brennan Center respectfully submits the following comments.

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<sup>1</sup> The Brennan Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Through the Brennan Center's Fair Courts Project we work to preserve fair and impartial courts and their role as the ultimate guarantor of equal justice in our constitutional democracy. Our research, public education, and advocacy in this area focus on improving selection systems (including elections), increasing diversity on the bench, promoting measures of accountability that are appropriate for judges, and keeping courts in balance with other governmental branches.

<sup>2</sup> 129 S. Ct. 2252 (2009).

*Introduction*

The burgeoning national discussion of the need for effective recusal standards is in many ways a response to the invitation by Justice Anthony Kennedy, in the U.S. Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*, for states to "adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards."<sup>3</sup> Justice Kennedy made that observation at a time when two clear trends were emerging in elections for judicial office. On the one hand, the amount of money in judicial races had dramatically increased.<sup>4</sup> At the same time, judicial elections had begun to witness an alarming upsurge in the involvement of third party groups, whose spending has often dwarfed that of the judicial candidates themselves.<sup>5</sup> The convergence of these trends has changed the tone of judicial elections across the country: once low-key, quiet, and civil contests, judicial elections have become "noisier, nastier and costlier,"<sup>6</sup> with negative campaign tactics and attack ads that are often indistinguishable from those seen in races for political office.

The increasing resemblance of judicial elections to traditional political contests, and the escalating sums spent in them, have unfortunately led many Americans to question the influence of money on the bench – to worry that that justice is "for sale." Strong and effective disqualification rules are central to combat these concerns, and to ensure that courts remain accountable the law instead of political pressure.<sup>7</sup> As the Conference of Chief Justices wrote in its *amicus* brief in *Caperton v. A.T. Massey Coal Co.*:

As judicial election campaigns become costlier and more politicized, public confidence in the fairness and integrity of the nation's elected judges may be

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<sup>3</sup> 536 U.S. 765, 794 (2002) (Kennedy, J., concurring).

<sup>4</sup> The trend toward increasingly expensive judicial elections has continued since *White* was decided in 2002. While in the decade from 1989-1998 state Supreme Court candidates nationally raised a total of \$85.4 million, in the last 10 years (from 1999-2008), they raised more than double that amount – a whopping \$200.4 million. Consistent with this aggregate increase, individual candidates also raised more money: During the earlier decade, 26 candidates (all but one of them from four states) raised more than \$1 million, while in 1999-2008, 66 candidates, from a dozen states, surpassed the \$1 million mark. The Brennan Center has partnered with the Justice at Stake Campaign and the National Institute on Money in State Politics to document the arms-race spending in judicial campaigns in a bi-annual series of reports entitled *The New Politics of Judicial Elections*, available on the Brennan Center's website at [http://www.brennancenter.org/content/resource/the\\_new\\_politics\\_of\\_judicial\\_elections\\_2006/](http://www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections_2006/).

<sup>5</sup> The most recent Supreme Court election in Wisconsin is illustrative of that trend: in that race, third party groups bought more than \$3 million dollars worth of television advertisements in the race – approximately 90% of all the television advertising involved in the race. See Press Release, Brennan Center for Justice, *Buying Time – Spending Rockets Before Elections* (Nov. 13, 2008), available at <http://tinyurl.com/ykcbk88>; Press Release, Justice at Stake, *Buying Time 2008: Television Advertising in State Supreme Court Elections* (Sept. 11, 2008), available at <http://tinyurl.com/yfuvqfq>.

<sup>6</sup> Richard Woodbury, "Is Texas Justice For Sale?: The State's Top Judge Resigns to Fight for Reform," *Time*, Jan. 11, 1988, at 74.

<sup>7</sup> While there is technically a distinction between "disqualification" and "recusal" – the former being mandatory and the latter voluntary – the difference is often blurred, and we use them interchangeably herein.

imperiled. Disqualification is an increasingly important tool for assuring litigants that they will receive a fair hearing before an impartial tribunal . . . .<sup>8</sup>

The Honorable Thomas R. Phillips, retired Chief Justice of the Supreme Court of Texas, recently echoed the point, noting that, “now as never before, reinvigorating recusal is truly necessary to preserve the court system that Chief Justice Rehnquist called the ‘crown jewel’ of our American experiment.”<sup>9</sup>

For several years, the Brennan Center has urged substantive and procedural reforms of recusal practice in the state courts. We have articulated, in particular, the crucial importance of reducing situations where judicial campaign conduct, campaign cash, or special interest pressure could cast the impartiality of judges into doubt. In 2008, we issued a comprehensive report, *Fair Courts: Setting Recusal Standards*, which details the increasing threats to the impartiality of state courts and the ways in which robust recusal standards may help to safeguard due process and public trust in the judiciary.<sup>10</sup> We also filed an *amicus curiae* brief in the U.S. Supreme Court in *Caperton v. A.T. Massey Coal Co.*, in which we argued that the Due Process Clause of the U.S. Constitution does not permit a judge to preside over a case in which a person with a personal stake in the litigation spent extraordinary sums to elect the judge while the case was pending.<sup>11</sup>

It is worth noting that stronger recusal standards enjoy overwhelming public support. A February 2009 national poll conducted for the Justice at Stake Campaign by Harris Interactive, for example, revealed that more than 80% of the public believes judges should avoid cases involving major campaign supporters. And 81% believe a disinterested judge should have the last word on recusal motions, not the judge whose objectivity is being challenged.<sup>12</sup> A USA Today/Gallup Poll also conducted in February 2009 reiterated these findings. It found that 89% of those surveyed believe the influence of campaign contributions on judges’ rulings is a problem. More than 90% of the respondents said judges should not hear a case if it involves an individual or group that contributed to the judge’s election campaign.<sup>13</sup>

Given our longstanding commitment to reforming recusal practice, we are grateful to the Supreme Court of Wisconsin for the leadership it has shown in examining the issue, and for permitting us to respond to the various proposals under consideration. We respectfully submit

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<sup>8</sup> *Caperton v. A.T. Massey Coal Co.*, Brief of Amici Curiae, The Conference of Chief Justices, in Support of Neither Party 4 (U.S. No. 08-22), available at <http://tinyurl.com/n7smjz>.

<sup>9</sup> James Sample, David Pozen & Michael Young, *Fair Courts: Setting Recusal Standards* 3 (2008) (“*Setting Recusal Standards*”), available at [http://www.brennancenter.org/content/resource/fair\\_courts\\_setting\\_recusal\\_standards/](http://www.brennancenter.org/content/resource/fair_courts_setting_recusal_standards/).

<sup>10</sup> See *id.* at 8-35.

<sup>11</sup> See *Caperton v. A.T. Massey Coal Co.*, Brief of Amici Curiae The Brennan Center for Justice, the Campaign Legal Center, and the Reform Institute (U.S. No. 08-22), available at <http://tinyurl.com/ydzo3qr>.

<sup>12</sup> Justice at Stake Campaign, Press Release, Poll: Huge Majority Wants Firewall Between Judges, Election Backers (Feb. 22, 2009), available at <http://www.justiceatstake.org/node/125>.

<sup>13</sup> See Joan Biskupic, “Supreme Court case with the feel of a best seller,” *USA Today*, Feb. 16, 2009.

BRENNAN CENTER FOR JUSTICE

the following comments on the pending proposals, and urge the Court to take a comprehensive approach to reforming disqualification practice in Wisconsin.

*The pending petitions provide a useful starting point as the Court considers new disqualification rules.*

The League of Women Voters of Wisconsin Education Fund (the “League”) and Wisconsin Realtors Association, Inc., (the “Realtors”) are to be commended for the initiative they have taken in petitioning the Court to address recusal in situations involving campaign support. The Brennan Center agrees that, given recent trends in the conduct of judicial elections, it is appropriate to rethink when it is appropriate for a judge to hear cases involving litigants from whom the judge has received substantial campaign support. And the Brennan Center agrees with both the League and the Realtors that the Supreme Court of Wisconsin should act now to bring clarity to this area, so that potential litigants know the consequences of their spending in support of candidates for judicial office.

The Brennan Center urges the Court to act promptly and adopt a rule addressing when a litigant’s campaign support for a judicial candidate warrants recusal. In developing such a rule, the Court should give particular attention to three issues: (1) the possibility that a mandatory recusal rule could encourage gamesmanship and judge-shopping; (2) the need for a rule to call for adequate disclosure of campaign support to ensure fully informed recusal decisions; and (3) the need for a rule to address both direct contributions to a judicial candidate and independent campaign spending.

*First*, were the Court inclined to adopt a *per se* rule calling for mandatory disqualification when a litigant has contributed a threshold amount to a judicial candidate, it is crucial that such a rule include a waiver provision to discourage gamesmanship. The idea of a mandatory disqualification threshold, contained in the League’s petition, is based on Rule 2.11(A)(4) of Canon 2 of the American Bar Association’s Model Code of Judicial Conduct. That rule, a form of which has been part of the Model Code since 1999, would require mandatory disqualification of any judge who has accepted contributions over a pre-determined threshold amount from a party appearing before her.

Under the ABA’s model rule, if the contribution level is set at a reasonable level – either the League’s proposed \$1,000 or some similar figure – parties or their lawyers could easily disqualify a disfavored judge by making contributions above that amount to his or her campaign committee. This gaming of the system, however, could be defeated by a waiver provision, under which any party whose litigation opponent made a disqualifying contribution to the judge is permitted to waive disqualification. Such a waiver provision, contained in the League’s proposal, would effectively address potential judge-shopping that could occur were the Court to adopt a *per se* disqualification rule.

*Second*, any rule that calls for recusal based on campaign spending must include adequate disclosure provisions. Without some minimum level of transparency designed to give judges information to which litigants may have much better access, it will be impossible for judges to make informed disqualification decisions.

Recognizing this principle, federal rules require that nongovernmental corporate parties appearing in federal court file a statement identifying any parent corporation or publicly held corporation that owns a significant portion of the corporate party's stock early on in a court proceeding.<sup>14</sup> The Court could adopt a similar rule requiring all litigants and their attorneys to file an affidavit at the outset of litigation in which they disclosed specific information relevant to a disqualification decision, including information about campaign contributions and independent expenditures. Judges are already called upon to disclose information they possess that is relevant to recusal;<sup>15</sup> requiring similar disclosure by litigants of information solely in their hands would increase transparency. Such a requirement could be tailored to require only disclosures of spending beyond a minimum threshold, just as the federal rules require disclosure only of ownership interests that cross a specified threshold of materiality. And it would not require parties to file reports of all their campaign expenditure, as it would only come into play when a party who had spent in support of a particular judge appeared before that same judge.

*Finally*, to effectively address the effects that excessive campaign spending can have on the public perception of an independent and impartial judiciary, any recusal rule the Court adopts should reach both direct campaign contributions and independent expenditures. The *Caperton* case offers the clearest example of why both forms of spending must be addressed. In *Caperton*, the U.S. Supreme Court held that, given Don Blankenship's expenditure of approximately \$3 million to support Brent Benjamin's campaign for West Virginia's highest court, it was necessary for Justice Benjamin to recuse himself from Mr. Blankenship's case. But, of the \$3 million Blankenship spent, only \$1,000 took the form of a direct contribution to then-Judge Benjamin's campaign. The remainder comprised independent expenditures Blankenship made either directly or through an independent "527" organization. The Supreme Court's decision in *Caperton* recognized that substantial campaign spending can lead to reasonable questions about a judge's impartiality, whether the spending takes the form of direct contributions or independent expenditures.

The close relationship – if not equivalence – of contributions and independent expenditures in the context of judicial elections, and its potential impact on perceptions of judicial impartiality, means that a good recusal rule should reach both types of spending. Accordingly, a rule providing that recusal is not warranted so long as a party's campaign *contributions* are below a given threshold could effectively create a presumption against recusal in that situation, even if the same party made extraordinary *expenditures* that would lead an objective observer to question a judge's impartiality. The Realtors' proposal, which provides that a judge shall not be disqualified *solely* because of a legal campaign contribution, of course leaves open the possibility that a judge who received a lawful contribution might still recuse because of extraordinary independent spending by a litigant. But such a proposal, by remaining silent on independent expenditures, could create a presumptive "safe harbor" in which recusal was never contemplated because of campaign contributions, regardless of the level of independent spending. *Caperton* demonstrates why this would be problematic.

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<sup>14</sup> See, e.g., Fed. R. Civ. P. 7.1 & advisory committee note; Fed. R. App. P. 26.1 & historical amendment notes.

<sup>15</sup> See Wisc. S.C.R. § 60.04(4), cmt. ("A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of recusal, even if the judge believes that there is no real basis for recusal.").

We urge the Court to adopt a rule that addresses all forms of campaign spending. Indeed, the preferred rule would call on judges assessing disqualification to consider the totality of circumstances surrounding a litigant's campaign spending – including not just the gross amount spent on contributions and expenditures, but also the relative size of the party's contributions in comparison to the total amount of money contributed to the campaign; the ratio of the party's spending to the total amount spent in the election; the apparent effect of the party's spending on the results of the election; and whether the party's spending occurred while the litigation in question was pending or imminent.<sup>16</sup>

The application of such a rule to the myriad situations presented in today's campaign environment would, of necessity, be developed on a case-by-case basis. Such a rule would, therefore, be less easily applied than a simple, mechanistic one that would determine whether disqualification is compelled based on whether a single type of spending fell above or below a pre-determined threshold. But it would more effectively respond to the range of forms that modern campaign support can take, and would be less vulnerable to circumvention by litigants intent on gamesmanship and judge-shopping.

In addition to the issues raised directly in the petitions of the League and the Realtors, there are a number of other potential measures that would strengthen a comprehensive recusal rule.

*The Court should create a mechanism to afford meaningful and timely review of recusal decisions by individual judges.*

Permitting a judge whose objectivity is challenged to have the last word his or her own disqualification motions may undermine public confidence in the impartiality and legitimacy of the judicial process. Accordingly, Illinois and several other states require that motions for disqualification be independently adjudicated.<sup>17</sup> The Brennan Center believes that such an approach enhances procedural integrity and fosters increased public trust in the judicial system. But even where a judge makes the initial decision on his or her own recusal challenges, as in Wisconsin, it is possible to establish safeguards against partiality by providing for meaningful review of a judge's resolution of requests for his or her own recusal. A variety of mechanisms, discussed below, could provide for input into – or review of – the initial recusal decision; the key common feature is the review of a judge's subjective recusal decision by requiring a disinterested “second opinion” before a recusal decision is finalized.

Wisconsin law currently provides for the target judge to make an initial, subjective decision with respect to recusal.<sup>18</sup> The plain text of Wisconsin's recusal statute, however, also indicates that there is an objective test that must be applied in determining whether disqualification is warranted: it provides that a judge should be disqualified if “*it appears* he or she cannot . . . act

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<sup>16</sup> See generally *Caperton*, 129 S. Ct. at 2263-64.

<sup>17</sup> See, e.g., Ariz. R. Crim. P. 10.1; 725 Ill. Comp. Stat. § 5/114-5(d); 735 Ill. Comp. Stat. § 5/2-1001(a)(3); Ohio Rev. Code Ann. § 2701.03; Nev. Rev. Stat. Ann. § 1.225.

<sup>18</sup> See Wisc. Stat. § 757.19(2)(g); see also *State v. Harrell*, 199 Wis. 2d 654 (1996).

in an impartial manner.”<sup>19</sup> The Code of Judicial Conduct confirms the importance of this objective test. It provides that a judge shall recuse “when, reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances . . . would reasonably question the judge’s ability to be impartial.”<sup>20</sup> The objective test requires an “assessment of the risk that a judge, despite the very best of intentions, might not be capable of holding ‘the balance nice, clear and true’ under the facts and circumstances.”<sup>21</sup>

Though the Supreme Court of Wisconsin had recognized the importance of the objective test in *State v. Walberg*,<sup>22</sup> it later concluded in *State v. American TV & Appliance*<sup>23</sup> that Wisconsin law did *not* require an objective assessment of whether a judge’s impartiality might reasonably be questioned. This, for the reasons articulated by Chief Justice Abrahamson in *State v. Harrell*,<sup>24</sup> was unfortunate. It excised the half of Wisconsin’s disqualification statute that plainly calls for recusal when “it appears” that a judge cannot act impartially, and it renders the parallel segment of the Code of Judicial Conduct a nullity. Indeed, as the court of appeals observed, if Wisconsin’s disqualification statute is read to include only a subjective test, it means that “even when a judge commits ethical violations by presiding over a case, his actions do not constitute grounds for recusal.”<sup>25</sup>

We urge the Court to clarify the importance of the objective component of the disqualification standard. The excision of the objective test from Wisconsin’s recusal statute accomplished in *American TV* is unfortunate not only because it conflicts with the statute’s plain language and the conflict it causes a clash between the statute and ethical canons, but also because it is undesirable policy. Having a second, objective opinion inform a disqualification assessment is crucial to ensuring public confidence in judicial impartiality. It eliminates the bad atmospherics that may occur when a judge issues a final order on recusal after “deliberating” with him or herself alone.

An objective, second opinion could be introduced into recusal deliberations either before or after the target judge makes an initial, subjective decision. On the front end of the process, a challenged judge could be required to consult a recusal advisory body before rendering his or her decision, or to consult with at least one colleague on the bench.

Just as many states, bar associations, and other groups have created non-binding advisory bodies to serve as a resource for candidates on campaign-conduct questions, a similar model might be followed with respect to recusal. An advisory body could identify best practices and

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<sup>19</sup> *Id.*

<sup>20</sup> Wisc. S.C.R. § 60.04(4).

<sup>21</sup> *State v. Harrell*, 199 Wis. 2d 654, 666 (1996) (Abrahamson, J., concurring) (quoting *Aetna Life Ins. Co. v. LaVoie*, 475 U.S. 813, 825 (1986)).

<sup>22</sup> 109 Wis. 2d 96 (1982), *rev’d on other grounds*, 766 F.2d 1071 (1985).

<sup>23</sup> 151 Wis. 2d 175 (1989).

<sup>24</sup> 199 Wis. 2d 654 (1996).

<sup>25</sup> *State v. Carviou*, 154 Wis. 2d 641, 644 (Ct. App. 1990).

encourage judges to set strong standards for themselves. In a recusal process incorporating a non-binding advisory body, judges would retain the authority to rule on disqualification motions but would be encouraged to seek guidance from the advisory body before ruling. A judge relying on an advisory body's recommendation not to recuse would enjoy an extra level of public defense if a disgruntled party criticized a decision not to step aside. Parallel benefits would be gained by a rule that required a judge to consult and receive an opinion from a colleague, or colleagues, before ruling.

In the alternative, meaningful objective review of a judge's initial recusal decision could be achieved through immediate review of recusal decisions. We would urge the Court to consider establishing a mechanism by which a judge's initial decision on recusal could be promptly, and meaningfully reviewed – either by a single disinterested judge or justice, or by a panel. To be most effective, such review should take place immediately upon the issuance of a recusal decision, not after the proceeding has run its full course. And because review of a disqualification decision may offer little genuine protection against partiality if that review is conducted under a perfunctory abuse-of-discretion standard, *de novo* review is appropriate. Such scrutiny of disqualification decisions represents another important means by which to ensure the integrity of the adjudicative process for litigants and the public at large.

*All disqualification decisions should be in writing and should explain the grounds for the decision.*

To facilitate transparency and the possibility of meaningful review, all disqualification decisions should be explained in writing. Although Wisconsin law provides that, when a judge determines she should recuse herself from hearing a case, the judge “shall file in writing the reasons”<sup>26</sup> why she has reached that decision, the statutes do not require a written explanation by a judge who has concluded disqualification is not warranted. And while the commentary in the Code of Judicial Conduct endorses the disclosure of relevant information even when a judge declines to recuse,<sup>27</sup> strengthening the Code's provisions on this issue would be beneficial.

It is critically important — for litigants, for the courts, and for the public at large — that disqualification decisions include transparent and reasoned decision-making. As explained in the Brennan Center's recusal report, a failure to explain recusal decisions “allows judges to avoid conscious grappling with the charges made against them” and “offends not only a basic tenet of legal process, but also a basic tenet of liberal democracy — that officials must give public reasons for their actions in order for those actions to be legitimate.”<sup>28</sup> Such a failure also makes it far more difficult for those reviewing a specific disqualification decision to understand the underlying rationale or facts, and denies other judges, justices, and courts both precedent for use in other cases and the chance to build on this precedent in developing a more refined body of disqualification jurisprudence.

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<sup>26</sup> Wisc. Stat. § 757.19(5).

<sup>27</sup> See Wisc. S.C.R. § 60.04(4), cmt. (“A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of recusal, even if the judge believes that there is no real basis for recusal.”).

<sup>28</sup> *Setting Recusal Standards* at 32 (footnote omitted).



Requiring judges to explain the reasons they recuse themselves, as Wisconsin statutes mandate, is important. Requiring an explanation when a judge declines to recuse is equally important – if not more so. Without a judge’s explanation of his or her reasons for denying a given recusal request, collateral review of that decision will be an illusory, empty exercise at best. And, as explained above, without such review – by another judge on the same bench, by an advisory panel, or by some appellate review – it is not possible to evaluate whether disqualification is required under the appropriate, objective test. For these reasons, we would urge the Court to consider a more robust rule, requiring a judge to set forth in writing the reasons he or she has declined a request to recuse.

*An effective recusal rule need not carve out special protections for justices’ campaign speech.*

In *Republican Party of Minnesota v. White* the U.S. Supreme Court held that a clause in the Minnesota Code of Judicial Conduct prohibiting judicial candidates from announcing their views on disputed legal or political issues unconstitutionally abridged the First Amendment rights of those candidates. Although the majority opinion recognized that judicial impartiality might represent a sufficiently compelling state interest to justify restraints on speech in certain circumstances, the Supreme Court concluded that the clause in question was not narrowly tailored to address that interest.<sup>29</sup>

*White* concerned a restriction placed on judges or judicial candidates insofar as they were campaigning for judicial office. It did not suggest, much less hold, that a judicial candidate’s free speech rights trump litigants’ due process rights once that candidate has taken the bench. Nor did *White* otherwise restrict how a state may choose to promote and protect the impartiality of its courts through disqualification rules. To the contrary, as Justice Kennedy suggested in his concurrence in *White*, states concerned that unfettered judicial campaign conduct may undermine the real and perceived impartiality of the courts are free to adopt disqualification standards “more rigorous than due process requires, and censure judges who violate these standards.”<sup>30</sup>

A rule under which certain campaign spending triggers recusal need not interfere with either the First Amendment speech of judicial candidates or the associational rights of candidates and their supporters. Indeed, such a rule need not have any impact on First Amendment activities that take place during campaigns. Rather, it would recognize – as the Supreme Court did in *Caperton* – that when a campaign supporter appears in court before a judge he has supported, the First Amendment rights implicated during the campaign do not rest alone on the balance; they must be weighed against the opposing party’s constitutional right to Due Process. Stated differently, while the First Amendment may protect the rights of judicial candidates to speak out on the issues of the day and the rights of contributors to associate with candidates they support, it does override the non-supporter’s right to a fair and impartial tribunal. The First Amendment does not entitle any party to choose what judge will hear her case.

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<sup>29</sup> 536 U.S. at 775-81.

<sup>30</sup> *Id.* at 794 (Kennedy, J., concurring).

BRENNAN CENTER FOR JUSTICE

*Finally, the Court should consider a rule that will promote increased and uniform data collection and dissemination.*

To increase transparency and consistency in the disqualification process, we urge the Court to adopt a rule that will lead to the collection and publishing of uniform data on disqualification motions and their dispositions, including the disqualification histories of individual judges. In the short term, such data would be useful to litigants who could review the disqualification history of any judge involved in their case. In the longer term, increased data collection would facilitate meaningful analysis of the impact of specific disqualification policies in Wisconsin, and – as other states adopt similar measures – comparative analysis of disqualification policies across jurisdictions.

Several of the foregoing proposals, as well as additional suggestions for recusal reform, are described at greater length in the Brennan Center's report, *Fair Courts: Setting Recusal Standards*, and in the Brennan Center's more recent analysis, *Setting Recusal Standards after Caperton v. A.T. Massey Coal Company*.<sup>31</sup>

*Conclusion*

To function effectively and ensure public confidence, the judiciary must keep the promise of dispensing fair and impartial justice. The articulation of clear, enforceable rules governing judicial disqualification is an important means for doing just that. The Brennan Center commends the Court for its attention to this important issue, and for its national leadership.

We also greatly appreciate the opportunity for public comment, and hope that the Court finds the foregoing useful as it considers amending the Code of Judicial Conduct's rules on recusal. We would be delighted to answer any questions the Court may have, or to provide any additional information, either before or during the public hearing scheduled for October 28, 2009.

Respectfully submitted,



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<sup>31</sup> Brennan Center for Justice, *Setting Recusal Standards after Caperton v. A.T. Massey Coal Company* (2009), available at [http://brennan.3cdn.net/a6252cfe16365afbb9\\_sim6bxrdd.pdf](http://brennan.3cdn.net/a6252cfe16365afbb9_sim6bxrdd.pdf).