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FAIR COURTS: SETTING RECUSAL STANDARDS

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EXECUTIVE SUMMARY

This paper takes its cue from Justice Anthony Kennedy's concurrence in the 2002 case of *Republican Party of Minnesota v. White*. In *White* (discussed in greater detail in the body of the paper), Justice Kennedy wrote that in response to dynamics perceived to threaten the impartiality of the courts, states "may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards." The need for states to heed Justice Kennedy's advice was critical in 2002 – and has only become more critical in the years since.

The paper describes the increasing threats to the impartiality of America's state courts and argues that they have been spurred by two trends: the growing influence of money in judicial elections and the dismantling of codes of judicial ethics that once helped to preserve the distinctive character of the judiciary, even during the course of campaigns for the bench. While acknowledging that more sweeping – and controversial – measures are ultimately needed to fully address the emerging threats to impartial courts, this paper focuses on how judges, courts, legislators, and litigants can maximize the due process protection that stronger recusal rules potentially afford. Technically, there is a difference between disqualification and recusal – disqualification is mandatory, recusal is voluntary – but the difference is often blurred because in the many jurisdictions in which judges adjudicate challenges to their own qualification to sit, disqualification functions essentially as recusal. In this paper, we use the terms interchangeably but distinguish between mandatory and voluntary removal of a judge from a case.

We first describe the trends undermining public confidence in the courts and explain how, in a recent decision, the United States Supreme Court exacerbated the impact of those trends. Second, we explain why current recusal practice is marked by underuse and underenforcement. Third, we examine the case of *Avery v. State Farm Mutual Insurance Company* as a means of illustrating the real-world implications of the dynamics discussed in the first two parts of the paper. In *Avery*, the plaintiffs were unable to remove a judge who, during his campaign, received substantial financial support from individuals and organizations closely associated with the defendant, *while the case was pending* before the court.

Finally, we offer ten proposals to strengthen the fairness and legitimacy of state recusal systems. Some of the procedures we recommend are already in place in some states. Others are more novel and demanding. All would help protect due process. The ten proposals are as follows:

1. Peremptory disqualification. Just as the parties on both sides of criminal trials are permitted to strike a certain number of people from their jury pool without showing cause, so might litigants be allowed peremptory challenges of judges. About a third of the states already permit counsel to strike one judge per proceeding. Simplicity is a significant advantage of peremptory disqualification, but the potential for gamesmanship is a concern. We argue that the cost-benefit analysis militates in favor of a carefully-crafted provision.

2. Enhanced disclosure. At the outset of litigation, judges could be required to disclose orally or in writing any facts, particularly those involving campaign statements and campaign contributions, that might plausibly be construed as bearing on their impartiality. Such a mandatory disclosure scheme would shift some of the costs of disqualification-related fact finding from the litigant to the state. It would also increase the reputational and professional cost to judges who fail to disclose pertinent information that later emerges through another source. To further enhance the disclosure of relevant information concerning disqualification, states could also provide a centralized system through which attorneys and their clients can review a judge's recusal history.

3. *Per se* rules for campaign contributors. To address the concern about judges who decline to recuse themselves when their campaign finances reasonably call into question their impartiality, the ABA recommends mandatory disqualification of any judge who has accepted large contributions (i.e., contributions over a pre-determined threshold amount) from a party appearing before her. The ABA's provision, however, has not been adopted by the states. We recommend a minor modification to the ABA's provision that should mollify concerns that may have created a hesitancy to adopt this sensible provision.

4. Independent adjudication of disqualification motions. The fact that judges in many jurisdictions decide on their own disqualification challenges, with little to no prospect of immediate review, is one of the most heavily criticized features of United States law in this area – and for good reason. Allowing judges to decide on their own disqualification motions is in tension not only with the guarantee of a neutral case arbiter, but also with states' express desire for objectivity in disqualification decisions.

5. Transparent and reasoned decision-making. All judges who rule on a disqualification motion should be required to explain their decision in writing or on the record, even if only briefly. Such a requirement would facilitate appellate review and ensure greater accountability for these decisions.

6. De novo review on interlocutory appeal. Making appellate review more searching would be less important if the other reforms on this list were adopted, but it would still provide a valuable safeguard against partiality. The United States Court of Appeals for the Seventh Circuit, the only federal appeals court to review recusal determinations de novo, offers one example of a court that has embraced enhanced review.

7. Mechanisms for replacing disqualified judges. If recusal is to provide a due process protection, rather than an invitation for gamesmanship, courts need to put in place efficient methods for replacing a disqualified judge. This is particularly true at the appellate level.

8. Expanded commentary in the canons. Expanding the canon commentary on recusal, while a "soft" and highly limited solution, would nonetheless offer relatively costless guidance for judges seeking to adhere to the highest ethical standards, even when not strictly required.

9. Judicial education. Seminars for judges that enable them to confront the standard critiques of disqualification law might provide another soft solution for invigorating its practice. Judges could be instructed on the underuse and underenforcement of disqualification motions, the social psychological research into bias, the importance of avoiding the appearance of partiality, and their own potential role in helping to reform recusal doctrines and court rules.

10. Recusal advisory bodies. 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. Advisory bodies could identify best practices and encourage judges to set high standards for themselves. Judges could be encouraged to seek guidance from the advisory body when faced with difficult issues of recusal. A judge accepting such advice could expect a public defense if a disgruntled party criticized a decision not to recuse.

We recognize that all of these proposals come with their own risks. On the one hand, strengthening disqualification rules may be a means to safeguard due process and public trust in the judiciary. On the other hand, strengthening these rules may increase administrative burdens and litigation delays, open new avenues for strategic behavior (such as judge shopping), and undermine a judge's duty to hear all cases. These tradeoffs demand that any solution be carefully designed and implemented, and we do not mean to minimize that task by providing only a cursory sketch of each option. But the looming crisis in judicial recusal means that reform is no longer an option; it is a necessity.

INTRODUCTION

While on a recent vacation, the pipes in your basement froze, flooding the interior and causing substantial damage to your home. Fortunately, you were covered by your home insurance policy. Or at least, so you thought. But the insurance company, citing a strained reading of your policy, refused to pay. After seeking legal advice, you decided to sue for the cost of repairs. The judge dismissed your case. Months later, you happened across a television commercial in which the judge, now running for re-election, rails against "the plaintiffs' lawyers and litigants responsible for the jackpot justice mentality that is costing us jobs and destroying our family values." You normally agree with such sentiments as a general matter. In suing, however, you wanted no jackpot, just a fair hearing and, ideally, the cost of restoring your home.

A few days later, a profile of the judge in the local paper lists the biggest contributors to his previous campaign, as well as the contributors to his current re-election bid. Your insurance company and the lawyers who represented it are near the top of each list. Neither you nor your lawyer, a solo practitioner, ever contributed to a judicial campaign. Numerous friends, expert and otherwise, have told you that while your case may have been a close call, it was by no means a slam dunk for the defense. Was justice done? Maybe you don't actually know, and think it's at least possible that it was. So let's rephrase. Does it *appear* to you that justice was done? Or, to borrow from the American Bar Association's standard for mandatory judicial recusal, "might" the judge's impartiality "reasonably" have been questioned? And would it affect your view on this if you knew that the judge was permitted to decide that question in his own case?

Unfortunately, in far too many state courtrooms around the country today, the above scenario is anything but hypothetical. The parties may be switched; the details are always unique; but the fundamental appearance of bias remains the same. Not only are the rules of recusal[1] often too weak; those rules that do exist often go underenforced.

In many respects, recusal is an incomplete due process protection, a safeguard of last resort. More complete, *ex ante* solutions promoting fair and impartial courts – whether in the form of judicial selection methodology, campaign finance regulation, or the canons of conduct governing judicial speech – are likely to be more effective, but they are beyond the scope of this paper. This paper focuses on disqualification doctrines and procedures. It argues that the rules currently used by many judges are inadequate to protect litigants or preserve public trust and that, to safeguard their own independence, courts should consider a variety of reforms. Its aim is to help judges, courts, legislators, and litigants maximize the due process protection that recusal potentially affords.

The paper proceeds in four parts. Part I describes the trends undermining public confidence in the courts and explains how, in a recent decision, the United States Supreme Court exacerbated the impact of those trends. Part II provides a quick survey of recusal law and its failings. Part III looks more closely at one extraordinary (at least up until now) case that strikingly illustrates the trends and problems identified in Parts I and II. Finally,

Part IV outlines ten proposals for strengthening recusal that acknowledge the public's legitimate demand for accountability while protecting the judiciary's institutional need for independence.

I. JUDICIAL ELECTIONS AND CONFIDENCE IN THE COURT

A. EXPLICIT ATTACKS ON FAIR AND IMPARTIAL COURTS

In recent years, we have seen an escalation of attacks on the independence of the judiciary. Government officials and citizens upset by judicial decisions are increasingly seeking to limit courts' jurisdiction over controversial matters,[2] to solicit pre-election commitments from judicial candidates,[3] and to draft ballot initiatives with sanctions for judges who make unpopular rulings.[4] Many of these efforts threaten constitutional ideals of the rule of law and separation of powers.

The threat is sufficiently serious to command attention at the highest levels of the judiciary. Indeed, since stepping down from the Court, U.S. Supreme Court Justice Sandra Day O'Connor has made it a personal mission to spotlight such attacks on the judiciary. Of particular concern to Justice O'Connor is the fact that the attacks are increasingly being launched by judges themselves:

> Earlier this year [2006], Alabama Supreme Court Justice Tom Parker excoriated his colleagues for faithfully applying the Supreme Court's precedent in *Roper v. Simmons*, which prohibited imposition of the death penalty for crimes committed by minors. Offering a bold reinterpretation of the Constitution's supremacy clause, Justice Parker advised state judges to avoid following Supreme Court opinions "simply because they are 'precedents.'" Justice Parker supported his criticism of "activist federal judges" by asserting that "the liberals on the U.S. Supreme Court . . . look down on the pro-family policies, Southern heritage, evangelical Christianity, and other blessings of our great state."[5]

The attacks have been exacerbated by two other serious problems: the growing influence of money in judicial elections and the dismantling of codes of judicial ethics that once helped to preserve the distinctive character of the judiciary, even during the course of campaigns for the bench. The acceleration of those trends seems likely to erode public confidence in the ability of courts to serve as fair arbiters of disputes. Moreover, the cynicism bred by those trends tars all courts – elective and appointive, state and federal – with the same brush.

B. MONEY AND JUDICIAL ELECTIONS

Judge Harrison lamented the politicization of the [state] supreme court. "It's unseemly," he was saying, "how they are forced to grovel for votes. You, as a lawyer representing a client in a pending case, should have no contact whatsoever with a supreme court justice. But because of the system, one comes to your office seeking money and support. Why? Because some special interests with plenty of money have decided they would like to own her seat on the court. They're spending money to purchase a seat. She responds by raising money from her side of the street. It's a rotten system, Wes."

"How do you fix it?"

"Either take away the private money and finance the races with public funds or switch to appointments."

- John Grisham, *The Appeal*, 189 (2008).

Nationwide, thirty-nine states use some form of election to select or retain their judges. Of the emerging threats to judicial impartiality and the appearance of impartiality, perhaps most fundamental is the influence of money. Between 1994 and 1998, candidates for state supreme courts raised a total of $73.5 million, and 19 candidates broke the million-dollar threshold. Between 2000 and 2004, candidates raised a total of $123 million, a 67% increase over the previous period, and 37 of them broke the million-dollar mark.[7] Winning candidates who did not accept public financing raised an average of more than $650,000 in 2004, up 45% from 2002's average of $450,000.[8]

Big money is changing the character of judicial election campaigns. These campaigns are now high-stakes contests in which chambers of commerce, tort reform lobbyists, organized labor, plaintiffs' lawyers, and other, often much narrower, interest groups spend substantial resources – frequently without disclosing the sources of their funding.[9] Television advertising has emerged as a central feature of judicial campaign strategy. As late as 2000, television ads aired in only 4 of 18 (22%) states with contested supreme court elections.[10] By 2006, this figure had risen to 11 out of 12 (96%).[11]

Each of these developments has the potential to stoke the widespread concern that campaign contributions distort judges' decision making. National public opinion surveys from 2001 and 2004 found that over 70% of Americans believe that campaign contributions have at least some influence on judges' decisions in the courtroom.[12] Only 5% of those surveyed believe that campaign contributions have no influence.[13] These suspicions may be corroding the public's faith in the judiciary. According to the 2001 poll, only 33% of those surveyed believe that the "justice system in the U.S. works equally for all citizens," while 62% believe that "[t]here are two systems of justice in the U.S. – one for the rich and powerful and one for everyone else."[14]

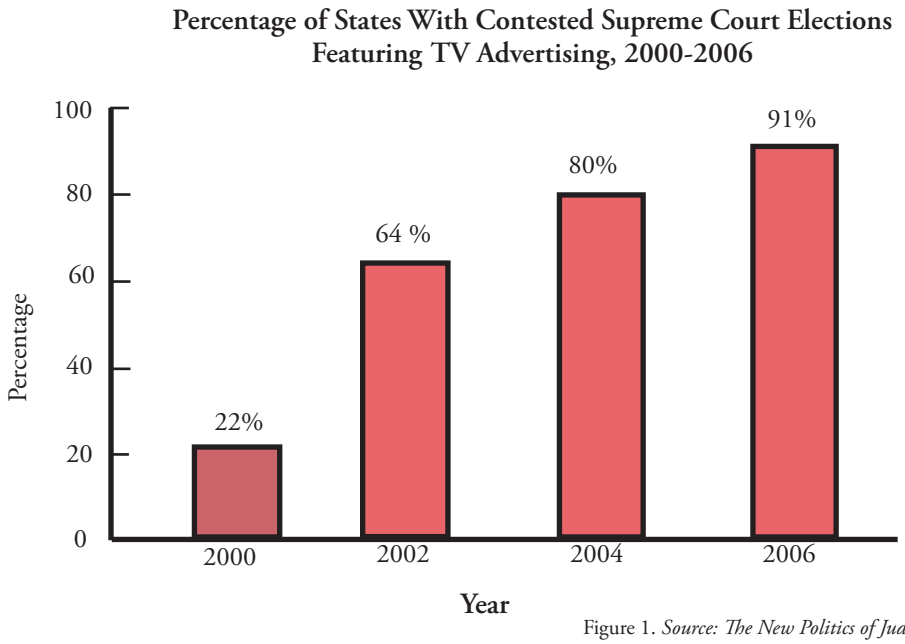

Figure 1. *Source: The New Politics of Judicial Elections 2006*

More shocking than the public perception – in itself a critical concern – is what judges themselves say. In a 2002 written survey of 2,428 state lower, appellate, and supreme court judges, over a quarter (26%) of the respondents said they believe campaign contributions have at least "some influence" on judges' decisions and nearly half (46%) said they believe contributions have at least "a little influence."[15] The survey also revealed that 56% of state court judges believe "judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign."[16]

So, over two-thirds of citizens and nearly half of state judges believe that campaign contributions influence judges' decisions; do the data support them? Although there is no way to know how judges would have voted in the absence of a contribution, the evidence is certainly suggestive. Professor Stephen Ware's empirical study of Alabama Supreme Court decisions from 1995 to 1999 found a "remarkably close correlation between a justice's votes on arbitration cases and his or her source of campaign funds."[17] In 2006, Adam Liptak and Janet Roberts of *The New York Time*s completed a groundbreaking study of Ohio Supreme Court decisions entitled *Campaign Cash Mirrors a High Court's Rulings*. The study showed that over a twelve-year period, Ohio justices voted in favor of their contributors more than 70% of the time, with one justice, Terrence O'Donnell, voting with his contributors 91% of the time.[18]

Following on his work in Ohio, in January 2008 Liptak reported on a study of the Louisana Supreme Court by Tulane law professor Vernon Valentine Palmer. According to Palmer's study, over a 14-year period ending in 2006, justices voted in favor of their contributors 65% of the time, and two justices did so 80% of the time.[19] Because, as Liptak notes, the "conventional response to such findings is that they do not prove much,"[20] Palmer drilled deeper, analyzing

lawsuits not involving contributors to establish a baseline of how often particular court members voted for plaintiffs or defendants. The results, as described in the *Times*, are striking:

> Justice John L. Weimer, for instance, was slightly pro-defendant in cases where neither side had given him contributions, voting for plaintiffs 47 percent of the time. But in cases where he received money from the defense side (or more money from the defense when both sides gave money), he voted for the plaintiffs only 25 percent of the time. In cases where the money from the plaintiffs' side dominated, on the other hand, he voted for the plaintiffs 90 percent of the time. That is quite a swing.
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> "It is the donation, not the underlying philosophical orientation, that appears to account for the voting outcome," Professor Palmer said. Larger contributions had larger effects, the study found. Justice Catherine D. Kimball was 30 percent more likely to vote for a defendant with each additional $1,000 donation. The effect was even more pronounced for Justice Weimer, who was 300 percent more likely to do so.
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> "The greater the size of the contribution," Professor Palmer said, "the greater the odds of favorable outcomes."[21]

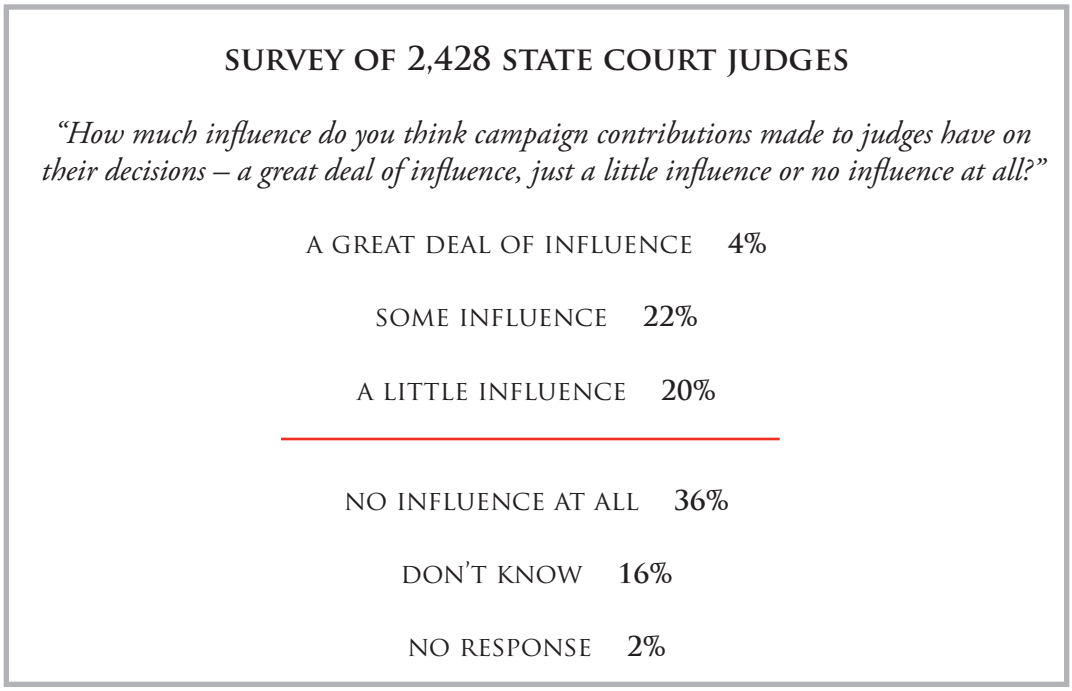

Figure 2. *Source: Justice at Stake*

Is this causation or mere correlation? There is no way to know for sure, but the studies in Ohio and Louisiana clearly suggest the former. One thing is certain: many major contributors hope and assume it is the former. As one sitting justice on Ohio's Supreme Court, Justice Paul E. Pfeifer, told the *Times*: "Everyone interested in contributing has very specific interests. They mean to be buying a vote. Whether they succeed or not, it's hard to say."[22]