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FOR JUSTICE

FAIR COURTS: SETTING RECUSAL STANDARDS

James Sample, David Pozen
and Michael Young

Foreword by the Honorable Thomas R. Phillips,
Retired Chief Justice, Supreme Court of Texas

Brennan Center for Justice *at New York University School of Law*

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FOREWORD

An impartial and independent tribunal is the *sine qua non* of our nation's promise of equal justice under law. The rule of law is imperiled if justice is not done and if it is not seen to be done. As Chief Justice Harlan Fiske Stone said simply, "The law itself is on trial in every case."

One method to help litigants secure a fair judge for their disputes is the motion for disqualification or recusal, available in some form in every American jurisdiction. But recusal has traditionally been a difficult, cumbersome process, seldom considered and even less often actually used.

In earlier times, throwing up roadblocks to discourage frequent recusal motions made some sense, as cumbersome communication and slow travel made replacing a judge a difficult and expensive matter. The doctrine of necessity, by which even a presumptively biased judge could decide a case when no substitute was available, made legal and practical sense. But now, no judicial system should accept a process which leaves a litigant acting in good faith saddled with a judge whose fairness can be reasonably questioned.

In recent years, the need for viable judicial recusal systems has been exacerbated by the increasing politicization of both federal and state judicial selection. Appointing authorities are under unprecedented public pressure from political parties and special interest groups to select "reliable" judges. As a result, many judges come to the bench with a "label" that seemingly predisposes them to one side or the other in many cases. In elective systems, the new pressures are even worse. As the Brennan Center, the National Institute on Money in State Politics, and the Justice at Stake Campaign have documented in a series of reports, record-breaking campaign contributions, frequently unreported special interest expenditures, and misleading advertising campaigns threaten to undermine public confidence in the entire judicial branch. Perhaps most significantly, the states' most effective checks on unseemly judicial campaign behavior, the Codes of Judicial Conduct, have been seriously undermined in the wake of the Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*. Although the *White* decision itself was fairly unremarkable, several federal circuit and district court opinions have applied its rationale to strike down, on free speech grounds, state restrictions on judges making pledges or promises about or committing to future performance in office.

In some of these cases, the complainants have also challenged the applicable state code's recusal provision. These challenges have almost invariably failed. In fact, in his concurrence to the *White* opinion, Justice Kennedy even suggested that "more rigorous" recusal standards are the proper response to concerns that unfettered judicial speech may undermine the real and perceived fairness of the courts.

Thus, 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. In many jurisdictions, judges still decide their own disqualification challenges, with little

prospect of meaningful review. There is no obligation for judges to give reasons for their recusal decisions, and they rarely do. The cumulative result of these policies, along with other incentives, the authors show, is that "disqualification provisions may be systematically underused and underenforced in many states relative to Model Code expectations."

The Brennan Center's recusal report provides a roadmap to achieving meaningful reform. Judges, legislators, and citizens who care about the integrity of America's state courts will want to consult its ten proposals. As the authors recognize, certain of these proposals, such as adopting the ABA's contribution-based recusal provision or moving towards independent adjudication of disqualification motions, represent difficult but potentially promising steps. Others, like expanded commentary in the canons, may have only limited effect. Different jurisdictions will come to different conclusions as to whether and how to implement such reforms. No state will likely adopt all the suggestions, but every state should adopt some of them.

As the authors acknowledge, threats to judicial impartiality and the appearance of impartiality will persist no matter how perfectly a state structures its recusal process. As political pressures on the judiciary mount, most states should consider more fundamental changes to their systems of judicial selection. But until that day, improved recusal procedures are among the most promising incremental reforms. Hopefully, the Brennan Center's report will be a significant contribution to achieving those changes.

The Honorable Thomas R. Phillips
Retired Chief Justice, The Supreme Court of Texas

Thomas R. Phillips was appointed Chief Justice of the Supreme Court of Texas by Governor William P. Clements in 1988. He was elected and reelected to that office in 1988, 1990, 1996 and 2002. He resigned in 2004, and is now a partner in the Austin office of Baker Botts LLP.

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]

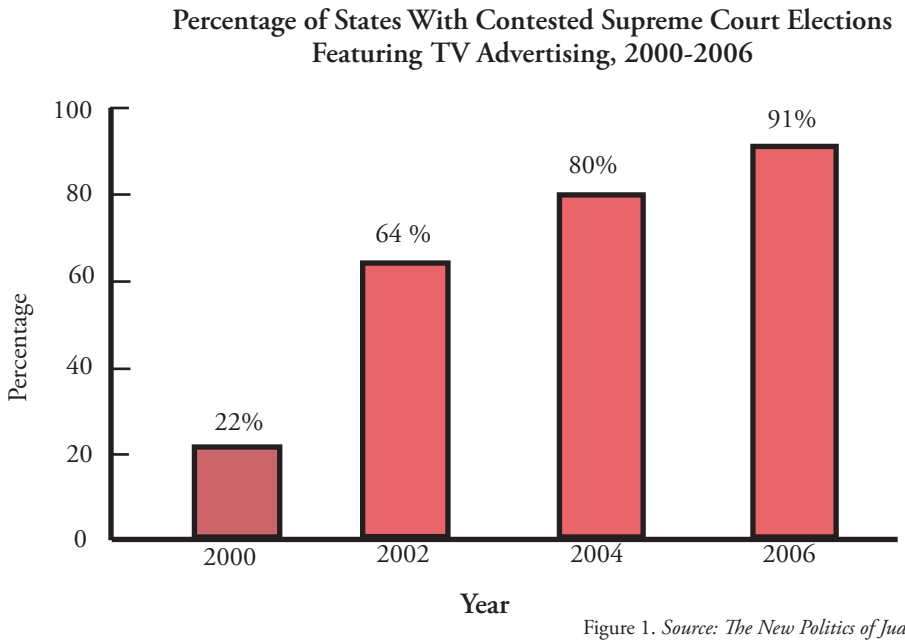


Figure 1. *Source: The New Politics of Judicial Elections 2006*

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.
>
> "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.
>
> "The greater the size of the contribution," Professor Palmer said, "the greater the odds of favorable outcomes."[21]

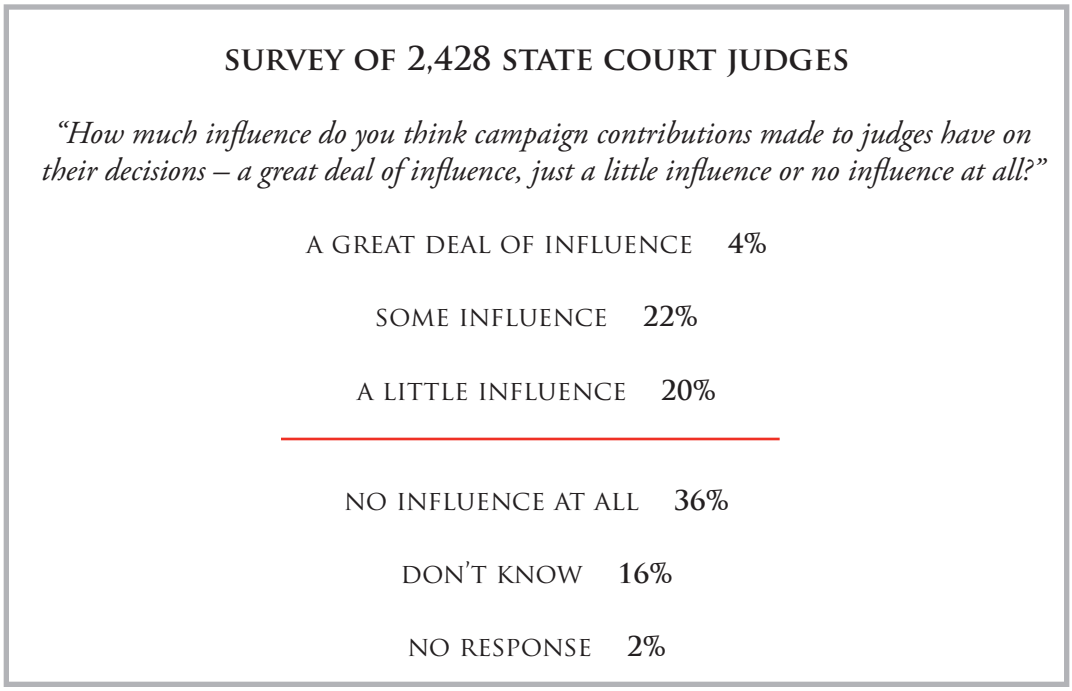


Figure 2. *Source: Justice at Stake*

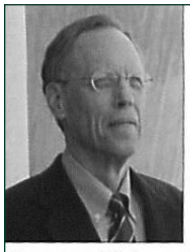
Is this causation or mere correlation? There is no way to know for sure, but the studies in Ohio and Louisiana clearly suggest the former. One thing is certain: many major contributors hope and assume it is the former. As one sitting justice on Ohio's Supreme Court, Justice Paul E. Pfeifer, told the *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]

C. *REPUBLICAN PARTY OF MINNESOTA V. WHITE* AND ITS AFTERMATH

The Supreme Court has recognized that there is a "fundamental tension between the ideal character of the judicial office and the real world of electoral politics."[23] Nevertheless, in *Republican Party of Minnesota v. White*,[24] the Court helped fuel a broader movement to undermine longstanding norms designed to protect the distinctive character of judicial campaigning.

At issue in *White* was a particular clause of the Minnesota Code of Judicial Conduct – the "Announce Clause" – which prohibited any candidate for judicial office from "announc[ing] his or her views on disputed legal or political issues."[25] The Supreme Court held, five votes to four, that the Announce Clause unconstitutionally abridged the First Amendment rights of judicial candidates. Justice Scalia's majority opinion recognized that, under some definitions, judicial impartiality might be a sufficiently compelling state interest to justify restraints on speech, but it concluded that the Announce Clause was not narrowly tailored to serve that interest.[26] The majority was unpersuaded by arguments that statements made during campaigns carry a special threat to the open-mindedness of judges.[27] Justice Scalia also dismissed fears that judges would regard campaign statements as binding and thereby violate litigants' due process right to a fair hearing.[28] In any event, suggested Justice Kennedy in concurrence, such concerns might be less restrictively addressed through "more rigorous" recusal standards.[29]

The impact on the conduct of campaigns was immediate and unmistakable. Candidates in many states received questionnaires soliciting their positions on controversial topics such as abortion and equal marriage rights for partners of the same sex.

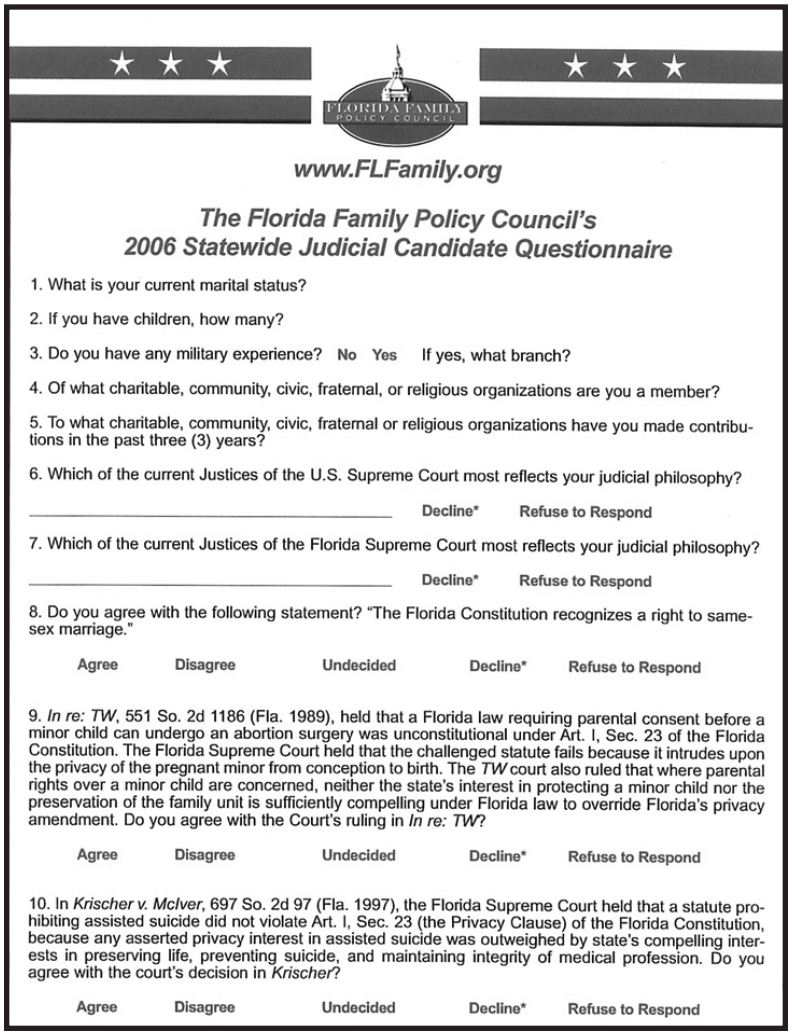


ALABAMA

Chief Justice

Drayton Nabers (R)	ISSUES	Sue Bell Cobb (D)
Agree	Unborn Child is Fellow Human Being	No Response
Agree	Home School Education Tax Credits	No Response
Agree	Oppose Establishment of Gambling	No Response
Agree	Voter Identification	No Response
Agree	The State Can Acknowledge God	No Response
Agree	Alabama "Lawsuit Abuse" Harms Economic Development	No Response
Disagree	Judicial Branch May Impose Taxes	No Response
Disagree	Same Sex Marriage	No Response

Figure 3. *Source: New Politics of Judicial Elections 2006*



www.FLFamily.org

The Florida Family Policy Council's
2006 Statewide Judicial Candidate Questionnaire

1. What is your current marital status?

2. If you have children, how many?

3. Do you have any military experience? No Yes If yes, what branch?

4. Of what charitable, community, civic, fraternal, or religious organizations are you a member?

5. To what charitable, community, civic, fraternal or religious organizations have you made contributions in the past three (3) years?

6. Which of the current Justices of the U.S. Supreme Court most reflects your judicial philosophy?

_____ Decline* Refuse to Respond

7. Which of the current Justices of the Florida Supreme Court most reflects your judicial philosophy?

_____ Decline* Refuse to Respond

8. Do you agree with the following statement? "The Florida Constitution recognizes a right to same-sex marriage."

Agree Disagree Undecided Decline* Refuse to Respond

9. *In re: TW*, 551 So. 2d 1186 (Fla. 1989), held that a Florida law requiring parental consent before a minor child can undergo an abortion surgery was unconstitutional under Art. I, Sec. 23 of the Florida Constitution. The Florida Supreme Court held that the challenged statute fails because it intrudes upon the privacy of the pregnant minor from conception to birth. The *TW* court also ruled that where parental rights over a minor child are concerned, neither the state's interest in protecting a minor child nor the preservation of the family unit is sufficiently compelling under Florida law to override Florida's privacy amendment. Do you agree with the Court's ruling in *In re: TW*?

Agree Disagree Undecided Decline* Refuse to Respond

10. In *Krischer v. McIver*, 697 So. 2d 97 (Fla. 1997), the Florida Supreme Court held that a statute prohibiting assisted suicide did not violate Art. I, Sec. 23 (the Privacy Clause) of the Florida Constitution, because any asserted privacy interest in assisted suicide was outweighed by state's compelling interests in preserving life, preventing suicide, and maintaining integrity of medical profession. Do you agree with the court's decision in *Krischer*?

Agree Disagree Undecided Decline* Refuse to Respond

Figure 4. *Source: The Florida Family Policy Council*

Although the candidates had a legal right not to answer (and nationally, most chose not to answer) the competitive pressure of campaigns made it difficult for some to refuse. Voters wanted to understand how prospective judges were likely to approach the pressing issues of the day, and some candidates for the bench were eager to prove their allegiance to energized voting blocs and potential donors. The press not only failed to signal or understand the risks to impartial decision-making presented by campaign promises, but also, in some instances, actively chided candidates for being unwilling to take stands on whole categories of cases.

Although *White* addressed only the most speech-restrictive canon of them all, the "Announce Clause" (which was in effect in only nine states as of 2002), it was immediately followed by a series of lawsuits seeking to expand the decision's reach. Candidates, political parties, and interest groups promoting more politicized judicial elections challenged other

canons that regulated campaign conduct. Three categories of canons were targets of litigation in the years immediately following *White*.

> *The questions had multiple parts and follow-ups, and were obviously designed to walk the voter down a path lined with hot-button issues. No effort was made to explain that the supreme court was not a legislative body; it did not have the responsibility or jurisdiction to make laws dealing with these issues. No effort was made to keep the field level.*
>
> - John Grisham, *The Appeal*, 189 (2008).

First, codes of judicial ethics in many states ban "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office."[30] The purpose of the "Pledges or Promises Clause" is to prevent promises by judicial candidates that "impair the integrity of the court by making the candidate appear to have pre-judged an issue without the benefit of argument or counsel, applicable law, and the particular facts presented in each case."[31] State canons also typically include a "Commit Clause," which prohibits "statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court."[32] Taking aim at these provisions, some interest group questionnaires offered a "Decline to Respond" option indicating refusal to answer because of the canons, use of which plaintiffs then cited in lawsuits challenging the Pledges or Promises and Commit Clauses.[33] While the *White* majority recognized that campaign promises might "pose a special threat to open-mindedness,"[34] courts facing challenges to Pledges or Promises and Commit Clauses in the wake of *White* have reached mixed conclusions.[35]

The *White* decision may be expected to increase not only the volume of judicial campaign contributions, but also the frequency of judicial campaign speech expressing a position on disputed issues likely to come before the court, and these two factors are likely to interact in ways that may threaten the culture of judicial independence. As Commit Clauses and Pledges or Promises Clauses are rescinded or invalidated, judicial campaign *promises* will be "unavoidable" as well.[36] Yet on account of the strong presumption against disqualifying a judge for her views on law or policy, recusal will rarely be required because of something the judge has said. Except when they have expressed a clear, prejudicial view on a particular party appearing before the court or the merits of a particular case, judges will normally have no obligation to recuse for statements they have made on the campaign trail.[37]

Courts are also split on the constitutionality of canons that prohibit judges and judicial candidates from directly soliciting campaign contributions. Prior to *White*, such bans generally were upheld because of the due process interests the bans served,[38] and since *White* two courts have agreed.[39] The Arkansas Supreme Court most recently explained: "We do not believe that anyone can seriously argue that a judge personally soliciting campaign contributions from attorneys having cases before him or her should be permissible."[40] But the Eleventh Circuit struck down Georgia's solicitation canon, baldly asserting "that the

Supreme Court's decision in *White* suggests that the standard for [First Amendment review of] judicial elections should be the same as the standard for legislative and executive elections."[41] The Eleventh Circuit's flagrant disregard for Justice Scalia's cautionary words in *White* – "we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office"[42] – adds to the uncertain future of the canons.

Finally, various canons designed to reduce partisanship in judicial elections or to constrain political activity by judges have come under fire. On remand from the Supreme Court in *White*, the Eighth Circuit struck down clauses in Minnesota's canons that were designed to preserve the non-partisanship of the state's judicial elections.[43] Other courts, however, have upheld political-activity canons designed to insulate sitting judges from politics unrelated to their own campaigns for reelection.[44]

The increasing and often successful attacks on this wide array of canons have left state bodies charged with regulating judicial conduct in disarray, especially when applying canons to campaign conduct. As one trial court observed: "To say that there is considerable uncertainty regarding the scope of the Supreme Court's decision in *White* is an understatement. . . . It has caused, and will continue to cause, considerable uncertainty and consternation on the part of judicial candidates."[45] The broader *White*'s scope becomes, the greater will be the erosion of the traditional buffers between state judges and questionable outside influences.

In sum, when canons regulating political activity are stricken, the consequences are real. Given the dynamics of modern political contests, the candidates face a dilemma: either they comport themselves in a manner that may be inconsistent with impartiality or risk almost-certain attack and possible defeat. The effect is a surge in judicial campaign conduct (and other judicial conduct) that threatens judicial impartiality and the appearance of such impartiality.

II. THE CURRENT LANDSCAPE OF RECUSAL

Recognizing the threat these developments pose to judicial impartiality and due process, scholars have been furiously debating the proper relationship between judicial campaign activities and disqualification. The ABA has revised relevant provisions of its Model Code of Judicial Conduct (hereinafter, the Model Code).[46] Courts and legislatures may come next. "The topic du jour," one Ninth Circuit judge observed in a recent speech, "is recusal."[47]

In order to evaluate reform options for judicial disqualification, one must first understand how this body of law currently operates. In this Part, we summarize the universal and differential features of recusal law across the United States, and we explain why this system may often prove inadequate.

A. UNIVERSAL FEATURES

There are some important features of disqualification law that are largely consistent across United States jurisdictions. The most widely shared is Rule 2.11(A) of the ABA's 2007 Model Code (formerly Canon 3E(1) and referred to interchangeably herein): "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."[48] That general standard has been incorporated into federal law[49] and the judicial conduct codes of forty-seven states (see text box), and it offers the most expansive ground for disqualification everywhere it appears.

THE UNIVERSAL RECUSAL STANDARD

The ABA's general disqualification standard is the most ubiquitous of recusal provisions. The three states whose codes of judicial conduct lack the ABA clause are Michigan, Montana, and Texas. We do not count (as lacking the clause) Wisconsin, whose code, incorporated in full into its Supreme Court rules, stipulates that "a judge shall recuse himself or herself in a proceeding . . . when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial." Wisc. Sup. Ct. R. ch. 60.04(4) (2005). Wisconsin thus explicitly appeals to a reasonable person who is "knowledgeable" and "well-informed," but the substance of the standard is the same.

Among the forty-seven states (and the District of Columbia) with codes of judicial conduct that include this clause, some follow the original ABA Model Code in using "should disqualify" instead of "shall disqualify." Yet even where state codes use "should," most courts have interpreted the provision to have a mandatory effect. Jeffrey M. Shaman et al., Judicial Conduct and Ethics § 4.02, at 110-11 (3d ed. 2000).

In Michigan, Montana, and Texas, moreover, the ABA language may still offer a basis for disqualification. A January 2006 ruling by the Michigan Supreme Court featured one Justice proposing a new court rule that would incorporate this Canon, Adair v. State, 709 N.W.2d 567, 581 (statement of Cavanagh, J.), while another Justice forcefully protested the majority's failure to apply it, id. at 584 (statement of Weaver, J.). A dissent from a 1990 Montana Supreme Court ruling suggested that Canon 3E(1) may require disqualification of a judge "[u]nder appropriate circumstances." Washington v. Montana Mining Properties, Inc., 795 P.2d 460, 466 (Mont. 1990) (Sheehy, J., dissenting). The argument for Texas is more straightforward: its rules of civil procedure expressly incorporate Canon 3E(1). Tex R. Civ. P. 18b(2)(a) (2005); see also Texas Code of Judicial Conduct Canon 5 cmt. (2002) ("A statement made during a campaign for a judicial office, whether or not prohibited by this Canon, may cause a judge's impartiality to be reasonably questioned in the context of a particular case and may result in recusal."). Thus, setting aside these minor distinctions, the standard articulated by the ABA's rule is nearly universally applicable.

Most of Rule 2.11(A)'s specific rules on disqualification also apply nationwide: a judge should always recuse herself (or be disqualified) when she is biased against one of the parties,[50] previously served as a lawyer in the matter in controversy,[51] has an economic interest in the subject matter of greater than de minimis value,[52] is related to a party or lawyer in the proceeding within the third degree of kinship,[53] has personal knowledge of disputed evidentiary facts,[54] or has made improper *ex parte* communications during the course of the proceeding.[55] These *per se* rules are largely commonsensical and uncontroversial.

Underscoring the importance of recusal as a means of promoting impartial courts, the ABA, under the able leadership of Indiana Law Professor Charles Geyh, is presently preparing a report surveying disqualification practices around the country. That project, as with this policy paper, aims to supply judges and lawyers with an additional tool to assist them in framing and analyzing disqualification questions, particularly where judges are governed only by the general directive to disqualify themselves when their impartiality might reasonably be questioned.

Certain disqualification doctrines are similarly universal. The "rule of necessity" – when no impartial judge is available, the original judge(s) assigned to the case may take it – always trumps.[56] Blanket and class-based disqualification challenges are disfavored.[57] It is more difficult to disqualify a judge for bias against an attorney than for bias against a party.[58] To be disqualifying, the actual or apparent bias of the judge must be directly relevant to the proceeding at issue,[59] and the bias must be personal, as opposed to judicial, in nature.[60] The latter distinction is often analyzed under the "extrajudicial source rule," which holds that unless it is so pervasive or egregious as to "display a deep-seated favoritism or antagonism that would make fair judgment impossible," bias that stems directly from the case proceedings will not be disqualifying.[61]

In all for-cause disqualification motions, the evidentiary and persuasive burdens rest with the movant; judicial bias, partiality, and interest are never presumed.[62] These burdens are heavy. To prevail, the movant "ordinarily must adduce facts that would raise significant doubt as to whether justice would be done in the case."[63] On appeal, odds of success are even worse. Nearly every appellate court, state and federal, will overturn a lower court's disqualification or recusal decision only for an "abuse of discretion."[64]

B. DIFFERENTIAL FEATURES

Other features of judicial disqualification law vary substantially across U.S. jurisdictions. The most meaningful distinction is that in about one-third of the states, litigants may disqualify a judge without showing cause.[65] This is known as peremptory disqualification.[66] When peremptory challenges are denied for a procedural deficiency or are no longer available – such challenges are usually capped at one per proceeding[67] – litigants retain the right to seek recusal or disqualification for cause.

Among for-cause jurisdictions (and in peremptory jurisdictions when challenges are made for cause), the crucial distinctions tend to be procedural, not substantive. While jurisdictions differ as to the specific situations calling for disqualification and the specific requirements for a successful motion, the standards and doctrines that courts apply tend to be functionally the same, as we explain above. More notable, and probably more consequential, are differences in the methods courts use for handling a recusal or disqualification motion – a topic on which the Model Code is silent.

"I repeat – the pernicious effects of Mr. Blankenship's bestowal of his personal wealth and friendship have created a cancer in the affairs of this Court. And I have seen that cancer grow and grow. . . . At this point, I believe that my stepping aside in the instant case might be a step in treating that cancer – but only if others as well rise to the challenge. If they do not, then I shudder to think of the cynicism and disgust that the lawyers, judges, and citizens of this wonderful State will feel about our judicial system.

And I reiterate that unless another justice also steps aside in this case, my replacement on the Court will be selected by the justice whose campaign was supported by something close to $4,000,000 from monies that came from one side of the case."

Source: Notice of Voluntary Disqualification of the Hon. Larry V. Starcher, Justice of the Supreme Court of Appeals of West Virginia, *A.T. Massey Coal Co., Inc., v. Caperton,* No. 33350 (Feb. 15, 2008).

Some courts require the challenged judge to transfer these motions immediately to a colleague (a presiding judge or chief judge chooses which colleague[68]); some require transfer only after the challenged judge has ensured the motion's timeliness and sufficiency; the rest let the challenged judge decide on these motions herself.[69] Most state and federal courts, including the Supreme Court,[70] follow the latter policy and rarely, if ever, require transfer.[71] Nor is voluntary transfer typical.[72]

Likewise, while some jurisdictions encourage or require challenged judges to hold evidentiary hearings, most leave the decision of whether to do so entirely to the judge's discretion.[73] With or without hearings, judges in most jurisdictions do not need to give a reasoned explanation for their recusal decisions.[74] In practice, judges have been much more likely to give reasons when they decline to recuse themselves.[75]

Another important distinction is external to disqualification law: how jurisdictions select their judges and regulate their behavior outside the courtroom. Among the states with elected judiciaries, campaign practices vary along a host of dimensions, from fundraising and spending regulations,[76] to speech restrictions (though these may be converging on account of *White*), to levels of special interest involvement, advertising, and partisan rancor. Thus, even though two states may have disqualification regimes that look quite similar on the books, in application one state's courts might face systematically different – and more

troubling – issues on account of its judicial elections and the financial and political pressures they entail.

C. UNDERUSE AND UNDERENFORCEMENT

Unfortunately, there appear to be no systematic empirical studies on the success rates of disqualification motions or the circumstances in which recusal occurs. Such research is stymied by the lack of a written record on most recusal decisions. But there are several reasons to believe that disqualification provisions may be systematically underused and underenforced in many states relative to Model Code expectations.

First, motions for disqualification are likely to be underused by parties because they are costly and risky. Paying clients may not wish to incur the additional litigation costs of filing the motion, especially if the prospects for success appear low. As a rule, the heavy evidentiary and persuasive burdens demanded of movants will generate steep odds against disqualification at the trial level, and steeper odds on review.[77] And the fear of angering the judge with an unsuccessful motion – which may apply especially to lawyers who are likely to appear before the judge in other cases – may deter the filing from the start.[78]

Second, several of the current doctrines concerning recusal make it likely that disqualification provisions are underenforced. Allowing judges to decide challenges to their own impartiality is not a policy calculated to promote vigorous enforcement.[79] Transferring the motion to friendly colleagues on the same court, while an improvement over deciding one's own case, may not substantially improve the situation. Moreover, the fact that judges generally are required neither to hold hearings on the claim nor to give reasons for their decisions makes it easy for them to reject even meritorious disqualification motions with impunity.

Third, research on social psychology shows that much bias is unconscious and that people tend to underestimate and undercorrect for their own biases and conflicts of interest.[80] Thus, even a judge trying conscientiously to decide a motion for her disqualification may be unable to appreciate biases apparent to more objective observers. Given current levels of homogeneity in the judiciary, it might also be the case that appellate judges will share certain unexamined biases that will impair their ability to operate as a corrective.

III. THE ULTIMATE – AND UNFORTUNATE – CASE IN POINT: *AVERY V. STATE FARM*

Illustrative of the problems identified in Parts I and II is the case of *Avery v. State Farm Mutual Insurance Company*, decided on the heels of the most notorious judicial election in recent U.S. history. In *Avery,* the plaintiffs sought recusal of a judge who received substantial financial support from individuals and organizations closely associated with the defendant. To appreciate the import of the refusal to recuse, and the Supreme Court's refusal to review that decision, requires some understanding of the underlying facts.[81]

In May 2003, the Illinois Supreme Court heard oral arguments in *Avery*, an appeal from a class action verdict against State Farm of over $1 billion, including $456 million in contractual damages. The appeal was not decided until after the November 2004 election, so the matter was pending throughout the 2004 campaign for a seat on Illinois's Supreme Court.

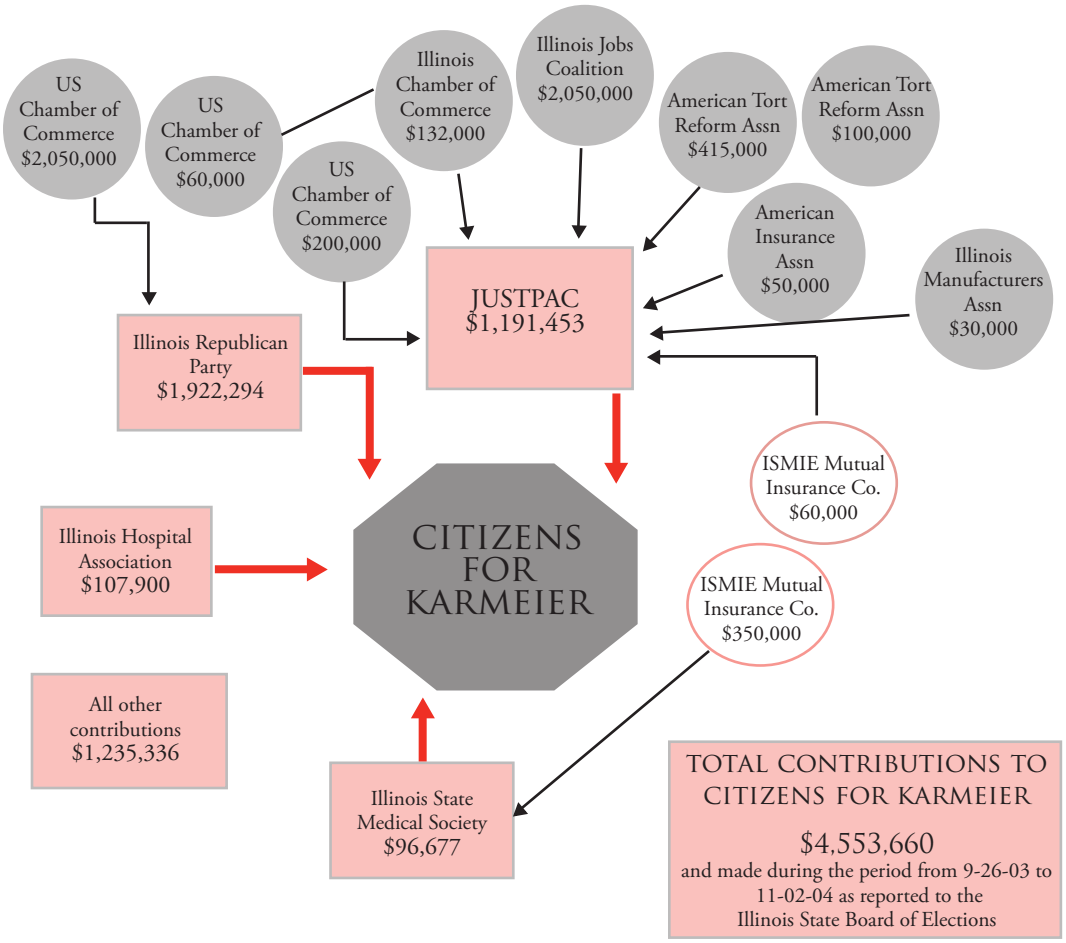


Figure 5. *Source: Illinois Campaign for Political Reform*

Recognizing the high stakes of the race, a number of business groups and the Republican Party contributed heavily to the campaign of then-Circuit Judge Lloyd Karmeier, while the plaintiffs' bar and the Democratic Party contributed heavily to the campaign of then-Illinois Appellate Judge Gordon Maag. Together the candidates raised $9.3 million in political contributions, a national record for a judicial election – in a state that elects its high court judges by district (as opposed to statewide).[82] Karmeier received more than $2 million from the Chamber of Commerce and more than $350,000 in direct contributions from State Farm's employees, lawyers, and others involved with the company or the case.[83] Maag, meanwhile, received nearly equal support from trial lawyers and labor organizations.

The funds financed a contest illustrating all of the ill effects of the current system. In his own campaign ads, Karmeier all but promised to "fix" the "medical malpractice crisis" of "phony lawsuits" against doctors and hospitals. His interest group supporters accused Maag of taking half a million dollars from trial lawyers. In turn, ads run by Maag's backers claimed that Karmeier was "in the pocket of big business" and HMOs, which could count on Karmeier's support "as they outsource American jobs and eliminate healthcare for workers." Karmeier boasted that he presided over "the first death penalty conviction in St. Claire County during the modern era," while the Democratic Party accused him of leniency toward a child molester.[84]

In the end, Karmeier won both the fundraising battle and the election. Karmeier described the expense of the campaign as "obscene" and expressed unease about its impact on public trust in the courts, but his concern for appearances waned almost immediately upon election. Once seated on the Illinois high court, he refused to recuse himself from the *Avery* appeal. Because Illinois state judges are allowed to rule on their own disqualification motions, the plaintiffs had no other means to remove him from the case. Karmeier then cast the deciding vote on the breach of contract claims, overturning that verdict against State Farm. The public could be forgiven for questioning whether justice was truly served.

CHRONOLOGY OF *AVERY V. STATE FARM* CONTROVERSY

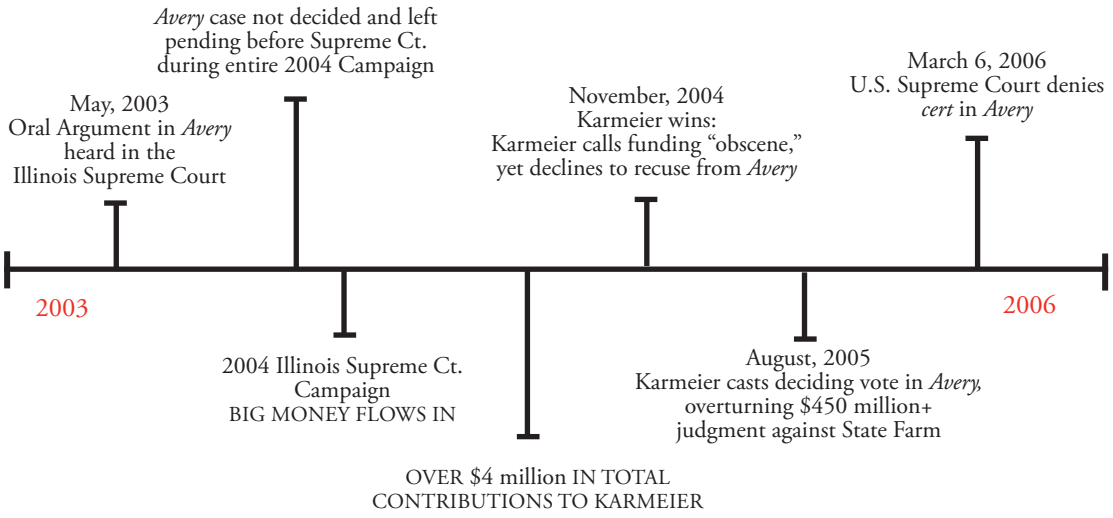


Figure 6.

Was Justice Karmeier's decision unbiased? Very possibly yes, but we will never know. Overshadowing the merits of his decision is a single stark fact: without Karmeier's vote, State Farm would have faced further proceedings on claims valued at up to $456 million. That result is either a coincidence or an impressive rate of return on State Farm's investment. Because we cannot know which it is, public trust in the courts suffers.[85]

The *St. Louis Post Dispatch* summarized the consequences of the Karmeier-Maag race this way:

> The juxtaposition of gigantic campaign contributions and favorable judgments for contributors creates a haze of suspicion over the highest court in Illinois. . . . Although Mr. Karmeier is an intelligent and no doubt honest man, the manner of his election will cast doubt over every vote he casts in a business case. This shakes public respect for the courts and the law – which is a foundation of our democracy.

Source: Editorial, *Illinois Judges: Buying Justice?*, St. Louis Post-Dispatch, Dec. 20, 2005, at B8.

The United States Supreme Court could have stepped in to restore public confidence. It was asked to review Karmeier's decision to sit on the case and to reevaluate whether due process required recusal under such extreme circumstances, but the Court declined review.[86] The Court's decision to deny review was consistent, most notably, with its 1988 denial of review in *Texaco, Inc. v. Pennzoil Co.*, in which the courts had declined to order the recusal of a trial judge who had received a $10,000 campaign contribution from Pennzoil just two days after the company filed its answer.[87] Of course, in today's world of judicial elections, a direct $10,000 contribution seems almost quaint, particularly by comparison to the sophisticated seven-figure independent efforts in support of judicial candidates that are increasingly becoming the norm (see the sidebar on Wisconsin for one example). *Avery* closed the door, at least for now, to a Supreme Court ruling that the real or apparent bias created by large campaign contributions violates the right to due process under the federal Constitution. If the circumstances of *Avery* could not persuade the Court to intervene, it is even less likely that the Court will do so when campaign statements undermine confidence in fair and impartial courts. As such, the most critical point is this: *Avery* not only highlights the urgency of the problem, it also leaves the primary responsibility for preserving the reality and appearance of impartial justice in elective state courts squarely in the hands of those courts.

FOR RECUSAL PURPOSES, A [$2 MILLION] CONTRIBUTION BY ANY OTHER NAME

When judges fail to police themselves, and when the judiciary fails to adequately police the judges who fail to police themselves, we all lose. Gross failures to adhere to the most basic standards of impartiality hurt not only the litigants before the court, but the institution of the judiciary as a whole.

A flurry of news from Wisconsin in late 2007 and early 2008 described one of the country's many recent recusal-related flashpoints. The news from Wisconsin also served as just the latest reminder that the problem of bias and/or the appearance of bias can be manifest in many forms. In the case of now-Wisconsin Supreme Court Justice, Annette Ziegler, it involved ruling on cases involving a bank that her husband helped to run, ruling on cases involving a company in which she owned $50,000 in stock, and yes, in a scenario with striking similarities to *Avery*, sitting on a case involving an organization that spent $2 million in independent expenditures – more than the total expenditures of her entire campaign – to help get her elected.

The last of these instances led to a flurry of editorials in Wisconsin urging her to step down from the case, and even from the bench. One editorial framed the situation as follows:

> To try to pretend that Ziegler is not doing severe damage to the reputation of the state's highest court, and more broadly to the rule of law, is at this point untenable for anyone who has sworn a solemn oath to "support the Constitution of the United States and the Constitution of the state of Wisconsin" and to "faithfully and impartially discharge the duties of said office."
>
> *Source*: Editorial, *Ziegler Should Quit the Bench*, The Capital Times (Madison), November 30, 2007.

Perhaps partially in response to the overwhelming public outcry, or perhaps applying a different standard in cases involving direct contributors as opposed to groups who made independent expenditures in support of her campaign, in December of 2007, Justice Ziegler recused herself from a case involving the Wisconsin Realtors Association and Wisconsin Builders Association. Each group, via political action committees, had separately contributed the maximum allowable amount of $8,625 to her campaign.

Where $17,250 in combined contributions triggers recusal, it is unreasonable not to question a judge's impartiality in a case involving a group that spent $2 million supporting that same judge's election. Neither state courts considering reforms, nor judges considering their obligations under the rules to recuse, should be encouraged to hide behind such an unrealistic distinction. at 110-11 (3d ed. 2000).

IV. INVIGORATING JUDICIAL DISQUALIFICATION: TEN POTENTIAL REFORMS

The time has come for all courts – and particularly elected courts – to take active measures to restore public trust. Without a meaningful response to legitimate concerns induced by their own campaign-related behavior, judges cannot expect the public to rise to their defense when their authority is questioned on illegitimate grounds. To protect judicial independence, courts must embrace the public demand for accountability – in its procedural sense. Courts must demonstrate their accountability for the decisions they make by more aggressively distancing themselves from situations in which their fairness and impartiality might reasonably be questioned.

With the canons of judicial conduct looking increasingly precarious in the wake of *White*, courts and litigants are left with precious few reliable mechanisms to safeguard the constitutional right to due process. Recusal is one such remaining safeguard, and, because it is tailored to the specific factual circumstances of the case at issue, it does not trigger the same First Amendment scrutiny as canons limiting political speech.[88] Having outlined the growing threats to judicial independence and impartiality – and the inadequacy of judicial disqualification, as currently utilized, to combat these threats – we propose here some possible solutions.

Specifically, we offer ten proposals with the potential to invigorate dramatically the protections offered by disqualification. Section A suggests nine possible reforms to systems of disqualification that courts could implement unilaterally – what we will call *internal* solutions. Some of these reforms could also be implemented by state legislatures. Section B suggests an additional reform that citizens might undertake even without the imprimatur of the courts – what we will call an *external* solution. We make no claim to the originality of our list, but it offers an array of recusal reform options for courts interested in preserving their independence and impartiality.

We recognize that all of these proposals require tradeoffs among the benefits and risks they present. On the one hand, strengthening disqualification rules may be a means to safeguard due process and public trust in the judiciary.[89] 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 reform option. But the looming crisis created by *White* and exacerbated by *Avery* means that reform is no longer an option; it is a necessity.

A. NINE INTERNAL SOLUTIONS

Invigorating recusal standards in any particular jurisdiction is unlikely to require acceptance of all of the proposals we describe. Indeed, some of the procedures we recommend are already in place in some states.[90] Implementing certain suggestions would obviate the

need for others. The value of each reform will depend upon the context into which it is introduced.

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.[91]

One example is Montana, where each party in a criminal or civil matter is allowed one "substitution" of a judge.[92] The only requirements placed on the party moving for substitution are that the motion be filed in a timely manner (within 30 days after service of summons) and, in civil cases, that it be accompanied by a $100 fee.[93] Peremptory disqualification has the potential to substantially increase the frequency of disqualification, and it denies judges the opportunity to defend themselves against charges of partiality. Its great advantage, though, lies in its simplicity: by granting litigants one "free pass," peremptory disqualification allows most of them to secure an unbiased judge without the expense, unseemliness, and retribution risk of a disqualification challenge. If the next-assigned judge is also unsatisfactory, the litigant may challenge her for cause.

19 States Allowing Peremptory Disqualification

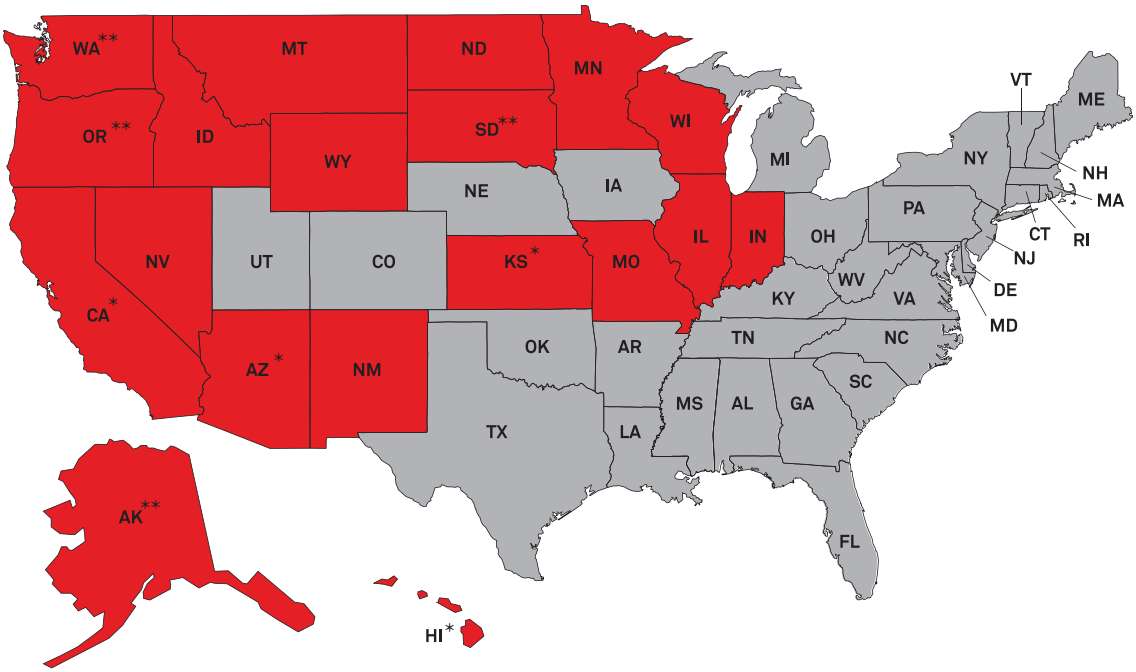


Figure 7.

Opponents of peremptory disqualification have typically raised two main arguments against it: that it will lead to "abuses" – instances in which the litigant exercises a peremptory strike not out of sincere due process concerns but rather because the assigned judge seems unfavorable – and that it will burden judicial administration.[94] Abuse is always a risk, but the criticism applies equally to peremptory challenges of venirepersons, which we nevertheless use to promote confidence in the jury's fairness. Jurisdictions may be able to deter peremptory challenges of judges for truly ungrounded or offensive reasons by requiring an affidavit explaining the challenge.[95]

> "If a party or a party's attorney in a district court action or a superior court action, civil or criminal, files an affidavit alleging under oath the belief that a fair and impartial trial cannot be obtained, the presiding district court or superior court judge, respectively, shall at once, and without requiring proof, assign the action to another judge of the appropriate court in that district, or if there is none, the chief justice of the supreme court shall assign a judge for the hearing or trial of the action. The affidavit must contain a statement that it is made in good faith and not for the purpose of delay."
>
> Source: Alaska Stat. 22.20.022(a) (2005).

Some amount of administrative disruption is likewise inevitable. But by capping peremptory challenges at one per proceeding and requiring them to be made at an early stage (before the removed judge has invested time and energy familiarizing herself with the case), disruption can be kept to a minimum. Against these costs, the great appeal of peremptory disqualification is that of all the plausible reforms it provides the most straightforward, robust protection of judicial impartiality. Even where peremptory challenges exist on the trial court level, however, other measures are needed in the context of appeals.

2. Enhanced Disclosure

In the wake of the *White* decision, enhanced disclosure might be one of the simplest and most important reforms available. Judicial candidates now are more likely to make campaign statements on controversial legal and policy questions. Some of those statements – particularly when they reflect actual or implied promises about how the judge will decide certain classes of cases – might support reasonable doubts about the judge's impartiality. Judges could be required to file with their clerk's office copies or transcripts of all campaign advertising and statements, which the court could then make available for public inspection by parties in a case. Without such disclosure requirements, the burden of tracking down such information may be prohibitive for many litigants.

Similarly, judges could be required to disclose information about their campaign finances. Although campaign finance laws in every state now mandate reporting of campaign contributions and expenditures,[96] the stringency and enforcement of disclosure provisions vary

widely. Even when disclosure rules are sound, moreover, information about a particular judge may be difficult to obtain. In states with canons proscribing the direct solicitation of contributions by judicial candidates, the court clerk's office might be asked to provide the parties with campaign finance reports, so that these disclosures do not vitiate efforts by conscientious judges to insulate themselves from the potentially distorting influence of that information.

More generally, at the outset of the litigation, judges could be required to disclose orally or in writing any facts that might plausibly be construed as bearing on the judges' 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.

States have taken various approaches on this front. As discussed previously, most states have adopted the Model Code's Rule 2.11(A) in one form or another.[97] However, states have differed on whether judges are required to disclose any information that might be considered relevant for recusal or disqualification purposes. Iowa requires that a judge disclose on the record information the judge believes might be relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.[98] However, in Michigan, a judge is not required to disclose any information concerning disqualification but is merely encouraged to do so by the applicable canon.[99]

To further enhance the disclosure of relevant information concerning disqualification, some states provide a centralized system through which attorneys and their clients can review a judge's recusal history. Alaska courts utilize a system that assigns a special code to cases that have been reassigned due to a judge's recusal. The database of these cases is accessible to the public, allowing one to track the number of recusals for a specific judge. Parties interested in determining the reasons for the recusals, however, must inspect the individual case files, as such information is not stored in the database.[100]

Objections to these proposals might emphasize the added burden on judges or clerks, the potential intrusiveness on judges' privacy, or the low probability that judges would disclose many of the most relevant facts. (For example, no one will say, "I am a racist" or "I feel beholden to the trial lawyers who supported my campaign.") The practical burden on judges is small, however, and the marginal cost to their privacy is slighter still, because judges already have an ethical obligation to disclose pertinent facts, even if this obligation has not been formalized into a legal rule.[101] While it may be true that no disclosure policy could force judges to disclose their biases and interests when they are unwilling to do so (or are ignorant of their existence), this weakness is not an argument *against* enhanced disclosure; it just indicates that enhanced disclosure is a partial solution. Disclosure is also an incomplete solution in the sense that it provides only the grounds for disqualification; it does not guarantee that a judge will recuse herself when the grounds are made known.

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 has recommended mandatory disqualification of any judge who has accepted large contributions from a party appearing before her. As we explained above, current recusal doctrine makes it extremely difficult to disqualify a judge for having received contributions from a litigant or her lawyer,[102] even though there is ample evidence to suggest that these contributions create not only the appearance of bias but also actual bias in judicial decision-making.[103] This problem is only going to grow more acute in the coming years, as judicial election campaigns become increasingly expensive.

"[Y]ou do not have to do away with elections and or even fund-raising to make a drastic improvement in the quality of justice in state courts around the nation. All you need to do is listen to Professor [Vernon Valentine] Palmer. If a judge has taken money from a litigant or a lawyer, Professor Palmer says, the judge has no business ruling on that person's case."

Source: Adam Liptak, *Looking Anew at Campaign Cash and Elected Judges*, N.Y. TIMES, Jan. 29, 2008.

Since 1999 (and with minor updating in 2007 that is reflected in the text below) the ABA's Model Code has included a provision prescribing disqualification of an elected judge when:

> The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that [is greater than $[insert amount] for an individual or $[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].[104]

By setting a maximum threshold, the ABA's per se rule eliminates lawyers' incentive to curry favor through large contributions. By allowing contributions below that threshold, the ABA rule respects the fact that in many races the local bar will be in the best position to evaluate the candidates' merits – and if lawyers do not support candidates' campaigns, special interests and self-funding will likely dominate judicial campaign finance.

However, the ABA provision has yet to be adopted or applied by any state. Indeed, the ABA position is not just ignored; it is inverted in the prevailing jurisprudence, in which motions to disqualify a judge for campaign contributions "hardly ever succeed."[105] Motions to disqualify because a party or attorney has provided other types of campaign sup-

port, such as public endorsement or participation on the judge's campaign staff, have met a similar fate.[106] Motions to disqualify for *failure* to contribute money, time, or support to a judge's election campaign have fared even worse.[107] One state (Alabama) had a similar policy in place at the time of the ABA's revision,[108] but it appears to be rarely applied, as judges are unclear about the statute's legal status.[109] Mississippi includes campaign donations by counsel to the presiding judge as a factor available to parties moving for recusal.[110] However, the Mississippi statute falls well short of any sort of threshold standard, and, as a factor in the recusal determination, donations are not given any special weight.[111]

Two problems with the ABA's formulation of the rule may help to explain why no states have adopted it. First, in states with reasonable contribution limits, the potential for real or apparent corruption is largely addressed by the limits, which no individual may legally exceed. Under those circumstances, the ABA rule adds little to the campaign finance regime in protecting a judge's impartiality. Those jurisdictions would be better served by a rule that triggers disqualification after receipt of aggregate contributions of a certain amount not from a single donor, but collectively from all donors associated with a party to the litigation (such as corporate officers or management-level employees) or with counsel (such as law firm partners who have given in their individual capacity). This modification of the rule would also augment its efficacy in jurisdictions that lack reasonable contribution limits.[112] Concededly, precise line-drawing in terms of the scope and breadth of language pertaining to contribution aggregation is difficult, and preferences will vary based on many factors including jurisdiction. In that regard, the suggested language below is offered for consideration both in itself, and as a potential point of departure.

Second, the mandatory disqualification required by the ABA rule invites gamesmanship that could defeat its purpose. If the contribution threshold were set at a reasonable level, parties or lawyers could disqualify an unfavorable judge by making contributions (or aggregate contributions) above that amount to her campaign committee. To prevent such gaming of the system, any party whose opposition (or counsel for the opposition) contributed to the judge should be permitted to waive disqualification. A waiver is preferable to requiring a motion for disqualification because it keeps the onus on the court to disclose campaign finance information.[113] Thus, the ABA rule would be improved, and perhaps more likely to be adopted, if it were to require disqualification when:

> the judge knows or learns by means of a timely motion that a party, a party's lawyer, or the officers, partners, or other management-level employees of that party or of the law firm of the party's lawyer, has within the previous [ ] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than [$] for an individual or [$] for an entity. Disqualification under this section may be waived by any party, provided that the party, the party's lawyer, or the officers, partners, or other management-level employees of that party or of the law firm of the party's lawyer, has not made such contributions.

4. Independent Adjucation of Disqualification Motions

"The uproar over conflicts of interest at the West Virginia Supreme Court calls into question the practice of giving judges the final say in their recusals – even when they're faced with demands to step down. . . . 'There's a lot not to like in leaving it up to the conscience of the individual judge,' said Deborah Rhode, director of the Center for Ethics at Stanford University's law school."

Source: The Associated Press, *Massey-Maynard photos highlight judicial recusal rule*, The Herald-Dispatch, January 27, 2008.

The fact that judges in many jurisdictions decide on their own recusal challenges, with little to no prospect of immediate review,[114] is one of the most heavily criticized features of United States disqualification law – and for good reason. Recusal motions are not like other procedural motions. They challenge the fundamental legitimacy of the adjudication. They also challenge the judge in a very personal manner: they speculate on her interests and biases; they may imply unattractive things about her. Understanding this tension, Texas and several other states require that motions for disqualification be independently adjudicated. Texas Rules of Civil Procedure require that when a judge is presented with a motion for disqualification, the judge may choose one of two options before proceeding further in the trial: the judge may recuse herself, or the judge may request that the presiding judge assign another judge to hear and rule on the motion.[115]

In the face of mounting controversy surrounding its recusal laws, the West Virginia legislature is considering a different approach to independent adjudication of recusal motions.[116] Lawmakers there have proposed a resolution that would amend the state's constitution and create a judicial recusal commission.[117] The commission would be composed of acting or retired judges appointed by the governor, upon advice of the state senate, to serve six-year terms.[118] Parties seeking the recusal of a judge would simply submit an application to the commission to have that judge removed, upon which the commission would then issue a binding decision on the matter.[119]

Allowing judges to decide on their own recusal motions is in tension not only with the guarantee of a neutral decision-maker, but also with the explicit commitment to objectivity in this arena. "Since the question whether a judge's impartiality 'might reasonably be questioned' is a 'purely objective' standard" – a standard that virtually every state has adopted – "it would seem to follow logically that the judge whose impartiality is being challenged should not have the final word on the question whether his or her recusal is 'necessary' or required."[120]

Against these arguments, several prudential objections are typically offered in favor of judges making their own recusal decisions. As one commentator sets out the core claims:

> The primary benefit of the individual determination model is that the person with the best knowledge of the facts is the person who resolves whether the circumstances support recusal. Individual determination may also reduce the number of recusal "fishing expeditions" because parties will be reluctant to approach an individual [judge] with weak evidentiary support for a disqualification motion. The single-judge procedure also enhances judicial efficiency because it avoids prolonged fact-finding hearings before recusal decisions.[121]

None of these critiques is wholly misguided, but we do not find them compelling. The challenged judge may have the best knowledge of the facts, but the very biases or conflicts of interest that prompted the challenge in the first place may prevent her from fairly evaluating the import of those facts. In addition, the judge may fear that granting a disqualification motion will send the signal that she is biased, even if she is not, and that it will raise questions about why she failed to recuse herself *sua sponte*.[122] "Fishing expeditions" should be deterred by the fact that the third-party decision-makers will be judges themselves, and so will have a professional and personal interest in ensuring that such expeditions do not flourish.[123] (Sanctions might also be used for frivolous challenges.) And while independent adjudication of recusal motions does raise efficiency costs, those costs should not be substantial if decisions are based on written affidavits and oral argument, rather than full-blown adversarial hearings. The increased procedural integrity and public trust fostered by an independent decision-maker may be well worth the price.

5. Transparent and Reasoned Decision-Making

Judicial disqualification in many jurisdictions is something of a black box: there is no systematic record of how disqualification motions are decided or on what grounds.[124] The failure of many judges to explain their recusal decisions, and the lack of a policy forcing them do so, 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.[125] The lack of public reason-giving also creates less abstract problems: it stymies and distorts the development of precedent, it deprives appellate courts of materials for review, and it allows judges to avoid conscious grappling with the charges made against them. To remedy these problems, 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.

"Just think about it – $4,000,000! I know hardly a soul who could believe that a justice who benefited to this extent from a litigant could rule fairly on cases involving that litigant or his companies – or appoint judges to sit on those cases. That is the very definition of 'appearance of impropriety.'"

Source: Notice of Voluntary Disqualification of the Hon. Larry V. Starcher, Justice of the Supreme Court of Appeals of West Virginia, *A.T. Massey Coal Co., Inc., v. Caperton*, No. 33350 (Feb. 15, 2008).

Most states require that a ruling on a motion for disqualification be executed in writing, either through a written order or a bench decision on the record.[126] However, in practice, this procedural requirement does not guarantee any discussion whatsoever of the reasons for disqualification. California has supplemented this process somewhat by requiring that certain information be disclosed to the parties in regards to a disqualification hearing.[127] Specifically, parties are entitled to receive a copy of any written answer a judge may file regarding disqualification.[128] Yet even measures such as these do not necessarily enhance precedent or the materials available for appellate review. Any sort of measure requiring judges to explain the basis for their disqualification decisions would be preferable.

6. De Novo Review of Interlocutory Appeal

The perfunctory abuse-of-discretion standard of review applied to recusal decisions in nearly every jurisdiction has drawn its fair share of critics.[129] 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. It would also provide a measure of discipline for lower court judges, who would face a higher risk of disqualification – and the attendant professional embarrassment – for erroneous recusal decisions. Evidence from the Seventh Circuit, the only federal appeals court to review recusal determinations de novo, might shed some light on why such a standard is desirable.

In addition to adopting a more meaningful standard of appellate review, courts could improve their procedures for appeal. While the standard mechanisms for filing an appeal – interlocutory orders, motions for reconsideration, and post-trial petitions – all have a role to play, interlocutory orders offer litigants the earliest opportunity for relief. In jurisdictions in which independent adjudication of the recusal motion is not implemented at the trial court level, encouraging or requiring appellate courts to accept interlocutory orders in a timely manner (which rarely happens at present)[130] may provide a second-best alternative

7. Mechanisms for Replacing Disqualified Appelate Judges

The *Avery* case illustrates a problem with recusal procedures in states that do not designate a substitute for a disqualified appellate judge. If Justice Karmeier had agreed to step down from the case, his court would have split evenly, leaving the decision below intact. The potential for such even splits at the appellate level can raise serious problems of gamesmanship, and it undermines the precedential value of the resulting decisions. It is therefore important that regardless of which recusal policies they adopt, courts have in place mechanisms for efficiently replacing a disqualified judge.[131]

8. Expanded Commentary in the Canons

Expanding the canon commentary on recusal would be a classic "soft" solution for regulating its practice. This reform would be of limited value, both because of the commentary's weak legal stature and because the discussion cannot cover all possible situations. Neverthe-

less, it would be relatively costless to do, and it would promote adherence to higher ethical standards by clarifying when recusal is advisable, if not strictly required. The commentary could also be expanded to provide more examples of situations meriting disqualification – for instance, representative campaign statements that might reasonably be interpreted as indicating a commitment to a particular outcome in certain types of proceedings –which would make it tougher for judges to deny disqualification motions based on similar facts.

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 likely underuse and underenforcement of disqualification motions, the social psychological research into bias, the importance of avoiding the appearance of partiality, and so forth. These seminars might also review potential reforms to recusal doctrines and court rules. Beyond their specific teachings, simply having such seminars might help to foster a legal culture in which there is deeper awareness of disqualification law and its current flawed state.

B. AN EXTERNAL SOLUTION: RECUSAL ADVISORY BODIES

Outside observers need not sit idly by as judges consider the previous reforms. In some states in which there is heightened concern about the fallout from *White* and other pressures to abandon ethical standards, bar associations or other groups of volunteers have created committees to monitor judicial campaign conduct.[133] These groups serve both as a resource for candidates who want to take the high road, by offering them cover for the refusal to lower their standards, and as a source of corrective public education when advertising in judicial campaigns (by candidates, political parties, or interest groups) is false or misleading. The most effective committees often have no official status; they work by drawing attention to problems and keeping participants in the electoral process accountable for their behavior.

> Campaign conduct oversight committees – some of which are official, some quasi-official, and some unofficial committees of diverse community leaders – can make a major difference in curbing inappropriate judicial campaign conduct.
>
> Source: Barbara Reed & Roy Schotland, *Judicial Campaign Conduct Committees*, 35 Ind. L. Rev. 781, 783 (2002).

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. In contrast, the advisory body could disclose when a

judge has ignored advice favoring disqualification. The publicity would create pressure for the judges to follow recusal recommendations or to specify clear reasons for their decision to sit on a case.

V. CONCLUSION

We have by no means catalogued all of the possible changes to recusal doctrine and practice that could enhance the accountability of judges and protect their independence. But even the few proposals briefly outlined here could compensate for some of the evident weaknesses in current disqualification standards and help to protect the real and apparent impartiality of the courts. The challenge for elected judges, whose campaign supporters may well want them to rule on cases from which they should be disqualified, will be to overcome pressures to maintain the status quo. The rising attacks on the judiciary may provide the needed incentives for recusal reform.

We acknowledge that, although recusal reform is badly needed, it is less than a perfect solution to the problems arising in the aftermath of *White*. Recusal is an incomplete safeguard of judicial fairness and impartiality because it is an individualized, case-specific remedy and so protects only against harms to particular litigants. Front-end, systemic protections, such as non-elective judicial selection methods or canons prohibiting conduct that undermines real and perceived judicial impartiality, are ultimately preferable. But the fact is that as those protections are being scaled back or stricken, the back-end disqualification of judges who appear to be biased is becoming all the more important as a protection of last resort. Invigorating recusal would help courts currently under siege to seize the high ground and recover the respect of a disenchanted public.

ENDNOTES

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1 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.

2 *See* David Rottman, *The State Courts in 2005: A Year of Living Dangerously*, *in* 38 Council of State Gov'ts, The Book of the States 237, 237 (2006) (summarizing state court jurisdiction-stripping measures).

3 *See, e.g.*, Kansas Judicial Watch v. Stout, 440 F. Supp. 2d 1209 (D. Kan. 2006) (discussing the questionnaire submitted by the plaintiff to judicial candidates); Barbara E. Reed, *Tripping the Rift: Navigating Judicial Speech Fault Lines in the Post*-White *Landscape*, 56 Mercer L. Rev. 971, 996-1016 (2005) (documenting the growing role of judicial candidate questionnaires and providing examples).

4 The Judicial Accountability Initiative Law ("J.A.I.L. 4 Judges") was on the ballot in South Dakota in 2006. It would have created a Special Grand Jury empowered to sanction judges who made decisions it found unacceptable. Voters rejected the ballot measure by a margin of 78 points (89% to 11%).

5 Sandra Day O'Connor, *The Threat to Judicial Independence,* Wall St. J., Sept. 27, 2006, at A18.

6 Deborah Goldberg et al., The New Politics of Judicial Elections 2004, at 13-14 (2005), *available at* http://www.brennancenter.org/dynamic/subpages/download_file_10569.pdf.

7 *Id.*

8 *Id.*

9 *Id.* at 23.

10 *Id.* at 3.

11 Press Release, Brennan Center for Justice, Once Courtly, Campaigns for America's High Courts Now Dominated by Television Attack Ads (Nov. 2, 2006), http://www.brennancenter.org/press_detail.asp?key=100&subkey=38281.

12 Greenberg Quinlan Rosner Research & American Viewpoint, Justice at Stake Frequency Questionnaire 4 (2001), http://www.gqrr.com/articles/1617/1412_JAS_ntlsurvey.pdf; Justice at Stake Campaign, March 2004 Survey Highlights: Americans Speak Out on Judicial Elections (2004).

13 *Id.* at 4.

14 *Id.* at 7.

15 Greenberg Quinlan Rosner Research & American Viewpoint, Justice at Stake—State Judges Frequency Questionnaire 5 (2002), http://www.gqrr.com/articles/1617/1411_JAS_judges.pdf; *see also* Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 Stan. L. Rev. 449, 463-66 (1988) (providing examples of comments by elected judges that suggest that contributions influence case outcomes).

16 *Id.* at 11.

17 Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 Cap. U. L. Rev. 583, 584 (2002).

18 Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006, at A1.

19 Adam Liptak, *Looking Anew at Campaign Cash and Elected Judges*, N.Y. Times, Jan. 29, 2008.

20 *Id.*

21 *Id.*

22 Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006, at A1..

23 Chisom v. Roemer, 501 U.S. 380, 400 (1991).

24 536 U.S. 765 (2002).

25 *White*, 536 U.S. at 770.

26 Justice Scalia considered three definitions of "impartiality": lack of bias for or against either party, lack of preconception in favor of or against a particular legal view, and open-mindedness. *Id.* at 775-81. For a critique of Justice Scalia's proposed definitions, see J.J. Gass, Brennan Ctr. for Justice at NYU Sch. of Law, After *White*: Defending and Amending Canons of Judicial Ethics 6-7 (2004), *available at* http://www.brennancenter.org/dynamic/subpages/ji4.pdf.

27 *See White*, 536 U.S. at 780-81.

28 *Id.*

29 *See id.* at 794 (Kennedy, J., concurring) ("[States] may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.").

30 *See, e.g.*, Mich. Code of Judicial Conduct Canon 7B.1.c (1994); Ohio Code of Judicial Conduct Canon 7(B)(2)(c) (1997).

31 Ackerman v. Ky. Jud. Retirement & Removal Comm'n, 776 F. Supp. 309, 315 (W.D. Ky. 1991).

32 *See, e.g.*, Kan. Code of Judicial Conduct Canon 5A(3)(d)(ii) (2006); Pa. Code of Judicial Conduct Canon 7B(1)(c) (2005).

33 *See, e.g.*, Indiana Right to Life, Inc. v. Shepard, --- F.3d ----, No. 06-4123, 2007 WL 3120095, *5 (7th Cir. Oct, 26, 2007) (ruling that the plaintiff did not have standing based on the fact that candidates declined to answer questionnaires); Pennsylvania Family Insti-

tute, Inc., v. Celluci, --- F.3d ----, No. 07-1707, 2007 WL 3010523, at *11 (E.D. Pa. Oct. 16, 2007) (ruling that the plaintiff had constitutional standing as a potential recipient of "chilled speech' from judicial candidates who would have filled out questionnaires but for the state's Pledges or Promises Clause); Kansas Judicial Watch v. Stout, 440 F. Supp. 2d 1209 (D. Kan. 2006), *appeal docketed* No. 06-3290 (10th Cir. Aug. 17, 2006); Duwe v. Alexander, 490 F. Supp. 2d 968, 972 (W.D. Wis. 2006) (ruling that the inability to obtain answers to questionnaires due to the state's supreme court rules was sufficient grounds for challenging canons

34 *White*, 536 U.S. at 780.

35 *Compare* Alaska Right to Life Pol. Action Comm. v. Feldman, 380 F. Supp. 2d 1080, 1083 (D. Alaska 2005) (striking down Alaska's Pledges or Promises Clause), *vacated*, 504 F.3d 840 (9th Cir. 2007), *and* North Dakota Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1039 (D.N.D. 2005) ("A careful reading of the majority opinion in *White* makes it clear that the 'pledges and promises clause' . . . [is] not long for this world"), *with* Pennsylvania Family Institute, Inc., v. Celluci, --- F.3d ----, No. 07-1707, 2007 WL 3010523, at *11 (E.D. Pa. Oct. 16, 2007) (upholding Pennsylvania's Pledges and Promises Clause); *In re* Kinsey, 842 So. 2d 77, 87 (Fla. 2003) (upholding Florida's Pledges or Promises Clause), *and In re* Watson, 794 N.E. 2d 1, 6 (N.Y. 2003) (upholding New York's Pledges or Promises Clause).

36 Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 Colum. L. Rev. 563, 620 (2004).

37 Recognizing as much, an ABA commission recently added the following to the Model Code, prescribing disqualification when:

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

See ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, Overview of Model Code of Judicial Conduct as Adopted (Feb. 2007), *available at* http://www.abanet.org/judicialethics/Overview_GAK_030707.pdf [hereinafter ABA Report], Canon 2, R. 2.11(A)(5).

38 *See, e.g.*, Stretton v. Disciplinary Bd. of the Supreme Ct., 944 F.2d 137, 146 (3d Cir. 1991) ("[W]e cannot say that the state may not draw a line at the point where the coercive effect, or its appearance, is at its most intense—personal solicitation by the candidate."); *In re* Fadeley, 802 P.2d 31, 40 (Or. 1991) (explaining that the ban mitigates not only the danger of the appearance of quid pro quo corruption, but also the prospect of coercion of lawyers and litigants into contributing).

39 Simes v. Ark. Judicial Discipline & Disability Comm'n, 368 Ark. 577 (Ark. 2007); *In re* Dunleavy, 838 A.2d 338 (Me. 2003).

40 *Simes*, 368 Ark. 577.

41 Weaver v. Bonner, 309 F.3d 1312, 1321 (11th Cir. 2002); *see also* Republican Party of Minn. v. White, 416 F.3d 738, 765-66 (8th Cir. 2005) (holding that Minnesota's solicitation clause was unconstitutional to the extent that it prohibited candidates from signing solicitation letters and making campaign appeals before large groups).

42 *See White,*536 U.S. at 783.

43 *See White*, 416 F.3d at 754-63.

44 *See, e.g.*, *In re* Dunleavy, 838 A.2d 338 (Me. 2003) (upholding the requirement that a judge resign before running for another office); *In re* Raab, 793 N.E.2d 1287 (N.Y. 2003) (upholding restrictions on activities supporting campaigns other than the candidate's own).

45 North Dakota Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1041-42 (D.N.D. 2005).

46 *See* ABA Report, *supra* note 37; *see also* Rachel Paine Caufield, *In the Wake of* White*: How States are Responding to* Republican Party of Minnesota v. White *and How Judicial Elections Are Changing*, 38 Akron L. Rev. 625, 646 (2005) (describing the recommendations of the ABA's Standing Committee on Judicial Independence); M. Margaret McKeown, *Don't Shoot the Canons: Maintaining the Appearance of Propriety Standard*, 7 J. App. Prac. & Process 45, 48 (2005) ("The [ABA] Commission [to Evaluate the Model Code of Judicial Conduct] is examining the disqualification standards in light of increased attention and sensitivity about recusal).

47 McKeown, *supra* note 45, at 45.

48 ABA Model Code of Judicial Conduct Canon 2, R. 2.11 (2007) [hereinafter ABA Model Code].

49 28 U.S.C. § 455(a) (2000).

50 ABA Model Code, *supra* note 48, Canon 2, R. 2.11(A)(1).

51 *Id.* Canon 2, R. 2.11(A)(6)(a).

52 *Id.* Canon 2, Rule 2.11(A)(3).

53 *Id.* Canon 2, R. 2.11(A)(2).

54 *See generally* Richard E. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges § 6.4.1, at ch. 12 (1996). *See also id.* § 12.1, at 335 & n.8 (noting that courts have interpreted Canon 3E's general standard as prescribing disqualification when the judge has personal knowledge of disputed evidentiary facts).

55 ABA Model Code, *supra* note 48, Canon 2, R. 2.9(A); Flamm, *supra* note 54, at ch. 14.

56 The rule of necessity is absolute when it applies, and "can be justified only by strict and imperious necessity." Annotation, *Necessity as Justifying Action by Judicial or Administrative Office Otherwise Disqualified To Act in Particular Case*, 39 A.L.R. 1476, 1479 (1925). It has been in use since at least 1430. *See* United States v. Will, 449 U.S. 200, 213 (1980).

57 These are challenges that seek to remove a judge from hearing all cases of a certain type. An example of a blanket disqualification challenge would be an attorney's request that a judge be disqualified from hearing all cases brought by her firm or a public defender's request that a judge be disqualified from hearing all capital cases. An example of a class-based challenge would be a motion to remove a judge for her racism. Both types of challenges violate the case-by-case method and the "strong presumption that those who sit in a judicial capacity are disinterested, impartial, and unbiased in all matters that come before them," Flamm, *supra* note 54, § 19.9, at 573-74 (internal citations omitted), and so are rarely upheld. *See id.* § 3.5.3, at 66-72 (summarizing blanket challenges); *id.* § 4.5, at 126-29 (summarizing claims of class bias); Jeffrey M. Shaman et al., Judicial Conduct and Ethics § 4.08, at 125 (3d ed. 2000) (noting that "courts are highly reluctant to grant blanket disqualification" and providing examples).

58 *See* Flamm, *supra* note 54, § 4.4, at 114-26; Shaman et al., *supra* note 55, § 4.08, at 122-24.

59 *See* Flamm, *supra* note 54 § 4.6.1, at 132.

60 *See id.* §§ 4.3, 4.6.1 at 112, 131; Shaman et al., *supra* note 57, § 4.04, at 113.

61 Liteky v. United States, 510 U.S. 540, 555 (1994); *see also* United States v. Grinnell Corp., 384 U.S. 563, 583 (1966) (applying the extrajudicial source rule); Flamm, *supra* note 54, § 4.6, at 129-40 (explaining the rule); Shaman et al., *supra* note 57, § 4.05, at 115-17 (same). There is some debate over the coherence and manageability of this doctrine—critics point out the difficulties in determining what is extrajudicial versus intrajudicial and ask why this distinction should be so decisive—but it remains good law.

62 Flamm, *supra* note 54, § 19.9, at 573; John Leubsdorf, *Theories of Judging and Judicial Disqualification*, 62 N.Y.U. L. Rev. 237, 241-42 (1987).

63 Flamm, *supra* note 54, § 19.9, at 575-76. Different courts have defined the evidentiary burden in different ways—demanding, for example, a showing of compelling evidence, substantial evidence, or a preponderance of the evidence. *Id.* § 19.9, at 576-77. In some jurisdictions, a judge must take as true the facts alleged in support of a disqualification motion, whereas in others judges may be permitted, or may even have the duty, to assess the validity of these facts. *Id.* § 19.3.1, at 559-62. Jurisdictions also differ as to whether the actions of a disqualified judge are void or merely voidable. *Id.* § 22.4.2, at 653-55. All of these distinctions, however, are minor compared to the uniformity in the allocation (to the movant) and degree (onerous) of the burden of proof.

64 *See* Flamm, *supra* note 54, § 32.1, at 592 (Supp. 2005) ("The 'abuse of discretion' standard is generally employed both by state appellate courts and by the various federal circuit courts of appeal, and it is typically applied in both civil and criminal proceedings."); Fed. Judicial Ctr., Recusal: Analysis of Case Law Under 28 U.S.C. § 455 & 144 at 65 (2000) (claiming that an abuse of discretion standard is used in every federal circuit except for the Seventh, which reviews disqualification appeals de novo); *see also* Flamm, *supra* note 54, § 1.10.1, at 20 (asserting that appellate courts "tend to view judicial disqualification inquiries as both difficult and distasteful") (internal citations omitted); *id.* §§ 31.4-.7, at 975-91 (summarizing the procedural mechanisms for appealing a disqualification decision and noting that state and federal courts rarely grant such appeals, whether made through interlocutory order, motion for reconsideration, or post-trial petition); Patrick M. McFadden, Am. Judicature Soc'y, Electing Justice: The Law and Ethics of Judicial Election Campaigns 19-20 (1990) (highlighting the deferential nature of appellate review regarding recusal). The abuse of discretion standard is typical of appellate review of conclusions of fact in the American legal system, whereas conclusions of law are generally reviewed de novo. (The scrutiny applied to mixed findings of fact and law will depend on the issue at question.) *See* Lisa M. White, Comment, *A Wrong Turn on the Road to Tort Reform: The Supreme Court's Adoption of De Novo Review in* Cooper Industries v. Leatherman Tool Group, Inc., 68 Brook. L. Rev. 885, 904 (2003).

65 *See* Flamm, *supra* note 54, § 3.1, at 59 (stating that "a substantial minority" of states, most either midwestern or western, have adopted peremptory rules); Friedland, *supra* note 63, at 615 ("About a third of the states already provide for . . . peremptory disqualification."); Leubsdorf, *supra* note 60, at 240 n.13 (reporting that, as of 1987, seventeen states had statutory provisions allowing peremptory disqualification). *See generally* Flamm, *supra* note 52, at ch. 3 (providing an overview of peremptory disqualification).

At the federal level, 28 U.S.C. § 144 appears to dictate peremptory disqualification for charges of personal bias or prejudice in district courts, but the Supreme Court has in-

terpreted § 144 so as to require "fair support" for all such charges, Berger v. United States, 255 U.S. 22, 33 (1921), and disqualification has rarely been sought or obtained under this statute. Flamm, *supra* note 54, § 25.8, at 737-38; Charles Alan Wright et al., Federal Practice and Procedure § 3541, at 551 (2d ed. 1992). Critics have assailed the Court's interpretation of § 144 as subverting a clear congressional intent to allow peremptory disqualification. *See, e.g.*, Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 Iowa L. Rev. 1213, 1224 (2002); John P. Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 629 (1947); Frost, *infra* note 71, at 543-44.

66 Peremptory disqualification, it should be noted, may be implemented any number of ways. Among jurisdictions that offer it, there are significant disparities regarding whether and what kind of affidavit must be filed, the strictness or liberality with which judges will interpret the controlling statutes, and the rules on timeliness, waiver, and review. *See* Flamm, *supra* note 54, §§ 3.7-.17, at 74-102.

67 Flamm, *supra* note 54, § 3.9.2, at 80-81.

68 *See, e.g.*, Alaska Stat. 22.20.020(a)(9) (2005); Utah R. Civ. P. 63(b)(2)-(3) (2005); Vt. R. Civ. P. 40(e)(3) (2006).

69 *See* Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 Val. L. U. Rev. 543, 545-58 (1994) (explaining these three methods and their subvariants).

70 Judicial disqualification raises particularly vexing issues at the Supreme Court level, where there is no possibility of review by a higher court or (under current law) substitution of Justices, and where the removal of a Justice creates the possibility of an equally divided Court. Many have criticized the federal Supreme Court's laissez-faire recusal policies. Because the Supreme Court's disqualification practices raise such discrete concerns and are already scrutinized by the media and the legal community at great depth, we focus in this article only on lower courts.

71 On the rarity of transfers in federal courts, see Schurz Communications, Inc. v. FCC, 982 F.2d 1057, 1059 (7th Cir. 1992); Fed. Judicial Ctr., *supra* note 64, at 44; Amanda Frost, *Keeping Up Appearences: A Process Oriented Approach to Judicial Recusal*, 53 U. Kan. L. Rev. 531. 571-72 (2005); Randall J. Litteneker, Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. Chi. L. Rev. 236, 266 (1978). On the rarity of transfers in state courts, see Flamm, *supra* note 54, § 17.5.1, at 516-17; Abramson, *supra* note 69, at 547 (counting twenty-seven states as of 1994 that rest recusal decisions within the "sound discretion" of the challenged judge).

72 *See* Flamm, *supra* note 54, § 17.5.1, at 516-17; Frost, *supra* note 71, at 571-72.

73 *See* Flamm, *supra* note 54, § 17.6, at 523-35; Abramson, *supra* note 69, at 555-58; Frost, *supra* note 71, at 569-70.

74 *See* McFadden, *supra* note 64, at 19; Frost, *supra* note 71, at 569-70; Leubsdorf, *supra* note 60, at 244-45.

75 *See* Frost, *supra* note 72, at 570-71; Leubsdorf, *supra* note 62, at 244-45 ("Published opinions . . . form an accumulating mound of reasons and precedents against withdrawal; meanwhile, some judges routinely and silently disqualify themselves in comparable cases.").

76 *See generally* Anthony Corrado et al., The New Campaign Finance Sourcebook (2d ed. 2005); Brennan Ctr. for Justice at NYU Sch. of Law, Writing Reform: A Guide to Drafting State and Local Campaign Finance Laws (Deborah Goldberg ed., rev. ed. 2004).

77 *See supra* notes 58-60 and accompanying text; *see also* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 Geo. J. Legal Ethics 1059, 1080 (1996) (observing that "even a casual perusal of the cases decided under the federal statute"—which is similar in substance to many state statutes— "demonstrates that only the very most outrageous behavior is sufficient to win a recusal").

78 *See* Alan J. Chaset, Disqualification of Federal Judges by Peremptory Challenge 58 (1981) (noting that "[j[udges, like other persons, are likely to resent charges of bias"); Howard J. Bashman, *Recusal on Appeal: An Appellate Advocate's Perspective*, 7 J. App. Prac. & Process 59, 68 (2005) ("[An] unsuccessful[] recusal request could cause the appellate judge to harbor resentment toward the party which claimed that the appellate judge was incapable of being fair. After all, judges are only human. And therefore, a recusal request that unsuccessfully challenges the perception of a judge's impartiality can serve as a self-fulfilling prophesy."); *id.* at 74 ("[A] party should move to disqualify an appellate judge only when disqualification is guaranteed to result. This is because the only thing worse than an appellate judge whose impartiality might reasonably be questioned is an appellate court that might well resent a party's attempt, without a convincing basis, to disqualify a judge from ruling on the merits of a case."); Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in* Bush v. Gore, 61 Md. L. Rev. 606, 622 (2002) ("Although recusal motions are filed against Justices on the Court, most litigants do not seek disqualification . . . because to do so suggests a lack of confidence in a Justice's ability to evaluate the issues objectively."); Stephen L. Wasby, *Recusal of Federal Judges: A Discussion of Recent Cases*, 14 Just. Sys. J. 525, 530-31 (1991) (discussing the risks of judicial "retribution" following a denied recusal motion).

79 This sentiment is perhaps most clearly articulated in the time-tested maxim that "no man shall be a judge in his own case." Dr. Bonham's Case, (1610) 77 Eng. Rep. 646, 652 (K.B.) *("aliquis non debit esse Judex in propria causa . . . . "); see also* Blackstone famously wrote that "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." 3 WILLIAM BLACKSTONE, COMMENTARIES *361, Additionally, R. Matthew Pearson notes that "asking a challenged Justice to rule on a motion to recuse puts that Justice in a precarious position. . . . [B]ecause a Justice is expected to recuse himself sua sponte if there is a reasonable apprehension of bias, a successful motion to recuse requires the Justice to admit that he failed in the first instance to adhere to statutory and ethical requirements." R. Matthew Pearson, Note, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 Wash. & Lee L. Rev. 1799, 1833-34 (2005).

One empirical study of 571 state court judges in Arkansas, Nebraska, New Hampshire, and Ohio regarding their disposition to disqualify themselves under a range of circumstances seemed to suggest a general judicial hostility toward recusal. Almost three-fourths of the respondents indicated a high level of ambivalence about disqualification across all of the questions raising the issue. Jeffrey M. Shaman & Jona Goldschmidt, Judicial Disqualification: An emperical Study of Judicial Practices and Attitudes, (1995).

80 *See, e.g.*, Dolly Chugh et al., *Bounded Ethicality as a Psychological Barrier To Recognizing Conflicts of Interest*, *in* Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy 74 (Don A. Moore et al. eds., 2005); Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 Psych. Rev. 781 (2004). Professor Debra Lyn Bassett has probed the relevance of these findings for judicial disqualification in Bassett, *supra* note 65, at 1248-51; and Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 Hastings L.J. 657, 661-71 (2005).

81 The following discussion of *Avery* draws on Brief *Amici Curiae* of 12 Organizations Concerned About the Influence of Money on Judicial Integrity, Impartiality, and Independence in Support of Petitioners, *Avery v. State Farm Mut. Auto. Ins. Co.*, 126 S. Ct. 1470 (2006) (No. 05-842) [hereinafter *Avery* brief]; and Goldberg et al., *supra* note 6, at 18-19, 26-27.

82 *See* Goldberg et al., *supra* note 6, at 18.

83 Petition for a Writ of Certiorari 8, *Avery*, 126 S. Ct. 1470 (2006) (No. 05-842).

84 Storyboards, providing video clips at four-second intervals and the full script of the ads, may be found at http://www.brennancenter.org/dynamic/subpages/download_file_47458.pdf.

85 *See* James Sample, *The Campaign Trial: The True Cost of Expensive Court Seats*, Slate, Mar. 6, 2006, http://www.slate.com/id/2137529/; *see also* Brief for Business and Professional People for the Public Interest and Citizen Action/Illinois as Amici Curiae in Support of Petitioners 2-5, *Price v. Philip Morris Inc.*, 127 S. Ct. 685 (2006) (No. 06-465) (explaining that Justice Karmeier also recently cast the deciding vote in reversing a $10.1 billion judgment against Philip Morris USA, a company that, along with a business lobbying group backing it, reportedly spent more than $1 million supporting Karmeier in the 2004 election).

86 One of the authors of this article contributed to an amicus brief co-signed by the Brennan Center for Justice, the Campaign Legal Center, and ten other organizations in support of certiorari in *Avery*. *See Avery* Brief, *supra* note 81. The brief asserted that the case "present[ed] an important opportunity for the Court to provide guidance as to the circumstances in which the Due Process Clause of the Fourteenth Amendment requires recusal." *Id.* at 2.

It should be noted that, while the potential harms raised by large campaign contributions apply only to state judicial elections, many of the due process protections provided by the canons also apply in the context of appointed state courts. As in the more dramatic context of elective judiciaries, the current uncertainties surrounding those due process protections also militate in favor of guidance as to the circumstances in which due process may mandate recusal.

87 Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768, 844-45 (Tex. App. 1987), *cert dismissed*, 485 U.S. 994 (1988).

88 Drawing on Justice Kennedy's concurrence in *White*, courts that have invalidated canons regulating campaign speech, fundraising, or political activity have upheld canons mandating disqualification when impartiality might reasonably be questioned. *See, e.g.*, Indiana Right to Life, Inc. v. Shepard, --- F.3d ----, No. 06-4123, 2007 WL 3120095, *5 (7th Cir. Oct, 26, 2007); Kansas Judicial Watch v. Stout, 440 F. Supp. 2d 1209 (D. Kan. 2006), *appeal docketed* No. 06-3290 (10th Cir. Aug. 17, 2006); Alaska Right to Life Pol. Action Comm. v. Feldman, 380 F. Supp. 2d 1080, 1083 (D. Alaska 2005) *vacated*, 504 F.3d 840 (9th Cir. 2007); North Dakota Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021,1039 (D.N.D. 2005); Family Trust Fund of Ky. v. Wolnitzek, 345 F. Supp. 2d 672 (E.D. Ky. 2004).

89 Sometimes one hears the argument that disqualification rules concerned with minimizing the appearance of bias will have the perverse effect of distracting attention from more pressing issues of actual bias, of elevating appearance over reality. *See, e.g.*, Alex Kozinski, *The* Real *Issues of Judicial Ethics*, 32 Hofstra L. Rev. 1095 (2004). This line of argument, in our view, slights the instrumental value of avoiding the appearance of bias both for preserving public confidence in the judiciary (and in public institutions more generally) and, more basically, for rooting out actual bias that would otherwise be undetectable.

90 Systematic comparative research into the usage and efficacy of the various policies already in place is sadly lacking.

91 *See supra* notes 65-67 and accompanying text (describing peremptory disqualification). There is also a federal peremptory disqualification statute, 28 U.S.C. § 144, but the Supreme Court has vitiated its significance by requiring "fair support" for all motions brought under it. *See supra* note 66.

92 Mont. Code Ann. § 3-1-804 (2005).

93 *Id.*

94 *See* Bassett, *supra* note 65, at 1254.

95 *See* Flamm, *supra* note 54, § 3.8, at 76-79 (describing peremptory disqualification jurisdictions that require the filing of a timely motion, a supportive affidavit, and a certification of good faith in order for disqualification to be granted).

96 *See* Banner, *supra* note 15 ("All fifty states and the District of Columbia require candidates for elective office to file reports disclosing all campaign contributions and, for contributions over a certain amount, the names of contributors.").

97 ABA Model Code, *supra* note 48, Canon 2, R. 2.11.

98 Iowa Code § 602.1606 (2006); *see also* Iowa Code of Judicial Conduct Canon 3(D) (2007) (stating that instead of remitting or disqualifying himself/herself a judge may disclose the relevant information concerning disqualification to the parties and receive written consent to proceed as the adjudicator despite the potential conflict).

99 Mich. Code Judicial Conduct 3(C) (2007).

100 Recusal Survey, National Center for State Courts, Alaska Survey Response (2007) (on file with author).

101 Judges do have a general ethical obligation to disclose possible grounds for their disqualification. *See* Flamm, *supra* note 54, § 19.10.2, at 579. The ABA Model Code stipulates that "[a] judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." ABA Model Code, *supra* note 48, Canon 2, R. 2.11, cmt. 5. Notice, however, that this stipulation appears only in the Commentary and is phrased in hortatory, not mandatory terms. Legally, litigants "cannot require an unwilling judge to disclose facts and opinions." Leubsdorf, *supra* note 62, at 242.

102 *See infra* notes 105-111 and accompanying text.

103 *See supra* note 54 (citing recent empirical studies finding a significant correlation between campaign contributions and litigation success rates).

104 ABA Model Code, *supra* note 48, Canon 2, R. 2.11(A)(4). Note that the language cited was adopted in 2007 and differs from its 1999 predecessor in that it includes the phrase "or the law firm of a party's lawyer." "Aggregate contributions" are meant to include both direct and indirect gifts made to a candidate. *Id.* at terminology.

105 John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 Harv. J. on Legis. 69, 87 (2003) (citing numerous examples); *accord* Flamm, *supra* note 54, § 6.4.1, at 184-85; *see also* Brief of Amicus Curiae Public Citizen in Support of Reversal 1, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (No. 01-521) (describing Public

Citizen's unsuccessful challenge to Texas's system, "which allows large campaign contributions by lawyers and others with interests before the courts but does not require recusal of judges when contributors appear before them"). Professor Nagle notes that academia has sided squarely with the ABA on this issue: "Indeed, the scholarly opinion is just as unanimous that a campaign contribution should require a judge to recuse as the courts are agreed that recusal is unnecessary." Nagle, *supra*, at 88 (providing citations to scholarly critiques).

Courts have been more sympathetic to disqualification motions when the campaign contribution at issue is particularly large, particularly close in time to the proceeding, or supplemented by additional campaign activity. *See, e.g.*, MacKenzie v. Super Kids Bargain Store, Inc., 565 So.2d 1332, 1338 n.5 (Fla. 1990) ("Although a motion for disqualification based *solely* upon a legal campaign contribution is not legally sufficient, it may well be that such a contribution, in conjunction with some additional factor, would constitute legally sufficient grounds for disqualification upon motion."); Pierce v. Pierce, 39 P.3d 791, 798 (Okla. 2001) (indicating that the size, timing, and manner of judicial campaign contributions may be relevant to the disqualification determination).

106 *See* Flamm, *supra* note 54, § 6.4.3, at 191-94.

107 *See id.* § 6.5, at 194-96. Some courts have denied disqualification when the moving party or her counsel did not merely provide political support to the judge's opponent, but in fact *was* the opponent. *Id.* § 6.5, at 195-96.

108 Ala. Code § 12-24-2(c) (Supp. 2000). *Cf.* Petition for a Writ of Certiorari 24, *Jones v. Burnside*, 127 S. Ct. 576 (2006) (No. 06-53) (identifying Alabama as the only state with a similar provision to the ABA's Canon 2, R. 2.11(A)(4); Peter A. Joy, *A Professionalism Creed for Judges: Leading by Example*, 52 S. C. L. Rev. 667, 675 & n.28 (2001) (identifying Alabama as the only state that clearly requires elected judges to recuse or be disqualified when faced with major contributors and arguing that disqualification in these instances should be automatic).

109 *See* Val Walton, *Suit Claims Governor, AG Not Enforcing Campaign Law*, Birmingham News, Aug. 2, 2006, at 2B; *see also* Finley v. Patterson, 705 So. 2d 834, 835 n.1 (Ala. 1997) (Cook, J., concurring) (describing the enforcement of Ala. Code § 12-24-2 as being "in legal limbo" because it was not precleared under the Voting Rights Act); Brackin v. Trimmier Law Firm, 897 So. 2d 207, 230-34 (Ala. 2004) (Brown, J., statement of nonrecusal) (stating, "I am not aware of any opinions in which this Court has resolved the issue of the enforceability of §§ 12-24-1 and -2," and refusing to recuse despite contributions of more than $50,000 from a *amicus curiae* PAC affiliated with one of the parties).

110 Mississippi has added a provision to its Code of Judicial Conduct indicating that "[a] party may file a motion to recuse a judge based on the fact that an opposing party or counsel of record for that party is a major donor to the election campaign of such judge" and stipulating that such motions will be evaluated like any other recusal motion. MISS. CODE OF JUDICIAL CONDUCT Canon 3E(2) (2002). As if to clarify how dramatically this provision falls short of the ABA's Canon 2, R. 2.11(A)(4), the official commentary notes that "[t]his provision does not appear in the ABA Model Code of Judicial Conduct." *Id.* Canon 3E(2) cmt..

111 *Id.*

112 In the Illinois race for Supreme Court at issue in *Avery*, for example, State Farm made *no* contributions to Karmeier, but individuals and entities closely associated with it contributed more than $1 million to his campaign.

113 Canon 2, R.2.11(C) ABA Model Code of Judicial Conduct appears to permit waiver when *both* parties agree to it. But requiring mutual consent perpetuates the potential for gamesmanship.

114 *See supra* notes 72-74 and accompanying text.

115 Tex. R. Civ. Pro. 18a(c) (2007).

116 *See Maynard-Massey Flap Triggers Recusal Legislation*, The Intelligencer / Wheeling News-Register, Feb. 1, 2008, http://www.theintelligencer.net/page/content.detail/id/38554.html?isap=1&nav=535.

117 H.R.J. Res. 104, 78th Leg., 2d Sess., (W.Va. 2008).

118 *Id.*

119 *Id.*

120 Abimbola Olowofoyeku, *Regulating Supreme Court Recusals*, 2006 Sing J. Legal Stud. 60. 69 (internal citations and quotations omitted). Recall that this objective standard is the centerpiece of modern American disqualification practice and has been codified into law nearly everywhere. *See supra* notes 48-49 and accompanying text.

121 Pearson, *supra* note 79, at 1833 (internal citations omitted).

122 *See supra* note 79.

123 Indeed, one might argue that a challenged judge's colleagues are not independent enough to rule on her disqualification motion, on account of the collegiality and reciprocity pressures that they will likely face in such situations. One might therefore prefer the use of outside arbiters instead. We find this idea intriguing and not necessarily outlandish, but we do not address it here because of the deep practical and possibly constitutional concerns that any such scheme would raise.

124 *See supra* notes 74-75 and accompanying text.

125 *See* Frost, *supra* note 71, at 560-63, 569-70, 588-90 (describing public reason-giving as a core tenet of Legal Process theory and recommending its incorporation into the practice of judicial disqualification).

126 *See, e.g.*, Colo .R. Civ .Pro. 97 (2007) (requiring that "all other proceedings in [a] case shall be suspended until a *ruling* is made" on the disqualification motion (emphasis added)); Colo .R. Civ .Pro. 58 (2007) (explaining that all judgments, decrees, and orders must be entered in writing).

127 Cal. Civ. Proc. Code § 170.3(c)(3) (West 2007).

128 *Id.*

129 *See, e.g.*, Paul G. Lewis, *Systemic Due Process: Procedural Concepts and the Problem of Recusal*, 38 U. Kan. L. Rev. 381, 407 (1990) (critiquing the abuse of discretion standard for not providing meaningful protection against judicial misconduct); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 Brook L. Rev. 589, 661-62 (1987) (same).

130 *See supra* note 64.

131 This problem has already received a great deal of attention at the federal level. *See, e.g.*, Cheney v. United States Dist. Court, 541 U.S. 913, 915-16 (2004) (mem. of Scalia, J.); Laird v. Tatum, 409 U.S. 824, 837-38 (1972) (mem. of Rehnquist, J.); Ryan Black & Lee Epstein, *Recusals and the "Problem" of an Equally Divided Supreme Court*, 7 J. App. Prac. & Process 75 (2005); Olowofoyeku, *supra* note 120, at 81-84; Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 748-50 (1973); Pearson, *supra* note 79, at 1806, 1836-37.

132 In revising the Model Code, the ABA appears to have made some minor additions to the commentary on its disqualification provision, but much more could still be done. *See* ABA Model Code, *supra* note 48 (of note are comments two and six which clarify that the disqualification rules apply regardless of whether a motion to disqualify has been filed and elaborate on the meaning of 'economic interest,' respectively).

133 *See* Chief Justice Joseph E. Lambert, *Contestable Judicial Elections: Maintaining Respectability in the Post*-White *Era*, 94 Ky. L.J. 1, 13 (2005) (summarizing the work of these committees in Alabama, Florida, Kentucky, and Ohio); *see also The Way Forward: Lessons from the National Symposium on Judicial Campaign Conduct and the First Amendment*, 35 Ind. L. Rev. 649, 655 (2002) (recommending the creation of official and unofficial campaign conduct committees "to help assure appropriate campaign conduct").

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