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### Making Judicial Recusal More Rigorous

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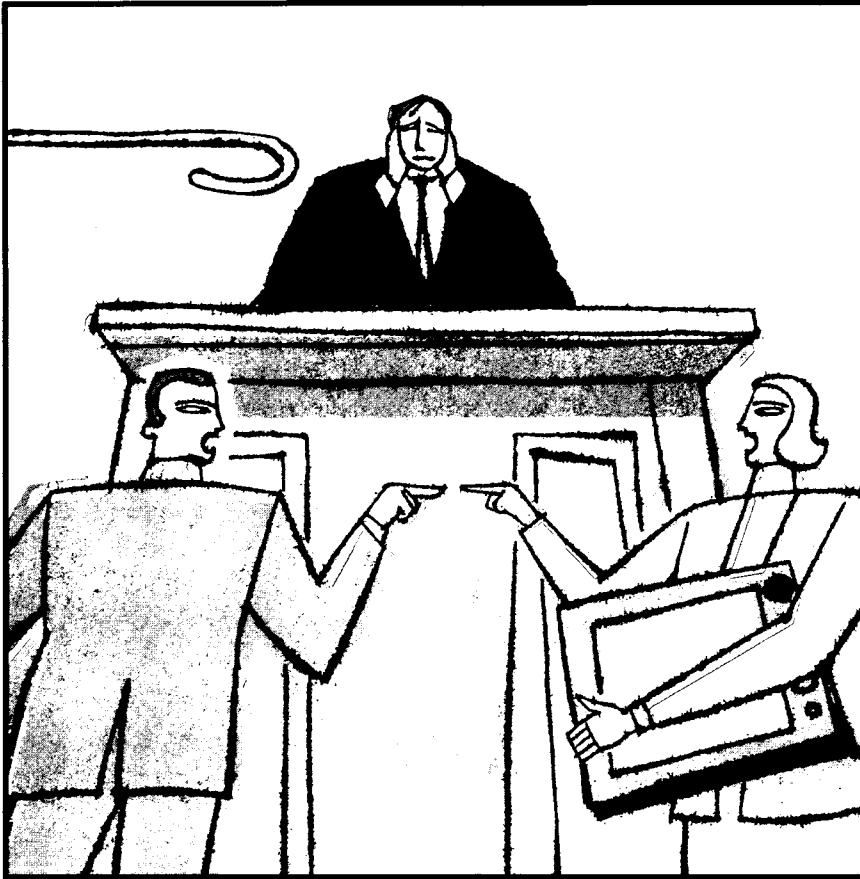
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# Making Judicial Recusal More Rigorous

By James Sample  
and  
David E. Pozen

The right to an impartial arbiter is the bedrock of due process. Yet litigants in most state courts face judges subject to election and reelection—and therefore to majoritarian political pressures that would appear to undermine judicial impartiality. This tension has existed for as long as judges have been elected and, to some extent, for as long as they have been appointed (in which case “campaigns” often take a less public but equally politicized form). In recent years, however, this tension has become more acute, and the consequence is the undermining of a touchstone of due process. Today, state courts across the country increasingly resemble—and are increasingly perceived to resemble—interest group battlegrounds in which judges represent particular constituencies in addition to, or even instead of, the rule of law.<sup>1</sup> Two key reasons for this are both systemic and verifiable: The role of money in judicial elections is growing while several canons of conduct have been narrowed or stricken. These trends are creating dramatic new threats to judicial impartiality and due process. Taking our cue from Justice Anthony Kennedy’s concurrence in *Republican Party of Minnesota v. White*, we explore in this article a possible solution: making judicial recusal rules “more rigorous.”<sup>2</sup>

## The Money and Judicial Elections

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 nineteen candidates broke the million-dollar threshold.<sup>3</sup> Between 2000 and 2004, candidates raised a total of \$123 million, a 67 percent increase over the previous period, and thirty-seven of them broke the million-dollar mark.<sup>4</sup> Winning candidates who did not take public funds raised an average of

more than \$650,000 in 2004, up 45 percent from 2002's average of \$450,000.<sup>5</sup>

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 much narrower interest groups spend substantial resources—frequently without disclosing the sources of their funding.<sup>6</sup> In states with partisan judicial elections, political parties do the same.<sup>7</sup> Television advertising has emerged as a central feature of judicial campaign strategy. As late as 2000, television ads aired in only four of eighteen states (22 percent) with contested Supreme Court elections.<sup>8</sup> By 2006, this figure had risen to eleven out of twelve (96 percent).<sup>9</sup>

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 percent of Americans believe that campaign contributions have at least some influence on judges' decisions in the courtroom.<sup>10</sup> Only 5 percent

believe that campaign contributions have no influence.<sup>11</sup> These suspicions may be corroding the public's faith in the judiciary. According to the 2001 poll, only 33 percent of those surveyed believe that the "justice system in the U.S. works equally for all citizens," while 62 percent believe that "[t]here are two systems of justice in the U.S.—one for the rich and powerful and one for everyone else."<sup>12</sup>

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 percent) of the respondents said they believe campaign contributions have at least "some influence" on judges' decisions and nearly half (46 percent) said they believe contributions have at least "a little influence."<sup>13</sup> The survey also revealed that 56 percent 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."<sup>14</sup>

So, over two-thirds of citizens and nearly half of state judges believe that campaign contributions influence judges' decisions; do the data support such beliefs? Although there is no way to know for sure how judges would have voted in the absence of a contribution, the evidence is certainly suggestive that contributions have an impact. 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."<sup>15</sup> Similarly, Adam Liptak and Janet Roberts of *The New York Times* recently completed a groundbreaking study of Ohio Supreme Court decisions which showed that, over a twelve-year period, Ohio justices voted in favor of their contributors more than 70 percent of the time, with one justice, Terrence O'Donnell, voting with his contributors 91 percent of the time.<sup>16</sup>

While there is no way to assess definitively whether this is causation or mere correlation, 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*, "[e]veryone interested in contributing has very specific interests. They mean to be buying a vote. Whether they succeed or not, it's hard to say."<sup>17</sup>

### The Disappearing Canons

Whereas the growing influence of money, special interest groups, and political parties in judicial elections has a multitude of causes, the erosion of the canons of judicial conduct can be traced more or less to a specific source: *Republican Party of Minnesota v. White*.<sup>18</sup> In this 2002 case, the Supreme Court struck down Minnesota's Announce Clause—which prohibited judicial candidates from announcing their views on disputed legal or political issues—as a violation of candidates' First Amendment rights. Since *White* was decided, many states have seen challenges to other judicial campaign speech canons designed to ensure impartiality, as well as to canons prohibiting candidates from directly soliciting contributions or engaging in partisan activities.

All of these canons are currently on uncertain footing.<sup>19</sup> Successful court challenges have narrowed some of them, as have anticipatory amendments spurred by fear of litigation. The North Carolina Supreme Court, for example, amended the state's Code of Judicial Conduct to repeal its Pledges or Promises Clause and to allow candidates greater freedom to endorse other candidates and personally seek contributions.<sup>20</sup> North Carolina's justices told a reporter that they made these changes so as "to get ahead of a trend in federal court rulings and to avoid lawsuits over the state requirements."<sup>21</sup>

As the canons are narrowed or stricken, states are left with fewer



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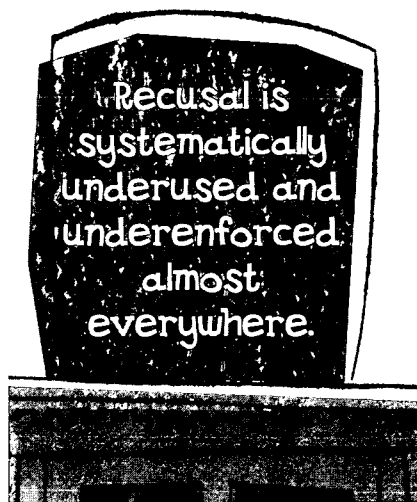
means of ensuring the appearance and actuality of impartial courts. “Given the dynamics of modern political contests,” the Brennan Center noted in a 2006 amicus brief, “the vacuum formerly occupied by the canon is almost invariably filled by a race to the bottom with respect to the conduct at issue.”<sup>22</sup> Candidates must “comport themselves in a manner that may be inconsistent with impartiality or risk almost certain defeat.”<sup>23</sup>

Television advertising provides one particularly salient example. In addition to becoming much more prevalent over the past few years, television ads now appear earlier in the campaign cycle; are more likely to directly attack candidates; and are more likely to include strong signals from the candidates themselves about how they will rule if elected.<sup>24</sup> Another telling phenomenon is the proliferation of surveys that ask judicial candidates to indicate their views on controversial matters.<sup>25</sup> Campaign rhetoric has adapted rapidly. In a recent editorial in the *Wall Street Journal*, former Supreme Court Justice Sandra Day O’Connor provided an illustration:

Earlier this year, 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.”<sup>26</sup>

Thus, at the same time that judicial campaigns are becoming increasingly similar to regular political campaigns in style and structure—with levels of television advertising, special interest

involvement, and fund-raising all rising precipitously—they are also becoming increasingly similar in substantive content and ideological rancor. Following *White*, all candidates for judicial office must be allowed to announce their views on controversial issues. Candidates feel intense pressure to exercise their newfound freedom because hot-button issues are precisely the ones that voters want to hear dis-



cussed. As a result, judges will face more and more cases in which they have already suggested a preference for, if not a commitment to, a particular outcome, and in which they have received significant campaign contributions from one or more of the litigants.

### The Untapped Promise of Judicial Recusal

Recognizing the threat that these developments would pose to judicial impartiality and due process, much of the debate among *amici* in *White* centered on the viability of recusal and disqualification<sup>27</sup> as a corrective.<sup>28</sup> Justice Kennedy picked up on this theme in his concurrence, when he suggested that states may want to adopt “recusal standards more rigorous than [constitutional] due process requires.”<sup>29</sup> In light of *White* and fol-

low-up decisions, scholars have been vigorously debating the proper relationship between judicial campaign activities and recusal, and the American Bar Association has been reviewing its Model Code provisions.<sup>30</sup>

The motivation for this renewed attention on recusal is straightforward: because it is an *ex post* remedy tailored to the specific factual situation, recusal does not trigger the same First Amendment scrutiny as canons limiting political speech or activity. Recusal may not protect against damage done to the judiciary’s reputation by statements that candidates make, but it can at least protect individual litigants from a biased judge. The ABA Model Code Canon 3E(1)’s general standard that “a judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned”<sup>31</sup>—incorporated into congressional statute<sup>32</sup> and the judicial conduct codes of nearly every state—appears to offer an expansive basis for disqualification. The problem, as Justice Kennedy’s comment insinuated, is that in most courts judicial recusal practices are not very rigorous; indeed, there is reason to believe that recusal is systematically underused and underenforced almost everywhere.

Parties are deterred from pursuing judicial recusal for at least three main reasons. First and most obviously, litigants may be afraid of bringing recusal motions for fear of angering their judge.<sup>33</sup> This fear may be particularly acute for parties and lawyers who are likely to be repeat players before the court. Second, the odds of success are low. In all for-cause challenges, the movant bears a heavy evidentiary and persuasive burden: “Ordinarily,” the movant “must adduce facts that would raise significant doubt as to whether justice would be done in the case.”<sup>34</sup> Empirical research into the success rate of recusal motions is stymied by insufficient recordkeeping, but “even a casual perusal of the cases decided under the federal statute”—which is substantively quite similar to the laws of many

states—“demonstrates that only the very most outrageous behavior is sufficient to win a recusal.”<sup>35</sup> On appeal, odds of success are even worse. Almost all state and federal appellate courts will overturn a lower court’s disqualification or recusal decision only for an abuse of discretion.<sup>36</sup> Third, the parties have to pay for it—raising and litigating recusal motions cost money. Less wealthy litigants may be especially unwilling to incur the added legal fees.

Even when litigants do summon up the courage (and the resources) to file a recusal motion, judges who rule on their own challenges may have personal reasons to disfavor them. As R. Matthew Pearson points out, recusal motions put judges in a “precarious position”: “because a [judge] is expected to recuse himself *sua sponte* if there is a reasonable apprehension of bias, a successful motion to recuse requires the [judge] to admit that he failed in the first instance to adhere to statutory and ethical requirements.”<sup>37</sup> Some judges, moreover, may be worried that recusal will send the signal that they *are* biased, even if they are not. Conversely, some judges may believe they are not biased, even if they are: Social psychological research has long shown that much bias is unconscious<sup>38</sup> and that people tend to underestimate and undercorrect for their own prejudices and conflicts of interest.<sup>39</sup>

All of the above are reasons why disqualification and recusal do not protect against judicial partiality to the extent one might anticipate—and desire—from reading the expansive language of Canon 3E(1) and its ubiquitous state and federal counterparts. Of more specific concern in an era of big money and no Announce Clauses, it is extremely difficult to disqualify a judge either for receiving a campaign contribution from one of the parties or their lawyers or for having previously expressed a position on a legal or political issue implicated by the case.

Since 1999, the ABA has included in Canon 3E a provision prescribing disqualification of an elected judge when:

the judge knows or learns by means of a timely motion that a party or a 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 ]] [[is reasonable and appropriate for an individual or an entity]].<sup>40</sup>

Yet in the subsequent years, no states have adopted this provision. One state (Alabama) had a similar policy in place at the time of the ABA’s revision,<sup>41</sup> and even there it seems that courts refuse to apply the relevant statute.<sup>42</sup> 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.”<sup>43</sup>

Likewise, there is a strong presumption against disqualifying a judge for his or her statements on law or policy.<sup>44</sup> The petitioners in *White* noted that as of 2002, “nine states ha[d] partially or fully elected judiciaries and ha[d] either no announce or commitments clause or a provision that is significantly more speech permissive.”<sup>45</sup> While one might have expected greater numbers of recusals and disqualifications in these nine states, there was no evidence that this happened. “Indeed, where state courts have opined on the matter in these states, the courts recognize that a judicial candidate’s public view on an issue or public statement on judicial philosophy is insufficient to require recusal or disqualification.”<sup>46</sup> 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 themselves for statements they have made on the campaign trail.

### **A Glimpse into the Future: The “Obscene” World of Avery**

To step beyond abstract analysis, let us offer a real-life example. Perhaps no recent case better illustrates the growing problems with U.S. recusal

structures than *Avery v. State Farm Mutual Automobile Insurance Co.*<sup>47</sup>

*Avery*, a case in the Illinois Supreme Court, was an appeal from a lower-court class action verdict of over \$1 billion against State Farm, including \$456 million in contractual damages. The backdrop was the 2004 race for a seat on the Supreme Court between then-Illinois Appellate Judge Gordon Maag and then-Circuit Judge Lloyd Karmeier. The two candidates combined to raise \$9.3 million in campaign contributions, more than double the previous national record for a state judicial election.<sup>48</sup> Even more staggering than the record-setting numbers, however, was the relationship of the campaign to the *Avery* litigation. The Illinois Supreme Court heard oral arguments in *Avery* in May 2003, but the appeal was not decided until after the November 2004 election. Hence, the matter was pending for the duration of the 2004 campaign.

Because Illinois lacks contribution limits, big money flooded the race. Justice Karmeier received over \$350,000 in direct contributions from State Farm’s employees, lawyers, and others involved with the company or the case (such as attorneys for supportive *amici*).<sup>49</sup> Justice Karmeier also received over \$1 million in contributions from groups financed in part by or affiliated with the company.<sup>50</sup> Judge Maag, meanwhile, received nearly equal support from trial lawyers and labor organizations.<sup>51</sup>

In the end, Justice Karmeier won both the fund-raising battle and the election. Although he described the fund-raising as “obscene,”<sup>52</sup> he refused to recuse himself from participating in the *Avery* decision. He then cast the deciding vote on the breach of contract claims, overturning the verdict against State Farm.

Justice Karmeier’s decision may well have been unbiased and well-founded. Overshadowing the merits of his decision, however, was the inescapable fact that without his vote, State Farm would have faced further

proceedings on claims valued at up to \$456 million. Even assuming, *arguendo*, that the correct result was reached on the merits, the appearance of justice clearly suffered. “The juxtaposition of gigantic campaign contributions and favorable judgments for contributors creates a haze of suspicion over the highest court in Illinois,” observed the *St. Louis Post Dispatch*. “Although Mr. Karmeier is an intelligent and no doubt honest man, the manner of his election will cast doubt on 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.”<sup>53</sup>

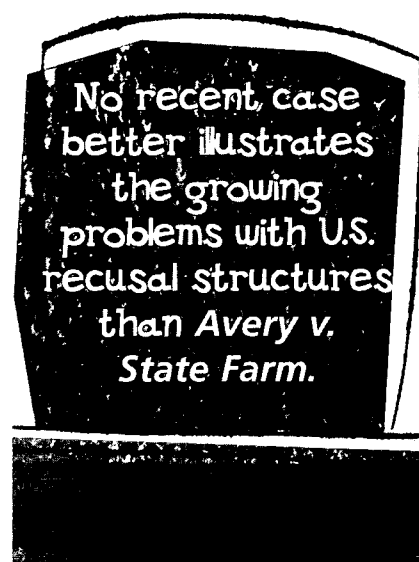
Thus, in what appeared to be a paradigmatic example of a case in which the judge’s impartiality “might reasonably be questioned,”<sup>54</sup> the general standard for disqualification went unenforced. The Supreme Court’s denial of certiorari, moreover, meant that the Due Process Clause provided no backup protection.<sup>55</sup> *Avery’s* fact pattern may be especially dramatic, but it would be a mistake to assume that similarly troubling fact patterns do not exist elsewhere in the country. For example, the *Times* study on the Ohio Supreme Court noted that “[i]n the 215 cases with the most direct potential conflicts of interest, justices recused themselves just 9 times.”<sup>56</sup>

### Strategies for Reform

The argument to this point leads to a sobering conclusion: On account of recent developments in judicial election law and policy, recusal will be called on to play a more vital role than ever before in safeguarding due process and public trust in the judiciary; and, yet, current recusal practices leave it unsuited to this task.

How might judges and legislators go about invigorating recusal? Here, we briefly explore five reform proposals we think are particularly promising.<sup>57</sup> Any of these proposals, if implemented, could lead to an increased rate of disqualification. It is therefore impor-

tant that regardless of which policies are adopted, courts have in place mechanisms for efficiently replacing a disqualified judge. Particularly small, remote courts may want to consider developing reciprocal arrangements with neighboring courts or otherwise enlisting substitute judges from beyond their own bench. Increased rates of disqualification also raise special issues for Supreme Courts that rule as a



whole body, in that the removal of one judge creates the possibility of an equally divided court (which is generally taken as affirmation of the decision below). In such circumstances, the need for effective replacement mechanisms is critically important.

### *Independent Adjudication of the Disqualification/Recusal Motion.*

The fact that judges in many jurisdictions decide on their own disqualification and recusal challenges, with little to no prospect of immediate review, is one of the most heavily criticized features of U.S. disqualification law, and for good reason. When significant rights and interests are at stake, the American legal system is generally

careful to ensure a neutral decision-maker. Disqualification motions are not like other procedural motions because they challenge the fundamental legitimacy of the adjudication. They also challenge the judge in a very personal manner—they speculate on the judge’s interests and biases; they may imply unattractive things about him or her. Allowing judges to self-regulate with respect to these motions conflicts with our general commitment to impartiality in adjudication and our specific commitment, as manifested in ABA Canon 3E(1), to objectivity in the disqualification decision. To avoid these problems, states should consider a system similar to the one employed by certain state courts in which the challenged judge must transfer disqualification motions immediately to a colleague chosen by a presiding judge or the chief judge.<sup>58</sup>

While allowing judges to rule on their own motions may be quicker and easier and may deter litigants from pursuing weak challenges, these rebuttals are, to our mind, beside the point. The challenged judge may have the best knowledge of the facts, but he or she may also have biases or conflicts of interest relating to those facts (which is why the judge is being challenged in the first place) that cannot easily be corrected for, as well as other incentives not to recuse. Some parties may be reluctant to challenge an individual judge not only when they have weak evidentiary support but also when they have reasonably strong evidentiary support, for fear of reprisal. Frivolous motions should be deterred both by sanctions and by the fact that the third-party decision makers would be colleagues of the challenged judge, and so would have a professional and personal interest in ensuring that “fishing expeditions” do not flourish. And while independent adjudication of the disqualification or recusal motion does raise efficiency costs, it does not necessarily have to incorporate prolonged fact-finding hearings; written affidavits and limited forms of oral

presentation might suffice. Against the speculative efficiency arguments traditionally raised in favor of the self-determination model, independent adjudication would bring powerful benefits to the integrity, impartiality, and appearance of impartiality of the judicial system.

**Mandatory Disclosure.** Campaign finance laws in every state now require monetary campaign contributions to be a matter of public record. For litigants faced with a particular judge, however, this information may be difficult to come by, and the judge almost never has an enforceable obligation to make disclosures to those litigants about his or her contributors—much less about possible biases, conflicts, financial interests, or previously expressed views. (Judges do have a general ethical obligation to disclose possible grounds for their disqualification.<sup>59</sup>)

One way to increase the odds that litigants will learn pertinent information would be to require judges to disclose, at the outset of the litigation, any facts that might reasonably be construed as bearing on the judges' impartiality. California already has in place a model for other states to consider. It provides that:

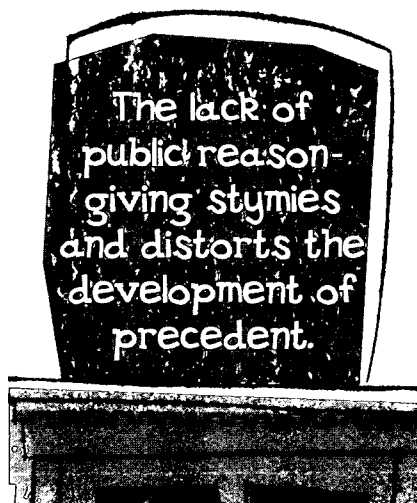
[i]n all trial court proceedings, a judge shall disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification.<sup>60</sup>

Such a mandatory disclosure scheme would, in effect, 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.

**Per se Rules for Campaign Contributors.** As discussed earlier, current rules make it extremely difficult to disqualify a judge for having

received contributions from a party or his or her lawyer, 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. The ABA devised a solution for this problem almost a decade ago; courts should take a hard look at it.

The ABA's solution is a per se rule for campaign contributors: Disqualification shall be required



whenever a party, a party's lawyer, or a party's lawyer's law firm has given the judge aggregate contributions above a certain amount, within a certain time period.<sup>61</sup> Low- or medium-level contributions need not be disqualifying, because these contributions will often be standard practice in the community and will not raise suspicion that the judge owes the donor any special debt. By setting a maximum threshold, the ABA's per se rule eliminates lawyers' incentive to curry favor through large contributions. Yet 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 the

local bar does not give money, special interests and self-funding will likely dominate judicial campaign finance. The ABA rule is therefore something of a compromise. Indeed, it is significantly less restrictive than the absolute ban on hearing a contributor's case that more than 50 percent of state judges claim to support.<sup>62</sup> An even more moderate step in the same direction would be mandatory disqualification on motion (as opposed to automatic disqualification) when contributions exceed the threshold.

**Transparent Decision Making.** In many jurisdictions, even completed disqualification proceedings are something of a black box: There is no systematic record of how disqualification motions are decided or on what grounds.<sup>63</sup> The failure of many judges to explain their recusal decisions, and the lack of a policy forcing them to 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. The lack of public reasoning 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 complaints registered against them.

To remedy these problems, all judges who rule on a disqualification motion—whether for themselves or for their colleagues—should be required to explain their decision in writing. In order to ease the administrative burden, the explanation need not be long and the reasons given may be conclusory. Even this small step toward transparency would represent a sea change in practice.

**Enhanced Appellate Review.** The perfunctory abuse-of-discretion standard of review applied to recusal and disqualification decisions in nearly every jurisdiction has essentially cut appellate courts out of the picture. Making appellate review more searching would

provide a valuable safeguard against partiality and also a measure of discipline for lower court judges, who would face a higher risk of reversal—and the attendant professional embarrassment—for erroneous recusal decisions. The Seventh Circuit, the only federal appeals court to review recusal determinations *de novo*,<sup>64</sup> provides an example of what such enhanced review might look like.

Courts may also want to examine the procedural mechanisms they use for handling recusal appeals. Interlocutory orders offer litigants a chance at relief at the earliest stage in their proceedings. In jurisdictions where 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 (as rarely happens at present) may provide a second-best alternative.

## Conclusion

Making judicial recusal more rigorous is not the only way to combat the rising influence of money and the liberalization of campaign speech; there are also myriad *ex ante* solutions for protecting judicial impartiality. For example, states could prevent many difficult situations from ever arising by disciplining judges who make improper commitments, pledges, or promises on the campaign trail. Tougher campaign finance laws such as lower contribution limits, public financing, or bans on contributions from individuals or groups with pending cases could mitigate problems of significant contributors appearing before the court. Switching from an elected judiciary to an appointed one—or, less dramatically, limiting elected judges to one term, instituting retention reviews in place of reelections, or lengthening judges' tenures—could ease the pressure on judges to render decisions that will be popular with the public.

Attractive as these reforms might seem, they are also quite demanding. Efforts to adopt *ex ante* solutions such as these would generally require new

legislation and would invite significant public controversy. As a result, few states have shown any appetite for taking them on. If judges want to preserve the independence of their decision making and the integrity of their courtrooms, they should take the lead and revise their own recusal procedures.

Metaphorically, it might be helpful to consider due process in terms of a balance sheet. As described in the first part of this article, the last six years alone have produced staggering “debts” to judicial impartiality and the appearance thereof. At the same time, longstanding provisions designed to protect impartiality are in sharp decline. The combination of these two dynamics, without any corresponding new “credits” on the opposite side of the ledger, is producing a serious and growing due process deficit. Judicial and legislative passivity is unacceptable with the bedrock right to impartial courts languishing in the red. While reforms to invigorate recusal are surely imperfect, under the circumstances they are just as surely necessary. ■

## Endnotes

1. See *infra* note 6 and accompanying text; see also Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 187 (2004) (“Other forces, including the growing costs of judicial election campaigns and the increasing involvement of interest groups in judicial elections, are likely to swamp the effects of continued enforcement of the canons.”) (internal citation omitted); Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391 (2001) (describing the growing involvement of interest groups in judicial elections nationwide).
2. *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring) (“[States] may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.”).
3. DEBORAH GOLDBERG ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2004*, at 13-14 (2005), available at [www.brennancenter.org/dynamic/subpages/download\\_file\\_10569.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_10569.pdf).
4. *Id.*
5. *Id.*
6. *Id.* at 23.
7. *Id.* at 8-9.
8. *Id.* at 3.
9. Press Release, Brennan Center for Justice,

Once Courtly, Campaigns for America's High Courts Now Dominated by Television Attack Ads (Nov. 2, 2006), [www.brennancenter.org/press\\_detail.asp?key=100&subkey=38281](http://www.brennancenter.org/press_detail.asp?key=100&subkey=38281).

10. Greenberg Quinlan Rosner Research & American Viewpoint, Justice at Stake Frequency Questionnaire 4 (2001), [www.gqrr.com/articles/1617/1412\\_JAS\\_ntlsurvey.pdf](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), [faircourts.org/files/ZogbyPollFactSheet.pdf](http://faircourts.org/files/ZogbyPollFactSheet.pdf).
11. Greenberg Quinlan Rosner Research & American Viewpoint, *supra* note 10, at 4.
12. *Id.* at 7.
13. Greenberg Quinlan Rosner Research & American Viewpoint, Justice at Stake—State Judges Frequency Questionnaire 5 (2002), [www.gqrr.com/articles/1617/1411\\_JAS\\_judges.pdf](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).
14. Greenberg Quinlan Rosner Research & American Viewpoint, *supra* note 13, at 11.
15. Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583, 584 (2002).
16. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1.
17. *Id.*
18. 536 U.S. 765 (2002).
19. For synopses of recent litigation involving the canons, see 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, 636-47 (2005); Brennan Center for Justice, *Summaries of Relevant Cases Decided Since Republican Party of Minnesota v. White*, [www.brennancenter.org/stack\\_detail.asp?key=348&subkey=35327](http://www.brennancenter.org/stack_detail.asp?key=348&subkey=35327) (last visited Nov. 26, 2006). We should note by way of disclosure that the Brennan Center has litigated and written in support of the canons and remains an amicus curiae participant in selected post-*White* litigation.
20. See Caufield, *supra* note 19, at 645.
21. Matthew Eisley, *Code Loosens Grip on Judges*, RALEIGH NEWS & OBSERVER, Sept. 20, 2003, at B1.
22. Brief *Amici Curiae* of 12 Organizations Concerned About the Influence of Money on Judicial Integrity, Impartiality, and Independence in Support of Petitioners 18, *Avery v. State Farm Mut. Auto. Ins. Co.*, 126 S. Ct. 1470 (2006) (No. 05-842) [hereinafter *Avery Brief*].
23. *Id.*
24. See GOLDBERG ET AL., *supra* note 3, at 7-12.
25. See Marcia Coyle, *Judicial Surveys Vex the Bench*, NAT'L L.J., Sept. 8, 2006, [www.law.com/jsp/article.jsp?id=1157629870187](http://www.law.com/jsp/article.jsp?id=1157629870187).



26. Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18.

27. The traditional distinction between disqualification and recusal—the former is mandatory, the latter voluntary—is often blurred because in some jurisdictions the term “disqualification” covers both practices and in the many jurisdictions in which judges decide on their own challenges, disqualification essentially becomes recusal. Our theoretical discussion applies equally to the two.

28. Compare, e.g., Brief of Amicus Curiae Conference of Chief Justices in Support of Respondents 9-13, *White*, 536 U.S. 765 (2002) (No. 01-521), with Brief Amici Curiae of the American Civil Liberties Union and the Minnesota Civil Liberties Union Supporting Petitioners 18, *White*, 536 U.S. 765 (2002) (No. 01-521).

29. See *supra* note 2. In this suggestion, one could hear echoes of Justice John Paul Stevens's earlier remark to an ABA audience that “[a] campaign promise to be ‘tough on crime,’ or to ‘enforce the death penalty,’ is evidence of bias that should disqualify a [judicial] candidate from sitting in criminal cases.” John Paul Stevens, Assoc. Justice, U.S. Supreme Court, Opening Assembly Address, American Bar Assoc. Annual Meeting, Orlando, Florida (Aug. 3, 1996), reprinted in 12 ST. JOHN'S J. LEGAL COMMENT 21, 30-31 (1996).

30. See ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, REPORT (Nov. 2006), available at [www.abanet.org/judicialethics/commissionreport.html](http://www.abanet.org/judicialethics/commissionreport.html) [hereinafter ABA REPORT].

31. ABA MODEL CODE CANON 3E(1) (2004).

32. 28 U.S.C. § 455(a) (2000).

33. See 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.”).

34. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 19.9, at 575-76 (1996).

35. Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1080 (1996).

36. See RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 32.1, at 592 (Supp. 2005).

37. R. Matthew Pearson, Note, *Duck Duck Recuse?: Foreign Common Law Guidance and Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV. 1799, 1833-34 (2005).

38. Debra Lyn Bassett has probed the relevance of these findings for judicial disqualification in Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1248-51 (2002); and Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 661-71 (2005).

39. 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).

40. ABA MODEL CODE, *supra* note 31, at Canon 3E(1)(e). “Aggregate contributions” are meant to include both direct and indirect gifts made to a candidate. *Id.* at pmb1. In its suggested revisions to the Model Code, an ABA commission recently recommended adding “or a party's lawyer's law firm” to the phrase “a party or a party's lawyer” and setting the time period at one year. ABA REPORT, *supra* note 30, Canon 2.12(A)(4).

41. ALA. CODE § 12-24-2(c) (Supp. 2000).

42. See Val Walton, *Suit Claims Governor, AG Not Enforcing Campaign Law*, BIRMINGHAM NEWS, Aug. 2, 2006, at 2B; see also Brackin v. Trimmier Law Firm, 897 So. 2d 207, 230-34 (Ala. 2004) (Brown, J., statement of nonrecusal) (asserting, “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 an amicus curiae PAC affiliated with one of the parties).

43. John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69, 87 (2003) (citing numerous examples). 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.” *Id.* at 88. 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); Pierce v. Pierce, 39 P.3d 791, 798 (Okla. 2001).

44. See generally FLAMM, *supra* note 34, §§ 10.1-7, at 290-303 (summarizing the disqualification rules for judges' remarks on legal and political matters).

45. Reply Brief for Petitioners Republican Party of Minnesota et al. 15-16, *White*, 536 U.S. 765 (2002) (No. 01-521).

46. *Id.* at 16 (citing representative examples).

47. 835 N.E.2d 801 (Ill. 2005), cert. denied,

126 S. Ct. 1470 (2006). The Brennan Center for Justice and co-counsel the Campaign Legal Center filed an amicus brief in the Supreme Court in support of certiorari. *Avery* Brief, *supra* note 22.

48. See GOLDBERG ET AL., *supra* note 3, at 18-19.

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

50. *Id.* at 7-8. For example, Justice Karmeier received \$1.9 million in contributions from the Illinois Republican Party, which received over \$2 million for the U.S. Chamber of Commerce. See GOLDBERG ET AL., *supra* note 3, at 26 fig.17.

51. See GOLDBERG ET AL., *supra* note 3, at 27 fig.18.

52. See Ryan Keith, *Spending for Supreme Court Seat Renews Cry for Finance Reform*, ASSOC. PRESS, Nov. 3, 2004.

53. Editorial, *Illinois Judges: Buying Justice?*, ST. LOUIS POST-DISPATCH, Dec. 20, 2005, at B8.

54. See *supra* notes 31-32 and accompanying text.

55. Cf. FLAMM, *supra* note 34, § 2.3.3, at 33-38 (explaining the limited role that constitutional due process plays in the judicial disqualification context).

56. Liptak & Roberts, *supra* note 16.

57. We offer a more thorough analysis of this question in a forthcoming article, co-authored with Deborah Goldberg of the Brennan Center, in the volume 46 symposium issue of the *Washburn Law Journal*. In the *Washburn* article, we propose additional reforms to bolster recusal practices, including substantive and procedural clarification, peremptory disqualification, doctrinal interventions, expanded canon commentary, and educational programs. While disciplinary measures might be attached to many of these proposals, as suggested by Justice Kennedy in his *White* concurrence, see *supra* note 2, we do not take up this topic here, both because we do not see disciplinary measures as independent innovations and because such measures raise their own concerns for judicial independence.

58. 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).

59. See, e.g., ABA MODEL CODE, *supra* note 31, at Canon 3E(1)(e), Commentary.

60. CALIFORNIA CODE OF JUDICIAL ETHICS Canon 3E(2) (2005).

61. See *supra* note 40 and accompanying text.

62. See *supra* note 14 and accompanying text.

63. See PATRICK M. MCFADDEN, AMERICAN JUDICATURE SOCIETY, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 19 (1990); Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusals*, 53 KAN. L. REV. 531, 569-70 (2005).

64. See FEDERAL JUDICIAL CENTER, RECUSAL: ANALYSIS OF CASE LAW UNDER 28 U.S.C. §§ 455 & 144, at 65 (2002).