INVIGORATING JUDICIAL DISQUALIFICATION

TEN POTENTIAL REFORMS

by JAMES SAMPLE and MICHAEL YOUNG

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 *Republican Party of Minnesota v. 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.[1] To combat the growing threats to judicial independence and impartiality—and the inadequacy of judicial disqualification, as currently utilized —we propose here some possible solutions.

Specifically, we offer 10 proposals with the potential to invigorate dramatically the protections offered by disqualification. We first suggest 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. We then suggest 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.[2] On the other hand, strengthening these rules

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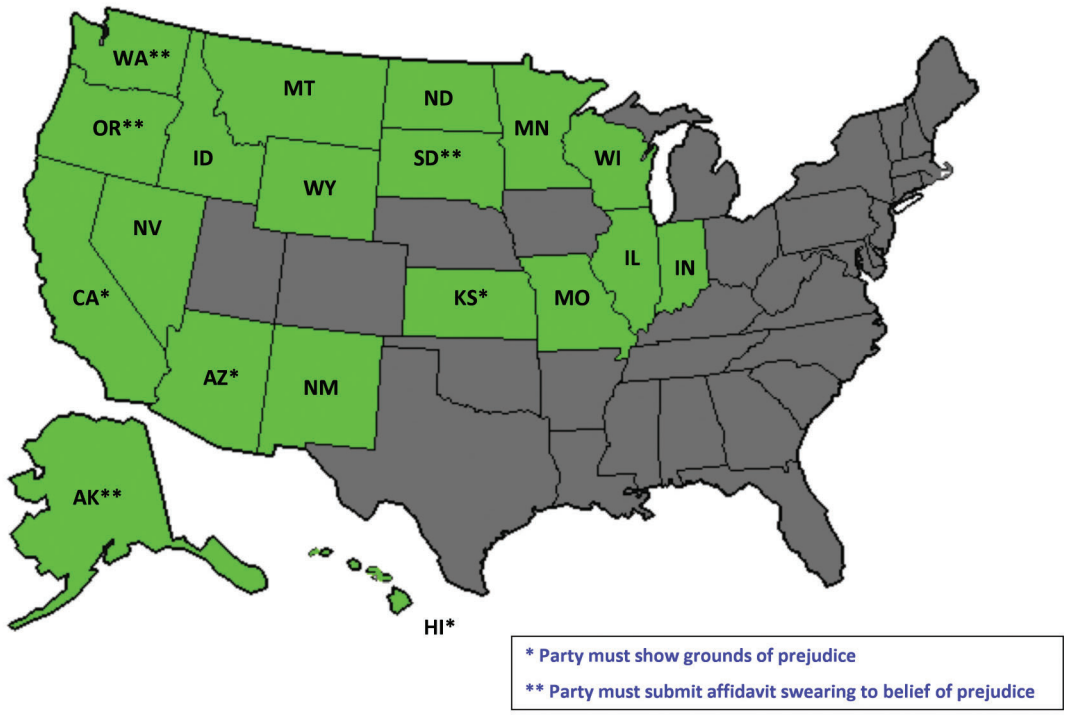
1. Drawing on Justice Kennedy's concurrence in *White*, courts that have invalidated canons regulating campaign speech, fundraising, or political activity have upheld canons mandating disqualification when impartiality might reasonably be questioned. *See, e.g.*, Indiana Right to Life, Inc. v. Shepard, 507 F.3d 545, 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).

2. 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.

19 States allowing peremptory disqualification



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.

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.[3] 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.

One example is Montana, where each party in a criminal or civil matter is allowed one "substitution" of a judge.[4] 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. 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.

Opponents of peremptory disqualification have typically raised two main arguments against it: that it will

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

4. Mont. Code Ann. § 3-1-804 (2005).

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.[5] 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.[6]

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,[7] 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.

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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. Most states have adopted the Model Code's Rule 2.11(A) (see page 10) in one form or another. 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.[8] 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.[9]

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

5. *See* Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1254 (2002).

6. *See* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 3.8, at 76-79 (1996) (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).

7. *See* Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 463-66 (1988). ("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.").

8. 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).

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

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

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.[10]

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.[11] 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

"The improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today. A line needs to be drawn somewhere to prevent a judge from hearing cases involving a person who has made massive campaign contributions to benefit the judge."

—Theodore B. Olson, former Solicitor General of the United States.

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. Current recusal doctrine makes it extremely difficult to disqualify a judge for having received contributions from a litigant or her lawyer,[12] 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.[13] 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."

—Adam Liptak, *Looking Anew at Campaign Cash and Elected Judges,* NEW YORK 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].[14]

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

11. Judges do have a general ethical obligation to disclose possible grounds for their disqualification. *See* FLAMM, *supra* n. 6, § 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. 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." John Leubsdorf, *Theories of Judging and Judicial Disqualification*, 62 N.Y.U. L. Rev. 237, 242 (1987).

12. *See* John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69, 87 (2003) (citing numerous examples); *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).

13. *See* Flamm, *supra* n. 6. § 6.4.1, at ch. 12 (citing recent empirical studies finding a significant correlation between campaign contributions and litigation success rates).

14. ABA MODEL CODE, 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.

disqualify a judge for campaign contributions "hardly ever succeed."[15] Motions to disqualify because a party or attorney has provided other types of campaign support, such as public endorsement or participation on the judge's campaign staff, have met a similar fate.[16] Motions to disqualify for *failure* to contribute money, time, or support to a judge's election campaign have fared even worse.[17] One state (Alabama) had a similar policy in place at the time of the ABA's revision,[18] but it appears to be rarely applied, as judges are unclear about the statute's legal status.[19] Mississippi includes campaign donations by counsel to the presiding judge as a factor available to parties moving for recusal.[20] 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.

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.[21] 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.[22] 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, have not made such contributions.

4. Independent adjudication 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."

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

15. Nagle, *supra* n. 12; *see also* Brief of Amicus Curiae Public Citizen in Support of Reversal 1, Republican Party of Minn. v. White, *supra* n. 12.

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).

16. *See* FLAMM, *supra* n. 6, § 6.4.3, at 191-94.

17. *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.

18. 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).

19. *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 an *amicus curiae* PAC affiliated with one of the parties).

20. 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 CODUCT 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.

21. In the Illinois race for Supreme Court at issue in *Avery v. State Farm Mutual Insurance Company* , 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.

"By not recusing himself from the appeal of a $50 million jury verdict against A.T. Massey Coal Company ("Massey")—after he received over $3 million in post-verdict, pre-appeal campaign support from Massey's CEO—West Virginia Supreme Court Justice Brent Benjamin created an appearance of bias that would diminish the integrity of the judicial process in the eyes of any reasonable person."

"A holding by the Court that the Due Process Clause required Justice Benjamin's recusal would provide crucial guidance to elected judges and preserve public confidence in judicial elections. Such confidence is of particular value to those engaged in commerce, who rely on even-handed justice to make informed financial and investment decisions."

—Brief amicus curiae, Committee for Economic Development, in support of the petition filed with the U.S. Supreme Court in Caperton v. A.T. Massey Coal Co., No. 08-22

The fact that judges in many jurisdictions decide on their own recusal challenges, with little to no prospect of immediate review, 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.[23]

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.[24] Lawmakers there have proposed a resolution that would amend the state's constitution and create a judicial recusal commission. 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. 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.

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."[25]

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.[26]

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*. "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.[27] (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,

22. 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.

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

24. *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.

25. 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.

26. 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), at 1833 (internal citations omitted).

27. 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.

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. 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.[28] 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.

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.[29] 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.[30] Specifically, parties are entitled to receive a copy of any written answer a judge may file regarding disqualification. 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 on 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.[31] 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) may provide a second-best alternative.

7. Mechanisms for replacing disqualified appellate judges

In states that do not designate a substitute for a disqualified appellate judge recusal of a judge can result in even splits. 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.[32]

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. Nevertheless, 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

IT IS IMPORTANT THAT COURTS HAVE IN PLACE MECHANISMS FOR EFFICIENTLY REPLACING A DISQUALIFIED JUDGE.

28. *See* Amanda Frost, *Keeping Up Appearences: A Process Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531 560-63, 569-70, 588-90 (2005) (describing public reason-giving as a core tenet of Legal Process theory and recommending its incorporation into the practice of judicial disqualification).

29. *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).

30. CAL. CIV. PROC. CODE § 170.3(c)(3) (West 2007).

31. *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).

32. 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); Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 748-50 (1973); Pearson, *supra* n. 26, at 1806, 1836-37.

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.[33]

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.[34] 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.

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.

INVIGORATING RECUSAL WOULD HELP COURTS TO SEIZE THE HIGH GROUND AND RECOVER PUBLIC RESPECT.

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.

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.

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33. 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 (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).

34. *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").