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## Due Process and Judicial Disqualification: The Need for Reform

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# Due Process and Judicial Disqualification: The Need for Reform

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*[The king] has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries.*

The Declaration of Independence<sup>1</sup>

I. INTRODUCTION

In Anglo-American law, due process has always been understood to require a trial before an impartial decision-maker. America's Founders declared: "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain *unalienable Rights*, that among these are *Life, Liberty*, and the Pursuit of Happiness."<sup>2</sup> Similarly, the Constitution provides that "[n]o person shall be . . . deprived of *life, liberty*, or property, *without due process of law*."<sup>3</sup> As the United States Supreme Court recently observed: "A fair trial in a fair tribunal is a basic requirement of due process."<sup>4</sup>

Due process traces all the way back to the Magna Carta.<sup>5</sup> But what if the judges presiding over cases are not impartial? What if they are prejudiced, biased, perhaps related to one of the parties, or stand to gain something from the court proceedings? Should the judges recuse themselves? If they will not recuse, can they be challenged and

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1. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

2. *Id.* pmb1. (emphasis added).

3. U.S. CONST. amend. V (emphasis added). The Fifth Amendment's due process protection against the Federal Government is duplicated against the States, almost word for word, by the Fourteenth Amendment. *See id.* amend. XIV, § 1. Throughout this Comment, "due process" refers to the clause in the Fifth Amendment or the one in the Fourteenth Amendment, as applicable.

4. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2259 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)); *see also infra* notes 193–232 and accompanying text for further discussion of *Caperton*.

5. *See Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1855).

disqualified?<sup>6</sup> All these questions are the domain of judicial disqualification law, a legal field that is more than one thousand years old.<sup>7</sup> It is a law that has affected people from all walks of life, including monarchs. Shakespeare, in his play *Henry VIII*, depicts the trial of Katharine of Aragon, Queen of England and Henry's wife, in an ecclesiastical court presided by Cardinal Wolsey.<sup>8</sup> The Queen complains to Henry: "I am a most poor woman . . . / . . . having here / No judge indifferent . . ."<sup>9</sup> She does not accept Cardinal Wolsey as her judge, on account of their enmity:

I do believe,  
 Induc'd by patent circumstances, that  
 You are mine enemy, and make my challenge.  
 You shall not be my judge. For it is you  
 Have blown this coal betwixt my lord and me  
 Which God's dew quench, therefore I say again  
 I utterly abhor; yea, from my soul  
 Refuse you for my judge, whom yet once more  
 I hold my most malicious foe, and think not  
 At all a friend to truth.<sup>10</sup>

After the Cardinal's rebuttal, she insists: "I do refuse you for my judge, and here / Before you all, appeal unto the Pope / To bring my whole cause 'fore his holiness / And to be judg'd by him."<sup>11</sup> And then she leaves the court. After an initial consideration, the ecclesiastical court refuses to proceed in the Queen's absence, considering that she had successfully asserted that she did not have "fair and impartial judges."<sup>12</sup> Four hundred years later, we still

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6. "Recusal" is customarily used to signify the judge's decision to stand down voluntarily, while "disqualification" is used to describe the constitutionally or statutorily required removal of a judge, initiated by one of the parties in litigation. See RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 1.1, at 3 (2d ed. 2007); see also *Forrest v. State*, 904 So. 2d 629, 629 n.1 (Fla. Dist. Ct. App. 2005). In this Comment, these terms are used interchangeably.

7. See *infra* notes 23–24 and accompanying text.

8. WILLIAM SHAKESPEARE, KING HENRY THE EIGHTH, act 2, sc. 4.

9. *Id.*

10. *Id.* The Queen is accusing Wolsey of having a personal grudge against her and, thus, being unfit to judge her.

11. *Id.* Queen Katharine's demand could be interpreted, through our time's lens, as both a request for an alternate (and presumably impartial) judge as well as an "interlocutory appeal" to the ecclesiastical "Supreme Court" of the time, the Pope.

12. Harrington Putnam, *Recusation*, 9 CORNELL L. Q. 1, 6 (1923). This statement is based not on Shakespeare's play but on historical accounts of the Queen's trial. *Id.* at 6 n.20.

have concerns about judges' impartiality. How can they be disqualified, if needed?

Part II of this Comment surveys the history of disqualification law from its early beginnings, through the English common law, to modern American standards.<sup>13</sup> This study highlights the well-known underlying structural tension in a constitutional democracy—between the rule of law and the rule of the people—as well as its consequence: the tension between judicial impartiality and judicial accountability.<sup>14</sup> Part III expounds on the current state of recusal law in the states as well as in the federal judiciary.<sup>15</sup> A brief consideration of the ABA's Model Code of Judicial Conduct<sup>16</sup> is followed by references to recusal statutory and case law in the fifty states and the District of Columbia.<sup>17</sup> The federal disqualification statutes are discussed.<sup>18</sup> The most significant United States Supreme Court disqualification jurisprudence is then analyzed,<sup>19</sup> together with the recusal practices of the justices in the modern era.<sup>20</sup> Part IV makes the argument for reforming the law of judicial disqualification, both state and federal.<sup>21</sup> The need for recusal reform is presented in detail and several solutions are proposed.<sup>22</sup> Part V succinctly concludes this Comment. Finally, a concise review of the disqualification laws in the fifty states and the District of Columbia is provided in the Appendix.

## II. HISTORY OF JUDICIAL DISQUALIFICATION

### A. *Early Beginnings*

The notion of fairness in judicial proceedings can be traced back to Roman times. Roman law provided that parties were allowed to disqualify a judge who was “under suspicion” as long as they did so before the case went to trial.<sup>23</sup> Similarly, early Jewish law codified the rule that a judge was disqualified from a case in which a party was a kinsman, a friend, or an

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13. See *infra* notes 23–83 and accompanying text.

14. See *infra* notes 39–83 and accompanying text.

15. See *infra* notes 84–260 and accompanying text.

16. See *infra* notes 84–102 and accompanying text.

17. See *infra* notes 103–12 and accompanying text; see also Appendix *infra* notes 382–641.

18. See *infra* notes 113–47 and accompanying text.

19. See *infra* notes 148–239 and accompanying text.

20. See *infra* notes 240–60 and accompanying text.

21. See *infra* notes 261–381 and accompanying text.

22. See *infra* notes 276–381 and accompanying text.

23. CORPUS JURIS CIVILIS, CODEX, lib. 3, tit. 1, no. 16, *as trans. in* Putnam, *supra* note 12, at 3 n.10 (“Although a judge has been appointed by imperial power, yet because it is our pleasure that all litigations should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion, to recuse him before issue joined.”).

enemy.<sup>24</sup> While civil law countries, in general, still follow such expansive disqualification privileges,<sup>25</sup> English common law ultimately went in the opposite direction.

### B. Common Law and English Courts

In the thirteenth century, the great English jurist, Henry of Bracton, favored (much like the earlier Roman scholars) a broad view of disqualification—one that allowed litigants to remove a judge based on mere suspicion of bias.<sup>26</sup> Over time this changed considerably. In the seventeenth century, Sir Edward Coke, Chief Justice of England’s Court of Common Pleas, decreed that “no man shall be a judge in his own case,” where “own case” was taken to mean “direct financial interest.”<sup>27</sup> While a juror would be disqualified by certain categories of familial relationships, a judge would not be.<sup>28</sup> Old English statutes had recognized one additional ground for disqualification: judges could not try cases in the county of their birth, but these statutes had been repealed by 1739.<sup>29</sup> By the mid-eighteenth century, Lord Blackstone’s now famous commentary, “[T]he 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,”<sup>30</sup> settled the matter for English jurisprudence. Thus, unlike civil law countries, in the English courts at the time of America’s founding, a judge could only be disqualified for a direct pecuniary interest in the case, and not for bias, perceived bias, or any other mere basis for suspicion.<sup>31</sup>

24. THE CODE OF MAIMONIDES (*MISHNEH TORAH*): BOOK XIV, THE BOOK OF JUDGES, ch. 23, 68–70 (Abraham M. Hershman trans., Yale Univ. Press 1949); see also FLAMM, *supra* note 6, § 1.2, at 5 n.2.

25. Putnam, *supra* note 12, at 1–9, 14.

26. 6 HENRY BRACTON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE 249 (Travers Twiss ed., 1883) (“A justiciary may be refused for good cause, but the only cause for refusal is a suspicion, which arises from many causes, as if the judge be a blood relative of the plaintiff, . . . his parent or friend, . . . his kinsman or a member of his household, or a table-companion, or he has been his counsellor or his pleader in that cause or in another, and in any such like capacity.”); see also FLAMM, *supra* note 6, § 1.2, at 5, n.5.

27. *Dr. Bonham’s Case*, 77 Eng. Rep. 646, 652 (K.B. 1609) (ruling by Lord Coke that members of a board that determined physicians’ qualifications could not impose fines and receive those fines); see also John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 610 (1947).

28. *Brookes v. Rivers*, 145 Eng. Rep. 569 (Ex. 1668) (a judge was not disqualified from presiding over his brother-in-law’s case because “favour shall not be presumed in a judge”); see also FLAMM, *supra* note 6, § 1.2, at 6, n.8.

29. FLAMM, *supra* note 6, § 1.2, at 7.

30. 3 WILLIAM BLACKSTONE, COMMENTARIES 361; see also FLAMM, *supra* note 6, § 1.2, at 6 n.7.

31. FLAMM, *supra* note 6, § 1.2, at 6; see also *Litkey v. United States*, 510 U.S. 540, 543 (1994)

This practice was closely mirrored in the thirteen American colonies.<sup>32</sup> Dramatic changes came about with the introduction, in the 1800s, of an American innovation: judicial elections.

### C. American Innovation: Judicial Elections and the Need for More Disqualification Grounds

In the American colonies, direct financial interest in the case at bar was the only accepted reason for disqualifying a judge,<sup>33</sup> and this practice continued in all the states after independence.<sup>34</sup> All the original thirteen states had an appointive process for judicial selection.<sup>35</sup> The Constitution also provided for federal judges to be appointed.<sup>36</sup> This state of affairs favored judicial independence from the electorate.<sup>37</sup> That changed dramatically when Jacksonian-style Democracy swept the states—starting with Mississippi in 1832—bringing about statewide judicial elections.<sup>38</sup>

In any constitutional democracy there is a structural tension between constitutionalism (the rule of law) and democracy (the rule of the people, the rule of the majority).<sup>39</sup> In the judicial sphere, this translates into the tension between two well-established principles of the American polity: judicial independence and public accountability.<sup>40</sup> Judicial independence is

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(“Required judicial recusal for bias did not exist in England at the time of Blackstone.”).

32. See Frank, *supra* note 27, at 609.

33. See, e.g., *In re Dodge & Stevenson Mfg. Co.*, 77 N.Y. 101 (1879); see also Michael Nevels, *Bias and Interest: Should They Lead to Dissimilar Results in Judicial Qualification Practice?*, 27 ARIZ. L. REV. 171 (1985).

34. See *Idaho v. Freeman*, 507 F. Supp. 706 (D. Idaho 1981).

35. Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 5 (1994). In eight states, the legislature appointed the judges; in three states, the appointments were jointly made by the governor and a council; in the remaining two states, the governor made the appointments subject to a council’s confirmation. *Id.*

36. U.S. CONST. art. III. “[I]ndependence of the judges is . . . requisite to guard the Constitution and the rights of individuals . . .” THE FEDERALIST NO. 78, at 527 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

37. While independent from the electorate, judges were—directly or indirectly—at the political whim of legislatures. See Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 407–12 (1996).

38. See Goldschmidt, *supra* note 35, at 5. It really began with Georgia localities in 1789 and Vermont localities in 1793. See Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077, 1093 (2007). Outside the United States, judicial elections are used only in a few Swiss cantons and for the retention of the Japanese High Court. See Herbert M. Kritzer, *Law Is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 DEPAUL L. REV. 423, 431 (2007); see also Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 1996 (1988) (“To the rest of the world, the American adherence to judicial elections is as incomprehensible as our rejection of the metric system.”). For a thorough discussion of judicial elections in the “new era,” see David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008).

39. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 701–06 (1995).

40. Pozen, *supra* note 38, at 271–72.

important when “[w]e want judges to uphold the rule of law, to check the excesses of the legislature and the executive, and to protect constitutional rights and deep-seated values against majority encroachments,” but “we also want judges to be deferential to the ‘political’ branches and to administer faithfully the laws on the books,” which can only be insured through accountability.<sup>41</sup> Judicial elections were, and are, paramount to those demanding judicial accountability to the public.<sup>42</sup> Elected judges are more accountable and less independent than their appointed counterparts because a Damocles’ sword looms over their heads—they can be voted out of office. Consciously or subconsciously, the elected judge’s thought processes could be affected by that political pressure, resulting in a skewed jurisprudence and, maybe, a warped appreciation of the judiciary’s proper function in society.<sup>43</sup> This is the essence of “the majoritarian difficulty,”<sup>44</sup> which is the concern that elected judges are overly influenced by the views of the many—the future voters.<sup>45</sup> Additionally, there is the potential for favoritism, which is the concern that elected judges are overly influenced by the views of the few—the campaign supporters.<sup>46</sup>

By the 1860s, twenty-two of thirty-four states had judicial elections.<sup>47</sup> Party machines controlled the judicial selection process.<sup>48</sup> Abuses of this politicized process were soon evident and, by the 1900s, the Progressive movement suggested replacing judicial elections with an appointive system based on merit.<sup>49</sup> In 1914, Northwestern University’s Professor Albert M. Kales proposed that a non-political commission create a short list of judicial nominees, and after a judge was appointed from this short list and served for a particular period, he or she would run unopposed in a “retention” election.<sup>50</sup> With slight modification, this plan was adopted by Missouri in 1940 and thereafter became known as the Missouri Plan.<sup>51</sup> Today more than fifteen different judicial selection systems exist in the United States.<sup>52</sup> All of them are attempts to balance the competing interests of judicial

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41. *Id.* at 272.

42. *See* Schotland, *supra* note 38, at 1086.

43. *See* Pozen, *supra* note 38, at 289.

44. *See generally* Croley, *supra* note 39; *see also infra* note 55, at 739 (the “crocodile-in-the-bathtub” analogy).

45. Pozen, *supra* note 38, at 320.

46. *Id.*

47. *See* Goldschmidt, *supra* note 35, at 5.

48. *Id.* at 6.

49. *Id.* at 8.

50. *Id.*

51. *Id.* at 20.

52. *See* Schotland, *supra* note 38, at 1084.



independence and judicial accountability to the people, and are combinations and variations of the appointment system, of the partisan election system, and of the Missouri Plan.

The tension between judicial independence and accountability to the public is well-portrayed in the following exchange that took place between several Justices in *Republican Party of Minnesota v. White*.<sup>53</sup> In his dissent, Justice Stevens remarked “[t]here is a critical difference between the work of the judge and the work of other public officials. . . . [T]he elected judge . . . does not serve a constituency while holding that office.”<sup>54</sup> Concurring Justice O’Connor replied that elected judges are well-aware of consequences in future elections if there is public dissatisfaction with their decisions,<sup>55</sup> and she expressed her concern that “relying on campaign donations may leave judges feeling indebted to certain parties or interest groups.”<sup>56</sup> In her dissent, Justice Ginsburg agreed with Justice Stevens that judges must “neutrally apply[] legal principles, and, when necessary, ‘stand[] up to what is generally supreme in a democracy: the popular will.’”<sup>57</sup> Several years later, after resigning from the bench, Justice O’Connor issued this stern admonition: “In too many states, judicial elections are becoming political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the Constitution.”<sup>58</sup> This statement nicely captures the current situation.

Judicial elections (whether partisan elections or retention ones) have sometimes yielded strange results:

[B]ecause judicial races rarely attract media attention, voters depend heavily on party cues if available, bought advertising, and/or candidates’ names. Whatever one’s view of name familiarity in elections generally, in judicial elections they are often the entire game because these candidates have such low visibility. For

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53. 536 U.S. 765 (2002). For a case summary, see *infra* notes 179–92 and accompanying text.

54. *White*, 536 U.S. at 798–99 (Stevens, J., dissenting).

55. *Id.* at 789 (O’Connor, J., concurring). Justice O’Connor indirectly quotes former California Supreme Court Justice Otto Kaus, who said that “ignoring the political consequences of visible decisions is ‘like ignoring a crocodile in your bathtub.’” Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 739 (1994). Justice Kaus made that remark one year before California Chief Justice Bird and two of her colleagues were denied retention. See Schotland, *supra* note 38, at 1099–100 (2007). The California trio was defeated—the first ever such defeats in California Supreme Court history—after the Justices were attacked for their low rates of affirming death penalty cases. See B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1431–33 (2001).

56. *White*, 536 U.S. at 790 (O’Connor, J., concurring).

57. *Id.* at 804 (Ginsburg, J., dissenting). Ironically, Justice Ginsburg is quoting Justice Antonin Scalia’s own words back to him. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989).

58. *Money & Elections*, JUSTICE AT STAKE, [http://www.justiceatstake.org/issues/state\\_court\\_issues/money\\_elections.cfm](http://www.justiceatstake.org/issues/state_court_issues/money_elections.cfm) (last visited Mar. 18, 2011).

example, in last year's California's June primary, 20-year veteran judge Dzintra Janavs ("particularly vulnerable—and even [perhaps] targeted—because of her unusual name") lost to bagel shop owner Lynn Diane Olson. While Janavs was a leader in complex litigation and endorsed by the district attorney, sheriff, county supervisors, and 18 sitting judges, Olson self-funded her campaign with \$100,000 for "slate mailers" and had only reactivated her bar membership the year before (she had practiced for four years more than a decade earlier). In 1990, in Washington State, highly regarded Chief Justice Keith Callow lost to an unknown Tacoma lawyer who did not campaign and spent only \$500, but had the same name as a Tacoma TV news anchorman. That same year, in San Antonio, a judge so highly regarded that he was supported by both sides of a divisive tort-law battle was defeated for a supreme court nomination by a lawyer new to the area—a recent retiree from the Army whose name was Gene Kelly. And in 1982, an Alabama Supreme Court primary was narrowly won by incumbent Oscar Adams, the state's first black justice, beating a three-year practitioner from an unaccredited law school who had the same name as a well-known local baking company. The Justice said: "Our surveys showed a substantial number favored [my opponent] because they thought he was the bakery man."<sup>59</sup>

With such results, even the most honest judges might feel the need to raise and spend significant campaign funds. Money has come to play a big role in judicial elections, and overall spending has increased. In 2002, Ohio's high court elections were unusually heated, prompting Ohio Supreme Court Chief Justice Moyer to say afterwards: "Candidates were outraged. Citizens were outraged. I am outraged. Anybody who places their trust and confidence in a constitutional democracy should be outraged. We have been subjected to the dark side of democracy. . . ."<sup>60</sup> In 2004, for the forty-nine seats in play in sixteen states (not counting retention elections), candidates spent \$46.8 million, while non-candidates contributed an additional \$12 million.<sup>61</sup> But how will a judges react when a campaign donor shows up in their court? What kind of protection does a litigant have against such a donor in a trial presided by the donee? A judge presiding in a case for a previous contributor was not seen as having a direct financial interest in the matter

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59. See Schotland, *supra* note 38, at 1092–93.

60. *Id.* at 1080. Ohio Chief Justice Moyer was reacting to the virulent ads by non-candidate groups on both sides. *Id.*

61. *Id.*

and could not be disqualified unless novel grounds for disqualification were allowed.<sup>62</sup> The evolving recusal law has provided such new bases.

#### *D. Evolution of the Modern Disqualification Standard*

Early in the twentieth century, in a legal dispute between two Montana copper companies, a judge favoring one of the companies issued an injunction against the other.<sup>63</sup> When the losing party asked for the judge's disqualification, the state supreme court refused to do so, noting the absence of disqualification grounds related to bias or prejudice.<sup>64</sup> Montana's legislature quickly enacted a law that overturned this decision and permitted judges to be disqualified for bias or prejudice.<sup>65</sup> More recently, doubts about the suitability of a judge to preside over certain cases have been expressed in two notable instances: first, during the congressional hearings for Justice Samuel Alito's confirmation; and second, when former House Minority Leader Tom DeLay secured the disqualification of a Texas judge, who was about to preside over DeLay's criminal trial, because the judge contributed to MoveOn.org, an organization that disparaged DeLay.<sup>66</sup> Scholars and judges alike have, for a long time, endorsed even stricter standards than bias.

Congress and state legislatures took action. Although the 1792 version of the federal statute required disqualification only for interest, for acting in the matter, or for having been of counsel in the case,<sup>67</sup> Congress subsequently amended the statute and added new disqualification bases,<sup>68</sup> most notably that "impartiality might reasonably be questioned."<sup>69</sup> State courts followed the lead, eager to assure litigants and the public that courts were impartial.<sup>70</sup> A few states, mostly in the West and Midwest, have added

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62. *See supra* notes 33–34 and accompanying text.

63. *See Frank, supra* note 27, at 608 n.8.

64. *State ex rel. Anaconda Copper-Mining Co. v. Dist. Court*, 76 P. 1133 (Mont. 1903).

65. *See Frank, supra* note 27, at 608 n.8.

66. FLAMM, *supra* note 6, § 1.5, at 11.

67. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278–79.

68. Act of Mar. 3 1821, ch. 51, 3 Stat. 643 (if, in the judge's opinion, the judge is so related or connected to a party as to render a decision improper, the judge should recuse); Act of Mar. 1891, ch. 517, § 3, 26 Stat. 826, 827 (a judge may not hear an appeal of a case he tried); *see also* 28 U.S.C. § 47 (2006); Act of Mar. 3, 1911, ch. 23, § 21, 36 Stat. 1087, 1090 (a judge is disqualified when a party files a sufficient affidavit of bias).

69. Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609 (codified as 28 U.S.C. §§ 47, 144, 455 (2006)) (among other provisions, judges are disqualified when their impartiality might reasonably be questioned); *see infra* notes 113–47 and accompanying text.

70. *See, e.g.,* *People v. Dist. Court*, 560 P.2d 828 (Colo. 1977); *Johnson v. Dist. Court*, 674 P.2d 952 (Colo. 1984); *Tennant v. Marion Health Care Found., Inc.*, 459 S.E.2d 374, 384 (W. Va. 1995) ("The legal system will endure only so long as members of society . . . believe that our courts endeavor to provide . . . unbiased forums in which justice may be found and done."); *see also* FLAMM, *supra* note 6, § 1.4, at 9.

peremptory challenges,<sup>71</sup> which allow a party to remove a judge from the case without having to show good cause, bias, prejudice, or appearance of impropriety. For its part, the ABA Model Code of Judicial Conduct has required—since the first version came out in 1924 under the guidance of Chief Justice (and former President) Taft—that judges avoid impropriety, and the *appearance* of impropriety as well.<sup>72</sup> It was a subjective standard at first, and judges decided for themselves if recusal was needed.<sup>73</sup> In the 1970s the standard changed to an objective one—the reasonable person standard—and in 1990 the language again changed to make clear the mandatory nature of the provision.<sup>74</sup> But even such novel bases for disqualification can be ineffective because in most states judges still rule on their own challenges, and in all jurisdictions it is difficult to remove a judge for having received support from a party (financial or otherwise), for bias, prejudice, or appearance thereof.<sup>75</sup>

In the majority of jurisdictions there is no constitutional ground to disqualify a judge, unless one is implicitly read in the right to fair trial, and even then it would require actual bias, not merely its appearance.<sup>76</sup> It is thus not surprising that, looking for a pervasive solution to all these issues, litigants have turned to the United States Constitution's Due Process Clause as a last resort against federal and state courts' decisions.<sup>77</sup> More recently, parties have made bold assertions that judicial elections, in themselves, exert such influence on judges that they violate the Due Process Clause.<sup>78</sup> In

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71. See, e.g., Cal. Civ. Proc. Code § 170.6 (West, Westlaw through all 2010 Reg. Sess. Laws; all 2009–2010 through 8th Exec. Sess. Laws; and all Props. on 2010 ballots); Or. Rev. Stat. § 14.250 (West, Westlaw through 2010 Special Sess. Laws); Wis. Stat. Ann. § 801.58 (West, Westlaw through 2009 Act 406). But see *Wamser v. State*, 587 P.2d 232 (Alaska 1978) (common law did not have peremptory challenges, and most states and federal courts do not allow it).

72. See M. Margaret McKeown, *Don't Shoot the Canons: Maintaining the Appearance of Propriety Standard*, 7 J. APP. PRAC. & PROCESS 45, 46, nn.11 & 14 (2005).

73. *Id.* at 46–47.

74. *Id.* at 47.

75. Pozen, *supra* note 38, at 291.

76. See, e.g., *State v. Hollingsworth*, 467 N.W.2d 555, 560 (Wis. Ct. App. 1991) (only actual unfair treatment of litigant deprives a party of the fundamental fairness constitutional guarantee; appearance of bias or speculation as to the judge's bias does not); see also *Margoles v. Johns*, 660 F.2d 291 (7th Cir. 1981); cf. ARK. CONST., art VII, § 20; N.H. CONST., pt. 1, art. 35, § 18; TENN. CONST., art. 6, § 11 (disqualification provisions are explicit).

77. See, e.g., *Tumey v. Ohio*, 273 U.S. 510 (1927). See *infra* notes 148–57 and accompanying text for further discussion of *Tumey*.

78. See, e.g., Brief Amicus Curiae of the Idaho Conservation League and the Louisiana Environmental Action Network in Support of Neither Side at 24–30, *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (No. 01-521) (asserting that “[s]tate judicial election procedures violate litigants’ rights under the Due Process Clause to have their cases heard by fair and impartial courts”); see also Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding*

2004, *The Washington Post* published an article discussing then-recently decided elections for the West Virginia Supreme Court.<sup>79</sup> The article highlighted that Don Blankenship, chief executive of Massey Energy Co., contributed \$1.7 million out of the total \$2.5 million raised to elect the new Justice Brent Benjamin.<sup>80</sup> Massey Energy Co., the coal company, was expected to appeal several cases before the state supreme court.<sup>81</sup> Through his campaign spokesman, Justice Benjamin vowed to consider motions to “recuse himself in cases involving Blankenship and his company.”<sup>82</sup> His later decision to renege on this promise and preside over cases involving Massey Energy Co. is what led directly to the Court’s recent decision in *Caperton*<sup>83</sup>—ultimately defining the role of the federal Constitution’s Due Process Clause in the judicial disqualification arena. Notwithstanding issues of federalism, *Caperton* has the potential to radically change the current state of the law.

### III. CURRENT STATE OF THE LAW

#### A. *The Model Code of Judicial Conduct*

The Canons of the first Model Code of Judicial Conduct were adopted in 1924.<sup>84</sup> The ABA was reacting to the conflict of interest created by Kenesaw Mountain Landis who was both a federal judge and the Commissioner of the Major League Baseball Association.<sup>85</sup> There were

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*Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 822 (1995) (arguing that constitutional due process implies that “judges should be disqualified from presiding over cases in which there is the appearance that political considerations could tempt judges in their rulings”); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 498 (1986) (“[I]n cases involving the assertion of a liberty or property interest in which the state is a party, the use of non-tenured state judges seems to be a clear violation of procedural due process.”).

79. Carol Morello, *W. Va. Supreme Court Justice Defeated in Rancorous Contest*, WASH. POST, Nov. 4, 2004, at A15.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). See *infra* notes 193–232 and accompanying text for further discussion of *Caperton*.

84. See McKeown, *supra* note 72, at 46. The ABA Code of Judicial Conduct has been adopted, partially or in its entirety, by most states and the District of Columbia. See Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 468 n.102 (1988). The Judicial Conference of the United States also adopted (in 1973) the ABA Code, with only minor changes, as the standard for the conduct of all federal judges except Justices of the United States Supreme Court. *Id.* The United States Supreme Court is not under the jurisdiction of the Judicial Conference. *Id.*

85. See McKeown, *supra* note 72, at 46. Judge Landis was working to clean up the betting scandal involving the Chicago White Sox. See JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* 180–82 (1974).

thirty-four canons, and they included both impropriety and its appearance<sup>86</sup> as subjective standards.<sup>87</sup> In 1972, the objective standard was introduced (“impartiality might reasonably be questioned”),<sup>88</sup> and in 1990 “should” was replaced with “shall” in all the canons and rules, making the Model Code mandatory.<sup>89</sup> Rule 2.11 provides the reasons for disqualifying a judge: personal knowledge of disputed facts in the proceeding or likelihood of being a material witness, relationship to the parties or their lawyers, bias or prejudice, economic interest in the matter,<sup>90</sup> being a party in the proceeding, parties or their lawyers having contributed to the judge’s campaign,<sup>91</sup> the judge having made public statements committing or appearing to commit the judge to a certain outcome in the current proceeding,<sup>92</sup> and other grounds.<sup>93</sup> Most of the Model Code’s provisions are also found in 28 U.S.C. § 455, one of the federal disqualification statutes.<sup>94</sup>

The Model Code has had its fair share of criticism, and its “appearance of impropriety” standard has been perceived as imprecise and difficult to implement.<sup>95</sup> Critics fear that vague standards could lead to politically-based prosecutions of judges.<sup>96</sup> It is also seen as promoting the idea that in order to prevent judges from behaving unethically, they must be prevented from *appearing* to behave unethically; the more time judges spend avoiding the appearances of impropriety, the less they spend on “real ethical pitfalls.”<sup>97</sup> The standard’s supporters point out that (1) appearance of impropriety and impropriety are not mutually exclusive, (2) appearance could be just as important as real bias,<sup>98</sup> and (3) the Canons inspire

86. The old Canon 4 read: “A judge’s official conduct should be free from impropriety *and the appearance of impropriety*.” MACKENZIE, *supra* note 85, at 190.

87. See McKeown, *supra* note 72, at 46–47.

88. SUSAN R. MARTYN ET AL., *THE LAW GOVERNING LAWYERS: NATIONAL RULES, STANDARDS, STATUTES, AND STATE LAWYER CODES*, 329 (2009).

89. See *id.* at 318; see also McKeown, *supra* note 72, at 47.

90. The interest must be more than *de minimis* but applies to the judges and their relatives to the third degree. See MARTYN ET AL., *supra* note 88, at 328–29.

91. If the contributions are more than a certain amount, as individuals or as part of an entity, in one contribution, or in the aggregate over a number of certain years. *Id.* at 325.

92. The statements must be other than those made by the judge in a court proceeding or judicial decision or opinion. *Id.*

93. For a comprehensive list of disqualification reasons, see *id.* at 328–29.

94. See *infra* notes 113–28 and accompanying text.

95. Leonard Post, *ABA’s Judicial Conduct Proposals Draw Fire*, NATL. L.J. 1, (Feb. 24, 2005), available at <http://www.law.com/jsp/article.jsp?id=1109128219258&hblogin=1> (last visited Mar. 18, 2011).

96. *Id.*

97. Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1105 (2004).

98. McKeown, *supra* note 72, at 52. If the judge “sport[s] a ‘Hang ‘em high’ or ‘Save the

confidence in the judiciary.<sup>99</sup> Several state chief justices see the “appearance of impropriety” standard as both “a structure for imposing discipline” and as “a guide to how judges should conduct themselves.”<sup>100</sup> The “reasonable person” standard of the Model Code has also been criticized:

[A]n appearance test shifts attention away from what objections are valid to what objections might appear valid to a reasonable observer who has not wrestled with the problem. The reasonable person may be a better guide for driving a car than the thinking judge, but not for deciding whether it is unjust for a judge to hear a case. The appearance test invites judges to rest on appearances, instead of looking deeper.<sup>101</sup>

It is particularly the combination of the “reasonable person” standard and self-judging of recusal motions that some scholars view as failing to keep judicial discretion in check.<sup>102</sup> It is a valid point, but recusal reform may be able to address it.

### *B. State Disqualification Law*

It is useful, at this point, to get a quick overview of the disqualification laws in the states. A concise review of it, in the fifty states and the District of Columbia, is provided in the Appendix.<sup>103</sup> State recusal law takes the form of constitutional provisions, court rules, and statutes.<sup>104</sup> There are relevant differences, however. Most importantly, a significant minority of states have adopted statutes or court rules that allow disqualification peremptorily, while in the majority of states judges can only be disqualified

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Whales’ shirt,” judicial impartiality is undermined not because of actual bias but because of the appearance of bias. *Id.*

99. *Id.* This confidence in the judiciary is also important for the Supreme Court and it is at the very heart of federal recusal statutes. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864–65 (1988). As Justice Anthony Kennedy wrote:

Disputes arousing deep passions often come to the courtroom, and justice may appear imperfect to parties and their supporters disappointed by the outcome. This we cannot change. We can, however, enforce society’s legitimate expectation that judges maintain, in fact and appearance, the conviction and discipline to resolve those disputes with detachment and impartiality.

*Liteky v. United States*, 510 U.S. 540, 564 (1994).

100. Post, *supra* note 95.

101. John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 278 (1987).

102. Jeffrey M. Hayes, *To Recuse or to Refuse: Self-Judging and the Reasonable Person Problem*, 33 J. LEGAL PROF. 85, 101 (2008).

103. See Appendix *infra* notes 382–641 and accompanying text.

104. Delaware and New Hampshire are the exception—they do not have disqualification statutes.

for cause.<sup>105</sup> Peremptory challenges augment the impartiality or appearance thereof, by allowing parties to remove a judge without having to show bias (or appearance of bias).<sup>106</sup> They also alleviate the risk of judicial retribution following a failed attempt to remove a judge for cause.<sup>107</sup>

When it comes to the reasons for recusal, twenty-four states allow it for the appearance of impropriety (i.e., when the judge's impartiality might reasonably be questioned), five require proof of actual bias,<sup>108</sup> and the law is unclear in the rest of the states.

The way the judges are selected also varies greatly within the nation. Twelve states, and the District of Columbia, appoint their judges<sup>109</sup> (with three of them following up with elections). Twelve states use a merit system (with three of them following up with retention elections).<sup>110</sup> Twenty states use non-partisan elections (a few of them follow up with retention elections), while eight use partisan elections (with Illinois alone following up with retention elections).<sup>111</sup> For comprehensive information regarding state law governing judges, see the American Judicature Society's websites.<sup>112</sup> Federal law adds to this tapestry of American recusal law.

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105. Seventeen states allow for peremptory disqualification (without cause); three states have quasi-peremptory rules (the judge must recuse or transfer the recusal motion to another judge); thirty-one states do not allow peremptory disqualification. See Appendix *infra* notes 382–641 and accompanying text.

106. See, e.g., *Turnipseed v. Truckee-Carson Irrigation Dist.*, 13 P.3d 395, 398 (Nev. 2000) (“The right to peremptory challenge promotes judicial fairness by allowing a party to disqualify a judge that it believes is unfair or biased.”).

107. For a detailed treatment of the benefits and critiques of the peremptory challenge system, including the constitutionality of peremptory challenges vis-à-vis separation of powers, see FLAMM, *supra* note 6, §§ 26.1–26.2.

108. Arizona, Iowa, Louisiana, Michigan, and South Carolina require actual bias before a judge needs to recuse. See Appendix *infra* notes 382–641 and accompanying text.

109. Massachusetts judges are appointed for life, with a mandatory retirement age of seventy. See *Methods of Judicial Selection*, AMERICAN JUDICATURE SOCIETY, [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm?state=](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=) (last visited Mar. 18, 2011).

110. Florida uses a merit system for its appellate courts but non-partisan elections for its trial courts. *Id.*

111. See Appendix *infra* notes 382–641 and accompanying text.

112. AMERICAN JUDICATURE SOCIETY, <http://www.ajs.org> (last visited Feb. 18, 2011); *Judicial Selection in the States*, <http://www.judicialselection.us> (last visited Feb. 18, 2011) [hereinafter *AJS, Judicial Selection*].



### C. Federal Disqualification Law

#### 1. 28 U.S.C. § 455

The first federal statute dealing with judicial recusal, 28 U.S.C. § 455,<sup>113</sup> dates back to 1792,<sup>114</sup> and at that time it disqualified the judge only for pecuniary interest or if the judge had acted in the proceeding or had been “of counsel” for a party.<sup>115</sup> Congress amended the statute several times over the following century, each time adding grounds for disqualification.<sup>116</sup> Although the increase in bases for disqualification was modest, the statute’s real weakness was that the challenged judges themselves could decide on the parties’ motions.<sup>117</sup> As amended by Congress in 1974,<sup>118</sup> the statute tracks almost word for word the ABA Code of Judicial Conduct,<sup>119</sup> calling for judicial disqualification whenever a judge’s “impartiality might reasonably be questioned,”<sup>120</sup> while still enumerating specific circumstances for disqualification.<sup>121</sup> Importantly, the new law substituted the objective “reasonable man” standard for the old subjective “in the opinion of the judge” standard.<sup>122</sup> Under Section 455(b), the judge must recuse himself if the statutory criteria exist, even if no motion has been introduced, no affidavit filed, and even if a reasonable person would not question the judge’s impartiality.<sup>123</sup> Some federal courts have said that a Section 455 motion<sup>124</sup> should be decided by a judge other than the challenged judge,<sup>125</sup> while other courts have held that Section 455 motions may,<sup>126</sup> should,<sup>127</sup> or

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113. At the time this was called Section 20.

114. See Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278.

115. *Liteky v. United States*, 510 U.S. 540, 544 (1994).

116. Act of Mar. 3, 1821, ch. 51, 3 Stat. 643; Act of Mar. 3, 1911, ch. 23, § 20, 36 Stat. 1090 (codified as 28 U.S.C. § 455 (2006)) (requiring a judge to disclose a conflict of interest, and mandating disqualification when a judge is a material witness); see Act of June 25, 1948, ch. 646, § 455, 62 Stat. 908.

117. See, e.g., *McGuire v. Blount*, 199 U.S. 142, 143 (1905).

118. Act of December 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609.

119. ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3(e) (1990). The ABA Code of Judicial Conduct has been adopted, partially or in its entirety, by most states and the District of Columbia. See *supra* note 84.

120. 28 U.S.C. § 455(a) (2006).

121. See 28 U.S.C. § 455(b) (2006).

122. *In re Acker*, 696 F. Supp. 591, 595 (N.D. Ala. 1988).

123. See, e.g., *United States v. Cerceda*, 139 F.3d 847, 852–53 (11th Cir. 1998); *In re Bernard*, 31 F.3d 842, 843, n.1 (9th Cir. 1994); *United States v. Balistrieri*, 779 F.2d 1191, 1202 (7th Cir. 1985).

124. For a comprehensive treatment of deciding Section 455 motions, see FLAMM, *supra* note 6, § 24.8, at 721.

125. See, e.g., *Levitt v. Univ. of Tex. at El Paso*, 847 F.2d 221, 226 (5th Cir. 1988).

126. See, e.g., *United States v. Conforte*, 457 F. Supp. 641 (D. Nev. 1978).

127. See, e.g., *United States v. Studley*, 783 F.2d 934, 940 (9th Cir. 1986); *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988).

must be decided by the challenged judge.<sup>128</sup> Thus, Section 455 covers appearance of bias and a specific list of conditions already deemed as resulting from bias or prejudice.

## 2. 28 U.S.C. § 144

In 1911 Congress made significant changes to the statute,<sup>129</sup> adding Section 144,<sup>130</sup> which prohibited a challenged judge to proceed further on the recusal motion, and requiring that “another judge shall be designated” to hear the matter.<sup>131</sup> Scholars argued that the language in Section 144<sup>132</sup> clearly showed Congress’s intention for it to be a peremptory challenge statute.<sup>133</sup> The United States Supreme Court decided otherwise. In the first case to interpret Section 144, *Berger v. United States*,<sup>134</sup> the Court supported the idea that a district judge may not pass judgment upon the truth of the facts alleged in the disqualification affidavit (the judge had to accept the party’s allegations as true), but decided that the challenged judge could still consider if the alleged facts (accepted as true) were legally sufficient for disqualification.<sup>135</sup> Therefore, disqualification under Section 144 has never been peremptory, although some courts have recognized it to be at least “partially preemptory.”<sup>136</sup>

Section 144 allows for disqualification based on bias or prejudice alleged in an affidavit filed by a party, a reason that is not found on the list of Section 455. Thus, the advantage of Section 144 is that the factual allegations will be deemed true, while the major disadvantage is that the challenged judge will decide if those facts are legally sufficient.<sup>137</sup> Because of the courts’ strict construction of the statute’s procedural requirements,<sup>138</sup> disqualification under Section 144 has been rare.<sup>139</sup>

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128. See, e.g., *United States v. Eisenberg*, 734 F. Supp. 1137, 1157 (D.N.J. 1990); *In re Moody*, 58 B.R. 308 (Bankr. S.D. Tex. 1986).

129. See *Liteky v. United States*, 510 U.S. 540, 544 (1994).

130. At the time this was called Section 21.

131. Act of Mar. 3, 1911, ch. 23, § 21, 36 Stat. 1090.

132. Act of May 24, 1949, Pub. L. No. 80-72, ch. 139, § 65, 63 Stat. 99.

133. See, e.g., Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 666 (1985).

134. 255 U.S. 22 (1921).

135. *Id.*; see also *Fong v. Am. Air., Inc.*, 431 F. Supp. 1334, 1337 (N.D. Cal. 1977).

136. See *Murray v. I.R.S.*, 923 F. Supp. 1289, 1292 (D. Idaho 1996).

137. *Berger*, 255 U.S. at 22, 32.

138. See *United States v. Hines*, 696 F.2d 722, 728 (10th Cir. 1982); see also *Huff v. Std. Life Ins. Co.*, 643 F. Supp. 705, 706-07 (S.D. Fla. 1986).

139. For an in-depth discussion of Section 144 motions, see FLAMM, *supra* note 6, §§ 23.3-23.7.

### 3. Other Provisions of Federal Disqualification Law

A lesser known federal statute involving judicial disqualification is 28 U.S.C. § 47, which provides that “no judge shall hear or determine an appeal from the decision of a case or issue tried by him.”<sup>140</sup> Although the statute’s language is quite specific, the term “appeal” has been supplemented by several federal appellate circuits to include petitions of habeas corpus that are entered before a judge who was previously involved at the trial level.<sup>141</sup>

### 4. Summary of Federal Disqualification Law

There are two main federal statutes regarding recusal: 28 U.S.C. § 144 and 28 U.S.C. § 455.<sup>142</sup> While they have significant overlap, they also have major differences: (1) Section 144 is directed solely at actual bias, while Section 455 also covers specific conflicts of interest and the appearance of bias; (2) an affidavit is needed to invoke Section 144, but not to invoke Section 455, which also mandates that judges recuse *sua sponte*; and (3) Section 144 applies only to district court judges, while Section 455 extends to “any justice, judge, or magistrate judge of the United States.”<sup>143</sup> The courts added, as a common gloss to both Section 144 and Section 455, that the source of bias must be an extrajudicial one.<sup>144</sup> Although the extrajudicial rule was developed only for Section 144,<sup>145</sup> *Liteky v. United States*<sup>146</sup> settled the matter and nowadays federal courts are unanimous in requiring that the bias be extrajudicial no matter which disqualification statute applies.<sup>147</sup>

Due to the variety and strength of the disqualification options present in federal statutes, and due to the Supreme Court’s direct appellate power over the lower federal courts, the Due Process clause will rarely (if at all) be invoked in the federal system.

The Court’s cases significantly augment our understanding of disqualification law.

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140. 28 U.S.C. § 47 (2006).

141. *Clemmons v. Wolfe*, 377 F.3d 322, 325–29 (3d. Cir. 2004) (also citing cases in the Fourth, Sixth, and Seventh Circuit).

142. Fed. Judicial Ctr., *Recusal: Analysis of Case Law Under 28 U.S.C. §§ 455 & 144*, at 1 (2002), available at <http://www.fjc.gov/public/pdf.nsf/lookup/recusal.pdf?file/recusal.pdf>.

143. 28 U.S.C. § 455 (2006); see Fed. Judicial Ctr., *supra* note 142, at 1.

144. The bias or prejudice must be personal and not arising from the judge’s previous conduct in the same case. See, e.g., *Green v. Nevers*, 111 F.3d 1295, 1303–04 (6th Cir. 1997); *In re Grand Jury Proceedings*, 875 F.2d 927, 932 n.5 (1st Cir. 1989); *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1314 (2d Cir. 1988); *United States v. Page*, 828 F.2d 1476, 1481 (10th Cir. 1987).

145. *Alexander v. Chi. Park Dist.*, 773 F.2d 850, 856 (7th Cir. 1985).

146. 510 U.S. 540 (1994).

147. See *In re Antar*, 71 F.3d 97 (3d Cir. 1995).

*D. Supreme Court Cases*1. *Tumey v. Ohio*

Pursuant to an Ohio statute, Ed Tumey was arrested for illegal possession of intoxicating liquor, brought before the mayor of an Ohio town, tried, convicted, and fined by the same mayor, who then received compensation for hearing the case (no compensation would be received for an acquittal).<sup>148</sup> The Ohio Supreme Court affirmed Tumey's conviction, and he appealed to the United States Supreme Court.<sup>149</sup>

The Supreme Court started by declaring that not all matters regarding judicial recusal rise to the level of a constitutional concern and that "matters of kinship, personal bias, state policy, [and] remoteness of interest would seem generally to be matters merely of legislative discretion."<sup>150</sup> The Court reiterated that the common law required disqualification, as a matter of due process, only when the judge had a direct financial interest in the matter.<sup>151</sup> The Court found that to be the case in *Tumey* due to the fact that the mayor would be paid only upon conviction and not upon acquittal.<sup>152</sup> Scholars routinely quote the Court for what is now known to be the "hold the balance nice, clear, and true" test:

There are doubtless mayors who would not allow such a consideration . . . to affect their judgment . . . , but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.<sup>153</sup>

Yet, it is largely ignored that the mayor's direct pecuniary interest was not the only due process violation.<sup>154</sup> The fact that the mayor occupied two

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148. *Tumey v. Ohio*, 273 U.S. 510, 515–20 (1927).

149. *Id.* at 515.

150. *Id.* at 523.

151. *Id.* at 523–25.

152. *Id.* at 532.

153. *Id.*

154. *Id.*

inconsistent positions, one executive and “partisan,” and the other judicial, had led *Tumey* to question whether he would get a fair trial before the mayor, and it, necessarily, resulted in a lack of due process.<sup>155</sup> The Court recognized that the legislature may vest such powers into one individual (and dispose of the fees resultant) but held that such individual may be disqualified from his judicial function if his dual responsibilities present him with a “motive to convict,” incongruent with a party’s right to have an impartial judge.<sup>156</sup> This “motive to convict” language combined with the “possible temptation . . . not to hold the balance nice, clear, and true” test, amounts to an “appearance of impropriety” reason for disqualification, although the Court’s opinion does not use that phrase.<sup>157</sup> Forty-five years later, in *Ward v. Village of Monroeville*,<sup>158</sup> the Supreme Court upheld this second disqualification principle from *Tumey*.

## 2. *Ward v. Village of Monroeville*

Much like the mayor in *Tumey*, the mayor of Monroeville, Ohio, could act in a judicial capacity, and he did, fining Ward for two traffic violations.<sup>159</sup> In 1972, the Monroeville mayor was responsible for law enforcement and also for revenue production in the village, and a substantial part of the village’s income came from such fines as imposed on Ward,<sup>160</sup> although unlike in *Tumey*, this mayor did not personally share in the fees and costs.<sup>161</sup> Nevertheless, the Supreme Court held that this was not a limitation of the principle announced in *Tumey*,<sup>162</sup> but was rather a similar “situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.”<sup>163</sup> Quite interesting is that the High Court also dismissed an argument that Ward’s rights were adequately protected by an Ohio statute that provided disqualification for bias,<sup>164</sup> as well as an alternative argument that this issue can be corrected on appeal, or in a de

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155. *Id.* at 533–34.

156. *Id.* at 534.

157. The *Tumey* opinion was written by Chief Justice Taft three years after the publication—under his guidance—of the first ABA Model Code of Judicial Conduct, which included appearance of impropriety as a reason for disqualification. See McKeown, *supra* note 72, 46–50 and accompanying text.

158. 409 U.S. 57 (1972).

159. *Id.* at 57.

160. *Id.* at 58.

161. *Id.* at 62 (White, J. & Rehnquist, J., dissenting).

162. *Id.* at 60 (majority opinion).

163. *Id.* (quoting *Tumey*, 273 U.S. at 534).

164. *Id.* at 61 (“[T]he [Ohio] statute requires too much and protects too little.”).

novo trial, back in the Ohio courts.<sup>165</sup>

### 3. *In re Murchison*

In 1955, a judge acting under Michigan law as a “one-man grand jury”<sup>166</sup> interrogated policeman Murchison in a secret hearing and, convinced that Murchison had committed perjury, charged him and, in a subsequent public proceeding, convicted and sentenced him for criminal contempt.<sup>167</sup> The Supreme Court found it to be a due process violation for the same judge who acted as a one-man grand jury (and interrogated the contemnor) to also preside over the contempt trial.<sup>168</sup> Although factually very different from *Tumey*, the Supreme Court based its decision on the same test: “[E]very procedure which would offer a possible temptation to the average man as a judge [which might lead him] not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.”<sup>169</sup> The Court stated once more that basic due process requires a fair trial before a fair court, and then expanded on the idea by declaring that our legal system has always sought to remove even the probability of unfairness.<sup>170</sup>

Speaking for the Court, Justice Black recast the old English legal maxim—no man should be a judge in his own case—into “no man is permitted to try cases where he has an interest in the outcome.”<sup>171</sup> To discover and characterize such interest, relationships and circumstances must be examined<sup>172</sup> and, while this may sometimes disqualify judges who have no actual bias and who would strive to be impartial, “justice must satisfy the appearance of justice” if it is to “perform its high function in the best way.”<sup>173</sup>

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165. *Id.* (stating that “the State’s trial court procedure [may not] be deemed constitutionally acceptable simply because the State *eventually* offers a defendant an impartial adjudication” (emphasis added)).

166. *In re Murchison*, 349 U.S. 133, 133 (1955).

167. *Id.* at 134–35.

168. *Id.* at 139.

169. *Id.* at 136 (quoting *Tumey*, 273 U.S. at 532).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* (citing *Offutt v. United States*, 348 U.S. 11, 14 (1954), a case that had presented an almost identical situation to the one in *Murchison*, albeit in a federal district court).

#### 4. *Aetna Life Ins. Co. v. Lavoie*

In 1986, in *Lavoie*, a justice on the Supreme Court of Alabama had cast the deciding vote upholding a jury verdict (including a \$3.5 million punitive award) against an insurance company, during the time that the same justice had an ongoing case pending against a different insurer, but for the same legal matter.<sup>174</sup> The United States Supreme Court answered the allegation of actual bias and prejudice by stating that only in extreme circumstances would the Due Process Clause be triggered by such bases of disqualification.<sup>175</sup> However, the Court found a due process violation existed based on its finding of interest in the outcome of the case by the Alabama justice.<sup>176</sup> The Court's opinion did not decide whether the Alabama justice was actually biased; it only considered whether there was a "possible temptation . . . not to hold the balance nice, clear and true."<sup>177</sup> Most importantly, the High Court framed the relationship between the Due Process Clause and disqualification law:

[O]ur decision today undertakes to answer only the question of under what circumstances the Constitution requires disqualification. The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today.<sup>178</sup>

This framework would be used later in deciding *White*<sup>179</sup> and *Caperton*.<sup>180</sup>

#### 5. *Republican Party of Minnesota v. White*

Minnesota has selected its judges through elections since its statehood in 1858, and the elections have been non-partisan since 1912.<sup>181</sup> In 1974, the Minnesota Supreme Court promulgated a rule—known as the “announce clause”—that prohibited candidates running in judicial elections from putting forward their views on disputed legal and political matters.<sup>182</sup> A lawyer, running for a seat on the Minnesota Supreme Court, distributed

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174. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 816–17 (1986).

175. *Id.* at 821.

176. *Id.* at 825.

177. *Id.* (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

178. *Id.* at 828.

179. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

180. *Caperton v. Massey*, 129 S. Ct. 2252 (2009).

181. *White*, 536 U.S. at 768.

182. *Id.* The rule was based on the Minnesota Code of Judicial Conduct Canon 5(A)(3)(d)(i) (2000), which was, in turn, based on Canon 7(B) of the 1972 American Bar Association (ABA) Model Code of Judicial Conduct.

information criticizing sitting Minnesota justices for their decisions on crime, abortion, and welfare.<sup>183</sup> Although a complaint against him with the state bar was dismissed, the lawyer withdrew from the campaign fearing the loss of his license to practice law.<sup>184</sup> The lawyer ran again in a subsequent election and, after asking for an advisory opinion from the state bar regarding the constitutionality of the announce clause, he filed a suit in federal district court asking for a declaratory judgment that the announce clause was in violation of his First Amendment rights.<sup>185</sup> Writing for a 5–4 majority, Justice Scalia considered history, the tension between competing democratic principles, and the definition of “impartiality.”<sup>186</sup> He found that the announce clause prohibited speech that belongs to the core of our First Amendment freedoms and, as such, was subject to and failed the strict scrutiny test, and therefore violated the First Amendment.<sup>187</sup> His passionate opinion notwithstanding, Justice Scalia sharply stated that the case did not stand for the proposition that judicial elections are or should be the same as legislative elections.<sup>188</sup> Justice O’Connor concurred in the opinion but wrote separately to highlight her concerns about judicial elections.<sup>189</sup> She wrote that elected judges, when deciding cases, ignore the public at their own (reelection) peril, and warned that judges could feel indebted to interest groups.<sup>190</sup> In his concurrence, Justice Anthony Kennedy joined the side bar discussion pointing out that “[j]udicial integrity is . . . a state interest of the highest order.”<sup>191</sup> Justices Stevens and Ginsburg filed dissents, each joined by Justices Souter and Breyer, expounding on the (desired) neutrality of judges, and their proper role in a democratic society.<sup>192</sup>

#### 6. *Caperton v. A.T. Massey Coal Co.*

The facts in *Caperton* are worthy of a Hollywood script. Two West Virginia mining companies took competition to a whole new level, and when one of them, Massey, almost destroyed the other, Caperton, the latter

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183. *Id.*

184. *Id.* at 768–69. The State Bar regulatory body had expressed doubts about the constitutionality of the announce clause. *Id.* at 769.

185. *Id.* at 769–70.

186. *See id.* at 774–88.

187. *Id.*

188. *Id.* at 783.

189. *See id.* at 788 (O’Connor, J., concurring).

190. *Id.* at 789–90.

191. *Id.* at 793 (Kennedy, J., concurring).

192. *See id.* at 797 (Stevens, J., dissenting); *id.* at 803 (Ginsburg, J., dissenting).



sued for fraud and tortious interference with contractual relationships.<sup>193</sup> In 2002, a jury found for Caperton and awarded \$50 million in damages (compensatory and punitive).<sup>194</sup> By 2005, the trial court had denied Massey all post-trial motions and the case was ripe for appeal.<sup>195</sup> In 2004, however, West Virginia ran its scheduled judicial elections, and Don Blankenship, chairman, CEO, and president of Massey, supported lawyer Brent Benjamin in his quest to unseat and replace Justice McGraw on the West Virginia Supreme Court of Appeals.<sup>196</sup> Blankenship donated close to \$2.5 million to an organization that supported Benjamin and opposed McGraw; the money donated by Blankenship made up more than two-thirds of the money that organization raised.<sup>197</sup> Furthermore, Blankenship spent another \$500,000 in independent expenditures supporting Benjamin (direct mailings, letters to prospective donors, media advertisements, and more).<sup>198</sup> The \$3 million spent by Blankenship was more than the total amount of money spent by the rest of Benjamin's supporters combined, and about three times what Benjamin's own committee spent.<sup>199</sup> Benjamin won with 53.3% of the votes and took his place on the West Virginia Supreme Court of Appeals.<sup>200</sup>

In October 2005, Caperton preemptively asked then-Justice Benjamin to recuse himself from any potential appeals that involved Massey; Justice Benjamin denied the motion.<sup>201</sup> In December 2006, Massey filed an appeal challenging the \$50 million jury verdict, and the Supreme Court of Appeals of West Virginia granted review.<sup>202</sup> In November 2007, the court reversed the jury verdict in a 3–2 decision with Benjamin casting the deciding vote.<sup>203</sup> Caperton asked for a rehearing, and both parties sought to recuse three of the five sitting justices: Massey asked for one recusal; Caperton for two, one of which was Benjamin.<sup>204</sup> Benjamin was the only one who refused to recuse himself—for the second time—and, acting as Chief Justice, selected two judges to replace the two justices who did recuse.<sup>205</sup> Before the rehearing, Caperton moved again—for the third time—to disqualify Justice Benjamin, but its request was denied, and Benjamin went on to cast the deciding vote, again, in a 3–2 opinion in favor of Massey.<sup>206</sup> The United States Supreme

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193. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 2258.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

Court then granted certiorari.<sup>207</sup>

The issue before the Court was whether the Fourteenth Amendment's Due Process Clause was violated when Justice Benjamin refused to recuse himself.<sup>208</sup> The majority began by reiterating that the basic requirement of due process is a fair trial before a fair court<sup>209</sup> and that "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."<sup>210</sup> Nonetheless, the Court concluded that (1) this principle did not mean that bias or prejudice was enough grounds for disqualification,<sup>211</sup> and (2) most issues pertaining to judicial recusal and disqualification—personal bias, kinship, degree of interest—will not present a constitutional question, and will be left to the legislature to circumscribe.<sup>212</sup>

However, in certain circumstances where "the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable," the Court had mandated disqualification.<sup>213</sup> Those circumstances included: (1) an interest in the outcome of the case (i.e., *Tumey* and *Ward*)<sup>214</sup>—although a lesser one than the common law would have sanctioned,<sup>215</sup> (2) the involvement of the judge in a pending but similar action (i.e., *Lavoie*);<sup>216</sup> and (3) criminal contempt actions (i.e., *Murchison*),<sup>217</sup> run by the same judge who previously presided over the proceeding resulting in the contempt.<sup>218</sup> Justice Kennedy summarized the Court's line of cases with two principles: (1) judges are not allowed to try cases if they have an interest in their outcome; the interest that would disqualify the judge is not precisely defined—relationships and circumstances are to be considered;<sup>219</sup> and (2) the inquiry is an objective one; not whether the judge is actually biased, but whether it is likely that the average judge in the given circumstances would

207. *Id.* at 2259.

208. *Id.* at 2256.

209. *Id.* at 2259 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)); see also *supra* notes 166–73 and accompanying text for further discussion on *In re Murchison*.

210. *Caperton*, 129 S. Ct. at 2259 (quoting THE FEDERALIST NO. 10, *supra* note 36, at 59 (James Madison)); see also Frank, *supra* note 27, at 611–12.

211. *Caperton*, 129 S. Ct. at 2259 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986)); see also *supra* notes 174–78 and accompanying text for further discussion on *Lavoie*.

212. *Caperton*, 129 S. Ct. at 2259 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)); see also *supra* notes 148–57 and accompanying text for further discussion on *Tumey*.

213. *Caperton*, 129 S. Ct. at 2259 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

214. See *id.* at 2259–60.

215. *Id.* at 2260.

216. *Id.* at 2260–61.

217. *Id.* at 2261.

218. *Id.*

219. *Id.* (citations omitted).

be neutral, or whether an unconstitutional potential for bias exists.<sup>220</sup> It is the risk of actual bias that we must also guard against, if the due process guarantee is to have any meaning.<sup>221</sup>

While recognizing that not all campaign contributions rise to the level of a due process violation, Justice Kennedy defined the case before the Court to be exceptional, based on the relative size of Blankenship's contribution compared to the total sum contributed by all of Benjamin's supporters and the total sum spent in the election process by both parties.<sup>222</sup> The test was solely whether the "possible temptation to the average . . . judge . . . [might] lead him not to hold the balance nice, clear and true."<sup>223</sup> The Court concluded that the extreme facts of the case raised the probability of actual bias to unconstitutional levels.<sup>224</sup> The majority opinion closed by restating that the Due Process Clause defined the outer boundary of judicial recusal, and that legislatures may impose more stringent rules.<sup>225</sup>

Chief Justice Roberts dissented, joined by Justices Thomas, Alito, and Scalia, and warned about the difficulty the courts will have in implementing this outer boundary.<sup>226</sup> The dissent submitted forty questions to the Court and criticized the majority for creating new constitutional rights,<sup>227</sup> as well as failing to "formulate a 'judicially discernible and manageable standard' . . . ."<sup>228</sup> At the most basic level, the dissent asked, will this case apply only to judicial campaign contributions or to judicial disqualifications in general?<sup>229</sup> The dissent also expressed concern that *Caperton* will diminish the confidence of the people in the justice system.<sup>230</sup> Justice Scalia expressed the same opinion in his own dissent.<sup>231</sup> He also foresaw a flood of litigation based on *Caperton*-type claims and warned against trying to right all wrongs through the Constitution.<sup>232</sup>

## 7. *Caperton* Aftermath

In 1990, in Texas, Charles Dean Hood was found guilty of double homicide by a jury of his peers.<sup>233</sup> During trial there were rumors that the

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220. *Id.* at 2262.

221. *Id.* at 2263.

222. *Id.* at 2263–64.

223. *Id.* at 2264 (citations omitted).

224. *Id.* at 2265.

225. *Id.* at 2267.

226. *Id.* (Roberts, C.J., dissenting).

227. *Id.* at 2267–73.

228. *Id.* at 2272 (quoting *Vieth v. Jubelirer*, 541 U.S. 257, 306 (2004)).

229. *See id.* at 2269.

230. *Id.* at 2274.

231. *Id.* (Scalia, J., dissenting).

232. *Id.* at 2274–75. Justice Scalia reminded his colleagues that some issues are non-justiciable.

233. *See Hood v. State*, 158 S.W.3d 480 (Tex. Crim. App. 2005) (citing *Hood v. State*, No.

trial judge and the prosecutor were romantically involved.<sup>234</sup> In 2008, both the judge and the prosecutor were deposed and confirmed their relationship and their efforts to keep it confidential, but the Texas Court of Criminal Appeals still rejected Hood's habeas petition.<sup>235</sup> Hood then petitioned the U.S. Supreme Court, claiming that the secret relationship between the judge and the prosecutor violated his due process right to a fair trial.<sup>236</sup> Legal experts expected the Supreme Court to take the case to apply and support the rule announced in *Caperton*.<sup>237</sup> The Supreme Court denied certiorari,<sup>238</sup> to the disappointment of many that followed the case.

The judge in *Hood* did not recuse herself from presiding over a criminal trial prosecuted by her paramour. Under Texas law, the judge did not have to recuse herself *sua sponte*.<sup>239</sup> What about the highest Court in the land? Do Justices of the United States Supreme Court abide by any recusal rules?

#### E. Recusal for Supreme Court Justices in the Modern Era

In 1946, Justice Jackson created media frenzy when he criticized fellow Justice Black for not recusing himself in a case advocated by a lawyer who had been Black's partner twenty years prior.<sup>240</sup> Scholars analyzing the issue at the time concluded (after examining practices by such famous Justices as Holmes, Brandeis, and Cardozo) that Jackson's criticism was unwarranted, and that Black's decision was in line with 150 years of tradition.<sup>241</sup> Nevertheless, in 1952, Justice Frankfurter recused himself in *Public Utilities Commission of District of Columbia v. Pollak* because he strongly objected to the playing of radio programs on public buses.<sup>242</sup> He took the unprecedented action of explaining and memorializing his decision: "My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it."<sup>243</sup> Justice

71,167, slip op. at 1 (Tex. Crim. App. Nov. 24, 1993)).

234. Steven Seidenberg, *Too Close for Comfort*, A.B.A. J., July 1, 2010, at 24, available at [http://www.abajournal.com/magazine/article/too\\_close\\_for\\_comfort/](http://www.abajournal.com/magazine/article/too_close_for_comfort/).

235. *Id.*

236. *Id.*

237. *Id.* at 25.

238. 130 S. Ct. 2097 (2010).

239. See *infra* note 599 and surrounding text.

240. Frank, *supra* note 27, at 605. The case was *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161 (1945).

241. Frank, *supra* note 27, at 634–35.

242. *Pub. Utils. Comm'n of D.C. v. Pollak*, 343 U.S. 451, 466–67 (1952) (Frankfurter, J., stating reasons he took no part in the consideration or decision of the case).

243. *Id.* at 467.

Frankfurter carefully considered his judicial training, habits, and discipline, but ended up deciding that his subconscious hatred for the playing of radio on the bus would influence his ultimate judgment or be thusly perceived by others.<sup>244</sup> His cautious stance and his meticulous written justification has seldom been followed.

The late 1960s and early 1970s were laden with events involving Supreme Court justices. In 1968, President Johnson nominated his long-time friend and confidante, Associate Justice Abe Fortas, to the post of Chief Justice, replacing Earl Warren.<sup>245</sup> Even while serving as a Justice, Abe Fortas had a habit of counseling the President on important matters (such as the escalation of the Vietnam War and the appropriate response to the Detroit riots).<sup>246</sup> This prompted the first ever Senate filibuster in history over a Supreme Court nomination.<sup>247</sup> Justice Fortas's troubles were not over and he resigned in 1969—the first Justice ever to do so—after revelations of involvement with financier Louis Wolfson.<sup>248</sup> Later that year, the Senate rejected Judge Clement Haynsworth's nomination to replace Fortas on the Supreme Court because he participated in five cases in which he had small pecuniary interests.<sup>249</sup> In 1972, freshly minted Associate Justice Rehnquist declined to recuse himself in *Laird v. Tatum*.<sup>250</sup> Earlier, as a Department of Justice lawyer, Rehnquist had testified as an expert witness on the matter at Senate hearings.<sup>251</sup> The case was decided 5–4 in the Supreme Court, and a motion for recusal and rehearing was filed.<sup>252</sup> Justice Rehnquist denied the recusal motion and his memorandum explaining his decision was a first in the practice of the Supreme Court.<sup>253</sup> Rehnquist found he had a duty to sit, particularly because there was no replacement for a recused Justice, which could lead to an equally divided Court.<sup>254</sup> His concerns would later be mirrored in a written Statement of Recusal Policy signed by seven Supreme Court Justices.<sup>255</sup>

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244. *Id.* at 466–67.

245. *Filibuster Derails Supreme Court Appointment*, U.S. SENATE (Oct. 1, 1968), [http://www.senate.gov/artandhistory/history/minute/Filibuster\\_Derails\\_Supreme\\_Court\\_Appointment.htm](http://www.senate.gov/artandhistory/history/minute/Filibuster_Derails_Supreme_Court_Appointment.htm) (last visited Mar. 18, 2010).

246. See MACKENZIE, *supra* note 85, at 24.

247. U.S. SENATE, *supra* note 245.

248. See MACKENZIE, *supra* note 85, at 71–76.

249. Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 545 (2005); see also MACKENZIE, *supra* note 85, at 67–94.

250. *Laird v. Tatum*, 409 U.S. 824 (1972). This case challenged the constitutionality of the surveillance of civilian political activity by the Army. *Id.*

251. See Frost, *supra* note 249, at 545.

252. *Id.*

253. See *Laird*, 409 U.S. at 824.

254. *Id.* at 837.

255. Justices Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Thomas, and Ginsburg signed the statement. Justices Blackmun and Souter did not sign it. Chief Justice Roberts adopted this policy in November 2005.

We have spouses, children or other relatives within the degree of relationship covered by 28 U.S.C. § 455 who are or may become practicing attorneys. . . .

. . . .  
. . . We think that a relative's partnership in the firm appearing before us, or his or her previous work as a lawyer on a case that later comes before us, does not *automatically* trigger [recusal]. . . .

We do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage. Even one unnecessary recusal impairs the functioning of the Court. . . . In this Court, where the absence of one Justice cannot be made up [by the presence] of another, needless recusal . . . produces the possibility of an even division on the merits of the case, and has a distorting effect upon the [appeals] process requiring the petitioner to obtain . . . four votes out of eight instead of four out of nine.

Absent some special factor, therefore, we will not recuse ourselves by reason of a relative's participation as a lawyer in the earlier stages of the case. One such special factor . . . would be the relative's functioning as the lead counsel below. . . . We shall recuse ourselves whenever, to our knowledge, a relative has been lead counsel below.

Another special factor, of course, would be the fact that the amount of the relative's compensation could be substantially affected by the outcome here. That would require our recusal even if the relative had not worked on the case, but was merely a partner in the firm that shared the profits. . . .<sup>256</sup>

In 2004, after vacationing with then-Vice President Cheney,<sup>257</sup> Justice Scalia cited the abovementioned policy in his twenty-one page memorandum in support of his decision not to recuse himself in *Cheney v. United States District Court for the District of Columbia*.<sup>258</sup> The media outcry was national in scope.<sup>259</sup> Soon thereafter, it was Justice Ginsburg's turn to be

256. FLAMM, *supra* note 6, at 1101–03.

257. Justice Scalia had traveled on Air Force Two as “an official guest” of the Vice President’s for a duck-hunting trip. David G. Savage & Richard A. Serrano, *Scalia Was Cheney Hunt Trip Guest*, L.A. TIMES, Feb. 5, 2004, at A1.

258. 541 U.S. 913 (2004).

259. See, e.g., Editorial, *Scalia, Use Good Judgment; Bow Out of Cheney Case*, ATL. J.-CONST., Jan. 29, 2004, at 14A; Editorial, *Scalia’s Apparent Conflict*, BOS. GLOBE, Feb. 7, 2004, at A14;

criticized for allowing her name to be used in the “Justice Ruth Bader Ginsburg Distinguished Lecture Series,” co-sponsored by the National Organization for Women (NOW).<sup>260</sup> So far, she has declined to do so. Scholars will continue to keep a close watch over the recusal practices of Justices of the United States Supreme Court.

#### IV. THE NEED FOR RECUSAL REFORM—PROPOSED SOLUTIONS

##### A. *Judicial Elections: Zero-Sum Game?*

It has been argued that judicial elections create a zero-sum game because judicial candidates have a First Amendment right to express their positions to the electorate and to receive campaign contributions, while at the same time they will potentially lose their appearance of impartiality and infringe on a litigant’s due process guarantee to a fair trial.<sup>261</sup> Historically, judicial elections were relatively quiet,<sup>262</sup> based on the candidates’ perception that such elections and their campaigns were fundamentally different from other types of elections.<sup>263</sup> However, they have been transformed by personal attacks unrelated to the candidates’ qualifications, and increased campaign spending.<sup>264</sup> The growing importance of money and the perceived inefficiency of judicial ethics codes have led to a loss of public confidence in the courts as impartial arbiters.<sup>265</sup>

States had, in the past, responded to due process concerns through campaign speech restrictions, until the Supreme Court invalidated such restrictions in *White*.<sup>266</sup> While nothing in the High Court’s jurisprudence addresses the matter of restricting solicitations for campaign contributions,

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Editorial, *Scalia’s Not-So-Excellent Journey: Hunting Trip with Cheney Was Highly Inappropriate*, BUFFALO NEWS, Feb. 4, 2004, at C4; Editorial, *Sit This One Out*, CHI. SUN-TIMES, Feb. 8, 2004, at 35; Editorial, *Too Close for Comfort*, COLUMBUS DISPATCH, Jan. 23, 2004, at 10A; Editorial, *Scalia’s Conflict of Interest*, DENVER POST, Jan. 26, 2004, at B7; Editorial, *One Case Scalia Should Skip*, L.A. TIMES, Jan. 22, 2004, at B16; Editorial, *Duck-Blinded Ethics; Scalia Puts Supreme Court Integrity at Risk*, SAN DIEGO UNION-TRIB., Feb. 6, 2004, at B8; Editorial, *Too Close for Comfort*, S.F. CHRON., Jan. 26, 2004, at B6; Editorial, *Scalia Should Recuse Himself*, SEATTLE POST-INTELLIGENCER, Feb. 9, 2004, at B5.

260. Frost, *supra* note 249, at 533 n.7. More than a dozen Republican members of Congress demanded that Justice Ginsburg recuse herself from all future abortion-related cases. *Id.*

261. David K. Stott, *Zero-Sum Judicial Elections: Balancing Free Speech and Impartiality Through Recusal Reform*, 2009 BYU L. REV. 481, 481 (2009).

262. “[A]s exciting as a game of checkers [p]layed by mail.” Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1231 (2008) (citations omitted).

263. Thomas R. Phillips & Karlene Dunn Poll, *Free Speech For Judges and Fair Appeals For Litigants: Judicial Recusal in a Post-White World*, 55 DRAKE L. REV. 691, 693 (2007).

264. *Id.* at 693–94.

265. Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 503–04 (2007).

266. Stott, *supra* note 261, at 482.

states and lower courts have interpreted *White* to mean that such restrictions would be unconstitutional as well.<sup>267</sup> The *White* decision<sup>268</sup> brought about increased spending by political parties and special interests, sterilized judicial codes of conduct, and placed strong pressure on candidates to issue pre-election statements committing them to positions desired by their electoral base.<sup>269</sup>

As the money spent in judicial campaigns increased significantly, the Supreme Court first declined to consider its due process impact in *Avery v. State Farm Mutual Automobile Insurance Co.*,<sup>270</sup> only later deciding, in *Caperton*, to intervene.<sup>271</sup> Some scholars have opined that *Caperton* was wrongly decided and have accused Justice Kennedy—who provided the swing vote and wrote the opinion—of retreating from his previous position in *White* as an ardent supporter of political speech and campaign financing.<sup>272</sup> The recent *Citizens United* case, deciding that restrictions on corporate campaign spending violate the First Amendment (and written by the same Justice Kennedy),<sup>273</sup> shows that such an analysis is incomplete at best. As the line of cases shows and as the Court has explicitly said, the solution is not to be found in restrictions on campaign speech and financing, but in better disqualification standards.<sup>274</sup> The Court has consistently struck down laws and rules that infringed the First Amendment rights of judicial candidates and, just as consistently, has protected litigants' due process

267. See *Republican Party of Minn. v. White*, 416 F.3d 738, 763 (8th Cir. 2005) (striking down Minnesota's solicitation clause); see also *Weaver v. Bonner*, 309 F.3d 1312, 1321 (11th Cir. 2002) (striking down Georgia's solicitation canon).

268. The *White* decision was viewed by some to validate an underlying theory that judicial impartiality is not constitutionally mandated, but was merely a policy choice to be subordinated to the First Amendment. See Donald L. Burnett, Jr., *A Cancer on the Republic: The Assault upon Impartiality of State Courts and the Challenge to Judicial Selection*, 34 *FORDHAM URB. L.J.* 265, 276 (2007). Such point of view was seen particularly in Justice O'Connor's observation that "[i]f the State has a problem with judicial impartiality, it is largely one that the State brought upon itself by continuing the practice of popularly electing judges." *Republican Party of Minn. v. White*, 536 U.S. 765, 792 (2002) (O'Connor, J., concurring).

269. Stott, *supra* note 261, at 498.

270. *Avery v. State Farm Mut. Auto. Ins. Co.*, 547 U.S. 1003 (2006). In this case, State Farm had an outstanding jury verdict against it to the tune of \$1 billion, and its appeal was to be heard and decided only after one seat on the Illinois Supreme Court would be filled; the two sides to the electoral battle spent a combined \$9.3 million dollars in the election. Goldberg, *supra* note 265, at 510. The candidate supported by State Farm won and then cast the vote that decided the case, reversing the jury award. *Id.*

271. See *supra* notes 193–232 and accompanying text for further discussion on *Caperton*.

272. Terri R. Day, *Buying Justice: Caperton v. A.T. Massey: Campaign Dollars, Mandatory Recusal and Due Process*, 28 *MISS. C. L. REV.* 359, 374–76 (2009).

273. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 882 (2010).

274. See *supra* notes 178 and 193–232 and accompanying text.



rights by expanding the grounds for judicial disqualification.<sup>275</sup> If a litigant's right to an impartial adjudicator can be protected without infringing on judicial candidates' rights to speak their mind and receive campaign contributions, then judicial elections are no longer a zero-sum game, but rather a win-win situation.

### B. *Why Do We Need Recusal Reform?*

As John Adams wrote in the original Massachusetts Constitution of 1780, we have a right to a trial by “judges as free, impartial, and independent as the lot of humanity will admit.”<sup>276</sup> Judiciary independence is also an important part of the separation of powers in our constitutional democracy.<sup>277</sup> This judicial impartiality is now under attack by the political branches and economic special interests.<sup>278</sup> James Madison warned that the separation of powers must be maintained lest “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>279</sup> Justice Kennedy, the author of the majority opinion in both *White* and *Caperton*, once said “The law makes a promise . . . . The promise is neutrality. If that promise is broken, the law ceases to exist. All that’s left is the dictate of a tyrant, or a mob.”<sup>280</sup>

Recusal is a safeguard needed to restore and keep that promise. But most recusal decisions (whether approved or not) are made without providing a detailed written opinion.<sup>281</sup> The motions to disqualify are costly and risky, bearing a small chance of success because of the heavy evidentiary burdens.<sup>282</sup> Parties and lawyers who foresee a continuing relationship with that court will also be discouraged<sup>283</sup> and will fear angering the judge.<sup>284</sup> Having the challenged judges decide the motions discourages

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275. See *supra* notes 193–232 and accompanying text.

276. See Schotland, *supra* note 38, at 1079.

277. *Id.*

278. Burnett, *supra* note 268, at 265. Our constitutional republic used structural separation of powers to combat two forms of tyranny: “[T]he oppression of the many by the few, and the oppression of the few by the many.” *Id.* at 266.

279. THE FEDERALIST NO. 47, *supra* note 36, at 301 (James Madison).

280. Joan Biskupic, *Two Justices Defend Judicial Independence*, SEATTLE TIMES, Dec. 6, 1998, at A22, available at 1998 WLNR 1532334.

281. Goldberg, *supra* note 265, at 524.

282. *Id.*

283. *Id.*

284. See 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) (“[A]sking a challenged [judge] to rule on a motion to recuse puts that [judge] in a precarious position. . . . [B]ecause 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

their filing, and decreases the chances of success once the motions are filed.<sup>285</sup> Having the motion decided by a colleague judge is only a minute improvement.<sup>286</sup> Moreover it is quite easy for judges to deny recusal motions when they are not required to hear the parties in the matter or justify their decisions.<sup>287</sup> Furthermore, for most people bias is unconscious,<sup>288</sup> and research in social psychology shows that most biased people will underestimate and undercorrect for their prejudices.<sup>289</sup> The furious debate in public forums regarding Justice Scalia's refusal to recuse in *Cheney*<sup>290</sup> demonstrates that current disqualification law is not efficient at protecting the judiciary's reputation for independence.<sup>291</sup>

Judicial independence is "an essential safeguard against the effects of occasional ill humors in the society."<sup>292</sup> Our Founding Fathers, in the Declaration of Independence, listed the lack of judicial independence as one of the important grievances of the American people: "[The king] has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries."<sup>293</sup> Replacing "the king" with "the people" does not yield better results. It is worth noting that unelected judges have regularly reversed decisions made by elected bodies and still have commanded the respect of the public.<sup>294</sup> Process and procedural safeguards, rather than accountability to the public, have legitimized the appointed judiciary.<sup>295</sup>

The recognized process in American law has the following components: (1) litigants initiate the disputes;<sup>296</sup> (2) the disputes are put forward through

first instance to adhere to statutory and ethical requirements.").

285. In *Berger v. United States*, 255 U.S. 22 (1921), defendants (some of German descent) were under the accusation of espionage. The judge for this case had previously stated: "One must have a very judicial mind, indeed, not to be prejudiced against the German-Americans in this country. Their hearts are reeking with disloyalty." Despite this, he refused to recuse himself and sentenced the defendants to twenty years in prison. *Id.* at 28.

286. Goldberg, *supra* note 264, at 524–25.

287. *Id.*

288. Tobin A. Sparling, *Keeping up Appearances: The Constitutionality of the Model Code of Judicial Conduct's Prohibition of Extrajudicial Speech Creating the Appearance of Bias*, 19 GEO. J. LEGAL ETHICS 441, 480 (2006) ("[Some] judges may convince themselves they can rule fairly, unaware that the currents of bias often run deep.").

289. Goldberg, *supra* note 265, at 525.

290. 541 U.S. 913 (2004); *see also supra* note 258.

291. Frost, *supra* note 249, at 532.

292. THE FEDERALIST NO. 78, *supra* note 36, at 470 (Alexander Hamilton).

293. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

294. Frost, *supra* note 249, at 554.

295. *Id.*

296. Courts must wait for "cases" or "controversies" to be raised before them. U.S. CONST. art. III, § 2.

an adversarial system;<sup>297</sup> (3) judgments must be supported by a rationale;<sup>298</sup> (4) judgments must be grounded in the law;<sup>299</sup> and (5) the judge must be impartial.<sup>300</sup> The current law of recusal, around the nation, offends one or more of these principles. For example, disqualification is made difficult under federal law by an absence of statutory provisions for procedure.<sup>301</sup> Opposition of a recusal motion by the other party is also difficult because that party lacks knowledge of the facts.<sup>302</sup> It is rather the judge who plays the role of the adversary party, but in an unfair way: getting to decide the matter, and rarely giving a reasoned (and written) explanation.<sup>303</sup> Justice Frankfurter's example of writing a separate opinion explaining the reasons for his decision in a recusal motion<sup>304</sup> has rarely been followed.<sup>305</sup> As far as grounding these decisions in the law, it is a thorny issue. Most written opinions regarding recusal are made by judges who deny such motions, providing little or no case law for future movants.<sup>306</sup> Justice Scalia recused himself without explanation in *Elk Grove Unified School District v. Newdow*,<sup>307</sup> but wrote a twenty-one page justification to his decision not to

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297. The parties' participation in the process legitimizes the judgment. Frost, *supra* note 249, at 559–60. The judiciary is not equipped, nor empowered to undertake factual investigations. *Id.* at 560.

298. Congress, which is legitimized through periodic elections, legislates without justification, but courts legitimize themselves by providing reasons for their decisions. Frost, *supra* note 249, at 561. Justice Kennedy quipped, "We are the only branch of the government that must give reasons for what we do. They are in the opinions." Tony Mauro, *Courtside: When Planets Collide*, LEGAL TIMES, Mar. 29, 2004, at 10, available at 2004 WLNR 23406968. A congressman responded, "We give reasons, too. It is called re-election." *Id.*

299. "[C]ourts may act only when there is law, based on precedent, to apply. Courts do not possess authority to assert their own will." Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, U.C. DAVIS L. REV. 41, 55 (1995). "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . ." THE FEDERALIST NO. 78, *supra* note 36, at 496 (Alexander Hamilton).

300. Frost, *supra* note 249 at 555–56. There may not be agreement as to *why* these procedural factors strengthen legitimacy, but there is general agreement that they do. *Id.* The Constitution grants life tenure and undiminished salaries for this very purpose, because "a power over a man's subsistence amounts to a power over his will." See U.S. CONST., art. III, para. 1; see also THE FEDERALIST NO. 79, *supra* note 36, at 504 (Alexander Hamilton). Federal diversity jurisdiction is also anchored in impartiality. See U.S. CONST., art. III, para. 2. Finally, the Supreme Court emphasized that having an impartial judge is an essential element of due process, under the Fifth and Fourteenth Amendments. See *Ward v. Village of Monroeville*, 409 U.S. 57, 60–62 (1972).

301. Frost, *supra* note 249, at 567.

302. *Id.*

303. *Id.*

304. See *supra* notes 243–44 and accompanying text.

305. Frost, *supra* note 249, at 569.

306. Leubsdorf, *supra* note 101, at 244–45 ("[A] judge who withdraws usually writes no opinion. Published opinions, consequently, form an accumulating mound of reasons and precedents against withdrawal; meanwhile, some judges routinely and silently disqualify themselves in comparable cases.").

307. 540 U.S. 945 (2003) (a challenge to the recitation of the pledge of allegiance in public schools).

recuse in *Cheney*.<sup>308</sup> The fifth and most important tenet, judge impartiality, is not consistent with the self-judging of recusal motions, which is the law in most states and the federal system,<sup>309</sup> and finding an impartial appellate judge for an interlocutory appeal places a heavy burden on litigants.<sup>310</sup> In fact, it is so ingrained in our judiciary that the challenged judge should pass upon a recusal motion that Chief Justice Rehnquist rebuked Senators Patrick Leahy and Joe Lieberman for questioning Justice Scalia in *Cheney* while the case was pending.<sup>311</sup> But Scalia's memorandum has more similarities with an opposing party's document than with a neutral adjudicator's decision; the author is, after all, justifying his own conduct.<sup>312</sup> Judicial recusal is in need of reform, at all levels.

### C. Proposed Recusal Reforms

#### 1. Make the Motions More Affordable

The costs of a disqualification motion can significantly add to litigants' financial burdens.<sup>313</sup> There is a need to lessen these extra burdens to provide a streamlined and affordable recusal process. Disclosure requirements<sup>314</sup> and peremptory challenges<sup>315</sup> will also help.

#### 2. Define Strict Rules for Mandatory Recusal

Mandatory disqualification when impartiality may reasonably be questioned strengthens judicial independence and protects parties from the judges who owe a debt of gratitude to outside forces.<sup>316</sup> Freedom from prior restraint (*White*) does not translate into freedom from recusal.<sup>317</sup> The ABA has recommended instituting a rule for mandatory recusal for judges who

308. See *supra* notes 257–58 and accompanying text.

309. See *supra* notes 103–12 and 113–47 respectively; see also Appendix *infra* notes 382–641.

310. Frost, *supra* note 249, at 571–72.

311. “[I]t has long been settled that each justice must decide such a question for himself. . . . Anyone at all is free to criticize the action of a justice—as to recusal or as to the merits—after the case has been decided. But . . . any suggestion . . . as to why a justice should recuse himself in a pending case is ill-considered.” See David G. Savage, *High Court Won't Reconsider Scalia's Recusal Decision*, L.A. TIMES, Jan. 27, 2004, at A12.

312. Frost, *supra* note 249, at 591.

313. Stott, *supra* note 261, at 509.

314. See *infra* notes 336–40 and accompanying text.

315. See *infra* notes 326–35 and accompanying text.

316. Burnett, Jr., *supra* note 268, at 288.

317. *Id.* at 289. Recusal would lose its safety net function. *Id.*

have accepted significant campaign contributions from a party.<sup>318</sup> The *Caperton* aftermath is still unknown but will, most likely, deem such a rule constitutional, as a guarantee of due process. A rule pertaining to campaign contributions will most likely establish a ceiling that would trigger automatic disqualification.<sup>319</sup> An added benefit is providing a disincentive to special interests to spend large sums in a race that should really be run locally.<sup>320</sup> No state has yet adopted the ABA proposed rule<sup>321</sup> for two reasons. First, in the states that have legal limits to campaign contributions, those limits work to limit the possibility of actual or perceived bias.<sup>322</sup> We should be mindful that the Supreme Court has not (yet) considered a case that challenges such limits on First Amendment grounds.<sup>323</sup> Second, such a rule could have an adverse effect: parties could make over-the-limit contributions for the sole purpose of disqualifying a judge they do not like.<sup>324</sup> Allowing waivers for disqualification would prevent such gamesmanship and preserve the efficacy of the rule.<sup>325</sup>

### 3. Peremptory Disqualification

Peremptorily challenging a judge is similar to peremptorily striking jurors.<sup>326</sup> Seventeen states that elect their judges already allow it, and so does Hawai'i—a state that uses a merit system.<sup>327</sup> Allowing peremptory challenges will most likely result in an increased number of disqualifications.<sup>328</sup> By getting one “free pass,” parties will skip an expensive and risky recusal motion.<sup>329</sup> They would still be able to challenge the next-appointed judge for cause. The risk is that a peremptory challenge will be used to strike a judge who the litigant perceives as unfavorable rather than partial, leading to judge-shopping, and undermining the reputation of the judiciary.<sup>330</sup> Yet such risks are currently being faced, and met, in the jury selection process—a process that has been found to promote confidence

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318. Goldberg, *supra* note 265, at 528.

319. *Id.* at 529.

320. *Id.*

321. *Id.*

322. *Id.* Such states would benefit more from mandatory recusal rules that would target aggregate contributions from donors associated with one litigant. *Id.* In the Illinois Supreme Court race in *Avery*, State Farm made no direct contributions, but individuals and entities closely associated with it contributed an aggregate of more than \$1 million. *See supra* note 270.

323. Such a decision would be the “campaign-contributions” equivalent of *White*.

324. Goldberg, *supra* note 265, at 529.

325. *Id.*

326. *Id.* at 526.

327. *See* Schotland, *supra* note 38, at 1102.

328. Goldberg, *supra* note 265, at 526.

329. *Id.*

330. Frost, *supra* note 249, at 587.

in juries.<sup>331</sup>

A bigger problem is the burden placed on the administration of the courts: there are a lot more jurors in jury pools than there are judges waiting in the wings to take over for a disqualified colleague. A proposed solution that would alleviate the risk of abusing the peremptory system is the requirement that an affidavit be filed<sup>332</sup> explaining the reason for challenging the judge. Offensive reasons could be identified,<sup>333</sup> and improper recusal motions could be denied.<sup>334</sup> Administrative burdens can also be reduced by limiting the number of peremptory challenges allowed to one litigant in the same action (most states allow only one per litigant, per action) and by requiring that the challenges be made before the judge has spent significant time and energy on the case.<sup>335</sup> Peremptory disqualification is a solid preventative measure against both bias and appearance of bias.

#### 4. Disclosure

Improved disclosure by judges of campaign activities is another measure available to improve the disqualification process.<sup>336</sup> It would be difficult and costly for litigants to discover relevant information, so judges could be required to have on file copies of their campaign statements, as well as information on their campaign finances.<sup>337</sup> Disclosure need not be limited to the presentment of such documents for parties' inspection. Judges could be required to disclose, before the trial starts, any additional circumstances that could affect their impartiality or create an appearance of prejudice.<sup>338</sup> The main disadvantages of enhanced disclosure are the administrative burden on the court system<sup>339</sup> and the fact that disclosure, while providing bases for recusal, does not guarantee it.<sup>340</sup> But, the benefits outweigh the burdens.

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331. Goldberg, *supra* note 265, at 527.

332. See FLAMM, *supra* note 6, § 26.5, at 767–69 (describing the requirement of an affidavit in some states that have peremptory challenges).

333. Goldberg, *supra* note 265, at 527.

334. It is important to note that only in special circumstances would a peremptory challenge be denied. The default action must be approval; otherwise peremptory disqualification would lose its meaning.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.* at 528.

339. *Id.*

340. *Id.*

## 5. Independent Adjudication of Recusal Motions

Recusal motions are different than other procedural motions because they implicate the very legitimacy of the legal system.<sup>341</sup> And yet, in many jurisdictions, it is the challenged judges themselves who pass upon the motion, most often with no prospect of review (interlocutory or otherwise).<sup>342</sup> Recusal motions can be taken personally,<sup>343</sup> and therefore litigants will still dread judicial retribution.<sup>344</sup> Both neutrality and objectivity are in jeopardy,<sup>345</sup> and while good arguments have been made for judges self-deciding the motions,<sup>346</sup> the same arguments function just as well in the context of independently adjudicated motions,<sup>347</sup> and a handful of states have already done so.<sup>348</sup> The administrative costs of implementing independent adjudication of recusal motions must be borne to carry into effect the litigant's most important due process right to a fair tribunal and the critical social interest in protecting the judiciary's reputation for impartiality. Administrative measures can be implemented to prevent frivolous recusal motions.

## 6. Written Opinions for the Motions

Records are sparse regarding decisions and their reasoning,<sup>349</sup> and this negatively affects the development of any jurisprudence in the recusal area, much less a consistent one. Basic democratic values in general, and judicial ones in particular, should require judges to explain their decisions.<sup>350</sup> A written opinion would also enable appellate courts to make informed decisions on review. Recusal motions should be memorialized.

## 7. Interlocutory Appeal and De Novo Review

In theory, a litigant has four potential courses of action after being

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341. *Id.* at 530.

342. See Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 547 (twenty-seven states place the recusal decision "within the sound discretion of the challenged judge").

343. See Sparling, *supra* note 288 and accompanying text.

344. See Stott, *supra* note 261, at 507.

345. See Goldberg, *supra* note 265, at 530.

346. Judges are the persons closest to the alleged facts; the risk of recusal "fishing expeditions" is reduced; and efficiency is enhanced without a protracted fact-finding process. *Id.*

347. *Id.* Judges' best knowledge of the facts is counterweighed by the potential bias suggested by the same facts; "fishing expeditions" are just as powerfully deterred by an independent adjudicator who can impose sanctions; and efficiency can be preserved by the use of affidavits. *Id.* at 530–31.

348. See *supra* notes 103–12 and accompanying text; see also Appendix *infra* notes 382–641.

349. Goldberg, *supra* note 265, at 531.

350. *Id.*; see also Leubsdorf, *supra* note 101, at 244–45 ("Published opinions . . . form an accumulating mound of reasons and precedents.").

denied a recusal motion: a petition for rehearing, an appeal after a final decision in the case, an interlocutory appeal, and writ relief.<sup>351</sup> The challenged judge is usually reluctant to reconsider, and appeals from final decisions have consistently been turned down because “[o]nce the proceedings in the [lower] court are complete, the harm sought to be avoided by the requirement of recusal for appearance of impropriety has been done.”<sup>352</sup> Because of this irreparable damage, to the litigants and to the people’s confidence in the judiciary, all federal circuits employ writs of mandamus as a way to challenge a defeated motion to recuse under Section 455.<sup>353</sup> Interlocutory appeals give litigants extra protection against bias or perceived bias—especially in jurisdictions where judges self-decide recusal motions. In criminal cases, the ability to file an interlocutory appeal after losing a motion to disqualify is crucial for the government because a trial verdict for the defendant, on the merits, will terminate the case and render illusory a final judgment appeal. On appeal, the abuse of discretion standard is used in most federal<sup>354</sup> and state courts.<sup>355</sup> But this standard relies on the assumed legitimacy of the lower court proceedings—legitimacy brought in doubt by the very recusal motion.<sup>356</sup> If the lower court has self-judged, the impartiality interest would dictate de novo review; if the lower court decision was made by an alternate judge, no deference by the appeals court would be warranted.<sup>357</sup> Efficiency losses, for both interlocutory appeals and de novo review, result from an increased load for the appellate courts, but they are justified when compared with the gains in fair trial guarantees.

351. See FLAMM, *supra* note 6, § 32.1, at 960.

352. *United States v. Troxell*, 887 F.2d 830, 833 (7th Cir. 1989) (citation omitted); see also *Nateman v. Greenbaum*, 582 So. 2d 643 (Fla. App. 1991) (Baskin, J., dissenting) (stating that appellate review after a final decision, as a remedy for a denied recusal motion, thwarted its very purpose).

353. See, e.g., *In re United States*, 666 F.2d 690, 694 (1st Cir. 1981); *In re IBM Corp.*, 618 F.2d 923, 926–27 (2d Cir. 1980); *In re Sch. Asbestos Litig.*, 977 F.2d 764, 774–78 (3d Cir. 1992); *In re Rogers*, 537 F.2d 1196, 1197 n.1 (4th Cir. 1976) (per curiam); *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958, 961 n.4 (5th Cir. 1980); *In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136, 1139–43 (6th Cir. 1990); *SCA Servs. v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977) (per curiam); *Liddell v. Bd. of Educ.*, 677 F.2d 626, 643 (8th Cir. 1982); *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1025 (9th Cir. 1982); *Bell v. Chandler*, 569 F.2d 556, 559 (10th Cir. 1978).

354. A notable federal court exception is the Seventh Circuit. See *United States v. Balistrieri*, 779 F.2d 1191, 1203 (7th Cir. 1985); see also *Sac & Fox Nation of Okla. v. Cuomo*, 193 F.3d 1162, 1168 (10th Cir. 1999) (applying de novo standard where district judge “did not create a record or document her decision not to recuse”).

355. In some circumstances de novo review is also used in Colorado, Florida, Minnesota, and Wisconsin. FLAMM, *supra* note 6, § 33.1, at 987.

356. Leubsdorf, *supra* note 101, at 276.

357. See Goldberg, *supra* note 265, at 531–32.



## 8. Provide Substitutes for Disqualified Judges

In the *Avery* case, if the challenged Justice had recused himself, the court would have been evenly split, giving a default victory to the party that had won in the lower court.<sup>358</sup> This creates the potential for gamesmanship and reduces the value of jurisprudence established in this manner,<sup>359</sup> unless the courts adopt procedures to substitute for the disqualified judges.<sup>360</sup>

## 9. Educate the Judiciary

Providing seminars presenting the social and psychological evidence about bias and stressing the importance to the judicial system of avoiding bias or its appearance would help judges identify and correct unconscious bias.<sup>361</sup> These events could also disseminate information and collect feedback on potential and proposed disqualification reforms, as well as create awareness for the current standards of recusal and a culture favorable to improving them.<sup>362</sup>

## 10. Special Recusal Bodies

Post-*White*, special committees have been created to monitor conduct during judicial campaigns.<sup>363</sup> These groups work best when they are unofficial, by drawing attention to candidates' false or misleading campaign assertions,<sup>364</sup> and ensuring accountability.<sup>365</sup> This concept can also be implemented in recusal, by creating advisory recusal bodies that judges would be encouraged to consult.<sup>366</sup> The advisory body would make public any advice given and the judges' decisions to follow that advice or not, thus creating public pressure on the judges to either follow the recommendations, or to thoroughly explain their refusal to do so.<sup>367</sup>

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358. *Avery v. State Farm Mut. Auto. Ins. Co.*, 547 U.S. 1003 (2006).

359. Goldberg, *supra* note 265, at 532.

360. *Id.*; see also *Cheney v. U.S. 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.).

361. See Sparling, *supra* note 288 and accompanying text; see also Goldberg, *supra* note 265, at 533.

362. Goldberg, *supra* note 265, at 533.

363. See Joseph E. Lambert, *Contestable Judicial Elections: Maintaining Respectability in the Post-White Era*, 94 KY. L.J. 1, 13 (2005) (describing the work of such committees in Alabama, Florida, Kentucky, and Ohio); see also Note, *The Way Forward: Lessons from the National Symposium on Judicial Campaign Conduct and the First Amendment*, 35 IND. L. REV. 649, 655 (2002) (proposing the creation of conduct committees, both official and unofficial).

364. Goldberg, *supra* note 265, at 533.

365. Ensuring accountability is accomplished by informing the public on the amount and source of campaign contributions that candidates receive.

366. Goldberg, *supra* note 265, at 533.

367. *Id.* at 533–34.

*D. What Else Can Be Done?*

There should be longer terms for the judiciary because short terms reduce judicial independence.<sup>368</sup> Longer terms translate into fewer elections and campaigns, less need to raise funds, and fewer opportunities to make political speeches that would create the appearance of partiality.<sup>369</sup> Of course, longer terms run counter to the accountability that is the very reason for having judicial elections,<sup>370</sup> so we can expect to encounter significant resistance to this proposal.

Increasing public outreach is another possibility. Educating the people about the judicial system and its inner workings will increase the public's confidence in the judicial system.<sup>371</sup> California judges regularly talk to high school students in a program called "Judges' Nights."<sup>372</sup> The ABA's "Youth Education for Citizenship" is another great program.<sup>373</sup>

Educate voters in judicial elections.<sup>374</sup> Voter guides on judicial candidates should be prepared and distributed by state and local governments at no cost to candidates.<sup>375</sup> California, Oregon, Washington, Alaska, Colorado, North Carolina (only for appellate candidates), as well as New York City, already send out voter guides.<sup>376</sup>

Establish campaign conduct committees. Several states have followed Justice Kennedy's advice in *White* that "all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence. Indeed, if democracy is to fulfill its promise, they must do so."<sup>377</sup> Justice Stevens, although in dissent in *White*, agreed on this point, suggesting that official bodies may advise the voters when the candidates' statements make them incompatible with the judicial position they seek.<sup>378</sup> Such a committee in Ohio, started by

368. See Schotland, *supra* note 38, at 1099.

369. *Id.* at 1100.

370. Pozen, *supra* note 38, at 285.

371. See Schotland, *supra* note 38, at 1100.

372. *Id.*

373. *Id.*

374. However, as Judge Posner eloquently put it, "Most of what courts do is opaque to people who are not lawyers. It is completely unrealistic to think that the average voter will ever know enough about judicial performance to be able to evaluate judicial candidates intelligently. That is a decisive objection to . . . elect[ing] judges." Richard A. Posner, *Judicial Autonomy in a Political Environment*, 38 ARIZ. ST. L.J. 1, 5 (2006).

375. Summit, *Call to Action: Statement of the National Summit on Improving Judicial Selection*, 34 LOY. L.A. L. REV. 1353, 1357 (2001).

376. See Schotland, *supra* note 38, at 1101.

377. *Republican Party of Minn. v. White*, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring).

378. *Id.* at 797 (Stevens, J., dissenting). "If the solution to harmful speech must be more speech,

the state bar, publicly decried the advertisements aired by non-candidates in 2002,<sup>379</sup> which led to a 2004 judicial election entirely free of such ads.<sup>380</sup>

Many such efforts, that do not involve recusal, may be seen as “band-aids,” but they are incremental improvements to secure judicial independence in the world of judicial accountability.<sup>381</sup>

## V. CONCLUSION

There is a need for disqualification reform in all jurisdictions, elective or appointive. The United States Supreme Court has charted a narrow course and has, so far, successfully navigated between a rock and a hard place, shoring up judicial independence while preserving the rights of states to have judicial elections. Case law develops slowly, which is why the Court has encouraged the states and Congress to act. Fortunately, this is not a zero-sum game, and the right to an impartial judge can be preserved and strengthened. Several reform proposals have found favor in academia as well as with the bench and the bar. The costs vary, but the benefits are well known: impartial tribunals, justice, renewed confidence in the judiciary, and due process protection for life and liberty.

Gabriel D. Serbulea\*

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so be it.” *Id.*

379. Schotland, *supra* note 38, at 1103.

380. *Id.*

381. *Id.*

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APPENDIX: CONCISE REVIEW OF RECUSAL LAW IN THE FIFTY STATES AND  
THE DISTRICT OF COLUMBIA*Alabama*

Alabama courts rarely found sufficient grounds to disqualify judges before 1975,<sup>382</sup> when the legislature enacted judicial disqualification statutes. The statutes required disqualification of judges who had an interest in the case, were related to one of the parties, or had been of counsel in the matter.<sup>383</sup> The statutes also mandated that judges recuse themselves for the appearance of impropriety if they had, as a judicial election candidate, received substantial contributions from anyone involved with the case.<sup>384</sup> In 1975, Alabama also adopted the Canons of Judicial Ethics which require, in Canon 3(C), recusal not only for actual bias but also whenever absolute impartiality cannot be guaranteed.<sup>385</sup> The Supreme Court of Alabama has held Canon 3(C) to govern recusal and disqualification in the Alabama courts.<sup>386</sup> Alabama has partisan judicial elections and does not have peremptory disqualification.<sup>387</sup>

*Alaska*

While historically only direct interest in a pending case or a relationship to the parties would disqualify judges in Alaska,<sup>388</sup> the legislature changed that in 1967 by granting parties the privilege to peremptorily disqualify judges.<sup>389</sup> Alaska judges can also be disqualified for cause,<sup>390</sup> including actual bias or the appearance of bias.<sup>391</sup> The disqualification basis for the appearance of bias is strengthened by Alaska's Code of Judicial Conduct, which asks judges to seriously consider the possible appearance of

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382. See, e.g., *Ex parte White*, 300 So. 2d 420 (Ala. Crim. App. 1974).

383. See *Ex parte Jackson*, 508 So. 2d 235 (Ala. 1987); see also *Ex parte Fowler*, 863 So. 2d 1136 (Ala. Crim. App. 2001).

384. ALA. CODE § 12-24-1 (West, Westlaw through end of 2010 1st Special Sess.).

385. See *Ex parte Rives*, 511 So. 2d 514, 517 (Ala. Civ. App. 1986).

386. *Ex parte Little*, 837 So. 2d 822, 824 (Ala. 2002).

387. See generally AJS, *Judicial Selection*, *supra* note 112.

388. ALASKA CIV. CODE § 707(i) (1900), Act of June 6, 1900, ch. 70, 31 Stat. 321, 444.

389. ALASKA STAT. § 22.20.022 (1967); see also *Moore v. State*, 895 P.2d 507, 510 (Alaska Ct. App. 1995); *Feichtinger v. State*, 779 P.2d 344, 347 (Alaska Ct. App. 1989).

390. ALASKA STAT. § 22.20.020 (West, Westlaw through 2010 2d Reg. Sess. of the 26th Legis.).

391. *Perotti v. State*, 806 P.2d 325, 327 (Alaska Ct. App. 1991). However, disqualification for the appearance of bias places a greater burden on the moving party. See *R.J.M. v. State*, 946 P.2d 855 (Alaska 1997).

impartiality.<sup>392</sup> Alaska has had a merit selection system for its judges since it gained statehood.<sup>393</sup>

### *Arizona*

Arizona is one of the states that allow peremptory disqualification. In noncapital criminal cases, the Arizona Rules of Criminal Procedure permit each party one peremptory change of judge.<sup>394</sup> The same Rules of Criminal Procedure specify disqualification for cause.<sup>395</sup> In civil cases, peremptory disqualification,<sup>396</sup> as well as for cause disqualification,<sup>397</sup> is governed by the Arizona Rules of Civil Procedure. Some disqualification for cause can be brought under the Arizona Code of Judicial Conduct.<sup>398</sup> It is the challenged judge who decides issues of timeliness and waiver, after the motion is filed.<sup>399</sup> Arizona's judicial elections are non-partisan, followed by retention.<sup>400</sup>

### *Arkansas*

Arkansas's Constitution provides that judges cannot preside over trials in which they have an interest or are related to any parties.<sup>401</sup> In 1973, the Arkansas Supreme Court declared the state's Code of Judicial Conduct to be the standard for judicial conduct.<sup>402</sup> The Code looks for bias and the appearance of bias as well.<sup>403</sup> Arkansas has non-partisan judicial elections and does not allow peremptory challenges.<sup>404</sup>

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392. See *Keller v. State*, 84 P.3d 1010 (Alaska Ct. App. 2004).

393. See generally AJS, *Judicial Selection*, *supra* note 112.

394. ARIZ. R. CRIM. P. 10.2(a) (West, Westlaw through Jan. 1, 2011 legislation).

395. ARIZ. R. CRIM. P. 10.1.

396. ARIZ. R. CIV. P. 42(f)(1) (West, Westlaw through Jan. 1, 2011 legislation); see, e.g., *Anderson v. Contes*, 128 P.3d 239 (Ariz. Ct. App. 2006); see also *Brush Wellman, Inc. v. Lee*, 996 P.2d 1248 (Ariz. App. 2000).

397. ARIZ. R. CIV. P. 42(f)(2).

398. See *Scheehle v. Justices of Supreme Court*, 120 P.3d 1092 (Ariz. 2005).

399. *Taliaferro v. Taliaferro*, 921 P.2d 21, 23 (Ariz. 1996) (en banc); cf. *Williams v. Superior Court*, 945 P.2d 391, 393 (Ariz. Ct. App. 1997) (“[W]aiver provisions . . . are intended to prohibit a party from peremptorily challenging a judge after discovering the judge’s viewpoint on any significant aspect of the case.”).

400. See generally AJS, *Judicial Selection*, *supra* note 112.

401. ARK. CONST., amend. LXXX, § 12. Prior to its repeal in 2001, ARK. CONST. art. 7, § 20 provided the same grounds for judicial disqualification. See *Lofton v. State*, 944 S.W.2d 131 (Ark. 1997).

402. See *Roe v. Dietrich*, 835 S.W.2d 289, 292 (Ark. 1992); *Turner v. State*, 926 S.W.2d 843 (Ark. 1996).

403. ARK. CODE OF JUDICIAL CONDUCT Canon 3 (West, Westlaw through Oct. 15, 2010 legislation); *Holder v. State*, 124 S.W.3d 439 (Ark. 2003) (quoting the Code’s proposition that a judge shall recuse when interested, and a judge must avoid all appearances of bias).

404. See generally AJS, *Judicial Selection*, *supra* note 112.

*California*

The California Constitution requires disqualification of judges who have been indicted or recommended for removal or retirement by the Commission on Judicial Performance.<sup>405</sup> However, it is the California Civil Procedure Code that allows disqualification of judicial officers for cause<sup>406</sup> or peremptorily.<sup>407</sup> Notably, the peremptory challenge right is viewed as “a substantial right and an important part of California’s system of due process that promotes fair and impartial trials and confidence in the judiciary.”<sup>408</sup> The peremptory challenge section of the California Civil Procedure Code applies to both civil and criminal cases.<sup>409</sup> Unique in the nation is California’s Civil Procedure Code § 170.2, which specifies a list of circumstances that *are not* bases for disqualification.<sup>410</sup> California has non-partisan judicial elections, followed by retention elections.<sup>411</sup>

*Colorado*

In civil cases, the Colorado Rules of Civil Procedure govern disqualification,<sup>412</sup> while in criminal cases both statutes<sup>413</sup> and the Rules of Criminal Procedure<sup>414</sup> apply. The Colorado Code of Judicial Conduct must be taken into consideration by judges, when deciding disqualification motions.<sup>415</sup> Colorado is one of the few western states that does not have peremptory challenges. Its judicial selection system is one based on merit, but it does provide for subsequent retention elections.<sup>416</sup>

405. CAL. CONST., art. 6, § 18.

406. CAL. CIV. PROC. CODE §§ 170.1–170.5 (West, Westlaw through 2010 Reg. Sess. laws; all 2009–2010 1st through 8th Ex. Sess. laws; and all Props. on 2010 ballots), which seem to parallel 28 U.S.C. § 455.

407. CAL. CIV. PROC. CODE § 170.6.

408. *Stephens v. Superior Court*, 116 Cal. Rptr. 2d 616, 622 (Ct. App. 2002).

409. *See, e.g., Le Louis v. Superior Court*, 257 Cal. Rptr. 458 (Ct. App. 1989); *Peracchi v. Superior Court*, 30 Cal. 4th 1245, 1248–49 (2003).

410. When the judge is a member of a racial, ethnic, religious, sexual, or other such group, and the matter involves such a group’s rights. CAL. CIV. PROC. CODE § 170.2.

411. *See generally* AJS, *Judicial Selection*, *supra* note 112.

412. COLO. R. CIV. P. 97 (West, Westlaw through Mar. 1, 2011 legislation).

413. COLO. REV. STAT. § 16-6-201 (West, Westlaw through ch. 1–6 of the 1st Reg. Sess. of the 68th Gen. Assembly (2011)); *see also* *People v. Taylor*, 131 P.3d 1158, 1166–67 (Colo. Ct. App. 2005).

414. COLO. R. CRIM. P. 21(b) (West, Westlaw through Mar. 1, 2011 legislation); *see also* *People v. Rodriguez*, 914 P.2d 230, 283 (Colo. 1996).

415. *See* *People v. Julien*, 47 P.3d 1194, 1197 (Colo. 2002) (en banc) (quoting the Code’s proposition that a judge should recuse if “impartiality might reasonably be questioned”).

416. *See generally* AJS, *Judicial Selection*, *supra* note 112.

## Connecticut

A judicial disqualification statute has been part of Connecticut's legal system since 1672.<sup>417</sup> The current statute provides financial interests and relationship to litigants as bases for disqualification.<sup>418</sup> The state's Code of Judicial Conduct requires, under Rule 2.11, that judges recuse themselves for personal bias or when their impartiality might reasonably be questioned.<sup>419</sup> Connecticut does not have peremptory challenges and selects its judges using a merit plan.<sup>420</sup>

## Delaware

There are no statutes regarding judicial disqualification in Delaware—one of few states in this situation.<sup>421</sup> Judges are bound by the Delaware Code of Judicial Conduct, which is very similar to the ABA version.<sup>422</sup> The Code, of course, includes the situation where impartiality might reasonably be questioned.<sup>423</sup> Delaware does not have peremptory disqualification and its judiciary is selected using a merit selection system.<sup>424</sup>

## District of Columbia

In the District of Columbia, judicial disqualification in civil cases follows the D.C. Superior Court Rule of Civil Procedure 63-I.<sup>425</sup> For criminal cases, the courts follow the same rule.<sup>426</sup> Alternatively, the ABA Code of Judicial Conduct can be used as grounds for disqualifying judges in

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417. See *Petrowski v. Norwich Free Acad.*, 481 A.2d 1096, 1102 (Conn. 1984) (mentioning the Connecticut General Statutes of 1672).

418. CONN. GEN. STAT. § 51-39 (West, Westlaw through Gen. Stat., Rev. 1-1-2011).

419. See CONN. CODE OF JUDICIAL CONDUCT R. 2.11 (2011) (West, Westlaw through Feb. 1, 2011 legislation). Prior to the 2010 amendments, case law dealt with recusal under Canon 3(c). See *Abington Ltd. P'ship, v. Heublein*, 717 A.2d 1232 (Conn. 1998) (personal bias); *Sabatasso v. Hogan*, 882 A.2d 719 (Conn. 2005) (impartiality reasonably questioned); see also *State v. Eric M.*, 858 A.2d 767 (Conn. 2004) (stating "relevant . . . is Canon 3(c)(1) of the Code").

420. See generally AJS, *Judicial Selection*, *supra* note 112.

421. FLAMM, *supra* note 6, §§ 26.1–26.2.

422. See DEL. JUDGES' CODE OF JUDICIAL CONDUCT (West, Westlaw through Dec. 1, 2011 legislation); DEL. SUP. CT. R. 84 (West, Westlaw through Dec. 1, 2011 legislation) (establishing the Delaware Judges' Code of Judicial Conduct as the standard for Delaware judges).

423. See *In re Wittrock*, 649 A.2d 1053, 1054 (Del. 1994); *Los v. Los*, 595 A.2d 381, 383 (Del. 1991).

424. See generally AJS, *Judicial Selection*, *supra* note 112.

425. D.C. SUPER. CT. CIV. P. 63-I (West, Westlaw through July 1, 2010 legislation). The rule has, practically, the same content as the Federal Rule of Civil Procedure 63, or 28 U.S.C. § 144. See *Browner v. D.C.*, 549 A.2d 1107, 1113 (D.C. Ct. App. 1987).

426. See D.C. SUPER. CT. R. CRIM. P. 57(a) (West, Westlaw through July 1, 2010 legislation).

both civil and criminal trials.<sup>427</sup> There are no peremptory recusals and judges are appointed.<sup>428</sup>

### *Florida*

The state supreme court has held that Florida Statute § 38.10 is dispositive when deciding disqualification in the state.<sup>429</sup> The Florida Code of Judicial Conduct may provide independent grounds for recusal.<sup>430</sup> Judges may not consider the truth of the facts alleged,<sup>431</sup> but they must consider the legal sufficiency of the claim.<sup>432</sup> There are no peremptory challenges. Florida's appellate judges are selected using a merit-based system, while its trial-level judges are selected in non-partisan elections.<sup>433</sup>

### *Georgia*

Georgia statutes disqualify judges for pecuniary interest, for relationship to parties, for having been of counsel in the matter, or for presiding over the matter in a lower court.<sup>434</sup> Other provisions are sometimes cited, but of prevalent use is the Georgia Code of Judicial Conduct, which provides broader bases for disqualification than any of its statutes.<sup>435</sup> Judges were prohibited from soliciting campaign contributions, offering public endorsements, or making misleading statements until 2002 when a federal court struck down those provisions.<sup>436</sup> There is no peremptory

427. *See, e.g.,* *Belton v. United States*, 581 A.2d 1205, 1213 n.8 (D.C. 1990).

428. *See generally* AJS, *Judicial Selection*, *supra* note 112.

429. *See, e.g.,* *Kokal v. State*, 901 So. 2d 766 (Fla. 2005); *see also* *Zuchel v. State*, 824 So. 2d 1044, 1046 (Fla. Dist. Ct. App. 2002).

430. *See, e.g.,* *Kokal*, 901 So. 2d 766; *see also* *Fischer v. Knuck*, 497 So. 2d 240, 242 (Fla. 1986).

431. *See, e.g.,* *Gates v. State*, 784 So. 2d 1235, 1237 (Fla. Dist. Ct. App. 2001) ("The judge . . . erred when she attempted to refute the factual accuracy of the allegations."). *But see* *Niebla v. State*, 832 So. 2d 887, 888 (Fla. Dist. Ct. App. 2002) ("Although it is impermissible for a [judge] to refute the charges in a motion to disqualify . . . a court is permitted to state the status of the record.").

432. *See e.g.,* *Randolph v. State*, 853 So. 2d 1051, 1064 (Fla. 2003); *see also* *McQueen v. Roye*, 785 So. 2d 512, 514 (Fla. Dist. Ct. App. 2000) ("The function of the trial court is limited to a determination of the legal sufficiency of an affidavit, without reference to its truth and veracity.").

433. *See generally* AJS, *Judicial Selection*, *supra* note 112.

434. *See, e.g.,* *In re A.H.*, 578 S.E.2d 247 (Ga. Ct. App. 2003); *see also* *Bevil v. State*, 467 S.E.2d 586, 588 (Ga. Ct. App. 1996).

435. *See, e.g.,* *Pope v. State*, 354 S.E.2d 429, 431 (Ga. 1987); *see also* *Gillis v. City of Waycross*, 543 S.E.2d 423, 425 (Ga. 2000) ("[I]n 1982, the Supreme Court made clear that Canon 3E . . . provides 'a broader rule' . . ."). *But see* *Brannen v. Prince*, 421 S.E.2d 76 (Ga. Ct. App. 1992) (stating that Canons 2 and 3 are not the legal test).

436. *Weaver v. Bonner*, 309 F.3d 1312, 1321 (11th Cir. 2002) ("[T]he distinction between judicial elections and other types of elections has been greatly exaggerated, and we do not believe that the



disqualification, and judges are initially appointed followed by contested retention elections.<sup>437</sup>

### *Hawai'i*

Hawai'i litigators use three sources of disqualification law:<sup>438</sup> statutes,<sup>439</sup> the Hawai'i Code of Judicial Conduct,<sup>440</sup> and case law. The appearance of impropriety is one of the bases for disqualification.<sup>441</sup> Hawai'i does not have peremptory challenges, and its judges are selected using a merit system that stresses the importance of qualifications, not political patronage.<sup>442</sup>

### *Idaho*

Idaho judges can be disqualified under the Idaho Rules of Criminal Procedure in criminal cases,<sup>443</sup> or under the Idaho Rules of Civil Procedure in civil cases.<sup>444</sup> In order to disqualify a judge, a party must show that the judge has an interest in the pending case, is related to the parties, has been of counsel in the matter, or is biased. While the Code of Judicial Conduct adds the "impartiality might reasonably be questioned"<sup>445</sup> standard as a disqualification basis, the decision itself is made by the challenged judge.<sup>446</sup> Idaho has peremptory disqualifications,<sup>447</sup> and uses non-partisan elections to select its judges.<sup>448</sup>

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distinction, if there truly is one, justifies greater restrictions on speech during judicial campaigns than during other types of campaigns.").

437. See generally AJS, *Judicial Selection*, *supra* note 112.

438. See generally *Yorita v. Okumoto*, 643 P.2d 820 (Haw. Ct. App. 1982).

439. HAW. REV. STAT. ANN. § 601-7(a) (West, Westlaw through 2010 Reg. and Special Sess.) (providing disqualification for pecuniary interest, relationship to parties, being of counsel, or having passed judgment on the matter in an inferior court).

440. See, e.g., *State v. Brown*, 776 P.2d 1182, 1187 (Haw. 1989).

441. See *Office of Disciplinary Counsel v. Au*, 113 P.3d 203, 213–14 (Haw. 2005) (also stating that the appearance of impropriety basis uses a reasonable person objective test).

442. See generally AJS, *Judicial Selection*, *supra* note 112.

443. IDAHO R. CRIM. P. 25(b) (West, Westlaw through June 15, 2010 legislation).

444. IDAHO R. CIV. P. 40(d)(2) (West, Westlaw through June 15, 2010 legislation).

445. IDAHO CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (West, Westlaw through June 15, 2010 legislation).

446. See *Gunter v. Murphy's Lounge*, 105 P.3d 676 (Idaho 2005).

447. IDAHO R. CIV. P. 40(d)(1).

448. See generally AJS, *Judicial Selection*, *supra* note 112.

*Illinois*

In Illinois, parties can seek disqualification for cause in both criminal<sup>449</sup> and civil<sup>450</sup> cases. The Illinois Code of Judicial Conduct is another source of law in the disqualification arena, and its provisions are considered mandatory.<sup>451</sup> Its Canon 3 mandates that judges recuse themselves if their impartiality might reasonably be questioned.<sup>452</sup> The Illinois Code of Criminal Procedure allows criminal defendants to remove a judge upon good faith allegations of bias,<sup>453</sup> or peremptorily.<sup>454</sup> Illinois judges are initially elected in partisan elections, followed by retention elections (unopposed).<sup>455</sup>

*Indiana*

At present, Trial Rule 79(C) governs the disqualification for cause in Indiana.<sup>456</sup> The rule requires recusal in accordance (and even references) Canon 3(E) of the Code of Judicial Conduct.<sup>457</sup> However, an original twist on the matter is that only the Indiana Supreme Court can review alleged Code violations,<sup>458</sup> and thus disqualification issues must ultimately reach the high court.<sup>459</sup> In criminal cases, both the defendant and the state may ask for disqualification based upon bias under Indiana Criminal Rule 12(B).<sup>460</sup> Furthermore, Indiana allows peremptory challenges, pursuant to Trial Rule 76.<sup>461</sup> Indiana's judiciary is selected through a wide variety of methods

449. See, e.g., *People v. Jones*, 757 N.E.2d 464 (Ill. 2001); see also *People v. Flynn*, 792 N.E.2d 527 (Ill. App. Ct. 2003).

450. See, e.g., *Jacobs v. Union Pac. R.R. Co.*, 683 N.E.2d 176, 180 (Ill. App. Ct. 1997).

451. See *Woods v. Durkin*, 539 N.E.2d 920, 922 (Ill. App. Ct. 1989); see also *People v. Matthews*, 562 N.E.2d 1113, 1140 (Ill. App. Ct. 1990).

452. See *People v. Phinney*, 620 N.E.2d 444, 446 (Ill. App. Ct. 1993).

453. ILL. CODE CRIM. P. § 114-5(a) (West, Westlaw through P.A. 96-1542 of the 2010 Reg. Sess.); see also *People v. Buck*, 838 N.E.2d 187 (Ill. App. Ct. 2005).

454. ILL. CODE CRIM. P. § 114-5(c); see also *People v. Nolan*, 773 N.E.2d 105 (Ill. App. Ct. 2002).

455. See generally AJS, *Judicial Selection*, *supra* note 112.

456. *Tri Lakes Reg'l Sewer Dist. v. Geiger*, 830 N.E.2d 890 (Ind. 2005).

457. See *Hass v. State*, 843 N.E.2d 994 (Ind. Ct. App. 2006).

458. See *Carter v. Knox Cnty. Office of Family & Children*, 761 N.E.2d 431, 434 (Ind. Ct. App. 2001) (“[B]ecause the Indiana Supreme Court has exclusive jurisdiction over alleged [Code of Judicial Conduct violations] we cannot determine whether a trial court judge violated a Judicial Canon.”).

459. See *Tri Lakes*, 830 N.E.2d at 890.

460. See IND. R. CRIM. P. 12(B) (West, Westlaw through Jan. 1, 2011 legislation); see also *Flowers v. State*, 738 N.E.2d 1051, 1059 (Ind. 2000).

461. IND. R. TRIAL P. 76(B) (West, Westlaw through Jan. 1 2011 legislation); see, e.g., *Rose v. Mercantile Nat'l Bank of Hammond*, 844 N.E.2d 1035, 1047 (Ind. Ct. App. 2006) (applying Indiana

from appointment, to non-partisan elections, to partisan elections.<sup>462</sup> The majority of trial-level courts are elected in partisan elections—excepting a handful of counties which use merit or non-partisan elections.<sup>463</sup> The appellate courts are appointed.<sup>464</sup>

### *Iowa*

In Iowa, judicial disqualification must be for cause,<sup>465</sup> with the limited bases provided for by statute: personal bias, personal knowledge of evidence in the case, previously serving as a lawyer in the matter, financial interest in the controversy, or relationship to the parties.<sup>466</sup> While Iowa's Code of Judicial Conduct has a provision for reasonably questioning impartiality,<sup>467</sup> courts have continued to require actual bias.<sup>468</sup> Iowa does not allow peremptory disqualification. Its judges are selected using a merit-based system, followed by retention elections.<sup>469</sup>

### *Kansas*

Although Kansas does not have true peremptory challenges (without showing of cause), it comes close in its statutory provisions by requiring—upon filing of an affidavit, subsequent to the motion—that judges disqualify themselves or immediately transfer the matter to another judge (the new judge will rule on the affidavit's sufficiency).<sup>470</sup> Legal sufficiency is attained only if the facts contained in the affidavit, if true, would support the party's belief that the challenged judge will not preside over a fair trial.<sup>471</sup> Kansas elections are non-partisan.<sup>472</sup>

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Trial Rule 76(B)); *see also* Breitweiser v. Penrod, 775 N.E.2d 1175 (Ind. Ct. App. 2002).

462. *See generally* AJS, *Judicial Selection*, *supra* note 112.

463. *See id.*

464. *See id.*

465. *See* State v. Lawrence, 344 N.W.2d 227, 230–31 (Iowa 1984).

466. IOWA CODE ANN. § 602.1606 (West, Westlaw through 2010 Reg. Sess.); *see also* *In re Estate of Olson*, 479 N.W.2d 610, 613 (Iowa Ct. App. 1991).

467. IOWA CODE OF JUDICIAL CONDUCT Canon 3(C) (West, Westlaw through Feb. 2, 2011 legislation).

468. *See* State v. Biddle, 652 N.W.2d 191, 198 (Iowa 2002) (“[A]ctual prejudice must be shown.”).

469. *See generally* AJS, *Judicial Selection*, *supra* note 112.

470. KAN. STAT. ANN. § 20-311d (West, Westlaw through 2010 Reg. Sess.); *see also* Logan v. Logan, 937 P.2d 967, 977 (Kan. Ct. App. 1997).

471. *See, e.g.*, State v. Alderson, 922 P.2d 435, 443 (Kan. 1996); *see also* State v. Goss, 777 P.2d 781, 788 (Kan. 1989).

472. *See generally* AJS, *Judicial Selection*, *supra* note 112.

*Kentucky*

In Kentucky, the state's Code of Judicial Conduct, Supreme Court Rules, Criminal Rules, and statutes all play a role. Litigants file motions based on the statute, which mandates recusal for personal bias, for personal knowledge of disputed evidentiary facts, or where the judge's impartiality might reasonably be questioned.<sup>473</sup> If the affidavit is sufficient on its face, the challenged judge loses jurisdiction and the matter cannot proceed unless a special judge is appointed or the Kentucky Supreme Court intervenes.<sup>474</sup> Kentucky uses non-partisan elections for its judiciary and does not have peremptory challenges.<sup>475</sup>

*Louisiana*

Several statutory provisions mandate judicial disqualification for cause in Louisiana. In civil matters, article 151 of the Code of Civil Procedure and the subsequent provisions govern,<sup>476</sup> while article 671 of the Code of Criminal Procedure and subsequent provisions govern the matter in criminal cases.<sup>477</sup> A mere appearance of bias is not an accepted basis for disqualification in either civil or criminal matters.<sup>478</sup> Louisiana does not have peremptory challenges and uses partisan elections for its judges.<sup>479</sup>

*Maine*

Statutorily, only defendants in civil suits may petition for a change of judge in Maine,<sup>480</sup> although case law has provided otherwise.<sup>481</sup> Most of the

473. KY. REV. STAT. ANN. § 26A.015 (2)(a)–(e) (West, Westlaw through 2010 legislation); *see also* Marlowe v. Commonwealth, 709 S.W.2d 424, 428 (Ky. 1986). Parties can also use KY. REV. STAT. ANN. § 26A.020. *See* Mills v. Commonwealth, 170 S.W.3d 310 (Ky. 2005).

474. Jackson v. Commonwealth, 806 S.W.2d 643, 645 (Ky. 1991).

475. *See generally* AJS, *Judicial Selection*, *supra* note 112.

476. LA. CODE CIV. PROC. ANN. art. 151 (West, Westlaw through 2010 Reg. Sess.). The statute provides for recusal for prior participation (as an attorney or judge) in the case, for relationship to the parties or their attorneys, etc. *See* Use v. Use, 654 So. 2d 1355, 1360–61 (La. Ct. App. 1995).

477. LA. CODE CRIM. PROC. ANN. art. 671 (West, Westlaw through 2010 Reg. Sess.). The criminal statute includes the grounds expounded in the civil statute and adds: bias or personal interest, being a witness in the case, and inability—for any reason—to conduct a fair trial. *See, e.g.*, State v. Brown, 874 So. 2d 318, 322 (La. Ct. App. 2004).

478. Brown v. Brown, 877 So. 2d 1228, 1238 (La. Ct. App. 2004) (stating that actual bias is required).

479. *See generally* AJS, *Judicial Selection*, *supra* note 112.

480. ME. REV. STAT. ANN. tit. 14, § 1103 (West, Westlaw through 2009 2d Reg. Sess. of 124th Legis.).

481. *See In re* Estate of Roach, 595 A.2d 433 (Me. 1991); *see also* Brendla v. Acheson, 554 A.2d

jurisprudence touches upon known principles of disqualification (pecuniary interest,<sup>482</sup> extrajudicial source,<sup>483</sup> etc.). Maine does not have peremptory challenges, and its judiciary is appointed.<sup>484</sup>

### *Maryland*

Maryland's Constitution mandates recusal for interest, having been of counsel in the matter, or relationship to the parties.<sup>485</sup> Canon 3 of the Maryland Code of Judicial Conduct is also used on frequent occasions.<sup>486</sup> Court rules may also apply in some instances of judicial disqualification.<sup>487</sup> Maryland does not have peremptory disqualification. Its judges are initially appointed, and then they stand for either retention elections (appellate judges) or non-partisan elections (judges for trial-level courts).<sup>488</sup>

### *Massachusetts*

Article 29 of the Massachusetts Declaration of Rights guarantees state citizens the right to be tried by impartial judges.<sup>489</sup> This right is implemented in Rule 3:09 of the Supreme Judicial Court of Massachusetts<sup>490</sup> and in Canon 3 of the state's Code of Judicial Conduct.<sup>491</sup> Although a "reasonable person" standard is used, the judges self-rule on their impartiality.<sup>492</sup> Massachusetts does not have peremptory challenges. Since 1780, its judges have been appointed and receive life tenure; a 1972 constitutional amendment mandates retirement at the age of seventy.<sup>493</sup>

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798 (Me. 1989).

482. *City of Bangor v. Am. Fed'n of State, Cnty. & Mun. Emps.*, 449 A.2d 1129, 1137 (Me. 1982).

483. *Barber v. Town of Fairfield*, 486 A.2d 150, 152 (Me. 1985).

484. *See generally* AJS, *Judicial Selection*, *supra* note 112.

485. MD. CONST. art. IV, § 7; *see also* *S. Easton Neighborhood Ass'n v. Town of Easton*, 876 A.2d 58, 77–78 (Md. 2005); *State v. Calhoun*, 511 A.2d 461, 491 (Md. 1986).

486. *Boyd v. State*, 581 A.2d 1, 4–5 (Md. 1990); *Wiseman v. State*, 531 A.2d 1311, 1313 (Md. 1987).

487. *Hernandez v. State*, 672 A.2d 103, 105 (Md. 1996) (referring to Maryland Rule 4-406(b)); *Surratt v. Prince George's Cnty.*, 578 A.2d 745, 758 (Md. 1990) (referring to Maryland Rule P4(d)(2)); *In re George G.*, 494 A.2d 247, 249 (Md. 1985) (referring to Maryland Rule 4-243(c)(5)).

488. *See generally* AJS, *Judicial Selection*, *supra* note 112.

489. *See Harris v. Bd. of Trs. of State Colls.*, 542 N.E.2d 261, 269 (Mass. 1989).

490. *Linkage Corp. v. Trs. of Bos. Univ.*, 679 N.E.2d 191, 201 (Mass. 1997).

491. *See Parenteau v. Jacobson*, 586 N.E.2d 15, 16–17 (Mass. App. Ct. 1992).

492. *See, e.g., Fid. Mgmt. & Research Co. v. Ostrander*, 662 N.E.2d 699, 705 (Mass. App. Ct. 1996).

493. *See generally* AJS, *Judicial Selection*, *supra* note 112.

*Michigan*

Michigan's judicial disqualifications mostly arise under Michigan Court Rule 2.003,<sup>494</sup> which provides the following grounds: personal bias against a party or attorney, personal knowledge of disputed evidentiary facts, has been of counsel in the matter, has associated with counsel in the preceding two years, has an economic interest in the case, is a party in the proceeding, or is likely to be a material witness in the matter.<sup>495</sup> Actual bias can be used for disqualification in Michigan,<sup>496</sup> but the appearance of bias is not a valid ground.<sup>497</sup> Michigan does not have peremptory disqualification and has non-partisan elections for its judges.<sup>498</sup>

*Minnesota*

The framework for disqualification in civil trial is provided in Minnesota Statute § 487.40<sup>499</sup> as well as § 542.16.<sup>500</sup> Removal of judges in criminal proceedings is provided by the Minnesota Rule of Criminal Procedure 26.03.<sup>501</sup> Minnesota allows for peremptory disqualification in both civil<sup>502</sup> and criminal cases.<sup>503</sup> Its judges are selected in non-partisan elections.<sup>504</sup> Minnesota used to prohibit judicial candidates from debating their views on legal and political issues, from accepting political endorsements, and from soliciting campaign contributions. The U.S. Supreme Court in 2002 and the U.S. Court of Appeals for the Eighth Circuit in 2005 struck down these provisions as violations of the First Amendment.<sup>505</sup> Since 2007, the state is undergoing an effort to change from elections to an appointment system.<sup>506</sup>

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494. *Adair v. State*, 709 N.W.2d 567 (Mich. 2006).

495. MICH. CT. R. 2.003(C) (West, Westlaw through June 1, 2010 legislation).

496. *Id.* at (C)(1)(a); *see also* Law Offices of Lawrence J. Stockler, P.C. v. Rose, 436 N.W.2d 70, 76–77 (Mich. Ct. App. 1989).

497. *People v. Wells*, 605 N.W.2d 374, 391 (Mich. Ct. App. 1999).

498. *See generally* AJS, *Judicial Selection*, *supra* note 112.

499. This statute mandates recusal for personal interest. *See Berthiaume v. Berthiaume*, 368 N.W.2d 328, 333 (Minn. Ct. App. 1985).

500. *See In re Estate of Lange*, 398 N.W.2d 569, 573 (Minn. Ct. App. 1986).

501. *Hooper v. State*, 680 N.W.2d 89, 92 (Minn. 2004).

502. MINN. R. CIV. P. 63.03 (West, Westlaw through Nov. 1, 2010 legislation); *see also* *Zweber v. Zweber*, 435 N.W.2d 593, 594 (Minn. Ct. App. 1989).

503. MINN. R. CRIM. P. 26.03.14(3)-(6) (West, Westlaw through Nov. 1, 2010 legislation); *see also* *State v. Azure*, 621 N.W.2d 721, 723 (Minn. 2001).

504. *See generally* AJS, *Judicial Selection*, *supra* note 112.

505. *See* *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (“announce clause,” which prohibited candidates for judicial election from announcing their views on disputed legal or political

## Mississippi

Disqualification in Mississippi is found in the state constitution,<sup>507</sup> statutes,<sup>508</sup> the Uniform Rules of Circuit and County Court Practice,<sup>509</sup> and the state Code of Judicial Conduct.<sup>510</sup> The state's supreme court has held that the Code provides the standard for recusal of Mississippi's judges.<sup>511</sup> Recusal is required if impartiality might reasonably be questioned.<sup>512</sup> Mississippi does not have peremptory challenges and elects most of its judges in non-partisan contests.<sup>513</sup>

## Missouri

Missouri's judicial disqualification framework includes statutes,<sup>514</sup> as well as the Missouri Code of Judicial Conduct.<sup>515</sup> The appearance of impartiality has been upheld as a basis for recusal.<sup>516</sup> The right of a party to disqualify a judge has been regarded as an important piece of Missouri's court system.<sup>517</sup> Peremptory disqualification is also permitted in civil cases,<sup>518</sup> as well as criminal matters.<sup>519</sup> Judges are selected in a merit-based plan—the Missouri Plan.<sup>520</sup>

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issues, violated First Amendment); *Republican Party of Minn. v. White*, 416 F.3d 738, 765–66 (8th Cir. 2005) (“solicitation clause,” which prohibited candidates for judicial election from engaging in specific partisan political activities and personally soliciting campaign contributions, violated First Amendment).

506. See generally AJS, *Judicial Selection*, *supra* note 112.

507. MISS. CONST. art. 6, § 165; *J.N.W.E. v. W.D.W.*, 922 So. 2d 12, 14 (Miss. Ct. App. 2005).

508. MISS. CODE ANN. § 9-1-11 (West, Westlaw through 2010 Reg., 1st & 2nd Extraordinary Sess.).

509. See MISS. UNIF. R. CIR. & CNTY. CT. PRAC. 1.15 (West, Westlaw through Oct. 1, 2010). Rule 1.15 requires recusal if impartiality might be questioned (by a reasonable person) and for other reasons provided by the Mississippi Code of Judicial Conduct, or otherwise provided by law.

510. See *Bryan v. Holzer*, 589 So. 2d 648, 653 (Miss. 1991); *cf. Hill v. State*, 919 So. 2d 142, 144–45 (Miss. Ct. App. 2005).

511. *Hatchcock v. S. Farm Bureau Cas. Ins. Co.*, 912 So. 2d 844, 850 (Miss. 2005).

512. See *Bredemeier v. Jackson*, 689 So. 2d 770, 774 (Miss. 1997); *King v. State*, 897 So. 2d 981, 988 (Miss. Ct. App. 2004); *cf. Tubwell v. Grant*, 760 So. 2d 687, 689 (Miss. 2000); *Beckum v. State*, 917 So. 2d 808, 816 (Miss. Ct. App. 2005).

513. See generally AJS, *Judicial Selection*, *supra* note 112.

514. See MO. REV. STAT. §§ 545.660, 508.090, 508.140, 517.061 (West, Westlaw through the end of the 2010 First Extraordinary Sess. of the 95th General Assembly); see also *McPherson v. U.S. Physicians Mut. Risk Retention Grp.*, 99 S.W.3d 462 (Mo. Ct. App. 2003); *Nixon v. Dir. of Revenue*, 883 S.W.2d 945, 946–47 (Mo. Ct. App. 1994); *State ex rel. Couch v. Stovall-Reid*, 144 S.W.3d 895 (Mo. Ct. App. 2004).

515. See *Moore v. Moore*, 134 S.W.3d 110 (Mo. Ct. App. 2004).

516. *State v. Jones*, 979 S.W.2d 171, 178 (Mo. 1998); *Williams v. Reed*, 6 S.W.3d 916, 921–22 (Mo. Ct. App. 1999).

517. *State ex rel. Stubblefield v. Bader*, 66 S.W.3d 741, 742 (Mo. 2002). A liberal construction in favor of this right is therefore mandated. *Id.*; see also *State v. Rulo*, 173 S.W.3d 649, 651 (Mo. Ct. App. 2005).

518. See, e.g., *State ex rel. Hagler v. Seay*, 907 S.W.2d 786, 787 (Mo. 1995); see also *State v.*

*Montana*

Montana's constitutional right to a fair trial is also secured by statute.<sup>521</sup> Peremptory challenges are allowed under the same statute.<sup>522</sup> Montana's judiciary is elected in non-partisan elections.<sup>523</sup>

*Nebraska*

Nebraska's statutes providing for judicial recusal are seldom used,<sup>524</sup> and so is the Nebraska Code of Judicial Conduct.<sup>525</sup> Nebraska courts tend to use other states' jurisprudence in support of their disqualification decisions.<sup>526</sup> Nebraska does not have peremptory disqualification and its judges are initially appointed with retention elections to follow.<sup>527</sup>

*Nevada*

In general, Nevada's judiciary can be disqualified as provided by statute,<sup>528</sup> and the grounds include bias, being a party to the proceedings, relationship to the parties, and being of counsel in the matter. The Nevada Code of Judicial Conduct also provides bases for recusal,<sup>529</sup> as does the due process clause of the Nevada Constitution.<sup>530</sup> Nevada permits, pursuant to

Athansiades, 857 S.W.2d 337, 341 (Mo. Ct. App. 1993).

519. See *State v. McElroy*, 894 S.W.2d 180, 189 (Mo. Ct. App. 1995); *State v. Hornbuckle*, 746 S.W.2d 580, 583–84 (Mo. Ct. App. 1988); see also MO. REV. STAT. § 517.061.

520. See generally AJS, *Judicial Selection*, *supra* note 112.

521. See MONT. CODE ANN. § 3-1-805 (West, Westlaw through all 2009 legislation) (providing for disqualification for bias); see also *Swan v. State*, 130 P.3d 606, 610–11 (Mont. 2006).

522. See MONT. CODE ANN. § 3-1-804(1); see also *Swan*, 130 P.3d at 608; *Wareing v. Schreckendgust*, 930 P.2d 37, 49 (Mont. 1996); *State v. Langford*, 882 P.2d 490, 495 (Mont. 1994).

523. See generally AJS, *Judicial Selection*, *supra* note 112.

524. NEB. REV. STAT. §§ 24-739, 24-740, 24-315 (West, Westlaw through the 101st 2d Reg. Sess. 2010); see *Gibilisco v. Gibilisco*, 637 N.W.2d 898 (Neb. 2002). But see *State v. Thomas*, 685 N.W.2d 69 (Neb. 2004).

525. *In re Estate of Odineal*, 368 N.W.2d 800, 804 (Neb. 1985). But see *State ex rel. Grape v. Zach*, 524 N.W.2d 788, 798 (Neb. 1994).

526. See *State v. Barker*, 420 N.W.2d 695, 699 (Neb. 1988).

527. See generally AJS, *Judicial Selection*, *supra* note 112.

528. NEV. REV. STAT. § 1.230 (West, Westlaw through the 2009 75th Reg. Sess. & 2010 26th Special Sess. of the Nev. Legis. and technical corrections received from the Legis. Counsel Bureau) (for all judges except for the Nevada Supreme Court justices); see also *Scialabba v. Brandise Const. Co.*, 921 P.2d 928, 932 n.2 (Nev. 1996). Nevada Supreme Court justices can be disqualified pursuant to NEV. REV. STAT. § 1.225 and NEV. R. APP. P. 35 (West, Westlaw through Jan. 1, 2010 legislation); *Towbin Dodge, LLC v. Eighth Judicial Dist. Court*, 112 P.3d 1063, 1068 (Nev. 2005).

529. See *Towbin Dodge*, 112 P.3d at 1067–68 (Nev. 2005)

530. See *Ainsworth v. Combined Ins. Co. of Am.*, 774 P.2d 1003 (Nev. 1989).



Nevada Supreme Court Rule 48.1(3), peremptory challenges.<sup>531</sup> Its judiciary is selected through non-partisan elections; a recently proposed constitutional amendment calls for a merit plan selection.<sup>532</sup>

### *New Hampshire*

The state constitution, Article 35, part 1, governs judicial disqualification in New Hampshire.<sup>533</sup> While no statutes are on the books regarding recusal, case law provides for disqualification for financial interest, having knowledge of confidential evidence from prior proceedings, relationship to parties, or having become entangled with a party in the case.<sup>534</sup> New Hampshire does not allow for peremptory challenges and its judiciary is appointed at all levels.<sup>535</sup>

### *New Jersey*

New Jersey has both statutes<sup>536</sup> and court rules<sup>537</sup> forming the framework of judicial recusal in the state. Occasionally courts have referenced the New Jersey Code of Judicial Conduct, but have still required a showing of prejudice or potential bias.<sup>538</sup> New Jersey does not have peremptory challenges and its judges are all appointed.<sup>539</sup>

### *New Mexico*

Peremptory disqualification, “excusal” in New Mexico, has been a part of the state’s law since 1851.<sup>540</sup> Disqualification for cause can be achieved under the state’s constitution,<sup>541</sup> for interest or relationship to parties, as well as under New Mexico’s Code of Judicial Conduct Rule 21-400,<sup>542</sup> which

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531. See, e.g., *Hogan v. Warden*, 916 P.2d 805, 807–08 (Nev. 1996); see also *Panko v. Dist. Court*, 908 P.2d 706, 708 (Nev. 1995); *Towbin Dodge*, 112 P.3d at 1068.

532. See generally AJS, *Judicial Selection*, *supra* note 112.

533. See *Appeal of Grimm*, 692 A.2d 508, 510 (N.H. 1997); see also *State v. Ayer*, 834 A.2d 277, 296 (N.H. 2003).

534. See *State v. Fennelly*, 461 A.2d 1090, 1092 (N.H. 1983).

535. See generally AJS, *Judicial Selection*, *supra* note 112.

536. See N.J. STAT. ANN. § 2A:15-49 (West, Westlaw through L.2010, c. 123 (End) and J.R. No. 6); see also *State v. Medina*, 793 A.2d 68, 79–80 (N.J. Super Ct. App. Div. 2002).

537. *State v. Sherman*, 842 A.2d 859 (N.J. Super. Ct. App. Div. 2004).

538. See *State v. Marshall*, 690 A.2d 1, 94 (N.J. 1997); see also *State v. Harris*, 859 A.2d 364, 434–35 (N.J. 2004).

539. See generally AJS, *Judicial Selection*, *supra* note 112.

540. N.M. STAT. ANN. § 38-3-9 (West, Westlaw through 2010 legislation); see *Roberts v. Richardson*, 109 P.3d 765, 765–66 (N.M. 2005); see also *In re Eastburn*, 914 P.2d 1028, 1030 (N.M. 1996).

541. N.M. CONST., art. VI, § 18; see also *State v. Fero*, 732 P.2d 866, 869–70 (N.M. 1987); *State v. Williams*, 730 P.2d 1196, 1201 (N.M. Ct. App. 1986).

542. N.M. CODE OF JUD. COND. R. 21-400 (West, Westlaw through Aug. 1, 2010 legislation); see

includes cases where “impartiality might reasonably be questioned.”<sup>543</sup> New Mexico’s judges are selected using a mix of merit system, partisan elections, and retention elections.<sup>544</sup>

### *New York*

Judiciary Law § 14 controls judicial disqualification in New York.<sup>545</sup> The recusal motion must be based on bias or appearance of bias, and will be decided by the challenged judge.<sup>546</sup> Other sources have occasionally been invoked for recusal: other statutory provisions,<sup>547</sup> New York court rules,<sup>548</sup> and the New York Code of Judicial Conduct.<sup>549</sup> The state of New York does not have peremptory challenges and its judiciary is, in its entirety, selected in partisan elections.<sup>550</sup>

### *North Carolina*

Although North Carolina’s only disqualification statute applies to criminal cases,<sup>551</sup> jurisprudence shows that civil cases are also afforded the remedy.<sup>552</sup> The ABA Code of Judicial Conduct Canon 3C was adopted in 1987, and was held to be—together with North Carolina General Statute section 15A-1223—controlling in disqualification matters.<sup>553</sup> A judge should recuse when impartiality could reasonably be questioned.<sup>554</sup> North

Martinez v. Carmona, 624 P.2d 54, 58–59 (N.M. Ct. App. 1980).

543. State v. Gonzales, 119 P.3d 151, 162 (N.M. 2005).

544. See generally AJS, *Judicial Selection*, *supra* note 112.

545. N.Y. JUDICIARY LAW § 14 (West, Westlaw through 2010 legislation). Judiciary Law § 14 prohibits a judge from sitting if interested in the matter. See *In re Kila DD*, 812 N.Y.S.2d 700, 701 (App. Div. 2006); *Wash. Cnty. Cease, Inc. v. Persico*, 465 N.Y.S.2d 965, 979 (Sup. Ct. 1983).

546. See, e.g., *People v. Moreno*, 516 N.E.2d 200 (N.Y. 1987); see also *In re Murphy*, 605 N.Y.S.2d 232, 234 (N.Y.A.D. 1993).

547. *Flynn-Stallmer v. Stallmer*, 563 N.Y.S.2d 207, 209 (App. Div. 1990) (stating that New York’s Family Court Act mandates disqualification if a judge has an interest in the case or is related to any of the parties).

548. *People v. Diaz*, 498 N.Y.S.2d 698 (Cnty. Ct. 1986).

549. See *Johnson v. Hornblass*, 461 N.Y.S.2d 277, 279 (App. Div. 1983) (a judge is required to avoid impropriety and the appearance thereof).

550. See generally AJS, *Judicial Selection*, *supra* note 112.

551. N.C. GEN. STAT. § 15A-1223 (West, Westlaw through 2010 legislation) (providing mandatory recusal for a judge that cannot discharge judicial duties in an impartial manner); see also *State v. Scott*, 471 S.E.2d 605, 612 (N.C. 1996).

552. *Koufman v. Koufman*, 388 S.E.2d 207, 211 (N.C. Ct. App. 1990).

553. See *State v. McRae*, 594 S.E.2d 71 (N.C. Ct. App. 2004).

554. See *State v. Scott*, 471 S.E.2d at 613; see also *In re Pedestrian Walkway Failure*, 618 S.E.2d 819, 829–30 (N.C. Ct. App. 2005).

Carolina does not have peremptory disqualification and uses non-partisan elections for its judges.<sup>555</sup>

### *North Dakota*

The North Dakota Code of Judicial Conduct governs judicial disqualification for bias in the state.<sup>556</sup> North Dakota also allows peremptory challenges.<sup>557</sup> North Dakota's judiciary is selected through non-partisan elections.<sup>558</sup>

### *Ohio*

In general, disqualifying the judges of Ohio's Court of Common Pleas is done pursuant a statute.<sup>559</sup> However, the Ohio Constitution<sup>560</sup> gives the chief justice of the Ohio Supreme Court the authority (and the exclusive jurisdiction)<sup>561</sup> to determine the disqualification of a judge on the Court of Common Pleas. Because of this exclusivity and the absence of review of the chief justice's decisions in disqualification matters, parties have alleged violations of the U.S. Constitution's Due Process Clause in Ohio cases<sup>562</sup>—unsuccessfully. The Ohio Canons of Judicial Ethics are considered mandatory for the entire Ohio judiciary and include the appearance of bias as one of the grounds for recusal.<sup>563</sup> Ohio does not have peremptory disqualifications and uses non-partisan elections for its judiciary.<sup>564</sup>

### *Oklahoma*

The right of every Oklahoma citizen to have an impartial judge at his or her proceeding is enshrined in the state's constitution.<sup>565</sup> Statutory

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555. See generally AJS, *Judicial Selection*, *supra* note 112.

556. N.D. CODE OF JUDICIAL CONDUCT Canon 3 (West, Westlaw through Feb. 1, 2010 legislation); see also *State v. Murchison*, 687 N.W.2d 725 (N.D. 2004).

557. See *City of Fargo v. Habiger*, 682 N.W.2d 300, 303 (N.D. 2004) (noting that following the procedure in North Dakota's Century Code § 29-15-21, a party may request a new judge in the matter); see also *State v. Stockert*, 684 N.W.2d 605, 610–11 (N.D. 2004).

558. See generally AJS, *Judicial Selection*, *supra* note 112.

559. OHIO REV. CODE ANN. § 2701.03 (West, Westlaw through 2010 legislation) (providing for judicial disqualification for bias); see also *State v. Woods*, 2006 Ohio App. LEXIS 1218, at \*10 (Ct. App. Mar. 23, 2006).

560. OHIO CONST. art. IV, § 5(C).

561. See, e.g., *State v. DeSellems*, No. 2004-L-057, 2005 Ohio App. LEXIS 3931, at \*11 (Aug. 19, 2005); see also *Goddard v. Children's Hosp. Med. Ctr.*, 751 N.E.2d 1062, 1066 (Ohio Ct. App. 2000).

562. *Bland v. Graves*, 650 N.E.2d 117, 124, 124–25 (Ohio Ct. App. 1994).

563. See, e.g., *Clemons v. Hafner*, No. 04 MA 162, 2005 Ohio App. LEXIS 4102, at \*4 (Aug. 22, 2005); see also *James v. James*, 656 N.E.2d 399, 404 (Ohio Ct. App. 1995).

564. See generally AJS, *Judicial Selection*, *supra* note 112.

565. OKLA. CONST. art. 2, § 6; see also *Black v. State*, 21 P.3d 1047, 1056 (Okla. Crim. App.

provisions<sup>566</sup> spell out the bases for recusal, such as interest in the case,<sup>567</sup> relationship to parties,<sup>568</sup> and bias.<sup>569</sup> Oklahoma has also adopted and codified the Code of Judicial Conduct, which requires disqualification when impartiality might reasonably be questioned.<sup>570</sup> A party may ask for a re-hearing of a denied recusal motion before the county's chief judge.<sup>571</sup> There are no preemptory challenges in Oklahoma and the state's judges are selected using a merit system (appellate judges) or non-partisan elections (trial judges).<sup>572</sup>

### *Oregon*

Oregon has extensive disqualification statutes, which include preemptory challenges.<sup>573</sup> Oregon uses a mix of appointments, retention, and non-partisan elections to select its judges.<sup>574</sup>

### *Pennsylvania*

Pennsylvania's Code of Judicial Conduct mandates recusal for both impropriety and its appearance.<sup>575</sup> A litigant may file a "plea of prejudice" with the judge trying the case,<sup>576</sup> who will decide whether to recuse himself or herself—a decision that will not be reversed unless an abuse of discretion

2001).

566. OKLA. STAT. ANN. tit. 20 § 1401 (West, Westlaw through ch. 479 (End) of the 2d Reg. Sess. of the 52nd Legis. 2010).

567. See *Black*, 21 P.3d at 1057.

568. *Holloway v. Hopper*, 852 P.2d 711, 712 (Okla. 1993).

569. OKLA. STAT. ANN. tit. 20 § 1401(c).

570. OKLA. STAT. ANN. tit. 5, ch. 1, app. 4, Canon 3(E) (West, Westlaw through Dec 1, 2010 legislation).

571. *Ward v. Ward*, 895 P.2d 749, 751 (Okla. Civ. App. 1995).

572. See generally AJS, *Judicial Selection*, *supra* note 112.

573. OR. REV. STAT. §§ 14.210–14.275, 46.141 (West, Westlaw through 2010 legislation); see also *In re Kluge*, 66 P.3d 492, 502–03 (Or. 2002); *State ex rel. Ray Wells, Inc. v. Hargreaves*, 761 P.2d 1306, 1307 (Or. 1988); *Hanson v. Or. Dept. of Revenue*, 653 P.2d 964, 966 (Or. 1982); *State v. Hilborn*, 692 P.2d 1383, 1384 (Or. Ct. App. 1984), *rev'd on other grounds*, 705 P.2d 192 (Or. 1985).

574. See generally AJS, *Judicial Selection*, *supra* note 112.

575. PA. CODE OF JUDICIAL CONDUCT Cannons 1–7 (West, Westlaw through Feb 18, 2011 legislature); see *Mun. Publ'ns, Inc. v. Court of Common Pleas*, 489 A.2d 1286, 1289–90 (Pa. 1985); see also *Commonwealth v. Fisher*, 681 A.2d 130, 135 (Pa. 1996); *Commonwealth v. Miller*, 664 A.2d 1310, 1321 (Pa. 1995).

576. *Rohm and Haas Co. v. Cont'l Cas. Co.*, 732 A.2d 1236, 1261 (Pa. Super. Ct. 1999) (citing *In re Crawford's Estate*, 160 A.2d 585, 587 (Pa. 1931)).

is found.<sup>577</sup> There are no peremptory challenges in Pennsylvania, and its judiciary is elected in partisan elections.<sup>578</sup>

### *Rhode Island*

Although Rhode Island's Code of Judicial Conduct (which includes the appearance of bias basis) is cited by state cases as the authority in disqualification matters,<sup>579</sup> the Rhode Island Supreme Court, in its sparse jurisprudence, seems to require actual bias.<sup>580</sup> Rhode Island does not have peremptory disqualification and selects its judges through a merit-based system.<sup>581</sup>

### *South Carolina*

Although the South Carolina Code of Judicial Conduct calls for disqualification when "impartiality might reasonably be questioned,"<sup>582</sup> case law has shown that proof of bias is required.<sup>583</sup> Statutes also mandate disqualification for interest, for having been of counsel in the matter,<sup>584</sup> or for relationship to the parties.<sup>585</sup> South Carolina does not have peremptory challenges and its judges are appointed by the legislature.<sup>586</sup>

### *South Dakota*

The South Dakota Supreme Court has stated that the right to disqualify a judge is statutory and not constitutional—"except as it may be implicit in a right to a fair trial."<sup>587</sup> Although the South Dakota Code of Judicial Conduct provides for recusal when impartiality might reasonably be questioned, the decision to do so is at the discretion of the challenged judge.<sup>588</sup> South

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577. *Commonwealth v. Druce*, 848 A.2d 104, 108 (Pa. 2004).

578. *See generally* AJS, *Judicial Selection*, *supra* note 112.

579. *See* *State v. Lead Indus. Ass'n.*, 2005 R.I. Super. LEXIS 127, at \*8-9 (R.I. Super. Ct. 2005).

580. *See* *Kelly v. R.I. Pub. Transit Auth.*, 740 A.2d 1243, 1246 (R.I. 1999) (recognizing the tension and required balance between two equally important principles: obligation to recuse oneself if unable to render impartial decision versus obligation *not* to recuse oneself if there is no sound reason to do it).

581. *See generally* AJS, *Judicial Selection*, *supra* note 112.

582. S.C. CODE OF JUDICIAL CONDUCT Canon 3(e) (West, Westlaw through Dec. 15, 2010 legislation); *see also* *Roche v. Young Bros., Inc.*, 504 S.E.2d 311, 316 (S.C. 1998); *Christensen v. Mikell*, 476 S.E.2d 692, 694 (S.C. 1996).

583. *Parker v. Shecut*, 531 S.E.2d 546, 566 (S.C. Ct. App. 2000), *rev'd on other grounds*, 562 S.E.2d 620 (S.C. 2002); *see also* *Patel v. Patel*, 599 S.E.2d 114, 118 (S.C. 2004) (stating that a judge's refusal to disqualify will not be reversed if there is no evidence of bias).

584. S.C. CODE ANN. 1976 § 14-8-70 (West, Westlaw through 2010 Reg. Sess.).

585. S.C. CODE ANN. 1976 § 14-2-130.

586. *See generally* AJS, *Judicial Selection*, *supra* note 112.

587. *See* *State v. Hoadley*, 651 N.W.2d 249, 257 (S.D. 2002).

588. *Id.*

Dakota has peremptory challenges.<sup>589</sup> The Supreme Court justices of South Dakota are appointed, while the rest of the judges are elected in non-partisan elections.<sup>590</sup>

### Tennessee

Tennessee's Constitution guarantees a fair tribunal to every state citizen,<sup>591</sup> and it is one of the very few states that have held that "[a] fair trial in a fair tribunal is a basic requirement of due process."<sup>592</sup> The state constitution (and a statute) also provides the grounds for disqualification: interest in the case, relationship to the parties, having been of counsel in the matter, or having presided over previous proceedings.<sup>593</sup> The Tennessee Code of Judicial Conduct includes as a ground for disqualification a situation where the judge's impartiality might reasonably be questioned,<sup>594</sup> but the decision is committed to the judge's discretion.<sup>595</sup> Tennessee does not have peremptory disqualifications and uses a hybrid system of merit selection and partisan elections for its judiciary.<sup>596</sup>

### Texas

The Texas Constitution mandates disqualification for interest in the case, relationship to the parties, or for having been of counsel in the matter,<sup>597</sup> but not for bias.<sup>598</sup> Notably, a Texas trial judge does not have to recuse *sua sponte*.<sup>599</sup> In the late 1970s and early 1980s, the Texas legislature

589. S.D. CODIFIED LAWS §§ 15-12-21, 15-12-22 (West, Westlaw through the 2010 Reg. Sess., 2010 general election, and Sup. Ct. R. 10-07); *see also* State v. Chamley, 568 N.W.2d 607, 619 (S.D. 1997); State v. Tapio, 432 N.W.2d 268, 270–71 (S.D. 1988).

590. *See generally* AJS, *Judicial Selection*, *supra* note 112.

591. *See generally* TENN. CONST. art. I § 17.

592. Henderson v. State, 2005 Tenn. Crim. App. LEXIS 667, at \*71 (Tenn. Crim App. 2005).

593. TENN. CONST., art. VI, § 11; *see also* TENN. CODE ANN. 17-2-101 (West, Westlaw through end of 2010 First Ex. Sess. and 2010 Reg. Sess.); Yeubanks v. Methodist Healthcare Memphis Hosp., 2004 Tenn. App. LEXIS 808, \*10 (Ten. App. 2001).

594. *See* TENN. SUP. CT. R. 10, Canon 3(e) (West, Westlaw through Dec. 1, 2010); Davis v. Liberty Mut. Ins. Co., 38 S.W.3d 560, 564–65 (Tenn. 2001).

595. *See* TENN. Canon 3(e); *see also* Davis v. Liberty Mut. Ins. Co., 38 S.W.3d 560, 564–65 (Tenn. 2001).

596. *See generally* AJS, *Judicial Selection*, *supra* note 112.

597. TEX. CONST. art. V, § 11; *see also* McDuffie v. State, 854 S.W.2d 195, 201 (Tex. App. 1993).

598. *See* Stafford v. State, 948 S.W.2d 921, 924 (Tex. App. 1997).

599. Hall v. Treon, 39 S.W.3d 722, 723 (Tex. App. 2001).

enacted a plethora of statutes regarding disqualification.<sup>600</sup> In 1981, the Texas Supreme Court adopted Rule 18 as part of the Texas Rules of Civil Procedure. The rule provides the procedure to be followed for motions of recusal. If the procedure is correctly observed, the challenged judge must either recuse himself or herself, or request the assignment of another judge to decide the motion.<sup>601</sup> Because Texas has two courts of last resort<sup>602</sup>—the supreme court, which hears only civil matters, and the Court of Criminal Appeals—it was not easily settled if Rule 18 applied to criminal cases. Texas courts have split over the issue, only recently to resolve the matter in favor of using Rule 18 in both civil and criminal cases.<sup>603</sup> In 1987, the legislature enacted section 74.053 of the Texas Government Code, which is peremptory in nature, with a Texas twist: it deals with disqualification of “visiting judges,”<sup>604</sup> be they “regular judges,”<sup>605</sup> “retired judges,” or “former judges.”<sup>606</sup> The Texas judiciary is selected in partisan elections.<sup>607</sup>

### Utah

Utah statutes require recusal for interest in the case, relationship to parties, or for having been an attorney in the case.<sup>608</sup> Two court rules<sup>609</sup> clarify that the challenged judge has only two options: to recuse or to submit the matter to another judge.<sup>610</sup> Utah is one of the several western states with no peremptory disqualifications, and its judges are primarily selected on merit.<sup>611</sup>

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600. TEX. CODE CRIM. PROC. ANN. art. 30.01 (West, Westlaw through 2009 Reg. & 1st Called Sess. of the 81st Legis.) (criminal cases); TEX. GOV'T CODE § 74.059 (West, Westlaw through 2009 Reg. & 1st Called Sess. of the 81st Legis.) (disqualification of Texas District Court judges); TEX. GOV'T CODE § 26.011 (judges in criminal and non-probate cases); TEX. GOV'T CODE § 25.00255 (probate judges).

601. *Johnson v. Pumjani*, 56 S.W.3d 670, 672–73 (Tex. App. 2001).

602. *See generally* AJS, *Judicial Selection*, *supra* note 112.

603. *See Crawford v. State*, 807 S.W.2d 597, 598 (Tex. App. 1991). *But see Dickerson v. State*, 87 S.W.3d 632, 642 (Tex. App. 2002).

604. *See Logic Sciences, Inc. v. Smith*, 798 S.W.2d 394, 395 (Tex. App. 1990). *But see Tex. Emp't Comm'n v. Alvarez*, 915 S.W.2d 161, 165–66 (Tex. App. 1996).

605. A current judicial officer from another court. TEX. GOV'T CODE ANN. § 74.054(a)(1); *see also Oilwell Control Services, Inc. v. PI Energy Corp.*, 24 S.W.3d 548, 551 (Tex. App. 2000).

606. TEX. GOV'T CODE ANN. § 74.054; *see also Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436 (Tex. 1997).

607. *See generally* AJS, *Judicial Selection*, *supra* note 112.

608. UTAH CODE ANN. § 78A-2-222 (West, Westlaw through 2010 legislation); *see also Reg'l Sales Agency, Inc. v. Reichert*, 830 P.2d 252, 255 (Utah 1992); *Madsen v. Prudential Fed. Sav. & Loan Ass'n*, 767 P.2d 538, 544 (Utah 1988); *Am. Plural Cellular, Inc., v. Systems Comm. Corp.*, 939 P.2d 185, 194–95 (Utah App. 1997).

609. UTAH R. CRIM. P. 29 (West, Westlaw through 2010 legislation); UTAH R. CIV. P. 63(b) (West, Westlaw through 2010 legislation); *see also In re Affidavit of Bias*, 947 P.2d 1152, 1153 n.2 (Utah 1997); *State v. O'Neil*, 848 P.2d 694, 696 n.1 (Utah App. 1993).

610. *See State v. Ontiveros*, 835 P.2d 201, 204 (Utah App. 1992).

611. *See generally* AJS, *Judicial Selection*, *supra* note 112.

*Vermont*

While the tradition in Vermont has been self-recusal,<sup>612</sup> both the Rules of Civil<sup>613</sup> and Criminal<sup>614</sup> Procedure have entered the fray requiring an administrative judge to hear motions to disqualify in civil cases,<sup>615</sup> and that an affidavit or certificate accompany the motion for criminal cases.<sup>616</sup> Also, the Code of Judicial Conduct mandates disqualification whenever impartiality might reasonably be questioned.<sup>617</sup> There are no peremptory challenges in Vermont and its judges are appointed.<sup>618</sup>

*Virginia*

Although Virginia has adopted the Code of Judicial Conduct,<sup>619</sup> including its provision for appearance of bias,<sup>620</sup> the Virginia Supreme Court has held that a Code violation does not automatically result in disqualification; rather, the party needs to prove bias.<sup>621</sup> Virginia does not have peremptory challenges and its judges are appointed by the legislature.<sup>622</sup>

*Washington*

Canon 3D of the Washington Code of Judicial Conduct requires judges to recuse themselves for bias or whenever impartiality might reasonably be questioned.<sup>623</sup> Judicial disqualification in Washington is also provided for by statute and can be for cause<sup>624</sup> or peremptory.<sup>625</sup> Washington's judges are elected in non-partisan elections.<sup>626</sup>

612. *See* Perrott v. Johnston, 562 A.2d 459, 461 (Vt. 1989).

613. VT. R. CIV. P. 40(e) (West, Westlaw through 2010 legislation).

614. VT. R. CRIM. P. 50(d)(2) (West, Westlaw through 2010 legislation).

615. *See* State v. Dann, 702 A.2d 105, 115 (Vt. 1997); *see also* Ball v. Melsur Corp., 633 A.2d 705, 710 (Vt. 1993); Klein v. Klein, 572 A.2d 900, 903 (Vt. 1990).

616. State v. Carter, 577 A.2d 280, 281 (Vt. 1990).

617. VT. CODE OF JUDICIAL CONDUCT Canon 3 (West, Westlaw through Adjourned Sess. of the 2009–2010 Gen. Assembly (2010)); *see also* Dann, 702 A.2d at 115.

618. *See generally* AJS, *Judicial Selection*, *supra* note 112.

619. *See* VA. CANONS OF JUDICIAL CONDUCT (West, Westlaw through Oct. 1, 2010).

620. Wilson v. Commonwealth, 617 S.E.2d 431, 441 (Va. App. 2005), *rev'd* 630 S.E.2d 326 (Va. 2006).

621. Commonwealth v. Jackson, 590 S.E.2d 518 (Va. 2004); *see also* Wilson, 617 S.E.2d at 441.

622. *See generally* AJS, *Judicial Selection*, *supra* note 112.

623. Finn Hill Masonry, Inc. v. Dept. of Labor & Indus., 116 P.3d 1033, 1034 (Wash. Ct. App. 2005).

624. WASH. REV. CODE ANN. § 4.12.040 (West, Westlaw through 2011 legislation).



## West Virginia

Modern West Virginia law concerning disqualification is governed by Canon 3(E) of the state's Code of Judicial Conduct<sup>627</sup> and its implementation in court rules.<sup>628</sup> Once the motion is filed, the challenged judge must step aside and the motion is decided by the presiding judge or the chief justice of the Supreme Court of Appeals.<sup>629</sup> There are no peremptory disqualifications, and its judges have been elected in partisan manner since statehood in 1862.<sup>630</sup>

## Wisconsin

Although Wisconsin has adopted the Code of Judicial Ethics, a violation thereof will not disqualify a judge.<sup>631</sup> Rather, disqualification is mandatory when statutory conditions are met: relationship to parties or counsel, being a party or material witness, having previously been of counsel, having previously presided over the case, interest in the matter, bias, or the appearance of bias.<sup>632</sup> Wisconsin statutes also allow peremptory challenges in both civil<sup>633</sup> and criminal cases.<sup>634</sup> Non-partisan judicial elections are the norm in Wisconsin.<sup>635</sup>

## Wyoming

Statutes provide for disqualification for cause in Wyoming,<sup>636</sup> using a reasonable person standard.<sup>637</sup> The state's Code of Judicial Conduct can also be used.<sup>638</sup> Most importantly, Wyoming allows for peremptory

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625. WASH. REV. CODE ANN. § 4.12.050; *see also* Harbor Enter., Inc. v. Gudjonsson, 803 P.2d 798, 800 (Wash. 1991); State v. Waters, 971 P.2d 538, 541 (Wash. Ct. App. 1999).

626. *See generally* AJS, *Judicial Selection*, *supra* note 112.

627. Armeault v. Armeault, 605 S.E.2d 590, 596–97 (W. Va. 2004).

628. W. VA. TRIAL COURT RULES 17.01–.08 (West, Westlaw through 2009 legislation); *see also* State *ex rel.* E.I. Dupont De Nemours & Co. v. Hill, 591 S.E.2d 318 (W. Va. 2003).

629. State *ex rel.* Pritt v. Vickers, 588 S.E.2d 210 (W. Va. 2003); *see also* State *ex rel.* Myers v. Painter, 576 S.E.2d 277 (W. Va. 2002).

630. *See generally* AJS, *Judicial Selection*, *supra* note 112.

631. State v. Carviou, 454 N.W.2d 562 (Wis. Ct. App. 1990).

632. WIS. STAT. ANN. § 757.19 (West, Westlaw through 2009 legislation); *see* City of Edgerton v. Gen. Cas. Co. of Wis., 527 N.W.2d 305, 307 (Wis. 1995); *see also* State v. Smith, 2004 Wis. App. LEXIS 477, \*15–16 (2004).

633. WIS. STAT. ANN. § 801.58; *see also* State *ex rel.* Mateo v. Cir. Court for Winnebago Cnty, 696 N.W.2d 275, 277–78 (Wis. Ct. App. 2005).

634. WIS. STAT. ANN. § 971.20; *see also* State *ex rel.* Mace v. Circ. Court for Green Lake Cnty., 532 N.W.2d 720, 722 (Wis. 1995).

635. *See generally* AJS, *Judicial Selection*, *supra* note 112.

636. WYO. R. CIV. P. 40.1(b)(2) (West, Westlaw through 2010 legislation).

637. *See* Mace v. Nocera, 101 P.3d 921 (Wyo. 2004).

638. Counts v. State, 899 P.2d 1341 (Wyo. 1995).

disqualification in civil suits<sup>639</sup> as well as criminal trials.<sup>640</sup> Most of Wyoming's judges are selected using a merit-based process and later stand for retention elections.<sup>641</sup>

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639. WYO. R. CIV. P. 40.1(b); *see also* *Olsten Staffing Serv., Inc. v. D.A. Stinger Serv., Inc.*, 921 P.2d 596, 597 (Wyo. 1996).

640. WYO. R. CRIM. P. 21.1 (West, Westlaw through 2010 legislation) (divesting the challenged judge of jurisdiction and requiring the assignment of the case to another judge).

641. *See generally* AJS, *Judicial Selection*, *supra* note 112.

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