

THE JUSTICE SYSTEM WE WANT:  
STRIVING FOR JUSTICE IN THE NEW JUDICIAL LANDSCAPE  
BY PENNY J. WHITE

I. Fair Trials, Fair Tribunals, and Constitutional Rights

Overheard, on March 3, 2009, in an ornate courtroom in Washington D.C.:

“A fair trial in a fair tribunal is a fundamental constitutional right. This means not only the absence of actual bias, but a guarantee against the probability of an unfair tribunal . . . .”

“Who says? Have we every said that?”

. . .

“Are you saying that appearances without any actual proof of bias could never be sufficient as a constitutional matter?”

“We are saying that the Due Process Clause does not exist to protect the integrity or reputation of the State judicial systems. . . . Appearance [of bias] could [n]ever raise a due process issue. . . . Appearance is addressed to a different thing. It’s addressed to the reputation of the judicial system, which is not the function of the Due Process Clause to address.”

II. Due Process and Fair Trials

A. Common Law

*Nemo debet esse iudex in propria causa.*

“No one should be the judge in his own cause.”

“The judicial department comes home to every man’s fireside; it passes on his property, his reputation, his life, his all. . . . I have always thought from my earliest youth till now that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary.”

Chief Justice John Marshall, 1830, before the Virginia Constitutional Convention

B. United States Constitution

“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Amend. XIV, Section 1

C. United States Supreme Court

“Due Process clause establishes a ‘constitutional floor, not a uniform standard for judicial disqualification.’”

*Bracy v. Gramley*, 520 U.S. 899, 904 (1997)

“The requirement of due process of law in judicial procedure is not satisfied by the argument that [people] 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 [person] as a judge to forget the burden of proof . . . or which might lead him not to hold the balance nice, clear and true . . . denies . . . due process of law.

*Tumey v. Ohio*, 237 U.S. 510, 532 (1927)

“Not only is a biased decisionmaker constitutionally unacceptable but ‘our system of law has always endeavored to prevent even the probability of unfairness.’”

*Withrow v. Larkin*, 421 U.S. 35, 47 (1975)

“Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.”

*In re Murchison*, 349 U.S. 133, 136 (1955)

“Articulated standards of judicial conduct may advance [judicial integrity] which is a state interest of the highest order. States [with an elected judiciary] may strive to define those characteristics that exemplify judicial excellence and may enshrine their definitions in a code of judicial conduct.” They may “adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.”

*Republican Party of Minnesota v. White*, 536 U.S. 765, 793 (2002) (Kennedy J., concurring)

“Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal, but this is an exceptional case. We conclude that there is a serious risk of actual bias –based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and

disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.”

*Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2263-64 (2009)

““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.’ Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances.”

*Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2267 (2009)  
(quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986).

### III. Recusal Reform

The Standing Committee on Judicial Performance of the American Bar Association is recommending to the ABA House of Delegates that the recommendations of the Judicial Disqualification Project be adopted. The recommendations are set forth in a sixteen page documents entitled “Recommendations for Improving Judicial Disqualification Standards, Practices, and Procedures Among the States.”

The report concludes that disqualification is underutilized because of the over-reliance on judicial self evaluation and inadequate information on disqualification practices and standards. The report identifies three specific judicial disqualification “problem areas” and a fourth general disqualification issue that arises out of application of the other three. The problem areas include (1) judges who preside over matters in which campaign contributors appear as parties or counsel; (2) judges who made prior statements that committed or appeared to commit them to reach a particular result in a matter now before the court; (3) judges who hear matters involving relatives who are employed by parties or their lawyers, and friends or former colleagues who appear as counsel, parties or witnesses.

The resolution makes two primary recommendations: first, states should reduce reliance on self-evaluation by the judge whose disqualification is sought; second, states should collect information about judicial disqualification practices and provide greater guidance to judges. The first recommendation does not set forth a universal alternative to self-evaluation of disqualification motions, but suggests that states consider implementing one or more of four options: (1) assigning disqualification motions to a different judges after denial; (2) applying a *de novo* standard of appellate review to disqualification motions; (3) establishing a procedure for review of the denial of disqualification motions by the state’s “high court judges;” and (4) adopting a preemptory challenge procedure for challenged judges.

The second recommendation suggests that states gather and disseminate data about judicial disqualification; encourage judges to articulate reasons for disqualification

decisions, and provide guidance through judicial education programs and other means. The resolution specifically recommends factors to be considered when judicial disqualification issues arising as a result of campaign support. These factors include: (1) the level of support given, directly or indirectly, by a litigant in relation to aggregate support for the candidate and total amount spent by all candidates in that race; (2) in the case of monetary support, whether any distinction between direct contributions or indirect expenditures bears on the disqualification issue; (3) the timing of support in relation to the case for which disqualification is sought; and (4) when the support is from a non-litigant, the relationship between the supporter and any litigant or issue before the court or the supporter and the candidate and also consideration of the total support received by the candidate and by all candidates in that race.