PROPOSED REVISIONS TO CODE OF CONDUCT FOR U.S. JUDGES

Public Comments

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The Brennan Center applauds the efforts of the committee in proposing changes to the Code of Conduct for United States Judges.

We thank you for the invitation to comment on your proposals. This month, the Brennan Center published a new report outlining recusal reforms, including slight modifications to provisions in the American Bar Association's Model Code, which we believe will strengthen the protections for due process in the courtroom.

Setting Recusal Standards documents the politicization of the courts, includes real-world recusal-related anecdotes, state-specific sidebars, and, most importantly, ten separate recommendations for judges, legislators, citizens and media seeking to reform or analyze recusal practices in their respective states. Certain of the recommendations in the report pertain only to the state courts, but others, such as enhanced appellate review of recusal decisions, pertain to the federal and state courts alike.

Former Texas Chief Justice Thomas R. Phillips, writes in his Foreword to the report, that "[n]ow, as never before, reinvigorating recusal is truly necessary to preserve the court system that Chief Justice Rehnquist called the 'crown jewel' of our American experiment." We agree and hope you will consider the report.

We have attached the Executive Summary of the report as an Appendix to this comment letter. To the extent that the entire report may be of interest, (1) it is attached to this email as a separate PDF; (2) it is available electronically at [redacted]; and (3) hard copies will be mailed to each member of the committee. [redacted] Should you have any questions, or if you would like a hard copy, please do not hesitate to contact us.

[Appendix]

Fair Courts: Setting Recusal Standards by James Sample, David Pozen and Mike Young

EXECUTIVE SUMMARY

This paper takes its cue from Justice Anthony Kennedy's concurrence in the 2002 case of *Republican Party of Minnesota v. White*. In *White* (discussed in greater detail in the body of the paper), Justice Kennedy wrote that in response to dynamics perceived to threaten the impartiality of the courts, states "may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards." The need for states to heed Justice Kennedy's advice was critical in 2002 — and has only become more critical in the years since.

The paper describes the increasing threats to the impartiality of America's state courts and argues that they have been spurred by two trends: the growing influence of money in judicial elections and the dismantling of codes of judicial ethics that once helped to preserve the distinctive character of the judiciary, even during the course of campaigns for the bench. While acknowledging that more sweeping — and controversial — measures are ultimately needed to address fully the emerging threats to impartial courts, this paper focuses on how judges, courts, legislators, and litigants can maximize the due process protection that stronger recusal rules potentially afford. Technically, there is a difference between disqualification and recusal--disqualification is mandatory, recusal is voluntary--but the difference is often blurred because in the many jurisdictions in which judges adjudicate challenges to their own qualification to sit, disqualification functions essentially as recusal. In this paper, we use the terms interchangeably but distinguish between mandatory and voluntary removal of a judge from a case.

We first describe the trends undermining public confidence in the courts and explain how, in a recent decision, the United States Supreme Court exacerbated the impact of those trends. Second, we explain why current recusal practice is marked by underuse and underenforcement. Third, we examine the case of *Avery v. State Farm Mutual Insurance Company* as a means of illustrating the real-world implications of the dynamics discussed in the first two parts of the paper. In *Avery*, the plaintiffs were unable to remove a judge who, during his campaign, received substantial financial support from individuals and organizations closely associated with the defendant, *while the case was pending* before the court.

Finally, we offer ten proposals to strengthen the fairness and legitimacy of state recusal systems. Some of the procedures we recommend are already in place in some states. Others are more novel and demanding. All would help protect due process. The ten proposals are as follows:

1) **Peremptory disqualification.** Just as the parties on both sides of criminal trials are permitted to strike a certain number of people from their jury pool without showing cause, so might litigants be allowed peremptory challenges of judges. About a third of the states already permit counsel to strike one judge per proceeding. Simplicity is a significant advantage of peremptory disqualification, but the potential for gamesmanship is a concern. We argue that the cost-benefit analysis militates in favor of a carefully-crafted provision.
2) **Enhanced disclosure.** At the outset of litigation, judges could be required to disclose orally or in writing any facts, particularly those involving campaign statements and campaign contributions that might plausibly be construed as bearing on their impartiality. Such a mandatory disclosure scheme would shift some of the costs of disqualification-related fact finding from the litigant to the state. It would also increase the reputational and professional cost to judges who fail to disclose pertinent information that later emerges through another source. To further enhance the disclosure of relevant information concerning disqualification, states could also provide a centralized system through which attorneys and their clients can review a judge's recusal history.
3) ***Per se* rules for campaign contributors.** To address the concern about judges who decline to recuse themselves when their campaign finances reasonably call into question their impartiality, the ABA recommends mandatory disqualification of any judge who

has accepted large contributions (i.e., contributions over a pre-determined threshold amount) from a party appearing before her. The ABA's provision, however, has not been adopted by the states. We recommend a minor modification to the ABA's provision that should mollify concerns that may have created a hesitancy to adopt this sensible provision.

4) **Independent adjudication of disqualification motions.** The fact that judges in many jurisdictions decide on their own disqualification challenges, with little to no prospect of immediate review, is one of the most heavily criticized features of United States law in this area—and for good reason. Allowing judges to decide on their own disqualification motions is in tension not only with the guarantee of a neutral case arbiter, but also with states' express desire for objectivity in disqualification decisions.
5) **Transparent and reasoned decision-making**. All judges who rule on a disqualification motion should be required to explain their decision in writing or on the record, even if only briefly. Such a requirement would facilitate appellate review and ensure greater accountability for these decisions.
6) **De novo review on interlocutory appeal.** Making appellate review more searching would be less important if the other reforms on this list were adopted, but it would still provide a valuable safeguard against partiality. The United States Court of Appeals for the Seventh Circuit, the only federal appeals court to review recusal determinations de novo, offers one example of a court that has embraced enhanced review.
7) **Mechanisms for replacing disqualified judges.** If recusal is to provide a due process protection, rather than an invitation for gamesmanship, courts need to put in place efficient methods for replacing a disqualified judge. This is particularly true at the appellate level.
8) **Expanded commentary in the canons.** Expanding the canon commentary on recusal, while a "soft" and highly limited solution, would nonetheless offer relatively costless guidance for judges seeking to adhere to the highest ethical standards, even when not strictly required.
9) **Judicial education.** Seminars for judges that enable them to confront the standard critiques of disqualification law might provide another soft solution for invigorating its practice. Judges could be instructed on the underuse and underenforcement of disqualification motions, the social psychological research into bias, the importance of avoiding the appearance of partiality, and their own potential role in helping to reform recusal doctrines and court rules.
10) **Recusal advisory bodies.** Just as many states, bar associations, and other groups have created non-binding advisory bodies to serve as a resource for candidates on campaign-conduct questions, a similar model might be followed with respect to recusal. Advisory bodies could identify best practices and encourage judges to set high standards for themselves. Judges could be encouraged to seek guidance from the advisory body when faced with difficult issues of recusal. A judge accepting such advice could expect a public defense if a disgruntled party criticized a decision not to recuse.

We recognize that all of these proposals come with their own risks. On the one hand, strengthening disqualification rules may be a means to safeguard due process and public trust in the judiciary. On the other hand, strengthening these rules may increase administrative burdens and litigation delays, open new avenues for strategic behavior (such as judge shopping), and

undermine a judge's duty to hear all cases. These tradeoffs demand that any solution be carefully designed and implemented, and we do not mean to minimize that task by providing only a cursory sketch of each option. But the looming crisis in judicial recusal means that reform is no longer an option; it is a necessity.