**8.5: Judicial Recusal & Misconduct**

*Good morning Judge, why do you look so mean? Sorry Mr. Judge, what can the charges be? If there’s been trouble I will plead not guilty. It must be someone else, you know it can’t be me.*[[1]](#footnote-0)

*“If I had me job to pick out,” said Mr. Dooley, “I’d be a judge. I’ve looked over all th’ others an’ that’s th’ on’y wan that suits. I have th’ judicyal timperamint. I hate wurruk.”[[2]](#footnote-1)*

Judges must be neutral and impartial at all times. Or at least, they must appear to be neutral and impartial. Accordingly, judicial conduct is regulated by a congeries of constitutional, statutory, and administrative rules intended to ensure neutrality and impartiality.

Among other things, due process requires judges to recuse themselves to avoid conflicts of interest, and may require disqualification if a judge fails to recuse. Federal law prohibits judges from accepting or soliciting bribes.[[3]](#footnote-2) But it also requires judges to recuse themselves whenever their impartiality could reasonably be questioned.[[4]](#footnote-3) The Judicial Conduct and Disability Act of 1980 authorizes complaints alleging that a federal judge “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts” or “is unable to discharge all the duties of office by reason of mental or physical disability.”[[5]](#footnote-4) And the Rules for Judicial-Conduct and Judicial-Disability Proceedings govern misconduct and disability proceedings against federal judges under the Act.[[6]](#footnote-5) States may have similar statutory and administrative provisions.

Finally, federal and state judicial codes of conduct comprehensively regulate judges. In 1924, the ABA first created and approved its Canons of Judicial Conduct, which were revised in 1972, 1990, and 2007. The ABA canons are currently titled the [Model Code of Judicial Conduct](https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/), and consist of both aspirational principles and specific rules intended to realize those principles. The federal judiciary has adopted the [Code of Conduct for United States Judges](https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges), which includes the ethical canons that apply to federal judges and provides guidance on their performance of official duties and engagement in a variety of outside activities. Most states also have judicial commissions, which are empowered to investigate violations of judicial ethics.

**Judicial Recusal**

*Stop eatin’ that fudge, cause here comes the judge. Don’t nobody buzz, cause here comes the judge. Judge Shorty is presidin’ today, and he don't take no stuff from nobody, no kind of way.*[[7]](#footnote-6)

[**Model Code of Judicial Conduct: Canon 1**](https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/mcjc_canon_1/)

A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

[**Model Rule 1.2: Promoting Confidence in the Judiciary**](https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/mcjc_canon_1/ruke1_2promotingconfidenceinthejudiciary/)

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

[**Model Rule 1.2: Comments**](https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/mcjc_canon_1/ruke1_2promotingconfidenceinthejudiciary/commentonrule1_2/)

1. Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.
2. A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.
3. Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.
4. Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament, or fitness to serve as a judge.



The Philadelphia Inquirer, Jan. 11, 1972, at 1

[***Mayberry v. Pennsylvania*, 400 U.S. 455 (1971)**](https://scholar.google.com/scholar_case?case=17959960013273838085)

**Summary:** Mayberry and two co-defendants were tried in state court for an attempted prison break. They were appointed counsel, but represented by Mayberry. During the trial, Mayberry repeatedly insulted the judge and questioned his impartiality. The jury found the defendants guilty, but before imposing the sentence, the judge pronounced Mayberry guilty of 11 counts of criminal contempt, and sentenced him to 11 to 22 years. The Supreme Court of Pennsylvania affirmed the contempt charges, but the Supreme Court granted Mayberry’s *pro se* petition for certiorari and reversed, holding that due process entitles a defendant in a criminal contempt proceeding to a trial before a different judge.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner and two codefendants were tried in a state court for prison breach and holding hostages in a penal institution. While they had appointed counsel as advisers, they represented themselves. The trial ended with a jury verdict of guilty of both charges on the 21st day, which was a Friday. The defendants were brought in for sentencing on the following Monday. Before imposing sentence on the verdicts the judge pronounced them guilty of criminal contempt. He found that petitioner had committed one or more contempts on 11 of the 21 days of trial and sentenced him to not less than one nor more than two years for each of the 11 contempts or a total of 11 to 22 years.

The Supreme Court of Pennsylvania affirmed by a divided vote. The case is here on a petition for writ of certiorari.

Petitioner’s conduct at the trial comes as a shock to those raised in the Western tradition that considers a courtroom a hallowed place of quiet dignity as far removed as possible from the emotions of the street.

On the first day of the trial petitioner came to the sidebar to make suggestions and obtain rulings on trial procedures. Petitioner said: “It seems like the court has the intentions of railroading us” and moved to disqualify the judge. The motion was denied. Petitioner’s other motions, including his request that the deputy sheriffs in the courtroom be dressed as civilians, were also denied. Then came the following colloquy:

Mr. Mayberry: I would like to have a fair trial of this case and like to be granted a fair trial under the Sixth Amendment.

The Court: You will get a fair trial.

Mr. Mayberry: It doesn't appear that I am going to get one the way you are overruling all our motions and that, and being like a hatchet man for the State.

The Court: This side bar is over.

Mr. Mayberry: Wait a minute, Your Honor.

The Court: It is over.

Mr. Mayberry: You dirty sonofabitch."

The second episode took place on the eighth day of the trial. A co-defendant was cross-examining a prison guard and the court sustained objections to certain questions:

Mr. Codispoti: Are you trying to protect the prison authorities, Your Honor? Is that your reason?

The Court: You are out of order, Mr. Codispoti. I don't want any outbursts like that again. This is a court of justice. You don’t know how to ask questions.

Mr. Mayberry: Possibly Your Honor doesn't know how to rule on them.

The Court: You keep quiet.

Mr. Mayberry: You ought to be Gilbert and Sullivan the way you sustain the district attorney every time he objects to the questions.

The Court: Are you through? When your time comes you can ask questions and not make speeches.

The next charge stemmed from the examination of an inmate about a riot in prison in which petitioner apparently was implicated. There were many questions asked and many objections sustained. At one point the following outburst occurred:

Mr. Mayberry: Now, I’m going to produce my defense in this case and not be railroaded into any life sentence by any dirty, tyrannical old dog like yourself.

The Court: You may proceed with your questioning, Mr. Mayberry.

The fourth charge grew out of an examination of another defense witness:

By Mr. Mayberry:

Q. I ask you, Mr. Nardi, is that area, the handball court, is it open to any prisoner who wants to play handball, who cares to go to that area to play handball?

A. Yes.

Q. Did you understand the prior question when I asked you if it was freely open and accessible area?

The Court: He answered your question. Let’s go on.

Mr. Mayberry: I am asking him now if he understands…

The Court: He answered it. Now, let's go on.

Mr. Mayberry: I ask Your Honor to keep your mouth shut while I’m questioning my own witness. Will you do that for me?

The Court: I wish you would do the same. Proceed with your questioning.

The fifth charge relates to a protest which the defendants made that at the end of each trial day they were denied access to their legal documents—a condition which the trial judge shortly remedied. The following ensued:

Mr. Mayberry: You’re a judge first. What are you working for? The prison authorities, you bum?

Mr. Livingston: I have a motion pending before Your Honor.

The Court: I would suggest…

Mr. Mayberry: Go to hell. I don’t give a good God damn what you suggest, you stumbling dog.

Meanwhile one defendant told the judge if he did not get access to his papers at night he’d “blow your head off.” Another defendant said he would not sit still and be “kowtowed and be railroaded into a life imprisonment.” Then the following transpired:

Mr. Mayberry: You started all this bullshit in the beginning.

The Court: You keep quiet.

Mr. Mayberry: Wait a minute.

The Court: You keep quiet.

Mr. Mayberry: I am my own counsel.

The Court: You keep quiet.

Mr. Mayberry. Are you going to gag me?

The Court: Take these prisoners out of here. We will take a ten minute recess, members of the jury.

The sixth episode happened when two of the defendants wanted to have some time to talk to a witness whom they had called. The two of them had had a heated exchange with the judge when the following happened:

Mr. Mayberry: Just one moment, Your Honor.

The Court: This is not your witness, Mr. Mayberry. Keep quiet.

Mr. Mayberry: Oh, yes, he is my witness, too. He is my witness, also. Now, we are at the penitentiary and in seclusion. We can’t talk to any of our witnesses prior to putting them on the stand like the District Attorney obviously has the opportunity, and as he obviously made use of the opportunity to talk to his witnesses. Now…

The Court: Now, I have ruled, Mr. Mayberry.

Mr. Mayberry: I don’t care what you ruled. That is unimportant. The fact is…

The Court: You will remain quiet, sir, and finish the examination of this witness.

Mr. Mayberry: No, I won’t be quiet while you try to deny me the right to a fair trial. The only way I will be quiet is if you have me gagged. Now, if you want to do that, that is up to you; but in the meantime I am going to say what I have to say. Now, we have the right to speak to our witnesses prior to putting them on the stand. This is an accepted fact of law. It is nothing new or unusual. Now, you are going to try to force us to have our witness testify to facts that he has only a hazy recollection of that happened back in 1965. Now, I believe we have the right to confer with our witness prior to putting him on the stand.

The Court: Are you finished?

Mr. Mayberry: I am finished.

The Court: Proceed with your examination.

The seventh charge grew out of an examination of a codefendant by petitioner. The following outburst took place:

By Mr. Mayberry:

Q. No. Don't state a conclusion because Gilbert is going to object and Sullivan will sustain. Give me facts. What leads you to say that?

Later petitioner said:

Mr. Mayberry: My witness isn’t being in an inquisition, you know. This isn’t the Spanish Inquisition.

Following other exchanges with the court, petitioner said:

Mr. Mayberry: Now, just what do you call proper? I have asked questions, numerous questions and everyone you said is improper. I have asked questions that my adviser has given me, and I have repeated these questions verbatim as they came out of my adviser’s mouth, and you said they are improper. Now just what do you consider proper?

The Court: I am not here to educate you, Mr. Mayberry.

Mr. Mayberry: No. I know you are not. But you're not here to railroad me into no life bit, either.

Mr. Codispoti: To protect the record…

The Court: Do you have any other questions to ask this witness?

Mr. Mayberry: You need to have some kind of psychiatric treatment, I think. You're some kind of a nut. I know you're trying to do a good job for that Warden Maroney back there, but let's keep it looking decent anyway, you know. Don’t make it so obvious, Your Honor.

A codefendant was removed from the courtroom and when he returned petitioner asked for a severance.

Mr. Mayberry: I have to ask for a severance.

The Court: I have heard that before. It is denied again. Let’s go on.

(Exception noted.)

Mr. Mayberry: This is the craziest trial I have ever seen.

The Court: You may call your next witness, Mr. Mayberry.

Petitioner wanted to call witnesses from the penitentiary whose names had not been submitted earlier and for whom no subpoenas were issued. The court restricted the witnesses to the list of those subpoenaed:

Mr. Mayberry: Before I get to that I wish to have a ruling, and I don't care if it is contempt or whatever you want to call it, but I want a ruling for the record that I am being denied these witnesses that I asked for months before this trial ever began.

The ninth charge arose out of a ruling by the court on a question concerning the availability of tools to prisoners in their cells.

The Court: I have ruled on that, Mr. Mayberry. Now proceed with your questioning, and don’t argue.

Mr. Mayberry: You’re arguing. I’m not arguing, not arguing with fools.

The court near the end of the trial had petitioner ejected from the courtroom several times. The contempt charge was phrased as follows by the court:

On December 7, 1966, you have created a despicable scene in refusing to continue calling your witnesses and in creating such consternation and uproar as to cause a termination of the trial.

As the court prepared to charge the jury, petitioner said:

Before Your Honor begins the charge to the jury defendant Mayberry wishes to place his objection on the record to the charge and to the whole proceedings from now on, and he wishes to make it known to the Court now that he has no intention of remaining silent while the Court charges the jury, and that he is going to continually object to the charge of the Court to the jury throughout the entire charge, and he is not going to remain silent. He is going to disrupt the proceedings verbally throughout the entire charge of the Court, and also he is going to be objecting to being forced to terminate his defense before he was finished.

The court thereupon had petitioner removed from the courtroom and later returned gagged. But petitioner caused such a commotion under gag that the court had him removed to an adjacent room where a loudspeaker system made the courtroom proceedings audible. The court phrased this contempt charge as follows:

On December 9, 1966, you have constantly, boisterously, and insolently interrupted the Court during its attempts to charge the jury, thereby creating an atmosphere of utter confusion and chaos.

These brazen efforts to denounce, insult, and slander the court and to paralyze the trial are at war with the concept of justice under law. Laymen, foolishly trying to defend themselves, may understandably create awkward and embarrassing scenes. Yet that is not the character of the record revealed here. We have here downright insults of a trial judge, and tactics taken from street brawls and transported to the courtroom. This is conduct not “befitting an American courtroom,” and criminal contempt is one appropriate remedy.

As these separate acts or outbursts took place, the arsenal of authority described in *Allen* was available to the trial judge to keep order in the courtroom. He could, with propriety, have instantly acted, holding petitioner in contempt, or excluding him from the courtroom, or otherwise insulating his vulgarity from the courtroom. The Court noted in *Sacher v. United States*, that, while instant action may be taken against a lawyer who is guilty of contempt, to pronounce him guilty of contempt is “not unlikely to prejudice his client.” Those considerations are not pertinent here where petitioner undertook to represent himself. In *Sacher* the trial judge waited until the end of the trial to impose punishment for contempt, the Court saying:

If we were to hold that summary punishment can be imposed only instantly upon the event, it would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment. We think it less likely that unfair condemnation of counsel will occur if the more deliberate course be permitted.

Generalizations are difficult. Instant treatment of contempt where lawyers are involved may greatly prejudice their clients but it may be the only wise course where others are involved. Moreover, we do not say that the more vicious the attack on the judge the less qualified he is to act. A judge cannot be driven out of a case. Where, however, he does not act the instant the contempt is committed, but waits until the end of the trial, on balance, it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place. What Chief Justice Taft said in *Cooke v. United States* is relevant here:

The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backward and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency but it is not always possible. Of course where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed. But attempts of this kind are rare. All of such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place.

We conclude that that course should have been followed here, as marked personal feelings were present on both sides.

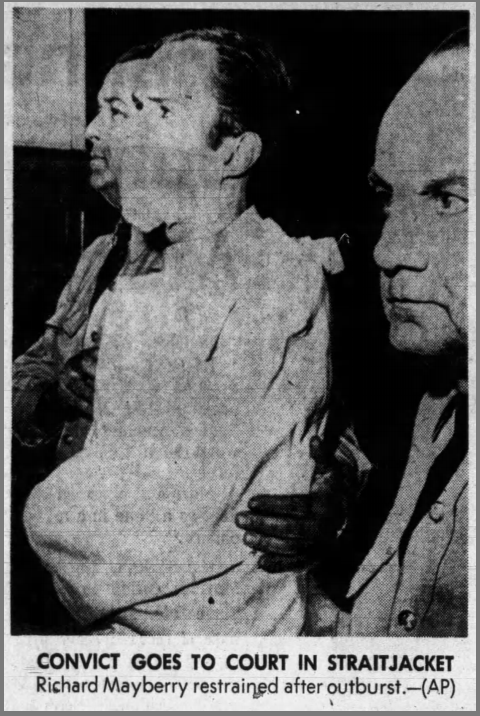
Whether the trial be federal or state, the concern of due process is with the fair administration of justice. At times a judge has not been the image of “the impersonal authority of law,” but has become so “personally embroiled” with a lawyer in the trial as to make the judge unfit to sit in judgment on the contempt charge.

“The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to a personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice.”

*Offutt* does not fit this case, for the state judge in the instant controversy was not an activist seeking combat. Rather, he was the target of petitioner’s insolence. Yet a judge, vilified as was this Pennsylvania judge, necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication. *In re Murchison* was a case where a judge acted under state law as a one-man grand jury and later tried witnesses for contempt who refused to answer questions propounded by the “judge-grand jury.” We held that since the judge who sat as a one-man grand jury was part of the accusatory process he “cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.” “Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.”

It is, of course, not every attack on a judge that disqualifies him from sitting. In *Ungar v. Sarafite*, we ruled that a lawyer’s challenge, though “disruptive, recalcitrant and disagreeable commentary,” was still not “an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification.” Many of the words leveled at the judge in the instant case were highly personal aspersions, even “fighting words”—”dirty sonofabitch,” “dirty tyrannical old dog,” “stumbling dog,” and “fool.” He was charged with running a Spanish Inquisition and told to “Go to hell” and “Keep your mouth shut.” Insults of that kind are apt to strike “at the most vulnerable and human qualities of a judge’s temperament.”

Our conclusion is that by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor. In the present case that requirement can be satisfied only if the judgment of contempt is vacated so that on remand another judge, not bearing the sting of these slanderous remarks and having the impersonal authority of the law, sits in judgment on the conduct of petitioner as shown by the record.



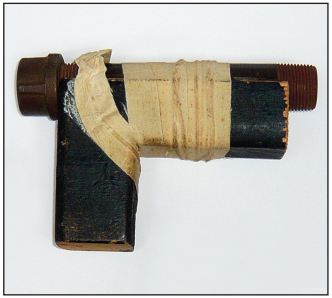
Oakland Tribune, Dec. 10, 1966, at 2

**Questions:**

1. On June 27, 1965, Richard O.J. Mayberry, Dominick Codispopi, and Herbert Langes tried to escape from Western State Penitentiary in Pittsburgh, Pennsylvania. Mayberry was originally convicted of armed robbery in 1957, and was serving 3.5 to 10 years for a previous escape attempt in 1961. Mayberry, Codispoti, and Langes armed themselves with zip guns and homemade bombs, and took two guards hostage in the prison hospital. They surrendered after 90 minutes, when the state police bombarded them with tear gas, and released their hostages unharmed. Mayberry’s hand was injured when one of the bombs exploded while he was throwing it. Mayberry became a legendary “jailhouse lawyer.” Two of his petitions for certiorari were accepted by the Supreme Court, and several of the actions he filed led to significant prison reform. Today, Mayberry is still incarcerated in the Pennsylvania State Correctional Institution at Huntingdon.
2. Why did the Court hold that due process required the judge to recuse himself from deciding the criminal contempt charges? Did Mayberry receive any due process on those charges?
3. Mayberry, Codispoti, and Langes were all charged with contempt. On remand, all three were convicted of criminal contempt of court in non-jury trials, and sentenced to multiple consecutive terms, amounting to about 3 years. The Pennsylvania Supreme Court affirmed, but the Supreme Court granted certiorari and reversed, holding that criminal defendants in a contempt proceeding are entitled to a jury trial if the cumulative sentence could exceed 6 months. [*Codispoti v. Pennsylvania*, 418 U.S. 506 (1974)](https://scholar.google.com/scholar_case?case=5458121294621896838).



Richard Mayberry (2018)



Zip gun used in prison escape attempt

**Further Reading:**

* [Steven R. Jenkins, *Mayberry v. Pennsylvania: Due Process Limitation in Summary Punishments for Contempt of Court*, 25 Sw L.J. 805 (1971)](https://scholar.smu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3396&context=smulr)
* [*Contempt: Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), 62 J. Crim. L. Criminology & Police Sci. 525 (1971)](https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=5751&context=jclc)

[***Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009)**](https://scholar.google.com/scholar_case?case=5164778803227309755)

**Summary:** In 2002, Caperton won a business tort action against Massey and Blankenship, and received a $50 million damages award, which Massey and Blankenship appealed. In the meantime, Benjamin ran for a seat on the Supreme Court of Appeals of West Virginia. Blankenship spent about $3 million campaigning for Benjamin. When Benjamin won, Caperton filed a motion to disqualify Benjamin from the appeal, which Benjamin denied. The Supreme Court of Appeals granted the appeal and reversed. Benjamin also declined to recuse on rehearing, and the court once again reversed. The Supreme Court granted certiorari and reversed, holding that due process requires recusal when the facts create an objective appearance of impropriety. The dissent argued that the standard adopted by the majority was arbitrary and unworkable.

Justice KENNEDY delivered the opinion of the Court.

In this case the Supreme Court of Appeals of West Virginia reversed a trial court judgment, which had entered a jury verdict of $50 million. Five justices heard the case, and the vote to reverse was 3 to 2. The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when one of the justices in the majority denied a recusal motion. The basis for the motion was that the justice had received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the corporation found liable for the damages.

Under our precedents there are objective standards that require recusal when “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” Applying those precedents, we find that, in all the circumstances of this case, due process requires recusal.

I

In August 2002 a West Virginia jury returned a verdict that found respondents A.T. Massey Coal Co. and its affiliates liable for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations. The jury awarded petitioners Hugh Caperton, Harman Development Corp., Harman Mining Corp., and Sovereign Coal Sales the sum of $50 million in compensatory and punitive damages.

In June 2004 the state trial court denied Massey’s post-trial motions challenging the verdict and the damages award, finding that Massey “intentionally acted in utter disregard of Caperton’s rights and ultimately destroyed Caperton’s businesses because, after conducting cost-benefit analyses, Massey concluded it was in its financial interest to do so.” In March 2005 the trial court denied Massey’s motion for judgment as a matter of law.

Don Blankenship is Massey’s chairman, chief executive officer, and president. After the verdict but before the appeal, West Virginia held its 2004 judicial elections. Knowing the Supreme Court of Appeals of West Virginia would consider the appeal in the case, Blankenship decided to support an attorney who sought to replace Justice McGraw. Justice McGraw was a candidate for reelection to that court. The attorney who sought to replace him was Brent Benjamin.

In addition to contributing the $1,000 statutory maximum to Benjamin’s campaign committee, Blankenship donated almost $2.5 million to “And For The Sake Of The Kids.” The § 527 organization opposed McGraw and supported Benjamin. Blankenship’s donations accounted for more than two-thirds of the total funds it raised. This was not all. Blankenship spent, in addition, just over $500,000 on independent expenditures—for direct mailings and letters soliciting donations as well as television and newspaper advertisements—“to support Brent Benjamin.”

To provide some perspective, Blankenship’s $3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin’s own committee. Caperton contends that Blankenship spent $1 million more than the total amount spent by the campaign committees of both candidates combined.

Benjamin won. He received 382,036 votes (53.3%), and McGraw received 334,301 votes (46.7%).

In October 2005, before Massey filed its petition for appeal in West Virginia’s highest court, Caperton moved to disqualify now-Justice Benjamin under the Due Process Clause and the West Virginia Code of Judicial Conduct, based on the conflict caused by Blankenship’s campaign involvement. Justice Benjamin denied the motion in April 2006. He indicated that he “carefully considered the bases and accompanying exhibits proffered by the movants.” But he found “no objective information to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial.” In December 2006 Massey filed its petition for appeal to challenge the adverse jury verdict. The West Virginia Supreme Court of Appeals granted review.

In November 2007 that court reversed the $50 million verdict against Massey. The majority opinion, authored by then-Chief Justice Davis and joined by Justices Benjamin and Maynard, found that “Massey’s conduct warranted the type of judgment rendered in this case.” It reversed, nevertheless, based on two independent grounds — first, that a forum-selection clause contained in a contract to which Massey was not a party barred the suit in West Virginia, and, second, that res judicata barred the suit due to an out-of-state judgment to which Massey was not a party. Justice Starcher dissented, stating that the “majority’s opinion is morally and legally wrong.” Justice Albright also dissented, accusing the majority of “misapplying the law and introducing sweeping ‘new law’ into our jurisprudence that may well come back to haunt us.”

Caperton sought rehearing, and the parties moved for disqualification of three of the five justices who decided the appeal. Photos had surfaced of Justice Maynard vacationing with Blankenship in the French Riviera while the case was pending. Justice Maynard granted Caperton’s recusal motion. On the other side Justice Starcher granted Massey’s recusal motion, apparently based on his public criticism of Blankenship’s role in the 2004 elections. In his recusal memorandum Justice Starcher urged Justice Benjamin to recuse himself as well. He noted that “Blankenship’s bestowal of his personal wealth, political tactics, and ‘friendship’ have created a cancer in the affairs of this Court.” Justice Benjamin declined Justice Starcher’s suggestion and denied Caperton’s recusal motion.

The court granted rehearing. Justice Benjamin, now in the capacity of acting chief justice, selected Judges Cookman and Fox to replace the recused justices. Caperton moved a third time for disqualification, arguing that Justice Benjamin had failed to apply the correct standard under West Virginia law — i.e., whether “a reasonable and prudent person, knowing these objective facts, would harbor doubts about Justice Benjamin’s ability to be fair and impartial.” Caperton also included the results of a public opinion poll, which indicated that over 67% of West Virginians doubted Justice Benjamin would be fair and impartial. Justice Benjamin again refused to withdraw, noting that the “push poll” was “neither credible nor sufficiently reliable to serve as the basis for an elected judge’s disqualification.”

In April 2008 a divided court again reversed the jury verdict, and again it was a 3-to-2 decision. Justice Davis filed a modified version of her prior opinion, repeating the two earlier holdings. She was joined by Justice Benjamin and Judge Fox. Justice Albright, joined by Judge Cookman, dissented: “Not only is the majority opinion unsupported by the facts and existing case law, but it is also fundamentally unfair. Sadly, justice was neither honored nor served by the majority.” The dissent also noted “genuine due process implications arising under federal law” with respect to Justice Benjamin’s failure to recuse himself.

Four months later — a month after the petition for writ of certiorari was filed in this Court — Justice Benjamin filed a concurring opinion. He defended the merits of the majority opinion as well as his decision not to recuse. He rejected Caperton’s challenge to his participation in the case under both the Due Process Clause and West Virginia law. Justice Benjamin reiterated that he had no “‘direct, personal, substantial, pecuniary interest’ in this case.” Adopting “a standard merely of ‘appearances,’” he concluded, “seems little more than an invitation to subject West Virginia’s justice system to the vagaries of the day — a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations.”

We granted certiorari.

II

It is axiomatic that “a fair trial in a fair tribunal is a basic requirement of due process.” As the Court has recognized, however, “most matters relating to judicial disqualification do not rise to a constitutional level.” The early and leading case on the subject is *Tumey v. Ohio* (1927). There, the Court stated that “matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.”

The *Tumey* Court concluded that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has “a direct, personal, substantial, pecuniary interest” in a case. This rule reflects the maxim that “no 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.” Under this rule, “disqualification for bias or prejudice was not permitted”; those matters were left to statutes and judicial codes. Personal bias or prejudice “alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause.”

As new problems have emerged that were not discussed at common law, however, the Court has identified additional instances which, as an objective matter, require recusal. These are circumstances “in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” To place the present case in proper context, two instances where the Court has required recusal merit further discussion.

A

The first involved the emergence of local tribunals where a judge had a financial interest in the outcome of a case, although the interest was less than what would have been considered personal or direct at common law.

This was the problem addressed in *Tumey*. There, the mayor of a village had the authority to sit as a judge (with no jury) to try those accused of violating a state law prohibiting the possession of alcoholic beverages. Inherent in this structure were two potential conflicts. First, the mayor received a salary supplement for performing judicial duties, and the funds for that compensation derived from the fines assessed in a case. No fines were assessed upon acquittal. The mayor-judge thus received a salary supplement only if he convicted the defendant. Second, sums from the criminal fines were deposited to the village’s general treasury fund for village improvements and repairs.

The Court held that the Due Process Clause required disqualification “both because of the mayor-judge’s direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village.” It so held despite observing that “there are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it.” The Court articulated the controlling principle:

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.

The Court was thus concerned with more than the traditional common-law prohibition on direct pecuniary interest. It was also concerned with a more general concept of interests that tempt adjudicators to disregard neutrality.

This concern with conflicts resulting from financial incentives was elaborated in *Ward v. Monroeville* (1972), which invalidated a conviction in another mayor’s court. In *Monroeville*, unlike in *Tumey*, the mayor received no money; instead, the fines the mayor assessed went to the town’s general fisc. The Court held that “the fact that the mayor in *Tumey* shared directly in the fees and costs did not define the limits of the principle.” The principle, instead, turned on the “possible temptation” the mayor might face; the mayor’s “executive responsibilities for village finances may make him partisan to maintain the high level of contribution to those finances from the mayor’s court.” As the Court reiterated in another case that Term, “the judge’s financial stake need not be as direct or positive as it appeared to be in *Tumey*.”

The Court in *Lavoie* further clarified the reach of the Due Process Clause regarding a judge’s financial interest in a case. There, a justice had cast the deciding vote on the Alabama Supreme Court to uphold a punitive damages award against an insurance company for bad-faith refusal to pay a claim. At the time of his vote, the justice was the lead plaintiff in a nearly identical lawsuit pending in Alabama’s lower courts. His deciding vote, this Court surmised, “undoubtedly ‘raised the stakes’” for the insurance defendant in the justice’s suit.

The Court stressed that it was “not required to decide whether in fact the justice was influenced.” The proper constitutional inquiry is “whether sitting on the case then before the Supreme Court of Alabama “would offer a possible temptation to the average judge to lead him not to hold the balance nice, clear and true.” The Court underscored that “what degree or kind of interest is sufficient to disqualify a judge from sitting cannot be defined with precision.” In the Court’s view, however, it was important that the test have an objective component.

The *Lavoie* Court proceeded to distinguish the state-court justice's particular interest in the case, which required recusal, from interests that were not a constitutional concern. For instance, “while the other justices might conceivably have had a slight pecuniary interest” due to their potential membership in a class-action suit against their own insurance companies, that interest is “too remote and insubstantial to violate the constitutional constraints.”

B

The second instance requiring recusal that was not discussed at common law emerged in the criminal contempt context, where a judge had no pecuniary interest in the case but was challenged because of a conflict arising from his participation in an earlier proceeding. This Court characterized that first proceeding (perhaps pejoratively) as a “one-man grand jury.”

In that first proceeding, and as provided by state law, a judge examined witnesses to determine whether criminal charges should be brought. The judge called the two petitioners before him. One petitioner answered questions, but the judge found him untruthful and charged him with perjury. The second declined to answer on the ground that he did not have counsel with him, as state law seemed to permit. The judge charged him with contempt. The judge proceeded to try and convict both petitioners.

This Court set aside the convictions on grounds that the judge had a conflict of interest at the trial stage because of his earlier participation followed by his decision to charge them. The Due Process Clause required disqualification. The Court recited the general rule that “no man can be a judge in his own case,” adding that “no man is permitted to try cases where he has an interest in the outcome.” It noted that the disqualifying criteria “cannot be defined with precision. Circumstances and relationships must be considered.” These circumstances and the prior relationship required recusal: “Having been a part of the one-man grand jury process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.” That is because “as a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his ‘grand-jury’ secret session.”

The *Murchison* Court was careful to distinguish the circumstances and the relationship from those where the Constitution would not require recusal. It noted that the single-judge grand jury is “more a part of the accusatory process than an ordinary lay grand juror,” and that “adjudication by a trial judge of a contempt committed in a judge’s presence in open court cannot be likened to the proceedings here.” The judge's prior relationship with the defendant, as well as the information acquired from the prior proceeding, was of critical import.

Following *Murchison* the Court held in *Mayberry v. Pennsylvania* (1971), “that by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor.” The Court reiterated that this rule rests on the relationship between the judge and the defendant: “A judge, vilified as was this Pennsylvania judge, necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication.”

Again, the Court considered the specific circumstances presented by the case. It noted that “not every attack on a judge disqualifies him from sitting.” The Court distinguished the case from *Ungar v. Sarafite* (1964), in which the Court had “ruled that a lawyer’s challenge, though ‘disruptive, recalcitrant and disagreeable commentary,’ was still not ‘an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification.’” The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is “likely” to be neutral, or whether there is an unconstitutional “potential for bias.”

III

Based on the principles described in these cases we turn to the issue before us. This problem arises in the context of judicial elections, a framework not presented in the precedents we have reviewed and discussed.

Caperton contends that Blankenship’s pivotal role in getting Justice Benjamin elected created a constitutionally intolerable probability of actual bias. Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected. That temptation, Caperton claims, is as strong and inherent in human nature as was the conflict the Court confronted in *Tumey* and *Monroeville* when a mayor-judge (or the city) benefited financially from a defendant's conviction, as well as the conflict identified in *Murchison* and *Mayberry* when a judge was the object of a defendant's contempt.

Justice Benjamin was careful to address the recusal motions and explain his reasons why, on his view of the controlling standard, disqualification was not in order. In four separate opinions issued during the course of the appeal, he explained why no actual bias had been established. He found no basis for recusal because Caperton failed to provide “objective evidence” or “objective information,” but merely “subjective belief” of bias. Nor could anyone “point to any actual conduct or activity on his part which could be termed ‘improper.’” In other words, based on the facts presented by Caperton, Justice Benjamin conducted a probing search into his actual motives and inclinations; and he found none to be improper. We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias.

Following accepted principles of our legal tradition respecting the proper performance of judicial functions, judges often inquire into their subjective motives and purposes in the ordinary course of deciding a case. This does not mean the inquiry is a simple one. “The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth.”

The judge inquires into reasons that seem to be leading to a particular result. Precedent and stare decisis and the text and purpose of the law and the Constitution; logic and scholarship and experience and common sense; and fairness and disinterest and neutrality are among the factors at work. To bring coherence to the process, and to seek respect for the resulting judgment, judges often explain the reasons for their conclusions and rulings. There are instances when the introspection that often attends this process may reveal that what the judge had assumed to be a proper, controlling factor is not the real one at work. If the judge discovers that some personal bias or improper consideration seems to be the actuating cause of the decision or to be an influence so difficult to dispel that there is a real possibility of undermining neutrality, the judge may think it necessary to consider withdrawing from the case.

The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge’s own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. In defining these standards the Court has asked whether, “under a realistic appraisal of psychological tendencies and human weakness,” the interest “poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.”

We turn to the influence at issue in this case. 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. The inquiry centers on the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.

Applying this principle, we conclude that Blankenship’s campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case. Blankenship contributed some $3 million to unseat the incumbent and replace him with Benjamin. His contributions eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee. Caperton claims Blankenship spent $1 million more than the total amount spent by the campaign committees of both candidates combined.

Massey responds that Blankenship’s support, while significant, did not cause Benjamin’s victory. In the end the people of West Virginia elected him, and they did so based on many reasons other than Blankenship’s efforts. Massey points out that every major state newspaper, but one, endorsed Benjamin. It also contends that then-Justice McGraw cost himself the election by giving a speech during the campaign, a speech the opposition seized upon for its own advantage.

Justice Benjamin raised similar arguments. He asserted that “the outcome of the 2004 election was due primarily to his own campaign’s message,” as well as McGraw’s “devastating” speech in which he “made a number of controversial claims which became a matter of statewide discussion in the media, on the internet, and elsewhere.”

Whether Blankenship’s campaign contributions were a necessary and sufficient cause of Benjamin’s victory is not the proper inquiry. Much like determining whether a judge is actually biased, proving what ultimately drives the electorate to choose a particular candidate is a difficult endeavor, not likely to lend itself to a certain conclusion. This is particularly true where, as here, there is no procedure for judicial factfinding and the sole trier of fact is the one accused of bias. Due process requires an objective inquiry into whether the contributor’s influence on the election under all the circumstances “would offer a possible temptation to the average judge to lead him not to hold the balance nice, clear and true.” In an election decided by fewer than 50,000 votes (382,036 to 334,301), Blankenship’s campaign contributions — in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election — had a significant and disproportionate influence on the electoral outcome. And the risk that Blankenship’s influence engendered actual bias is sufficiently substantial that it “must be forbidden if the guarantee of due process is to be adequately implemented.”

The temporal relationship between the campaign contributions, the justice’s election, and the pendency of the case is also critical. It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice. The $50 million adverse jury verdict had been entered before the election, and the Supreme Court of Appeals was the next step once the state trial court dealt with post-trial motions. So it became at once apparent that, absent recusal, Justice Benjamin would review a judgment that cost his biggest donor’s company $50 million. Although there is no allegation of a *quid pro quo* agreement, the fact remains that Blankenship’s extraordinary contributions were made at a time when he had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when — without the consent of the other parties — a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin’s recusal.

Justice Benjamin did undertake an extensive search for actual bias. But, as we have indicated, that is just one step in the judicial process; objective standards may also require recusal whether or not actual bias exists or can be proved. Due process “may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.” The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process. We find that Blankenship’s significant and disproportionate influence — coupled with the temporal relationship between the election and the pending case — “offers a possible temptation to the average judge to lead him not to hold the balance nice, clear and true.” On these extreme facts the probability of actual bias rises to an unconstitutional level.

IV

Our decision today addresses an extraordinary situation where the Constitution requires recusal. Massey and its *amici* predict that various adverse consequences will follow from recognizing a constitutional violation here — ranging from a flood of recusal motions to unnecessary interference with judicial elections. We disagree. The facts now before us are extreme by any measure. The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case.

It is true that extreme cases often test the bounds of established legal principles, and sometimes no administrable standard may be available to address the perceived wrong. But it is also true that extreme cases are more likely to cross constitutional limits, requiring this Court’s intervention and formulation of objective standards. This is particularly true when due process is violated.

This Court’s recusal cases are illustrative. In each case the Court dealt with extreme facts that created an unconstitutional probability of bias that “cannot be defined with precision.” Yet the Court articulated an objective standard to protect the parties’ basic right to a fair trial in a fair tribunal. The Court was careful to distinguish the extreme facts of the cases before it from those interests that would not rise to a constitutional level. In this case we do nothing more than what the Court has done before.

As such, it is worth noting the effects, or lack thereof, of the Court’s prior decisions. Even though the standards announced in those cases raised questions similar to those that might be asked after our decision today, the Court was not flooded with *Monroeville* or *Murchison* motions. That is perhaps due in part to the extreme facts those standards sought to address. Courts proved quite capable of applying the standards to less extreme situations.

One must also take into account the judicial reforms the States have implemented to eliminate even the appearance of partiality. Almost every State — West Virginia included — has adopted the American Bar Association’s objective standard: “A judge shall avoid impropriety and the appearance of impropriety.” The ABA Model Code’s test for appearance of impropriety is “whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”

The West Virginia Code of Judicial Conduct also requires a judge to “disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” Under Canon 3E(1), “the question of disqualification focuses on whether an objective assessment of the judge's conduct produces a reasonable question about impartiality, not on the judge’s subjective perception of the ability to act fairly.” Indeed, some States require recusal based on campaign contributions similar to those in this case.

These codes of conduct serve to maintain the integrity of the judiciary and the rule of law. The Conference of the Chief Justices has underscored that the codes are “the principal safeguard against judicial campaign abuses” that threaten to imperil “public confidence in the fairness and integrity of the nation's elected judges.” This is a vital state interest:

Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen’s respect for judgments depends in turn upon the issuing court’s absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.

It is for this reason that States may choose to “adopt recusal standards more rigorous than due process requires.”

“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.

The judgment of the Supreme Court of Appeals of West Virginia is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Chief Justice ROBERTS, with whom Justice SCALIA, Justice THOMAS, and Justice ALITO join, dissenting.

I, of course, share the majority’s sincere concerns about the need to maintain a fair, independent, and impartial judiciary — and one that appears to be such. But I fear that the Court’s decision will undermine rather than promote these values.

Until today, we have recognized exactly two situations in which the Federal Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts. Vaguer notions of bias or the appearance of bias were never a basis for disqualification, either at common law or under our constitutional precedents. Those issues were instead addressed by legislation or court rules.

Today, however, the Court enlists the Due Process Clause to overturn a judge's failure to recuse because of a “probability of bias.” Unlike the established grounds for disqualification, a “probability of bias” cannot be defined in any limited way. The Court’s new “rule” provides no guidance to judges and litigants about when recusal will be constitutionally required. This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.

I

There is a “presumption of honesty and integrity in those serving as adjudicators.” All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise. We have thus identified only two situations in which the Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is presiding over certain types of criminal contempt proceedings.

It is well established that a judge may not preside over a case in which he has a “direct, personal, substantial, pecuniary interest.” This principle is relatively straightforward, and largely tracks the longstanding common-law rule regarding judicial recusal. For example, a defendant’s due process rights are violated when he is tried before a judge who is “paid for his service only when he convicts the defendant.”

It may also violate due process when a judge presides over a criminal contempt case that resulted from the defendant’s hostility towards the judge. In *Mayberry*, the defendant directed a steady stream of expletives and *ad hominem* attacks at the judge throughout the trial. When that defendant was subsequently charged with criminal contempt, we concluded that he “should be given a public trial before a judge other than the one reviled by the contemnor.”

Our decisions in this area have also emphasized when the Due Process Clause does not require recusal:

All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.

Subject to the two well-established exceptions described above, questions of judicial recusal are regulated by “common law, statute, or the professional standards of the bench and bar.”

In any given case, there are a number of factors that could give rise to a “probability” or “appearance” of bias: friendship with a party or lawyer, prior employment experience, membership in clubs or associations, prior speeches and writings, religious affiliation, and countless other considerations. We have never held that the Due Process Clause requires recusal for any of these reasons, even though they could be viewed as presenting a “probability of bias.” Many state statutes require recusal based on a probability or appearance of bias, but “that alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause.” States are, of course, free to adopt broader recusal rules than the Constitution requires — and every State has — but these developments are not continuously incorporated into the Due Process Clause.

II

In departing from this clear line between when recusal is constitutionally required and when it is not, the majority repeatedly emphasizes the need for an “objective” standard. The majority’s analysis is “objective” in that it does not inquire into Justice Benjamin’s motives or decisionmaking process. But the standard the majority articulates — “probability of bias” — fails to provide clear, workable guidance for future cases. At the most basic level, it is unclear whether the new probability of bias standard is somehow limited to financial support in judicial elections, or applies to judicial recusal questions more generally.

But there are other fundamental questions as well. With little help from the majority, courts will now have to determine:

1. How much money is too much money? What level of contribution or expenditure gives rise to a “probability of bias”?
2. How do we determine whether a given expenditure is “disproportionate”? Disproportionate to what?
3. Are independent, non-coordinated expenditures treated the same as direct contributions to a candidate's campaign? What about contributions to independent outside groups supporting a candidate?
4. Does it matter whether the litigant has contributed to other candidates or made large expenditures in connection with other elections?
5. Does the amount at issue in the case matter? What if this case were an employment dispute with only $10,000 at stake? What if the plaintiffs only sought non-monetary relief such as an injunction or declaratory judgment?
6. Does the analysis change depending on whether the judge whose disqualification is sought sits on a trial court, appeals court, or state supreme court?
7. How long does the probability of bias last? Does the probability of bias diminish over time as the election recedes? Does it matter whether the judge plans to run for reelection?
8. What if the “disproportionately” large expenditure is made by an industry association, trade union, physicians’ group, or the plaintiffs’ bar? Must the judge recuse in all cases that affect the association's interests? Must the judge recuse in all cases in which a party or lawyer is a member of that group? Does it matter how much the litigant contributed to the association?
9. What if the case involves a social or ideological issue rather than a financial one? Must a judge recuse from cases involving, say, abortion rights if he has received “disproportionate” support from individuals who feel strongly about either side of that issue? If the supporter wants to help elect judges who are “tough on crime,” must the judge recuse in all criminal cases?
10. What if the candidate draws “disproportionate” support from a particular racial, religious, ethnic, or other group, and the case involves an issue of particular importance to that group?
11. What if the supporter is not a party to the pending or imminent case, but his interests will be affected by the decision? Does the Court’s analysis apply if the supporter “chooses the judge” not in his case, but in someone else’s?
12. What if the case implicates a regulatory issue that is of great importance to the party making the expenditures, even though he has no direct financial interest in the outcome (*e.g.*, a facial challenge to an agency rulemaking or a suit seeking to limit an agency’s jurisdiction)?
13. Must the judge’s vote be outcome determinative in order for his non-recusal to constitute a due process violation?
14. Does the due process analysis consider the underlying merits of the suit? Does it matter whether the decision is clearly right (or wrong) as a matter of state law?
15. What if a lower court decision in favor of the supporter is affirmed on the merits on appeal, by a panel with no “debt of gratitude” to the supporter? Does that “moot” the due process claim?
16. What if the judge voted against the supporter in many other cases?
17. What if the judge disagrees with the supporter’s message or tactics? What if the judge expressly disclaims the support of this person?
18. Should we assume that elected judges feel a “debt of hostility” towards major opponents of their candidacies? Must the judge recuse in cases involving individuals or groups who spent large amounts of money trying unsuccessfully to defeat him?
19. If there is independent review of a judge’s recusal decision, *e.g.*, by a panel of other judges, does this completely foreclose a due process claim?
20. Does a debt of gratitude for endorsements by newspapers, interest groups, politicians, or celebrities also give rise to a constitutionally unacceptable probability of bias? How would we measure whether such support is disproportionate?
21. Does close personal friendship between a judge and a party or lawyer now give rise to a probability of bias?
22. Does it matter whether the campaign expenditures come from a party or the party’s attorney? If from a lawyer, must the judge recuse in every case involving that attorney?
23. Does what is unconstitutional vary from State to State? What if particular States have a history of expensive judicial elections?
24. Under the majority’s “objective” test, do we analyze the due process issue through the lens of a reasonable person, a reasonable lawyer, or a reasonable judge?
25. What role does causation play in this analysis? The Court sends conflicting signals on this point. The majority asserts that “whether Blankenship’s campaign contributions were a necessary and sufficient cause of Benjamin's victory is not the proper inquiry.” But elsewhere in the opinion, the majority considers “the apparent effect such contribution had on the outcome of the election,” and whether the litigant has been able to “choose the judge in his own cause.” If causation is a pertinent factor, how do we know whether the contribution or expenditure had any effect on the outcome of the election? What if the judge won in a landslide? What if the judge won primarily because of his opponent's missteps?
26. Is the due process analysis less probing for incumbent judges — who typically have a great advantage in elections — than for challengers?
27. How final must the pending case be with respect to the contributor’s interest? What if, for example, the only issue on appeal is whether the court should certify a class of plaintiffs? Is recusal required just as if the issue in the pending case were ultimate liability?
28. Which cases are implicated by this doctrine? Must the case be pending at the time of the election? Reasonably likely to be brought? What about an important but unanticipated case filed shortly after the election?
29. When do we impute a probability of bias from one party to another? Does a contribution from a corporation get imputed to its executives, and vice-versa? Does a contribution or expenditure by one family member get imputed to other family members?
30. What if the election is nonpartisan? What if the election is just a yes-or-no vote about whether to retain an incumbent?
31. What type of support is disqualifying? What if the supporter’s expenditures are used to fund voter registration or get-out-the-vote efforts rather than television advertisements?
32. Are contributions or expenditures in connection with a primary aggregated with those in the general election? What if the contributor supported a different candidate in the primary? Does that dilute the debt of gratitude?
33. What procedures must be followed to challenge a state judge’s failure to recuse? May *Caperton* claims only be raised on direct review? Or may such claims also be brought in federal district court under 42 U.S.C. § 1983, which allows a person deprived of a federal right by a state official to sue for damages? If § 1983 claims are available, who are the proper defendants? The judge? The whole court? The clerk of court?
34. What about state-court cases that are already closed? Can the losing parties in those cases now seek collateral relief in federal district court under § 1983? What statutes of limitation should be applied to such suits?
35. What is the proper remedy? After a successful *Caperton* motion, must the parties start from scratch before the lower courts? Is any part of the lower court judgment retained?
36. Does a litigant waive his due process claim if he waits until after decision to raise it? Or would the claim only be ripe after decision, when the judge's actions or vote suggest a probability of bias?
37. Are the parties entitled to discovery with respect to the judge’s recusal decision?
38. If a judge erroneously fails to recuse, do we apply harmless-error review?
39. Does the judge get to respond to the allegation that he is probably biased, or is his reputation solely in the hands of the parties to the case?
40. What if the parties settle a *Caperton* claim as part of a broader settlement of the case? Does that leave the judge with no way to salvage his reputation?

These are only a few uncertainties that quickly come to mind. Judges and litigants will surely encounter others when they are forced to, or wish to, apply the majority’s decision in different circumstances. Today’s opinion requires state and federal judges simultaneously to act as political scientists (why did candidate X win the election?), economists (was the financial support disproportionate?), and psychologists (is there likely to be a debt of gratitude?).

The Court's inability to formulate a “judicially discernible and manageable standard” strongly counsels against the recognition of a novel constitutional right. The need to consider these and countless other questions helps explain why the common law and this Court’s constitutional jurisprudence have never required disqualification on such vague grounds as “probability” or “appearance” of bias.

III

A

To its credit, the Court seems to recognize that the inherently boundless nature of its new rule poses a problem. But the majority’s only answer is that the present case is an “extreme” one, so there is no need to worry about other cases. The Court repeats this point over and over.

But this is just so much whistling past the graveyard. Claims that have little chance of success are nonetheless frequently filed. The success rate for certiorari petitions before this Court is approximately 1.1%, and yet the previous Term some 8,241 were filed. Every one of the “*Caperton* motions” or appeals or § 1983 actions will claim that the judge is biased, or probably biased, bringing the judge and the judicial system into disrepute. And all future litigants will assert that their case is really the most extreme thus far.

Extreme cases often test the bounds of established legal principles. There is a cost to yielding to the desire to correct the extreme case, rather than adhering to the legal principle. That cost has been demonstrated so often that it is captured in a legal aphorism: “Hard cases make bad law.”

Consider the cautionary tale of our decisions in *United States v. Halper* and *Hudson v. United States*. Historically, we have held that the Double Jeopardy Clause only applies to criminal penalties, not civil ones. But in *Halper*, the Court held that a civil penalty could violate the Clause if it were “overwhelmingly disproportionate to the damages the defendant has caused” and resulted in a “clear injustice.” We acknowledged that this inquiry would not be an “exact pursuit,” but the Court assured litigants that it was only announcing “a rule for the rare case, the case such as the one before us.”

Just eight years later, we granted certiorari in *Hudson* “because of concerns about the wide variety of novel double jeopardy claims spawned in the wake of *Halper*.” The novel claim that we had recognized in *Halper* turned out not to be so “rare” after all, and the test we adopted in that case — “overwhelmingly disproportionate” — had “proved unworkable.” We thus abandoned the *Halper* rule, ruing our “ill considered” “deviation from longstanding double jeopardy principles.”

The déjà vu is enough to make one swoon. Today, the majority again departs from a clear, longstanding constitutional rule to accommodate an “extreme” case involving “grossly disproportionate” amounts of money. I believe we will come to regret this decision as well, when courts are forced to deal with a wide variety of *Caperton* motions, each claiming the title of “most extreme” or “most disproportionate.”

B

And why is the Court so convinced that this is an extreme case? It is true that Don Blankenship spent a large amount of money in connection with this election. But this point cannot be emphasized strongly enough: Other than a $1,000 direct contribution from Blankenship, Justice Benjamin and his campaign had no control over how this money was spent. Campaigns go to great lengths to develop precise messages and strategies. An insensitive or ham-handed ad campaign by an independent third party might distort the campaign's message or cause a backlash against the candidate, even though the candidate was not responsible for the ads. The majority repeatedly characterizes Blankenship’s spending as “contributions” or “campaign contributions,” but it is more accurate to refer to them as “independent expenditures.” Blankenship only “contributed” $1,000 to the Benjamin campaign.

Moreover, Blankenship’s independent expenditures do not appear “grossly disproportionate” compared to other such expenditures in this very election. “And for the Sake of the Kids” — an independent group that received approximately two-thirds of its funding from Blankenship — spent $3,623,500 in connection with the election. But large independent expenditures were also made in support of Justice Benjamin’s opponent. “Consumers for Justice” — an independent group that received large contributions from the plaintiffs’ bar — spent approximately $2 million in this race. And Blankenship has made large expenditures in connection with several previous West Virginia elections, which undercuts any notion that his involvement in this election was “intended to influence the outcome” of particular pending litigation.

It is also far from clear that Blankenship’s expenditures affected the outcome of this election. Justice Benjamin won by a comfortable 7-point margin (53.3% to 46.7%). Many observers believed that Justice Benjamin’s opponent doomed his candidacy by giving a well-publicized speech that made several curious allegations; this speech was described in the local media as “deeply disturbing” and worse. Justice Benjamin’s opponent also refused to give interviews or participate in debates. All but one of the major West Virginia newspapers endorsed Justice Benjamin. Justice Benjamin just might have won because the voters of West Virginia thought he would be a better judge than his opponent. Unlike the majority, I cannot say with any degree of certainty that Blankenship “chose the judge in his own cause.” I would give the voters of West Virginia more credit than that.

It is an old cliché, but sometimes the cure is worse than the disease. I am sure there are cases where a “probability of bias” should lead the prudent judge to step aside, but the judge fails to do so. Maybe this is one of them. But I believe that opening the door to recusal claims under the Due Process Clause, for an amorphous “probability of bias,” will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts. I hope I am wrong.

Justice SCALIA, dissenting.

The principal purpose of this Court's exercise of its certiorari jurisdiction is to clarify the law. As THE CHIEF JUSTICE’s dissent makes painfully clear, the principal consequence of today’s decision is to create vast uncertainty with respect to a point of law that can be raised in all litigated cases in (at least) those 39 States that elect their judges. This course was urged upon us on grounds that it would preserve the public’s confidence in the judicial system.

The decision will have the opposite effect. What above all else is eroding public confidence in the Nation’s judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice. The Court’s opinion will reinforce that perception, adding to the vast arsenal of lawyerly gambits what will come to be known as the Caperton claim. The facts relevant to adjudicating it will have to be litigated — and likewise the law governing it, which will be indeterminate for years to come, if not forever. Many billable hours will be spent in poring through volumes of campaign finance reports, and many more in contesting nonrecusal decisions through every available means.

A Talmudic maxim instructs with respect to the Scripture: “Turn it over, and turn it over, for all is therein.” Divinely inspired text may contain the answers to all earthly questions, but the Due Process Clause most assuredly does not. The Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution. Alas, the quest cannot succeed — which is why some wrongs and imperfections have been called nonjusticiable. In the best of all possible worlds, should judges sometimes recuse even where the clear commands of our prior due process law do not require it? Undoubtedly. The relevant question, however, is whether we do more good than harm by seeking to correct this imperfection through expansion of our constitutional mandate in a manner ungoverned by any discernable rule. The answer is obvious.

**Questions:**

1. You can watch some of the television advertisements that [Don Blankenship](https://en.wikipedia.org/wiki/Don_Blankenship) and “And For the Sake of the Kids” ran opposing Justice Warren McGraw [here](https://www.youtube.com/watch?v=A4MzgI7zHIU&list=PL0699DE9DDC3F8AD2&index=4&t=0s), [here](https://www.youtube.com/watch?v=tMf34OjFCvA&list=PL0699DE9DDC3F8AD2&index=5&t=0s), [here](https://www.youtube.com/watch?v=kzCSMqVMZjI&list=PL0699DE9DDC3F8AD2&index=7&t=0s), [here](https://www.youtube.com/watch?v=HpVTVg56gic&list=PL0699DE9DDC3F8AD2&index=8&t=0s), [here](https://www.youtube.com/watch?v=bEt4mXf3nrE&list=PL0699DE9DDC3F8AD2&index=9&t=0s), [here](https://www.youtube.com/watch?v=-OIiy21VUck&list=PL0699DE9DDC3F8AD2&index=12&t=0s), [here](https://www.youtube.com/watch?v=Xl2wZXJvWk4&list=PL0699DE9DDC3F8AD2&index=13&t=0s), [here](https://www.youtube.com/watch?v=adddu8lzvDw&list=PL0699DE9DDC3F8AD2&index=14&t=0s), and [here](https://www.youtube.com/watch?v=qyb8xLTJ6SM&list=PL0699DE9DDC3F8AD2&index=16&t=0s). In 2009, the Supreme Court of Appeals of West Virginia reheard the appeal, with Justice Benjamin recused, and once again overturned the lower court verdict, holding 4-1 that the contract required Caperton to file his action in Virginia. Caperton refiled his action in Virginia, where it is still pending. The
2. On April 5, 2010, an explosion at Massey’s Upper Big Branch mine killed 29 miners. In the wake of the disaster, Blankenship resigned as CEO of Massey. On December 6, 2011, Mine Safety and Health Administration concluded that flagrant safety violations contributed to a coal dust explosion, and imposed $10.8 million in penalties on Massey. Blankenship was indicted on criminal charges, convicted of misdemeanor conspiracy to violate federal mine safety standards, and sentenced to one year in prison. Caperton’s action against Massey and the Upper Big Branch disaster were widely reported, including in the [New York Times](https://www.nytimes.com/2015/06/21/business/energy-environment/the-people-v-the-coal-baron.html), the [Daily Beast](https://www.thedailybeast.com/laurence-leamer-on-coal-baron-donald-blankenships-downfall), [Mother Jones](https://www.motherjones.com/politics/2015/09/blankenship-trial-king-coal-west-virginia/), and elsewhere.
3. After his release from prison, Blankenship became a Republican candidate for the United States Senate in West Virginia in 2018, but lost in the primary. You can see one of his campaign ads, in which he refers to Senate Majority Leader Mitch McConnell as “Cocaine Mitch” and makes other questionable comments [here](https://www.youtube.com/watch?v=nW4cSKWPre4). When Blankenship lost, the McConnell campaign [tweeted](https://twitter.com/Team_Mitch/status/994036999387537409) the following image.



1. In *Caperton v. Massey*, Justice Kennedy’s majority opinion held that due process requires recusal when the facts present a “serious, objective risk of actual bias.” The Roberts and Scalia dissents argued that the standard adopted by the majority is meaningless and unworkable, and would erode public confidence in the judiciary. Which argument do you find more compelling?

**Further Reading:**

* [Charles Gardner Geyh, *Judicial Disqualification: An Analysis of Federal Law*, Federal Judicial Center (2010)](https://www.fjc.gov/sites/default/files/2012/JudicialDQ.pdf)
* [John P. Frank, *Disqualification of Judges*, 56 Yale L.J. 605 (1947)](https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=4505&context=ylj)
* [Hearing on Examining the State of Judicial Recusals after Caperton v. A.T. Massey, Hearing before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary, 111th Cong. (2009)](https://www.govinfo.gov/content/pkg/CHRG-111hhrg53947/html/CHRG-111hhrg53947.htm)
* [Bruce A. Green, *Fear of the Unknown: Judicial Ethics after Caperton*, 60 Syracuse L. Rev. 229 (2010)](https://ssrn.com/abstract=1567553)
* [Jeffrey W. Stempel, *Playing Forty Questions: Responding to Justice Roberts’ Concerns in Caperton and Some Tentative Answers About Operationalizing Judicial Recusal and Due Process*, 39 Southwestern L. Rev. 1 (2009)](https://scholars.law.unlv.edu/facpub/234/)
* [Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of* Caperton, 123 Harv. L. Rev. 80 (2009)](https://harvardlawreview.org/2009/11/electing-judges-judging-elections-and-the-lessons-of-caperton/)
* [Kenneth L. Karst, *Caperton's Amici*, 33 Seattle U. L. Rev. 633 (2010)](https://digitalcommons.law.seattleu.edu/sulr/vol33/iss3/7/)
* [Ronald D. Rotunda, *Judicial Disqualification in the Aftermath of Caperton v. A.T. Massey Coal Co.*, 60 Syracuse L. Rev. 247 (2010)](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1554642)
* [Jed H. Shugerman, *In Defense of Appearances: What Caperton v. Massey Should Have Said*, 59 DePaul L. Rev. 529 (2010)](https://via.library.depaul.edu/law-review/vol59/iss2/10/?utm_source=via.library.depaul.edu%2Flaw-review%2Fvol59%2Fiss2%2F10&utm_medium=PDF&utm_campaign=PDFCoverPages)

**Judicial Misconduct**

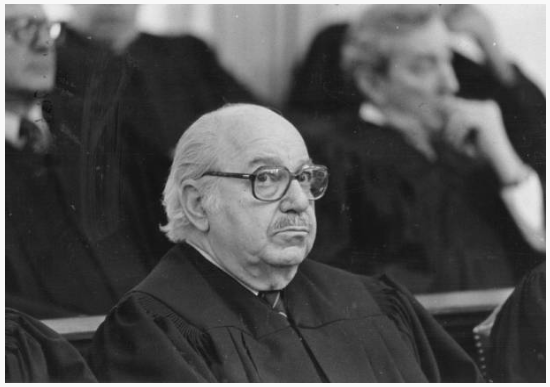
*Order, now my court is in session, will you please stand? First, allow me to introduce myself, my name is Judge Hundredyears. Some people call me Judge Dread. Now, I have come here to whoop you, to try all you rudeboys for shooting black people. In my court only we talk, cause I’m vexed, and I am the rudeboy today.*[[8]](#footnote-7)

[**Model Code of Judicial Conduct: Canon 2**](https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/)

A judge shall perform the duties of judicial office impartially, competently, and diligently.

[**Model Rule 2.3: Bias, Prejudice, and Harassment**](https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_3biasprejudiceandharassment/)

1. A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.
2. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.
3. A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.
4. The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.



Judge Alvin D. Lichtenstein (1984)

[***In re Inquiry Concerning Lichtenstein*, 685 P. 2d 204 (Colo. 1984)**](https://scholar.google.com/scholar_case?case=15832994497654983690)

**Summary:** Burns shot and killed his wife when he learned she was planning to leave him, and pleaded guilty to second-degree murder. At the sentencing hearing, Judge Lichtenstein observed, among other things, that Burns’s mental state was affected by “highly provoking acts on the part of the victim,” and imposed a two-year work release sentence. The Commission on Judicial Discipline found misconduct and recommended a public reprimand. The Colorado Supreme Court rejected the recommendation and dismissed the complaint.

PER CURIAM.

Pursuant to Article VI, Section 23(3)(e) of the Colorado Constitution, the Commission on Judicial Discipline certified the record of these proceedings to this court and recommended that a public reprimand be issued to District Judge Alvin D. Lichtenstein because he violated Canon 2A of the Colorado Code of Judicial Conduct. Having reviewed the record of the proceedings, we conclude that the conduct of Judge Lichtenstein did not violate Canon 2A of the Code. We therefore reject the Commission’s recommendation of a public reprimand and return the case to the Commission with directions to dismiss the complaint.

I.

On December 5, 1983, a formal complaint was filed with the Commission, alleging that on June 22, 1983, while serving as a district judge in the Denver District Court and presiding over a criminal action, Judge Lichtenstein made remarks during a sentencing hearing which “undermined public confidence in the integrity and impartiality of the judiciary” and “tended to bring the judiciary into disrepute” in violation of Canon 2A of the Code.[[9]](#footnote-8) The facts are not in dispute. Judge Lichtenstein was appointed a district judge of the Second Judicial District on January 4, 1978. In November 1980 he was elected to serve a six year term and is currently serving that term of office. During the events in question he was assigned to the criminal division of the Denver District Court. As part of his judicial responsibilities, Judge Lichtenstein heard various motions in the case of *People v. Clarence Burns*, in which Burns was charged with the first degree murder of his wife on August 15, 1982. During the pendency of the case, the defendant filed a motion to suppress a confession, which was heard by Judge Lichtenstein on April 4, 1983. Various witnesses testified at the suppression hearing, including a clinical psychologist who described the defendant's condition on August 15, the day of the shooting, as one of severe and suicidal depression resulting from the fact that he and his wife had separated earlier in the month. The judge granted the motion, ruling that the defendant’s state of depression preexisted and continued after his arrest and “caused a cognitive impairment which prevented the Defendant from understanding his *Miranda* rights and from intelligently waiving them.” Thereafter, a plea agreement was reached between the defendant and the district attorney’s office and, on May 2, 1983, the defendant entered a plea of guilty to second degree murder in exchange for a dismissal of the first degree murder charge. The defendant’s guilty plea was accepted, and the case was continued for a sentencing hearing on June 22, 1983.

During the sentencing hearing the judge received the stipulated testimony of one witness, considered the testimony of five additional witnesses, reviewed the videotaped deposition of the defendant’s and victim’s fifteen-year-old son, and considered the statements of counsel. Judge Lichtenstein began his remarks by stating that he had thoroughly reviewed the presentence report and had considered the matters presented by both sides during the sentencing hearing. Noting that Colorado case law required him to state on the record the reasons for the imposition of a sentence, the judge proceeded to describe the various degrees of homicide, the presumptive sentence of eight to twelve years for second degree murder, the statutory provision authorizing a sentence outside the presumptive range for extraordinary mitigating or aggravating circumstances, and concluded that extraordinary mitigating circumstances existed in this case. After stating that he was incorporating the specific findings of fact which he had previously made in ruling on the defendant’s motion to suppress, the judge found that the defendant’s capacity to appreciate the wrongfulness of his conduct was significantly impaired by a state of severe depression arising from his inability to understand why his wife had left him. The judge then made the following remarks which formed the basis of the formal complaint filed against him:

The Court finds that this mental state, his mental and emotional condition, combined with the sudden heat of passion caused by a series of highly provoking acts on the part of the victim of leaving him without any warning; in fact, based on the testimony that the Court has heard, in a sense deceiving him as to her intentions by being extremely loving and caring up to and through the morning that she left the family home with the full intention of obtaining a divorce and proceeding with a separation from him without even giving him any knowledge of her whereabouts or that of their son, the Court finds that this affected the Defendant sufficiently so that it excited an irresistible passion as it would in any reasonable person under the circumstances and, consequently, would warrant a sentence under the extraordinary mitigating terms of the statute.

The judge imposed a sentence of four years plus one year of parole, suspended the sentence, and ordered the defendant to undergo supervision by the Probation Department under various conditions including a two-year work release sentence to the county jail and the successful completion of a program of psychotherapy.[[10]](#footnote-9) The sentencing comments of the judge and the four-year suspended sentence generated extensive publicity. The formal complaint was thereafter filed with the Commission.

The Commission found that Judge Lichtenstein’s sentencing remarks “did not convey his intended meaning, and, as a direct result, the public questioned his impartiality on the bench and his ability and willingness to faithfully adhere to the law.” The Commission concluded that, although not constituting willful misconduct, the judge’s remarks nonetheless violated Canon 2A by bringing the judiciary into disrepute and undermining public confidence in the integrity and impartiality of the judiciary. The Commission, with three members dissenting, recommended a public reprimand.

II.

Because we have not previously addressed the matter of judicial discipline under Article VI, Section 23 of the Colorado Constitution, we take this occasion to delineate the constitutional basis of our responsibility in this matter. Article VI, Section 23(3), which became effective on July 1, 1983, states in pertinent part:

(d) A justice or judge of any court of record of this state, in accordance with the procedure set forth in this subsection (3), may be removed or disciplined for willful misconduct in office, willful or persistent failure to perform his duties, intemperance, or violation of any canon of the Colorado code of judicial conduct, or he may be retired for disability interfering with the performance of his duties which is, or is likely to become, of a permanent character.

(e) The commission may, after such investigation as it deems necessary, order informal remedial action; order a formal hearing to be held before it concerning the removal, retirement, suspension, censure, reprimand, or other discipline of a justice or a judge; or request the supreme court to appoint three special masters, who shall be justices or judges of courts of record, to hear and take evidence in any such matter and to report thereon to the commission. After a formal hearing or after considering the record and report of the masters, if the commission finds good cause therefor, it may take informal remedial action, or it may recommend to the supreme court the removal, retirement, suspension, censure, reprimand, or discipline, as the case may be, of the justice or judge. The commission may also recommend that the costs of its investigation and hearing be assessed against such justice or judge.

(f) Following receipt of a recommendation from the commission, the supreme court shall review the record of the proceedings on the law and facts and in its discretion may permit the introduction of additional evidence and shall order removal, retirement, suspension, censure, reprimand, or discipline, as it finds just and proper, or wholly reject the recommendation. Upon an order for retirement, the justice or judge shall thereby be retired with the same rights and privileges as if he retired pursuant to statute. Upon an order for removal, the justice or judge shall thereby be removed from office, and his salary shall cease from the date of such order. On the entry of an order for retirement or for removal of a judge, his office shall be deemed vacant.

(g) Prior to the filing of a recommendation to the supreme court by the commission against any justice or judge, all papers filed with and proceedings before the commission on judicial discipline or masters appointed by the supreme court, pursuant to this subsection (3), shall be confidential, and the filing of papers with and the giving of testimony before the commission or the masters shall be privileged; but no other publication of such papers or proceedings shall be privileged in any action for defamation; except that the record filed by the commission in the supreme court continues privileged and a writing which was privileged prior to its filing with the commission or the masters does not lose such privilege by such filing.

III.

Canon 2A of the Code states that “a judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” This canon includes within its scope statements made by a judge during judicial proceedings. Judicial misconduct creating the need for discipline may thus arise from the same source as judicial conduct that is within the scope of appellate review. The former seeks to prevent potential prejudice to the judicial system itself, while the latter seeks to correct erroneous legal rulings prejudicial to a particular party.

The question of whether Judge Lichtenstein's remarks were violative of Canon 2A must be evaluated in the context of the entire sentencing hearing. Section 18-1-105(7), which was applicable to the sentencing hearing in issue, requires a judge in imposing a sentence outside the presumptive range to “make specific findings on the record of the case, detailing the specific extraordinary circumstances which constitute the reasons for varying from the presumptive sentence.” Judge Lichtenstein’s remarks were made in an effort to place on record the extraordinary mitigating circumstances that he believed justified a sentence below the presumptive sentence of eight to twelve years applicable to second degree murder. The judge was attempting to describe how the victim’s conduct, as perceived and interpreted by the defendant, brought about an emotional state in the defendant similar to the “irresistible passion” required for voluntary manslaughter. Although the sentencing comments contain some phraseology which, when read in isolation, might have offended the sensibilities of others, the full context of the sentencing hearing indicates that the choice of words was no more than an awkwardly executed effort to place on record the confused and highly emotional state of the defendant at the time of the killing, which, in the judge’s opinion, constituted a mitigating circumstance justifying a sentence below the presumptive range. The judge’s comments were not intended to be disrespectful of the law, the victim, or anyone else; nor do they reasonably lend themselves to such a connotation in the full context of the hearing. We thus conclude that the judge’s remarks were not such as to bring the judiciary into disrepute or to undermine public confidence in the integrity or impartiality of the judicial system within the intendment of Canon 2A.

The recommendation of the Commission for a public reprimand is rejected and the case is returned to the Commission with directions to dismiss the formal complaint.

**Questions:**

1. On August 15, 1982, Clarence Burns shot and killed his estranged wife Patricia Ann Burns. Burns saw Patricia Ann’s car parked near her parents’ house, and climbed into the trunk. Eventually, she drove their son Darren to her new apartment. When they arrived, Burns emerged from the trunk and followed them into the apartment. An argument ensued, and Burns shot Patricia Ann five times in the face, killing her. Lichtenstein’s comments provoked considerable outrage and were widely reported, including in the [New York Times](https://www.nytimes.com/1984/07/17/us/court-backs-judge-who-found-slayer-had-been-provoked.html). Burns was eventually sentenced to 10 years in prison, and served 6. You can watch a short video about the case [here](https://www.youtube.com/watch?v=-yNtWlgYSrc). After the misconduct investigation, Lichtenstein requested and received a transfer to civil court. However, he continued to hear criminal cases on occasion, and made some other [controversial decisions](https://www.apnews.com/9191576b8b8aaab4d5687a689d27f0c5). In 2000, the Colorado Criminal Defense Bar established the [Alvin D. Lichtenstein Award](https://ccdb.org/index.cfm?pg=Awards) “for remarkable accomplishments over a lifetime of distinguished service.”
2. Was the objection to Lichtenstein’s conduct the sentence he imposed, his explanation of the sentence, or both? Should judges be censured for imposing lenient sentences?
3. The Colorado Supreme Court rejected the Commission’s recommendation to reprimand Lichtenstein. Do you agree with its decision? Why or why not?

**Further Reading:**

* [Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 Hofstra L. Rev. 1245 (2004)](https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=2597&context=hlr)

1. Wynonie Harris, *Good Morning Judge* (1952). [↑](#footnote-ref-0)
2. Finley Peter Dunne, Observations by Mr. Dooley (1902). [↑](#footnote-ref-1)
3. [18 U.S.C. § 203(a)(1)(B)](https://www.law.cornell.edu/uscode/text/18/203). [↑](#footnote-ref-2)
4. [28 U.S.C. § 455](https://www.law.cornell.edu/uscode/text/28/455). [↑](#footnote-ref-3)
5. [28 U.S. Code §§ 351-64](https://www.law.cornell.edu/uscode/text/28/part-I/chapter-16). [↑](#footnote-ref-4)
6. [Guide to Judiciary Policy, Vol. 2: Ethics and Judicial Conduct, Pt. E: Judicial Conduct and Disability Act and Related Materials, Ch. 3: Rules for Judicial-Conduct and Judicial-Disability Proceedings](https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019_0.pdf). [↑](#footnote-ref-5)
7. Shorty Long, *Here Comes the Judge* (1968). [↑](#footnote-ref-6)
8. Prince Buster (Cecil Bustamente Campbell / Muhammed Yusef Ali), *Judge Dread* (1967). [↑](#footnote-ref-7)
9. After the formal complaint was filed and during the preliminary investigation of this matter by the Commission, other complaints were filed alleging that Judge Lichtenstein exhibited a bias in favor of criminal defendants, particularly those who allegedly committed crimes against women, and that he had a bias against women. These charges were investigated by the Commission and found to be without substance or merit. We therefore limit our consideration to the sentencing remarks made by Judge Lichtenstein. [↑](#footnote-ref-8)
10. After the sentencing hearing, the judge on June 28, 1983, *sua sponte*, vacated the suspended sentence and imposed a sentence of four years imprisonment plus one year of parole. Thereafter, the defendant and the district attorney filed original proceedings in this court directed to the June 22 and June 28 sentences. The defendant requested that the sentence of June 28 be vacated and that the original sentence of June 22 be reinstated. The district attorney, on the other hand, requested that both sentences be vacated and that the district judge be directed to impose a sentence within the aggravated range or at least a sentence within the presumptive range for second degree murder. We held that the sentence of June 22 was an illegal sentence and remanded the case for resentencing. [↑](#footnote-ref-9)