second, Sidney Powell, was ordered to pay the defendants' fees incurred in defending a Michigan lawsuit and is now facing potential discipline in Texas where she is admitted to practice. Most other lawyers involved in the effort have not suffered any significant discipline.

5. In 2016, Model Rule 8.4(g) was adopted. Under this rule it is professional misconduct to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." This rule has been adopted in its original form by only a few states and has faced legal challenges. What might be of concern?

Prosecutors and Judges

As employees of the public, prosecutors and judges have their own particular responsibilities in the judicial system. Model Rule 3.8 addresses prosecutors, directing them to refrain from bringing charges not supported by evidence, to inform the accused of the right to counsel, to exercise restraint in dealing with unrepresented people, and to provide the defense with information that would tend to negate guilt or mitigate the offense.

Judges have an entire model code of their own: the Model Code of Judicial Conduct. States have also enacted their own laws dealing with the subject of judicial ethics. They are primarily concerned with maintaining fairness, both in appearance and fact. Judges are elected in many states, rather than appointed, and this creates concerns when they make campaign speeches. In the following case, a public prosecutor running for election as a judge made campaign statements indicating that she had the support of the police, would favor victims, and would be tough on criminals.

In re Kinsey

842 So.2d 77 (Fla. 2003)

Per curiam

We review the recommendation of the Judicial Qualifications Commission ("JQC") that Judge Patricia Kinsey be disciplined. This case arose out of charges brought against Judge Kinsey alleging that she engaged in a pattern of improper conduct during the course of her 1998 election campaign for the office of County Court Judge for Escambia County. Formal proceedings were officially instituted against Judge Kinsey on September 9, 1999, when she was initially charged with eleven ethical violations, all based upon conduct occurring during her election campaign. These charges were amended on March 8, 2000, to include an additional allegation which related to a radio advertisement that was aired during the campaign. A hearing was held before the JQC on June 12–13, 2000, at which time the

campaign brochures and radio excerpts were the primary evidence used to support the charges. The JQC found Judge Kinsey guilty or guilty in part of nine ethical violations

During Judge Kinsey's judicial campaign, she distributed numerous pamphlets which depicted a very "pro-law enforcement" stance. In charge 1, Kinsey disseminated a brochure which showed a full-page picture of her standing with ten heavily armed police officers and was captioned "Who do these guys count on to back them up?" Within the flyer, she stated, "[Y]our police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals where they belong . . . *behind bars!*"

Charge 2 is based upon another flyer entitled "*If you are a criminal, you probably won't want to read this!*" In this leaflet, she again stressed, "[Y]our police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals where they belong . . . *behind bars!*" The brochure also declared, "Above all else, Pat Kinsey identifies with the victims of crime."

A brochure entitled "*Let's Elect Pat Kinsey*" is the basis behind charge 3. In this leaflet, she informed the voting public that she believes, "We must support our hard-working law enforcement officers by putting criminals behind bars, not back on our streets."

Charge 5, which is drawn from the six brochures and a radio interview, asserts that Judge Kinsey deliberately attempted to cloak her campaign "in an umbrella of law enforcement." In a flyer entitled "*The Alternative for County Judge,*" she stated, "Pat Kinsey will support our valiant law enforcement officers . . . not make their job harder." She also declared in this literature that, "Pat Kinsey will bend over backward to ensure that honest, law-abiding citizens are not victimized a second time by the legal system that is supposed to protect them." This charge also refers to statements in a brochure entitled "*A Vital Message From Law Enforcement,*" which declared, "victims have a right to expect judges to protect them by denying bond to potentially dangerous offenders."

Although some of these charges taken in isolation would not violate the judicial canons, taken together it becomes clear that Judge Kinsey was running on a platform which stressed her allegiance to police officers. Each of the charges addressed above involved implicit pledges that if elected to office, Judge Kinsey would help law enforcement. Through these statements, Judge Kinsey fostered the distinct impression that she harbored a prosecutor's bias and police officers could expect more favorable treatment from her as she promised to support police officers and help them put criminals behind bars. She also made pledges to victims of crime, promising to bend over backward for them and stressing the point that she identified with them "above all else," thus giving the appearance that she was already committed to according them more favorable treatment than other parties appearing before her. By disseminating materials which promised a different treatment based on the identity of the person appearing before her, it is beyond question that these promises

affect her appearance of impartiality and fitness as a judge. While our judicial code does not prohibit a candidate from discussing his or her philosophical beliefs, in the campaign literature at issue Judge Kinsey pledged her support and promised favorable treatment for certain *parties and witnesses* who would be appearing before her (i.e., police and victims of crime). Criminal defendants and criminal defense lawyers could have a genuine concern that they will not be facing a fair and impartial tribunal. We do not find that these types of pledges and statements by a judicial candidate are protected by the First Amendment.

The panel found that based on the violations of the canons as addressed above, Judge Kinsey engaged in conduct unbecoming a candidate for a judicial post and brought the judiciary into disrepute by conveying the false and misleading impression of the judge's role, particularly in the handling of criminal cases. We agree. Judge Kinsey's campaign materials gave the misleading impression that a judge's role in criminal proceedings is to combat crime and support police officers as opposed to being an impartial tribunal where justice is dispensed without favor or bias.

Discipline

We next turn to the appropriate sanction for Judge Kinsey's misconduct. The JQC found that Judge Kinsey was guilty of serious violations and that a public reprimand alone was insufficient; accordingly, the JQC recommended that Judge Kinsey be publicly reprimanded and fined in the amount of $50,000 plus the costs of these proceedings. The amount of the fine represented approximately 50% of her yearly salary, or in other words, a six-month suspension without pay (which was the other option that the JQC considered imposing).

We agree with the JQC that Judge Kinsey is guilty of serious campaign violations that warrant a severe penalty. Accordingly, this Court agrees with the JQC's recommendation as to discipline and finds that a substantial fine is warranted in order to assure the public that justice is dispensed in a fair and unbiased manner and to warn any future judicial candidates that this Court will not tolerate improper campaign statements which imply that, if elected, the judicial candidate will favor one group of citizens over another or will make rulings based upon the sway of popular sentiment in the community.

* * *

Topics for Further Discussion

1. In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the U.S. Supreme Court considered a statute that prohibited a judicial candidate from "announc[ing] his or her views on disputed legal or political issues." A candidate for the state supreme court had criticized several of that court's decisions. The U.S. Supreme Court struck the law down as an unconstitutional infringement of freedom of speech. The Florida Supreme Court, in the *Kinsey* case, distinguished the Florida law from that involved in *White*.

Recusal

Judges who have a personal interest in a matter coming before them are obligated to step down and to transfer the case to a different judge. For example, a judge owning stock in a corporation is not permitted to handle a case concerning that company. When a judge voluntarily removes himself from a case it is called a recusal. Parties are also permitted to make a motion to remove a judge whom they believe to be prejudiced or otherwise unfit to preside over the case. The motion is not always successful as can be seen from the following opinion.

Cheney v. U.S. Dist. Court for Dist. of Columbia

124 S. Ct. 1391 (2004)

Memorandum of Justice Scalia

I have before me a motion to recuse in these cases consolidated below. The motion is filed on behalf of respondent Sierra Club. The other private respondent, Judicial Watch, Inc., does not join the motion and has publicly stated that it "does not believe the presently-known facts about the hunting trip satisfy the legal standards requiring recusal." Since the cases have been consolidated, however, recusal in the one would entail recusal in the other.

I

The decision whether a judge's impartiality can "'reasonably be questioned'" is to be made in light of the facts as they existed, and not as they were surmised or reported. The facts here were as follows: For five years or so, I have been going to Louisiana during the Court's long December–January recess, to the duck-hunting camp of a friend whom I met through two hunting companions from Baton Rouge, one a dentist and the other a worker in the field of handicapped rehabilitation. The last three years, I have been accompanied on this trip by a son-in-law who lives near me. Our friend and host, Wallace Carline, has never, as far as I know, had business before this Court. He is not, as some reports have described him, an "energy industry executive" in the sense that summons up boardrooms of ExxonMobil or Con Edison. He runs his own company that provides services and equipment rental to oil rigs in the Gulf of Mexico.

During my December 2002 visit, I learned that Mr. Carline was an admirer of Vice President Cheney. Knowing that the Vice President, with whom I am well acquainted (from our years serving together in the Ford administration), is an enthusiastic duck-hunter, I asked whether Mr. Carline would like to invite him to our next year's hunt. The answer was yes; I conveyed the invitation (with my own warm recommendation) in the spring of 2003 and received an acceptance (subject, of course, to any superseding demands on the Vice President's time) in the summer. The Vice President said that if he did go, I would be welcome to fly down to Louisiana with him. (Because of national security requirements, of course, he must fly in a Government plane.) That invitation was later extended — if space was

available — to my son-in-law and to a son who was joining the hunt for the first time; they accepted. The trip was set long before the Court granted *certiorari* in the present case, and indeed before the petition for *certiorari* had even been filed.

As it turned out, I never hunted in the same blind with the Vice President. Nor was I alone with him at any time during the trip, except, perhaps, for instances so brief and unintentional that I would not recall them — walking to or from a boat, perhaps, or going to or from dinner. Of course we said not a word about the present case. The Vice President left the camp Wednesday afternoon, about two days after our arrival. I stayed on to hunt (with my son and son-in-law) until late Friday morning, when the three of us returned to Washington on a commercial flight from New Orleans.

II

Let me respond, at the outset, to Sierra Club's suggestion that I should "resolve any doubts in favor of recusal." That might be sound advice if I were sitting on a Court of Appeals. There, my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different: The Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case. Thus, as Justices stated in their 1993 Statement of Recusal Policy: "[W]e do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage. Even one unnecessary recusal impairs the functioning of the Court." Moreover, granting the motion is (insofar as the outcome of the particular case is concerned) effectively the same as casting a vote against the petitioner. The petitioner needs five votes to overturn the judgment below, and it makes no difference whether the needed fifth vote is missing because it has been cast for the other side, or because it has not been cast at all.

Even so, recusal is the course I must take — and will take — when, on the basis of established principles and practices, I have said or done something which requires that course. I have recused for such a reason this very Term. See *Elk Grove Unified School District v. Newdow*, 124 S.Ct. 384 (*cert.* granted, Oct. 14, 2003). I believe, however, that established principles and practices do not require (and thus do not permit) recusal in the present case.

A

My recusal is required if, by reason of the actions described above, my "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Why would that result follow from my being in a sizable group of persons, in a hunting camp with the Vice President, where I never hunted with him in the same blind or had other opportunity for private conversation? The only possibility is that it would suggest I am a friend of his. But while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it

has traditionally not been a ground for recusal where official action is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer.

A rule that required Members of this Court to remove themselves from cases in which the official actions of friends were at issue would be utterly disabling. Many Justices have reached this Court precisely because they were friends of the incumbent President or other senior officials — and from the earliest days down to modern times Justices have had close personal relationships with the President and other officers of the Executive. John Quincy Adams hosted dinner parties featuring such luminaries as Chief Justice Marshall, Justices Johnson, Story, and Todd, Attorney General Wirt, and Daniel Webster. Justice Harlan and his wife often "'stopped in'" at the White House to see the Hayes family and pass a Sunday evening in a small group, visiting and singing hymns. Justice Stone tossed around a medicine ball with members of the Hoover administration mornings outside the White House. Justice Douglas was a regular at President Franklin Roosevelt's poker parties; Chief Justice Vinson played poker with President Truman.

III

The core of Sierra Club's argument is as follows: "Sierra Club makes this motion because . . . damage [to the integrity of the system] is being done right now. As of today, 8 of the 10 newspapers with the largest circulation in the United States, 14 of the largest 20, and 20 of the 30 largest have called on Justice Scalia to step aside. . . . Of equal import, there is no counterbalance or controversy: not a single newspaper has argued against recusal. Because the American public, as reflected in the nation's newspaper editorials, has unanimously concluded that there is an appearance of favoritism, any objective observer would be compelled to conclude that Justice Scalia's impartiality has been questioned. These facts more than satisfy Section 455(a), which mandates recusal merely when a Justice's impartiality "might reasonably be questioned.'"

The implications of this argument are staggering. I must recuse because a significant portion of the press, which is deemed to be the American public, demands it. The motion attaches as exhibits the press editorials on which it relies. Many of them do not even have the facts right.

V

Since I do not believe my impartiality can reasonably be questioned, I do not think it would be proper for me to recuse. That alone is conclusive; but another consideration moves me in the same direction: Recusal would in my judgment harm the Court. If I were to withdraw from this case, it would be because some of the press has argued that the Vice President would suffer political damage if he should lose this appeal, and if, on remand, discovery should establish that energy industry representatives were *de facto* members of NEPDG — and because some of the press has elevated that possible political damage to the status of an impending stain on the reputation and integrity of the Vice President. But since political damage often

comes from the Government's losing official-action suits; and since political damage can readily be characterized as a stain on reputation and integrity; recusing in the face of such charges would give elements of the press a veto over participation of any Justices who had social contacts with, or were even known to be friends of, a named official. That is intolerable.

* * *

As in the *Cheney* case, the judge whose impartiality is in question makes the decision as to whether she should opt out. That is what happened initially in a case heard in the Supreme Court of Appeals of West Virginia. Judges of the West Virginia Court are elected. Blankenship, the president of the defendant coal company, spent $3 million to support the campaign of a candidate, Benjamin, knowing that the case would reach that court on appeal. The trial court jury had returned a damage award of $50 million against the company.

The candidate Blankenship supported was elected and, when the case did come before the court, he declined to recuse himself. He turned out to be one of the members of a 3–2 majority that reversed the lower court judgment. The plaintiff, Caperton, then sought relief in the Supreme Court of the United States for what he contended was a violation of Due Process.

Caperton v. A.T. Massey Coal Co.

129 S.Ct. 2252 (2009)

Kennedy, J.

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, 273 U. S. 510 (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 "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." The Federalist No. 10, p. 59 (J. Cooke ed. 1961) (J. Madison). 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."

This problem arises in the context of judicial elections, a framework not presented in the precedents we have reviewed and discussed.

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.

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 fact-finding 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." 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."

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 — "offer 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.

* * *

Topics for Further Discussion

1. In the *Cheney* case, the Sierra Club sought to compel Vice President Cheney to produce documents regarding meetings that were allegedly held in his office with various energy officials. The implication was that the Vice President was improperly engaged in helping his former industry colleagues. Do you agree with Justice Scalia that imposing a "no-friend" rule on the Court would be unreasonable?

2. What if Justices socialize with persons who make a concerted effort to befriend them because of an interest in issues of public concern before the Court such as the scope of religious freedom or women's right to abortion, rather than any financial interest? What if those persons make large contributions to charities such as the Supreme Court Historical Society?

3. According to Justice Scalia, what are the standards for recusal of Supreme Court Justices? How about for the judges of other courts? Are these different from the standards the Court subsequently put forth in *Caperton*? The administrative law aspects of the *Cheney* case are discussed further in Chapter 12.

4. What is the likely result in a world where (based upon *Republican Party of Minnesota v. White*) judges campaigning for election have First Amendment rights to express their views on disputed legal and political issues, and (based upon *Caperton v. A.T. Massey Coal Co.*) parties have a Due Process right to an unbiased tribunal?

Key Terms and Concepts

Attorney-Client Privilege
Chinese Wall
Conflict of Interest
Disbarment
Model Code of Judicial Conduct
Model Code of Professional Responsibility
Model Rules of Professional Conduct
Recusal
Retainer
Statute of Limitations