NEMO IUDEX IN CAUSA SUA: HOW THE CONTEMPT POWER PERMITS ACTS OF JUDICIAL RETRIBUTION

*Frank Bencomo-Suarez**

"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."[1]

I. INTRODUCTION

In December 2019, a state trial judge found the mother of a defendant in direct criminal contempt of court and sentenced her to thirty days incarnation in the county jail.[2] The mother had attempted to plead for her son and expressed to the judge, "I don't know how you sleep at night."[3] For this one, direct comment, the judge summarily sentenced the mother to thirty days of incarceration for direct criminal contempt.[4] The Kentucky Court of Appeals described various levels of contempt—petty, serious, or somewhere in between—and found that Stokes' behavior constituted the *least* severe level.[5] However, even dealing with the least severe level of contempt, the appellate court still found a thirty-day period of incarceration to be within the discretion of the trial court and refused to disturb the sentence.[6] Such a severe sentence has both direct and collateral consequences for the contemnor. In jail, she cannot provide emotional support or financial support for her family because she will lose her job due to a continued absence. The Kentucky Supreme Court denied the motion for discretionary review of the case.[7]

Because trial courts have "broad discretion" to exercise their contempt powers, appellate courts tend to defer to those trial decisions.[8] Contempt

---

* J.D., University of Louisville Brandeis School of Law, 2023; BA in Political Science, University of Louisville College of Arts and Sciences, 2018. The author thanks Professor Leslie W. Abramson for his invaluable aid and guidance in writing this note. Furthermore, the author would like to thank his family starting with his parents, Maria Suarez and Modesto Bencomo, whose love, sacrifice, and support has been the bedrock foundation of any success I have achieved in this life. To my brother, Amar Korac, thank you for always listening to my legal rants around the billiards table. Finally, to my beloved wife Miranda Bencomo, thank you for the unwavering love, encouragement, and support you have bestowed upon me throughout my challenging journey of three years in law school. Your presence by my side has been an irreplaceable source of strength and inspiration.

[1] THE FEDERALIST NO. 10, at 59 (James Madison) (Jacob Cooke ed., 1961).

[2] Stokes v. Commonwealth, No. 2019-CA-1845-MR, 2021 Ky. App. Unpub. LEXIS 217, at *2 (Ct. App. Apr. 16, 2021).

[3] *Id.* at *1.

[4] *Id.* at *2.

[5] *Id.* at *4.

[6] *Id.* at *7–8.

[7] Stokes v. Commonwealth, No. 2021-SC-0323-D, 2022 Ky. LEXIS 103 (Mar. 16, 2022).

[8] Cary v. Pulaski Co. Fiscal Ct., 420 S.W.3d 500, 520 (Ky. App. 2013).

orders are reviewable for an abuse of discretion; in other words, whether the trial court's action was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles."[9] A trial court abuses its discretion only when its decision rests on an error of law such as the application of an erroneous legal principle or a *clearly* erroneous factual finding, or if its decision cannot square with the range of permissible decisions allowed by a "correct" application of the facts to the law.[10] These observations apply to any judge, state or federal.[11]

It is an essential component of equal justice under the law that judges be neutral to the proceedings before them.[12] Public confidence in the system is eroded when judges have an interest in the parties, attorneys, or subject matter of the litigation.[13] A clear conflict arises, then, when judges may punish "contemptible" behavior that offends them, regardless of the contemnor's intent, as the rules of criminal procedure permit the court to punish direct criminal contempt summarily (without a trial).[14] The maximum summary sentence that can be given under precedent is a six-month incarceration and/or a fine of up to $1,000.[15] Many jurisdictions do not have rules of procedure regarding contempt.[16] Instead, contempt is often left as a common law creation for a judge to apply when necessary to maintain order in the court.[17] Therefore, standards for what constitutes direct criminal contempt in American courtrooms are unclear and often left to the individual judge.[18]

Part II of this Note will discuss the history of the direct criminal contempt power in American jurisprudence with a focus on the objectives behind it. Part III will discuss the issue of how the direct criminal contempt power may conflict with due process when applied to situations where the judge believes that a person in the courtroom has personally or verbally attacked her. Part IV of this Note will propose that the ABA add a rebuttable presumption to Rule 2.11[19] of the *Model Code of Judicial Conduct* (CJC) requiring the mandatory recusal of judges when punishing behavior that is reasonably

---

[9] Buddenberg v. Buddenberg, 304 S.W.3d 717, 722 (Ky. App. 2010).

[10] Miller v. Eldridge, 146 S.W.3d 909, 915 n.11 (Ky. 2004).

[11] Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. Pa. L. Rev. 703, 705 (2016).

[12] Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 NEB. L. REV. 1046, 1046 (1993).

[13] *Id.*

[14] FED. R. CRIM. P. 42(b).

[15] Blanton v. N. Las Vegas, 489 U.S. 538, 542, 544 (1989).

[16] Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power. Part One: The Conflict Between Advocacy and Contempt*, 65 WASH. L. REV. 477, 488–89 (1990).

[17] *Id.* at 487–88.

[18] Peter A. Joy, *Judges' Misuse of Contempt in Criminal Cases and Limits of Advocacy*, 50 LOY. U. CHI. L. J. 907, 922 (2020).

[19] MODEL CODE OF JUD. CONDUCT CANON 2.11 (AM. BAR ASS'N 2007).

believed to be aimed at a judge personally or reasonably would involve/offend their personal feelings. Both CJC Rule 2.11 and 28 U.S.C. § 455 use similar language to cover the situations in which justices, judges, or magistrate judges should disqualify themselves.[20] For the purpose of this Note, changes and commentary proposed will be framed as applying to Rule 2.11 as it is the broader of the two, but proposed changes and commentary should apply to both. Alternatively, this Note proposes additions to 28 U.S.C. § 144 to grant relief to contemnors in the aforenoted situation.

II. BACKGROUND

In this part, I will provide the background for the rest of the paper. I will begin with providing specific background information on the contempt power and then focusing on judicial disqualification

A. Background on the Contempt Power

Many see the power of judges to hold those in their courtroom in contempt as an expression of their authority to maintain order.[21] Its pervasive—and often unquestioned—nature means that there are few statistical accounts of just how common it is in the American legal system.[22] However, the potential for this power to facilitate acts of judicial overreach and, at times, retaliation, is well documented.[23] For example, in the infamous trial of the Chicago Seven, Judge Hoffman used the contempt power to interfere in the proceedings and to harass the defendants and their counsel.[24]

The concept of "contempt of court" has existed since the 12th century under common law.[25] The Judiciary Act of 1789 gave federal courts the power "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before" them.[26] In the early 1800s, this led to the contempt power going "essentially unchecked[,]"[27] with

---

[20] *See id.*; 28 U.S.C.S. § 455.

[21] United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812).

[22] For one of the few statistical analyses, *see* Timothy Davis Fox, *Right Back "In Facie Curiae"—A Statistical Analysis of Appellate Affirmance Rates in Court-Initiated Attorney-Contempt Proceedings*, 38 U. MEM. L. REV. 1 (2007).

[23] *See, e.g.*, Stephen Lubet, *Bullying from the Bench*, 5 GREEN BAG 2D 11, 12 (2001); Douglas R. Richmond, *Bullies on the Bench*, 72 LA. L. REV. 325, 330 (2012); Abbe Smith, *Judges as Bullies*, 46 HOFSTRA L. REV. 253, 256 (2017).

[24] *See* Joy, *supra* note 18, at 909.

[25] JOHN C. FOX, THE HISTORY OF CONTEMPT OF COURT: THE FORM OF TRIAL AND THE MODE OF PUNISHMENT 46 (1972).

[26] Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83 (1789).

[27] Joy, *supra* note 18, at 921.

no caselaw that limited the exercise of the court's contempt power appearing in any account of the early history of contempt in the United States.[28] Beginning in the mid-1800s, courts held that judicial contempt powers were inherent and thus were immune from legislative limitations.[29] During this period, courts ruled that legislatures could regulate the exercise of, but could not abridge, the express or implied powers granted to the courts by the Constitution because doing so would violate the separation of powers.[30] Thus, a legislature deciding to sanction the power of the judiciary to punish contempt by the usage of a *prohibitory* feature was to be regarded as "nothing more than the expression of a judicial opinion of the Legislature" on the judiciary, and therefore not binding on the courts.[31]

In 1933, Congress authorized the Supreme Court to prescribe rules of criminal appellate procedure which included any proceedings after the entry of a verdict or plea.[32] This resulted in support for a more complete set of rules for criminal procedure and ultimately led to the Rules Enabling Act.[33] This statute grants the Supreme Court primary authority for creating and amending federal rules of procedure, but also delegates congressional oversight of the rulemaking process.[34] The Supreme Court adopted the Federal Rules of Criminal Procedure (FRCP) in 1944.[35] Rule 42(b) deals with summary disposition in cases of direct criminal contempt and specifies:

> [N]otwithstanding any other provision of these rules, the court (other than a magistrate judge) may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies; a magistrate judge may summarily punish a person as provided in 28 U.S.C. § 636(e).[36]

18 U.S.C. § 401(1), adopted in 1948, states, "A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice."[37]

---

[28] Raveson, *supra* note 16, at 486 n.30.

[29] *See, e.g.*, State v. Morrill, 16 Ark. 384, 389 (1855); Bradley v. State, 111 Ga. 168, 36 S.E. 630 (1900); Clark v. Austin, 340 Mo. 467, 101 S.W.2d 977 (1937); State ex rel. Crow v. Shepherd, 177 Mo. 205 (1903).

[30] *See, e.g., Morrill*, 16 Ark. at 390; *Austin*, 340 Mo. at 467.

[31] *Morrill*, 16 Ark. at 391.

[32] Act of Feb. 24, 1933, Pub. L. No. 371, 47 Stat. 904 (codified as amended at 18 U.S.C. § 3772).

[33] 28 U.S.C.S. §§ 2071–77 (1988).

[34] *Id.*

[35] *Current Rules of Practice & Procedure*, U.S. CTS., https://www.uscourts.gov/rules-policies/current-rules-practice-procedure [https://perma.cc/2VGU-FU85] (last visited Feb. 5, 2023).

[36] FED. R. CRIM. P. 42(b).

[37] 18 U.S.C.S. § 401(1).

While conduct that violates § 401 is a crime, Rule 42(b) of the FRCP provides the expedited summary deposition procedure when the Court addresses conduct that violates § 401.[38] Rule 42(b) reflects the reality that contemptuous acts occurring in the courtroom may require an immediate response from the judge both to preserve the dignity of the court and to maintain order in the courtroom.[39] Accordingly, Rule 42(b) is purposefully streamlined. Courts should reserve summary contempt "for 'exceptional circumstances' which include acts threatening the judge or disrupting a hearing or obstructing court proceedings."[40] Courts have characterized this expansive contempt power as "a measure *necessary* for preserving this proper decorum" needed for courts to "maintain the order, dignity, and impartiality in its proceedings," which is required for fairness.[41]

Judges have persistently criticized the ability of courts to summarily punish literal or figurative speech as being incompatible with constitutional protections.[42] In a 1953 case, the Supreme Court warned judges about the potential for contempt power to be misused: "[t]rial courts no doubt must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice."[43] In a different case, six years later, the Court stated:

> [O]ne person has concentrated in himself the power to charge a man with a crime, prosecute him for it, conduct his trial, and then find him guilty. I do not agree that any such "inherent" power exists. Certainly, no language in the Constitution permits it; in fact, it is expressly forbidden by the two constitutional commands for trial by jury . . . [T]his doctrine that a judge has "inherent" power to make himself prosecutor, judge and jury seriously encroaches upon the constitutional right to trial by jury and should be repudiated.[44]

Four years later, the Court expressed that it "has long recognized the potential for abuse in exercising the summary power to imprison for

---

[38] *See* FED. R. CRIM. P. 42(b).

[39] *See Contempt of Court*, CORNELL L. SCH. (last updated July 2022), https://www.law.cornell.edu/wex/contempt_of_court [https://perma.cc/8N7F-4DXX].

[40] STEPHEN E. ARTHUR & ROBERT S. HUNTER, FEDERAL TRIAL HANDBOOK: CRIMINAL § 14:7 (2022).

[41] Paul V. Evans, *The Power to Punish Summarily for "Direct" Contempt of Court: An Unnecessary Exception to Due Process*, 5 DUKE BAR J. 155, 156 (1956).

[42] Gordon L. Walgren, Comment, *Free Speech, Due Process—and Contempt*, 32 WASH. L. REV. 47, 52 (1957).

[43] Brown v. United States, 356 U.S. 148, 153 (1958).

[44] United States v. Barnett, 376 U.S. 681, 726 (1964).

contempt—it is an arbitrary power which is liable to abuse."[45] As for severe contempt punishments, the Supreme Court said, "[W]hen serious punishment for contempt is contemplated, rejecting a demand for jury trial cannot be squared with the Constitution or justified by considerations of efficiency or the desirability of vindicating the authority of the court."[46]

B. Background on Judicial Disqualification

The concept of due process is derived from the Fifth Amendment to the United States Constitution.[47] Procedural due process requires that government officials follow fair procedures, so as to prevent the deprivation of one's life, liberty, or property.[48] When the government seeks to deprive a person of one of those interests, procedural due process requires that the government afford that person notice, an opportunity to be heard, and a neutral decision-maker.[49] The Due Process Clause of the Fourteenth Amendment guarantees litigants the right to objective impartiality from state court judiciaries.[50] While aspirational, this vague standard has allowed much room for interpretation.[51] In furtherance of ensuring a neutral decision-maker, among other goals, in 1924, the House of Delegates of the American Bar Association (ABA) adopted thirty-four *Canons of Judicial Ethics*, which were adopted by the states verbatim or in a slightly amended version over the following forty-eight years.[52] "In 1972, an ABA Special Committee on Standards of Judicial Conduct chaired by California Chief Justice Roger Traynor completed three years of work and persuaded the ABA House of Delegates to adopt higher and more explicit standards of judicial conduct."[53] "The House of Delegates adopted a revised *Model Code of Judicial Conduct* in 1990[,]" and again in 2007, when the format changed, in order to parallel the ABA's Model Rules of Professional Conduct.[54]

Rule 2.11 of the 2007 *Code* describes the general standard for a judge's disqualification: "[a] judge shall disqualify himself or herself in any

---

[45] Bloom v. Illinois, 391 U.S. 194, 202 (1968) (quoting Ex Parte Terry, 128 U.S. 289, 313 (1888)).

[46] *Id.* at 208.

[47] U.S. Const. amend. V.

[48] ROBERT L. GLICKSMAN & RICHARD E. LEVY, ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT 657 (3d ed. 2020).

[49] *Id.*

[50] *See* Ward v. Village of Monroeville, 409 U.S. 57, 61–62 (1972).

[51] Louis S. Raveson, *Advocacy and Contempt--Part Two: Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy*, 65 WASH. L. REV. 743, 755 (1990).

[52] Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned"*, 14 GEO. J. LEGAL ETHICS 55, 55 n.1 (2000).

[53] *Id.*

[54] *Id.* Any references in this Note to the *Code* will reference the 2007 CJC, but comparisons to cases prior to 2007 will reference earlier versions of the CJC. Any comparisons and recommendations are to be understood to apply to all versions of the CJC.

proceeding in which the judge's impartiality might reasonably be questioned."[55] Courts rely on this catch-all provision for analysis of alleged disqualifying judicial conduct when the circumstances of a case do not align with the factual settings described in the subsections that follow Rule 2.11(A).[56]

C. Background on Judicial Disqualification as Applied to Direct Contempt Cases

Whether a judge must be disqualified from holding another person in contempt is governed at the federal level by 28 U.S.C. § 455, which states: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[57] This language is essentially the same as that of the ABA *Code of Judicial Conduct*.[58] The Supreme Court uses § 455 as its guide except where the statutory application offends due process.[59] If the court finds an offense to due process, it will engage in a balancing of the contemnor's due process right to a wholly disinterested and impartial tribunal against the traditional, self-protective powers of a court and the need to maintain its dignity and efficacy as an instrument of the law.[60]

In several cases, the Supreme Court has held that the time of imposing punishment is a major consideration in determining whether a judge should be disqualified.[61] If judges delay imposing instant summary punishment for a contempt committed in open court, in their direct presence, and against or involving themselves, courts usually hold that disqualification is necessary where judges have become emotionally involved to a point where their objectivity might reasonably be questioned.[62] However, while this rule is beneficial for contemnors tried for contempt after a trial, it provides no protections for those who are held in contempt immediately following the contemptible act in the courtroom.

Courts have held that when it becomes necessary for a judge to protect the court's dignity and processes by the instantaneous or near-instantaneous

---

[55] MODEL CODE OF JUD. CONDUCT CANON 2.11(A) (AM. BAR ASS'N 2007).

[56] Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 REV. LITIG. 733, 776 (2011).

[57] 28 U.S.C.S. § 455(a).

[58] MODEL CODE OF JUD. CONDUCT CANON 2.11(A) (AM. BAR ASS'N 2007).

[59] Abramson, *supra* note 12, at 1055 n.35.

[60] *See, e.g.*, Mayberry v. Pennsylvania, 400 U.S. 455, 464 (1971); Taylor v. Hayes, 418 U.S. 488, 501 (1974); Greene v. Tucker, 375 F. Supp. 892, 898 (E.D. Va. 1974); Howell v. Jones, 516 F.2d 53, 59 (5th Cir. 1975).

[61] *See, e.g.*, *Mayberry*, 400 U.S. at 463–64; *Taylor*, 418 U.S. at 499 n.9.

[62] *See* Steven R. Jenkins, Note, *Mayberry v. Pennsylvania: Due Process Limitation in Summary Punishments for Contempt of Court*, 25 SW. L.J. 805, 810 (1971).

summary imposition of the contempt sanction, the fact that the judge may be the victim of the contempt—and, hence, emotionally involved to a degree ordinarily requiring disqualification for actual or apparent bias—becomes largely irrelevant.[63] A particularly well-known example is the case of *People v. Hall*, where during a meeting between the defendant, defense counsel, and the judge, the defendant struck his lawyer with a chair and hit the judge with his fist.[64] The defendant subsequently attempted to disqualify the judge at the trial level and on appeal of his death sentence.[65] The court denied the defendant's motions for disqualification under the logic that trial judges are already expected to ignore provocations and pressures; thus, to hold that the law requires a substitution of judges under circumstances similar or comparable to *Hall* would promote misconduct towards judges in order to improve the chances of avoiding a trial with an undesired judge.[66] However, other courts suggest that a judge should be disqualified from holding a person in contempt where the contempt involves an attack upon him personally.[67]

The reasonably probable bias of a judge is a question of evidence by either direct evidence that arises from a judge's own actions or words or by circumstantial evidence from the nature and degree of the contempt as it would naturally affect a person with a judicial temperament.[68] In certain situations, an attack on the judge will be taken to be so extreme and personal that, even absent tangible evidence of an actual resulting bias on the part of the judge, her disqualification will be required.[69] However, often in situations, like *People v. Hall*, judges will decide whether circumstances merit their own recusal even in situations where a reasonable person would see that no normal person, even one expected to possess a "judicial temperament," could remain unaffected, and, therefore, unbiased.[70] Judge Caisley, in denying the defendant's request that he recuse himself, stated:

> The interest of proceeding to justice, the administration of justice, requires that there be a certain element of courage to go forward and to see that justice is fairly and impartially administered, and the fact that I have been struck by the defendant is a matter that is within his control but it is a

---

[63] *See, e.g.*, People v. Hall, 499 N.E.2d 1335, 1347 (Ill. 1986); White v. White, No. 5: 02-492-KKC, 2021 U.S. Dist. LEXIS 175852 (E.D. Ky. Sep. 16, 2021); Capano v. State, 781 A.2d 556 (Del. 2001).

[64] *Hall,* 499 N.E.2d at 1339.

[65] *Id.* at 1346.

[66] *Id.* at 1347.

[67] *See, e.g.*, Cooke v. United States, 267 U.S. 517, 539 (1925); In re Kendall, No. MISC. 2009-0025, 2011 WL 3290421, at *3 (2011); United States v. Combs, 390 F.2d 426, 431 (6th Cir. 1968).

[68] *See* Patel v. Patel, 599 S.E.2d 114, 118 (S.C. 2004).

[69] Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971).

[70] *Hall*, 499 N.E.2d at 1339.

> matter within my control whether I allow that to prejudice me, and I have determined in my own mind that I shall not allow that to prejudice me in any way and that I will be completely fair and impartial in this case.[71]

This further illustrates a lack of protection for the contemnor as judges must decide themselves to be biased for a contemnor to have access to an unbiased judiciary. As the very occupation of a judge ideally is to be a neutral party, it is unlikely this will happen with enough regularity to inspire confidence in the system.[72] This derives from the fear that by recusing, judges will show themselves to be less than capable of remaining neutral.[73]

III. ANALYSIS: ALLEGED CONTEMNORS LACK NECESSARY LEGAL PROTECTIONS FROM SUMMARY CONTEMPT PROCEEDINGS BY PERSONALLY ATTACKED JUDGES IN THE COURTROOM

Many alleged contemnors have committed an offense personally and directly against the presiding judge. These alleged contemnors have often sought to raise the issue of being tried by an offended party but to no avail. Since recent cases highlight the conflict of interest that arises when a naturally biased party summarily sentences another, it is clear that protections for alleged contemnors must be broadened.

A. This Is a Routine Issue in American Jurisprudence

The issue of judges acting as arbiters and summarily punishing direct criminal contempt against a party in their courtroom is a repeated issue in our jurisprudence with a long history.[74] Although the *Model Code of Judicial Conduct* has attempted to clear up the responsibilities of judges as to when they should recuse themselves, its terms are not clearly defined and are thus open to interpretation.[75] This has permitted judges to adopt different standards about when they should recuse themselves when punishing

---

[71] *Id.* at 1347.

[72] *See* Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFFALO L. REV. 813, 833 (2009).

[73] *See, e.g.*, Letter from Antonin Scalia, Associate Justice of the Supreme Court of the United States, to David Savage, Reporter, Los Angeles Times (Jan. 16, 2004) (on file with author) (documenting Justice Scalia's response that he did not think that his "impartiality could reasonably be questioned" after going on vacation with the Vice President Dick Cheney after the Supreme Court had granted certiorari in a case in which he was involved).

[74] Louis Raveson, *A New Perspective on the Judicial Contempt Power: Recommendations for Reform*, 18 HASTINGS CONST. L.Q. 1, 65 (1990).

[75] *See* Abramson, *supra* note 52, at 60–61.

contemnors attacking them directly.[76] In the case *In re Buckley*, the California Supreme Court held that it was unnecessary for the trial judge to disqualify himself from ruling on the contempt, despite the fact that it had been directed against him personally, by pointing to the traditional rule that the court has the inherent power to defend its own dignity.[77] This standard is overbroad and creates, as noted by the dissenting opinion, a danger that trivial, personal discourtesies will be met by an abusive use of the contempt power under the guise of defending the dignity of the court.[78]

Also in 1973, the Supreme Court of Pennsylvania went even further and held that summary contempt is necessary to maintain order in the courtroom, and, thus, it would be appropriate for the trial judge to preside over the imposition of the contempt punishment.[79] The court held that such would be true even if the judge had become personally embroiled in the case or had been personally attacked.[80] In such cases, the court suggested, the need to preserve order, by itself, would not only support summary disposition but would also outweigh the possibility of bias on the part of the trial judge.[81] This massive exception to due process of law creates an unconstitutional special privilege which permits the judicial branch to deprive a person of constitutional rights because a member of the judicial branch is involved. Disqualification of the judge in these scenarios, so that a more neutral arbiter can decide the issue, would be a more appropriate path forward.

In an Alabama case, a defendant remarked that the court reminded him of a Selma court from the 1960s,[82] to which the judge took offense and responded, "I find that to be disrespectful, contemptuous and insolent behavior in court . . . ."[83] Then, the judge proceeded to sentence the defendant to two days in county jail and a fine of $300.[84] The appellate court held that summary contempt was acceptable in this case due to the fact that the judge was not required to disqualify himself because the defendant's comment was not a personal attack on his character but was instead a criticism of his authority to clear the courtroom.[85]

---

[76] *Compare* In re Buckley, 10 Cal. 3d 237, 256 (1973) (holding that trial judge was not required to recuse himself because the court has the inherent power to defend its own dignity), *with* In re Estate of Elliott, 993 P.2d 474, 481 (Colo. 2000) (finding that when a judge becomes "embroiled in a running controversy" with an individual being held in contempt, she must recuse herself).

[77] *In re Buckley*, 10 Cal. 3d at 247–48.

[78] *Id.* at 264 (Mosk, J., dissenting).

[79] Commonwealth v. Patterson, 452 Pa. 457, 464 (1973).

[80] *Id.* at 463.

[81] *Id.*

[82] The defendant was referring to Selma, Alabama's history of racial discrimination in its legal system.

[83] Holland v. State, 800 So. 2d 602, 605 (Ala. Crim. App. 2000).

[84] *Id.* at 603.

[85] *Id.* at 605.

In some cases, courts have opposed the idea that an insulted judge should remain presiding over a case without disqualification. In *Mayberry v. Pennsylvania*, a judge was subjected to insults such as "dirty sonofabitch," "dirty tyrannical old dog," "stumbling dog," and "fool," charged with running a "Spanish Inquisition," and told to "go to hell" and to "keep your mouth shut."[86] Under these circumstances, the Supreme Court held that it was impossible for the judge to have retained the total neutrality and objectivity necessary for the conduct of later, formalized contempt proceedings because insults of the kind recorded were prone to strike at the most vulnerable and human qualities of a judge's temperament.[87] In the case of *In re Estate of Elliot*, the Supreme Court of Colorado held that when a judge becomes embroiled in a "running controversy" with an individual being held in contempt, it becomes necessary for that judge to recuse herself and permit another judge to adjudicate the issue of contempt.[88] Remanding both of these trials for contempt to another judge protected the contemnor's due process rights and preserved the appearance of evenhanded justice which is at the core of due process. Otherwise, any sentence from the judge, who was a victim of abuse themselves, would appear to be biased against the respective defendants.

If the goal of the *Model Code* and its parallels at the federal and state level "is to avoid even the appearance of partiality[,]"[89] then this open approach fails. To the public, particularly in contempt cases where emotions can run high, the fact that judges can decide whether they will punish contempt summarily will always call the partiality of the judge into question and, by extension, that of the judiciary as a whole.[90] As Justice Manderino noted in his dissent in *Commonwealth of Pennsylvania v. Patterson*, this ability is a vestige of earlier practices during the 1600s in Britain and exceeds the exercise of constitutional judicial authority:

> Would we permit a person who is a witness to a crime to file a complaint, take the witness stand at the trial, receive immunity from cross-examination, get off the witness stand and jump into the judge's chair, make a final decision and impose punishment? Constitutional law prohibits such a practice. It does so for judges as well as all other citizens.[91]

---

[86] Mayberry v. Pennsylvania, 400 U.S. 455, 466 (1971).

[87] *Id.*

[88] In re Estate of Elliott, 993 P.2d 474, 481 (Colo. 2000).

[89] Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 860 (1988) (quoting Health Servs. Acquisition Corp. v. Liljeberg, 796 F.2d 796, 802 (5th Cir. 1986)).

[90] *See* People v. T & C Design, Inc., 680 N.Y.S.2d 832, 977 (Just. Ct. 1998) ("If a [j]udge is passing upon a question of his or her own recusal, then he or she is creating an appearance of impropriety by that act alone . . .").

[91] Commonwealth v. Patterson, 452 Pa. 457, 466 (1973) (Manderino, J., dissenting).

While obstructing the proceedings of a court is a serious offense, judges must balance the means by which they go after contempt with the constitutional protections afforded to defendants in American courtrooms.

B. Current Standards for Disqualification Do Not Include Vulnerable Contemnors

In this part I will begin by discussing the objective standard which is the standard used by the majority of state courts to measure whether a judge's impartiality might be questioned. Then I will discuss the Offutt rule and the weakness and limitation that these protections afford those before the court.

1. Objective Standard

The standard used by the majority of state courts to measure whether a judge's impartiality might be questioned is the objective standard.[92] The objective standard asks how things appear to the well-informed and thoughtful observer.[93] The objective standard is less concerned with whether the judge actually has any partiality and more with the specific question of whether a reasonable person observing the trial believes the judge to be biased towards one side.[94] In cases where judges are biased, they should presumably either move to recuse themselves *sua sponte* or the party suffering the weight of bias should have grounds on appeal to argue for a reversal and remand.[95]

As a practical matter, however, judges often function as the sole evaluator of their own impartiality.[96] Several courts have even backed the idea that judges are in the best or only position to decide whether their recusal is necessary.[97] Furthermore, in the fairly narrow majority of states, the decision of whether to recuse is within the discretion of the challenged judge.[98] However, it can be extremely difficult for judges to assess their own

---

[92] Abramson, *supra* note 52, at 71.

[93] In re Mason, 916 F.2d 384, 386 (7th Cir. 1990).

[94] *Id.*

[95] *See* Abramson, *supra* note 52, at 70.

[96] In re Murphy, 626 N.E.2d 48, 50 (N.Y. 1993).

[97] *See* State v. Jones, 979 S.W.2d 171, 178 (Mo. 1998) (judge "is in the best position to decide whether recusal is necessary"); *see also* Lawson v. State, 664 N.E.2d 773, 781 (Ind. Ct. App. 1996) (whether a circumstance has "any impact upon the judge's impartiality . . . is a question only the trial judge can answer").

[98] Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 545 (1994).

impartiality.[99] Judges, after all, are humans, and psychologists have shown that individuals experience an illusion of objectivity wherein they believe they are more objective, ethical, and fair than others.[100] Individuals can also experience a "bias blind spot:" the tendency to see bias in others but not in themselves.[101] Judges will "use introspection to acquit [themselves] of accusations of bias, while using realistic notions of human behavior to identify bias in others."[102] These tendencies will naturally be at their worst when a contemnor attacks a judge's personal values and will undermine the notion that a reasonable person could not possibly question the impartiality of the judge in that specific situation.

The extrajudicial source rule further enables judges to avoid recusal if the alleged disqualifying conduct occurred while they were performing their duties as judges as opposed to being off the bench.[103] This doctrine is meant to limit judges to only using observations they make while in the courtroom rather than personal information or preferences.[104] However, since such a rule broadly protects judges from having to recuse themselves when the court witnesses the contemnors' actions, it often provides no protections for alleged contemnors like Ms. Stokes.

2. The Offutt Rule

Another way of determining if judges should recuse themselves is the *Offutt* rule—judges must turn contempt adjudications over to colleagues if they are personally embroiled in disputes with the person accused of contempt.[105] On its face, the *Offutt* rule would appear to provide strong protections for contemnors from being tried summarily by a judge whom they have personally attacked.[106] However, the *Offutt* rule is inapplicable if the judge is acting under the portion of the contempt rule providing for summary adjudication immediately after the contempt is committed, "out of necessity to prevent obstruction of a proceeding."[107] One might argue that, because judges cover for each other, the *Offutt* Rule becomes functionally

---

[99] Jennifer K. Robbennolt & Matthew Taksin, *Can Judges Determine Their Own Impartiality?*, AM. PSYCH. ASS'N (Feb. 2010), https://www.apa.org/monitor/2010/02/jn#:~:text=Comment%3A,merits%2C%20without%20prejudice%20or%20preconception. [https://perma.cc/P2F8-695G].

[100] *Id.*

[101] *Id.*

[102] RICHARD A. POSNER, HOW JUDGES THINK 121 (2008).

[103] Johnson v. Trueblood, 629 F.2d 287, 290–91 (3d Cir. 1980).

[104] United States v. Balistrieri, 779 F.2d 1191, 1199 (7th Cir. 1985).

[105] Offutt v. United States, 348 U.S. 11, 14 (1954).

[106] *See id.* at 13.

[107] In re Appeal of Duckman, 2006 VT 23, ¶ 29, 179 Vt. 467, 482, 898 A.2d 734, 747.

worthless.[108] Viewing the issue from another perspective, it may also be argued that in a one-judge town, it takes too long to have a state supreme court appoint a judge from elsewhere to decide the issue.[109] Due to these limitations, the *Offutt* rule functions more as a recommendation to be followed at the will of a judge rather than as a hardline rule. The *Offutt* rule is further subject to abuse since judges that are personally embroiled in a continuing conflict with an alleged contemnor may simply refuse to recuse themselves and carry on with the trial.[110]

3. As Applied

Neither of these standards would have provided clear due process protection for the contemnor in *Stokes*. The case involved a back-and-forth dispute between Ms. Stokes and Judge Eggert, with Ms. Stokes ultimately questioning how the judge could sleep at night and the judge, in turn, accusing her of "causing such a ruckus."[111] During trial, the judge questioned the lifestyle Ms. Stokes was providing for her child, the defendant, in the home, stating, "I don't know what's going on in your home, but you are not getting sufficient support to stop committing extremely serious crimes involving guns."[112] Upon the conclusion of the trial, when the defendant was sentenced to five years of incarceration, Ms. Stokes exclaimed to the judge, "I don't know how you all sleep at night."[113] Following this statement, the judge ordered that Ms. Stokes be taken into custody and told her, "You need to control yourself, and you're causing a lot of problems for your kid, now you're causing 'em for yourself."[114] Following that, the judge proceeded to criticize Ms. Stokes' parenting skills and declared her subsequent apologies to be insincere.[115] Under the *Offutt* rule, the judge in *Stokes* seemingly should have turned the contempt adjudication over to a colleague, having become personally embroiled in a dispute with the one accused of contempt. However, because the summary sentence was immediate, the *Offutt* rule

---

[108] Andrew Wolfson, *Judge Cites 'Expletive Laden' Tirade for Jailing Suspect's Mom. Video Shows It Didn't Happen*, COURIER JOURNAL (May 6, 2022), https://www.courier-journal.com/story/news/crime/2022/05/06/judge-vs-video-did-moms-expletive-laden-tirade-really-happen/9664621002.

[109] *Id.*

[110] *See* Teresa S. Hanger, Note, *The Modern Status of the Rules Permitting a Judge to Punish Direct Contempt Summarily*, 28 WM. & MARY L. REV. 553, 579 (1987).

[111] Stokes v. Commonwealth, No. 2019-CA-1845-MR, 2021 Ky. App. Unpub. LEXIS 217, at *1 (Ct. App. Apr. 16, 2021).

[112] Wolfson, *supra* note 108.

[113] *Stokes,* 2021 Ky. App. Unpub. LEXIS 217, at *1.

[114] Wolfson, *supra* note 108.

[115] *Id.*

excepts it due to the "necessity to prevent obstruction of a proceeding."[116] The reality is that, when the court is formally in session, the judge directs all actions in the courtroom.[117] Thus, the *Offutt* rule provides no relief in these situations.

Furthermore, remarks on Ms. Stokes' parenting skills and her son's homelife were biased comments which the judge did not derive from evidence or the parties' conduct that she had observed in the course of proceedings. These were personal attacks of the nature which should have allowed Ms. Stokes recourse but failed to provide such.

The objective standard asks if, in this case, a reasonable person observing the trial and knowing what judges are called to do, would believe the judge to be biased towards or against Ms. Stokes.[118] Given the question Ms. Stokes asked and the judge's remarks towards her parenting, "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."[119] Furthermore, the objective standard does not require proof of actual bias, so the inquiry is not whether the judge is actually biased but whether the average judge in his position is likely to be neutral or if there is an unconstitutional "potential for bias."[120] In short, to follow the goal of the CJC "to avoid even the appearance of partiality[,]"[121] this case should have been transferred to another judge; however, that clearly did not happen. As neither standard protects contemnors like Stokes from finding themselves before a prejudiced judge, firmer protections are needed.

4. Courts Will Be Unlikely to Limit Themselves

As applied to the *Stokes* case, both the objective standard and the *Offutt* test have systemic shortcomings which prevent the guarantee of the necessary due process protections for contemnors who have directly attacked a judge. When it comes to the objective standard, a major problem in implementation is that judges work within a system that prompts them to be mindful of meeting professional standards and protecting a reputation as it pertains to

---

[116] In re Appeal of Duckman, 2006 VT 23, ¶ 29, 179 Vt. 467, 482, 898 A.2d 734, 747.

[117] *See* Jona Goldschmidt, *"Order in the Court!": Constitutional Issues in the Law of Courtroom Decorum*, 31 HAMLINE L. REV. 1, 25 (2008).

[118] In re Mason, 916 F.2d 384, 386 (7th Cir. 1990).

[119] Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 883–84 (2009) (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

[120] Commonwealth v. Patterson, 452 Pa. 457, 463 (1973) (quoting Ungar v. Sarafite, 376 U.S. 575, 584 (1964)).

[121] Abramson, *supra* note 12, at 1048 n.5.

maintaining their status and position as a judicial figure.[122] Explained differently, to be a judge is an inherently social position – one wherein you may be elected and/or appointed based on reputation and image. As such, judges who are asked to recuse themselves may hesitate to do so, out of fear of appearing less than professional, and judges acting as reviewers of others may feel uncomfortable calling into question their colleagues for fear of offending them.[123] This means that, effectively, the standard for impropriety can often become a demand for proof of actual impropriety.[124] This leaves contemnors in the impossible position of having to prove what is in the mind of a judge to the judiciary.

5. The Lack of Protections for Contemnors Contrasts with Other Protections

With no standards providing clear relief in these situations and courts unlikely to limit themselves in the context of punishing personal contempt, the problem of addressing misuse of the contempt power stands in stark contrast to others. Courts are firm in that judges should be disqualified when they have personal biases or prejudices concerning a party,[125] when they have served as lawyers in the matter in controversy,[126] and when a family member within the second degree of a judge appears before the court or is a material witness in the proceeding.[127] Courts are also firm in that judges must recuse themselves when they have made public statements that commit, or appear to commit, the judges with respect to an issue in the proceeding.[128] Perhaps coincidentally, these examples align with the specific examples of disqualifying conduct found within Rule 2.11 of the *Code of Judicial Conduct*.[129] They represent per se cases when a reasonable person would objectively believe that the judge is unlikely to be fully impartial, and, in the desire for a free and fair judicial system, the *Code* has highlighted them as mandatory recusal situations.[130]

---

[122] Tom Ginsburg & Nuno Garoupa, *Reputation, Information and the Organization of the Judiciary*, 4 J. COMPAR. L. 228 (2009).

[123] Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 585–86 (2005).

[124] In re Mason, 916 F.2d 384, 386 (7th Cir. 1990).

[125] In re Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1313 (2d Cir. 1988).

[126] In re O'Connor, 92 S.W.3d 446, 448 (Tex. 2002).

[127] Thompson v. Millard Pub. Sch. Dist. No. 17, 921 N.W.2d 589, 594 (Neb. 2019).

[128] *See, e.g.*, State ex rel. McCulloch v. Drumm, 984 S.W.2d 555, 557–58 (Mo. Ct. App. 1999).

[129] MODEL CODE OF JUD. CONDUCT CANON 2.11(A)(1), (2), (6)(a) (AM. BAR ASS'N 2007).

[130] *Id.*

IV. RESOLUTION: FEDERAL AND STATE GUIDELINES SHOULD ENSURE THAT CONTEMNORS WHO HAVE PERSONALLY ATTACKED OR OFFENDED A JUDGE RECEIVE DUE PROCESS

In order to better protect contemnors who have offended or attacked the presiding judge from undue use of the contempt power which may deprive them of due process, explicit guidelines should require judicial recusal, thereby mandating a sentencing proceeding before another judge.[131] An additional subsection to Rule 2.11 of the *Code of Judicial Conduct* should provide a rebuttable presumption for recusal when contemnors have personally attacked or offended the judge. Alternatively, additions to 28 U.S.C. § 144 could serve to achieve the same goal.

A. Adding a Rebuttable Presumption of Recusal to Rule 2.11 of the Code of Judicial Conduct

The history of the *Model Code of Judicial Conduct* has been a long arc towards more explicit and precise standards of judicial conduct and has served as a foundation upon which to build when circumstances demonstrate a need for clearer guidelines.[132] The *Code* is a living document, one which the ABA House of Delegates has revised when circumstances have required.[133] Therefore, expanding Rule 2.11 of the *Model Code of Judicial Conduct* to require recusal for contemnors' proceedings is a feasible solution to the problem of contemnors facing severe sentences from judges who have become personally embroiled in a continuing conflict with them. This expansion would require only one additional subcategory under section (A) of Rule 2.11, offering needed protection for contemnors and cementing greater respect for the ability of the court to operate in an unbiased nature.

Labeled as Canon 3C(1) in the 1972 *Code*, Canon 3E(1) in the 1990 *Code*, and Rule 2.11(A) in the 2007 *Code*, the black letter principle for judicial disqualification has remained practically the same for nearly fifty years.[134] One key difference is that, under the 1972 *Code*, judges "should" disqualify themselves if questions of impartiality arise, while the 1990 and 2007 *Codes* state that judges "shall" disqualify themselves.[135] This transition

---

[131] *See, e.g.*, *id.*

[132] *See About the Commission*, ABA, https://www.americanbar.org/groups/professional_responsibility/policy/judicial_code_revision_project/background/ [https://perma.cc/T7QK-P5E6] (last visited Jan. 29, 2023).

[133] *See id.*

[134] Leslie W. Abramson, *What Every Judge Should Know About the Appearance of Impartiality*, 79 ALB. L. REV. 1579, 1583 (2016).

[135] Several decisions have ruled that "should" means the same as "shall." JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 4.02, at 4-7–4-8 (4th ed. 2007).

from vaguer and optional language to clearer and mandatory language demonstrates the arc of the *Model Code* in preserving the integrity and independence of the courts. It is such an expansion which this Note recommends.

Additions to Rule 2.11(A) should include the following language:

> <u>Recusal of a justice or judge due to personal contempt, rebuttable presumption:</u>
>
> (a) In any proceeding, on motion of a party or on its own motion, a justice or judge shall recuse himself or herself from further presiding over any aspect of the case, if, as a result of direct contempt, either of the following circumstances exists:
> 1. A reasonable person would perceive that the justice or judge's ability to carry out judicial responsibilities with impartiality is impaired; or
> 2. A serious, objective probability of actual bias by the justice or judge due to statements made by the judge regarding the contemnor during proceedings.
>
> (b) A rebuttable presumption for recusal arises if the contemnor's offending behavior is directed to the justice or judge personally, with the intent to:
> 1. Attack the integrity of the justice or judge; or
> 2. Threaten to physically harm the justice or judge.

The rebuttable presumption does not require recusal because it is rebuttable. Similarly, the absence of the rebuttable presumption does not signify that recusal is not required. This rebuttable presumption would be triggered by a prima facie showing, based on sufficient corroborating evidence, that the judge must recuse herself. For example, in *Stokes*, both Judge Audra Eckerle's comments against Ms. Stokes's parenting[136] and Ms. Stokes's response[137] would satisfy the requirements of Rule 2.11(A)(1). Since the two parties found themselves embroiled in a personal conflict, a

---

[136] Wolfson, *supra* note 108.

[137] Stokes v. Commonwealth, No. 2019-CA-1845-MR, 2021 Ky. App. Unpub. LEXIS 217, at *1 (Ct. App. Apr. 16, 2021).

reasonable person would perceive that the judge's ability to carry out her judicial responsibilities with impartiality was impaired.

The added subsection has several benefits. First, it would serve to better satisfy concerns regarding apparent bias. The current *Code* lists specific examples where a judge's impartiality *per se* might reasonably be questioned,[138] but there are no specific rules for conduct directed at the judge personally. Usually, when no specific rule exists, a party who wants to disqualify a judge may still rely on a standard based on apparent bias or the appearance of partiality, even though no provable actual bias exists.[139] Noted case law frequently holds "that the appearance of impartiality is as important as actual impartiality."[140] For this reason, a judge is expected to recuse herself when a person of ordinary prudence would find a reasonable basis for questioning the judge's impartiality.[141] Situations of contempt such as those in the aforementioned cases are moments of high emotion where personal, physical, or verbal attacks may occur.[142] Although a judge may state that she is impartial, that alone may be insufficient to ensure public confidence in the courts during these tense situations.[143] "The fact that a judge avows he is impartial does not in itself put his impartiality beyond reasonable question."[144] Imposing specific standards for personal contempt moves the situation from the vague realm of apparent bias to a codified example, saving judges from having to pronounce themselves biased and the proceedings from a denial of due process.

Secondly, the contempt power is already viewed as an exception to due process of law because a judge may unilaterally deprive a person of constitutional rights.[145] Removing a judge who becomes embroiled in a contempt dispute can increase public trust in the judiciary.[146] Furthermore, framing the rebuttable presumption against the judge ensures that this expansive power is not used except for scenarios in which no reasonable person would perceive that judicial impartiality would be impaired.

The factors to be considered would prevent a contemnor from being rewarded with the judge's recusal when the contemnor threatens or assaults

---

[138] MODEL CODE OF JUD. CONDUCT CANON 2.11(A)(1), (2), (6)(a) (AM. BAR ASS'N 2007).

[139] *See, e.g.*, People ex rel. A.G., 262 P.3d 646, 650 (Colo. 2011) ("A judge who is disqualified based on an appearance of impropriety may be able to act impartially, but the judge is disqualified nonetheless because a reasonable observer might have doubts about the judge's impartiality. This broad standard is intended to protect public confidence in the judiciary rather than to protect the individual rights of litigants."); *see also* Abramson, *supra* note 134, at 1580.

[140] Abramson, *supra* note 134, at 1580; *see also* Offutt v. United States, 348 U.S. 11, 14 (1954).

[141] 28 U.S.C.S. § 455(a) (2014).

[142] *See* Raveson, *supra* note 51, at 825.

[143] State v. Burrell, 743 N.W.2d 596, 602 (Minn. 2008).

[144] *Id.*

[145] *See generally* Evans, *supra* note 41.

[146] *See* Sarah M. R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 3 (2007).

the judge, as in *Hall*.[147] Opponents of putting limits on the contempt power argue that restricting judicial authority in this manner could potentially favor a system wherein defendants act out for strategic reasons such as the removal of an "unfavorable" judge.[148] While the Supreme Court has already stated that "attempts of this kind are rare," the concern that contempt could become part of a strategy is valid.[149] To that end, the factors in the proposed amendment limit mandatory recusal to specific instances of conduct indicating judicial bias to the extent that recusal becomes necessary to avoid arbitrary judicial actions. Again, this is consistent with the understanding that a contemnor should not be sentenced by a judge who is biased towards the contemnor.

Finally, while it is said that states provide "laboratories of democracy,"[150] such innovation and differentiation is not found in the current *Code*. Generally, as the ABA has ratified new *Codes of Judicial Conduct*, most states have adopted the new language—often *verbatim*—at breakneck speed. As of January 17, 2022, thirty-seven states had ratified a revised *Code of Judicial Conduct* based on the 2007 version of the ABA *Model Code*.[151] Eight other jurisdictions had established committees to revise their *Code*.[152] The other states currently use language that is functionally the same, stemming from the 1990 *Code*.[153] The high rate of adoption in a relatively quick period of time speaks to the influence of the *Code*. State *Codes* that parallel the ABA *Model Codes* are almost exact copies of the ABA *Model Codes*.[154] As such, any addition to the *Code* would likely be adopted verbatim by at least a majority of the states.

---

[147] People v. Hall, 499 N.E.2d 1335, 1339 (Ill. 1986).

[148] *See* Cooke v. United States, 267 U.S. 517, 539 (1925).

[149] *Id.*

[150] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

[151] *Jurisdictional Adoption of Revised Model Code of Judicial Conduct*, ABA, https://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map/ [https://perma.cc/YV8K-2ETL] (last visited Mar. 3, 2022).

[152] *Id.*

[153] *See generally Charts Comparing Individual Jurisdictional Judicial Conduct Rules to ABA Model Code of Judicial Conduct*, ABA (June 23, 2020), https://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/aba_model_code_comparison/ [https://perma.cc/LX3G-ELJN].

[154] Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 HOUS. L. REV. 1343, 1352 n.19 (2000).

B. Supplemental Federal & State Legislation

Even if the ABA does not expand the *Code of Judicial Conduct*, Congress and state legislatures could make additions to federal and state statutes that would have a similar impact. The *Code of Judicial Conduct* is the foundation for disciplinary action; however, statutes also provide for reprimand, suspension, or removal from the bench. The federal government's § 144 is a codification of Canon 3 of the *Code of Judicial Conduct*. Under § 144:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.[155]

Judges who refuse to recuse themselves when a statute so directs may be tried for judicial misconduct.[156] Such cases come before the chief judge who determines if an investigation is necessary.[157] If the judge determines that an investigation is necessary, he appoints a special committee to investigate.[158] The special committee then investigates the claim, takes the findings of the investigation, and submits a report to the pre-established judicial council in the district.[159] Then, the judicial council makes a decision regarding the steps that should be taken to remedy the judicial misconduct.[160] This may take the form of a reprimand, suspension, or removal from the bench.[161]

"28 U.S.C. § 144 was the first provision enacted requiring district judge recusal for bias in general."[162] Although the legislative history of § 144 would seem to imply that it provides for peremptory and automatic removal of judges on a party's motion, case precedent points to the narrow construction of the statute, making a § 144 disqualification unlikely as it is currently

---

[155] 28 U.S.C.S. § 144 (1948).

[156] RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 6 (2007).

[157] *FAQs: Filing a Judicial Conduct or Disability Complaint Against a Federal Judge*, U.S. CTS., https://www.uscourts.gov/judges-judgeships/judicial-conduct-disability/faqs-filing-judicial-conduct-or-disability-complaint#faq-How-will-the-circuit-chief-judge-consider-my-complaint? [https://perma.cc/E8LQ-ZLZM] (last updated July 2021).

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] Toni-Ann Citera, *A Look at the Extrajudicial Source Doctrine Under 28 U.S.C. 455*, 85 J. CRIM. L. & CRIMINOLOGY 1114, 1116 (1995).

written.[163] In contrast to § 455,[164] § 144 is not self-enforcing.[165] Instead, the moving party alleging the bias must file an affidavit with the challenged judge stating: "the facts and the reasons for the belief that bias or prejudice exists."[166] Facts are assumed to be true, but the judge must evaluate the legal sufficiency of the affidavit using a "bias-in-fact" standard.[167] To prevail under this standard, a moving party must "1) allege specific facts showing bias, 2) prove that these facts amount to personal bias, and 3) show that the facts are sufficient to convince a reasonable person that bias actually exists."[168]

An addendum to § 144 could resolve the issue of alleged contemnors being sentenced by a judge who has become personally embroiled in a trial as a result of contemptuous behavior by incorporating the following language:

> § 144 (a)
>
> When the alleged bias or prejudice results from a party's personal attack on the presiding judge either verbally, physically, or both, that was supported in the record, the affidavit will be held to be legally sufficient.

Under the language of this added subsection, the legal sufficiency of affidavits would be assumed. Opponents of such a statute would likely argue that it promotes misbehavior towards a judge in order to disqualify that judge. However, as mentioned above, even the Supreme Court has found that such strategies are rare and certainly not used in the numbers that would make the continuation of such an expansive power worth it.[169] As mentioned above in Judge Manderino's dissent, such a power is in opposition to our standard acceptance of constitutional protections and thus should be used in limited circumstances.[170]

By expanding § 144, contemnors such as Ms. Stokes would have a mechanism to request transfer of the contempt finding to a different judge when the contemnor believes that the punishment is excessive. Ultimately, this law would protect more people who come before the court by ensuring a fairer judiciary in tense courtroom situations.

---

[163] *Id.* at 1117; *see also* Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 666 (1985).

[164] 28 U.S.C.S. § 455 is the federal statute that parallels Rule 2.11.

[165] Citera, *supra* note 162, at 1117.

[166] 28 U.S.C.S. § 144 (1948).

[167] Citera, *supra* note 162, at 1117.

[168] *Id.*; *see also* United States v. Alabama, 828 F.2d 1532, 1540 (11th Cir. 1987).

[169] Cooke v. United States, 267 U.S. 517, 539 (1925).

[170] Commonwealth v. Patterson, 452 Pa. 457, 466 (1973) (Manderino, J., dissenting).

V. CONCLUSION

The judiciary, perhaps more than any other branch of government, relies on the foundation of public trust in the fair administration of its powers. Contemnors who attack a judge on a personal level may not be always the most sympathetic of parties, but how we treat parties towards whom we are not as sympathetic says much about our system. Our system, much like the *Model Code of Judicial Conduct* itself, is partially aspirational. Section two of the preamble says as much: "Judges should maintain the dignity of judicial office at all times and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence."[171] It is in that spirit that we should seek to expand the blackletter *Canon* guides or enact supplemental federal legislation to include this specific behavior in which judges may reasonably be biased by insults of the kind apt to strike "at the most vulnerable and human qualities of a judge's temperament."[172] This would go far in ensuring due process for all before the court. It is one of our oldest legal traditions to hold that having a neutral and impartial arbiter matters. For nearly 250 years, we have aspired to the principal that a judge should not hear a case in which she has become personally embroiled. To that end, we must take steps to ensure the impartial arbiter in all cases, including contempt situations.

---

[171] MODEL CODE OF JUD. CONDUCT CANON PMBL. (AM. BAR ASS'N 2007).
[172] Bloom v. Illinois, 391 U.S. 194, 202 (1968).