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I. INTRODUCTION

One of the hallmarks of the American judicial system is that every litigant is entitled to "[a] fair trial in a fair tribunal."[1] To ensure a fair trial, the Supreme Court has repeatedly held that the Fourteenth Amendment's Due Process Clause will, in some circumstances, require the disqualification of a judge.[2] The Court has also held that the remedy for violating the constitutional mandate is to vacate the decision and remand the case for further proceedings.[3] However, no court has ever determined whether the Due Process Clause forbids a recused judge from later participating in the case from which he was disquali-

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

2. *See, e.g.*, Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 820-22 (1986) (reviewing previous Supreme Court cases where due process required disqualification); Withrow v. Larkin, 421 U.S. 35, 47 (1975) (stating that in order to disqualify a judge on due process grounds, a litigant "must convince [the court] that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals 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"); Taylor v. Hayes, 418 U.S. 488, 501 (1974) (holding that due process requires a judge to be disqualified when "'a likelihood of bias or an appearance of bias'" on the judge's part creates a situation where he is "'unable to hold the balance between vindicating the interests of the court and the interests of the accused'" (quoting Ungar v. Sarafite, 376 U.S. 575, 588 (1964))); Mayberry v. Pennsylvania, 400 U.S. 455, 466 (1971) ("[T]he Due Process Clause of the Fourteenth Amendment [requires that] a defendant in [a] criminal contempt proceeding[] should be given a public trial before a judge other than the one reviled by the contemnor."); *Murchison*, 349 U.S. at 136; Tumey v. Ohio, 273 U.S. 510, 523 (1927) ("[I]t certainly violates the Fourteenth Amendment, and deprives a defendant . . . due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest [in the] case."); *id.* at 532 ("Every procedure which would offer a possible temptation to the average man . . . not to hold the balance nice, clear and true . . . denies the latter due process of law."); *see infra* Part III.A.

3. *See Aetna*, 475 U.S. at 828 ("[W]e are aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote."); *see also id.* at 827-28.

fied. Although several courts have adopted the general rule that once recused, a judge may have no further participation in the case, none have grounded it in the Due Process Clause. The case of *Whitehead v. Nevada Commission on Judicial Discipline*[4] presents a compelling example of the need for this general rule to become a constitutional standard.

For over a year, the Nevada Supreme Court has been embroiled in a bitter controversy that raises new questions relating to judicial disqualification and the Due Process Clause. In 1993, Judge Jerry Carr Whitehead, a Nevada district judge, brought a petition to the Nevada Supreme Court seeking to force the Commission on Judicial Discipline, which was investigating him, to abide by the Nevada Constitution and its own procedural rules.[5] Two of the five elected members of the Nevada Supreme Court recused themselves, and two replacement judges were appointed.[6] Two years later, after the *Whitehead* panel had decided the case and granted Judge Whitehead's relief, the two recused justices, along with the lone dissenter in *Whitehead*, issued an administrative order voiding a portion of the relief granted in *Whitehead*.[7] The *Whitehead* majority objected to the actions taken by the recused justices and subsequently voided their order.[8] From that point on, these two factions of the Nevada Supreme Court have volleyed competing orders back and forth in an attempt to prevent the other side from advancing its position. As a result, the court has reached

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4. Because of the unique nature of this case, there are several published and unpublished dispositions. The published opinions directly relating to the *Whitehead* matter can be found at Del Papa v. Steffen, 920 P.2d 489 (Nev. 1996) (per curiam); Whitehead v. Nevada Comm'n on Judicial Discipline, 920 P.2d 491 (Nev. 1996) (per curiam); Del Papa v. Steffen, 915 P.2d 245 (Nev. 1996) (per curiam); Whitehead v. Nevada Comm'n on Judicial Discipline, 908 P.2d 219 (Nev. 1995) (per curiam); Whitehead v. Nevada Comm'n on Judicial Discipline, 893 P.2d 866 (Nev. 1995); Whitehead v. Nevada Comm'n on Judicial Discipline, 906 P.2d 230 (Nev. 1994); Whitehead v. Nevada Comm'n on Judicial Discipline, 878 P.2d 913 (Nev. 1994); Whitehead v. Nevada Comm'n on Judicial Discipline, 873 P.2d 946 (Nev. 1994).

5. *See Whitehead*, 906 P.2d at 231-32; *see also infra* notes 10-12 and accompanying text.

6. *See Whitehead*, 920 P.2d at 493, 505 n.12; *see also infra* notes 13-16 and accompanying text.

7. *See* Petition For An Order Rescinding Appointment of Special Master Entered September 1, 1995, and Voiding Associated Expenses, ADKM No. 221 (Nev. Sept. 15, 1995) (Order Granting Petition and Vacating Order Appointing Special Master); *see also Whitehead*, 878 P.2d at 915-22.

8. *See infra* text accompanying notes 29-30.

an impasse that only the United States Supreme Court can re solve.[9]

Part II explains the background that gave rise to the dispute in *Whitehead* and the arguments asserted by both factions of the Nevada Supreme Court in support of their respective positions. Part III reviews current due process jurisprudence as it relates to judicial disqualification and concludes that it is insufficient because it has never been interpreted to forbid a recused judge from later affecting the case from which he was recused. This Part then summarizes the general principles that courts use, without invoking the Due Process Clause, in determining that a recused judge may not later participate in the case. Part IV argues that the need exists for a due process standard that governs the requirements imposed on a judge after recusal. This Part proposes that the "general rule" used by state and federal courts become the constitutional standard and illustrates the usefulness of the proposed standard by applying it to the facts of *Whitehead*.

II. BACKGROUND

A. Procedural Background

In 1993, Judge Whitehead, a Nevada district judge, filed an original mandamus petition with the Nevada Supreme Court directed to the Nevada Commission on Judicial Discipline.[10] Judge Whitehead contended, among other things, that the Commission which was investigating him had exceeded its jurisdiction by failing to abide by its own confidentiality rules[11] and the confidentiality procedures imposed by the Nevada Constitution.[12]

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9. Chief Justice Steffen and Associate Justice Springer, two of the four-member majority in *Whitehead*, filed a petition with the United States Supreme Court to resolve the matter. Judge Whitehead also intervened as a petitioner in the matter before the United States Supreme Court. However, the Supreme Court denied the petition on February 18, 1997. *See infra* note 46.

10. *See* Whitehead v. Nevada Comm'n on Judicial Discipline, 906 P.2d 230, 231 (Nev. 1994).

11. *See* JUDICIAL DISCIPLINE COMM'N RULE 5(1) (Nev. 1996) ("All proceedings must be confidential until there has been a determination of probable cause and a filing of formal statement of charges.").

12. *See* NEV. CONST. art. VI, § 21, cl. 5 ("The supreme court shall make appropriate rules for . . . [t]he confidentiality of all proceedings before the commission . . . ."). All fifty states and the District of Columbia have adopted rules mandating confidentiality be kept in judicial discipline proceedings. Twenty-two states

Two elected members of the Nevada Supreme Court,[13] Justices Young and Rose, recused themselves from the *Whitehead* case. Justice Young recused himself because he served on the Judicial Discipline Commission during part of the time the Commission investigated Judge Whitehead.[14] Justice Rose was disqualified because he was a potential target of investigation by the Judicial Discipline Commission.[15] Two replacement judges were appointed to fill the disqualified justices' seats in the *Whitehead* case.[16]

In July 1993, the *Whitehead* panel stayed the Commission's investigation and ordered a confidential "in camera" inspection of the Commission's records to determine whether Judge Whitehead's claims had merit.[17] The panel subsequently "entered an order . . . directing the proceedings in [the] court to remain confidential" to satisfy the confidentiality requirements of the Nevada Constitution.[18] At some point after these orders were en-

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mandate pre-probable cause confidentiality of judicial disciplinary proceedings. Nineteen states "maintain confidentiality until formal proceedings have resulted in a finding of misconduct and a recommendation for discipline is filed with the highest state court, while the remaining ten commissions [including the District of Columbia] maintain confidentiality until the state supreme court actually orders discipline." JEFFERY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 13.15 (2d ed. 1995) (footnotes omitted). For a discussion of the reasons for confidentiality, see *infra* note 18.

13. *See* NEV. CONST. art. VI, § 3.

14. *See* Whitehead v. Nevada Comm'n on Judicial Discipline, 920 P.2d 491, 505 n.12 (Nev. 1996).

15. *See id.* (stating that Justice Rose "was secretly recorded by the police as telling the [Clark County] district attorney that he would 'love' to see the criminal charges pending against two friends, . . . 'go away'").

16. *See id.* at 493 ("Senior Justice Zenoff was appointed to sit on the *Whitehead* case in the place of then-Chief Justice Rose by Justice Steffen pursuant to Art. 6, § 19 of the Nevada Constitution, and Nevada Supreme Court Rule 10. The other member of the *Whitehead* court . . . was District Court Judge Addeliar Guy, who was appointed by the governor as requested by then-Chief Justice Rose pursuant to Art. 6, § 4 of the Nevada Constitution.").

17. *See* Whitehead v. Nevada Comm'n on Judicial Discipline, 906 P.2d 230, 232-33 (Nev. 1994).

18. Whitehead v. Nevada Comm'n on Judicial Discipline, 893 P.2d 866, 873 (Nev. 1995). Although all fifty states have adopted some form of confidentiality requirements in judicial discipline proceedings, *see* SHAMAN ET AL., *supra* note 12, § 13.15, there is a debate as to whether the practice is appropriate. Proponents of confidentiality refer to several reasons for the policy.

> Confidentiality is thought to: 1) encourage participation in the disciplinary process by protecting complainants and witnesses from retribution or harassment, and to reduce the possibility of subornation of perjury; 2) protect the reputation of innocent judges [that are] wrongfully accused of misconduct;

tered, someone directly violated the court's order by leaking to the public the confidential information regarding the proceedings against Judge Whitehead. The Las Vegas Review-Journal, the largest paper in Nevada, upon learning of the confidentiality order, unleashed a relentless attack on the actions of the *Whitehead* majority.[19]

Due to the constant negative public exposure his case received, Judge Whitehead subsequently filed a "motion for appointment of a master to conduct [a] factual investigation" into the source of the alleged breaches of confidentiality in violation

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3) maintain confidence in the judiciary by avoiding premature disclosure of alleged misconduct; 4) encourage retirement as an alternative to costly lengthy formal hearings; and 5) protect commission members from outside pressures.

Id. On the other hand, many argue that confidential judicial disciplinary proceedings are at odds with the goals of the First Amendment. *See id.* § 13.16.

19. *See, e.g.*, *An Endless Jig*, LAS VEGAS REV.-J., Oct. 14, 1996, at B10, *available in* 1996 WL 2351344; *An "Extraordinary" Action*, LAS VEGAS REV.-J., Jan. 28, 1994, at B12, *available in* 1994 WL 4179807; *Give It Up*, LAS VEGAS REV.-J., July 7, 1996, at C2, *available in* 1996 WL 2344713; A.D. Hopkins, *Acting Justice Opposes Probe of Media Leak*, LAS VEGAS REV.-J., Nov. 24, 1994, at B1, *available in* 1994 WL 4189451; A.D. Hopkins, *Challenge Rebuffed by Court Clerk*, LAS VEGAS REV.-J., Jan. 21, 1994, at A1, *available in* 1994 WL 4184194; A.D. Hopkins, *Experts Criticize Justices*, LAS VEGAS REV.-J., Feb. 9, 1994, at A1, *available in* 1994 WL 4184852; A.D. Hopkins, *Justices Continue Quarrel*, LAS VEGAS REV.-J., Dec. 30, 1995, at B1, *available in* 1995 WL 5807547; A.D. Hopkins, *Justices Quash Subpoenas Issued for News Leak Probe*, LAS VEGAS REV.-J., Dec. 29, 1995, at B4, *available in* 1995 WL 5807655; A.D. Hopkins, *Justices Say R-J Stories Wrong*, LAS VEGAS REV.-J., Jan. 13, 1994, at B1, *available in* 1994 WL 4186745; A.D. Hopkins, *Nevada Supreme Court Criticized*, LAS VEGAS REV.-J., Oct. 31, 1993, at B1, *available in* 1993 WL 4507403; A.D. Hopkins, *Reno Judge's Dispute Turns into Landmark*, LAS VEGAS REV.-J., Nov. 7, 1993, at A1, *available in* 1993 WL 4507982; A.D. Hopkins, *Revocation of Special Master Brings Reactions of Relief, Caution*, LAS VEGAS REV.-J., Sept. 16, 1995, at A2, *available in* 1995 WL 5800821; A.D. Hopkins, *Rose Pins Damage to High Court's Reputation on Justices*, LAS VEGAS REV.-J., Mar. 4, 1995, *available in* 1995 WL 5784753; *Maupin for High Court*, LAS VEGAS REV.-J., Oct. 23, 1996, at B14, *available in* 1996 WL 2351959; Thomas Mitchell, *Choose the Truth Over Confidentiality*, LAS VEGAS REV.-J., Jan. 7, 1996, at C2, *available in* 1996 WL 2332649; Jon Ralston, *High Court Mess Hits New Low*, LAS VEGAS REV.-J., Jan. 25, 1996, at B5, *available in* 1996 WL 2333727; Jon Ralston, *High Court Mess Should Scare All*, LAS VEGAS REV.-J., Jan. 7, 1996, at C3, *available in* 1996 WL 2332656; *Shaking the Trees*, LAS VEGAS REV.-J., Jan. 4, 1996, at B8, *available in* 1996 WL 2332457; *Some Plain, Strong Talk*, LAS VEGAS REV.-J., Apr. 28, 1996, at C2, *available in* 1996 WL 2339984; John L. Smith, *As Juice Jobs Go, the Whitehead Case is One for the Books*, LAS VEGAS REV.-J., July 28, 1994, at B1, *available in* 1994 WL 4164509; John L. Smith, *High Court Cronies in Search of Whitehead Whistle-Blower*, LAS VEGAS REV.-J., Sept. 10, 1995, at B1, *available in* 1995 WL 5800385; Ed Vogel, *High Court Slams Probe of Judge*, LAS VEGAS REV.-J., Apr. 23, 1994, at B1, *available in* 1994 WL 4168312.

of the court's order.[20] In response, the *Whitehead* panel, on July 26, 1994, granted Judge Whitehead's motion and ordered that

> [a] special master shall hereafter be appointed by the court and shall be specially empowered . . . to conduct such investigations as shall be necessary to determine the sources of the unlawful breaches of confidentiality that have occurred in these proceedings and the extent to which they may have impacted Petitioner's due process rights.[21]

Justice Shearing, one of the three elected members of the *Whitehead* panel, dissented from the decision to appoint a special master, stating that the court should not "appoint a master to investigate the source of information reported in the media without serious consideration of the ramifications of such an investigation and without setting forth specific guidelines."[22]

On September 1, 1995, the *Whitehead* panel, pursuant to their July 26, 1994 decision, appointed a special master and directed him to investigate the "interference with the administration of justice and the breaches of confidentiality that have so seriously impacted the efforts of this court to honorably, promptly, and effectively process the [*Whitehead*] matter."[23] The Special Master was given the power to carry out discovery proceedings, administer oaths, and have the clerk of the court issue subpoenas in order to fulfill his obligation.[24] However, on September 15, 1995, the two previously recused justices in

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20. Whitehead v. Nevada Comm'n on Judicial Discipline, 878 P.2d 913, 915 (Nev. 1994).

> [Some] state rules, provide for the appointment by the court of a master to assist [the court] in specific judicial duties as may arise in a case. The master's powers and duties depend upon the terms of the order of reference and the controlling court rule, and may include taking of testimony, discovery of evidence and other acts or measures necessary for the performance of his duties specified in the order of reference. The master is required to prepare a report of his proceedings for the court.

BLACK'S LAW DICTIONARY 975 (6th ed. 1990).

21. *Whitehead*, 878 P.2d at 923.

22. *Id.* at 948 (Shearing, J., dissenting).

23. Whitehead v. Nevada Comm'n on Judicial Discipline, No. 24598 (Nev. Sept. 1, 1995) (Order Appointing Special Master).

24. *See id.* Justice Shearing dissented from the appointment of the special master because the order "and the powers it confers upon the special master exceed the ostensible purposes of resolving any issues remaining in [*Whitehead*]." Whitehead v. Nevada Comm'n on Judicial Discipline, No. 24598 (Nev. Sept. 6, 1995) (dissent to order appointing special master).

Whitehead, Justices Young and Rose, along with the lone dissenter in *Whitehead*, Justice Shearing, acted in their administrative capacity to void the appointment of the Special Master.[25] The three justices justified their act on two grounds. First, they contended "that the appointment of a special master/prosecutor and the concomitant expenditure of funds serve[d] no legitimate purpose and amount[ed] to a gross waste of this court's limited resources."[26] Second, they stated that "the order [appointing the special master] exceed[ed] the [Whitehead] panel's jurisdiction to decide the case before it."[27] This order, issued in part by two previously recused justices, voiding a decision of the *Whitehead* panel began a series of competing orders and internal feuding that has propelled the *Whitehead* case to the United States Supreme Court.[28]

In response to the September 15th order issued in part by two recused justices, the *Whitehead* panel issued a per curiam opinion, signed by Justices Steffen, Springer, and Zenoff, three of the four members of the majority panel in *Whitehead*, declaring that "[t]he order signed by Justices Young, Shearing, and Rose, filed on September 15, 1995 . . . is hereby adjudged to be a nullity and of no legal force or effect."[29] The panel asserted that "[t]here is no need to cite legal authority for the proposition that disqualified justices are not empowered to alter the formal adjudications made by the court in this case."[30]

Six days later, the Nevada Attorney General, Frankie Sue Del Papa, filed an original mandamus petition with the Nevada Supreme Court seeking to resolve the "constitutional crisis" that resulted from the two competing orders.[31] The petition was filed under a new case number and named as respondents three members of the majority in *Whitehead*—Justices Steffen,

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25. *See* Petition For An Order Rescinding Appointment of Special Master Entered September 1, 1995, and Voiding Associated Expenses, ADKM No. 221 (Nev. Sept. 15, 1995) (Order Granting Petition and Vacating Order Appointing Special Master).

26. *Id.* at 2.

27. *Id.* at 1.

28. *See infra* note 46 and accompanying text.

29. Whitehead v. Nevada Comm'n on Judicial Discipline, 908 P.2d 219, 220 (Nev. 1995) (per curiam).

30. *Id.*

31. *See* Petition for a Writ of Prohibition or in the Alternative for a Writ of Mandamus at 3, Del Papa v. Steffen, 915 P.2d 245 (Nev. 1996) (No. 27847).

Springer, and Zenoff—and the Special Master. Del Papa's petition sought an order "mandating that the Respondents cease all action in [*Whitehead*] and in particular all action in furtherance of the unlawful and unconstitutional investigation [by the Special Master] directed against the Petitioner and numerous unnamed individuals."[32] The Attorney General filed this petition in spite of the fact that she had been previously disqualified from participating in *Whitehead*.[33]

On April 25, 1996, the two previously disqualified justices in *Whitehead*, Justices Young and Rose, and the only dissenter in *Whitehead*, Justice Shearing, granted the Attorney General's petition and

> direct[ed] the clerk of [the] court to issue a writ of prohibition to the Respondents directing them to cease and desist from any further action in the investigation launched in [*Whitehead*] by the appointment of a special master to determine the source of news leaks and the reason for this court's lost prestige.[34]

In granting the *Del Papa* petition, the justices ruled that the *Whitehead* panel "acted in excess of their jurisdiction" by mandating confidentiality in the proceedings[35] and that the panel "lacked authority to initiate and oversee" an investigation by the Special Master.[36] Thus, for the second time, Justices Young, Rose, and Shearing voided the appointment of the Special Mas-

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32. *Id.* Several prominent individuals were under investigation by the Special Master for the violation of the confidentiality order. The Special Master, in an interim report filed after his appointment had been voided by the September 15, 1995 administrative order stated:

> 1. My investigation discloses what appears to have been an intentional and knowing disclosure of confidential matters relating to the Whitehead matter before the Judicial Discipline Commission.
>
> 2. My investigation to date reveals that this disclosure may involve members of a law firm, *at least two members of the supreme court and the attorney general's office*.

Whitehead, 908 P.2d at 225 (emphasis added).

33. *See* Whitehead v. Nevada Comm'n on Judicial Discipline, 878 P.2d 913, 915-22 (Nev. 1994) ("The separation of powers clause of the Nevada Constitution prohibits the Attorney General from acting as prosecutor of judges in judicial discipline cases and from acting as the Commission's counsel in disciplinary matters.").

34. Del Papa v. Steffen, 915 P.2d 245, 254 (Nev. 1996) (per curiam).

35. *See id.* at 248.

36. *See id.* at 249-54.

ter authorized by the *Whitehead* panel.[37] Only this time, instead of using their administrative authority,[38] they reversed the *Whitehead* panel by granting a collateral petition.

On July 5, 1996, Justices Steffen and Springer, invoking the rule of necessity,[39] filed a per curiam opinion

> permanently enjoin[ing] the two disqualified justices from any further attempts to participate in any form of action or effort to interfere, in any way, with the jurisdiction of the court in [*Whitehead*] and its efforts to investigate and appropriately hold accountable, those responsible for the violations of its orders and any deprivation of the right to due process of the litigants in [*Whitehead*].[40]

The Justices grounded their opinion in two main arguments. First, they argued that once judges have recused themselves from a case, they may not reverse that decision and overrule decisions in the case from which they were disqualified.[41] Second, they asserted that the Due Process Clause of both the Nevada and United States Constitutions prevented Justices

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37. *See* Whitehead v. Nevada Comm'n on Judicial Discipline, 908 P.2d 219, 220 (Nev. 1995) (per curiam).

38. *See supra* text accompanying note 25.

39. *See* Whitehead v. Nevada Comm'n on Judicial Discipline, 920 P.2d 491, 493-96 (Nev. 1996) (per curiam). The rule of necessity states that "[w]hile a judge should disqualify himself when called upon to decide a matter in which he has a direct interest, if he is the only judge with power to hear and determine the matter, the rule of necessity requires that he hear it." BLACK'S LAW DICTIONARY 1332 (6th ed. 1990); *see also* United States v. Will, 449 U.S. 200, 213-16 (1980) (recognizing the validity of the common law rule of necessity). Justices Steffen and Springer invoked the rule of necessity by analogy because "there are [only] two functioning members of the *Whitehead* court remaining, the *Whitehead* case has not been finalized, and the dissenting justice, the two disqualified justices, and the governor have combined to prevent the appointment of substitute judges on the *Whitehead* court." *Whitehead*, 920 P.2d at 495. Judge Guy, who was appointed to replace Justice Rose, had retired from judicial office and was in ill health. *See id.* at 493. Senior Justice Zenoff, who had been appointed to replace Justice Young, requested that he be replaced on the *Whitehead* panel due to a family illness. *See id.* at 494. Chief Justice Steffen sent a letter to the Governor of Nevada asking him to appoint two new temporary judges to replace the two who could no longer serve on the panel. However, pursuant to a rule change made on December 28, 1995 by Justices Young, Rose, and Shearing, the Governor refused to appoint any new judges unless a majority of the *elected* members of the court requested it. *See id.*

40. *Whitehead*, 920 P.2d at 508.

41. *See id.* at 501-03.

Young and Rose from participating in both the *Whitehead* and *Del Papa* cases.[42]

One week later and as a final response to the ongoing dispute, Justices Young, Rose, and Shearing entered a per curiam opinion again voiding the appointment of the Special Master.[43] In addition, the justices ordered the clerk of the court to "strike as void" and not publish the July 5, 1996 opinion by Steffen and Springer and "direct[ed] the Clerk of th[e] court to accept no filings in [*Whitehead*] or [*Del Papa*] unless approved by a majority of the *elected* members of the court."[44]

On October 7, 1996, in an effort to obtain a final determination of the dispute, Justices Steffen and Springer petitioned the United States Supreme Court to issue a writ of prohibition or mandamus to Justices Young and Rose to require their continued recusal in both the *Whitehead* and the *Del Papa* cases.[45] However, on February 18, 1997, the United States Supreme Court denied the petition.[46]

B. Young and Rose Position

Justices Young and Rose rely on two arguments as justifications for their orders voiding the appointment of the Special Master. First, they contend that they "have in no way attempted to amend, restrict or change" the relief granted by the *Whitehead* panel.[47] Second, they assert that they are not disqualified from hearing the *Del Papa* petition because it is a wholly separate matter from the *Whitehead* case.[48]

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42. *See id.* at 503-05.

43. *See* Del Papa v. Steffen, 920 P.2d 489, 491 (Nev. 1996) (per curiam).

44. *Id.* (emphasis added).

45. *See* Petition for a Writ of Mandamus or Prohibition or, in the Alternative, for a Writ of Certiorari, *In re* Steffen, 920 P.2d 489 (Nev. 1996), *filed*, 65 U.S.L.W. 3310 (U.S. Oct. 7, 1996) (No. 96-541). The U.S. Supreme Court allowed Judge Whitehead to intervene as a Petitioner and file a separate petition supporting the request for Supreme Court review. *See* Response in Support of Petition, *In re* Whitehead, 920 P.2d 489 (Nev. 1996), *filed*, 65 U.S.L.W. 3416 (U.S. Dec. 10, 1996) (No. 96-829).

46. *See*Mandamus denied, *In re* Steffen, 920 P.2d 489 (Nev. 1996), 65 U.S.L.W. 3571 (U.S. Feb. 18, 1997) (No. 96-541); Mandamus denied, *In re* Whitehead, 920 P.2d 489 (Nev. 1996), 65 U.S.L.W. 3571 (U.S. Feb. 18, 1997) (No. 96-829).

47. *Del Papa*, 920 P.2d at 489.

48. *See* Whitebead v. Nevada Comm'n on Judicial Discipline, 920 P.2d 491, 503 (Nev. 1996).

1. The relief in Whitehead *has not been altered*

Justices Young and Rose justify their order voiding the Special Master on the ground that the *Whitehead* panel granted Judge Whitehead "the original relief sought in his petition for extraordinary relief and that the undersigned majority have in no way attempted to amend, restrict or change that relief."[49] Although they do not explain their reasoning for this proposition, it seems fairly obvious. Judge Whitehead's original petition sought a writ of mandamus or prohibition directed at the Nevada Commission on Judicial Discipline to force the Commission to abide by the confidentiality requirements of the Nevada Constitution and the Commission's own rules.[50] The *Whitehead* panel subsequently granted Judge Whitehead's petition and ordered the Commission to abide by the confidentiality requirements.[51] Since confidentiality was ordered pursuant to Whitehead's petition, Justices Young and Rose conclude that they did not "amend, restrict or change that relief" when they voided the order appointing the Special Master.

2. Whitehead *and* Del Papa *are different cases*

Justices Young and Rose next assert that they are not required to recuse themselves from the *Del Papa* petition because "[i]t is obvious that [*Del Papa*] is not the same case as [*Whitehead*]. Both the parties and the issues in the two cases are different."[52] Without discussing the similarities or differences in the content between the *Whitehead* and *Del Papa* petitions, the justices conclude that because the *Del Papa* petition names different parties than *Whitehead* and has a new case number, they are no longer disqualified. They were only required to recuse themselves from the *Whitehead* case, and since the *Del Papa* petition is not the *Whitehead* case, their recusal is no longer mandated.[53]

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49. *Del Papa*, 920 P.2d at 489.

50. *See* Whitehead v. Nevada Comm'n on Judicial Discipline, 906 P.2d 230, 231-32 (Nev. 1994); *see also supra* notes 10-12 and accompanying text.

51. *See* Whitehead v. Nevada Comm'n on Judicial Discipline, 893 P.2d 866, 873 (Nev. 1995).

52. *Whitehead*, 920 P.2d at 503.

53. Justices Young and Rose raised two ancillary arguments for voiding the appointment of the Special Master. First, they asserted that the *Whitehead* panel had no jurisdiction or authority to appoint the master. *See* Del Papa v. Steffen, 915 P.2d

C. Steffen and Springer Position

Justices Steffen and Springer responded with two primary arguments. First, they maintain that the recused justices violated constitutional due process when they reentered *Whitehead* and altered substantive rulings. Second, they assert that even though the attorney general filed an original writ of prohibition under a new case number naming new parties, her petition is essentially the same case as *Whitehead* and thus Justices Young and Rose should remain disqualified in both cases.

1. Judges may not reenter a case from which they have recused themselves

Justices Steffen and Springer have repeatedly objected to the participation of Justices Young and Rose in the *Whitehead* case. Essentially, they claim that because Young and Rose disqualified themselves from the *Whitehead* case, they may not, by administrative order or otherwise, affect the relief granted in

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245, 249-54 (Nev. 1996). The justices argue that even if the Nevada Constitution and the Commission rules provided for pre-probable cause confidentiality when investigating a judge, that confidentiality does not extend to hearings before the state supreme court. *See id.* at 248. By ordering the matters before the court to remain confidential, the *Whitehead* panel violated rights guaranteed under the First Amendment. *See id.* at 248-49. They invoke separation of power issues to argue that

> the investigation [by the Special Master] had nothing to do with the power of the judicial branch to hear and determine justiciable controversies, and therefore [the *Whitehead* panel] had no authority to initiate their investigation. The power to initiate an investigation into who engaged in potentially criminal behavior by leaking information to the media in violation of the Whitehead panel's orders of confidentiality was an executive function reserved exclusively for the executive branch. By initiating the investigation, Respondent Justices improperly exercised the functions of the executive branch in violation of . . . the Nevada Constitutinn.

Id. at 251 (footnote omitted). Thus, since the panel had no jurisdiction to issue the confidentiality order and the order was issued without authority, they argue that they had the power to void the order appointing the Special Master. *See id.* at 254.

Second, Justices Young and Rose objected to the expenditure of court funds on the investigation. In fact, their first order voiding the appointment of the Special Master was based primarily on the grounds that "expenditure of funds serves no legitimate purpose and amounts to a gross waste of this court's limited resources." Petition For An Order Rescinding Appointment of Special Master Entered September 1, 1995, and Voiding Associated Expenses, ADKM No. 221 (Nev. Sept. 16, 1995) (Order Granting Petition and Vacating Order Appointing Special Master). *See supra* text accompanying notes 25-27.

that case.[54] Justice Springer summed up their argument by asserting "that there are clearly a number of irrefutable legal reasons why [Justices Young and Rose] cannot be allowed to intervene in a case through the guise of an 'administrative conference' and start canceling out the decisions made in a case and controversy in which they were disqualified to sit."[55]

The Justices base their reasoning on both generally recognized rules and the Due Process Clause. They note that "[e]very federal appellate court that has ruled on the problem of a recused judge attempting to reenter a case and participate in any form of adjudication or matter other than that of a strictly ministerial nature . . . has ruled any decision or order of such judge to be void."[56] They also refer to numerous state court cases to conclude that "[t]he authorities are uniform, indeed it is black letter law that a disqualified judge may not issue any orders or rulings . . . in a case in which he or she is disqualified."[57]

In addition, they rely on due process grounds for their assertion that a disqualified judge may not reenter the case. They cite *Aetna Life Insurance Co. v. Lavoie*[58] for the proposition that the Due Process Clause will not "permit[] a court's decision to stand when a disqualified judge casts the deciding vote."[59] They claim that due process prohibits the participation of Young and Rose because, under the Supreme Court's judicial disqualification jurisprudence, if Young and Rose alter the relief in *Whitehead*, they would be "trying to put a stop to an investigation in

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54. *See* Whitehead v. Nevada Comm'n on Judicial Discipline, 908 P.2d 219, 220 (Nev. 1995) ("There is no need to cite legal authority for the proposition that disqualified justices are not empowered to alter the formal adjudications made by the court in this case.").

55. *Id.* at 221 (Springer, J., concurring).

56. Whitehead v. Nevada Comm'n on Judicial Discipline, 920 P.2d 491, 501 (Nev. 1996); *see also* Petition for a Writ of Mandamus or Prohibition or, in the Alternative, a Writ of Certiorari to the Supreme Court of the State of Nevada at 20 n.7, *In re* Steffen, 920 P.2d 489 (Nev. 1996) (No. 96-541) (citing cases).

57. *Whitehead*, 920 P.2d at 503; *see also* Petition for Writ of Mandamus at 21 n.8, *Steffen* (No. 96-541) (citing cases).

58. 475 U.S. 813, 827-28 (1986).

59. Petition for Writ of Mandamus at 20, *Steffen* (No. 96-541) (citing Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 827-28 (1986)).

which they themselves might be the targets"[60] and would thus be acting as judges in their own case.

2. Whitehead *and* Del Papa *are the same case*

Justices Steffen and Springer next assert that the *Del Papa* petition and the *Whitehead* case are essentially the same case, mandating the continued recusal of Young and Rose.[61] They argue that the only purpose of the *Del Papa* petition was to invalidate the appointment of the Special Master in *Whitehead*.[62] The issues in *Del Papa* "are the identical issues that were resolved by final judgment in the *Whitehead* case."[63] They conclude that just because the attorney general filed a collateral writ naming only the majority of the *Whitehead* court as respondents does not make the petition a separate case relieving the two disqualified justices of their duty to recuse themselves.[64]

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60. Whitehead v. Nevada Comm'n on Judicial Discipline, 908 P.2d 219, 223 (Nev. 1995) (Springer, J., concurring).

61. *See* Petition for Writ of Mandamus at 16-19, *Steffen* (No. 96-541); *Whitehead*, 920 P.2d at 503. For Young and Rose's counterarguments, see *supra* Part II.B. Although they recognize that the two cases exist, Justices Steffen and Springer give no credence to the *Del Papa* petition and view it as a mere

> attempt to avoid such doctrines as law of the case, res judicata, . . . collateral estoppel, and the problem of having two disqualified justices in [*Whitehead*] participate in interfering with and overruling critical aspects of the case in which they are disqualified. In every respect, . . . [*Del Papa*] represents an improper act of judicial manipulation calculated to oust the court of jurisdiction in [*Whitehead*] in order to overrule judgments in that case that are not well received by the attorney general or the three justices.

Whitehead, 920 P.2d at 499.

62. *See Whitehead*, 920 P.2d at 503.

63. *Id.*

64. *See id.* Justices Steffen and Springer also argue that they did not need to recuse themselves from the attorney general's action naming them as respondents because "'[a] party cannot disqualify a judge to sit in his case by bringing an action against him after the principal suit is commenced. Nor is a judge disqualified because he is made a formal party as a method of seeking review of his rulings.'" *Id.* at 500 (quoting Commonwealth v. Leventhal, 307 N.E.2d 839, 841 (Mass. 1974)). "'To honor such a technique would be to put the weapon of disqualification in the hands of the most unscrupulous.'" *Id.* (quoting *In re* Ronwin, 680 P.2d 107, 117 (Ariz. 1983) (en banc)).

III. JUDICIAL DISQUALIFICATION STANDARDS

A. *Due Process Disqualification of Judges*

The Due Process Clause of the Fourteenth Amendment requires a judge to recuse himself in some circumstances.[65] However, the Supreme Court has carefully noted that the Due Process Clause only sets the outer limits of judicial qualification while "Congress and the states . . . remain free to impose more rigorous standards for judicial disqualification."[66] Al-

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65. *See, e.g.*, cases cited *supra* note 2; *see also* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 475 (1986) ("If a given value cannot be protected absent the use of a specific procedure, then that procedure must be deemed essential to the achievement of due process in all cases. It is our position that the participation of an independent adjudicator is such an essential safeguard, and may be the only one.").

66. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986); *see also* FTC v. Cement Inst., 333 U.S. 683, 702 (1948) ("[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level."). For example, 45 states and the District of Columbia have adopted in whole or in part Canon 3 of the Model Code of Judicial Conduct for their judicial disqualification statutes. *See* Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 29 (1994); *see also* MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (1990). The United States Congress has essentially adopted Canon 3 as its judicial disqualification statute. 28 U.S.C. § 455 (1994) states in relevant part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular casa in controversy;
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in tbe subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) Is acting as a lawyer in the proceeding;

though the Court has articulated a series of standards that define when the Constitution requires a judge's recusal, the Court's due process jurisprudence as it relates to judicial disqualification has never been explicitly extended to prevent a recused judge from later participating in a matter affecting the case from which he was recused.

The Supreme Court has stated instead that a fundamental requirement of due process is that a litigant is entitled to "[a] fair trial in a fair tribunal."[67] In order to fulfil this constitutional requirement, the Court has held that it violates the Fourteenth Amendment "to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."[68] Likewise, due process mandates that no judge "can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome."[69] Although the interest cannot be defined with precision, the test is whether the situation "would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true."[70]

Although federal law and the Model Code of Judicial Conduct require a judge to recuse whenever "his impartiality might reasonably be questioned" or when "he has a personal bias or prejudice concerning a party,"[71] the Supreme Court has held that bias "alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause."[72]

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

67. *In re* Murchison, 349 U.S. 133, 136 (1955); *see also* Tumey v. Ohio, 273 U.S. 510, 535 (1927) (finding that the defendant has a right to an impartial judge).

68. *Tumey*, 273 U.S. at 523.

69. *Murchison*, 349 U.S. at 136.

70. *Id.* (quoting *Tumey*, 273 U.S. at 532).

71. 28 U.S.C. § 455 (1994); *see* MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (1990).

72. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 820 (1986) ("The Court has recognized that not '[a]ll questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.'" (quoting *Tumey*, 273 U.S. at 523)). *But see* Redish & Marshall, *supra* note 65, at 504 ("We have been unable to envision even one situation in which the values of due process can be achieved without the participation of an independent adjudicator. Moreover, in

Instead, disqualification for bias is only constitutionally mandated under "the most extreme of cases."[73]

When determining whether any temptation for bias exists, courts typically begin by presuming the honesty and integrity of judges, and then disqualify a judge "only when the biasing influence is strong enough to overcome that presumption."[74] Various decisions by the courts provide a sampling of which acts constitute due process violations. For instance, previous adverse rulings by a judge do not comprise sufficient grounds for a judge's recusal in a later case.[75] Verbal assaults by a litigant that personally attack a judge do not necessarily require recusal, but may under some circumstances.[76] In addition, due process violations occur when a party does not receive an impartial hearing at the trial level, even when the appellate process eventually resolves the problem.[77] Finally, in those instances where investigative and adjudicative powers are combined, the Supreme Court has ruled that a heightened burden of persuasion exists to prove a violation of due process.[78] The litigant must show that, "under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses

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defining the term 'independence,' *even the slightest hint of bias or undue influence must, as a general matter, disqualify a particular decisionmaker.*" (emphasis added)).

73. *Aetna*, 475 U.S. at 821.

74. Del Vecchio v. Illinois Dep't of Corrections, 31 F.3d 1363, 1375 (7th Cir. 1994); *see also* Withrow v. Larkin, 421 U.S. 35, 47 (1975).

75. *See* Liteky v. United States, 510 U.S. 540, 550-51 (1994); United States v. Bray, 546 F.2d 851, 857 (10th Cir. 1976); Martin v. United States, 285 F.2d 150, 151 (10th Cir. 1960); Fowler v. United States, 699 F. Supp. 925, 929 (M.D. Ga. 1988).

76. *See* Taylor v. Hayes, 418 U.S. 488, 503 n.10 (1974) ("It is not petitioner's conduct, considered alone, that requires recusal in this case; rather, the critical factor, as revealed by the record before us, is the character of [the judge's] response to misbehavior during the course of the trial."); Mayberry v. Pennsylvania, 400 U.S. 455, 465-66 (1971) (holding that when a judge becomes "embroiled in a running, bitter controversy" with a litigant from insults of the "kind . . . apt to strike 'at the most vulnerable and human qualities of a judge's temperament'" such that it is unlikely that the judge can "maintain that calm detachment necessary for fair adjudication," the Due Process Clause requires a defendant be given a public trial before a judge other than the one reviled by the contemnor (quoting Bloom v. Illinois, 391 U.S. 194, 202 (1968))).

77. *See* Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972) (holding that the state's trial court procedure is not constitutionally acceptable simply because the State eventually offers the defendant an impartial adjudication, because the "[p]etitioner is entitled to a neutral and detached judge in the first instance").

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

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."[79] These constitutional standards have a common thread. In each case, it appears that the influences that require disqualification strike "at the heart of human motivation, [such] that an average man would find it difficult, if not impossible, to set the influence aside."[80]

Aetna Life Insurance Co. v. Lavoie[81] represents the leading Supreme Court case holding that the Due Process Clause requires the disqualification of a state supreme court justice. In *Aetna*, Justice Embry, an Alabama Supreme Court Justice, failed to recuse himself in a bad-faith-failure-to-pay insurance appeal that came before the court at the very time he had a similar action pending against a different insurance company.[82] At the time the appeal came before the court, the law in Alabama was unsettled in the area of bad-faith-refusal-to-pay claims, and the *Aetna* opinion resolved many issues in the area.[83] Some of the issues decided by the court were the same issues that Justice Embry had pending in his own case.[84] The Alabama Supreme Court was sharply divided on the issues. The result was a 5-to-4 decision authored by Justice Embry.

The Supreme Court ruled that when Justice Embry "cast the deciding vote" in the court's decision, it "had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case."[35] As such, he acted as "a judge in his own case"[86] for an interest that was "direct, personal, substantial, [and] pecuniary."[87] The Court carefully pointed out that although no evidence existed of actual bias or prejudice, the "possible temptation . . . not to hold the balance nice, clear and true" violated the due process requirement that mandates an unbiased decision maker preside over every case.[88]

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79. *Id.*

80. Del Vecchio v. Illinois Dep't of Corrections, 31 F.3d 1363, 1373 (7th Cir. 1994).

81. 475 U.S. 813 (1986).

82. *See id.* at 822.

83. *See id.*

84. *See id.* at 823.

85. *Id.* at 824.

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

87. *Id.* (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927)).

88. *Id.* at 825 (quoting *Tumey*, 273 U.S. at 532) ("The Due Process Clause 'may

After ruling that Justice Embry was constitutionally disqualified from the case, the Court then articulated the appropriate remedy for the violation.[89] The Court concluded that

> we are aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote. Here Justice Embry's vote was decisive in the 5-to-4 decision and he was the author of the court's opinion. Because of Justice Embry's leading role in the decision under review, we conclude that the 'appearance of justice' will best be served by vacating the decision and remanding for further proceedings.[90]

Aetna is important precedent in the *Whitehead* matter for two reasons. First, it dictates when the Due Process Clause requires the disqualification of a state supreme court justice; second, it provides the constitutional remedy that is mandated for a violation of the due process requirements.

B. State and Federal Court Standards for Continued Recusal of Disqualified Judges

As the previous cases show, the Supreme Court's due process jurisprudence, as it relates to judicial disqualification, satisfactorily answers most questions pertaining to the consti-

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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. But to perform its high function in the best way, "justice must satisfy the appearance of justice."'" (quoting *In re* Murchison, 349 U.S. 133, 136 (1955) (quoting Offutt v. Unites States, 348 U.S. 11, 14 (1954)))).

89. *See id.* at 827-28.

90. *Id.* (footnote omitted). Although the Supreme Court unanimously agreed that Justice Embry violated the Due Process Clause in this case, three justices wrote separately to state that due process was violated by more than Justice Embry's casting of the "deciding vote." Justice Brennan stated that Justice Embry's mere "participation in the court's resolution of the case . . . was sufficient in itself to impugn the decision." *Id.* at 830-31 (Brennan, J., concurring). Justices Blackmun and Marshall agreed. They wrote separately

> to streas that the constitutional violation in this case should not depend on the Court's apparent belief that Justice Embry cast the deciding vote—a factual assumption that may be incorrect and . . . should be irrelevant to the Court's analysis. . . . Justice Emhry's mere participation in the shared enterprise of appellate decisionmaking—whether or not he ultimately wrote, or even joined, the Alabama Supreme Court's opinion—pesed an unacceptable danger of subtly distorting the decisionmaking process.

Id. at 831 (Blackmun & Marshall, JJ., concurring).

tutional qualification of a judge to sit in a case. However, the Due Process Clause has never been interpreted to forbid a recused judge from later affecting a case from which he was disqualified. Courts have reached this result without invoking the Constitution. Every lower federal court that has addressed this issue has held that, as a general rule, once a judge has recused, he should take no more adjudicative action in the case and is limited to performing ministerial acts.[91] State courts have adopted a similar rule.[92] Although state and federal

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91. *See, e.g.*, El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136, 141 (1st Cir. 1994) ("As a general rule, a trial judge who has recused himself 'should take no other action in the case except the necessary ministerial acts to have the case transferred to another judge.'" (quoting 13A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3550 (2d ed. 1984))); United States v. Moody, 977 F.2d 1420, 1423 (11th Cir. 1992) ("There is no question that a federal judge may perform ministerial acts even after he has disqualified himself from a particular case."); *In re* Aetna Casualty & Sur. Co., 919 F.2d 1136, 1145 (6th Cir. 1990) ("[E]ven a judge who has recused himself ought to be permitted to perform the duties necessary to transfer the case to another judge."); Moody v. Simmons, 858 F.2d 137, 143 (3d Cir. 1988) ("Once a judge has disqualified himself, he or she may enter no further orders in the case."); New York Hous. Dev. Corp. v. Hart, 796 F.2d 976, 979 (7th Cir. 1986) ("[T]he position that provides the greatest measure of safety for the judicial system as a whole is one that vacates all decisions taken after the filing of a justified motion to disqualify a judge . . . ."); Arnold v. Eastern Air Lines, Inc., 712 F.2d 899, 904 (4th Cir. 1983) ("Patently a judge who is disqualified from acting must not be able to affect the determination of any cause from which he is barred."); McCuin v. Texas Power & Light Co., 714 F.2d 1255, 1261 (5th Cir. 1983) ("To permit a disqualified chief judge to select the judge who will handle the case in which the chief judge is disabled would violate the congressional command that the disqualified judge be removed from all participation in the case."); *In re* Cement Antitrust Litig., 673 F.2d 1020, 1024-25 (9th Cir. 1982) (stating that a disqualified judge is only authorized to perform ministerial acts such as assigning the case to another judge); Ellentuck v. Klein, 570 F.2d 414, 424 (2d Cir. 1978) ("[I]t is clear that . . . if a judge is disqualified, that disqualification strips tha court of subject matter jurisdiction."); Stringer v. United States, 233 F.2d 947, 948 (9th Cir. 1956) (noting that after disqualification, judges may perform only "the mechanical duties of transferring the case to another judge or other essential ministerial duties short of adjudication"); Rohrbach v. AT&T Nassau Metals Corp., 915 F. Supp. 712, 716 (M.D. Pa. 1996) (after disqualification, judges may perform only the simple duties associated with transferring the case); *In re* Scott, 379 F. Supp. 622, 624 (S.D. Tex. 1974) (following recusal, a judge may enter only ministerial orders such as transferring the case to another jurist); *see also* 13A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3550 (2d ed. 1984).

92. *See, e.g.*, Johnson v. Sturdivant, 758 S.W.2d 415 (Ark. 1988) (Arkansas Supreme Court setting aside its own decision after one justice recused himself from the case); Gubler v. Comm'n on Judicial Performance, 688 P.2d 551, 567-68 (Cal. 1984) (en banc) (stating that once disqualified, a judge may not even offer advice to other judicial officers on how to dispose of the case); Beckord v. District Court, 698 P.2d 1323, 1330 (Colo. 1985) (en banc) ("We hold that after [the judge] disqualified

himself he was without jurisdiction to rule on the motions filed by the defendants because these matters involved an exercise of judicial discretion."); Johnson v. District Court, 674 P.2d 952, 957 (Colo. 1984) (en banc) ("We hold that the respondent judge abused his discretion by refusing to disqualify himself. The order denying the motion for a change of venue is vacated because the respondent judge had no authority to rule on the matter."); Bolt v. Smith, 594 So. 2d 864, 864 (Fla. Dist. App. 1992) ("Florida case law is well settled that once a trial judge has recused himself, further orders of the recused judge are void and have no effect."); Margulies v. Margulies, 528 So. 2d 957, 960 (Fla. Dist. Ct. App. 1988) ("[O]nce a trial judge disqualifies himself, he may not 'requalify' himself on removal of the reason for disqualification."); Rogers v. State, 341 So. 2d 196, 196 (Fla. Dist. Ct. App. 1976) ("Once the trial judge recused himself, further orders of his were void and of no effect."); Gilmer v. Shell Oil Co., 324 So. 2d 171, 172 (Fla. Dist. Ct. App. 1975) ("It is well settled that a judge who is disqualified can proceed no further in the case."), *overruled on other grounds by* Fischer v. Knuck, 497 So. 2d 240 (Fla. 1986); Butler v. Biven Software, Inc., 473 S.E.2d 168, 170 (Ga. Ct. App. 1996) ("By the nature of [the judge's] recusal, any actions following his recusal or after he should have recused himself are naturally void."); State v. Evans, 371 S.E.2d 432, 433 (Ga. Ct. App. 1988) ("A disqualified judge can take no judicial action in the case and any attempt at such action is a mere nullity."); People v. Morrison, 633 N.E.2d 48, 57 (Ill. App. Ct. 1994) ("If the trial court improperly denies a motion for substitution of [a] judge, any subsequent action taken by the court is void."); People v. Langford, 616 N.E.2d 628, 632 (Ill. App. Ct. 1993) ("If a motion for automatic substitution is improperly denied, all action by the trial court subsequent to the improper denial is void."); Henderson v. State, 647 N.E.2d 7, 10 (Ind. Ct. App. 1995) ("[The judge] had previously recused himself from the case and thus was not qualified to reassume jurisdiction."); Thacker v. State, 563 N.E.2d 1307, 1310 (Ind. Ct. App. 1990) (holding that a judge had no authority after he disqualified himself); Vacura v. Haar's Equip., Inc., 364 N.W.2d 387, 393 (Minn. 1985) ("[A]fter a judge has removed himself from a case, he may not issue an order which relates to the merits."); *In re* Burns, 538 N.W.2d 162, 166 (Minn. Ct. App. 1995) ("When a trial judge refuses to honor a removal notice properly filed pursuant [to the rule], any further exercise of judicial power is unauthorized."); Ferguson v. Pony Express Courier Corp., 898 S.W.2d 128, 130 (Mo. Ct. App. 1995) ("[A] judge who disqualifies himself or who has been disqualified by one of the parties has no further right to hear the case."); Johnson v. Mehan, 731 S.W.2d 887, 888 (Mo. Ct. App. 1987) ("Once a change of judge has been entered and the case transferred to another judge the disqualified judge has no further authority in the case and any orders made after the disqualification are void."); Byrd v. Brown, 613 S.W.2d 695, 699-700 (Mo. Ct. App. 1981) (holding that after judge's disqualification, all orders made thereafter are void); Blaisdell v. City of Rochester, 609 A.2d 388, 391 (N.H. 1992) (voiding all subsequent rulings that were based on findings by a judge who should have been disqualified); Pueblo of Laguna v. Cillessen & Son, Inc., 682 P.2d 197, 199 (N.M. 1984) ("Since the district court was properly disqualified, it had power only to perform mere formal acts subsequent to the disqualification."); *In re* Risovi, 429 N.W.2d 404, 407 (N.D. 1988) (holding that the orders signed by the judge after he was disqualifiad are void); Longhini v. Bisbop, 901 P.2d 962, 965 (Or. Ct. App. 1995) ("As a general rule, a judge who has been disqualified from a particular case is without authority to act further in any judicial capacity in that case."); State v. Nossaman, 666 P.2d 1351, 1355 (Or. Ct. App. 1983) ("A judgment entered by a judge who has been disqualified in the manner prescribed in the statute is void."); Degarmo v. State, 922 S.W.2d 256, 268 (Tex. Ct. App. 1996, no writ) ("If a judge is disqualified under the constitution, he is absolutely without jurisdiction in the case, and any judgment rendered by him is void

courts have reached the same conclusion, no court has felt compelled to ground its decision in the Due Process Clause. Instead, they refer to it as a generally accepted rule.[93]

Four general principles can be gleaned from these state and federal decisions. First, courts repeatedly hold that once a judge has recused, whether the recusal is based on statutory or constitutional grounds,[94] he is forbidden from affecting any adjudicated matter in the case. Second, even when a judge mistakenly recuses himself and an appellate court later determines that the judge did not need to recuse, he is still required to maintain his disqualification.[95] Third, courts have recognized one exception: judges may perform ministerial, nondiscretionary acts to ensure that the case is properly disposed of by an unbiased decision maker. Finally, as a remedy for violating one of these policies, appellate courts typically void all actions taken by the judge after he did or should have recused.

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and subject to collateral attack."); McElwee v. McElwee, 911 S.W.2d 182, 186 (Tex. Ct. App. 1995, writ denied) ("If a judge is disqualified under the Texas Constitution, he is without jurisdiction to hear the case, and therefore, any judgment he renders is void and a nullity."); Chilicote Land Co. v. Houston Citizens Bank & Trust, 525 S.W.2d 941, 943 (Tex. Civ. App. 1975, no writ) (ruling that once disqualified, the judge was "incapacitated from taking any action in the cause which required . . . judicial discretion").

93. *See, e.g.*, *El Fenix*, 36 F.3d at 141 ("As a general rule, a trial judge who has recused himself 'should take no other action in the case . . . .'" (quoting 13A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3550 (2d ed. 1984))); *Simmons*, 858 F.2d at 143 ("Once a judge has disqualified himself, he or she may enter no further orders in the case."); *Bolt*, 594 So. 2d at 864 ("Florida case law is well settled that once a trial judge has recused himself, further orders of the recused judge are void and have no effect."); *Longhini*, 901 P.2d at 965 ("As a general rule, a judge who has been disqualified from a particular case is without authority to act further in any judicial capacity in that case.").

94. *See supra* note 66 and accompanying text.

95. *See El Fenix*, 36 F.3d at 141 (finding that even though there were no grounds for the judge's recusal, "a trial judge who has recused himself 'should take no other action in the case . . . .'" (quoting 13A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3550 (2d ed. 1984))); *Simmons*, 858 F.2d at 142 ("[E]ven when, objectively, [the statutory standards for recusal are] not met, an appellate court will be extremely reluctant to second guess a judge whose heightened sensitivity to even a remote or speculative appearance of impropriety impels him or her to recuse.").

1. Once recused, always recused

Once a judge has recused himself from a case, he may not "second guess" his recusal and reenter the case.[96] Cases routinely hold that when a judge recuses himself, he is stripped of the power to affect any adjudicated matter in the case from which he was disqualified.[97] The cases suggest that a recused judge is powerless to modify or affect the outcome relating to a case from which he was disqualified.[98] Hence, recused judges have been forbidden from making both direct and indirect modifications that have arisen from collateral petitions[99] or other adjudications closely connected to the case,[100] hearing the case on remand,[101] participating in a rehearing,[102] advising a replacement judge on how to dispose of the case,[103] entering any type of

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96. *See Simmons*, 858 F.2d at 142.

97. Ellentuck v. Klein, 570 F.2d 414, 424 (2d Cir. 1978) ("[I]t is clear that . . . if a judge is disqualified, that disqualification strips the court of subject matter jurisdiction."); *Evans*, 371 S.E.2d at 433 ("A disqualified judge can take no judicial action in the case . . . .").

98. *See, e.g.*, cases cited *supra* notes 91-92.

99. *See* Blaisdell v. City of Rochester, 609 A.2d 388 (N.H. 1992) (voiding all orders entered in two subsequent collateral proceedings, even though they were presided over by two different judges, because the original proceeding was adjudicated by a judge that should have disqualified himself).

100. *See* Beckord v. District Court, 698 P.2d 1323, 1328-30 (Colo. 1985) (en banc) (holding that once a judge recused and referred a portion of the multidistrict litigation to another judge, he was forbidden from adjudicating motions relating to the same case).

101. *See* Burrows v. Forrest City, 543 S.W.2d 488, 493 (Ark. 1976) (en banc) (holding that when it appears a trial judge failed to recuse himself, "the better procedure . . . would be to . . . remand [the] case for hearing on appellee's motion to revoke before a different judge"); Catchpole v. Brannon, 42 Cal. Rptr. 2d 440, 445 (1995) ("Where the average person could well entertain doubt whether the trial judge was impartial, appellate courts . . . should reverse the judgment and remand the matter to a different judge for a new trial on all issues."); Leone v. Leone, 917 S.W.2d 608, 612 (Mo. Ct. App. 1996) ("[A] new judge would be required on remand, because the trial judge who entered the dissolution decree later recused herself from further proceedings in the case.").

102. *See* Johnson v. Sturdivant, 758 S.W.2d 415, 416 (Ark. 1988) (deciding that all seven members of the Arkansas Supreme Court should not participate in the rehearing of a case where one judge should have recused himself).

103. *See* McCuin v. Texas Power & Light, Co., 714 F.2d 1255, 1261 (5th Cir. 1983) ("To permit a disqualified chief judge to select the judge who will handle a case in which the chief judge is disabled would violate the congressional command that the disqualified judge be removed from all participation in the case."); Gubler v. Comm'n on Judicial Performance, 688 P.2d 551, 567-68 (Cal. 1984) (en banc) (stating that once disqualified, a judge may not even offer advice to other judicial officers on how to dispose of the case); State v. Evans, 371 S.E.2d 432, 434 (Ga. Ct. App. 1988) ("[A]

order related to the case,[104] or any other judicial act affecting the case.[105] Although no case has explicitly so held, these decisions seem functional in nature so that any act by a recused judge—whether in the same case or a related case—that affects the case from which he was recused would be improper.

2. Even when wrong, a judge should remain recused

Even when appellate courts determine that insufficient grounds exist for the judge's initial recusal, they still hold that "the better part of discretion" suggests that due process requires the judge to maintain his recusal.[106] Courts reason that once a judge's "heightened sensitivity to even a remote or speculative appearance of impropriety impels him or her to recuse," the appellate court should not lightly second-guess that decision.[107] Courts adhere to this strict rule to give legitimacy to the judicial process. Litigants, and more importantly the citizenry as a whole, must be assured that once a judge has decided that his conflicts are too great to participate in a case, nothing can overcome that decision. Without this rule, the public may lose confidence that the judicial system works to promote the fair adjudication of their rights.[108]

3. The ministerial acts exception

The only explicitly recognized exception to the general rule is that a judge should only be allowed to perform ministerial, nondiscretionary acts related to the case from which he is disqualified.[109] In most situations, this entails seeing that the case

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recused state court judge [is] without authority to select his own replacement.").

104. *See* Bolt v. Smith, 594 So. 2d 864, 864 (Fla. Dist. Ct. App. 1992) ("[O]nce a trial judge has recused himself, further orders . . . are void and have no effect."); Thacker v. State, 563 N.E.2d 1307, 1309-10 (Ind. Ct. App. 1990) (setting aside the order made by a judge after he disqualified himself).

105. *See* Chilicote Land Co. v. Houston Citizens Bank & Trust, 525 S.W.2d 941, 943 (Tex. Civ. App. 1975, no writ) (ruling that once disqualified, the judge was "incapacitated from taking any action in the cause which required . . . judicial discretion").

106. *See* El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136, 141-42 (1st Cir. 1994).

107. Moody v. Simmons, 858 F.2d 137, 142 (3d Cir. 1988).

108. *See infra* text accompanying note 132.

109. *But see* Stringer v. United States, 233 F.2d 947, 948 n.2 (9th Cir. 1956) ("There may be other instances where a judge disqualifying himself could resume direction or even decide the issues. For instance, he might be mistaken as to the

is properly transferred to another judge or that another judge is appointed in his stead.[110] The dispositive issue then becomes whether an act constitutes a "ministerial" act or a "judicial" act. Courts suggest that ministerial acts include those formal, nonjudicial functions that do not involve "an exercise of judicial discretion" or adjudicate the rights of a party.[111] If the recused judge acts in any way that requires judicial discretion, the action is outside the scope of the ministerial acts exception.

4. Vacating orders entered by a disqualified judge

When a recused judge violates the standards summarized above, higher courts typically remedy the situation by voiding all actions taken by the recused judge after he did or should have recused. In *Aetna*, the Supreme Court insisted on this remedy in a situation where a judge decided not to recuse when due process required his disqualification. The court concluded that "we are aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote."[112] Although the *Aetna* court was addressing the remedy for a judge's initial decision not to recuse, state and federal courts have applied the same remedy when a disqualified judge later attempts to affect the case from which he is recused.[113]

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identity of a party. But the reason for resuming control should be more than a second reflection on the same facts which the trial judge considered originally disqualified him.").

110. *See* WRIGHT & MILLER, *supra* note 91, § 3550.

111. Beckord v. District Court, 698 P.2d 1323, 1330 (Colo. 1985) (en banc); *see also Stringer*, 233 F.2d at 948; Chilicote Land Co. v. Houston Citizens Bank & Trust, 525 S.W.2d 941, 943 (Tex. Civ. App. 1975, no writ); *cf. Simmons*, 858 F.2d at 143 ("We conclude that orders converting a Chapter 11 bankruptcy proceeding to Chapter 7, disqualifying counsel or vacating a contingent fee agreement, and findings impugning counsel are too substantial to be considered mere 'housekeeping.'").

112. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 827-28 (1986).

113. *See, e.g.*, New York Hous. Dev. Corp. v. Hart, 796 F.2d 976, 979 (7th Cir. 1986) ("[T]he position that provides the greatest measure of safety . . . is one that vacates all decisions taken after the . . . motion to disqualify a judge . . . ."); Johnson v. Sturdivant, 758 S.W.2d 415 (Ark. 1988) (Arkansas Supreme Court setting aside its own decision after one justice recused himself from the case); Butler v. Biven Software, Inc., 473 S.E.2d 168, 170 (Ga. Ct. App. 1996) ("[A]ny actions following his recusal or after he should have recused himself are naturally void."); Blaisdell v. City of Rochester, 609 A.2d 388, 391 (N.H. 1992) (voiding all rulings made after the judge should have recused himself); Degarmo v. State, 922 S.W.2d 256, 267 (Tex. Ct. App. 1996, no writ) (holding that any judgment rendered by a disqualified judge is void).

IV. JUSTIFICATION FOR AND APPLICATION OF A PROPOSED CONSTITUTIONAL STANDARD

As noted above, the Supreme Court has articulated a series of standards that dictate when the Due Process Clause requires a judge to initially recuse from a case.[114] However, the situation routinely arises where a disqualified judge attempts to reassume jurisdiction in a case,[115] enter dispositive orders after he is recused,[116] offer advice to the replacement judge on how to dispose of the case,[117] or affect the case in some other way after he did or should have recused.[118] The *Whitehead* matter forcefully illustrates how recused judges later may attempt to affect a case in which they were disqualified. Although these situations are common, the Court has never decided whether the Due Process Clause applies to them. Thus, there is a compelling need for the Supreme Court to articulate a standard governing the rights and obligations of a judge after he has recused from a case.[119] If such a standard existed, then perhaps these troubling

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114. *See supra* Part III.A.

115. *See, e.g.*, Margulies v. Margulies, 528 So. 2d 957, 960 (Fla. Dist. Ct. App. 1988) ("[O]nce a trial judge disqualifies himself, he may not 'requalify' himself on removal of the reason for disqualification."); Henderson v. State, 647 N.E.2d 7, 10 (Ind. Ct. App. 1995) ("[The judge] had previously recused himself from the case and thus was not qualified to reassume jurisdiction.").

116. *See, e.g.*, Moody v. Simmons, 858 F.2d 137, 143 (3d Cir. 1988) ("Once a judge has disqualified himself, he or she may enter no further orders in the case."); Bolt v. Smith, 594 So. 2d 864, 864 (Fla. Dist. Ct. App. 1992) ("Florida case law is well settled that once a trial judge has recused himself, further orders of the recused judge are void and have no effect."); Rogers v. State, 341 So. 2d 196, 196 (Fla. Dist. Ct. App. 1976) ("Once the trial judge recused himself, further orders of his were void and of no effect."); Vacura v. Haar's Equip., Inc., 364 N.W.2d 387, 393 (Minn. 1985) ("[A]fter a judge has removed himself from a case, he may not issue an order which relates to the merits."); Johnson v. Mehan, 731 S.W.2d 887, 888 (Mo. Ct. App. 1987) ("Once a change of judge has been entered and the case transferred to another judge the disqualified judge has no further authority in the case and any orders made after the disqualification are void.").

117. *See, e.g.*, McCuin v. Texas Power & Light Co., 714 F.2d 1255, 1261 (5th Cir. 1983) ("To permit a disqualified chief judge to select the judge who will handle a case in which the chief judge is disabled would violate the congressional command that the disqualified judge be removed from all participation in the case."); Gubler v. Comm'n on Judicial Performance, 688 P.2d 551, 567-68 (Cal. 1984) (en banc) (stating that once disqualified, a judge may not even offer advice to other judicial officers on how to dispose of the case).

118. *See, e.g.*, cases cited *supra* notes 91-92.

119. Even though cases often arise where a recused judge "requalifies" himself, frequency of occurrence alone is not the only justification for the creation of a new

cases would arise less often—perhaps the *Whitehead* situation would not have caused the "intramural dispute"[120] that has bitterly divided the Nevada Supreme Court.

A. *The "General Rule" Should Become the Constitutional Rule*

As discussed earlier, state and federal courts have repeatedly adopted a general, four-part standard stating that once a judge recuses, he should take no further action in the case except to see that the case is transferred to another judge.[121] The *Whitehead* case provides an appropriate opportunity to propose that this "general rule" become a fundamental part of the Due Process Clause.

Some may argue that there is no need to incorporate the proposed standard into the Due Process Clause because all federal and state courts that have addressed the issue have already adopted the standard without hinting that the Constitution required it.[122] In support of this position, they may refer to the doctrine of constitutional avoidance to suggest that the proposed standard should not be embedded in the Constitution because it is not absolutely necessary.[123] To incorporate this

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constitutional standard. A new standard is justified because the judge's *actual conduct* appears suspect on its face. A judge has a duty to decide those cases that come before him and the duty not to recuse unless he feels that his interests are too great to remain fair. *See* Laird v. Tatum, 409 U.S. 824, 837 (1972) ("Those federal courts of appeals that have considered the matter have unanimously concluded that a federal judge has a duty to *sit* where *not disqualified* which is equally as strong as the duty to *not sit* where *disqualified*."). Thus, when a judge "requalifies" himself and begins anew in the case, it raises serious due process questions, including whether the judge can fairly administer justice. If the primary goal of the Due Process Clause in the area of judicial disqualification is to ensure that judges remain neutral arbitrators capable of rendering unbiased judgments, then the Constitution ought to have something to say about a disqualified judge attempting to later affect the case from which he is recused.

120. *See* Opposition to Petition for Writ of Mandamus or Prohibition, or in the Alternative, a Writ of Certiorari to the Supreme Court of the State of Nevada at 16, *In re* Stoffen, 920 P.2d 489 (Nev. 1996) (No. 96-541) (authored by Geoffrey C. Hazard, Jr.).

121. *See supra* Part III.B.

122. *See supra* notes 91-95 and accompanying text.

123. *See* Lowe v. Securities & Exch. Comm'n, 472 U.S. 181, 212 (1985) (White, J., concurring) ("[C]onstitutional adjudication is to be avoided where it is fairly possible to do so without negating the intent of Congress."); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring) ("[R]igorous adherence to the principle that this Court should decide no more of a constitutional question than is absolutely necessary accords with both our decided

rule as a constitutional mandate is not necessary since it already has widespread application among numerous state and federal courts. Furthermore, a constitutional rule would place undue burdens on every court in the United States—state and federal—and thus would sweep too far. Opponents of the proposed principle would likely view the *Whitehead* case as an anomaly not likely to be repeated and one in which state law and political processes should resolve the issue instead of the Supreme Court.

Although these arguments have some merit, for the reasons discussed below, the better view would be to adopt the constitutional rule that once a judge has recused from a case, he may take no further judicial action in the case. Several reasons necessitate the adoption of the proposed four-part standard as a constitutional standard. First, developing a due process standard would be a natural extension of existing due process jurisprudence in the area of judicial disqualification. As the Court has often repeated, one of the most fundamental tenants of due process is that every litigant is entitled to a fair trial before an unbiased decision maker.[124] This essential due process standard is violated when a case is decided by a judge that has a direct or personal interest in the outcome of the litigation.[125] The principle that a recused judge may have no further participation in the case from which he is recused rests on the notion that a litigant is entitled to a fair adjudicator; it is merely a refinement of the basic and accepted constitutional notion that every trial be conducted by an unbiased judge. If a judge's personal interest in a particular case is so great that he cannot remain fair, yet he refuses to recuse, he would clearly violate current due process standards.[126] Extending this logic one more step, if the same judge properly recuses himself but then later determines he would rather continue adjudicating the case, he would still violate due process. There is no constitutional difference

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cases and with sound judicial policy.").

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

125. *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821-22 (1986) ("'[I]t certainly violates the Fourteenth Amendment . . . to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.'" (alteration in original) (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927))).

126. *See supra* Part III.A.

between the impropriety of a disqualified judge adjudicating a matter *prior* to his formal recusal and the impropriety of his adjudicating the matter *after* his formal recusal. Both are equally impermissible because in both cases a biased judge is allowed to affect the case in violation of the mandate that there be a fair trial in a fair tribunal.[127]

Second, the proposed standard minimally interferes with the rights of judges to sit in a case while providing maximum protection to litigants.[128] The standard is necessary because it provides a built-in safeguard against arbitrary violations of litigants' due process rights. Because individual judges typically decide their own recusal motions and consequently decide whether to reenter a case, the proposed standard will always prevent disqualified judges from returning to the case. There are no factors for judges to weigh—no balancing of interests that they will have to engage in.[129] Judges will know that, once they recuse themselves from a case, the Due Process Clause forever forbids their participation in any judicial matter related to the case.[130]

Third, the proposed standard fulfils the constitutional mandate that every trial be conducted by an unbiased decision maker, and thus bolsters judicial legitimacy.[131] The public will not view the judicial system as legitimate if it believes that trials

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127. *See Murchison*, 349 U.S. at 136.

128. *See* Nugent, *supra* note 66, at 34 ("Once a case is assigned to a judge, the litigants and the public have a right to expect the judge to fairly and honestly evaluate whether there are any reasons to prevent the judge from presiding over the case."); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 667 (1987) (arguing that his proposed reform of the statutory disqualification standards would be only a "minimal logistical burden").

129. This is an especially relevant justification in light of a recent empirical study by the American Judicature Society that surveyed 571 judges to determine how sitting judges regard specific disqualification issues. One of the important conclusions of the study was that "the rules of judicial ethics, as they pertain to the issue of impartiality and the need for disqualification, are not providing judges with adequate guidance and are in serious need of clarification." Jona Goldschmidt & Jeffrey M. Shaman, *Judicial Disqualification: What Do Judges Think?*, 80 JUDICATURE 68, 71 (1996).

130. *But see* Diane C. Boniface, Note, *Class Actions: Establishing A More Effective Judicial Disqualification Standard*, 50 OHIO ST. L.J. 1291, 1302 (1989) (arguing that, under the statutory requirements for judicial disqualification, "the congressional goal of promoting public confidence in judicial impartiality may be accomplished by actually giving the judiciary at least some discretion to operate free of externally imposed standards").

131. *See Murchison*, 349 U.S. at 136.

are run by biased judges who have a personal interest in the outcome of the litigation. Requiring recused judges to remain recused will promote the requisite confidence in the judicial system that is absolutely required for effective adjudication of individual's rights. "Judges are absolutely dependent on the public's granting them legitimacy as institutional decision makers."[132] Litigants and citizens routinely and implicitly place their trust in a judicial system that demands judicial impartiality. Knowing that judges are not allowed to reenter cases that they were previously disqualified from participating in is just as vital to upholding the legitimacy of the judicial system as knowing that judges are not, for example, accepting bribes. "[I]f the public withdraws that [grant of legitimacy], the judicial system will be in very deep trouble."[133]

Finally, the Due Process Clause should be interpreted to mean that a previously recused judge is forbidden from later participating in the case because it would protect litigants from state judicial panels that either fail to adopt the "general rule" or refuse to abide by its precepts. If, as in *Whitehead*, a recused member of a state supreme court later attempts to affect a case from which he was disqualified, under the proposed standard, the litigant would have an avenue of appeal to the United States Supreme Court to review the judge's decision because it would now encompass a federal constitutional issue. On the other hand, if the decision by the judge is independently based on a general rule of state law, then the Supreme Court would have no power to review the judge's decision because it would not encompass a federal issue.[134]

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132. Frances Kahn Zemans, *From Chambers to Community*, 80 JUDICATURE 62, 63 (1996) ("The public will not benefit in the long run if public confidence in the courts continues to decline, as evidence indicates that it is. . . . [I]f the judiciary does not pay attention to what the public thinks and does not pay some attention to helping it understand why judicial independence and why the rule of law is so important to democracy, then all of the rest of the judiciary's good work will go for naught."); *see also* Stempel, *supra* note 128, at 667 ("To a large degree, the legitimacy of our Supreme Court is premised upon its assumed impartiality.").

133. Zemans, *supra* note 132, at 62.

134. *See* Michigan v. Long, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of stete courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground.").

Supreme Court review of decisions by state judges to return to cases from which they were previously recused is important because it provides a detached decision making panel to resolve intra-court disputes. The *Whitehead* situation is a telling example. If the Due Process Clause does not govern whether Justices Young and Rose may alter the relief granted by the *Whitehead* panel, then the issue is unreviewable by the Supreme Court.[135] Thus, the decision by the two recused justices to rescind the appointment of the special master would stand unaltered, arguably resulting in a miscarriage of justice.

So, although arguments against adopting a constitutional standard that would govern the *Whitehead* case have some merit, the better view is to adopt the constitutional rule that once a judge is disqualified he may take no further judicial action in the case. The power of state supreme court justices to determine the scope of their own recusal is too great to withstand scrutiny under the fundamental precepts of due process. The only practical method for checking their power is to bring a constitutional challenge to the only court able to issue a writ of mandamus or prohibition to state supreme courts—the United States Supreme Court. The proposed standard would not result in an intrusion on the independence of state courts. Under current due process jurisprudence, a state justice's decision whether to *initially* recuse is reviewable in the Supreme Court on due process grounds;[136] the proposed standard would ensure that any *later* decision by a recused judge to reenter a case and affect its outcome is likewise reviewable.

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135. In fact, this is one of the primary objections made by Justices Young and Rose. In their opposition to the petition filed to the United States Supreme Court, they dispute the existence of a federal question. *See* Opposition to Petition for Writ of Mandamus or Prohibition, or in the Alternative, a Writ of Certiorari to the Supreme Court of the State of Nevada at 8, *In re* Steffen, 920 P.2d 489 (Nev. 1996) (No. 96-541) (authored by Geoffrey C. Hazard, Jr.) ("[I]f there is a federal issue here, it is so exiguous as not to warrant this Court's intervention."). Attorney General Del Papa agreed: "*Aetna* says nothing about whether a state-court judge who has once recused himself or herself can return to the case at a later stage. That is wholly a question of state law on which the state court has spoken with final authority." Opposition to Petition for Writ of Mandamus or Prohibition, or in the Alternative, a Writ of Certiorari to the Supreme Court of the State of Nevada at 11, *In re* Steffen, 920 P.2d 489 (Nev. 1996) (No. 96-541) (authored by Charles Alan Wright et al.).

136. *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) (reviewing an Alabama Supreme Court justice's decision not to recuse himself in a case).

B. The Proposed Standard as Applied to Whitehead

To illustrate how the proposed four-part standard would resolve problems that may arise in the area of judicial disqualification, it will here be applied to the facts of *Whitehead*.

1. Once recused, always recused

Once a judge has been disqualified, due process should prevent that judge from affecting any aspect of the case from which he is disqualified. Because the ability to modify or alter a case is functional in nature, it makes no constitutional difference whether the *Del Papa* petition is a different case, as Justices Young and Rose suggest,[137] or is the same case, as Justices Steffen and Springer assert.[138] Instead, the relevant inquiry under the proposed standard is whether the *Del Papa* case seeks to alter or affect the outcome, judgment, order, or decision relating to the *Whitehead* case.[139] If granting the *Del Papa* petition would modify *Whitehead*, then the two recused justices should not be allowed to participate in *Del Papa*.[140]

The *Del Papa* petition is for all practical purposes a petition seeking modification of *Whitehead* and thus is practically the same case as *Whitehead*. Several aspects of Attorney General Del Papa's petition suggest this conclusion. For instance, the petition's stated purpose is to void the relief granted by the *Whitehead* panel because the attorney general felt that the competing orders in *Whitehead* (appointing and voiding the appointment of the Special Master) had created a "constitutional crisis."[141] In addition, the attorney general only named as respondents the Justices who voted in favor of the appointment of the Special Master and sought an order "mandating that the Respondents [the majority of the *Whitehead* panel] cease all

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137. *See supra* Part II.B.2.

138. *See supra* Part II.C.2.

139. *See supra* Part III.B.1.

140. The reasoning here is similar to that in *Aetna*, where Justice Embry was disqualified because his participation had the "immediate effect of enhancing . . . [his own] legal status" and thus he acted as a judge in his own case. *Aetna*, 475 U.S. at 824. In the *Whitehead* situation, Justices Young and Rose similarly acted as judges in their own case when they prevented an investigation into their alleged unethical behavior by voiding the appointment of the special master. *See supra* note 32.

141. Petition for a Writ of Prohibition or in the Alternative for a Writ of Mandamus at 3, Del Papa v. Steffen, 915 P.2d 245 (Nev. 1996) (No. 27847).

action in [*Whitehead*]."[142] Finally, the petition's "Statement of Facts" section only recites the background of the *Whitehead* case.[143] For these reasons, it is clear that *Del Papa* is an effort to reverse the unfavorable rulings by the *Whitehead* panel; thus, the two cases are functionally the same case.[144] Whether *Del Papa* is viewed as technically being a different case than *Whitehead* is not as important as understanding what effect *Del Papa* had on decisions made by the *Whitehead* panel. Because *Del Papa* is an attempt to modify a portion of the relief granted by the *Whitehead* panel, under the proposed constitutional standard, that modification should be vacated.

2. Even when wrong, a judge should remain recused

Even if a recused judge later determines that he should not have recused himself, due process should not allow the judge to later reenter the case. Although Justices Young and Rose do not dispute whether they should have recused themselves in *Whitehead*, they do argue that their continued recusal is not warranted in the *Del Papa* matter. However, for the reasons stated above, the *Del Papa* petition is essentially the same case as *Whitehead*; thus, under the proposed standard, the recused justices would be prohibited from participating in *Del Papa* since it seeks a reversal of the determinations of the *Whitehead* panel.

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142. *Id.* at 1.

143. *See id.* at 2-4.

144. The argument asserted by Justices Young and Rose that by granting the *Del Papa* petition they have not attempted to "amend, restrict or change [the] relief" granted in *Whitehead* seems implausible. Del Papa v. Steffen, 920 P.2d 489, 489 (Nev. 1996); *see supra* Part II.B.1. Judge Whitehead specifically requested, as part of his formal relief for the unconstitutional breaches of confidentiality and court orders, that a special master be appointed to determine the cause of the violations. Whitehead v. Nevada Comm'n on Judicial Discipline, 878 P.2d 913, 915 (Nev. 1994). Justices Young and Rose, along with the only dissenter in *Whitehead*, Justice Shearing, altered the relief by voiding the appointment of the Special Master. *See* Petition For An Order Rescinding Appointment of Special Master Entered September 1, 1995, and Voiding Associated Expenses, ADKM No. 221 (Nev. Sept. 15, 1995) (Order Granting Petition and Vacating Order Appointing Special Master); *see also* Del Papa v. Steffen, 915 P.2d 245, 254 (Nev. 1996) (per curiam). Even if, as the recused justices contend, the *Whitehead* panel appointed the Special Master in excess of jurisdiction and without authority, see *supra* note 25-26 and accompanying text, it is completely improper for them to "requalify" themselves and void an order of a legally empaneled court. *Del Papa*, 915 P.2d at 248-49.

Prohibiting Justices Young and Rose from participating in *Del Papa* because of their recusal in *Whitehead* is the best way to protect Judge Whitehead's due process rights. He has the right to have a panel of unbiased judges determine the ultimate fate of his request for the appointment of a special master.[145] If Justices Young and Rose are allowed to participate in that determination, then one of the most fundamental due process rights will be violated.[146]

3. The ministerial acts exception

Under the proposed standard, a ministerial act is a nonjudicial act that does not involve "an exercise of judicial discretion"[147] or the adjudication of the rights of a party. Justices Young and Rose claim that their administrative duty to oversee the limited resources of the court vested them with the power to void the appointment of the Special Master.[148] This assertion begs the question whether voiding a substantive ruling of the *Whitehead* panel through an administrative order is a ministerial act.

Admittedly, most administrative orders issued by a court, like those appropriating its budget monies, do fall within the ministerial acts exception. However, in cases like the present one, when recused justices use their power over the court's administration to overrule a substantive order in a case in which they are disqualified, that power should not be upheld. The administrative order issued by Justices Young and Rose voiding the appointment of the Special Master reversed a portion of the relief granted at the request of Judge Whitehead.[149] To allow an administrative order to void the substantive ruling of a legally empaneled court would allow recused justices to overturn any unfavorable decision under the guise of an administrative order.

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145. *See In re* Murchison, 349 U.S. 133, 136 (1955) (holding that every litigant is entitled to "a fair trial in a fair tribunal").

146. *See id.*

147. Beckford v. District Court, 698 P.2d 1323, 1330 (Colo. 1985) (en banc); *see also* cases cited *supra* note 111.

148. *See supra* text accompanying note 25.

149. *See supra* text accompanying notes 25-27.

4. Vacating orders entered by a recused judge

Because the *Del Papa* petition in effect modifies findings and relief granted by the *Whitehead* panel, under the proposed due process standard, Justices Young and Rose should be disqualified from participating in *Del Papa*. Since they participated in and granted the *Del Papa* petition, that order should be voided as a violation of due process. In addition to the *Del Papa* petition, the recused justices also issued an administrative order voiding the appointment of the Special Master.[150] Because this order also modifies or alters an adjudicated matter made by the *Whitehead* panel, it too should be voided.[151]

V. CONCLUSION

The Due Process Clause of the Fourteenth Amendment requires that every litigant receive a fair trial before an unbiased decision maker.[152] As a consequence, the Supreme Court has determined that due process requires judges to recuse themselves when they have such an interest in the outcome of a case that they cannot hold the balance "nice, clear and true."[153] The Court's existing due process jurisprudence as it relates to judicial disqualification is adequate to reach most issues faced by judges; however, as *Whitehead v. Nevada Commission on Judicial Discipline* displays, there is need to extend the protections afforded by the Due Process Clause.

In order to protect litigants from a biased decision maker, to bolster the legitimacy of the judicial system,[154] and to allow Supreme Court review, the Due Process Clause should be extended so that once a judge has recused himself, he may no longer affect the case in which he was disqualified in any way. This principle should hold true even if the judge erroneously recused himself in the first instance. Additionally, the only appropriate actions that a recused judge should be able to take are the ministerial acts necessary to transfer the case to another judge or to have another judge appointed in his stead.

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150. *See supra* text accompanying notes 25-27.
151. *See supra* text accompanying notes 112-13.
152. *See In re* Murchison, 349 U.S. 133, 136 (1955).
153. Tumey v. Ohio, 273 U.S. 510, 532 (1927).
154. *See* Zemans, *supra* note 132, at 62-63.

Several lower federal courts[155] as well as numerous state courts have adhered to these principles.[156] As the situation in *Whitehead* poignantly demonstrates, these principles should now be removed from the field of generally applicable law and be securely grounded in the Due Process Clause of the Fourteenth Amendment.

S. Matthew Cook

155. *See, e.g.*, cases cited *supra* note 91.
156. *See, e.g.*, cases cited *supra* note 92.