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Recusal and the Supreme Court

Debra Lyn Bassett
Southwestern Law School, dbassett@swlaw.edu

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University of California, Davis
Ann Wright Graham, editor

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From Laird v. Tatum *to* Bush v. Gore*, the refusal of some Supreme Court Justices to recuse themselves in controversial cases has caused reactions ranging from confusion to disgust. The latest "duck hunting" recusal controversy, and the Court's seemingly callous response to the public outcry, seemed to suggest a deliberate indifference to the recusal standard. This Article examines the recusal provisions applicable to the Supreme Court. Although there is little doubt that Congress drafted the federal recusal statute broadly, interesting questions surround recusal in the Supreme Court due to the unique position the Court holds, which raises potential separation of powers and enforcement issues. The Article concludes that rather than an insistence upon actual recusal, a more valuable approach at the Supreme Court level might involve the institution of additional disclosures, in the form of "statements of interest" accompanying participation.*

INTRODUCTION

It is an all too human trait to believe oneself fair and unbiased. Indeed, to the degree that one possesses strong opinions, one tends to rationalize them as objectively justified. In law, especially under the adversary system, the potential for bias is anticipated and protections provided. Clients are expected to focus on their own interests, and lawyers are expected to represent those individualized client interests. Balance is anticipated through the expectation that both sides will retain counsel to vigorously represent their interests. Because the parties are expected to approach legal issues from their own individualized, even selfish, perspectives, the adversary system places a particular burden on judges—because the ethical rules impose few obligations on attorneys toward third parties or toward the justice system,[1] an impartial judicial

Visiting Professor of Law, University of California, Davis, School of Law (Martin Luther King, Jr. Hall); Loula Fuller and Dan Myers Professor of Law, Florida State University College of Law. dlbassett@ucdavis.edu. J.D. 1987, University of California, Davis; M.S. 1982, San Diego State University; B.A. 1977, University of Vermont. I appreciate the helpful comments of Mike Lawrence, Rex Perschbacher, and Nat Stern on an earlier draft of this Article.

[1] *See* Debra Lyn Bassett, *Redefining the "Public" Profession*, 36 RUTGERS L.J. (forthcoming 2005); *see also* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 57 (2000) (noting that under the ethical rules, "the rights and autonomy of third parties barely figure"); Deborah L. Rhode, *The Future of the Legal Profession: Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 668 (1994) ("Although lawyers have certain obligations as officers of the court, these are quite limited and largely track the prohibitions on criminal and fraudulent conduct that govern all participants in the legal process.").

"referee" is essential to produce an appropriately "just" result.[2] Moreover, we require not only that judges conduct themselves without actual bias toward the parties, but also that judges are viewed, both by the critical participants and third-party observers, as unbiased—in other words, they must avoid even the appearance of impropriety.[3]

Of course, judges are human beings and thus are not free from bias either. Again, the potential for bias is anticipated and protections provided. Judges must disclose information that might be relevant to determining their potential bias in a case.[4] The concepts of recusal and disqualification recognize that judges will, from time to time, have biases, prejudices, or interests that prevent truly unbiased decision-making—or that at least suggest some potential for bias. Avoiding the appearance of impropriety requires a judge to withdraw from a case when the judge's impartiality in a matter might reasonably be questioned. Thus, actual bias is not required; the fact that the public might reasonably question a judge's impartiality is sufficient to require the judge to withdraw from the case. It is this concept of withdrawing from further participation in a case that underlies the concept of judicial recusal.[5]

[2] *See* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS § 9.01, at 231 (3d ed. 2004) (noting that "[a]n impartial judge is an essential component of an adversary system, providing a necessary counterpoise to partisan advocates."); *see also infra* notes 21–25 and accompanying text (discussing the importance of judicial impartiality to due process).

[3] *See* AMERICAN BAR ASSOCIATION, ABA MODEL CODE OF JUDICIAL CONDUCT, Canons 2, 3, 4 (2002) [hereinafter ABA MODEL CODE]; *see also* John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 238 (1987) ("Courts declare that impartiality is so important that a reasonable—albeit incorrect—appearance of bias compels recusal").

[4] *See* ABA MODEL CODE, *supra* note 3, at Canon 3E(1), cmt. 2 ("A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification."); Richard Carelli, *Judges' Financial Reports Hit Web*, Associated Press, June 22, 2000, 2000 WL 23358974 ("Since 1979, federal judges have been required by federal law to report all stock holdings and other family assets within broad ranges of estimated worth. They also must report gifts and other reimbursements."); *see also* Ethics in Government, §§ 101–109, 5 U.S.C.A. APP. 4 (2000) (requiring federal judges to file annual financial statements, and providing that such statements shall be available for public inspection).

[5] Traditionally "recusal" has referred to a judge's discretionary, voluntary decision to step down. *See* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 1.1, at 4 (noting this traditional view); Karen Nelson Moore, *Appellate Review of Judicial Disqualification Decisions in the Federal Courts*, 35 HASTINGS L.J. 829, 830 n.3 (1984) (noting that although the term "recusal" often is used as a synonym for disqualification, "it technically refers to a voluntary decision of the judge to step down"). "Disqualification," in contrast, refers to a motion for the statutorily or constitutionally mandated removal of a judge. FLAMM, *supra*, § 1.1, at 4–5. Despite the technical distinction between "recusal" and "disqualification," they often are treated as synonyms.

> [I]n many jurisdictions the term "disqualification" has been defined in such a way as to include both removal by a judge on his own motion and removal at the request of a party. In fact, in modern practice the terms

In recent years, a number of highly publicized cases have resulted in collective head-shaking by the public and academics alike. The seeming inconsistencies between what the applicable rules appear to require, versus judges' behavior in actual cases, have led many to wonder whether it is they—or the judges—who do not fully understand the notion of judicial recusal.

One highly publicized instance of recusal in the Supreme Court—or, more specifically, the failure to recuse—occurred in early 2004. The situation involved allegations that United States Supreme Court Associate Justice Antonin Scalia went duck hunting with Vice President Dick Cheney—during a period when a lawsuit against Cheney was pending before the Supreme Court.[6] As Professor Lubet has explained:

> Shortly after his inauguration, President George W. Bush named [Vice President Dick] Cheney to head the National Energy Policy Development Group (NEPDG), a task force charged with devising a national energy policy.
>
> Cheney's group worked in secret, without releasing interim reports or revealing the names of participants at its meetings. That would be legal only if all of the participants were government employees, but it was widely suspected that some of the meetings included energy company lobbyists and executives, including Enron's Kenneth Lay.
>
> Two public interest groups—the Sierra Club and Judicial Watch—sued for access to Cheney's records. [On July 8, 2003,] a lower court ruled against the vice president, requiring him to disclose certain documents. Noting that he could face a contempt of court citation if he failed to comply, Cheney asked the Supreme Court to accept the case for review.
>
> . . . On Dec. 15, [2003,] the Supreme Court accepted the case and scheduled it for hearing.[7]

> "disqualification" and "recusal" are frequently viewed as synonymous and are often used interchangeably.

Id. § 1.1, at 5.

[6] *See* Jeffrey Rosen, *The Justice Who Came to Dinner*, N.Y. TIMES, Feb. 1, 2004, § 4 at 1.

[7] Steven Lubet, *Was Cheney Aiming for More than Ducks?*, STAR TRIB. (Minneapolis, MN), Feb. 3, 2004, at 15A.

On January 5, 2004, Justice Scalia went duck hunting with Cheney under circumstances that caused a loud—and sustained—outcry.[8] In a written response to the *Los Angeles Times* after the hunting incident first attracted media attention, Justice Scalia denied any impropriety, stating, "I do not think my impartiality could reasonably be questioned."[9] Justice Scalia's decision to participate in the case was unreviewable. As Chief Justice William H. Rehnquist subsequently noted, "[T]here is no formal procedure for court review of the [recusal] decision of a justice in an individual case. This is because it has long been settled that each justice must decide such a question for himself."[10]

In light of the publicity accompanying recent cases, and seeming differences of opinion as to the circumstances under which judges are required to recuse themselves from a case, the subject of judicial recusal warrants additional scrutiny. Recusal issues arise at each level of both the federal and state judiciaries—in the trial level courts, the intermediate level appellate courts, and the court of last resort for the federal or that

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[8] *See, e.g.*, Michael Janofsky, *Scalia's Trip with Cheney Raises Questions of Impartiality*, N.Y. TIMES, Feb. 6, 2004, at A14; Charles Lane, *High Court Questioned on Allowing Scalia Trip*, WASH. POST, Jan. 23, 2004, at A04; Dana Milbank, *Scalia Joined Cheney on Flight; Justice's Ride on Air Force Two Adds New Element to Conflict Issue*, WASH. POST, Feb. 6, 2004, at A04; David G. Savage, *Trip with Cheney Puts Ethics Spotlight on Scalia; Friends Hunt Ducks Together, Even as the Justice is Set to Hear the Vice President's Case*, L.A. TIMES, Jan. 17, 2004, at A1; David G. Savage, *Senators Inquire of Justices' Recusal Rules; A Letter Questions Scalia's Impartiality on a Case Involving Cheney After the Two Took a Trip*, L.A. TIMES, Jan. 31, 2004, at A10; David G. Savage, *2 Democrats Criticize Scalia's Refusal to Quit Cheney Case*, L.A. TIMES, Jan. 31, 2004, at A26; *Cheney, Scalia Hunt While Case is Pending*, ST. PETERSBURG TIMES, Jan. 18, 2004, at 6A; *House Democrats Call for Hearings on High Court Conflicts of Interest*, L.A. TIMES, Feb. 7, 2004, at A14.

[9] *Id.* Justice Scalia subsequently defended his refusal to recuse himself by characterizing the pending case as "a government issue" rather than a personal lawsuit "against Dick Cheney as a private individual." *See* David Von Drehle, *Scalia Rejects Pleas for Recusal in Cheney Case*, WASH. POST, Feb. 12, 2004, at A35 (quoting Justice Scalia as saying, "It did not involve a lawsuit against Dick Cheney as a private individual . . . . This was a government issue. It's acceptable practice to socialize with executive branch officials when there are not personal claims against them. That's all I'm going to say for now. Quack, quack."). Still later, in response to a formal recusal motion, Justice Scalia again defended his continued participation in the case in a memorandum opinion. *See* Cheney v. United States Dist. Ct., 541 U.S. ___, 124 S. Ct. 1391 (No. 03-475, Mar. 18, 2004) (mem.) (Scalia, J.). The Supreme Court decided the case three months later, and Justice Scalia participated in the decision. Cheney v. United States Dist. Ct., 541 U.S. ___, 124 S. Ct. 2576 (June 24, 2004).

[10] William Rehnquist, *Let Individual Justice Make Call on Recusal*, ATLANTA J.-CONST., Jan. 29, 2004, at 15A. Supreme Court Justices have been embroiled in recusal controversies on a number of occasions. *See* Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1217 n.16 (2002) (citing examples); *see also infra* note 28 (same).

state's system—but this Article will focus on the particularly difficult and troubling issue of recusal in the United States Supreme Court.[11]

Part I of this Article examines the existence of unconscious bias, and analyzes the important, but largely neglected, role of such bias in the context of judicial recusal.[12] Part II examines the various provisions relevant to the recusal of federal judges generally.[13] Part III analyzes the particular problems of recusal at the Supreme Court level.[14] Part IV proposes modifications to the Supreme Court's recusal practices that more directly acknowledge the Court's political nature, including, in most cases, additional disclosures in the form of "statements of interest" rather than actual disqualification.[15]

I. RECUSAL AND THE GOAL OF IMPARTIALITY

Federal judges—whether at the district court, circuit court, or Supreme Court level—take an oath of impartiality before performing any judicial duties, swearing (or affirming) to "administer justice without respect to persons, and do equal right to the poor and to the rich, and [to] faithfully and impartially discharge and perform [his or her] duties."[16] This notion of an "impartial arbiter" is central to both our system of justice and our sense of justice.

Bias, of course, may affect a judge's ability to be impartial. In a general sense, "bias" means an "[i]nclination; bent; prepossession; a preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the

[11] In a recent article, I undertook an examination of judicial recusal and disqualification in the federal courts of appeals, observing that these issues in "the federal courts of appeals have largely been overlooked." Bassett, *supra* note 10, at 1220. As I noted, the scholarly legal commentary discussing judicial disqualification has tended to focus on the federal district courts. *See id*. at 1220 n.28 (citing examples). This Article now undertakes the examination of the Supreme Court Justices that I expressly reserved in my prior article. *See id*. at 1221 n.32 ("Although many of the concerns addressed in this Article would apply to Justices of the United States Supreme Court, the nine-member Court poses special recusal and disqualification concerns in terms of the limited number of Justices, the lack of any provision for sitting by designation, and the reality that the Supreme Court is the court of last resort without any option for further review. . . . Accordingly, issues concerning the recusal of Justices of the United States Supreme Court are beyond the scope of this Article.").

[12] *See infra* notes 16–74 and accompanying text.

[13] *See infra* notes 75–130 and accompanying text.

[14] *See infra* notes 131–173 and accompanying text.

[15] *See infra* notes 174–184 and accompanying text.

[16] 28 U.S.C. § 453 (2000); *see infra* note 59 (quoting the oath in full).

mind perfectly open to conviction. To incline to one side. . . ."[17] In the context of judicial decision-making, bias can arise in a number of circumstances. For example, financial bias may exist if the judge has a financial interest in a party or the outcome of the litigation.[18] Relationship bias may exist if the judge is related to, or is friends with, someone involved in the lawsuit.[19] Personal bias may exist if the judge personally favors or disfavors someone involved in the lawsuit.[20] All of these types of bias have the potential to impair the judiciary's impartiality.

The avoidance of bias is more than a mere nicety; the avoidance of bias is a prerequisite to due process. "A fair trial in a fair tribunal is a basic requirement of due process. . . . To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."[21] Recusal aims to ensure both actual judicial impartiality and the appearance of judicial impartiality, which are necessary to ensure due process.[22] The procedural protections provided by evidentiary and other rules[23] are of little value if a judge has an interest in the outcome, or if a judicial participant favors or disfavors one of the litigants.[24] Moreover, the necessity of judicial impartiality encompasses both actual and perceived biases. As the Supreme Court itself has noted, "even if there is no showing of actual bias in the tribunal, . . . due

[17] BLACK'S LAW DICT. 147 (5th ed. 1979).

[18] *See* 28 U.S.C. § 455(b)(4) (2000).

[19] *Id*. § 455(b)(5).

[20] *Id*. § 455(b)(1).

[21] *In re* Murchison, 349 U.S. 133, 136 (1955).

[22] *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821–22 (1986) (indicating that an impartial tribunal is required for due process); Marshall v. Jerrico. Inc., 446 U.S. 238, 242 (1980) (same); Withrow v. Larkin, 421 U.S. 35, 46–47 (1975) (same); Ward v. Vill. of Monroeville, 409 U.S. 57, 61–62 (1972) (same); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (same); *see also* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 476 (1986) (same).

[23] Evidence excluded for lack of personal knowledge or as hearsay, for example, ultimately may yield little protection if the judge harbors bias against a party. *See* FED. R. EVID. 602, 802.

[24] *See* FLAMM, *supra* note 5, § 5.4.2, at 151 (noting that "permitting disqualification on appearance grounds is reassurance not merely of the public but of the litigants themselves").

process is denied by circumstances that create the likelihood or the appearance of bias."[25]

Avoiding bias is also necessary to ensure public confidence in the courts.[26] As one commentator has observed:

> Judicial decisions rendered under circumstances suggesting bias or favoritism tend to breed skepticism, undermine the integrity of the courts, and generally thwart the principles upon which our jurisprudential system is based. Since an appearance of bias may be just as damaging to public confidence in the administration of justice as the actual presence of bias, acts or conduct giving the appearance of bias should generally be avoided in the same way as acts or conduct that inexorably bespeak partiality.[27]

Indeed, these notions of skepticism and damage to public confidence in the administration of justice have been evident in publicized cases.[28] So, then, why do

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[25] Peters v. Kiff, 407 U.S. 493, 502 (1972); *see also* Mayberry v. Pennsylvania, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) ("[T]he appearance of even-handed justice . . . is at the core of due process"); Offut v. United States, 348 U.S. 11, 14 (1954) ("justice must satisfy the appearance of justice").

[26] *See* ABA MODEL CODE, *supra* note 3, Canon 1 cmt. ("Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges"); *see also* FLAMM, *supra* note 5, § 5.4.1, at 148 ("The primary rationale for allowing disqualification to be sought on the basis of appearances stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence. Allegations of judicial bias may serve to erode this public confidence."); Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in* Bush v. Gore, 61 MD. L. REV. 606, 610 (2002) ("That judicial decision-making must appear to be free of bias is premised on the widely held belief that public confidence is essential to upholding the legitimacy of the judiciary."); *id*. at 611 ("[T]he judiciary—especially the appointed judiciary—derives its authority and legitimacy from the willingness of the people and sister branches of government to accept and submit to its decisions. Because public confidence is so essential to maintaining the integrity of the bench, even the appearance of bias, parochialism, or favoritism can threaten the judicial function.").

[27] FLAMM, *supra* note 5, § 5.4.1, at 150; *see also* Jeffrey Brown, *Disgrace*, NEW REPUBLIC, Dec. 25, 2000, at 18 (noting that the concerns regarding impartiality in the Supreme Court's *Bush v. Gore* decision "have . . . made it impossible for citizens of the United States to sustain any kind of faith in the rule of law").

[28] One such case was Justice Rehnquist's refusal to recuse himself from participating in Laird v. Tatum, 409 U.S. 824 (1972). Before his appointment to the Supreme Court, Rehnquist had been the Assistant Attorney General for the Office of Legal Counsel, and while the appeal in *Laird v. Tatum* was pending, Rehnquist had testified about the case before the Senate Subcommittee on Constitutional Rights. In his testimony, he asserted that the challenged Army surveillance activities were constitutional and stated the case was not justiciable. The Supreme Court ultimately held that the case was not justiciable, reversing the Court of Appeals on a 5-4 vote, with Rehnquist casting the

~~judges sometimes decline to~~ recuse themselves in situations involving an appearance of deciding vote. *See, e.g.,* FREEDMAN & SMITH, *supra* note 2, § 9.02, at 232–36 (discussing Justice Rehnquist's participation in *Laird v. Tatum* at length); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 597–621 (1987) (criticizing Justice Rehnquist's participation in *Laird v. Tatum* for reasons including the failure to disclose his connections to the issues, misstating the applicable facts, misstating the applicable legal standard, and perpetuating questionable recusal standards); Note, *Justice Rehnquist's Decision to Participate in* Laird v. Tatum, 73 COLUM. L. REV. 106, 124 (1973) (concluding that Justice Rehnquist's "participation in *Laird* lacked the appearance of impartiality necessary to maintain public confidence in the Supreme Court").

Another, more recent, example—again involving a refusal by Justice Rehnquist to recuse—was Microsoft Corp. v. United States, 530 U.S. 1301 (2000) (mem.) (Rehnquist, C.J.). Rehnquist declined to recuse himself from the *Microsoft* case even though his son James was representing Microsoft in related litigation. *See* Ifill, *supra* note 26, at 626 (stating that Justice Rehnquist's "summary analysis and explanation of why recusal [was] not warranted" in the *Microsoft* case as "deeply flawed"); *see also* Tony Mauro, *Rehnquist Won't Bow Out: Refusal to Recuse in* Microsoft, LEGAL TIMES, Oct. 2, 2000, at 12 (noting that Professor Stephen Gillers, a legal ethics expert, concluded that Justice Rehnquist should have recused himself from the case).

Of course, *Bush v. Gore* generated tremendous outcry. Five Justices ended the presidential election in 2000 by ordering the stoppage of an ongoing hand recount of the votes cast in the State of Florida. The Court's decision was based on equal protection grounds. *See* ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 at 206 (2001) ("People will—and should—trust [the Supreme Court] less, because it proved untrustworthy when tempted by partisanship and personal advantage [in *Bush v. Gore*]."); *id*. at 180 (noting a "widespread suspicion of the motives of the five justices who, contrary to their own previously expressed judicial views, rendered a decision that millions of Americans understandably believe was motivated by the desire to see George W. Bush elected president"); *see generally* Ifill, *supra* note 26 (criticizing *Bush v. Gore*); Richard K. Neumann, Jr., *Conflicts of Interest in* Bush v. Gore: *Did Some Justices Vote Illegally?*, 16 GEO. J. LEGAL ETHICS 375 (2003) (same).

The most recent example, as mentioned at the outset of this Article, involved Justice Scalia's refusal to recuse himself in Cheney v. United States Dist. Ct., 541 U.S. ___, 124 S. Ct. 1391 (No. 03-475, Mar. 18, 2004) (mem.) (Scalia, J.). Justice Scalia and Cheney, with others, went on a private hunting trip, using Air Force Two for travel, just weeks after the Supreme Court granted certiorari in an energy policy task force case in which Cheney was a named participant. Although Justice Scalia characterized the lawsuit as a "run-of-the-mill legal dispute about an administrative decision," 124 S. Ct. at 1396, the district court had ordered Cheney to disclose particular documents, which had the potential for demonstrating that Cheney had improperly conducted secret task force meetings. Because Cheney headed the task force and was aware of the necessary preconditions for secrecy, the ruling necessarily would have implications for Cheney personally; Cheney had a strong personal and reputational interest in how the matter was resolved. *See supra* notes 6–10 and accompanying text; *see also* Bernard Ries, *You Can't Duck This Conflict, Mr. Justice*, WASH. POST, Feb. 29, 2004, at B4 ("While it is true that Cheney is named only in his official capacity in the energy case, what onlooker would not suppose that he would grin for a week if he should win the case, thereby both vindicating his position on the law and successfully protecting the identity of the folks with whom he consulted about energy policy?"); Editorial, *Justice in a Bind*, N.Y. TIMES, Mar. 20, 2004 (noting that "[s]hould Mr. Cheney lose in the Supreme Court, there is the potential for deep personal and political embarrassment"). Justice Scalia's continued participation in the case was widely criticized. *See infra* note 156 (citing authorities).

bias?

Despite the existence of many types of bias, courts have not always recognized the full reach of bias. Indeed, historically, the only basis for recusal was a financial interest. Blackstone expressly rejected all possible reasons for recusal save a direct economic interest.[29] "The early English courts' nonrecognition of bias as a ground for disqualification extended even to cases involving familial relationships between judges and parties."[30]

Despite this historically narrow ground for judicial recusal, over time Congress repeatedly has amended the recusal statute, and "in each instance Congress enlarged the enumerated grounds for seeking disqualification."[31] Today, the federal recusal statute contains a specific list of circumstances identifying mandatory recusal situations,[32] as well as a catch-all provision mandating recusal whenever a judge's "impartiality might reasonably be questioned."[33] However, vestiges of the historical approach to recusal remain. The recusal statute's strongest provision is reserved for those circumstances involving a financial interest, providing that a judge must recuse himself when "[h]e knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter of the controversy . . . ."[34] The statute subsequently defines "financial interest" as "ownership of a legal or equitable

[29] *See* John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43, 43–44 n.3 (1970) ("[B]lackstone consciously rejected the earlier views of Bracton, who had said that a judge should disqualify if he were related to a party, if he were hostile to a party, or if he had been counsel in the case." (citing 4 BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 281 (Woodbine ed. 1942)).

[30] FLAMM, *supra* note 5, § 1.2.2, at 7; *see also* Brookes v. Rivers, 1 Hardres 503, 145 Eng. Rep. 569 (Ex. 1668) (noting that a judge need not recuse himself from a case involving his brother-in-law "for favour shall not be presumed in a judge").

[31] FLAMM, *supra* note 5, § 23.1, at 672; *see also* Bassett, *supra* note 10, at 1223–28 (tracking the legislative amendments to the recusal provisions since 1792); Leubsdorf, *supra* note 3, at 246 ("Congress has supplemented its original disqualification statute of 1792 five times, in each instance expanding the scope of disqualification.").

[32] *See* 28 U.S.C. § 455(b) (2000).

[33] 28 U.S.C. § 455(a).

[34] 28 U.S.C. § 455(b)(4) (2000).

interest, *however small . . . .*"[35] This emphasis on financial interests is similarly reflected in the disclosures required of federal judges, which address only financial holdings.[36]

The current popularity of law and economics also has tended to return the focus of judicial recusal to economic interests. Under economic theory, wealth maximization is the primary motivator behind human behavior,[37] and accordingly, our system of rights is derived from a goal of maximizing wealth.[38] One proponent of the economic approach to law is Justice Scalia, who has attempted to equate the concept of "fairness" solely with economic factors such as reliance, apparently concerned that otherwise "the potential vagaries of 'fairness' raise the spectre of judicial activism."[39] This transformation of

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[35] *Id*. § 455(d)(4) (emphasis added); *see* Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 NEB. L. REV. 1046, 1070 (1993) (noting that "a financial interest commands recusal if no specified exception applies and regardless of whether the outcome of the proceeding could have any effect on the interest").

[36] *See* Ethics in Government, § 101, 5 U.S.C.A. APP. 4 (2000); *see also* Carelli, *supra* note 4 (noting that federal law requires federal judges to submit financial disclosure forms).

[37] *See* Sean J. Griffith, *Ethical Rules and Collective Action: An Economic Analysis of Legal Ethics*, 63 U. PITT. L. REV. 347, 349 (2002) (noting "the fundamental insight of economic analysis: that individuals act in their self-interest to maximize their individual welfare").

[38] *See* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 109 (1981); *see also id*. at 74 ("Wealth maximization provides a foundation not only for a theory of rights and of remedies but for the concept of law itself."). The economic analysis of law has been the subject of extensive commentary and criticism. *See, e.g*., Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behaviorial Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1545 (1998) ("Traditional law and economics is largely based on the standard assumptions of neoclassical economics. These assumptions are sometimes useful but often false."); Russell B. Korobkin & Thomas S. Ulen, *Law and Behaviorial Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1056–57 (2000):

> In the wake of increasing questions about the sanctity of [law and economics'] rational choice assumptions, the proponents of rational choice theory retrenched, as defenders of criticized paradigms often do, and developed more sophisticated ways to paper over its empirical shortcomings and to denounce its critics as overly concerned with minor details not truly important to a general understanding of human behavior or to the critical analysis of law.

[39] Debra Lyn Bassett, *In the Wake of* Schooner Peggy: *Deconstructing Legislative Retroactivity Analysis*, 69 U. CIN. L. REV. 453, 511 (2001); *see, e.g*., Burnham v. Superior Court, 495 U.S. 604, 623 (1990) (criticizing the concurrence's proposed standard of "contemporary notions of due process" as measuring "state-court jurisdiction not only against traditional doctrines in this country, including current state-court practice, but also against each Justice's subjective assessment of what is fair and just," rendering the proposed standard "subjectiv[e], and hence inadequa[te]").

fairness into an economic concept is reflected in current recusal practices.[40] "[A particularly] troubling thing about current recusal jurisprudence is the emphasis the Court places on financial ties, to the apparent exclusion of all other entanglements."[41]

Due to the emphasis on financial interests, a dichotomy currently exists between recusal for financial versus most non-financial interests: any doubts about potential bias resulting from a financial interest generally are resolved in favor of recusal, whereas any doubts about potential bias resulting from most non-financial interests tend to be resolved in favor of participating in the case. Studies have shown that judges are most likely to recuse themselves from cases involving an actual or suggested financial interest in the pending matter, and are far less likely to recuse themselves from matters involving a possible non-financial bias.[42]

Although a substantial financial self-interest certainly warrants recusal, a financial interest is not the only—nor the most serious—form of bias. Admittedly, financial self-interest permits a straightforward and objective determination—either there is or is not a financial interest—whereas some other forms of bias often require a less clear and subjective determination.[43] However, the subjective nature of bias does not

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[40] *See* Jeff Bleich & Kelly Klaus, *Deciding Whether to Decide*, 48 FED. LAW. 45, 46 (2001) ("In practice, each individual justice makes the call on what sort of 'participation' or 'interest' qualifies [for recusal]. And judging by the cases where this has come up publicly, the governing principle remains that it all comes down to money.").

> The only consistent exception to the Court's generally laissez-faire attitude toward disqualification continues to be . . . money. Each year the greatest number of recusals is logged by Justice O'Connor, who, it appears, has investments in several U.S. corporations (most notably, AT&T) that have sought Court review. The frequency with which she has recused herself in cases involving those parties has caused Court-watchers to give such cases the acronym "OOPS" (O'Connor Owns Party Stock).

Id.

[41] *Id*. at 47.

[42] *See* JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 1 (1995) (finding almost one-half of the judges indicated a strong disposition toward disqualification on questions involving financial conflicts of interest, but on questions reflecting possible judicial bias or prejudice, a majority of the responding judges indicated ambivalence regarding the decision to disqualify—and one-third indicated a strong disposition *against* disqualification); Jona Goldschmidt & Jeffrey M. Shaman, *Judicial Disqualification: What Do Judges Think?*, 80 JUDICATURE 68, 70 (1996) (citing an American Judicature Society study finding that situations involving financial conflicts of interest "are the easiest for judges to resolve through disqualification").

[43] *See* Abramson, *supra* note 35, at 1051 (noting that "[i]n part, the difficulty in applying the personal bias standard results from its subjectivity").

render it a less valid basis for recusal; to the contrary, a situation can raise questions regarding judicial impartiality under a myriad of circumstances—monetary interests hold no monopoly. Indeed, recusal for a miniscule financial interest is much less compelling than recusal due to a close personal friendship with a party in the litigation. "While having a financial stake in a case may create a real conflict of interest, money is by no means the only or most powerful influence on people's judgments. As Winston Churchill noted, people are far more likely to be corrupted by friendship than by anything else."[44]

Financial interests are neither the most serious nor the most offensive form of bias; financial interests are merely the easiest form of bias to recognize. Focusing so intently on financial interests minimizes the potentially corrupting nature of non-financial interests, and essentially downplays the necessity of recusal for such non-financial interests. Thus, an undue emphasis on financial interests actually serves to undermine the purpose of recusal, which more broadly seeks "to promote public confidence in the impartiality of the judicial process."[45]

Beyond financial interests, other types of bias—both conscious and unconscious[46]—exist that are harder to recognize. A growing wealth of legal commentary addresses the potential effects of heuristics,[47] cognitive illusions,[48] and other

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[44] Bleich & Klaus, *supra* note 40, at 47; *see also* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1071 (1976) (stating that a friend "acts in your interests, not his own; or rather he adopts your interests as his own").

[45] H.R. REP. NO. 93-1453, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355; S. REP. NO. 93-419, at 5 (1974).

[46] *See* Bassett, *supra* note 10, at 1216–17 (noting that "[s]ome potential biases . . . are recognized readily," whereas other kinds of bias "are more difficult, or even impossible, for judges to recognize within themselves"); *see also infra* notes 52–57 and accompanying text (discussing unconscious bias).

[47] "Heuristics" are, in essence, mental shortcuts. *See* Richard E. Nisbett, David H. Krantz, Christopher Jepson & Ziva Kunda, *The Use of Statistical Heuristics in Everyday Inductive Reasoning, in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 510 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002) (describing heuristics as "rapid and more or less automatic judgmental rules of thumb"); *see also* Shane Frederick, *Automated Choice Heuristics, in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 548 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002) (describing heuristics as the mechanism "people use to simplify choice—the procedures they use to limit the amount of information that is processed or the complexity of the ways it is combined"); *id*. at 548–49 (distinguishing "choice heuristics" from "heuristics and biases," explaining that the latter "are largely based on impressions that occur automatically and independently of any explicit judgmental goal").

[48] "Cognitive illusions" are essentially the cognitive errors "that infect human reasoning." Robert E. Scott, *Error and Rationality in Individual Decisionmaking: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices*, 59 S. CAL. L. REV. 329, 334 (1986). The

biases upon judicial decision-making.[49] For example, bias may exist due to stereotypes and ideologies.[50] Although a judge's conscious awareness of bias does not eliminate all concern, unconscious bias—which often includes prejudice—is even more problematic because the judge's lack of awareness prevents any action to eliminate preferences.[51]

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elements of a cognitive illusion include:

> (1) A formal rule that specifies how to determine a correct (usually, the correct) answer to an intellectual question;
> (2) A judgment, made without the aid of physical tools, that answers the question; and
> (3) A systematic discrepancy between the correct answer and the judged answer. (Random errors don't count.)

Ward Edwards & Detlof von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL. L. REV. 225, 227 (1986).

[49] *See, e.g.*, Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (analyzing judicial susceptibility to cognitive illusions and biases); Arthur J. Lurigio, John S. Carroll & Loretta J. Stalans, *Understanding Judges' Sentencing Decisions: Attributions of Responsibility and Story Construction*, *in* APPLICATIONS OF HEURISTICS AND BIASES TO SOCIAL ISSUES 91 (Linda Heath et al. eds., 1994); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61 (2000) (discussing effects of heuristics and biases upon judges); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998) (discussing phenomenon of hindsight bias and its effects upon the judiciary). *See generally* Korobkin & Ulen, *supra* note 38, at 1075–1102 (summarizing the most common heuristics and biases). *But see* Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 67–72 (2002) (challenging "behavioral law and economics' assumption of uniformly imperfect rationality"—in which "biases and errors lead to predictably irrational behavior"—as oversimplified and "not faithful to the [psychological] empirical data on judgment and choice").

[50] *See* Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 176 (1992).

[51] *See infra* notes 52–57 and accompanying text (discussing social science research into unconscious bias).

Recent studies indicate that prejudiced responses are largely unconscious.[52] Until the 1980s, most psychologists assumed that attitudes, including prejudice and stereotypes, operated consciously.[53] Accordingly, many researchers used self-reporting to measure attitudes and stereotypes.[54] More recently, however, psychologists have emphasized that attitudes have "explicit" and "implicit" indices:

> Explicit measures of attitudes operate in a conscious mode and are exemplified by traditional self-report measures. Implicit attitudes, in contrast, operate in an unconscious fashion and represent introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects.[55]

These studies of unconscious bias confirm the observation that people who claim, and honestly believe, they are not prejudiced may nevertheless harbor unconscious stereotypes and beliefs.[56] Thus, although judges should be constantly vigilant for potential biases and prejudices, they will not always recognize their own biases and

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[52] *See* Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 181, 181 (1995) (finding unconscious gender stereotyping in fame judgments, and finding that explicit expressions of sexism or stereotypes were uncorrelated with the observed unconscious gender bias); Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142, 1142 (1996) (concluding that "stereotypes may be automatically activated"); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1989) (finding that stereotypes are "automatically activated in the presence of a member (or some symbolic equivalent) of the stereotyped group and that low-prejudice responses require controlled inhibition of the automatically activated stereotype"); John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 512 (1997) (noting that "[a]versive racism has been identified as a modern form of prejudice that characterizes the racial attitudes of many Whites who endorse egalitarian values, who regard themselves as nonprejudiced, but who discriminate in subtle, rationalizable ways"); Kerry Kawakami et al., *Racial Prejudice and Stereotype Activation*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 407, 407 (1998) ("[H]igh prejudiced participants endorsed cultural stereotypes to a greater extent than low prejudiced participants. Furthermore, for high prejudiced participants, [African-American] category labels facilitated stereotype activation under automatic and controlled processing conditions.").

[53] *See* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 4 (1995).

[54] *Id*.

[55] Dovidio et al., *supra* note 52, at 511.

[56] Greenwald & Banaji, *supra* note 53, at 15; *see also* Devine, *supra* note 52, at 5–7 (discussing unconscious bias).

stereotypes. "[E]ven honest judges . . . may be swayed by unacknowledged motives."[57] The existence of unconscious bias means that judges cannot necessarily trust their subjective belief that they can remain impartial.

Any number of factors may be implicated in a failure to recuse, including, among others, lack of understanding of the recusal standard, arrogance, denial, defensiveness, or simply the judge's personal belief in his or her impartiality. At times, all of these factors appear to be at work. Arrogance can result from an undue reliance upon the lifetime tenure of federal judges[58] and their oath of impartiality.[59] As has been noted, however, "[m]uch harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine."[60] In particular, recent commentators have challenged the idea that judges, however well-meaning, are able to shake their biases and prejudices at will.[61] "[A]ll judges, as a part of basic human functioning, bring to each decision a package of personal biases and beliefs that may unconsciously and unintentionally affect the decision-making process."[62]

Unfortunately, many judges respond to potential recusal situations with a defensive—sometimes arrogant—"I am not biased; I can be fair."[63] As one commentator

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[57] Leubsdorf, *supra* note 3, at 277.

[58] *See* 28 U.S.C. §§ 44(b), 134(a) (2000) (providing lifetime tenure for federal judges).

[59] *See id*. § 453.

> Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God."

Id.

[60] *In re* Linahan, 138 F.2d 650, 652 (2d Cir. 1943).

[61] *See* Jennifer Gerarda Brown, *Sweeping Reform from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 MINN. L. REV. 363, 363 (2000) (discussing judicial bias in the context of sexual orientation); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61 (2000) (noting that judges are susceptible to various biases).

[62] Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 3 (1994).

[63] *See* ALAN J. CHASET, DISQUALIFICATION OF FEDERAL JUDGES BY PEREMPTORY CHALLENGE 58 (1981) (noting that "[j]udges, like other persons, are likely to resent charges of bias"); FLAMM, *supra* note 5, § 1.10.5, at 25 (noting that "[j]ust as judges generally do not like to admit having committed legal error, they are typically less than eager to acknowledge the existence of situations that may raise

has observed, "judges are typically appalled if their impartiality is drawn into question[,] . . . believ[ing] themselves to be consistently objective, impartial and fair."[64] Another commentator, sharing the same view, noted: "Although we all like to think that the justices are paragons of reason with no irrational or self-interested prejudices on any subject, apparently no one likes to think this more than the justices do; indeed, based on their decisions, justices rarely, if ever, perceive that others might sense impropriety in their deciding a case."[65] This phenomenon is the manifestation of still another form of bias, known as egocentric bias, in which one tends to overestimate one's abilities.[66]

The "I'm not biased" approach to potential recusal situations implicates two concerns. First, and most importantly, the "I'm not biased" approach completely misses the point, because both the federal recusal statute and the ethical codes, by their terms, do not require actual bias in fact, but instead require recusal when appearances might suggest bias to an outsider.[67]

> [I]nstances of judicial preconception often are innocent in intent. Most judges genuinely believe that, despite their connections to a lawsuit, they can put aside their bias or interest, and decide the suit justly. What this ignores, unfortunately, is that partiality is more likely to affect the unconscious thought processes of a judge, with the result that he or she has little conscious

questions about their impartiality"). Of course, not all judges respond to recusal matters in a defensive manner. Indeed, one prominent exception to the defensive approach appeared in *In re* Bernard, 31 F.3d 842 (9th Cir. 1994). In *Bernard*, Judge Alex Kozinski stated that "judges have a professional responsibility not to take such challenges personally." *Id*. at 846 n.8; *see also id*. at 847 (noting that "[c]ounsel for a party who believes a judge's impartiality is reasonably subject to question has not only a professional duty to his client to raise the matter, but an independent responsibility as an officer of the court").

[64] Nugent, *supra* note 62, at 5. *Cf.* Dacher Keltner & Robert J. Robinson, *Extremism, Power, and the Imagined Basis of Social Conflict*, 5 CURRENT DIRECTIONS IN PSYCHOL. SCI. 101, 102–03 (1996) (noting that "opposing partisans indicated that they were more objective, fairer to the evidence, and freer from bias" with respect both to their opponents and to other partisans on their own side).

[65] Bleich & Klaus, *supra* note 40, at 47.

[66] *See* Guthrie et al., *supra* note 49, at 811 ("People tend to make judgments about themselves and their abilities that are 'egocentric' or 'self-serving.'"); *id*. at 814–15 ("[M]ost people genuinely believe that they are better than average at a variety of endeavors. . . . Egocentric biases might prevent judges from maintaining an awareness of their limitations . . . . More generally, egocentric biases may make it hard for judges to recognize that they can and do make mistakes.").

[67] *See* FLAMM, *supra* note 5, § 5.5, at 153–54 ("[T]he dispositive question . . . is not whether a judge is impartial in fact but whether a reasonable person—not knowing whether the judge is actually impartial—would be apt to question her impartiality."); *id*. § 5.6.4, at 162–63 (noting that "the charge of partiality must be based on facts that would create a reasonable doubt concerning the judge's impartiality . . . in the mind of a reasonable, uninvolved observer").

> knowledge of being swayed by improper influences. Furthermore, even if a judge were able to put aside bias and self-interest in a particular case, the appearance of impropriety remains, and is itself a serious problem that casts disrepute upon the judiciary.[68]

Accordingly, the judge's belief that she is not biased is not conclusive, and indeed, is irrelevant.[69] "[W]henever a judge's impartiality might reasonably be questioned by others, it is ordinarily his duty to disqualify himself without regard to his own subjective belief that he can dispense justice fairly and equitably."[70]

> Promoting public confidence in the judiciary necessarily requires viewing judicial practices from the perspective of the general public. In particular, bias or prejudice must be viewed from the perspective of the public, rather than that of the judiciary, for two reasons. First, bias and prejudice are notoriously difficult to recognize within ourselves. Thus, doubts as to how the public might view a judge's participation in the case must be resolved in favor of recusal. Second, public confidence in the judiciary does not result from the judiciary's perception of impartiality; it results from the public's perception of impartiality. Thus, a judge's belief that he or she is not biased is simply of little consequence to a recusal determination.[71]

The second concern implicated by the "I'm not biased" approach is the reality that such insistence often, in fact, suggests exactly the opposite.[72] Indeed, one

[68] LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT xi (2d ed. 1992).

[69] *See* FLAMM, *supra* note 5, § 5.6.2, at 157:

> The 'appearance of bias' standard . . . does not contemplate that the converse will necessarily be true—that when a judge is convinced of his ability to preside impartially he may properly deny a disqualification motion. On the contrary, the judge's actual state of mind or lack of partiality is generally considered beside the point because a judge who is convinced of his own impartiality, as well as the purity of his motives, may nonetheless act in a manner that would lead a reasonable person to believe he is biased.

Id.

[70] *Id*.

[71] Bassett, *supra* note 10, at 1245–46.

[72] *See* Leubsdorf, *supra* note 3, at 244 (noting that a judge's defensiveness in writing her opinion denying a disqualification motion "may prop up the judge's sense of her own rectitude; reading it

commentator has observed that "the most biased judges [are often] the least willing to withdraw."[73] Accordingly, when a judge finds herself denying the existence of bias, that very denial may suggest the necessity of reconsidering recusal.

Despite the aim of recusal to avoid bias in judicial decision-making, this goal is not being achieved under the current law. If certain biases are indeed unconscious, perhaps no recusal provision can reach them, which leaves the question how to reach as many forms of bias as possible. Although financial bias currently is given an undue emphasis, the result of financial disclosures and the statutory reference to "de minimis" financial interests appears to have resulted in an increased awareness of the potential for bias in that context.[74] Perhaps judicial disclosures related to other interests might increase judicial awareness of potential non-financial forms of bias. The next Section explores the current law—the specific statutes, rules, and disclosure provisions related to the recusal of federal judges.

II. THE LAW GOVERNING THE RECUSAL OF FEDERAL JUDGES

Federal judges generally find ethical guidance from two sources—the applicable ethical code and the United States Code. In addition, in 1993 the United States Supreme Court issued a "Statement of Recusal Policy," which pertains only to the Supreme Court.[75] The statutory provisions from the United States Code are the authority cited in the recusal and disqualification case law most often, and accordingly, the statutes provide the starting point for this Section.

A. Statutory Provisions

Three federal statutes address the recusal and disqualification of federal judges. In addition, federal statutes require federal judges to file annual statements of their personal financial interests.[76] The first—section 47—is a straightforward provision prohibiting judges from hearing on appeal any cases in which they served as the trial judge.[77] The second—section 144—applies by its terms only to district court judges,[78]

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often increases one's dismay that the judge insists on sitting").

[73] *Id*. at 245; *see also id*. at 277 ("The most biased judges may be the most persuaded that their acts are just.").

[74] *See supra* note 42 and accompanying text (noting that judges are most likely to recuse themselves for financial interests).

[75] *See* Statement of Recusal Policy, *reprinted in* FLAMM, *supra* note 5, Addendum to Appendix A, at 1068–70.

[76] *See* Ethics in Government, §§ 101–109, 5 U.S.C.A. App. 4 (2000) (requiring federal judges annually to file personal financial statements available for public inspection).

[77] *See* 28 U.S.C. § 47 (2000) ("No judge shall hear or determine an appeal from the decision of a case or issue tried by him.").

and sets forth the procedures for filing a judicial disqualification motion when "the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party."[79]

The remaining federal statute—section 455—is more comprehensive and appears by its terms to apply to federal judges at every level, including the United States Supreme Court. Section 455 states that its provisions apply to "[a]ny justice, judge, or magistrate of the United States."[80] Any "justice" would appear to include Supreme Court Justices; in the federal judiciary, only Supreme Court jurists are called "justices." Understanding section 455 as written today requires some knowledge of its history and, in particular, its previous (and now repudiated) subjective standard and the so-called "duty to sit."

1. Rejected Recusal Notions: The Subjective Standard and the "Duty to Sit"

In its original formulation, section 455 employed a largely subjective standard, leaving recusal to the judge's own personal opinion as to whether it would be "improper" to hear the case, unless the judge had been a material witness, of counsel, or possessed a "substantial" interest in the case, in which instance recusal was mandatory.[81] Indeed, the

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[78] 28 U.S.C. § 144 (2000). Section 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

See In re Bernard, 31 F.3d 842, 843 n.3 (9th Cir. 1994) (noting that section 144 "applies only to district judges, not appellate judges"); Hepperle v. Johnston, 590 F.2d 609, 613 (5th Cir. 1979) (noting that section 144 "by its terms applies only to district judges"); Pilla v. Am. Bar Ass'n, 542 F.2d 56, 58 (8th Cir. 1976) ("Section 144 is limited in application to proceedings in a district court.").

[79] 28 U.S.C. § 144.

[80] 28 U.S.C. § 455(a).

[81] The previous version of section 455 provided:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has

"duty to sit" doctrine required judges to decide borderline recusal questions in favor of participating in the case.[82] Under the "duty to sit" doctrine, judicial decisions "articulated [a] strong 'duty to sit' that was generally construed in such a way as to oblige the assigned judge to hear a case unless and until an unambiguous demonstration of extrajudicial bias was made."[83] As Professor Stempel has explained, under this doctrine,

> in cases where the challenged judge faces a serious and close disqualification decision, the judge should decide in favor of sitting and against recusal in order to minimize intrusions on fellow judges and enhance judicial efficiency, as well as to discourage the bringing of disqualification motions by litigants as a variant of forum or judge shopping.[84]

However, Congress eliminated both of these notions—the subjective standard and the "duty to sit" doctrine—in 1974.[85] Motivated by the widespread perception that the subjective recusal standard had failed, Congress amended section 455.[86] "[P]rior to the 1974 amendments to [section] 455, federal judges often expressly relied on the 'duty to

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> been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

H.R. REP. NO. 93-1453, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6352.

[82] *Id*. at 6355; *see* Laird v. Tatum, 409 U.S. 824, 837 (1972) (stating 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*") (emphasis in original).

[83] FLAMM, *supra* note 5, § 20.10.1, at 613.

[84] Stempel, *supra* note 28, at 604.

[85] *See* H.R. REP. NO. 93-1453, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6366 (eliminating the subjective standard and the "duty to sit" doctrine).

[86] *See* Bassett, *supra* note 10, at 1225 (noting that the 1974 amendments "resulted from financial conflict of interest concerns raised during the confirmation hearings concerning Judge Clement Haynsworth, Jr.'s nomination to the United States Supreme Court in 1969, as well as other scandals and controversies"); *id*. at 1225 n.63 ("The concerns involved whether Judge Haynsworth should have recused himself from five different cases, where he had a small financial interest, which had come before him during his tenure on the United States Court of Appeals for the Fourth Circuit."); *see also* FLAMM, *supra* note 5, § 23.6.1, at 678–79 (stating that the "notoriety arising from [the Haynsworth] situation, as well as from a number of highly publicized cases involving other judges' refusals to disqualify themselves despite apparent or actual conflicts of interest, began to kindle public sentiment for altering the standards for disqualifying federal judges"). *See generally* JOHN P. MACKENZIE, THE APPEARANCE OF JUSTICE (1974) (describing as examples of scandal and controversy, among others, the indictment of Judge Otto Kerner of the Seventh Circuit and the Senate's failure to approve Justice Abe Fortas as Chief Justice).

sit rule' to deny disqualification motions in all but the most blatant of circumstances."[87] The 1974 amendments reversed the presumption: "With the enactment of the 1974 amendments to [section] 455, the duty to sit rule was displaced by a 'presumption of disqualification' such that, after those amendments went into effect, whenever a judge harbored any doubts whether his disqualification was warranted, he was to resolve those doubts in favor of disqualification."[88] Indeed, changes to both section 455 and the ABA Model Code of Judicial Conduct were expressly aimed at abolishing the so-called "duty to sit."[89]

2. Recusal Where a Judge's Impartiality "Might Reasonably Be Questioned"

Today, subsection (b) of section 455 lists specific circumstances in which such federal judges must recuse themselves.[90] In addition, subsection (a) provides a broader

[87] FLAMM, *supra* note 5, § 20.10.1, at 614.

[88] *Id*. § 20.10.1, at 614–15; *see also* Nichols v. Alley, 71 F.3d 347, 352 (10th Cir. 1995) (noting that "if the question of whether § 455(a) requires recusal is a close one, the balance tips in favor of recusal").

[89] *See* FLAMM, *supra* note 5, § 20.10.1, at 614 (noting the American Bar Association's adoption of Canon 3E in the ABA Model Code of Judicial Conduct, which "was expressly designed to do away with the duty to sit concept"); *see also id*. (noting that the 1974 amendments to section 455 were "intended to harmonize the statute with the [ABA Model] Code").

[90] Section 455(b) provides:

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

catch-all, requiring that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[91] The use of the word "shall" indicates that when the standard is met, recusal is mandatory rather than left to the judge's discretion.[92] This leads to the standard itself.

Section 455(a) requires recusal when the judge's "impartiality might reasonably be questioned." The key word in this standard is "might." Professor Abramson has defined "might" as "expressing especially a shade of doubt of a lesser degree of possibility."[93] In close cases, any doubts are to be resolved in favor of recusal.[94] As standards go, this is reasonably clear. However, some federal courts—and some Supreme Court Justices—have attempted to rewrite the statutory language to change "might" to "would."

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

Id. Recusal under section 455(a) "is mandatory whenever any fact reasonably suggests that the judge appears to lack impartiality, where under section 455(b) recusal is mandatory when certain specifically enumerated circumstances create a presumption that the judge lacks impartiality." FLAMM, *supra* note 5, § 24.1, at 686. Subsection (b)(4) imposes a "rigid per se rule." *Id*. § 24.6.2, at 698. Waiver of any ground for disqualification enumerated in subsection (b) is prohibited. 28 U.S.C. § 455(e) (2000). Thus, the parties cannot agree to waive a judge's disqualification due to financial interest. FLAMM, *supra* note 5, § 24.9.1, at 712–13:

> [P]roposals to amend section 455 to permit express waiver of the statutory grounds for disqualification were criticized on the ground that parties with valid objections to a judge might be intimidated into agreeing to a waiver. Congress voiced concern about the possibility of federal judges wielding a 'velvet blackjack.' . . . Congress ultimately concluded that confidence in the impartiality of federal judges would be enhanced by not permitting waiver and, in fact, that to allow express waiver would defeat the purpose of the judicial disqualification statutes.

Id.

[91] 28 U.S.C. § 455(a).

[92] *See* BLACK'S LAW DICT. 1233 (5th ed. 1979) ("As used in statutes, contracts, or the like, this word ["shall"] is generally imperative or mandatory.").

[93] Abramson, *supra* note 35, at 58. The Supreme Court has previously held that constitutional due process requires recusal if the circumstances "might create an impression of possible bias." Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 149 (1968).

[94] *See supra* note 92 and accompanying text (noting presumption in favor of recusal).

> [T]here is a tendency for some judges and commentators—and particularly for advocates opposing disqualification—to slip away from the statutory language, turning "might" into "could" or "would." The differences are important. The word "might" is used to express "tentative possibility;" "could" is used to express "possibility;" while "would" connotes what "will" happen or is "going to" happen. Accordingly, the word "would" requires significantly more than a tentative possibility of doubt regarding a judge's impartiality, and use of the word "would" therefore produces a subtle but substantial change in the meaning of the statute.[95]

The statutory standard is clear, requiring recusal when a judge's impartiality "might" reasonably be questioned. Neither actual bias nor a probability of bias is required. Moreover, section 455 contains no procedural component; the language of section 455 indicates that the statute is self-enforcing.[96]

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[95] FREEDMAN & SMITH, *supra* note 2, § 9.06, at 242–43. An example is cited by Professors Freedman and Smith involving a Supreme Court Justice:

> [Justice Stephen] Breyer, when sitting in the First Circuit, had written an opinion that could well have had a devastating impact on Breyer's own financial well-being as a member of Lloyd's of London[, but Breyer failed] to recuse himself. Then White House Counsel Lloyd Cutler contended that reasonable people differed about whether Breyer's impartiality in the case was questionable, and that Breyer therefore was not required to recuse himself.
>
> That argument would have force if the statute required disqualification only when a reasonable person *would* question the judge's impartiality. . . . Under the statute as enacted, however, if reasonable people do disagree, then clearly a reasonable person *might* question the judge's impartiality, and recusal is required.

Id. at 243 (emphasis in original).

[96] *See* FLAMM, *supra* note 5, § 23.5.1, at 676 (noting that amendments to section 455 in 1948 "convert[ed] [section] 455 from a 'challenge-for-cause' provision to a 'self-enforcing' disqualification provision"); Aronson v. Brown, 14 F.3d 1578, 1581 (Fed. Cir. 1994) ("[S]ection 455 is 'self-enforcing' in that it is self-executing; that is, a judge may recuse *sua sponte*."); *see also* Taylor v. O'Grady, 888 F.2d 1189, 1200 (7th Cir. 1989) ("Recusal under Section 455 is self-executing; a party need not file affidavits in support of recusal and the judge is obligated to recuse herself *sua sponte* under the stated circumstances."); United States v. Story, 716 F.2d 1088, 1091 (6th Cir. 1983) ("[S]ection 455 is self-executing, requiring the judge to disqualify himself for personal bias even in the absence of a party complaint."); Davis v. Bd. of Sch. Comm'rs, 517 F.2d 1044, 1051 (5th Cir. 1975) (finding that no motion is required to precipitate a judge's recusal under section 455).

Thus, section 455 requires a federal judge to recuse herself not only for actual bias, but also when her "impartiality might reasonably be questioned."

> If dictionary definitions are indicative of how a word is to be understood, judges perhaps should be wary of rejecting a motion to disqualify for the appearance of partiality. When the dictionary meaning of "might" includes "expressing especially a shade of doubt or a lesser degree of possibility," use of that term . . . would seem to require "a judge to err on the side of caution by favoring recusal to remove any reasonable doubt as to his or her impartiality."[97]

Accordingly, section 455 mandates recusal whenever a judge's impartiality "might reasonably be questioned," and requires that any doubts be resolved in favor of recusal. The Court's decisions addressing section 455 are limited in number and provide some additional insight.

3. Case Law Interpreting Section 455

The United States Supreme Court has issued four major opinions touching on section 455: *United States v. Will*,[98] *Liljeberg v. Health Services Acquisition Corp.*,[99] *Liteky v. United States*,[100] and *Sao Paulo State of the Federative Republic of Brazil v. American Tobacco Co*.[101]

United States v. Will is of limited usefulness to our inquiry because the Court's discussion focused on whether section 455 intended to repeal the "rule of necessity."[102] The "rule of necessity" is a common law doctrine permitting a judge with an otherwise disqualifying conflict of interest to hear the case if all other judges are similarly disqualified.[103] In a cursory, summary analysis, the Court concluded that the purpose of

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[97] Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned*," 14 GEO. J. LEGAL ETHICS 55, 58 (2000).

[98] 449 U.S. 200 (1980).

[99] 486 U.S. 847 (1988).

[100] 510 U.S. 540 (1994).

[101] 535 U.S. 229 (2002) (per curiam).

[102] *Will*, 449 U.S. at 213–17.

[103] *See id*. at 213 ("although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise"); *see also infra* notes 131–134 and accompanying text (discussing the "rule of necessity").

section 455 "gives no hint of altering the ancient Rule of Necessity, a doctrine that had not been questioned under prior judicial disqualification statutes."[104] Thus, the Court concluded, the "rule of necessity" remained intact.

Liteky v. United States is of similarly limited usefulness because the Court's discussion focused on the extrajudicial source doctrine, which requires that any alleged judicial bias derive from outside the pending legal proceeding. As one commentator has explained, "[T]he alleged bias must have arisen not from judicial knowledge, opinions, conduct, or comments that derived from the evidence adduced in a pending or a prior proceeding, but by virtue of some factor that arose outside of the incidents that have taken place in the courtroom itself."[105] As the *Liteky* Court explained:

> The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a *necessary* condition for "bias or prejudice" recusal, since predispositions developed during the course of a trial will sometimes (albeit rarely) suffice. Nor is it a *sufficient* condition for "bias or prejudice" recusal, since *some* opinions acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will *not* suffice. . . . Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.[106]

Despite its focus on the extrajudicial source doctrine, *Liteky* provided at least one point of importance to our inquiry: the Court observed that what matters under section 455(a) "is not the reality of bias or prejudice but its appearance," as evaluated on an objective basis.[107]

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[104] *Id*. at 217.

[105] FLAMM, *supra* note 5, § 4.6.1, at 130–31; *see also id*. at 131 ("The extrajudicial source rule has often been stated in another way—to be disqualifying, a judge's alleged bias must be 'personal' rather than 'judicial' in nature."); Abramson, *supra* note 35, at 76–77 ("The appearance of impropriety may emanate from judicial conduct or remarks directed at counsel, her client, a witness, or an issue in a proceeding. . . . The appearance of impropriety may require recusal when a judge's remarks about the parties or a litigation issue results from information discovered outside the judicial proceeding, because that opinion arises from an extrajudicial source.").

[106] *Liteky*, 510 U.S. at 554–55.

[107] *Id*. at 548; *see also* Microsoft Corp. v. United States, 530 U.S. 1301, 1301 (2000) (mem.) (Rehnquist, J.) (stating that under section 455(a), "[the] inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances").

Perhaps the most helpful of the Supreme Court's decisions is the *Liljeberg* case, which addressed section 455—and its subsection (a) specifically—and concluded that "even though [the federal district judge's] failure to disqualify himself was the product of a temporary lapse of memory, it was nevertheless a plain violation of the terms of the statute."[108] Concluding that "both the District Court and the Court of Appeals found an ample basis in the record for concluding that an objective observer would have questioned [the judge's] impartiality,"[109] the Supreme Court noted that "[s]cienter is not an element of a violation of § 455(a). The judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy, but it does not eliminate the risk that 'his impartiality might reasonably be questioned' by other persons."[110]

The Court offered some clarification in the *San Paulo State* case, noting that section 455(a) "requires judicial recusal 'if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge' of his interest or bias in the case."[111] In *San Paulo State*, the judge's name had been added to a motion to file an amicus brief both mistakenly and without the judge's knowledge; in fact he "took no part in the preparation or approval of the amicus brief."[112] The Court thus concluded that "when [these facts] are taken into account we think it self-evident that a reasonable person would not believe [the judge] had any interest or bias."[113]

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[108] *Liljeberg*, 486 U.S. at 861.

[109] *Id*.

[110] *Id*. at 859. The Court also quoted the decision of the Court of Appeals with approval:

> The goal of section 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible. The judge's forgetfulness, however, is not the sort of objectively ascertainable fact that can avoid the appearance of partiality. [Citation omitted.] Under section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge.

Id. at 860–61.

[111] *San Paulo State*, 535 U.S. at 232–33.

[112] *Id*. at 233.

[113] *Id*.

Additional recusal guidance is available from the ethical codes.

B. The Ethical Codes

Two ethical codes come into play in the federal courts: the Code of Conduct for United States Judges and the ABA Model Code of Judicial Conduct. By its terms, the Code of Conduct for United States Judges[114] applies to "United States Circuit Judges, District Judges, Court of International Trade Judges, Court of Federal Claims Judges, Bankruptcy Judges, and Magistrate Judges."[115] Conspicuously absent from this list of federal judges are the Justices of the United States Supreme Court.[116] Although the Code of Conduct excludes the Supreme Court Justices from its reach, the Supreme Court has repeatedly indicated that another ethical code—the ABA Model Code of Judicial Conduct—is relevant to ethical determinations involving the Court.[117] This Section discusses both the Code of Conduct and the ABA Model Code, which are strikingly similar.

Both the Code of Conduct and the ABA Model Code repeatedly refer to the "appearance" of impropriety.[118] Both ethical codes also set forth a general standard of disqualification from any proceeding "in which the judge's impartiality might reasonably

[114] *See* Code of Conduct for United States Judges, *at* http://www.uscourts.gov/guide/vol2/ch1.html (last visited Jan. 26, 2004) [hereinafter Code of Conduct].

[115] *Id*. at Introduction.

[116] *See* Neumann, *supra* note 28, at 386 (stating that the Code of Conduct for United States Judges does not apply to the Supreme Court Justices because "[t]he Judicial Conference lacks the authority to make rules governing the Supreme Court").

[117] *See, e.g*., United States v. Will, 449 U.S. 200, 211–12 & n.12 (1980) ("Jurisdiction being clear, our next inquiry is whether 28 U.S.C. § 455 or traditional judicial canons operate to disqualify all United States judges, including the Justices of this Court, from deciding these issues.") (citing to the ABA Model Code of Judicial Conduct); Hanrahan v. Hampton, 446 U.S. 1301, 1301 (1980) (mem.) (Rehnquist, J.) (addressing a motion to recuse and stating, "I have considered the motion, the Appendices, the response of the state defendants, 28 U.S.C. § 455 . . ., and the current American Bar Association Code of Judicial Conduct, and the motion is accordingly denied.").

[118] *See* Code of Conduct, *supra* note 114, Canons 2, 3; ABA MODEL CODE, *supra* note 3, Canons 2, 3, 4.

be questioned,"[119] and largely mirror the provisions of section 455.[120] Another relevant statement is found in a comment within Canon 3E, which requires judges to disclose "on the record information that the judge believes the parties or their lawyers might consider relevant" to potential disqualification, regardless of the judge's view as to whether disqualification is warranted.[121]

Canon 3E of the ABA Model Code and Canon 3C of the Code of Conduct address recusal and disqualification. Canon 3E of the ABA Model Code provides, in part:

> [a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to [when] the judge has a personal bias or prejudice [regarding] a party or a party's lawyer, [has] personal knowledge of disputed evidentiary facts, [or] has served as a lawyer [or] been a material witness [in the matter].[122]

Canon 3C of the Code of Conduct is nearly identical to Canon 3E of the ABA Model Code, except that it omits the reference to personal bias or prejudice concerning a party's lawyer.[123]

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[119] *See* Code of Conduct, *supra* note 114, Canon 3C(1); ABA MODEL CODE, *supra* note 3, Canon 3E(1). The provisions of the Code of Conduct for United States Judges are strikingly similar to the American Bar Association's ABA Model Code of Judicial Conduct. ABA MODEL CODE, *supra* note 3; *see* Bassett, *supra* note 10, at 1229–32 (comparing provisions in ABA Model Code of Judicial Conduct and Code of Conduct for United States Judges). Forty-nine of the fifty states have adopted the ABA Model Code of Judicial Conduct in some form. *See* Abramson, *supra* note 35, at 55 (stating 49 states have adopted some form of the ABA Model Code of Judicial Conduct).

[120] The interrelationship among the ABA Model Code, the Code of Conduct, and section 455 is cemented by Congress's intention that section 455 should conform to the ABA Model Code. *See* H.R. REP. NO. 1453, at 2, *reprinted in* 1974 U.S.C.C.A.N. 6351, 6358; 119 CONG. REC. 33029 (1973) (remarks of Sen. Burdick) (articulating intention that section 455 should conform to the ABA Model Code of Judicial Conduct).

[121] *See* ABA MODEL CODE, *supra* note 3, Canon 3E(1), cmt. 2 ("A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.").

[122] ABA MODEL CODE, *supra* note 3, Canon 3E. Additional disqualifying circumstances involving economic interests or participation in the matter by the judge or a member of the judge's family are also detailed in Canon 3E. *Id*.

[123] *See* Code of Conduct, *supra* note 114, Canon 3C(1). The same additional disqualifying circumstances involving economic interests or participation in the matter set forth in Canon 3E of the ABA Model Code also exist in the Code of Conduct. One prominent difference between the two ethical codes in this regard is that the ABA Model Code sets forth as a disqualifying situation a judge or member of the judge's family having "any other more than de minimis interest that could be substantially affected by the proceeding." ABA MODEL CODE, *supra* note 3, Canon 3E(1)(c). In the

The ethical codes provide additional detail and explanation, and thus are helpful supplemental sources of guidance. However, federal judges often have declined the guidance of the codes, and instead have created their own interpretations of the statutory proscriptions under section 455.[124] Often, these judicial interpretations have downplayed the potential for the appearance of impropriety and instead have attempted to objectify the reasons for permitting the challenged judge to participate in the proceedings.[125]

C. Statement of Recusal Policy

In November 1993, seven of the nine United States Supreme Court Justices[126] issued a "Statement of Recusal Policy" addressing situations in which Justices' relatives have participated in pending cases.[127] The policy provides, in part:

> We think that a relative's partnership in the firm appearing before us, or his or her previous work as a lawyer on a case that later comes before us, does not automatically trigger [recusal]. . . .
>
> We do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage. . . .

Code of Conduct, however, although the reference exists to "any other interest that could be affected substantially by the outcome of the proceeding," there is no reference to "de minimis." *See* Code of Conduct, *supra* note 114, Canon 3C(1)(c).

[124] *See infra* note 125 and accompanying text (discussing examples of cases ignoring the ethical code).

[125] *See, e.g.*, Carter v. West Publ'g Co., No. 99-11959-EE, 1999 WL 994997, at * 1–2, 4 (11th Cir. Nov. 1, 1999) (describing a judge who declined to recuse himself from a case where he had previously traveled to resort-style locations at the defendant's expense, allegedly was personal friends with the defendant's top executives, and appeared before a subcommittee to advocate a product by the defendant; relying on section 455, and citing to the Code of Conduct for United States Judges as permitting judges to participate in "extra-judicial activities" but without citing to the appearance of bias standard in Canon 3); Strickler v. Pruett, Nos. 97-29, 97-30, 1998 WL 340420, at * 29–31 (4th Cir. June 17, 1998) (dealing with a judge who declined to recuse himself from a case involving carjacking and subsequent murder, where judge's father had been killed during a carjacking four years earlier, and citing only to section 455); Ball Mem'l Hosp. v. Mut. Hosp. Ins., 788 F.2d 1223, 1224 (7th Cir. 1986) (dealing with a judge who declined to recuse himself from a case where the judge had served as a consultant for an entity related to the defendant approximately one year earlier, without citing to section 455 or any ethical code).

[126] Chief Justice Rehnquist and Associate Justices Ginsburg, Kennedy, O'Connor, Scalia, Stevens, and Thomas signed the policy. *See* FLAMM, *supra* note 5, Addendum to Appendix A, at 1068. Associate Justices Blackmun and Souter did not sign the policy. *Id*.

[127] *Id*. at 1068–70.

> Absent some special factor, therefore, we will not recuse ourselves by reason of a relative's participation as a lawyer in earlier stages of the case. . . . We shall recuse ourselves whenever, to our knowledge, a relative has been lead counsel below.
>
> Another special factor, of course, would be the fact that the amount of the relative's compensation could be substantially affected by the outcome here. That would require our recusal even if the relative had not worked on the case, but was merely a partner in the firm that shared the profits. . . .[128]

Although the Statement's applicability is limited to situations involving relatives of the Justices, it is of great interest in gaining insight to the Court's perspective on section 455 and recusal generally.

> In effect, the 1993 Recusal Policy constitutes the Court's blanket and prejudged determination that a Justice's impartiality is not reasonably questioned when a relative is a partner in a firm appearing before the Court, so long as the Justice's relative receives no direct financial benefit from the matter before the Court. Rather than applying an objective reasonable person standard on a case-by-case basis, as § 455(a) requires, the Recusal Policy simply reflects the Justices' own sense of what to them would constitute a reasonable basis upon which to question a judge's impartiality and applies that standard across the board.[129]

In the Statement of Recusal Policy, the Justices "re-emphasized their negative view of recusal in cases where actual bias is not at issue."[130] Thus, the Supreme Court has made it clear that it has no intention of following the strict proscriptions of section 455, and instead believes that the Court's unique nature justifies a less-demanding recusal standard.

Accordingly, in dealing with recusal issues involving federal courts of appeals judges or United States Supreme Court Justices, the sources of guidance are limited. For federal circuit court judges, there is the Code of Conduct and there is section 455. For Supreme Court Justices, there is the Court-created "Statement of Recusal Policy," which applies only to situations involving the Justices' relatives; there is the ABA Model Code

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[128] *Id*.

[129] Ifill, *supra* note 26, at 626.

[130] *Id*. at 625.

of Judicial Conduct; and again, there is section 455. This leads us to a discussion of recusal in the specific and unique context of United States Supreme Court Justices.

III. RECUSAL AND THE UNIQUE NATURE OF THE UNITED STATES SUPREME COURT

Although the United States Supreme Court has faithfully interpreted section 455 and the recusal standard in addressing the recusal of federal district court judges, the Court has not always applied the same standard to itself. The consistent standard in section 455(a) and the ethical codes, requiring recusal from "any proceeding in which [the judge's] impartiality might reasonably be questioned," reflects uniformity among Congress, the Judicial Council, and the American Bar Association as to the appropriate recusal standard. But does this standard apply to Supreme Court Justices? Let's first look at one of the justifications that Chief Justice William H. Rehnquist has proffered in defense of a different approach to the recusal of Supreme Court Justices, which involves a variant of the rule of necessity.

A. "Rule of Necessity"

In large part, the Supreme Court's rationalization for its insistence upon participating in cases involving potential recusal issues has been based on a variant of the so-called "rule of necessity" and the "duty to sit."

The "rule of necessity" was developed in the common law more than 500 years ago,[131] and deals with the unremarkable notion that if every judge eligible to hear a particular case would be disqualified due to conflicts of interest—such as a case involving a constitutional challenge to a pay increase for all federal judges—none of the judges will be considered disqualified on that basis.[132] The purpose of the "rule of

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[131] *See* United States v. Will, 449 U.S. 200, 213 (1980).

> The Rule of Necessity had its genesis at least five and a half centuries ago. Its earliest recorded invocation was in 1430, when it was held that the Chancellor of Oxford could act as judge of a case in which he was a party when there was no provision for appointment of another judge. [Citation omitted.] Early cases in this country confirmed the vitality of the Rule.

Id. at 213–14.

[132] *See id*. at 213 ("although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise") (*quoting* F. POLLACK, A FIRST BOOK OF JURISPRUDENCE 270 (6th ed. 1929)); *see also* FLAMM, *supra* note 5, § 20.2.1, at 590 (noting that the "rule of necessity" involves "the principle that disqualification will not be permitted to destroy the only tribunal with power to act in the premises—that is, where disqualification would result in an absence of judicial machinery capable of dealing with a matter, disqualification must yield to necessity").

necessity," as explained by the Supreme Court, is to provide litigants their right to a forum.[133]

The "rule of necessity" is a rule of extremes. The "rule of necessity" at the Supreme Court level is not implicated when one Justice is subject to a disqualifying event or relationship, nor when several Justices are so affected. The "rule of necessity" thus applies only when every Supreme Court Justice would be subject to disqualification.[134]

Although not expressly phrased in terms of the "rule of necessity" (or the "duty to sit"), some Supreme Court Justices have not followed section 455 as written, but instead have used a less stringent standard, permitting them to participate in cases that other federal judges, employing section 455, could not. The clear implication of this lesser standard is that recusal at the Supreme Court level removes an important voice from the decision-making process (at best) and risks an inadequate number of Justices to hear the case (at worst), and therefore Justices should undertake recusals with caution, erring on the side of participation rather than erring on the side of recusal.[135] These concerns require closer examination.

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[133] *Will*, 449 U.S. at 217 ("[W]ithout the Rule [of Necessity], some litigants would be denied their right to a forum.").

[134] *See id.* at 217 (discussing the "rule of necessity" and referring to "all the Justices of this Court").

[135] *See* Laird v. Tatum, 409 U.S. 824, 837 (1972).

> I think that the policy in favor of the "equal duty" [not to recuse] concept is even stronger in the case of a Justice of the Supreme Court of the United States. There is no way of substituting Justices of this Court as one judge may be substituted for another in the district courts. There is no higher court of appeal which may review an equally divided decision of this Court and thereby establish the law of our jurisdiction.

Id.; *see* Microsoft Corp. v. United States, 530 U.S. 1301, 1301 (2000) (mem.) (Rehnquist, J.) ("[I]t is important to note the negative impact that the unnecessary disqualification of even one Justice may have upon our Court. . . . [T]here is no way to replace a recused Justice. Not only is the Court deprived of the participation of one of its nine Members, but the even number of those remaining creates a risk of affirmance of a lower court decision by an equally divided court."); *see also* Cheney v. United States Dist. Ct., 541 U.S. ___, 124 S. Ct. 1391, 1394 (No. 03-475, Mar. 18, 2004) (mem.) (Scalia, J.) (noting that the recusal of a Supreme Court Justice means that "[t]he Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case"); Statement of Recusal Policy, *reprinted in* FLAMM, *supra* note 5, Addendum to Appendix A, at 1069 ("In this Court, where the absence of one Justice cannot be made up by another, needless recusal deprives litigants of the nine Justices to which they are entitled, produces the possibility of an even division on the merits of the case, and has a distorting effect upon the certiorari process, requiring the petitioner to obtain (under our current practice) four votes out of eight instead of four out of nine.").

Nine Justices serve on the United States Supreme Court.[136] To hear a case, a quorum of six Justices must be able to participate.[137] As Professor Stempel has noted, "Seldom are at least two-thirds of the Justices not available to decide a case before them."[138] Accordingly, a full one-third of the Supreme Court Justices could recuse themselves in each case without preventing the Court from reviewing those cases. Indeed, although the Supreme Court is the most visible of the federal appellate courts, it is not the smallest. The smallest federal appellate court is the United States Court of Appeals for the First Circuit, which has six authorized judgeships; six other circuits have twelve or fewer authorized judgeships.[139]

In essence, the Supreme Court has used—and continues to use—a variant of the "rule of necessity" and the "duty to sit" doctrines to create a recusal standard for itself that is more limited and less stringent than the standard set forth in section 455. The primary reason articulated for subverting section 455's standard goes to the smaller size of the Supreme Court—a justification somewhat unpersuasive in light of the correspondingly small (or even smaller) sizes of seven of the thirteen federal courts of appeals.[140] Moreover, a specific statute addresses those relatively few situations in which a quorum of the Supreme Court is not available.

Congress anticipated that situations would arise where the Supreme Court would be unable to muster a quorum, and enacted section 2109 for that purpose.[141] Section 2109 provides two alternatives when the Supreme Court lacks a quorum: if the case came to the Supreme Court by direct appeal from a district court, the Chief Justice may send the case to the applicable circuit court; in all other cases, if the majority of the Justices do not believe that a quorum will become available in the next Term, the Court

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[136] *See* 28 U.S.C. § 1 (2000) ("The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices . . . .").

[137] *See id*. (noting that the Supreme Court is comprised of nine Justices, "any six of whom shall constitute a quorum").

[138] Stempel, *supra* note 28, at 647.

[139] *See* The Administrative Office of the U.S. Courts, Understanding the Federal Courts, *at* http://www.uscourts.gov/UFC99.pdf, at 46 (last visited Feb. 15, 2004). The Seventh and Eighth Circuits have eleven authorized judgeships; the Tenth, Eleventh, Federal, and District of Columbia Circuits have twelve authorized judgeships; the Second Circuit has thirteen authorized judgeships; the Third Circuit has fourteen authorized judgeships; the Fourth Circuit has fifteen authorized judgeships; the Sixth Circuit has sixteen authorized judgeships; the Fifth Circuit has seventeen authorized judgeships, and the Ninth Circuit has twenty-eight authorized judgeships. *Id*.

[140] *See id*.

[141] 28 U.S.C. § 2109 (2000).

must affirm the judgment, with the same effect as if the judgment had been affirmed by an equally divided Court.[142]

In most instances, by the time a case reaches the Supreme Court, at least two, and sometimes three, other courts have evaluated the litigants' challenges. In the federal system, typically the matter has been heard by the federal district court and the federal court of appeals; in the state system, typically the matter has been heard by the trial court, the intermediate-level appellate court, and the state's supreme court. The genuine need for a third (or fourth) judicial determination is rare. This is particularly true in light of the fact that the Supreme Court has repeatedly stated that its purpose is not merely to correct errors committed by the lower courts.[143]

The need for an additional judicial determination is also undermined by the limited number of cases heard by the Court each year. The Supreme Court's jurisdiction is largely discretionary, and the Court accepts few cases.[144] The Court grants

[142] In full, section 2109 provides:

> If a case brought to the Supreme Court by direct appeal from a district court cannot be heard and determined because of the absence of a quorum of qualified justices, the Chief Justice of the United States may order it remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court either sitting en banc or specially constituted and composed of the three circuit judges senior in commission who are able to sit, as such order may direct. The decision of such court shall be final and conclusive. In the event of the disqualification or disability of one or more of such circuit judges, such court shall be filled as provided in chapter 15 of this title.
>
> In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of the opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.

28 U.S.C. § 2109 (2000).

[143] *See, e.g.*, Watt v. Alaska, 451 U.S. 259, 275 (1981) (Stevens, J., concurring) ("Most certainly, this Court does not sit primarily to correct what we perceive to be mistakes committed by other tribunals.").

[144] By way of comparison, 60,847 cases were filed in the federal courts of appeals in 2003. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS, *at* http://www.uscourts.gov/judbus2003/front/caseload.pdf (last visited Jan. 4, 2005). The federal courts of appeals terminated 27,009 of these 60,847 cases on the merits—meaning that the Supreme Court reviewed approximately three-tenths of one percent (0.3%) of the decisions of the federal courts of appeals. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, *at* http://www.uscourts.gov/judbus2003/tables/s1.pdf (last visited Jan. 4,

approximately one percent of the petitions filed for certiorari—fewer than 100 cases each year.[145] Under the so-called "rule of four," at least four Justices must vote to grant the certiorari petition in a particular case for the Court to hear that case.[146] Accordingly, cases heard by the Supreme Court are largely a matter of choice, left to the Justices' discretion. Given the fact that the Court grants only about one percent of the requests for certiorari, litigants cannot reasonably expect the Supreme Court to take any given case[147]—the odds are stacked against a grant of certiorari, and the failure to secure a grant of certiorari in a particular case simply cannot be deemed unusual or disastrous when the same fate befalls ninety-nine percent of the petitions filed.

All of that said, however, there remains a fly in the ointment. The United States Supreme Court *is* different. Although there are courts of appeals with similarly few judges, the courts of appeals authorize district court judges to sit by designation in the federal circuit courts, thereby permitting judicial substitutions.[148] No such procedure exists in the Supreme Court; "there is no way to substitute a justice who has been recused in the way that judges may be substituted on the lower courts."[149]

> All courts want justice done, but the conflict of values comes over method; if disqualification of judges is too easy, both the

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2005). The filings of criminal and civil cases in the federal district courts in 2003 totaled 323,604. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS, *at* http://www.uscourts.gov/judbus2003/front/caseload.pdf (last visited Jan. 4, 2005).

[145] *See* 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY, *at* http://www.supremecourtus.gov/publicinfo/year-end/2004year-endreport.pdf (last visited Jan. 4, 2005) (noting that 7,814 cases were filing during the 2003 Term, and that "91 cases were argued and 89 were disposed of in 73 signed opinions . . . .").

[146] The "rule of four" is not mandated by statute; it is merely the Supreme Court's custom or practice. *See* DAVID O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 247 (3d ed. 1993) ("There is really no absolute rule that four votes are necessary when a full Court sits. Certainly when there are only six justices sitting, it seems that three should be sufficient to justify a hearing on the merits."); *see also* WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 264 (1987) (explaining that the "rule of four" is a practice rather than a statutory mandate).

[147] *See* SUP. CT. R. 19(1); Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 749 (1973) [hereinafter Note, *Disqualification*] ("At least in cases arising on certiorari, litigants have no absolute right to Supreme Court review.").

[148] *See generally* Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REFORM 351 (1995) (discussing the "sitting by designation" procedure and identifying problems raised by the procedure).

[149] Bleich & Klaus, *supra* note 40, at 47. Indeed, the Constitution refers to vesting the judicial power of the United States in "*one* supreme Court," raising the possibility that a constantly changing Court, due to substituted Justices, might arguably be unconstitutional. *See* U.S. CONST. art. III, § 1.

> cost and the delay of justice go out of bounds. If disqualification is too hard, cases may be decided quickly, but unfairly. Nowhere is that conflict of values more glaring than in the United States Supreme Court, where the cases are usually important. If a justice sits who should not, great interests may be jeopardized; but if a justice disqualifies who should not, vital questions may be needlessly left without authoritative decision. For under existing law, there is no procedure for replacing a disqualified justice of the Supreme Court even when his non-participation deprives the litigants of the statutory quorum necessary for decision.[150]

In addition, in the courts of appeals, judges hear cases in three-judge panels,[151] and the members of those panels typically rotate. In the Supreme Court, all cases are heard en banc. Thus, there is only one United States Supreme Court; there is no procedure to substitute any of the Court's nine members; and if the case cannot be heard by the Court, there is no alternative court to consult.

Recusals at the Supreme Court level raise two other potential consequences not encountered in other federal courts: (1) the loss of a potential grant of certiorari, and (2) the increased possibility of affirmances by an equally divided Court. The first of these potential consequences has been dubbed "the certiorari conundrum."[152] Professor Lubet has noted that under some circumstances, a Justice's recusal may "actually harm[] the very party that it was intended to protect."[153] Professor Lubet provided a statistical explanation:

> [A]ssume a 0.1 probability that any Justice will vote to grant certiorari in any case, and that three already have decided to grant a certain petition. If six Justices are yet to vote, the probability of granting certiorari is .47. With only five remaining Justices, however, the probability of review drops to .41, a difference of .06. This relationship remains constant, although the ratios change, for all probabilities less than 1.0. In fact, the absolute difference between probabilities for certiorari with nine- and

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[150] John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 608–09 (1947).

[151] Federal circuit courts of appeals must decide cases in panels of three, "at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified," in which case a judge from another appellate or district court may hear the case by designation. 28 U.S.C. § 46(b) (2000).

[152] *See* Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657 (1996).

[153] *Id*. at 661.

> eight-Justice Courts increases for higher probabilities. In other words, the more certworthy the case, the more keenly the petitioner will feel the loss of [a Justice's] participation, even if [the Justice] is actually biased against the petitioner. . . . [A]ssuming that [a Justice] is anything other than an outright hypocrite or thief, her recusal in a meritorious case may decrease significantly the petitioner's chances for certiorari. Indeed, even assuming that [a Justice] is so biased that she is only half as likely to vote for certiorari as are the other Justices, the availability of her biased vote nonetheless increases the probability that the Court will grant the petition. During the only period for which such statistics are available, between 23% and 30% of all certiorari petitions granted attracted only the minimum four positive votes. With no votes to spare in those cases, the disqualification of a single Justice therefore could affect dramatically a petitioner's access to review.[154]

The second of these potential consequences—the increased possibility of affirmances by an equally divided Court—is actually perhaps of less consequence to the litigants than to those who did not participate in the litigation.

> The more serious interest threatened by affirmances by an equally divided Court is that in having legal issues of general importance decided with certainty. If only because the Court generally will not write an opinion in such a case, the affirmance in effect makes no law except with regard to the precise facts of the dispute at hand. It can be freely disregarded even in closely analogous fact situations.[155]

Accordingly, much as commentators might agree that Justice Scalia did not comply with the broad standard set forth in section 455(a) in the *Cheney* case (and there

[154] *Id*. at 663–64.

[155] Note, *Disqualification*, *supra* note 147, at 749.

is widespread consensus that he did not[156]), judicial recusal of Supreme Court Justices raises a number of interesting issues, including potential constitutional issues.

B. Separation of Powers

At least one commentator has proposed changes to—or additional—ethical rules for Supreme Court Justices.

> Congress should enact conflict-of-interest rules binding on the justices. Today, the justices make up their own rules and they are often inadequate, self-serving, and inconsistent. For example, Justice Antonin Scalia has two sons who work in law firms that represented the Republicans in the recent election case. The high court's rules permit this so long as the firm deducts from the justice's children's compensation the proportion of income directly attributable to appearances before the Supreme Court. This formulation is naive in the extreme, since firms that win before the high court reap enormous indirect financial benefit in the form of new clients.[157]

The reality, however, is that section 455 already exists. The refusal by some Justices to follow section 455's statutory mandate suggests that additional "rules" might similarly be ignored.

Moreover, a question exists as to whether a congressional statute can mandate the recusal of a Supreme Court Justice.[158] In doing so, one branch of government (the

[156] *See, e.g.*, FREEDMAN & SMITH, *supra* note 2, § 9.10, at 266 (stating that "Scalia's opinion denying the recusal motion [in the *Cheney* case] engages in fallacious arguments and misstates and misapplies the Federal Disqualification Statute"); *id*. at 265 (noting that "[w]hen the motion was made to recuse Scalia, '8 of the 10 newspapers with the largest circulation in the United States . . . and 20 of the 30 largest have called on Justice Scalia to step aside.' Moreover, 'not a single newspaper has argued against recusal.'"). Indeed, "[d]ozens of newspaper editorials have demanded that Scalia remove himself from the *Cheney* case." Tony Mauro, *Decoding High Court Recusals*, LEGAL TIMES, Mar. 1, 2004, at 1; *see also* Ries, *supra* note 28, at B4 ("Of course [Justice Scalia's] impartiality in this case might reasonably be questioned. Of course his trip with Cheney might be viewed as something more than a social contact. From my perspective as someone who has acted as a legal arbiter between warring parties, Justice Scalia's arguments should be laughed out of court.").

[157] DERSHOWITZ, *supra* note 28, at 181.

[158] *See* Miller v. French, 530 U.S. 327, 341 (2000) ("The Constitution enumerates and separates the powers of the three branches of Government in Articles I, II, and III, and it is this 'very structure' of the Constitution that exemplifies the concept of separation of powers."); *see also* Clinton v. Jones, 520 U.S. 681, 689 (1997) ("The doctrine of separation of powers is concerned with the allocation of official power among the three coequal branches of our Government. The Framers 'built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'"); Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 700 (1980) ("Because of the unique position of the

legislature) at least arguably seeks to act beyond its own sphere of authority to proscribe an exercise of the discretionary power of another branch of government (the judiciary), thus raising a potential separation of powers issue.[159]

In amending section 455, Congress clearly undertook legislative action aimed at governing the behavior of federal judges by requiring that judges recuse themselves from cases under certain circumstances. To some degree, section 455 embodies a constitutional principle; the Supreme Court has long held that the avoidance of judicial bias is a prerequisite to due process.[160] However, not every situation involving an allegation of judicial bias will rise to the level of a constitutional due process violation—particularly when amended section 455 mandates recusal not only when actual bias exists, but also when one might reasonably question a judge's impartiality. Indeed, the Supreme Court has observed that disqualification is a constitutional issue "only in the most extreme of cases."[161]

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federal judiciary as the principal guardian of the rights conferred by the Constitution, encroachments upon its protected sphere must be weighed with acute sensitivity."). Indeed, guarding judicial independence is perhaps particularly important in light of the judiciary's lack of power over either "the sword or the purse." *See* THE FEDERALIST NO. 78, at 469 (Mentor ed. 1961) (Alexander Hamilton).

[159] Separation of powers concerns involving ethical rules have been discussed in the context of executive branch attorneys, specifically with regard to former Model Rule 3.8(f), which from 1990-1995 regulated a prosecutor's ability to issue subpoenas to defense attorneys by requiring judicial approval; Model Rule 4.2, which enjoins contact with represented persons; and Model Rule 8.4, which enjoins lawyers from engaging in conduct involving fraud, deceit, or misrepresentation and has been applied to federal prosecutors conducting undercover operations. *See, e.g.*, Baylson v. Disciplinary Bd., 764 F. Supp. 328, 346–48 (E.D. Pa. 1991) (holding that Pennsylvania Rule of Professional Conduct modeled after former Model Rule 3.8(f) violated Supremacy Clause), *aff'd*, 975 F.2d 102 (3d Cir. 1992); People v. Pautler, 35 P.3d 571 (Colo. 2001) (finding violation of Colorado rule modeled upon Model Rule 8.4); *In re* Gotti, 330 Or. 517 (2000) (same). *See generally* Edward C. Carter III, *Limits of Judicial Power: Does the Constitution Bar the Application of Some Ethics Rules to Executive Branch Attorneys?*, 27 S. ILL. U. L.J. 295 (2003); *see also* Brenna K. DeVaney, *The "No-Contact" Rule: Helping or Hurting Criminal Defendants in Plea Negotiations?*, 14 GEO. J. LEGAL ETHICS 933, 935 (2001) (noting that "[t]he application of Model Rule 4.2 to federal prosecutors has been steeped in controversy").

[160] *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986) (finding that a particular judge's participation in the case "violated appellant's due process rights"); *In re* Murchison, 349 U.S. 133, 136 (1955) (concluding that under the Due Process Clause no judge "can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome"); Tumey v. Ohio, 273 U.S. 510, 523 (1927) ("[I]t certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of 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 reaching a conclusion against him in his case.").

[161] *Lavoie*, 475 U.S. at 821.

Under some circumstances, the existence of a statutory command—a law—might lead to a conclusion that there was no separation of powers issue. Recall, however, that section 455 originally left the recusal decision in nearly all instances to the individual Justice's sole discretion[162]—indeed, the original federal recusal statute did not purport to apply to Supreme Court Justices at all.[163] Accordingly, the vast majority of recusal decisions formerly were within the judiciary's discretionary powers. At least to some degree, it would appear that there is a potential argument that recusal decisions constitute a discretionary judicial branch power in those instances where constitutional due process is not implicated.[164] And there is at least a potential argument that Congress acted beyond its own sphere of authority in seeking to control the exercise of that discretionary judicial branch power in amending section 455.[165] A statute interfering with a Justice's discretion to participate in a case suggests a different constitutional perspective than adjustments to the Court's size, or a broadening of the Court's jurisdiction, or even the evaluation of judicial qualifications in the sense of the powers given to the President and Congress in the appointments process. Adjustments to the Court's size and jurisdiction arguably address more general—and more remote—dimensions of the Court's functioning, in contrast to recusal standards, which implicate the ability of a currently-sitting individual Justice to participate in a case.[166]

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[162] *See supra* notes 81–83 and accompanying text.

[163] *See Historical and Statutory Notes*, 28 U.S.C. § 455 (2000) (stating that "[s]ection 24 of Title 28, U.S.C., 1940 ed., applied only to district judges. The revised section is made applicable to all justices and judges of the United States.").

[164] *See* Frank, *supra* note 150, at 612 ("In the Supreme Court disqualification has always been the prerogative of each individual Justice . . . . From the beginning the practice seems to have been founded upon a mixture of common law notions, individual judgments of propriety, and practicability."); David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 368 (2001) (describing the ethical rules as "loose and discretionary" in their application).

[165] In the context of reviewing the financial disclosure requirement of the Ethics in Government Act against a separation of powers challenge, the Fifth Circuit upheld the validity of the Act, but acknowledged that the Act's provisions constituted an "intrusion upon the constitutionally assigned functions of the judiciary." Duplantier v. United States, 606 F.2d 654, 668 (5th Cir. 1979).

[166] One commentator, however, has argued that there is no constitutional violation. Professor Stempel has stated that:

> The proposed Supreme Court review of recusal denials would not run counter to the Constitutional scheme if it were adopted by Supreme Court Rule. If adopted by statute, the procedure should face no greater skepticism. By enacting the proposed section 455(f), Congress would be merely exercising its conceded power to regulate the Court in limited, nonpartisan means not related to the desired result in a given case.

See Stempel, *supra* note 28, at 658; *see also* Note, *Disqualification*, *supra* note 147, at 743 n.29 (assuming, without analysis, that "the disqualification provisions of the ABA Code could of course

An additional factor within the separation of powers discussion is the Court's political nature. There is no merit-based selection process for Supreme Court Justices; Justices are selected through a highly politicized process.[167] Nominated by the President, Supreme Court Justices are not selected for their neutrality.[168] Indeed, the Supreme Court

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still become binding on the federal courts if Congress were to adopt them to replace the present § 455"). Professor Stempel observed that Congress "has altered the Court's size on seven occasions," Stempel, *supra* note 28, at 659, and that "Congress's authority to expand federal court jurisdiction, including the appellate jurisdiction of the Supreme Court, is accepted unquestionably." *Id*. The Fifth Circuit has upheld the constitutionality of requiring federal judges to file annual financial statements. Duplantier v. United States, 606 F.2d 654 (5th Cir. 1979). Arguably, such financial statements also fall within a different analysis, especially since the Ethics in Government Act, which implemented this requirement, applies to all three branches of government. *See* Ethics in Government, § 101, 5 U.S.C.A. APP. 4 (2000).

[167] *See* Debra Lyn Bassett, *"I Lost at Trial—In the Court of Appeals!": The Expanding Power of the Federal Appellate Courts to Reexamine Facts*, 38 HOUS. L. REV. 1129, 1182–83 (2001) (noting that "the highly political nature of judicial appointments, and the corresponding political 'litmus test' approach often employed in selecting judicial candidates, virtually ensures judicial biases and prejudices of some sort."); Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299, 301 (2004).

> We believe that the present Supreme Court selection system is so abysmal that even choice by lottery might be more productive. We also believe that politics is primarily to blame. The present level of partisan bickering has not only unduly delayed judicial appointments, it has also undermined the public's confidence in the objectivity of those justices that are ultimately selected.

Id.; *see also id*. at 305 ("The current selection criteria for the Supreme Court appear to be a set of political litmus tests on matters such as abortion, the death penalty, and affirmative action."); Ifill, *supra* note 26, at 611–12 ("[T]he public perception of judges and the judiciary as nonpolitical, neutral decision-makers, has been deeply eroded during the past fifty years. Indeed, judicial decision-making has increasingly come under fire for being 'activist,' 'partisan,' 'imperial,' or 'legislative.' . . . Nominations and confirmation hearings for federal court seats have become overtly hostile, political, and racial."); Leubsdorf, *supra* note 3, at 269 (noting that although the Senate reviews appointees for federal judgeships, "only Supreme Court appointments get much attention"). Justice Scalia's memorandum opinion refusing to recuse himself in the Cheney energy task force case drew attention to this politicized process. *See* Cheney v. United States Dist. Ct., 541 U.S. ___, 124 S. Ct. 1391, 1395 (No. 03-475, Mar. 18, 2004) (mem.) (Scalia, J.) (noting that "[m]any Justices have reached this Court precisely because they were friends of the incumbent President or other senior officials—and from the earliest days down to modern times Justices have had close personal relationships with the President and other officers of the Executive," and providing a number of examples).

[168] *See* U.S. CONST. art. II, § 2, cl. 2 (conferring upon the President the power to appoint federal judges with "the Advice and Consent of the Senate"); *see also* Saphire & Solimine, *supra* note 148, at 383–84 (noting that the Constitution "fails to offer guidelines for determining when or whether a person proposed by the President or considered by the Senate is eligible to serve").

is a political body[169] chosen through political considerations. "[P]olitical considerations were expected to be, and indeed have been, important factors in the process of selecting federal judges. . . . [T]here has been a long tradition of taking political factors into account in the nomination and confirmation of Supreme Court Justices."[170] The men and women sitting on the Supreme Court were selected precisely because they held (or were believed to hold) particular views on particular issues.

If, indeed, "the judgments that the President and the Senate are supposed to reach in the nomination and confirmation processes are essentially political judgments—in both the highest and lowest senses of that term,"[171] then Supreme Court Justices have, in fact, been selected because they hold particular biases. Having appointed a particular individual based on that person's ideology (and political connections) renders recusal due to bias as to those ideological issues incongruent.

Most importantly, even if there is no separation of powers issue—and even if the Supreme Court willingly accepts section 455 as its recusal guidepost—a practical problem remains. The standards within section 455 have the potential to be quite effective—if the Supreme Court would follow them. Enforcement is the problem, not a lack of potential standards. What are the consequences when a Supreme Court Justice disregards the statutory proscriptions? The Justice will not be subject to a disciplinary hearing; the only real remedy would appear to be impeachment.[172]

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[169] *See* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1644 (2003) ("[T]he Supreme Court is seen as more of a 'political' institution than are the lower appellate courts.").

[170] Saphire & Solimine, *supra* note 148, at 384; *see id*. at 385 (describing Supreme Court vacancies as "major political events"); *see also* JOSEPH C. GOULDEN, THE BENCHWARMERS: THE PRIVATE WORLD OF THE POWERFUL FEDERAL JUDGES 24 (1974) ("Lacking constitutional guidelines, the appointive system has evolved through custom. And an essential element of our custom is that political connections are as important to a prospective judge as is his legal ability."); Henry P. Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1204 (1988) (describing the confirmation process as political because the President "has selected an appointee satisfactory to him—a judgment that may include the nominee's philosophy, as well as a wide range of factors not associated with merit in a narrow sense, such as the appointee's contribution to the diversity of the Court."). One commentator has observed that "a Supreme Court appointment is usually not simply a parchment with a presidential autograph but represents an actual judgment in which a President really participated." John P. Frank, *Conflict of Interest and U.S. Supreme Court Justices*, 18 AM. J. COMP. L. 744, 745 (1970). Indeed, in earlier times, a Supreme Court appointee was "really and truly someone in whom the President repose[d] trust and confidence," and thus "appointing Presidents frequently look[ed] for advice to their appointees, because in many instances they were dependent upon those same appointees for advice before the appointment." *Id*.

[171] Lloyd N. Cutler, *The Limits of Advice and Consent*, 84 NW. U. L. REV. 876, 876 (1990).

[172] *See* Nixon v. United States, 506 U.S. 224, 235 (1993).

> In our constitutional system, impeachment was designed to be the *only* check on the Judicial Branch by the Legislature. On the topic of judicial

In short, there are no simple answers. Enforcing ethical standards for Supreme Court Justices is a problem without an easy solution. The Supreme Court is a distinct and unique entity, imbued with a distinct and unique constitutional and political stature. But the Supreme Court's unusual posture also renders potential bias a particular concern. "Generally speaking, where an appearance of bias—such that the judge's impartiality 'might reasonably be questioned' by a reasonable person—can be shown, any decision

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> accountability, Hamilton wrote: "The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the house of representatives, and tried by the senate, and if convicted, may be dismissed from office and disqualified for holding any other. *This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges*."

Id. (emphasis in original) (quoting THE FEDERALIST NO. 79, at 532–33 (J. Cooke ed., 1961)).

> The problem is that, whether a justice is right or wrong, ultimately he or she is right by definition. Once a justice decides that he or she is fit to hear a case, there is no process for challenging that conclusion and it becomes the law—thus calling to mind Justice Jackson's famous aphorism that a decision from the Court is final not because it is somehow infallible, but rather it is infallible because it is final.

Bleich & Klaus, *supra* note 40, at 47.

> There is today no effective mechanism for questioning the integrity of Supreme Court justices. When a commission delicately recommended several years ago that "the Supreme Court may wish to consider the adoption of policies and procedures for the filing and disposition of complaints alleging misconduct against justices of the Supreme Court," there was a resounding silence from the justices. To be sure, if any justice committed a federal crime, he or she could be indicted or impeached, but short of the radical surgery of criminal prosecution or congressional impeachment, there is no effective medicine that the body politic could administer to a sick Supreme Court. Indeed, we even lack the tools necessary to make the diagnosis, not only because of legal limitations, but also because of unwritten laws and traditions that govern the manner by which we may challenge the integrity of the justices. Every other judge in the United States is subject to some peer review or outside review. For example, all lower court federal judges—on the district or appellate court—are subject to investigation and sanctions administered by the Judicial Conference. The Supreme Court is exempted from this procedure.

DERSHOWITZ, *supra* note 28, at 179–80.

rendered by that judge will be subject to reversal."[173] However, this remedy is not available when the judge having an "appearance of bias" is a Supreme Court Justice. As the court of last resort, no other court can reverse a decision of the United States Supreme Court. Accordingly, when a Justice improperly participates in a decision, the taint can be removed only if a subsequent act of Congress changes the result. Moreover, when the Court's decision involves a ruling with respect to constitutionality, a tainted result cannot be undone by any other court, nor by any other branch of government. Thus, a tainted result in the Supreme Court carries ramifications far beyond a tainted result by a trial-level judge—yet under the current approach, it is the trial-level judge, not the Supreme Court Justice, who is held to the more demanding recusal standard.

But despite these concerns, the unique nature of the Supreme Court cannot be ignored. A more demanding recusal standard is possible at the lower federal court levels precisely because recourse is available—other judges are available to be substituted. At the Supreme Court level, however, precluding Justices from hearing cases for purely remote precautionary reasons, and thereby silencing important voices in the decision-making process, is impolitic, unwise, and counterproductive.

IV. MODIFYING THE SUPREME COURT'S APPROACH TO RECUSAL

At present, some Supreme Court Justices do not appear to follow the full intent of section 455(a)'s broad recusal standard. The rationalization for their approach appears to be based on several interrelated factors, including a generalized reluctance to recuse, a presumption in favor of participation, a belief that challenges to impartiality are likely politically motivated, and a belief that because the Supreme Court is "above the fray," recusals based on appearances of partiality would be improperly overbroad. Although there is a risk that some Justices do not take recusal sufficiently seriously, there is indeed some validity to each of these factors.

A related concern involves the differences among the Justices with respect to their approaches to recusal. Although this Article and recent media accounts have focused on current Justices who, in a few instances, have appeared to approach recusal in a somewhat cavalier manner, not every Justice's name has been tied to public calls for recusal, nor has any current Justice regularly refused to recuse such that his or her judgment appears genuinely impaired and impeachment warranted.[174] Is it fair or appropriate that the voices of some Justices are heard less frequently because they are more cautious and therefore recuse themselves more often? The reality is that we do notice when voices are missing from a Supreme Court decision.

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[173] FLAMM, *supra* note 5, § 5.5, at 154.

[174] For example, Justice Scalia recused himself from the controversial and highly-publicized pledge of allegiance case. *See* Elk Grove Unified Sch. Dist. v. Newdow, 540 U.S. 945, 945 (2003) (mem.) (indicating that Justice Scalia did not participate in the case).

Difficult situations call for innovative solutions, and this situation is no exception. It is tempting—but facile—to hold feet to the fire, insisting that Supreme Court Justices must obey the federal recusal standard and that consequences will follow. Too many issues lurk here, including some of a constitutional dimension and some of a practical enforcement nature. Accordingly, this Article takes a different tack.

This Article proposes that the Supreme Court shift its approach. Currently, recusal motions are uncommon in the Supreme Court; indeed, the Court appears to effectively discourage such motions.[175] This Article proposes that the Court encourage

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[175] Similarly, after the widespread outcry over the duck hunting incident involving Justice Scalia and Vice President Cheney, the Sierra Club eventually formally sought Justice Scalia's recusal. *See* Gina Holland, *Scalia Won't Step Aside from Cheney Legal Issue*, LANSING ST. J., Mar. 19, 2004, at 5A. However, such disqualification motions are unusual at the Supreme Court level.

> [T]here are no clear procedures for litigators who seek to disqualify Supreme Court Justices—a fairly remarkable fact given the complex set of rules and procedures that govern practice before the Court. . . . In effect, a lawyer who questions the impartiality of a Supreme Court Justice is given no direction on how to prepare a challenge to a Justice's participation in the hearing of the case. The absence of specific procedures for filing recusal motions to the Court implicitly discourages recusal motions by suggesting that they are outside the realm of "regular" Supreme Court practice. It also reinforces the notion that the Justices themselves, rather than litigants, are expected to take the lead in initiating recusal practices.

Ifill, *supra* note 26, at 623–24.

> The broad latitude afforded the Justices in making [recusal] determinations may be further aided by the tradition of deference and politesse that characterizes Supreme Court practice. Although recusal motions are filed against Justices on the Court, most litigants do not seek disqualification—certainly not one based merely on the appearance of bias—because to do so suggests a lack of confidence in a Justice's ability to evaluate the issues objectively. In the rarified world of Supreme Court practice, such an action may constitute a breach of protocol. . . . Perhaps for this reason, litigants sometimes appear to suggest indirectly that a Justice's connection to a case creates the appearance of bias, rather than formally move to disqualify the Justice from the case.

Id. at 622; *see also* Stempel, *supra* note 28, at 599 (noting that the "strong traditions of deference and good manners prevailing in Supreme Court practice" may inhibit litigants from seeking to disqualify Justices); Tony Mauro, *Thomas Ruling Spurs Recusal Spat*, LEGAL TIMES, Aug. 19 & 26, 1996 (quoting an attorney who declined to move for a Supreme Court Justice's recusal "for strategic reasons" as explaining that "[y]ou risk offending not only the justice but the whole body"); Tony Mauro, *Scalia Recusal Spurs Debate on Justices' Public Comments*, THE RECORDER, Oct. 20, 2003, at 3 (noting "long-standing, but unspoken, rules of etiquette that frown on asking justices to recuse themselves").

recusal motions from parties appearing before the Court. The disclosure requirements under federal law and the ethical rules facilitate recusal motions.[176] An increase in the filing of recusal motions would increase the information available to the Court and to the public, and might help to decrease the current sense of personal insult that sometimes seems to be associated with such motions. Moreover, Justices might become better sensitized to potential recusal issues if litigants were to file recusal motions more regularly.

But this Article does not propose an increase in actual recusals. Justices would, of course, be required to recuse themselves in those situations where their participation would violate due process. Short of a constitutional due process violation, recusal would remain where it essentially is now—resting with the conscience of each individual Justice. But, consistent with the Supreme Court's previous practice, this Article suggests that the Court consider drafting a new Statement of Recusal Policy (or expanding its current policy) to clarify a consistent—and narrow—approach to recusal that would permit Justices to participate in a case absent actual bias or an appearance of impropriety sufficient to cast doubt on the integrity of the Court's decision.

This Article proposes that rather than recusing themselves in borderline cases, Justices instead submit "statements of interest." Such "statements of interest" are recognized in comment 2 to Canon 3E(1), which states, "A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification."[177] "Statements of interest" could be as lengthy and formal as Justice Rehnquist's *Microsoft* memorandum explaining his decision to participate in the case,[178] or as brief and informal as a paragraph stating that the Justice owns ten shares of a litigant's stock. Either way, "statements of interest" would constitute a notable departure from current practices. Under the Supreme Court's current recusal practices, a Justice's decision not to participate in a case typically is not explained, leaving Court-watchers to guess the reason for a particular Justice's non-participation. "Supreme Court Justices are not required to issue written decisions explaining decisions to withdraw from hearing a case."[179]

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[176] *See* Ethics in Government, §§ 101–109, 5 U.S.C.A. APP. 4 (2000) (requiring federal judges to file annual personal financial statements); ABA MODEL CODE, *supra* note 3, Canon 3E(1), cmt. 2 (requiring judges to disclose any information potentially relevant to disqualification).

[177] ABA MODEL CODE, *supra* note 3, Canon 3E(1), cmt. 2. Although distinctively different from a case-specific statement of interest, federal law requires federal judges to file more generalized personal financial statements annually. *See* Ethics in Government, §§ 101–109, 5 U.S.C.A. APP. 4 (2000) (requiring federal judges to file annual personal financial statements).

[178] *See* Microsoft Corp. v. United States, 530 U.S. 1301 (2000) (mem.) (Rehnquist, C.J.); *see also supra* note 28 (discussing Justice Rehnquist's recusal decision in the *Microsoft* case).

[179] Ifill, *supra* note 26, at 620; *accord* O'BRIEN, *supra* note 146, at 226; *see also* Ifill, *supra* note 26, at 620 (describing the Supreme Court's recusal practices as "somewhat shrouded in mystery"); *Mr. Rehnquist's Dilemma*, N.Y. TIMES, Oct. 2, 2000, at A26 ("For a judge to reveal the thinking behind

"Statements of interest" would be part of the Court's record, available to the parties and to the public, and would help to ensure disclosure of potentially relevant information while permitting all of the Justices to participate in the vast majority of cases. The institution of "statements of interest" would avoid fear by the public of unknown, unacknowledged relationships, interests, or biases that Justices might have in a particular case, and would serve a policing function for the Justices as well. By requiring the Justices to acknowledge openly any relationships, interests, or biases in connection with a case, the practice would serve to focus each Justice's attention on matters involving the potential for bias.[180] Moreover, if Justices were consistently to acknowledge all potential interests in the litigation before them, such acknowledgements might invigorate public confidence in the Court—while at the same time preserving the Court's critical function.

The notion that disclosures tend to deter conflicts of interest and increase public confidence is well-established. Indeed, Congress expressly relied on both of these reasons in enacting the original Ethics in Government Act, which requires federal judges—as well as legislators and executive branch employees—to file annual financial statements.[181] The openness associated with disclosures tends to generate positive

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a recusal decision is all too rare.").

[180] *See* Debra Lyn Bassett, *When Reform Is Not Enough: Assuring More than Merely "Adequate" Representation in Class Actions*, 38 GA. L. REV. 927, 985 (2004) (observing that express acknowledgements "increase[] the likelihood that the requested behavior will occur").

[181] *See* S. REP. NO. 95-170, 95th Cong., 2d Sess. 21–22 (1977), U.S. CODE CONG. & ADMIN. NEWS 1978, at 4237–38 (Senate report setting forth the congressional objectives sought to be achieved by public disclosure).

> (1) Public financial disclosure will increase public confidence in the government. Numerous national polls of voter confidence in officials of the Federal government, and the low turnout of voters in recent elections, were cited for the proposition that public confidence in all three branches of the Federal government has been seriously eroded by the exposure, principally in the course of the Watergate investigation, of corruption on the part of a few high-level government officials. Public financial disclosure was seen as an important step to take to help restore public confidence in the integrity of top government officials, and, therefore, in the government as a whole.
> (2) Public financial disclosure will demonstrate the high level of integrity of the vast majority of government officials. Only a very small fraction of a percent of all government officials have ever been charged with professional impropriety.
> (3) Public financial disclosure will deter conflicts of interest from arising. Disclosure will not tell an official what to do about outside interests; it will ensure that what he does will be subject to public scrutiny.
> (4) Public financial disclosure will deter some persons who should not be entering public service from doing so. Individuals whose personal finances would not bear up to public scrutiny, whether due to questionable

reactions even when there is disagreement with the result.[182] Openly acknowledging all interests that might suggest potential bias encourages judicial reflection and introspection, which might also help to offset some of the effects of unconscious bias.

This proposal recognizes that "a gap appears to have opened up between recusal practices in the Supreme Court and recusal practices in the courts of appeals and in the

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> sources of income or a lack of morality in business practices, will very likely be discouraged from entering public office altogether, knowing in advance that their sources of income and financial holdings will be available for public review.
> (5) Public financial disclosure will better enable the public to judge the performance of public officials. By having access to financial disclosure statements, an interested citizen can evaluate the official's performance of his public duties in light of the official's outside financial interests.

Id.; *see also* Duplantier v. United States, 606 F.2d 654, 670 (5th Cir. 1979) ("Congress has set forth a rather extensive list of values served by the financial disclosure provisions of the [Ethics in Government] Act. Such values include increasing the public's confidence in the government and deterring conflicts of interest.").

> The first [public interest behind the adoption of the disclosure rules] is to assure the impartiality and honesty of the state judiciary. The second is to instill confidence in the public in the integrity and neutrality of their judges. The third is to inform the public of economic interests of the judges which might present a conflict of interest.

In re Kading, 235 N.W.2d 409, 417–18 (Wis. 1975) (reviewing provisions in Wisconsin's judicial code requiring financial disclosure).

Disclosure is similarly valued as a deterrent to corruptive influences in the area of political contributions. *See* Buckley v. Valeo, 424 U.S. 1, 67 (1976) ("[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity."); *see also* Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 428–29 (2000) (Thomas, J., dissenting) (arguing that disclosure, rather than contribution limits, satisfies the government's interest in preventing corruption). As stated by Justice Brandeis in a different context, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY 62 (1933).

[182] *See* Ifill, *supra* note 26, at 626 (noting that "Chief Justice Rehnquist's decision not to recuse himself in *Microsoft* drew criticism from some prominent legal ethics experts. His forthright disclosure of the issue and direct and public statement explaining the rationale behind his decision not to recuse himself drew praise from others."); *see also Mr. Rehnquist's Dilemma*, N.Y. TIMES, Oct. 2, 2000, at A26 ("Mr. Rehnquist's openness about the situation is praiseworthy."). Although not directly analogous, it is nevertheless of some interest that in the arbitration context, potential conflicts of interest are addressed solely through disclosure. *See* Schmitz v. Zilveti, 20 F.3d 1043, 1046–47 (9th Cir. 1994) (noting that although "arbitrators have many more potential conflicts of interest than judges[, i]n arbitration, . . . only disclosure and not recusal is required.").

district courts."[183] And this proposal encourages a less-demanding recusal standard for Supreme Court Justices than for other federal judges. But unlike other federal courts, there are no "replacements" or "substitutes" for recused Supreme Court Justices, and in the vast majority of circumstances, this Article suggests that perhaps it is preferable to hear the voices of all nine Justices. If Justice O'Connor holds a de minimis financial interest in a party, is it genuinely preferable to exclude her voice from the proceedings? Or is it acceptable—indeed more desirable—to have her participate in the case, having submitted a "statement of interest" indicating her de minimis financial holdings in the litigant? The ultimate recourse for blatant self-interest or other substantial bias is the same under both this Article's proposal and an insistence on strictly adhering to section 455—impeachment. Short of impeachment, there remains public pressure when a Justice appears oblivious to recusal-related concerns. But this Article suggests that perhaps, in most instances, it is really in the country's best interests to have all nine Justices participating in the Court's cases rather than insisting on a strict recusal standard that would prevent a Justice's participation for less than truly compelling reasons.[184]

[183] Neumann, *supra* note 28, at 427, n.304.

[184] *See* Leubsdorf, *supra* note 3, at 292.

> [D]isqualification can play no more than a limited role. The way to get good decisions is to enact good laws, to appoint good judges, and to provide effective access to courts, fair procedures, and meaningful appellate review. Preventing a judge from hearing a case because one fears she will decide it badly will always be a cumbersome procedure based largely on guesswork, and one sometimes invoked to remove good rather than bad judges.

Id.

CONCLUSION

Recusal at the United States Supreme Court level raises serious, and largely unexplored, issues. Although the federal recusal statute would appear by its terms to apply to Supreme Court Justices, it is unclear whether the statute potentially infringes on separation of powers. More importantly, the federal recusal statute is essentially unenforceable with respect to Supreme Court Justices; the only method of enforcement is impeachment. These constitutional and enforcement issues, taken together with the unique stature and eminently political nature of the Court, suggest that an insistence that Supreme Court Justices are subject to the broad standards of the federal recusal statute may border on being simplistic. This Article's proposals are aimed at Supreme Court practices and call for encouraging recusal motions, revising the Court's Statement of Recusal Policy to clarify a consistent, narrow approach to recusal, and the submission of "Statements of Interest" in borderline cases rather than actual recusal. These proposals would encourage open communication and full disclosure, while permitting all Justices to participate in all but the most ethically sensitive cases.