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## Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal

Amanda Frost\*

### I. INTRODUCTION

The laws governing judicial recusal are failing at one of their primary objectives: protecting the reputation of the judiciary. The problems with the recusal process were front and center during the recent controversy surrounding Justice Antonin Scalia's decision to sit on *Cheney v. United States District Court for the District of Columbia*<sup>1</sup> despite having vacationed with Vice President Richard Cheney shortly after the Supreme Court agreed to hear the case. Whatever one's opinion about whether Justice Scalia should have recused himself, most would agree that the manner in which the issue entered public debate and then was decided—beginning with front-page news stories about the trip, followed by Congressional inquiries, editorials calling for his recusal, a rash of political cartoons, and ending with Scalia's remarkable 21-page memorandum decision defending his decision to sit on the case—injured the reputation of the judiciary.

At the end of the day, two competing versions of the Scalia-Cheney vacation emerged. Those who think Scalia should have recused himself note that he and members of his family traveled together on the Vice President's plane, at government expense, and then spent several days in an intimate setting where the two would have had ample opportunity to discuss a case in which the Vice President's reputation was at stake. Those who think recusal was unwarranted point out that Scalia and his family bought round-trip airline tickets and thus did not save any money

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\* Assistant Professor of Law, American University Washington College of Law. I wish to thank Richard Fallon, John Leubsdorf, Laura Rosenbury, John Sharretts, Brian Wolfman, and David Zaring, as well as the faculty at American University Washington College of Law, for helpful comments on drafts of this Article. I also note that I was an attorney at Public Citizen Litigation Group at the time that Alan Morrison, another Litigation Group attorney, served as counsel of record for Sierra Club in *Cheney v. United States District Court for the District of Columbia*. However, I did not participate in that litigation, and this Article reveals no confidential information and reflects no one's views but my own.

1. 541 U.S. 913 (2004).

by traveling with Cheney; note that the suit was brought against the Vice President in only his official, and not his personal, capacity; and rely on Scalia's assurances that the two never spoke about the case or even were alone together during the trip.

Central to the debate was not just whether Justice Scalia would in *fact* be biased in Cheney's favor as a result of their social contact, but also whether the trip would create the *appearance* that he might be. The federal law's requirement that a judge recuse himself when his "impartiality" might "reasonably be questioned" creates an objective standard for evaluating partiality, meaning that a judge should recuse himself not only in cases where he is actually biased, but also in cases where the facts and circumstances could create that appearance.<sup>2</sup> Congress intended judges to recuse themselves in such cases so that "justice satisfies the appearance of justice," which will in turn "promote public confidence in the integrity of the judicial process."<sup>3</sup> Appearances matter because the judiciary's reputation is essential to its institutional legitimacy—that is, to the public's respect for and willingness to abide by judicial decisionmaking. Indeed, scholars of the federal court system suggest that the public's perception of the judiciary's independence and integrity is the primary source of its legitimacy, and ultimately its power.<sup>4</sup>

The furor over whether Justice Scalia should have recused himself from the *Cheney* case demonstrates that recusal law has not succeeded in protecting the judiciary's reputation. This is not the first time that the judicial branch has been criticized for its application of the laws governing judicial recusal and disqualification.<sup>5</sup> On many occasions during the past 200 years the public has focused on a judge's questionable decision not

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2. *Liteky v. United States*, 510 U.S. 540, 548 (1994) (Scalia, J.) ("[W]hat matters is not the reality of bias or prejudice but its appearance.").

3. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988) (citing S. REP. NO. 93-419, at 5 (1973); H.R. REP. NO. 93-1453, at 5 (1974)); H.R. REP. NO. 93-1453, at 5 (stating that the goal of legislation is to "promote public confidence in the impartiality of the judicial process"); see also *United States v. Hollister*, 746 F.2d 420, 425-26 (8th Cir. 1984) ("Avoiding the appearance of impropriety is as important to developing public confidence in the judiciary as avoiding impropriety itself.").

For an interesting discussion of the difficulty of disentangling concerns over the "appearance of justice" from actual injustice, see Note, *Satisfying the "Appearance of Justice": The Uses of Apparent Impropriety in Constitutional Adjudication*, 117 HARV. L. REV. 2708, 2710-21 (2004).

4. See discussion *infra* Part II.

5. The terms "recusal" and "disqualification" have slightly different meanings. "Recusal" refers to a judge's voluntary decision to remove himself from a case, while "disqualification" refers to a statutorily mandated removal of a judge. Randall J. Litteneker, Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 237 n.5 (1978). However, the same standard governs recusal and disqualification under federal law. *Id.* The terms are used interchangeably in this Article.

to recuse and has found the laws governing that decision to be wanting.<sup>6</sup> Nor is it likely to be the last time that a judge makes an unpopular decision to remain on a case. Even before the debate over Justice Scalia's trip with the Vice President had died down, new concerns were being raised, both in the press and by members of Congress, about Justice Ruth Bader Ginsburg's connections to the National Organization for Women—an entity that frequently has cases before the Court.<sup>7</sup>

This Article does not seek to answer the specific question whether Justice Scalia should have recused himself from the *Cheney* case, but rather uses that particular incident to illuminate the method by which such decisions should be made to best further the goal of protecting the reputation of the judiciary. How should the facts and arguments in favor of or against recusal be discovered, particularly when it is usually the judge, not the parties, who has first-hand knowledge of the circumstances? Should the opinions of editorial writers, pundits, and political cartoonists be taken into account? If not, just whose opinion are judges supposed to consider when determining whether their impartiality might “reasonably be questioned”? Finally, who gets to decide whether a judge or justice must be disqualified from sitting on a case—the very judicial officer whose impartiality is being questioned, or a neutral decision-maker?

Rather than answer these process-oriented questions, the academic literature has mainly focused on reforming the substantive standard for judicial disqualification. With each new scandal or crisis has come a flurry of scholarship advocating an expansion of the grounds for disqualification,<sup>8</sup> and Congress has often responded by amending the

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6. See discussion *infra* Part II.B.

7. Thirteen Republican members of Congress asked Justice Ginsburg to withdraw from all future cases concerning abortion after she agreed to loan her name and presence to the Justice Ruth Bader Ginsburg Distinguished Lecture Series, which is co-sponsored by the NOW Legal Defense Fund. *GOP Lawmakers Ask Ginsburg to Withdraw from Abortion Cases*, L.A. TIMES, Mar. 19, 2004, at A18; see also Peter S. Canellos, *Outspoken Justices Cloud High Court's Appearance*, BOSTON GLOBE, June 15, 2004, at A3 (criticizing Justice Ginsburg for allowing NOW to use her name for lecture series).

8. See, e.g., Debra Lyn Bassett, *Judicial Disqualification in the Federal Courts*, 87 IOWA L. REV. 1213 (2002); John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43 (1970); Paul G. Lewis, *Systemic Due Process: Procedural Concepts and the Problem of Recusal*, 38 U. KAN. L. REV. 381 (1990); Jeffrey W. Stempel, *Rehnquist, Recusal and Reform*, 53 BROOK. L. REV. 589 (1987); Note, *Disqualification of Federal District Judge for Bias—The Standard Under Section 144*, 57 MINN. L. REV. 749, 763–70 (1973) [hereinafter *The Standard*]; Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 HARV. L. REV. 1435, 1446–47 (1966) [hereinafter *Bias in the Federal Courts*]; Brian P. Leitch, Note, *Judicial Disqualification in the Federal Courts: A Proposal to Conform Statutory Provisions to Underlying Policies*, 67 IOWA L. REV. 525 (1982).

recusal laws as suggested.<sup>9</sup> However, altering the substance of the recusal standard has proven to be an ineffective method of reforming this sensitive area of judicial self-governance. As discussed in more detail below, history shows that each time the standard for recusal is broadened by Congress, it is narrowed soon thereafter as members of the judiciary apply it to themselves.<sup>10</sup> The very self-dealing that makes recusals necessary in the first place has operated to prevent disqualification statutes from being employed as fully and broadly as Congress intended.<sup>11</sup> Moreover, even when the recusal standards are vigorously applied, the ad hoc and informal processes by which the decision to disqualify is made undermines public confidence in the judiciary.

In any case, it would be troubling to broaden the substantive standard for recusal to require judges to step down every time the public questions their impartiality. In his memorandum defending his decision to remain on the *Cheney* case, Justice Scalia rejected the argument that he should recuse himself solely because dozens of editorial boards and political pundits had called for him to do so.<sup>12</sup> That seems right. Surely even unanimous cries for recusal by the media cannot govern such a politically sensitive question.

In part, this is because the media may not be an accurate proxy for public opinion. But even assuming that it could be demonstrated that the majority of citizens believed that a particular judge could not be impartial, it is not clear as a matter of constitutional law or even just good public policy that the judge should then automatically step aside. To give the public such control is antithetical to the role federal judges are intended to serve in the constitutional structure. Judges are given life tenure and salary protections not just so they can hold their own against the other two branches of government, but also so that they can take positions opposed by the majority of the public. As Robert Bork put it, “[f]ederal judges, alone among our public officials, are given life tenure precisely so that they will not be accountable to the people.”<sup>13</sup>

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9. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 23.1, at 672 (1996) (noting the federal judicial disqualification statute was amended “on multiple occasions; in each instance Congress enlarged the enumerated grounds for seeking disqualification”).

10. See discussion *infra* Part II.A.

11. The same phenomenon has undermined efforts to curb judicial contempt power. See Eric Fleisig-Greene, Note, *Why Contempt is Different: Agency Costs and “Petty Crime” in Summary Contempt Proceedings*, 112 YALE L.J. 1223, 1251–52 (2003).

12. *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 923 (2004).

13. ROBERT H. BORK, THE TEMPTING OF AMERICA 5 (1990). Bork’s point echoes that of Alexander Hamilton, who wrote that judicial independence is “an essential safeguard against the effects of occasional ill humors in the society.” THE FEDERALIST NO. 78, at 501 (Alexander Hamilton)

It is time to stop tinkering with the substantive standard for recusal, and instead to propose reforming the process by which the recusal decision is made. The solution I offer is to incorporate into recusal law the core tenets of adjudication identified fifty years ago by Legal Process theorists as essential to maintaining the judiciary's legitimacy—tenets that legal commentators continue to cite today as serving a vital legitimating function.<sup>14</sup> Chief among these are the adversarial system in which the parties present facts and arguments to an impartial judge, who then issues a reasoned explanation for her ruling.

These elements of adjudication were not invented by Legal Process theorists; rather, this school of legal scholars described the basic attributes of adjudication that had long existed and then explained why these qualities legitimized the judiciary's countermajoritarian role in a democracy. Even scholars who would not be described as Legal Process theorists have recognized the value of using procedures to cabin judicial discretion and improve the quality of judicial decisionmaking.<sup>15</sup> In addition, recent literature has observed that the traditional forms of adjudication described by the Legal Process school are also enshrined in the Constitution's description of the judicial role and reflect the judiciary's core competencies vis-à-vis the other branches of government.<sup>16</sup>

Furthermore, judges should be especially careful to adhere to the traditional forms of adjudication when addressing sensitive questions that will affect the reputation of the judiciary. Recusal laws are deeply concerned with protecting the integrity of the judiciary, which is an important element in maintaining the legitimacy of judicial decisionmaking.<sup>17</sup> Thus, it is particularly appropriate to seek their fix in Legal Process methodology, which itself arose as a defense against the Legal Realist

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(Robert Scigliano ed., 2000). Hamilton further stated that the judiciary needed life tenure to ensure that it served as a bulwark against the vagaries of popular opinion:

Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [judges'] necessary independence. If the power of making them was committed . . . to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

*Id.* at 502.

14. See discussion *infra* Part III.

15. See discussion *infra* Part II.

16. Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 32 (2003) (describing how the characteristics of the judicial role described by Lon Fuller are also incorporated into the constitutional framework and reflect the judiciary's institutional competence).

17. See *infra* notes 73–75 and accompanying text.

charge that adjudication is an undemocratic, and thus illegitimate, form of decisionmaking.<sup>18</sup>

Ironically, the recusal process is unique in the degree to which it has eschewed the basic procedural elements that have been viewed as indispensable to maintaining the legitimacy of adjudication.<sup>19</sup> Unlike almost any other area of the law, the process by which judges decide whether to recuse themselves ignores the systems usually employed to resolve disputes in a fair and impartial manner. As a general matter, the recusal process is usually not adversarial, does not provide for a full airing of the relevant facts, is not bounded by a developed body of law, and often is not concluded by the issuance of a reasoned explanation for the judge's decision. Most importantly, the decision itself is almost always made in the first instance by the very judge being asked to disqualify himself, even though that judge has an obvious personal stake in the matter. My contention is that it is this very ad hoc and informal process, rather than any problem with the substantive standards for recusal, which has led to the recurring dissatisfaction with the law.

Part II of this Article describes the evolution of federal judicial disqualification laws in the United States. For two centuries the substantive standards for disqualification have continually been amended by Congress in response to periodic controversial decisions by judges not to recuse themselves in high profile cases. However, these laws are then narrowly construed by the judges who apply the legal standards to themselves, undermining Congressional intent to protect the reputation of the judiciary. This history demonstrates that as long as judges decide recusal questions outside the boundaries of the traditional forms of adjudication, recusal law will not serve its intended legitimating function.

Searching for a solution, Part III describes the traditional forms of adjudication lauded by Legal Process scholars, among others, as essential to legitimizing judicial decisionmaking. At the core of the adjudicatory process is the conception that the parties must frame and present their dispute to a neutral decisionmaker who makes a reasoned decision cab-

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18. Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 619 (1991); see also Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 970 (1994) (noting that the Legal Process school provided an answer to the problem of judicial subjectivity introduced by Legal Realism); Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 693-95 (1989) (reviewing PAUL M. BATER ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1988)) (describing Legal Process theory as a response to Legal Realists' critiques of judicial legitimacy).

19. John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 243 (1987) (noting that judges have more leeway to decide whether to recuse themselves than they have in other matters).

ined by existing law. This Part, which is the normative heart of the Article, explains how the presence of each of these elements legitimizes judicial decisionmaking.

Part IV describes how judicial disqualification operates in a procedural vacuum that has prevented the disqualification laws from protecting judicial integrity. To illustrate the problem, Part IV describes the process (or rather, the lack thereof) accompanying the public disclosure of the Scalia-Cheney vacation and Justice Scalia's decision to continue to sit on the *Cheney* case even after the respondent sought his disqualification. Using this recent controversy as its example, this Part explains how the absence of the traditional adjudicatory procedures in recusal law undermines the reputation of the judiciary.

Part V suggests reforms that would incorporate the traditional forms of adjudication into the recusal process. Putting the theory into practice, I then return to the *Cheney* case and describe how the reforms suggested in this Article would have operated in the context of that case to better protect the reputation of the judiciary.

## II. THE EVOLUTION OF JUDICIAL DISQUALIFICATION LAW

An impartial decisionmaker has always been considered an essential component of the Anglo-American legal system,<sup>20</sup> as well as the legal systems of many other cultures.<sup>21</sup> Yet despite this longstanding and

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20. See Harrington Putnam, *Recusation*, 9 CORNELL L.Q. 1, 1 (1923) (describing the judicial obligation to recuse for bias or interest in medieval times). The concept of recusal for interest is found in the Code of Justinian, which incorporates references to judicial recusal dating back to 530 A.D. *Id.* at 3, 3 n.10. Putnam quotes the following passage (in translation) from the Code of Justinian:

It is the clearest right under general provisions laid down from thy exalted seat, that before hearings litigants may recuse judges . . . . Although a judge has been appointed by imperial power yet because it is our pleasure that all litigations should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion to recuse him before issue joined, so that the cause go to another; the right to recuse having been held out to him . . . .

*Id.* at 3 n.10; see also Schultz, *A New Approach to Bracton*, 2 SEMINAR 41, 42–50 (1944) (providing a history of medieval recusal practices).

Lack of judicial independence was also one of the principal grievances listed in the Declaration of Independence, which complained that the king had “made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.” THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

21. For example, Roman Law adopted in Spain in the fourteenth century provided for recusal of judges for personal hostility. Putnam, *supra* note 20, at 5–6. The same law applied in the Spanish-speaking republics of South America. *Id.* For other cultural examples, see Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 662 (1985) (“One of the most fundamental and self-evident principles of any fair

near-universal principle, the rules establishing when a judge is disqualified for interest or bias from hearing a dispute have varied widely over time and across jurisdictions. Even today in the United States, recusal in the federal courts alone is governed by three overlapping statutes<sup>22</sup> and by the Code of Judicial Conduct,<sup>23</sup> all of which set out different standards and procedures for recusal.<sup>24</sup> So, even though all agree that judges must recuse themselves under some circumstances, no uniform rule or procedure for recusal exists.

*A. The Origins of Judicial Disqualification Laws in the United States*

The development of the law of judicial disqualification in the United States has followed a recognizable pattern. First, Congress sets the standard governing when judges must remove themselves from sitting on cases in which they are not able, or might not be able, to be impartial. That standard is then narrowly construed by the judges who must apply it to decide whether they themselves should be disqualified from a case. Eventually, a particularly egregious situation arises in which a judge sits on a case when most outside observers think that she should have stepped aside. The situation comes to the attention of the press, the public, and ultimately Congress, which amends the law to provide stiffer standards for recusal. And then the whole process begins anew.<sup>25</sup>

Although the concept of recusal was firmly established in English common law by the time the American judicial system was being developed, it was a pale version of the standard we embrace today. The rule that “[n]o man shall be a judge in his own case” had been recognized in

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system of justice is that judges must be neutral and impartial.”); R. P. Lamond, *Of Interest as a Disqualification in Judges*, 23 SCOT. L. REV. 152, 152 (1907) (referencing English and Scottish cultures).

22. 28 U.S.C. §§ 47, 144, 455 (1998). Sections 144 and 455 are discussed in detail below. Section 47 of Title 28 provides simply that “[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him.” Because the application of this law has been straightforward and uncontroversial, it is not included in the discussion below.

23. CODE OF JUDICIAL CONDUCT CANNON 3 (1973). This Canon was adopted by the Judicial Conference of the United States in 1973. 69 F.R.D. 273, 277–79 (1975).

24. All states have recusal statutes as well, but again, those statutes differ as to when a judge should recuse herself and how that decision is to be made. A detailed discussion of the variations in state recusal laws is beyond the scope of this Article. For a description of some of the state practices, see generally FLAMM, *supra* note 9; Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543 (1994).

25. See Leubsdorf, *supra* note 19, at 245 (alluding to this “vicious cycle”). Books and articles describing high-profile refusals to recuse and subsequent congressional response include: JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* (1974); John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605 (1947); Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736 (1973) [hereinafter *Disqualification*].

English law since at least the seventeenth century,<sup>26</sup> but that potentially broad principle was limited in application, operating to disqualify judges from hearing only those cases in which they had a direct pecuniary interest.<sup>27</sup> Blackstone squarely rejected the idea that a judge should be prohibited from hearing a case in which he might have a bias unrelated to financial gain or loss,<sup>28</sup> and English courts followed Blackstone's lead—for example, by holding that a judge could sit on a case even though he was related to one of the parties.<sup>29</sup>

Federal judges have always been held to a higher standard than the bare minimum required by English common law. Within three years after the Constitution's ratification, Congress passed the first recusal statute. The Act of May 8, 1792, allowed federal district court judges to be disqualified if they had a financial interest in the litigation or had served as counsel to either party.<sup>30</sup> But other than these specific grounds for disqualification for interest, the statute did not prohibit judges from hearing cases in which they might have a bias or prejudice against or in favor of one of the parties.<sup>31</sup>

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26. *Dr. Bonham's Case*, 77 Eng. Rep. 638 (K.B. 1608) (Lord Coke ruled that members of a board that determined physicians' qualifications could not both impose and personally receive fines.).

27. For example, the Mayor of Hereford was imprisoned for sitting in judgment in a cause where he had leased land from the plaintiff. *Putnam*, *supra* note 20, at 4.

28. 3 WILLIAM BLACKSTONE, COMMENTARIES \*361 ("the law will not suppose the possibility of bias or favor in a judge").

29. *Brooks v. Rivers*, 1 Hardres 503, 145 Eng. Rep. 569 (1668) (stating that a judge was not required to recuse himself in his brother-in-law's case, "for favour shall not be presumed in a judge"). For a more detailed history of the origins of recusal standards in English common law and early American law, see Frank, *supra* note 25, at 609–26, and Putnam, *supra* note 20, at 9–14.

30. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278–79 (1792). That statute provided:

*And be it further enacted*, That in all suits and actions in any district court of the United States, in which it shall appear that the judge of such court is, any ways, concerned in interest, or has been of counsel for either party, it shall be the duty of such judge on application of either party, to cause the fact to be entered on the minutes of the court, and also to order an authenticated copy thereof, with all the proceedings in such suit or action, to be forthwith certified to the next circuit court of the district, which circuit court shall, thereupon, take cognizance thereof, in the like manner, as if it had been originally commenced in that court, and shall proceed to hear and determine the same accordingly.

*Id.*

31. Early standards for recusal were far more lax than they are today. Interestingly, *Marbury v. Madison* is an example of an early case in which a Justice chose not to recuse himself despite an obvious interest and involvement in the case. 5 U.S. 137 (1803). Chief Justice John Marshall had been the Acting Secretary of State who had failed to deliver William Marbury's commission to serve as Justice of the Peace. Thus, in sitting on the case, Marshall judged the legality of a commission that he had authorized while a cabinet official, and which he admitted responsibility for failing to deliver. MACKENZIE, *supra* note 25, at 1.

In reviewing the multiple instances in which Justices ran for office, negotiated treaties, and committed themselves to other non-judicial tasks, one commentator wrote: "This is not a part of our history that guides us by its ethical example; it is a part that dramatizes how different we have be-

The 1792 recusal statute was construed narrowly from its inception.<sup>32</sup> In defining improper judicial “interest,” courts adopted the restricted English common law standard and applied it sparingly.<sup>33</sup> For example, in 1872 a federal judge presided over bankruptcy proceedings despite being a creditor of the bankrupt.<sup>34</sup> Although the judge admitted that the matter raised a “question of delicacy” and put him in an “embarrassing position,” he nonetheless declined to recuse himself because he was “wholly unconscious of any bias” that could “warp [his] judgment.”<sup>35</sup> Courts also limited the 1792 Act’s requirement that a judge disqualify himself when he had previously represented a party, concluding that it applied only when the judge had been counsel *in the very same case*.<sup>36</sup>

In the first of many amendments attempting to broaden the law’s scope, the statute was altered in 1821 to mandate more generally that a judge recuse himself if he is “so related to, or connected with, either party, as to render it improper for him, in his opinion, to sit on the trial of such suit or action.”<sup>37</sup> Congress altered the statute again in 1911, adding that a judge should recuse himself if, “in his opinion,” his relationship with any attorney made it improper for the judge to sit on the case.<sup>38</sup> In 1948, the provision was recodified as 28 U.S.C. § 455, where it remains today. The 1948 amendments eliminated the requirement that a party

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come.” *Id.* at 5–7.

32. Frank, *supra* note 25, at 627–28; *Disqualification*, *supra* note 25, at 740 (“Courts have tended to construe narrowly the mandatory grounds of section 455.”).

33. Frank, *supra* note 25, at 627.

34. *In re Sime*, 22 F. Cas. 145, 146 (C.C.D. Cal. 1872) (No. 12,861).

35. *Id.* at 146–47.

36. See Frank, *supra* note 25, at 627 (citing *Carr v. Fife*, 156 U.S. 494 (1895)) (“‘Has been of counsel’ was soon limited by addition of the phrase ‘in this case’ . . .”).

37. Act of Mar. 3, 1821, ch. 51, 3 Stat. 643. That statute provided:

That in all suits and actions in any district court of the United States, in which it shall appear that the judge of such court is any ways concerned in interest, or has been of counsel for either party, or is so related to, or connected with, either party, as to render it improper for him, in his opinion, to sit on the trial of such suit or action, it shall be the duty of such judge, on application of either party, to cause the fact to be entered on the records of the court; and, also, an order that an authenticated copy thereof, with all the proceedings in such suit or action, shall be forthwith certified to the next circuit court of the district; and if there be no circuit court in such district, to the next circuit court in the state; and if there be no circuit court in such state, to the most convenient circuit court in an adjacent state; which circuit court shall, upon such record being filed with the clerk thereof, take cognisance thereof, in the like manner as if such suit or action had been originally commenced in that court, and shall proceed to hear and determine the same accordingly; and the jurisdiction of such circuit court shall extend to all such cases so removed, as were cognisable in the district court from which the same was removed.

*Id.*

38. Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1087, 1090 (codified as amended at 28 U.S.C. § 20 (1992)).

first seek a judge's disqualification, transforming the statute from a challenge-for-cause provision to a self-enforcing disqualification provision that places the onus on the judge to determine whether he should recuse himself.<sup>39</sup>

Judges applying the amended statute to themselves once again found ways to limit its reach. "The specific mandatory grounds for disqualification were narrowly construed" by courts.<sup>40</sup> In addition, judges created the "duty to sit" doctrine—that is, an obligation to remain on any case to which they had been assigned absent statutory grounds for recusal—that nowhere appears in the statute.<sup>41</sup> Theoretically, the "duty to sit" does not conflict with the statutory requirement that judges recuse themselves under certain specific circumstances. But the statutory standard for disqualification is vague, leading to ambiguous situations in which reasonable people can differ about whether the judge has a disqualifying interest. Because the legal obligation to recuse is not always clear, the "duty to sit" doctrine encouraged judges to remain on cases from which they arguably should have recused themselves.<sup>42</sup>

Early dissatisfaction with the law spurred Congress to enact a second recusal statute in 1911 that for the first time provided a means for litigants to seek disqualification of a judge not just for a conflict of interest, but also for more general bias or prejudice that might prevent the judge from serving as a neutral decisionmaker.<sup>43</sup> Although the new law—

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39. Act of June 25, 1948, ch. 646, § 455, 62 Stat. 869, 908 (codified as amended at 28 U.S.C. § 455 (1992)). The statute provides:

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 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.

*Id.*

In addition to eliminating the requirement that a party seek disqualification, the 1948 amendments added the word "substantial" before interest—one of the only occasions in which Congress narrowed a recusal statute.

40. Litteneker, *supra* note 5, at 239.

41. *Id.* Laird v. Tatum, 409 U.S. 824, 837 (1972) (noting that the courts of appeals had unanimously concluded that judges have "a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified").

42. Idaho v. Freeman, 507 F. Supp. 706, 717 (D. Idaho 1981) (noting that "duty to sit" doctrine led to judges refusing to recuse in "difficult" cases); Litteneker, *supra* note 5, at 239 (same).

43. Act of Mar. 3, 1911, ch. 23, § 21, 36 Stat. 1087, 1090. The statute provided:

Sec. 21. Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not

codified today as 28 U.S.C. § 144—established a more liberal standard for recusal, it applied only to district court judges and thus could not be used to disqualify judges on the courts of appeals or the Supreme Court, as § 455 can.

In addition to creating a broader standard for recusal of trial judges, the statute sought to limit judicial discretion about when to recuse. Section 144 permits either party to force the disqualification of a federal district judge by filing an affidavit alleging facts from which the judge's bias or prejudice reasonably may be inferred.<sup>44</sup> The legislative history explains that judges are to be automatically disqualified from any case in which such an affidavit is filed, even if they disagree with the claimed basis for disqualification.<sup>45</sup> Specifically, the statute provides:

Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to

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less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

*Id.*

44. *Id.* The affidavit must be from the party him or herself and must be accompanied by a certificate from counsel that it has been made in good faith. Parties are limited to one affidavit per case and must file it within a specified period of time. Although as originally written the law appeared to apply to all judges, early on it was construed as applying only to trial courts. See *Kinney v. Plymouth Rock Squab Co.*, 213 Fed. 449, 449 (1914) (stating that the statute “is so framed that evidently it does not apply to an appellate tribunal”).

45. See FLAMM, *supra* note 9, § 25.2.1, at 721 (“On its face § 144 appears to be a peremptory disqualification provision, and there is little doubt that it was originally intended to be one.” (footnote omitted)).

During debate over the legislation, Rep. Cullop of Indiana was asked whether district courts had discretion under the statute to determine whether affidavits were sufficient to justify their disqualification.

Mr. Cullop: No; it provides that the judge shall proceed no further with the case. The filing of the affidavit deprives him of further jurisdiction in the case.

Mr. Cox: [S]uppose the affidavit sets out certain reasons which may exist in the mind of the party making the affidavit; suppose the judge to whom the affidavit is submitted says that it is not a statutory reason? In other words, does it not leave it to the discretion of the judge?

Mr. Cullop: No, it expressly provides that the judge shall proceed no further.

46 CONG. REC. 2627 (1911).

the suit, such judge shall proceed no further therein, but another judge shall be designated . . . to hear such matter.<sup>46</sup>

Despite this clear language, judges consistently adopted a narrow definition of “bias and prejudice” and then reviewed affidavits to determine whether the allegations met that standard—a practice that essentially permitted judges to pass on the sufficiency of the allegations against them.<sup>47</sup> The Supreme Court’s decision in *Berger v. United States*<sup>48</sup> affirmed this trend, thereby “effectively eviscerat[ing] [§ 144’s] peremptory intent.”<sup>49</sup>

The defendants in *Berger*, some of whom were of German descent, were accused of espionage. They petitioned for the trial judge’s recusal on the ground that the judge was biased against German Americans, attesting by affidavit that the judge had stated, among other things, that “[o]ne must have a very judicial mind, indeed, not to be prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty.”<sup>50</sup> The judge had refused to recuse himself and had presided at the trial at which the defendants were convicted, and then had sentenced each defendant to twenty years in prison.<sup>51</sup> Although the Supreme Court concluded that the trial judge could not himself decide the truth of allegations of bias, it did allow that the judge had the authority to review the affidavit and application for disqualification to ensure they were legally sufficient before being required to recuse himself.<sup>52</sup> To be legally sufficient, the Court held that the affidavit “must give fair support to the charge of a [judge’s] bent of mind that may prevent or impede im-

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46. Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1087, 1090 (codified as amended at 28 U.S.C. § 20 (1911)).

47. Bassett, *supra* note 8, at 1224, 1224 n.58 (2002) (“[D]espite the clear intentions of both the bill’s sponsor and the statute’s language, a series of judicial decisions quickly eradicated the peremptory challenge intent behind the statute.” (footnote omitted)); Bloom, *supra* note 21, at 666 (“[T]he courts consistently construe the statute narrowly, which makes disqualification difficult.”); Frank, *supra* note 25, at 629, 626 n.98 (“Frequent escape from the statute has been effected through narrow construction of the phrase ‘bias and prejudice.’”); *Disqualification*, *supra* note 25, at 238–39 (noting that § 144 was limited in application by judicial decisions narrowing its scope).

48. 255 U.S. 22 (1921).

49. FLAMM, *supra* note 9, § 23.4.1, at 675; *see also* Idaho v. Freeman, 507 F. Supp. 706, 715 (D. Idaho 1981) (“Although from the face of section 21 and from its legislative history it appears that the section was designed to create a fully peremptory approach to disqualification where bias or prejudice is alleged, the United States Supreme Court chose not to give the section such a broad reading.”); Ernest J. Getto, *Peremptory Disqualification of the Trial Judge*, 1 LITIG. 22, 23 (1975) (stating that the Supreme Court’s decision in *Berger* encouraged the federal courts to construe § 144 as narrowly as possible).

50. *Berger*, 255 U.S. at 28.

51. *Id.* at 27.

52. *Id.* at 36.

partiality of judgment.”<sup>53</sup> Hence, *Berger* gave trial judges considerably more discretion in deciding whether to disqualify themselves than Congress had intended.

Courts have freely exercised that discretion. The leading treatise on judicial disqualification states that it is now “well established that the challenged judge has the prerogative, and may even have the duty, to pass on the timeliness and legal sufficiency of the §144 challenge in the first instance.”<sup>54</sup> To be successful, the affidavit must contain specific facts and circumstances demonstrating bias; allegations based on hearsay, opinion, or inferences are disregarded.<sup>55</sup> Moreover, only allegations of a judge’s “personal bias” are sufficient. That is, the bias must arise from an “extrajudicial source,” and not simply develop during the judge’s participation in the case.<sup>56</sup> Finally, courts strictly construe the procedural requirements of form, timeliness, and legal sufficiency against the party seeking disqualification.<sup>57</sup> Altogether, the judicial gloss on § 144 has meant that even though “the procedural requirements for obtaining judicial disqualification under § 144 would appear to be extremely easy to satisfy in a great many instances . . . disqualification under this statute has seldom been accomplished.”<sup>58</sup>

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53. *Id.* at 33–34.

54. FLAMM, *supra* note 9, § 25.4, at 727.

55. *See, e.g.*, *United States v. Sykes*, 7 F.3d 1331, 1339 (7th Cir. 1993) (“[T]he facts averred must be sufficiently definite and particular to convince a reasonable person that bias exists; simple conclusions, opinions, or rumors are insufficient.”); *United States v. Haldeman*, 559 F.2d 31, 135, 135 n.317 (D.C. Cir. 1976) (en banc) (per curiam) (noting that some courts do not permit an affidavit to contain hearsay); *see also, e.g.*, FLAMM, *supra* note 9, § 25.7.2, at 733.

At least one court has criticized this standard, commenting that the policy of disallowing an affiant’s conclusions and inferences undermines the requirement that courts accept the affidavit as true. *United States v. Platshorn*, 488 F. Supp. 1367, 1368–69 (S.D. Fla. 1980); *see also* Litteneker, *supra* note 5, at 238 n.8 (commenting that it is “difficult to reconcile” the “no-hearsay” rule with the requirement that affidavits be accepted as accurate because the “fact that the allegation is supported by hearsay should make no difference since it need not be supported by evidence at all”).

56. *See* *Liteky v. United States*, 510 U.S. 540, 550–51 (1994) (discussing the “extrajudicial source” doctrine as it applies to both §§ 144 and 455 of Title 28 and concluding that a judge will not be required to recuse himself except in rare cases of “pervasive bias”—that is, bias “so extreme as to display clear inability to render fair judgment”); *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) (stating that the alleged bias “must stem from an extrajudicial source” and not from “what the judge learned from his participation in the case”).

57. For example, the Tenth Circuit has stated that “the affidavits filed in support of recusal are strictly construed against the affiant and there is a substantial burden on the moving party to demonstrate that the judge is not impartial.” *United States v. Burger*, 964 F.2d 1065, 1070 (10th Cir. 1992); *see also* *Winslow v. Lehr*, 641 F. Supp. 1237, 1241 (D. Colo. 1986) (stating that “the procedural requirements are strictly construed”); FLAMM, *supra* note 9, § 25.8, at 737 (stating that “courts have generally construed § 144’s procedural requirements quite strictly”).

58. FLAMM, *supra* note 9, § 25.8, at 737–38 (stating that “§ 144’s disqualification mechanism has proven to be essentially ineffectual”); CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 3541, at 551 (2d ed. 1992) (“actual disqualifications under [§ 144] were rare”).

*B. Recent Amendments to the Judicial Disqualification Laws*

In the 1970s, highly publicized controversies regarding several judges' failures to disqualify themselves in questionable cases inspired a new round of reforms to disqualification laws.<sup>59</sup> Among these were the revelations during Judge Clement Haynsworth's unsuccessful 1969 Supreme Court confirmation hearings that he had sat on five different cases in which he had a small financial interest. Also influential was the Senate's rejection of Justice Abe Fortas's nomination to the position of Chief Justice, due in part to his habit of serving as counselor to President Johnson even while serving on the Court.<sup>60</sup> During Senate confirmation hearings, Fortas admitted attending White House conferences concerning the most sensitive and important matters facing the administration, such as the escalation of the Vietnam War and the response to the Detroit riots.<sup>61</sup> Even after his nomination failed, Fortas's troubles were not over. The next year, *Life* magazine published an article on Fortas's dealings with convicted financier Louis Wolfson, and Fortas was forced to resign under intense media pressure.<sup>62</sup> Finally, Justice (now Chief Justice) William Rehnquist's refusal to recuse himself in *Laird v. Tatum*<sup>63</sup> further spurred Congress to take action.

*Laird v. Tatum* involved a constitutional challenge to the Army's surveillance of civilian political activity. While serving in the Department of Justice, Rehnquist had appeared as an expert witness at Senate hearings on that subject, and he had commented on the application of the law to the facts of the *Laird* case, which was then pending in a lower court. After losing in the Supreme Court 5-4, the respondents in *Laird* filed a motion asking that Rehnquist recuse himself and that the case be reheard with eight Justices.

Justice Rehnquist refused to recuse himself, and he took the unusual step of issuing a memorandum explaining why.<sup>64</sup> He stated that in the

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59. *Idaho v. Freeman*, 507 F. Supp. 706, 717 n.12 (D. Idaho 1981); FLAMM, *supra* note 9, § 23.6.1, at 678-79; Leubsdorf, *supra* note 19, at 245 n.45.

60. *Freeman*, 507 F. Supp. at 717 n.12 ("Because of the problem raising from these cases a move to amend section 455 began to grow."); MACKENZIE, *supra* note 25, at 67-94 (citing as examples of the controversies leading to § 455's amendment the indictment of Seventh Circuit Judge Otto Kerner, the Senate's rejection of Justice Abe Fortas's nomination to Chief Justice, and the Senate's rejection of Judge Clement Haynsworth's nomination to the Supreme Court).

61. MACKENZIE, *supra* note 25, at 24.

62. *Id.* at 71-76. For a more detailed discussion of these events, see LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 370-73 (1990).

63. 409 U.S. 824 (1972).

64. In the first paragraph of that memorandum, Justice Rehnquist commented that he was the first Justice to issue such an explanation for a recusal decision. *Id.* at 824.

course of preparing his Senate testimony he was given some information about the *Laird* case, but he insisted that he had “no personal knowledge” of the case.<sup>65</sup> Accordingly, Rehnquist concluded that he was not required to recuse himself under 28 U.S.C. § 455 because he had not been “of counsel” in the case or even substantially involved in it.<sup>66</sup> Nor did he think his public statements and opinions on the law should lead him to recuse himself under § 455’s discretionary provision.<sup>67</sup>

Justice Rehnquist admitted that the question whether he should recuse is “a fairly debatable one,” and he “concede[d] that fair-minded judges might disagree about the matter.”<sup>68</sup> Nonetheless, he came down on the side of remaining on the case and cast the decisive vote in a decision that resolved the case in the manner consistent with his previously articulated views that the Army’s intelligence gathering was constitutional. Key to his decision was his belief that he had a “duty to sit” in any case in which he did not find clear grounds for recusal.<sup>69</sup> Rehnquist noted that the courts of appeals had unanimously concluded that federal judges “ha[ve] a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified,” and he found this duty to be even more compelling in the Supreme Court, where there is no substitute for a recused Justice, and where recusal would lead to the possibility of affirmance by an equally divided Court.<sup>70</sup>

Reacting to these controversies, the American Bar Association appointed a special committee charged with revising the Canons of Judicial Ethics to provide more guidance for judges about when to recuse themselves. The Committee developed a new canon, Canon 3C, that fleshed out the standard for judicial disqualification.<sup>71</sup> Most notable was the Canon’s creation of an objective “appearance of justice” standard that required a judge to recuse himself whenever “his impartiality might reasonably be questioned.”<sup>72</sup>

In 1974, Congress followed the ABA’s lead and amended § 455 to broaden and clarify the grounds for judicial disqualification,<sup>73</sup> using the ABA’s Canon 3C as its model.<sup>74</sup> Congress explained that the goal of the

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65. *Id.* at 827.

66. *Id.* at 828.

67. *Id.* at 830.

68. *Id.* at 836–37.

69. *Id.* at 837.

70. *Id.*

71. MODEL CODE OF JUDICIAL CONDUCT Canon 3C (1990).

72. *Id.*

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

74. *Id.* at 2, 5 reprinted in 1974 U.S.C.C.A.N. 6351, 6354–55.

legislation was to “promote public confidence in the impartiality of the judicial system”<sup>75</sup>—confidence that had been shaken by the Haynsworth, Fortas, and Rehnquist controversies.

Like Canon 3C, the amended § 455 established an objective “appearance” standard that replaced the original § 455’s subjective standard permitting a judge to reference his own “opinion” when deciding whether to recuse himself.<sup>76</sup> In the House Report, Congress stated explicitly that it intended the objective standard to eliminate the “so-called ‘duty to sit.’”<sup>77</sup> In addition, the amended version of § 455 defined a financial interest as any legal or equitable interest, “however small,”<sup>78</sup> thereby eliminating the vague “substantial interest” requirement that had been such a problem for Judge Haynsworth. The new § 455 also addressed the situation faced by Justice Rehnquist in *Laird v. Tatum* by requiring that a judge or Justice be disqualified if he or she had expressed an opinion concerning the merits of a case while serving as a government lawyer.<sup>79</sup> Another important change was the inclusion in § 455 of the more general “bias and prejudice” standard<sup>80</sup> that had previously been found only in § 144. Because § 455 applies to all Justices, judges, and magistrates, and not just to district court judges as § 144 does, these broad substantive standards for recusal suddenly had much wider application.

### C. *Judicial Disqualification Laws Today*

Today, §§ 455 and 144 together govern disqualification in the federal courts.<sup>81</sup> Although the two provisions contain different standards and procedures, they substantially overlap, and the relationship between the two is confusing.<sup>82</sup>

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75. *Id.* As Justice Scalia subsequently described the new standard, “what matters is not the reality of bias or prejudice but its appearance.” *Liteky v. United States*, 510 U.S. 540, 548 (1994).

76. Act of Dec. 5, 1974, Pub. L. 93-512, § 1, 88 Stat. 1609; *see also* H.R. Rep. No. 93-1453, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6354–55.

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

78. Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609, 1610.

79. *Id.* at 1609.

80. *Id.*

81. A third recusal statute provides that “[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him.” 28 U.S.C. § 47 (2000). This statute is straightforward, narrow in application, and has been implemented without problem, and thus will not be discussed further.

82. FEDERAL JUDICIAL CENTER, *RECUSAL: ANALYSIS OF CASE LAW UNDER 28 U.S.C. §§ 455 & 144*, 1 (2002) (noting that “the relationship between [28 U.S.C. §§ 455 and 144] has been a source of some confusion”); *see also* *Idaho v. Freeman*, 507 F. Supp. 706, 713 (D. Idaho 1981) (“The inter-

As some courts have commented, § 455 “does not provide the procedure for its enforcement.”<sup>83</sup> Judges are expected to recuse themselves under § 455 *sua sponte*. If they do not, parties have to invent the procedures for seeking disqualification as they go along. Judges also have no statutory guidance as to how to analyze and resolve the question of whether they are too biased or interested in the subject matter to sit on the case.

In contrast, § 144 does provide some procedures to guide litigants. That statute requires the filing of a timely motion to disqualify along with an affidavit and a certificate of good faith by counsel.<sup>84</sup> But, as discussed above,<sup>85</sup> § 144 did not explicitly provide the standards by which courts were to review such motions, and courts have used this procedural gap to give themselves a great deal of leeway when reviewing motions and affidavits for “legal sufficiency.”

Courts continue to narrowly interpret the amended statutes. In *Liteky v. United States*,<sup>86</sup> the Supreme Court again read an “extrajudicial source” requirement into § 455, holding that in most cases a judge could not be disqualified based on views derived from her participation in the legal proceedings.<sup>87</sup> Yet, as the concurrence pointed out, nowhere in § 455 did Congress indicate that the *source* of judicial bias or prejudice mattered when determining whether the judge was, or appeared to be, so biased as to create the appearance of partiality.<sup>88</sup> Consistent with *Liteky*, courts of appeals rarely order disqualification when the basis for a claim of bias occurred during the legal proceeding itself. For example, the Tenth Circuit upheld a district court judge’s refusal to recuse himself despite his pretrial statement that “the obvious thing that’s going to hap-

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relation between section 144 and section 455 has been subject to various interpretations and has caused some confusion.”)

As one commentator described it, after 1948 the law of disqualification “consisted of two wholly independent statutes, one of which, § 455, was intended to be self-enforcing but rarely was, and the other, § 144, which was intended to be peremptory but never was.” FLAMM, *supra* note 9, § 23.6.1, at 678.

83. See, e.g., *Fong v. Am. Airlines, Inc.*, 431 F. Supp. 1334, 1335 (N.D. Cal. 1977).

84. 28 U.S.C. § 144 (2000).

85. See discussion *supra* Part II.A.

86. 510 U.S. 540, 554 (1994). For a discussion of *Liteky*’s impact on judicial integrity, see Lawrence J. Hand, Jr., Note, *Liteky v. United States—Jeopardizing Judicial Integrity*, 40 LOY. L. REV. 995, 1009–10 (1995) (commenting that the Court’s decision in *Liteky* “may sacrifice, or at least erode, judicial integrity”).

87. *Liteky*, 510 U.S. at 554.

88. *Id.* at 558 (Kennedy, J., concurring). The extrajudicial source doctrine has been criticized by commentators as “incompatible with the language of section 455(a) and the goals of the 1974 amendments.” See, e.g., Litteneker, *supra* note 5, at 252.

pen . . . is that [the defendant's] going to get convicted . . . ."<sup>89</sup> The Tenth Circuit first noted that the judge had not based his opinion on knowledge gained outside the courtroom and then concluded that the judge's comment "does not show that the judge could not possibly render fair judgment."<sup>90</sup>

The duty-to-sit doctrine also remains alive despite Congress's expressed intent to abolish it. In 1993, seven Supreme Court Justices issued a "Statement of Recusal Policy" announcing their views regarding recusal when a relative was involved in a case before them.<sup>91</sup> In the course of describing their policy for recusal in such cases, these Justices declared more generally that they should not recuse themselves "out of an excess of caution" because "[e]ven one unnecessary recusal impairs the functioning of the Court."<sup>92</sup> This policy reflects the unique nature of the U.S. Supreme Court, in which a recusal would create the possibility of a tie vote that would leave a legal issue unresolved.<sup>93</sup> In his memorandum defending his decision to sit on the *Cheney* case, Justice Scalia again noted this problem and commented that a decision to recuse is "effectively the same as casting a vote against the petitioner."<sup>94</sup> As the Statement of Recusal Policy and Scalia's memorandum demonstrate, the duty-to-sit doctrine continues to guide recusal decisions by at least some of the Justices of the Supreme Court.<sup>95</sup>

Although they do not face the same personnel problem, circuit courts have also made statements suggesting that they continue to adhere to the duty-to-sit doctrine. For example, the Second Circuit recently declared that "where the standards governing disqualification have not been met,

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89. *United States v. Young*, 45 F.3d 1405, 1414 (10th Cir. 1995).

90. *Id.* at 1415.

91. See 1993 STATEMENT OF RECUSAL POLICY, available through the Supreme Court clerk's office. The seven Justices who signed the Statement of Recusal Policy—Justices Rehnquist, Stevens, Scalia, Thomas, O'Connor, Kennedy, and Ginsburg—all had "spouses, children, or other relatives within the degree of relationship covered by 28 U.S.C. § 455 who are or may become practicing attorneys." *Id.*

92. *Id.*

93. However, the Court was originally established with an even number of Justices (six), and it has sat for significant periods during its history with an even number of Justices—suggesting that tie votes are not of overriding concern to Congress. See *Bias in the Federal Courts*, *supra* note 8, at 1446–47. Finally, certain Justices frequently recuse themselves from cases because they own stock in one of the parties. See generally Tony Mauro, *Furor Over Scalia-Cheney Trip Casts Light on Murky World of Recusals*, 175 N.J. LAW J. 732 (2004). If avoiding ties was truly a priority, these Justices would have divested themselves of the stock that frequently requires their recusal.

94. 541 U.S. 913, 916 (2004).

95. Justice Ginsburg also cited the problem of tie votes in her response to a call by thirteen members of Congress for her to withdraw from all future cases concerning abortion because of her affiliation with NOW Legal Defense Fund. See *GOP Lawmakers Ask Ginsburg to Withdraw from Abortion Cases*, L.A. TIMES, Mar. 19, 2004, at A18.

disqualification is not optional; rather, it is prohibited.”<sup>96</sup> As one commentator observed, “[d]espite the clarity of the congressional purpose to eliminate the duty to sit, many courts have continued to find some version of such a duty.”<sup>97</sup>

*D. Calls for Reform of Judicial Disqualification Laws*

As a result of the controversy over Justice Scalia’s refusal to recuse himself from the *Cheney* case, judicial disqualification laws are again under scrutiny. If history is any guide, this public attention may lead to a new round of amendments in an effort to ensure that the laws serve the intended goal of protecting the judiciary’s reputation and serving the litigants’ interests.

Calls for reform can already be heard. The American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct is currently considering revisions to the Code, and several of the comments it has received refer explicitly to the Scalia-Cheney trip and suggest changes to the rules to address similar future situations.<sup>98</sup>

Although Congress has not taken any specific action yet, members have called for amendments to the disqualification laws in the wake of the Scalia-Cheney controversy. On February 6, 2004, Reps. John Conyers, Jr. and Howard L. Berman, two Democrats on the House Judiciary Committee, called for hearings into “possible gaps in federal laws” that would allow Justice Scalia to sit on a case after vacationing with one of the litigants. In a letter to the Committee’s Republican leaders, the Democrats complained that “the recusal laws contain no process for potential conflicts to be reviewed by other judges.”<sup>99</sup> In March 2004, Sen. John Kerry, the Democratic presidential nominee, issued a statement in response to the controversy. He asserted that “[t]here is absolutely no question that when judges accept vacations and gifts from the parties be-

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96. *In re Aguinda*, 241 F.3d 194, 201 (2d Cir. 2001).

97. Litteneker, *supra* note 5, at 241 n.26 (citing cases); *see also* FLAMM, *supra* note 9, § 20.10.2, at 615–18:

Despite Congress’ clear intent to abolish the duty to sit rule as a restriction on a judge’s discretion when confronted with a judicial disqualification motion and despite the recognition of some federal courts that a judge has no duty to sit whatsoever in any case, a number of federal courts have continued to invoke the duty to sit as a rationale for retaining cases in certain circumstances.

98. *See* ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, available at [www.abanet.org/judicialethics](http://www.abanet.org/judicialethics).

99. *House Democrats Call for Hearings on High Court Conflicts of Interest*, L.A. TIMES, Feb. 7, 2004, at A14.

fore them it erodes public trust in the courts.”<sup>100</sup> Thus, it is possible that Congress will seek to amend judicial recusal laws again in the near future.

*E. Lessons to Be Learned from Historical Experience*

That judicial recusal laws are amended by Congress in response to periodic crises does not make them unusual; laws often arise from various public scandals, catastrophes, or other high-profile events that prod Congress into action. Reform of the recusal statutes differs, however, because those amendments are designed to limit the authority of the very institutions (and individuals) responsible for construing them. Because judges apply the statutes to themselves in cases in which they may have an improper personal interest, they have an incentive to narrowly construe them. Thus, despite Congress’s best efforts to craft disqualification laws that protect the reputation of the judiciary, the laws are inevitably narrowed through interpretation to the point where they no longer serve the intended purpose.

The recusal statutes will fail to protect the reputation of the judiciary as long as they are implemented in an ad hoc fashion, without the procedural protections that normally govern adjudication. For as long as they have existed, the recusal statutes have operated in a procedural vacuum.<sup>101</sup> The laws do not provide for appropriate disclosure of relevant facts, an adversarial presentation of the issues, or a neutral decisionmaker who issues a reasoned opinion on the question of disqualification. For the reasons discussed in Part III, without these procedural protections, the judicial recusal laws will not fulfill their goal of promoting public confidence in the impartiality of the judicial system. If these protections were in place, however, the laws might finally be interpreted as Congress intended, and applied in a manner that strengthens public confidence in the judiciary.

Perhaps it should not be surprising that Congress has hesitated to dictate procedures for courts to follow in such a sensitive area as judicial disqualification. The legislative and executive branches may feel that it is inappropriate to dictate the minutiae of procedures to be followed when litigants seek to remove a judge from a case, preferring to leave it

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100. Josh Gerstein, *Kerry Has Pressed a Long Campaign to Rein in Judges*, N.Y. SUN, July 14, 2004, at 1.

101. *See Fong v. Am. Airlines, Inc.*, 431 F. Supp. 1334, 1335 (N.D. Cal. 1977) (noting that although “[s]ection 455 provides a substantive test for disqualification, it does not provide the procedure for its enforcement”).

to the judiciary to clean its own house.<sup>102</sup> And Congress has good reason to tread lightly in this area. Whenever Congress regulates the courts, it must keep in mind the need to maintain the separation of powers and to protect the judiciary's independence. In accordance with these principles, judges should not be forced to recuse themselves simply because they have expressed opinions and preferences that are at odds with those of the public or even just the parties before them.<sup>103</sup>

Unfortunately, the judiciary has failed to step in and fill the procedural void left by Congress. Judges applying disqualification laws to themselves have no incentive to formalize the process, just as they have no interest in broadly construing the substantive recusal standards. Judges who wish to maintain collegial relations with one another hesitate to set in stone recusal procedures that might be viewed as disrespectful of their fellow judges. This concern is particularly evident at the U.S. Supreme Court, where the nine active Justices must sit on all cases together and seek to forge coalitions from term to term. Perhaps for this reason, the Justices have established the practice of referring recusal motions to the very Justice whose impartiality is being questioned, rather than deciding the issue collectively.<sup>104</sup>

In conclusion, the lesson learned from the troubled history of judicial disqualification is that better procedures, rather than stricter substantive standards, are needed to govern the law's application. Whether those procedures are imposed by Congress, by professional associations such as the American Bar Association, or by the judiciary itself is not significant. What matters is that procedures be developed so that disqualification laws fulfill their goal of promoting public confidence in the justice system.

### III. PROCEDURE AS A SOURCE OF JUDICIAL LEGITIMACY

As described in Part II, one of Congress's main objectives in enacting judicial disqualification laws is to promote public confidence in the

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102. *Cf.* *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 862 (1988) (noting that § 455 does not prescribe any particular remedy for its violation and commenting that "Congress has wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation"); Mauro, *supra* note 93 (describing Congress's reluctance to regulate the Supreme Court).

103. See Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1202 (1992) (discussing the "confusion about bias, impartiality, knowledge, and experience" in the context of selecting judges and juries).

104. See *infra* note 207-09 and accompanying text.

federal court system by ensuring that judges are not only impartial in fact, but also that they maintain the appearance of impartiality.<sup>105</sup> The judiciary has more riding on its institutional reputation than the other two branches of government. As Alexander Hamilton observed, the judicial branch, possessing “no influence over either the sword or the purse,”<sup>106</sup> must take care to foster the public trust that serves as the main source of its authority.<sup>107</sup> The Supreme Court has also explicitly recognized the importance of maintaining the trust of the people, declaring the need to “preserve both the appearance and reality of fairness,” which “generat[es] the feeling, so important to a popular government, that justice has been done.”<sup>108</sup>

The recent controversy over whether Justice Scalia should have recused himself from the *Cheney* case exemplifies how thoroughly recusal laws have failed to protect the reputation of the judiciary. Although reasonable people can differ about whether Justice Scalia should have recused himself, most would agree that the process by which the issue was raised and decided—through front page articles, outraged editorials, political cartoons, late-night talk show host humor, criticism by members of Congress, and, finally, a defensive memorandum by Scalia justifying his decision to remain on the case—has had a negative effect on the public’s perception of the judiciary. And as described in Part II, the *Cheney* case is just one of a long series of cases in which the debate over recusal has itself impugned the reputation of the judiciary, and it is unlikely to be the last.<sup>109</sup>

Some commentators have sought to put an end to the controversy by advocating an expansion of the grounds for judicial disqualification.<sup>110</sup>

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105. See discussion *supra* Part II.A (describing Congress’s intention to protect the reputation of the judiciary through judicial disqualification laws).

106. THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1974); see also *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (“The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.”).

107. See Bloom, *supra* note 21, at 663 (“Public confidence is essential to effective functioning of the judiciary because, ‘possessed of neither the purse nor the sword’ the judiciary depends primarily on the willingness of members of society to follow its mandates.”).

108. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)); see also *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) (stating that maintaining the public’s confidence is important); *In re Murchison*, 349 U.S. 133, 136 (1955) (stating that an impartial judge is one way the judicial system maintains fairness); *Offutt v. United States*, 348 U.S. 11, 14 (1954) (stating that “justice must satisfy the appearance of justice”); *Ex parte McCarthy*, 1 K.B. 256, 259 (1923) (stating that “Justice should not only be done, but should manifestly and undoubtedly be seen to be done”).

109. See discussion *supra* Part II.E.

110. See, e.g., Bassett, *supra* note 8; Frank, *supra* note 8; Leitch, *supra* note 8; *The Standard*,

Congress has often followed these suggestions; Congress has amended disqualification laws on five occasions, each time broadening their scope.<sup>111</sup> As described in Part II, legislative solutions have proved ineffective because judges have interpreted the laws narrowly when applying them to themselves.<sup>112</sup> In any case, it is not clear that the substantive standards for disqualification should be lowered so far as to force judges to withdraw from cases simply because editorial writers or late-night talk show hosts suggest that they do so. The question whether a judge can sit on a case should not be decided solely in the court of public opinion. Indeed, to require judges to remove themselves whenever they are the subject of criticism would be antithetical to the judiciary's role as a bulwark against the vagaries of public opinion.<sup>113</sup>

To improve the law of judicial disqualification so that it serves to protect the judiciary's reputation, it is first necessary to identify the sources of the public's faith in the judiciary that the laws seek to preserve. Unelected judges regularly countermand the decisions made by elected officials, and yet for the most part the public abides by, and respects, the judiciary as an institution. In other words, judicial decision-making is viewed as legitimate, despite its countermajoritarian nature. Volumes have been written seeking to locate the source of the public's respect for, and adherence to, countermajoritarian judicial decision-making.<sup>114</sup>

Political scientists and legal theorists have recognized that procedures serve an important legitimating function for institutions in which the decisionmakers are appointed and/or given life tenure rather than elected and accountable to the constituents they govern.<sup>115</sup> Probably the

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*supra* note 8; *Bias in the Federal Courts*, *supra* note 8.

111. See discussion *supra* Part II.B.

112. See discussion *supra* Parts II.B–E.

113. See *supra* note 13.

114. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–17 (2d ed. 1986) (describing the “counter-majoritarian” nature of the judicial system); PHILIP BOBBITT, *CONSTITUTIONAL FATE* 3–5 (1982) (discussing judicial review of legislation); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 4–12 (1980) (discussing conflicts between judicial review and democracy); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 11–12 (1980) (discussing the role of interpretivism in the judicial system); Erwin Chemerinsky, *The Supreme Court 1988 Term—Forward: The Vanishing Constitution*, 103 *HARV. L. REV.* 43, 46 (1989) (noting that for decades the scholarly literature about judicial review has been primarily concerned with resolving the counter-majoritarian difficulty). See generally Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153 (2002) (discussing the evolution of the countermajoritarian debate).

115. BORK, *supra* note 13, at 2 (“The democratic integrity of the law . . . depends entirely upon the degree to which its processes are legitimate.”); John R. Allison, *Ideology, Prejudgment, and Process Values*, 28 *NEW ENG. L. REV.* 657, 682 (1994) (describing how “[m]any procedural elements found in judicial and administrative adjudication perform a surrogate legitimation function”);

most influential of these schools of thought in law has been Legal Process theory<sup>116</sup>—a procedurally oriented view of what it is courts should do that was formulated and presented by Henry Hart, Albert Sacks, and Herbert Wechsler in Hart and Wechsler's casebook *The Federal Courts and the Federal System*<sup>117</sup> and in Hart and Sacks's equally influential book *The Legal Process*.<sup>118</sup> Legal Process scholarship responded to attacks on the judiciary by Legal Realists<sup>119</sup> by defining the “boundaries and purposes” of federal judicial power in an effort to demonstrate that judicial decisionmaking is both “legitimate[] and restrained.”<sup>120</sup>

Legal Process theorists were certainly not the first to turn to procedure as a source of judicial legitimacy,<sup>121</sup> and their scholarship has spawned many second- and third-generation process theorists who have elaborated upon and developed their ideas.<sup>122</sup> While much remains contested about the sources of judicial legitimacy, most participants in the discussion agree on several essential procedural components of adjudication that legitimize it as a method of decisionmaking in a democratic society. As described in detail below, I extract from this literature the following five procedural components of adjudication that are universally considered essential to the legitimacy of the final product: (1) litigants,

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Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 315 (1997). See generally Lon L. Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3; Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379.

Some of these scholars deeply disagree with one another about the role of procedure in legitimating judicial decisionmaking. For example, Professor Peters disagrees with Professor Bork's view that the judiciary must follow certain procedures to avoid engaging in the type of “law-declaring” that only the legislature legitimately may do. Professor Peters argues instead that appropriate procedures can legitimate adjudicative lawmaking. However, for the purposes of this Article the relevant point—and one on which all these scholars agree—is that adjudicative procedures legitimate judicial decisionmaking.

116. The influence and longevity of Legal Process methodology has been frequently remarked upon. See, e.g., Amar, *supra* note 18 at 693–95; Fallon, *supra* note 18, at 970–71.

117. HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953).

118. HENRY M. HART, JR. & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

119. See *supra* note 18 and accompanying text.

120. Amar, *supra* note 18, at 694; see also Fallon, *supra* note 18, at 964 (“[M]ost of us, Hart and Wechsler assume, are prepared to accept the claim to legitimacy of thoughtful, deliberative, unbiased decisions by government officials who are reasonably empowered to make such decisions.”).

121. See Amar, *supra* note 18, at 693 (noting that many of the ideas and perspectives enunciated in Hart's, Wechsler's, and Sacks's work “had been gestating for years”); Fallon, *supra* note 18, at 963 (“Taken individually, most of Hart and Wechsler's doctrinal and policy questions were not original even in 1953. Similar questions have been raised at least since Congress addressed the question of how to allocate judicial power in the first Judiciary Act.”).

122. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

not courts, initiate disputes; (2) the disputes are presented through an adversarial system in which two or more competing parties give their conflicting views; (3) a rationale must be given for decisions; (4) decisions must refer to, and be restricted by, an identifiable body of law; and (5) the decisionmaker must be impartial.<sup>123</sup> Although scholars of the federal court system may not agree on *why* these particular procedural elements legitimize adjudication, the list is nonetheless a generally accepted description of the attributes of judicial decisionmaking considered essential to good (i.e. legitimate) adjudication.<sup>124</sup>

Furthermore, not only are these procedural elements generally agreed by scholars to be essential to judicial legitimacy on a theoretical level, they also are justified by reference both to the institutional competences of the courts as well as to the Constitution's articulation of the scope of judicial power. These procedures are thus legitimating not only because they provide a theoretical justification for the exercise of judicial power in a democracy, but also because they serve to further the Framers' in-

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123. See discussion *infra* Part III.A.

124. See, e.g., Allison, *supra* note 115, at 682 ("Procedures that require published rules, party participation, reasoned decisions, and communicated rationales have the intended and actual effect of enhancing public perceptions of legitimacy."); Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 13–14 (1979):

The judge is entitled to exercise power only after he has participated in a dialogue about the meaning of the public values. It is a dialogue with very special qualities: (a) Judges are not in control of their agenda, but are compelled to confront grievances or claims they would otherwise prefer to ignore. (b) Judges do not have full control over whom they must listen to. They are bound by rules requiring them to listen to a broad range of persons or spokesmen. (c) Judges are compelled to speak back, to respond to the grievance or the claim, and to assume individual responsibility for that response. (d) Judges must also justify their decisions.

...

The judge is required to listen and to speak, and to speak in certain ways. He is also required to be independent. This means, for one thing, that he not identify with or in any way be connected to the particular contestants. He must be impartial, distant, and detached from the contestants, thereby increasing the likelihood that his decision will not be an expression of self-interest (or preferences) of the contestants, which is the antithesis of the right or just decision.

See also Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1341–42 (2001):

Ideally, the adversary system allows each contending party to argue his or her case to an open-minded and disinterested judge who will reach a decision only after having heard and properly weighed all the relevant evidence presented as well as after having duly considered the conflicting interpretations of relevant legal precedents advanced by each of the contenders. . . . At the very least, [], such a judge promotes the rule of law by reaching an unbiased (in the sense that he or she has no reason to favor any party before the court over any other), legally-grounded, and procedurally fair decision that, by and large, should make dispute resolution through law preferable to other alternatives for a vast majority of the citizenry.

tended role for the courts in our constitutional structure.

Finally, the list of procedures described below is not merely normative or aspirational, but also descriptive; most disputes are presented to and decided by judges in accordance with these procedures. One of the few exceptions is the process (or lack thereof) that governs judicial recusals. As discussed in Part IV, recusal law's abandonment of these traditional forms of adjudication has led to its failure to perform its intended legitimating function.

#### *A. Litigants Initiate and Frame Disputes*

Federal courts do not initiate litigation. They wait for third parties to bring conflicts to them for resolution. In the U.S. model of adjudication, courts do not have agenda-setting powers and do not conduct their own investigations. Instead, they are confined to responding to the disputes initiated by injured parties.

As Professor Christopher Peters has observed, one source of adjudicative legitimacy comes from the participation of the litigants in framing and presenting disputes for courts to resolve.<sup>125</sup> By participating in the judicial process, the parties—winner and loser alike—have consented to the outcome, and consent of the governed has always been viewed as essential to legitimizing forms of government decisionmaking.<sup>126</sup> And solely from an instrumental perspective, participation of the bound parties improves decisionmaking by ensuring that those with the most to gain (and lose) have provided their insights and views to the decision-maker.<sup>127</sup>

That courts must wait for parties to bring disputes to them is fitting in light of the judiciary's institutional limitations. The third branch does not have the manpower and resources needed to investigate and commence disputes. Judges are generalists, meaning that they do not have the expertise to identify and investigate specific societal problems in

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125. Christopher J. Peters, *Persuasion: A Model of Majoritarianism as Adjudication*, 96 NW. U. L. REV. 1, 20 (2001) (observing that a "court case is initiated not by the court but by one of the parties," and noting that it is the participation of the litigants that lends legitimacy to judicial decision-making).

126. *Id.*

127. See, e.g., JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1927), reprinted in 2 JOHN DEWEY: *THE LATER WORKS, 1925-1953*, 235, 364 (Jo Ann Boydston ed., 1984); JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (1861), reprinted in *UTILITARIANISM, ON LIBERTY, AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 187, 224 (H.B. Acton ed., 1972) (noting that "each is the only safe guardian of his own rights and interests").

need of adjudication.<sup>128</sup> Furthermore, because federal judges are not elected and have no constituency they can plausibly claim to represent, they lack the mandate to create their own agenda. Thus, the affected parties are usually the best-situated to bring forward and frame their disputes for judicial resolution, because they have firsthand knowledge of the problem at issue and can best decide when, if, and how to frame that dispute.<sup>129</sup>

The Framers intended to limit judges to resolving disputes raised by others, and that view is reflected in Article III of the Constitution. Judges must wait until a “case” or “controversy” is brought to them; nothing in the text of Article III empowers courts to manufacture cases for themselves.<sup>130</sup> The Framers did not foresee the need for the legions of judges that would have been required were the judiciary to be assigned the task of investigating cases and initiating litigation. Accordingly, the Constitution did not mandate the creation of hundreds of new judicial officers, but rather vested the judicial power in “one Supreme Court” and “in such inferior courts as the Congress may from time to time ordain and establish.”<sup>131</sup>

Although not explicitly prohibited by the Constitution’s text, it would be constitutionally suspect for judges to take over the investigation and prosecution of cases. First, such tasks would interfere with the ability to carry out the primary task of judging; second, engaging in these activities would impermissibly mix the judicial function with that of the executive;<sup>132</sup> and third, permitting courts to choose which issues to address and when to address them would vest too much power in the hands of the government. The Framers preferred that the people retain the ability to choose which cases to bring to the courts for resolution.<sup>133</sup>

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128. See generally JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 31–36 (1938).

129. For discussion of the judiciary’s institutional limitations in this regard, see Molot, *supra* note 16, at 60.

130. *Id.* at 64–65.

131. U.S. CONST. art. III, § 1.

132. Alexander Hamilton explicitly discussed the danger to liberty if the judicial branch were to take on the powers of the other branches as well:

For I agree, that ‘there is no liberty, if the power of judging be not separated from the legislative and executive powers.’ It proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments . . . .

THE FEDERALIST NO. 78, at 497 (Robert Scigliano ed., 2000) (quoting 1 BARON DE MONTESQUIEU, *SPIRIT OF LAWS* 181 (1748)).

133. See Molot, *supra* note 16, at 66–67 (describing the Framers’ mistrust of the judiciary and relatively greater confidence in litigants and juries to play key roles in the judicial process).

*B. Adversarial Presentation of Disputes*

The adversarial presentation of disputes is another basic component of the traditional adjudicatory model.<sup>134</sup> Under an adversary system, opposing parties have an opportunity to present their conflicting arguments to a relatively passive decisionmaker. In his seminal article “The Forms and Limits of Adjudication,” Lon Fuller declared that the parties’ responsibility for presenting “reasoned arguments” in support of their respective positions was the “essence” of adjudication.<sup>135</sup> It is the parties who conduct investigations, choose which issues to pursue in litigation, and prepare and present arguments and evidence to the factfinder.<sup>136</sup> Although courts will occasionally raise issues or arguments on their own, these instances are rare and usually have to be justified by other limitations on judicial power, such as the court’s inability to decide questions outside of its jurisdiction or its interest in avoiding pronouncements on constitutional questions. This system is in sharp contrast to the inquisitorial systems of many other countries, in which state agents control litigation.<sup>137</sup>

Party control over case-presentation is legitimating for much the same reasons that party control over case-initiation is legitimating. Again, it is important symbolically that the parties who will be bound to the decision have a role in persuading the decisionmaker of their point of view.<sup>138</sup> And the fact that the litigants will be the most directly affected by the decision has instrumental value, for it improves the quality of their

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134. See, e.g., Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 301 (1989) (“[T]he hallmark of American adjudication is the adversary system.”).

135. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364–65 (1978).

136. Peters, *supra* note 125, at 21 (commenting that “judges in our model of adjudication typically do not rely upon evidence outside the record, or engage in their own investigative efforts, or even rely on legal arguments other than those advanced by the parties”).

137. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380–82 (1982). Mirjan Damaska has observed that inquisitorial legal systems tend to spring from political regimes that are less concerned with citizen participation in government decisionmaking. MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 154–73 (1986). That the United States has adopted a litigant-centered rather than judge-centered model of adjudication thus speaks not only to the qualities the citizens of the United States value in adjudication, but also the qualities they value in government decisionmaking more generally. See *also* Peters, *supra* note 125, at 22 (“Adjudication in the Anglo-American common-law tradition thus draws legitimacy from the same source as majoritarian political decisionmaking in the western democratic tradition. That source is the meaningful participation of the governed in the making of decisions that will bind them.”).

138. Fuller, *supra* note 115, at 19 (stating that the adversary model respects the dignity of the individual by affording those “affected by the decisions which emerge . . . [a] formally guaranteed opportunity to affect those decisions”).

participation and thus the quality of the final decision.<sup>139</sup> As Professor Peters has argued, the role of the parties in framing and arguing their own cases serves a legitimating function similar to that of reasoned deliberation in the legislative sphere.<sup>140</sup> Participation by the interested parties ensures that “a greater diversity of interests [are] represented in the decisionmaking process” than would occur were the court to decide without litigant input, just as deliberation adds voices and perspectives to Congress’s decisionmaking.<sup>141</sup> By bringing in the most interested parties to make arguments and present facts, the process of adjudication assures that the decisionmaker has as much relevant information as possible before her when making a decision.

Institutionally, American judges are not well suited to engage in factual investigations of social problems because they lack the resources and the public mandate to do so. Courts do not have large staffs to gather and sift through evidence for them and, even if they did, they do not make good representatives of a constituency because they do not engage in dialogue with their constituents or otherwise attempt to remain in tune with the wishes of the general population that they serve.

Finally, limiting the judicial role to that of decisionmaker, rather than investigator, is in keeping with the Framers’ intent that the judiciary be separate from the executive, and that the people maintain power and control over adjudication.<sup>142</sup>

### C. Reasoned Decisionmaking

Reasoned decisionmaking—“the explicit act of offering a justification or explanation for the result reached”<sup>143</sup>—is a hallmark of the legal process.<sup>144</sup> In his article “Giving Reasons,” Professor Frederick Schauer observed that the practice of providing reasons for legal decisions is “central to what makes the legal enterprise distinctive.”<sup>145</sup> Justifying

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139. R.L. Brilmayer, *Judicial Review, Justiciability and the Limits of the Common Law Method*, 57 B.U. L. REV. 807, 817 (1977) (“[T]he common law method has salutary procedural consequences in that it brings into the legal decisionmaking process precisely those person who bear the impact of a decision.”).

140. Peters, *supra* note 125, at 356.

141. *Id.* at 358.

142. See discussion *supra* Part II.A.

143. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 636 (1995).

144. HART & SACKS, *supra* note 118, at 143–52; Fallon, *supra* note 18, at 966 (“Reason and reasoned elaboration are the stuff of the judicial process.”).

145. Schauer, *supra* note 143, at 634.

decisions is widely viewed as a vital source of legitimacy for judicial decisionmaking.<sup>146</sup>

As Professor Schauer noted, the need to give reasons is a sign of the weakness of the decisionmaker.<sup>147</sup> Those in positions of unquestioned authority over subordinates—such as teachers, army officers, and parents—do not need to explain their decisions before their subordinates will comply with their commands. Only those whose authority is more tenuous must justify their rulings. As Schauer puts it, “reasons are what we typically give to support what we conclude precisely when the mere fact that we have concluded is not enough. And reasons are what we typically avoid when the assertion of authority is thought independently important.”<sup>148</sup>

That the judiciary ordinarily gives reasons for its conclusions is thus both a sign of its weakness as well as a means of bolstering its legitimacy.<sup>149</sup> Congress, which gains its legitimacy through periodic elections, enacts statutes in the form of commands without justification. The judiciary cannot act with the same assumption that its orders will be followed without question.<sup>150</sup> Rather a judge must explain and justify his

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146. Peters, *supra* note 125, at 20–21; CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 16 (1999); Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 775–76 (1995) (quoting former D.C. Circuit Judge Patricia Wald’s statement that reasoned opinions “lend decisions legitimacy, permit public evaluation, and impose a discipline on judges,” and concluding that reasoned decisions “thus promot[e] public confidence in the integrity of the courts”); Resnik, *supra* note 137, at 378 n.13 (“When ruling, judges are obliged to provide reasoned explanations for their decisions . . . .”); Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 42 (1979); Fuller, *supra* note 135, at 367; Alexander M. Bickel, *Is the Warren Court Too “Political”?*, N.Y. TIMES, Sept. 25, 1966, § 6, at 30 (“The Court must be able to demonstrate by reasoned argument why it thought the action right or necessary . . . . An action for which there is no intellectually coherent explanation may be tolerable . . . but it is for the political institutions to take, not for the Court.”).

147. Schauer, *supra* note 143, at 637.

148. *Id.*

149. Of course, reasons do not always accompany judicial decisions. Motions are often decided without explanation, and the Supreme Court’s denials of certiorari almost never come with reasons. However, the fact that these more marginal decisions are issued without justification only serves to illustrate that the norm for final, binding decisions on the merits of a question of law are usually accompanied by an explanation.

Appellate courts increasingly issue summary affirmances without decision. However, cases unaccompanied by a written decision are usually unanimous decisions on questions that the court has addressed and previously answered with a reasoned explanation. And yet even in such cases the practice has been criticized in part because it undermines judicial legitimacy. See, e.g., Anne Coyle, *A Modest Reform: The New Rule 32.1 Permitting Citation to Unpublished Opinions in the Federal Courts of Appeals*, 72 FORDHAM L. REV. 2471, 2491 (2004); Dragich, *supra* note 146, at 787, 797–802.

150. Schauer, *supra* note 143, at 658 (“[W]hen decisionmakers expect voluntary compliance, or when they expect respect for decisions because the decisions are right rather than because they ema-

decisions, which serves the dual purposes of proving that the judge has heard the litigants' arguments and demonstrating to the loser that the decision was not arbitrary or based on illegitimate preferences.<sup>151</sup>

In addition, reasons legitimize judicial decisions by committing the court to a general principle that controls a category of cases, which forces it to look beyond personal biases regarding the parties or emotional reactions to the facts in the specific case before it.<sup>152</sup> "[T]o provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself."<sup>153</sup> Reason-giving thus serves as a constraint on judicial power, cabining judicial discretion through the act of articulating general principles that will serve to bind the judge in future cases. A related benefit is that explaining and justifying judicial decisions forces the decisionmaker to slow down, guarding against a gut reaction to a case or a party that cannot be justified by a general principle.<sup>154</sup> Finally, because courts publicly declare reasons for their decisions, they cannot deviate too far from the mores and values of the community they serve. For example, a federal judge could not justify the outcome of a case simply by citing the race of the litigants, because race is not a legitimate ground for decisionmaking by the United States government.

Institutionally, courts are well suited to the task of reasoned decisionmaking. The act of giving a reason for a decision is best done by one or a small number of individuals, rather than a large group that might find it difficult to reach a consensus even on an outcome, and nearly impossible to articulate a single rationale for that outcome. Reasoned decisionmaking is also a valuable means of communication with the other

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nate from an authoritative source, then giving reasons becomes a way to bring the subject of the decision into the enterprise.").

This very principle was expressed by Justice Anthony Kennedy and Rep. Jose Serrano (D-N.Y.) during Kennedy's testimony in March 2004 defending the Court's proposed budget. In the course of a tense discussion in which Serrano commented that he was still "trying to figure out what you folks did in the 2000 election to pick a president," Kennedy stated, "We are the only branch of government that must give reasons for what we do. They are in the opinions." Representative Serrano responded, "We give reasons, too. It is called re-election." Tony Mauro, *Courtside: When Planets Collide*, LEGAL TIMES, Mar. 29, 2004, at 10.

151. Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 412 (1978). In describing and defending the Legal Process methodology, Professor Richard Fallon explained "[w]hat seems crucial to the notion of reasoned elaboration is that the value judgments occur within a process of legal reasoning, rather than being imposed from the outside as a judge's personal, dictatorial preferences." Fallon, *supra* note 18, at 973 n.85.

152. Schauer, *supra* note 143, at 652-53.

153. *Id.* at 641.

154. *Id.* at 656-57.

two branches of government about the acceptable limits of their powers. For example, Congress will know by reading a court's decision striking down a statute whether it is free to amend the law to overrule that decision or whether the Constitution itself prohibits the goal Congress wished to accomplish. By giving reasons, courts also set out a road map for litigants and judges to follow in the future. Citizens can better accord their conduct with the law when they are given reasons for a particular decision in a particular case.

Explanations are essential for courts to perform the tasks assigned to them under the Constitution. Reason-giving is necessary to "reconcile[]" "clashing" statutes, as courts must do to fulfill their role as "interpreters of the law."<sup>155</sup> Likewise, the Framers did not intend courts to strike down laws enacted by Congress without first explaining how they conflict with the Constitution.<sup>156</sup> Finally, the multi-tiered structure of the federal courts systems require reasoned decisionmaking so that appellate courts can review lower courts' pronouncements.

#### D. Reference to Governing Body of Law

Yet another core principle of adjudication is that judges are not to decide cases based solely on their own personal views, but rather must constrain themselves to applying and interpreting a recognized body of law.<sup>157</sup> Chief Justice John Marshall first articulated that limitation on federal judicial power in *Marbury v. Madison*.<sup>158</sup> "[C]ourts may act only when there is law, based on precedent, to apply. Courts do not possess authority to assert their own will."<sup>159</sup> The view that judges are con-

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155. THE FEDERALIST NO. 78, at 499 (Alexander Hamilton) (Robert Seigliano ed., 2000).

156. *Id.* at 500.

157. See Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 3 (1989) ("The notion that courts ordinarily should follow precedent in deciding cases is one of the core structural features of adjudication in common-law legal systems."); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1465 (2003) ("Judges are supposed to decide cases according to the law, and this practice may be essential to the legitimacy of the judiciary."); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L. J. 353, 506 (1989) ("As long as courts cultivate the perception that they are constrained and distinguishable from the political branches, their legitimacy will remain intact.")

Although common law cases are decided without reference to a written body of law, they are nonetheless bounded by the judicial precedent. In deciding common law cases, courts make references to the principles in these decisions and, at least in theory, justify application of the principle to the new fact situations before them. Judges are not free to simply disregard the body of decisions in this area just because there is no written, codified rule in place.

158. 5 U.S. 137, 165 (1803).

159. Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 55 (1995); see also Kathleen M. Sullivan, *The Supreme Court*,

strained by a body of law—whether that be statutory law or judge-made precedent—is by now a firmly established procedural limitation on judicial decisionmaking.

In attempting to legitimate judicial power, Legal Process theorists declared that courts must not simply read their own personal preferences into law, but should instead decide cases by referring to principles and policies that are deeply embedded in society as a whole.<sup>160</sup> The Legal Process school's primary concern was to respond to Legal Realist criticism by demonstrating that the judiciary was constrained in its choices, and was not simply deciding cases based on personal preferences, as an elected legislator might do.<sup>161</sup>

In more recent academic literature, commentators have noted that the common law method of reasoning by analogy promotes judicial legitimacy by ensuring that adjudication operates as interest representation.<sup>162</sup> Under the common law method, judicial decisions are binding only on those that are similarly situated to the original parties. This process ensures that litigants serve as vicarious representatives because their legal arguments will influence the outcome only for those future litigants that share their same interests.

Adherence to precedent not only cabins judicial discretion, it also promotes fairness and predictability in judicial decisionmaking.<sup>163</sup> If like cases must be decided alike, then judges are less free to reach outcomes based on their personal attitudes toward the litigants or the causes they promote. Requiring all judges to follow the same precedents helps to standardize decisionmaking and minimize inconsistency in judicial decisions, which in turn strengthens the credibility of those decisions and of the judiciary as an institution.<sup>164</sup>

The Framers of the Constitution also intended that the judiciary make decisions in accord with an identifiable body of law. Alexander Hamilton articulated that presumption in Federalist No. 78, explaining: "To avoid an arbitrary discretion in the courts, it is indispensable that

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1991 Term—Foreword: *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 64–65 (1992) ("Courts are to stick to law, judgment, and reason in making their decisions and should leave politics, will, and value choice to others.").

160. H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 160 (tentative ed. 1957).

161. Professor Fallon stated that a basic assumption of Legal Process Theory is that the judicial role "is limited to the reasoned elaboration of principles and policies that are ultimately traceable to more democratically legitimate decisionmakers." Fallon, *supra* note 18, at 966.

162. Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 203 (1992); Brilmayer, *supra* note 139, at 817; Peters, *supra* note 125, at 366–68.

163. Schauer, *supra* note 143, at 595–98.

164. *Id.* at 600.

they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.”<sup>165</sup>

### *E. Impartial Decisionmaker*

An impartial decisionmaker is essential to the legitimacy of any system of adjudication. The significance of an unbiased judge has been recognized in such varied and historical sources as the Old Testament,<sup>166</sup> the Code of Justinian,<sup>167</sup> and Shakespeare’s Henry VIII,<sup>168</sup> and has been described as the most basic requirement of due process.<sup>169</sup> In the Legal Process theorists’ conception of adjudication, the judge must be “thoughtful and dispassionate”<sup>170</sup> in reviewing the facts and arguments presented, and must bring to the case an “uncommitted mind.”<sup>171</sup> A decision by a judge lacking such an open mind would not be worthy of the respect ordinarily due judicial pronouncements.

An impartial decisionmaker also serves the instrumental value of improving the accuracy of judicial decisionmaking. A judge who is free from bias or prejudice is more likely to reach the correct result than one who is not.

Like all the procedural elements of adjudication discussed thus far, independent decisionmakers also serve the important non-instrumental value of protecting the reputation of the adjudicatory process by “generating the feeling, so important to a popular government, that justice has

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165. THE FEDERALIST No. 78, at 496 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1974).

166. See, e.g., *Devarim Deuteronomy* 16:18–20 (“Judges and officers shall you appoint in all your cities . . . and they shall judge the people with righteous judgment. You shall not pervert judgment, you shall not respect someone’s presence, and you shall not accept a bribe, for the bribe will blind the eyes of the wise and make just words crooked. Righteousness, righteousness shall you pursue. . .”).

167. See *supra* note 20.

168. WILLIAM SHAKESPEARE, KING HENRY THE EIGHTH act 2, sc. 4 (Queen Katherine of Aragon refuses to permit Cardinal Wolsey to sit as judge in her case because he was her “most malicious foe” and thus would not be a “friend to truth” in her case.).

169. *Goldberg v. Kelley*, 397 U.S. 254, 271 (1970) (“[A]n impartial decisionmaker is essential.”); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279 (1975); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 477 (1986) (“[U]se of an ‘independent adjudicator’ is a sine qua non of procedural due process.”); see also discussion *supra* Part II (describing historical background of impartial decisionmaker requirement).

170. Henry M. Hart, Jr., *The Supreme Court 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 124 (1959).

171. Fuller, *supra* note 135, at 386.

been done.”<sup>172</sup> When the decisionmaker appears to have a personal interest in the outcome of the litigation, the legitimacy of the final decision is in question. “Few situations more severely threaten trust in the judicial process than the perception that a litigant never had a chance because the decisionmaker may have owed the other side special favors.”<sup>173</sup>

An impartial judge is also a value enshrined in the Constitution. Article III requires that federal judges be given life tenure and prohibits diminution of judicial salaries.<sup>174</sup> Alexander Hamilton explained that such protections were necessary to ensure judicial independence, commenting that “a power over a man’s subsistence amounts to a power over his will.”<sup>175</sup> In addition, the Constitution’s allowance for federal jurisdiction in cases between parties from different states is yet another protection against actual or apparent judicial bias, because it arose from a concern that state court judges might be partial to their own citizens.<sup>176</sup> Finally, the Supreme Court has held that an unconflicted decisionmaker is an “essential” element of the “due process” guaranteed by the Fifth and Fourteenth Amendments.<sup>177</sup>

#### IV. JUDICIAL DISQUALIFICATION’S DEPARTURE FROM TRADITIONAL FORMS OF ADJUDICATION AND THE RESULTING LOSS OF LEGITIMACY

The five essential elements of adjudication described in Part III are not just normative ideals, they are descriptive of the processes followed in most American adjudication. As a general matter, the parties frame disputes that are decided by an impartial judge who issues a reasoned decision that references an established body of law. On rare occasions when courts stray from this traditional model of adjudication—as they tend to do when overseeing class actions or pre-trial practice, for exam-

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172. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).

173. Redish & Marshall, *supra* note 169, at 483.

174. U.S. CONST. art III, § 1.

175. THE FEDERALIST NO. 79, at 504 (Alexander Hamilton) (Robert Scigliano ed., 2000). More recently, the Supreme Court has also cited the importance of these protections in ensuring judicial independence. *See, e.g., N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (stating that the judiciary was designed “to guarantee that the process of adjudication itself remained impartial”).

176. U.S. CONST. art III, § 2.

177. *Ward v. Village of Monroeville*, 409 U.S. 57, 61–62 (1972) (finding a violation of the Due Process Clause where the decisionmaker had a financial interest in the proceeding); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (“[A]n impartial decisionmaker is essential.”); *In re Murchison*, 349 U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process.”).

ple—they are subject to criticism.<sup>178</sup>

This Part describes how the process by which a judge decides whether to recuse herself is one of the few areas in which judges consistently abandon these traditional forms of adjudication. Commentators have paid little attention to the procedural void in recusal law, perhaps because the question of judicial disqualification is such a sensitive one that it appears to be *sui generis*, and to be appropriately outside of the traditional model of adjudication. However, as discussed in Part III, the basic procedural elements that govern most adjudication serve a vital legitimating function. Disqualification laws have failed to protect the reputation of the judiciary because judges do not follow these traditional forms of adjudication when deciding whether they must recuse themselves.

*A. The Law of Judicial Disqualification Has Deviated from the Traditional Forms of Adjudication*

1. It Is Difficult for Litigants to Seek Judicial Disqualification

Section 455 of Title 28 does not outline any procedures by which parties may seek disqualification; rather, the judge is supposed to consider whether to recuse himself on his own volition. The very absence of statutorily prescribed procedures discourages lawyers from moving for disqualification and makes recusal motions all the more *ad hoc* and exceptional. In contrast, § 144 does contain clear procedural requirements for seeking judicial disqualification. However, because § 144 requires recusal only upon the more difficult showing of actual bias, rather than the “appearance” standard in § 455, and because it applies only to district courts, it is far less frequently cited as the basis for a disqualification motion.<sup>179</sup>

The absence of statutory procedures exacerbates the difficulties inherent in seeking a judge’s disqualification. A lawyer might reasonably hesitate to make such a motion, fearing that it will anger the judge before whom he will have to try the case if he loses. Even if the issue is clear-cut and the motion is sure to succeed—if not before the challenged

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178. See, e.g., Deborah R. Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 95 (noting that litigants may be better satisfied when disputes are framed by parties and judges’ decisions are based on an identifiable body of law); Molot, *supra* note 16, at 59 (“[W]hen judges stray from their traditional adjudicative role, they trigger questions regarding the effectiveness and legitimacy of their actions.”); Resnik, *supra* note 137, at 424–31.

179. FEDERAL JUDICIAL CENTER, *supra* note 82, at 48–49.

judge, then at least on appeal—a lawyer might still be concerned that the motion would annoy a judge before whom he expects to appear regularly.<sup>180</sup> Such fears are not unfounded. For example, a district court judge stated that he found the motion for his disqualification to be “offensive” and he asserted that it “impugn[ed his] integrity.”<sup>181</sup>

A more basic problem is that the parties often lack the factual information necessary to make such a motion.<sup>182</sup> A party or his lawyer may hear rumors about a relationship between a judge and the opposing party, but unless that information can be corroborated, the party and his lawyer will hesitate to ask the judge to recuse himself on the basis of speculation or gossip.<sup>183</sup> Indeed, affidavits based on hearsay are considered legally insufficient to justify recusal.<sup>184</sup> Nor are there any procedures establishing how a party can investigate such rumors to determine whether there is any truth to them. Judges are generally not required to disclose information about relationships, bias, or conflict of interest that they do not

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180. 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 9, § 1.10.5, at 25 (commenting 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 questions about their impartiality”); Bassett, *supra* note 8, at 1244 (noting that “many judges approach recusal decisions with a presumption of participation and with a touch of defensiveness”); Leubsdorf, *supra* note 19, at 244 (observing that judges often take a defensive tone in their opinions denying disqualification motions); Littenecker, *supra* note 5, at 260 (“Counsel who would face a particular judge many times in his career would be hesitant to charge the judge with bias or to refuse a judge’s request that he waive his right to disqualify.”).

For similar reasons, lawyers rarely file complaints against judges under the Judicial Conduct and Disability Act. Although attorneys are in the best position to observe and evaluate judicial behavior, they were responsible for filing only six percent of the complaints between 1980 and 1991. Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25, 45 (1993). In a 1993 report, the National Commission on Judicial Discipline and Removal stated that “testimony before the Commission, surveys, and interviews with attorneys reveal a widespread reluctance among members of the bar to file a complaint. This type of risk aversion is common among those who appear frequently in federal court, notably government lawyers.” Report of the National Commission on Judicial Discipline and Removal 100 (1993). Lawyers report a reluctance to make even informal complaints against judges. Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 256–59 (1993).

181. *Hook v. McDade*, 89 F.3d 350, 353 (7th Cir. 1996).

182. See DAVID G. KNIBB, *FEDERAL COURT OF APPEALS MANUAL: A MANUAL ON PRACTICE IN THE UNITED STATES COURT OF APPEALS* § 5.2, at 27–28 (2d ed. 1990) (“[T]he lawyer will probably have insufficient information to feel comfortable in asserting without reservation that the judge should have been disqualified.”).

183. Although federal judges are required to disclose gifts and honoraria received, those forms are filed only once a year—which may come far too late for a party to determine whether the judge has accepted gifts from a party or litigant in a pending case. 5 U.S.C. app. 4 §§ 101–11 (2003). In any case, a judge may have a close relationship with a lawyer or litigant that might prejudice the judge in that individual’s favor even though no gifts are exchanged.

184. See *supra* text accompanying note 52.

perceive as disqualifying.<sup>185</sup> For all these good reasons, parties rarely seek disqualification, waiting instead for the court to do so on its own motion.

## 2. Adversarial Presentation Is Absent Under Current Disqualification Procedures

Even when one party seeks the judge's recusal, the opposing party in litigation may remain silent on the recusal question. In many cases, the other party may not have any grounds to oppose the motion because that party has no idea whether the judge has a bias or financial interest that would justify disqualification. As one commentator noted, the challenged judge is the one "most familiar with his own conduct,"<sup>186</sup> and thus the most appropriate party to respond to a disqualification motion. Yet the judge does not respond—at least not in a traditional adversarial manner—because she is responsible for deciding the legal question of whether her conduct merits disqualification.

## 3. Judges Often Do Not Give a Reasoned Explanation for Recusal

Judges who recuse themselves rarely issue a decision explaining why. When Justice Frankfurter recused himself *sua sponte* from *Public Utilities Commission v. Pollak*,<sup>187</sup> he wrote a separate opinion discussing his reasons for doing so and declared that judges should publicly state the grounds for recusal decisions.<sup>188</sup> However, this practice has generally not been followed. One commentator has even referred to disqualification as "typically a quiet, almost invisible, legal issue."<sup>189</sup>

The process is particularly mysterious when a judge recuses herself *sua sponte*. But even when a judge is asked to step aside by one of the parties, it is often not clear whether the judge's decision to do so is based on bias-in-fact or simply concern that remaining on the case would create the appearance of impartiality. The lack of transparency exists even at the highest levels of the federal court system. For example, many of the sitting Justices have recused themselves from hundreds of cases, almost

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185. However, the Eleventh Circuit has stated that judges have an ethical duty to "disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification." *Porter v. Singletary*, 49 F.3d 1483, 1489 (11th Cir. 1995).

186. Litteneker, *supra* note 5, at 266.

187. 343 U.S. 451 (1952).

188. *Id.* at 466–67.

189. Bassett, *supra* note 8, at 1214.

always without explanation.<sup>190</sup> Presumably they own stock or have some other financial position that might be affected by the litigation, but because they do not issue explanations, their reasons for withdrawal are unknown.<sup>191</sup>

#### 4. The Precedent on Disqualification Is One-Sided

The federal statutory standards for recusal are vague. Section 455(a) of Title 28 requires a federal judge to “disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” Courts have struggled with the meaning of “impartial” and have differed over whose viewpoint to adopt when deciding whether it would be “reasonable” to question a judge’s impartiality. For instance, some courts have suggested that the “reasonableness” standard should be viewed from the perspective of an objective judge because a non-judicial observer is “less inclined to credit judges’ impartiality and mental discipline than the judiciary itself will be.”<sup>192</sup> In contrast, others have concluded that the standard should be based on a “reasonable person” with knowledge of all of the relevant facts.<sup>193</sup> Moreover, even when applying the same standards, courts will differ over when the language of the statute requires recusal.

Normally, ambiguous statutory text is clarified by a body of judicial precedent developed by judges applying the language to the specific cases before them. In the area of recusals, however, the judicial precedent is noticeably lopsided. Judges are more likely to publish opinions when denying a motion to disqualify than when granting one, meaning that the majority of published judicial decisions elaborate the reasons why a judge should continue to sit, and relatively few address circumstances justifying recusal.<sup>194</sup> Justice Scalia’s recusal decisions this term alone are illustrative of the problem. When he recused himself in *Elk Grove Unified School District v. Newdow* (concerning a challenge to the recitation of the pledge of allegiance in the public schools),<sup>195</sup> he did so

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190. Mauro, *supra* note 93. There is a wide disparity in the rates of recusal. Justice Breyer recuses himself most often, averaging forty-two times a year, while Chief Justice Rehnquist and Justice Ginsberg recuse themselves seven times a year, the lowest average.

191. See Bloom, *supra* note 21, at 690 n.172 (noting that Justices rarely state their reasons for disqualifying themselves).

192. *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990).

193. *United States v. DeTemple*, 162 F.3d 279, 287 (4th Cir. 1998).

194. Other commentators have noted this problem. See Leubsdorf, *supra* note 19, at 244–45 (“[A] judge who withdraws usually writes no opinion. Published opinions, consequently, form an accumulating mound of reasons and precedents against withdrawal; meanwhile, some judges routinely and silently disqualify themselves in comparable cases.”).

195. 540 U.S. 945 (2003). Justice Scalia did not issue a public statement or ruling announcing

without explanation, while he published a twenty-one page memorandum justifying his decision to sit on the *Cheney* case.

### 5. The Challenged Judge Is Not an Impartial Decisionmaker

The Catch-22 of the law of judicial disqualification is that the very judge being challenged for bias or interest is almost always the one who, at least in the first instance, decides whether she is too conflicted to sit on the case. Although precedent does exist for referral of disqualification motions to a neutral judge,<sup>196</sup> it is rare.<sup>197</sup> As one commentator has noted, the “policy against automatic transfer [of a motion to disqualify] is [] firmly embedded in court practice.”<sup>198</sup>

Exacerbating this problem is the deferential standard of appellate review of a trial court’s denial of a motion to disqualify. Circuit courts review such decisions only for abuse of discretion. One court opined that its review is deferential because a “judge presiding over a case is in the best position to appreciate the implications of those matters alleged in a recusal motion”<sup>199</sup>—a view that simply ignores the possibility that a judge’s refusal to recuse might be affected, consciously or unconsciously, by the very bias that is claimed as the basis for recusal. Litigants seeking recusal bear an even heavier burden if they seek to bring

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that he was recusing himself. Instead, the Court’s order granting the petition for a writ of certiorari was accompanied by the statement that “Justice Scalia took no part in the consideration or decision of these motions and this petition.” Interestingly, Justice Scalia made his first public statement about his recusal in *Newdow* in his memorandum in *In re Cheney*, when he stated that “recusal is the course I must take—and will take—when, on the basis of established principles and practices, I have said or done something which requires that course. I have recused for such a reason this very Term.” *In re Cheney*, 541 U.S. 913, 916 (2004).

196. See, e.g., *In re Lieb*, 112 B.R. 830, 837 (Bankr. W.D. Tex. 1990); *Bradley v. Milliken*, 426 F. Supp. 929 (E.D. Mich. 1977); *Rademacher v. City of Phoenix*, 442 F. Supp. 27 (D. Ariz. 1977); *United States v. Zagari*, 419 F. Supp. 494, 497 (N.D. Cal. 1976).

197. See, e.g., *United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989) (holding that a motion to disqualify is usually heard by the challenged judge); *In re Demjanjuk*, 584 F. Supp. 1321, 1322 n.1 (N.D. Ohio 1984) (stating that most federal courts resolve recusal motions themselves); *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976) (recusal motions normally first ruled upon by the judge who is the subject of the motion); see also FLAMM, *supra* note 9, § 17.5.1 at 513–17 (explaining that a judge challenged by a judicial disqualification motion usually decides the motion him or herself). However, some states have made such a transfer mandatory, either through statute or court rule. See *id.* § 17.5.3, at 521 (stating that in some jurisdictions “the challenged judge must either recuse himself or transfer the motion to another judge”); Edward G. Burg, Comment, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CAL. L. REV. 1445, 1465 (1981) (stating that in one case “judges on a court collectively disqualif[ied] one of their benchmates”).

198. Littenecker, *supra* note 5, at 266. The United States Court of Appeals for the District of Columbia Circuit has discouraged transfer. *United States v. Haldeman*, 559 F.2d 31, 131 (D.C. Cir. 1976) (en banc) (per curiam).

199. *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988).

the issue to the court of appeals before the merits of the case are decided,<sup>200</sup> even though immediate appeal of the disqualification decision is the only meaningful avenue for obtaining an impartial judge's review of a refusal to recuse.<sup>201</sup>

But at least there *is* review of a district court's refusal to recuse. Litigants seeking to remove an appellate judge have a slim chance of getting an impartial decisionmaker to review the challenged judge's decision to remain on the case. At both the circuit and Supreme Court levels, the challenged judge decides for himself whether to recuse. Theoretically, a circuit court judge's refusal to recuse could be reviewed by the en banc court or by the Supreme Court, but such review is so rare as to have little practical effect. The Supreme Court has adopted the practice of letting an individual Justice decide a motion asking him or her to recuse, and there is no system in place for the full Court to review that decision if the Justice refuses to step down.<sup>202</sup>

### B. *The Cheney Case: The Consequences of Flawed Recusal Procedures*

The process leading up to Justice Scalia's decision not to recuse himself from the *Cheney* case illustrates how far the recusal process has deviated from the traditional model of adjudication described in Part III.

#### 1. Background

The fact that Justice Scalia and Vice President Cheney went on vacation together after the Supreme Court had granted certiorari in the *Cheney* case was not disclosed to the public or the parties by either Scalia or Cheney. It only came to national attention when reported in the *L.A. Times* on January 17, 2004.<sup>203</sup> The story was quickly picked up by other papers. Then, in early February, the *L.A. Times* reported in a front-page

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200. As the Second Circuit explained:

[W]e must bear in mind not only the standards governing recusal, but we must also consider the extraordinary showing required to obtain the issuance of a writ of mandamus . . . . [P]etitioners must "clearly and indisputably" demonstrate that the district court abused its discretion. Absent such a showing, mandamus will not lie.

*In re Aguinda*, 241 F.3d 194, 200 (2d Cir. 2001) (citing *Drexel Burnham Lambert*, 861 F.2d at 1312-13).

201. FLAMM, *supra* note 9, § 31.2, at 973 ("[F]or a court's decision on disqualification to be meaningfully reviewed, it usually must be appealed immediately.").

202. See generally Bassett, *supra* note 8.

203. David G. Savage, *Trip With Cheney Puts Ethics Spotlight on Scalia*, L.A. TIMES, Jan. 17, 2004, at A1.

story that Justice Scalia had traveled on Air Force Two as “an official guest” of Vice President Cheney.<sup>204</sup> On the heels of this story came a wave of editorials proclaiming that Justice Scalia should recuse himself because his vacation with Cheney created at the very least the appearance that he could not be impartial when deciding the case.<sup>205</sup> Accompanying the news stories were a large number of political cartoons, and jokes about the trip were included in the monologues of late-night comedians.<sup>206</sup>

During this time, Justice Scalia did not make any public statement. He did issue a short written response to inquiries by an *L.A. Times* reporter confirming that he and Vice President Cheney had gone on a duck-hunting trip in Louisiana together after certiorari was granted in the *Cheney* case. He concluded with a two-sentence statement about why he believed that this social contact did not obligate him to recuse himself from the case:

I do not think my impartiality could *reasonably* be questioned. Social contacts with high-level executive officials (including cabinet officers) have never been thought improper for judges who may have before them cases in which those people are involved in their official capacity, as opposed to their personal capacity.<sup>207</sup>

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204. David G. Savage & Richard A. Serrano, *Scalia was Cheney Hunt Trip Guest*, L.A. TIMES, Feb. 5, 2004, at A1.

205. See, e.g., Editorial, *Duck-Blinded Ethics; Scalia Puts Supreme Court Integrity at Risk*, SAN DIEGO UNION-TRIB., Feb. 6, 2004, at B8; Editorial, *One Case Scalia Should Skip*, L.A. TIMES, Jan. 22, 2004, at B16; Editorial, *Scalia Should Recuse Himself*, SEATTLE POST-INTELLIGENCER, Feb. 9, 2004, at B5; Editorial, *Scalia, Use Good Judgment; Bow Out of Cheney Case*, ATL. JOURNAL-CONSTITUTION, Jan. 29, 2004, at 14A; Editorial, *Scalia's Apparent Conflict*, B. GLOBE, Feb. 7, 2004, at A14; Editorial, *Scalia's Conflict of Interest*, DENV. POST, Jan. 26, 2004, at B7; Editorial, *Scalia's Not-So-Excellent Journey; Hunting Trip with Cheney Was Highly Inappropriate*, BUFFALO NEWS, Feb. 4, 2004, at C4; Editorial, *Sit This One Out*, CHI. SUN-TIMES, Feb. 8, 2004, at 35; Editorial, *Too Close for Comfort*, S.F. CHRON., Jan. 26, 2004, at B6; Editorial, *Too Close for Comfort*, COLUMBUS DISPATCH, Jan. 23, 2004, at 10A.

206. See Mot. to Recuse, *Cheney v. United States Dist. Ct. for D.C.* 124 S. Ct. 2576 (2004) (No. 03-475).

207. Letter from Justice Antonin Scalia to Reporter David Savage (Jan. 16, 2004) (on file with author) (emphasis in original). Prior to his March 18, 2004, memorandum, Justice Scalia commented publicly on the matter on just one other occasion. When asked about the controversy while speaking at Amherst College on February 10, 2004, Justice Scalia responded that he did not need to recuse himself, because the lawsuit involved Cheney in his official and not personal capacity, and he repeated that it is “acceptable practice” for Justices to socialize with members of the executive branch. He finished his comment by declaring, “That’s all I’m going to say for now. Quack, quack.” Associated Press, *Scalia Says He’ll Stay on Cheney Court Case*, L.A. TIMES, Feb. 12, 2004, at A30.

Scalia provided no details about travel arrangements, allocation of expenses, lodgings, other attendees, or when the joint trip had been planned.

As the press attention increased, members of Congress began to weigh in on the matter. On January 22, Senator Patrick Leahy, ranking Democrat on the Judiciary Committee, and Senator Joe Lieberman, ranking Democrat on the Governmental Affairs Committee, jointly wrote to Chief Justice Rehnquist questioning whether Justice Scalia should sit on the case: "When a sitting judge, poised to hear a case involving a particular litigant, goes on a vacation with that litigant, reasonable people will question whether that judge can be a fair and impartial adjudicator of that man's case or his opponent's claims."<sup>208</sup> The two senators asked the Chief Justice to clarify the rules Justices follow in deciding whether to remove themselves from cases and inquired as to "whether mechanisms exist . . . for review of a justice's unilateral decision to decline to recuse himself."<sup>209</sup>

In his reply, Rehnquist stated that "[t]here is no formal procedure for court review of the decision of a justice in an individual case. That is so because it has long been settled that each justice must decide such a question for himself." He then chastised the senators for expressing their views that Scalia should recuse himself from the *Cheney* case: "Anyone at all is free to criticize the action of a justice—as to recusal or as to the merits—after the case has been decided. But I think any suggestion by you or Senator Lieberman as to why a justice should recuse himself in a pending case is ill-considered."<sup>210</sup>

The parties remained silent on the matter for several weeks. Then, on February 13, Judicial Watch, the conservative public interest law firm that is co-plaintiff on the *Cheney* case with the Sierra Club, publicly stated that it "does not believe the presently known facts about the hunting trip satisfy the legal standards requiring recusal."<sup>211</sup>

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208. This letter was reported in news stories. See, e.g., David G. Savage, *High Court Won't Review Scalia's Recusal Decision*, L.A. TIMES, Jan. 27, 2004, at A12.

209. *Id.* Democratic Representatives Henry A. Waxman (D-Cal.) and John Conyers Jr. (D-Mich.) also wrote to Chief Justice Rehnquist urging him to establish a procedure for "formal review" of Justices' ethical conflicts. The two argued that Justice Scalia had failed to recuse himself despite precedent in lower courts requiring recusal in such situations. They wrote: "It is no exaggeration to say that the prestige and power of the Vice President are directly at stake in the case." David G. Savage, *2 Democrats Criticize Scalia's Refusal to Quit Cheney Case*, L.A. TIMES, Jan. 31, 2004, at A26.

210. Savage, *supra* note 208.

211. *In re Cheney*, 541 U.S. 913, 914 (2004).

The Sierra Club disagreed, and on February 23 it took the unusual step of filing a motion asking Justice Scalia to recuse himself from the case. The motion was submitted to the full Court, and the Sierra Club intended that all nine Justices address it just as they would any other question of law. David Bookbinder, the Sierra Club's Washington legal director, stated: "Obviously, this is an issue for each of the nine justices to consider, since the integrity of the entire court is being called into question."<sup>212</sup> Nonetheless, the full Court did not address the motion. The docket entry for the motion stated: "In accordance with its historic practice, the Court refers the motion to recuse in this case to Justice Scalia."<sup>213</sup>

As is typical when one party asks a judge to recuse himself, the opposition did not respond to the motion. Indeed, the government never commented on the issue either in legal filings or in the press.

More than three weeks passed before Justice Scalia issued a twenty-one page memorandum decision denying the motion. Before he did so, it was not clear that Justice Scalia would respond at all. The Justices normally do not issue statements about decisions to recuse. For example, when the respondent in *Newdow* asked Justice Scalia to recuse himself earlier the same term because he had commented on the merits of the question presented, Justice Scalia had not issued any formal response. The public and the parties learned that he had recused himself from the case only because the Court's order granting a writ of certiorari in the case was accompanied by the statement that "Justice Scalia took no part in the consideration or decision of . . . this petition."<sup>214</sup>

Thus, the length and detail of Justice Scalia's response was surprising. To ask a Supreme Court Justice to recuse himself is rare; for the Justice to respond at length is almost unprecedented. During the Court's long history, the only comparable explanation for a denial of a motion to disqualify came from Justice Rehnquist in *Laird v. Tatum*, who began his memorandum by stating that he did not "wish to suggest" that providing such an explanation was "desirable or even appropriate" in most cases.<sup>215</sup>

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212. David G. Savage, *Sierra Club Asks Scalia to Step Aside in Cheney Case*, L.A. TIMES, Feb. 24, 2004, at A17.

213. Docket statement (02-5354, 02-5355, 02-5356), 541 U.S. 913 (2004).

214. 540 U.S. 945, 945 (2003).

215. 409 U.S. 824 (1972). In his memorandum explaining his decision not to recuse, Rehnquist stated that "neither the Court nor any Justice individually appears ever to have" provided a similar justification for remaining on a case. He added, "I do not wish to suggest that I believe such a course would be desirable or even appropriate in any but the peculiar circumstances present here." *Id.* Rehnquist provided a much shorter explanation of his decision to sit on the Microsoft antitrust litigation despite the fact that Microsoft had hired the firm at which his son was a lawyer. See Mi-

Justice Scalia's memorandum was thus a significant departure from past practice.

In the memorandum, Justice Scalia revealed facts about circumstances and logistics of the trip that previously had been unknown to the general public and to the Sierra Club, and then he made a persuasive case for why he should not be required to recuse himself. Nonetheless, his response did not settle the matter. In a second wave of editorials, the same newspapers that had called for Justice Scalia to recuse himself criticized his rationale for remaining on the case, and some also condemned a recusal process that left the final decision in the hands of the very individual whose judgment was under question.<sup>216</sup>

## 2. The Handling of the Recusal Question in the *Cheney* Case Undermined the Reputation of the Judiciary

The *Cheney* case well illustrates the problems created by the lack of formal procedures governing judicial disqualification. The dispute was difficult for the parties to frame. At first, the Sierra Club could not have raised the recusal issue because it was unaware of the trip. Justice Scalia was not required by law to inform the parties about his social relations with a litigant in a case before him. Thus, without the benefit of sharp-eyed journalists, the Sierra Club would never have learned that a Justice had recently vacationed with its opponent.

Even after the Sierra Club formally filed its motion, there was no adversarial presentation of the dispute. The government did not weigh in on the question whether Justice Scalia should sit on the case. The only "adversary" was Justice Scalia. Although not required to do so, Justice Scalia eventually did respond at length, revealing the facts and circumstances of the trip that had hitherto been known only to him and the others on the trip. He also attempted to frame the dispute in terms of the law governing judicial recusals, although he admitted that precedent was sparse.<sup>217</sup> But although Scalia provided an opposing view, he did not do

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crosoft Corp. v. United States, 530 U.S. 1301, 1301 (2000).

216. See, e.g., Paul Campos, Editorial, *Scalia Ducking the Issue*, ROCKY MTN. NEWS, Mar. 30, 2004, at 31A (criticizing Justice Scalia for turning the "reasonable observer" test "into what might be called the 'I'm a reasonable observer, and I didn't observe anything that makes me question my impartiality' test"); Editorial, *New Rules Needed on When Justices Should Step Aside*, DET. NEWS, Mar. 29, 2004, at 10A (urging the Court to adopt a new rule requiring the whole Court to determine whether a justice should step aside because the current practice is "eroding public confidence in the court").

A smaller number of editorialists defended Scalia's decision to remain on the case. See, e.g., Ronald D. Rotunda, Commentary, *Duck Hunting Benchmarks*, WASH. TIMES, Mar. 28, 2004, at B4.

217. *Cheney v. United States Dist. Ct. for D.C.*, 541 U.S. 913, 924 (2004).

so as part of the adversarial process but rather in his role as final decisionmaker.

As a result of this procedural vacuum, the question of whether Justice Scalia should recuse himself from the *Cheney* case entered the public discourse in a manner that undermined the public's faith in the judiciary. Because news of the Scalia-Cheney trip was first publicly "broken" by a journalist, rather than revealed by the Justice himself, it created a perception that the Justice had something to hide—even though, as Justice Scalia later made clear, he did not perceive the trip as inappropriate in any way. Moreover, details about the trip continued to leak slowly, rather than being fully disclosed at once, which generated a series of news stories that kept the issue in the public eye and heightened the perception that the trip had been improper. For example, shortly before the story was reported, Justice Scalia confirmed by letter with an *L.A. Times* reporter that he had gone on the trip with Vice President Cheney. But Scalia did not disclose that he had traveled with the Vice President on Air Force Two, which became the subject of a second front-page story once the press learned of it from other sources.

The press is certainly capable of generating controversy where none exists, and a Justice cannot be expected to anticipate and deflate every negative news story about his or her activities. Nevertheless, that Justice Scalia and members of his family traveled with Vice President Cheney on a government plane was newsworthy; it strongly suggested that they saved themselves the price of the trip, which would not only be grounds for recusal but would also potentially violate the Ethics Reform Act of 1989.<sup>218</sup> Therefore, the revelation about Justice Scalia's travel arrangements could reasonably be expected to generate a follow-up story. Yet it was a detail that could just as easily have been revealed up front by Justice Scalia at the same time that he confirmed taking the trip.

Moreover, as Justice Scalia eventually disclosed in his memorandum, neither he nor his relatives "saved a cent" by traveling with the Vice President because they had all purchased round-trip airline tickets for the return trip home.<sup>219</sup> Because this is the kind of information that only Justice Scalia could know, and because the information is directly relevant to the question whether Justice Scalia could properly sit on the case, it should have been revealed as soon as the trip itself became public. Immediate disclosure of the information might have prevented pub-

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218. 5 U.S.C. § 7353 (1996) (prohibiting gifts to, among others, federal judges from any person "seeking official action from, doing business with, . . . or whose interest may be substantially affected by the performance or nonperformance of the individual's official duties").

219. *Cheney*, 541 U.S. at 921.

lication of some of the news stories and editorials that tarnished Justice Scalia's reputation, and, by extension, the Court's.

Because of the absence of formal procedures for filing recusal motions, the public debate about whether Justice Scalia should recuse himself dragged on for two months. The Sierra Club did not file a motion seeking his disqualification until five weeks after the story first broke. Section 455 contains no procedures for filing such a motion, and thus it provides no time limit that would have forced the Sierra Club to act earlier. The Sierra Club had good reason to wait. The more editorials, cartoons, and jokes on late-night talk shows, the stronger its argument that Justice Scalia's impartiality might "reasonably be questioned." Ironically, § 455's lack of procedural requirements, coupled with the objective standard for recusal that takes account of public appearances, actually encourages parties to wait to seek recusal until the press has repeatedly reported on, and criticized, a Justice for sitting on a case—leading to the negative public perception of the judiciary that the law was designed to prevent.

Finally, because the process was not an adversarial one, no one gave the press or the public the other side of the story or defended the propriety of taking such a trip. Instead, for two months the public heard only one version of the story: Justice Scalia took a vacation with Vice President Cheney, at government expense, shortly after the Court agreed to hear Cheney's case, which many thought created at least the appearance that Justice Scalia could not be impartial.

Eventually, Justice Scalia spoke up in his own defense. In his memorandum decision, Scalia asserted heretofore unknown facts about the trip to rebut the arguments of his sharpest critics. Most relevant were the following: (1) Scalia's invitation to Cheney to join him on a duck-hunting trip, and Cheney's acceptance, came before the petition for certiorari was filed in the *Cheney* case;<sup>220</sup> (2) Scalia and his family members did not save any money as a result of traveling with the Vice President because they all bought round-trip plane tickets;<sup>221</sup> (3) the trip was attended by thirteen hunters as well as various staff and, of course, security for the Vice President, and thus was not, in Scalia's view, an "intimate setting";<sup>222</sup> (4) Scalia "never hunted in the same blind with the Vice

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220. *Id.* at 914.

221. *Id.* at 912–13.

222. *Id.* at 915.

President” and was never alone with him at any time during the trip,<sup>223</sup> and (5) Scalia and Cheney did not discuss the case.<sup>224</sup>

Justice Scalia then complained that many of the newspaper editorials calling for his recusal had their facts wrong.<sup>225</sup> He pointed out that some of the editorialists exaggerated the length of the trip, misidentified who paid for the travel and who was the guest of whom, and, most importantly, suggested that he had been alone with the Vice President during the trip and had an opportunity to discuss the case with him.<sup>226</sup>

Although some of these inaccuracies are indeed significant (one wonders just who was editing these editors), Justice Scalia could have prevented them from ever being put into print if he had simply disclosed the relevant facts himself. Significantly, Justice Scalia did not deny that certain details about the trip were relevant to the question whether he should have recused himself, and thus were proper topics to be shared with the public. To the contrary, in defending his decision not to recuse himself, he repeatedly asserted that he was never alone with the Vice President and never had the opportunity to discuss the case with him.<sup>227</sup> Yet he, along with the Vice President, chose to remain silent about these significant details of the trip even as they were being inaccurately reported in the media.

Justice Scalia began the memorandum by stating that “[t]he decision whether a judge’s impartiality can ‘reasonably be questioned’ is to be made in light of the facts as they existed, and not as they were surmised or reported.”<sup>228</sup> But that is arguable. On the one hand, the media’s ignorance of the facts should not force recusal where it is unjustified. But on the other hand, the facts as “reported” are the ones that the public first read. They shape the public’s impressions of the propriety of a Justice’s actions and ultimate decision to sit on a case. If appearances matter—and the recusal laws say they do—then the public’s perception of the facts, even an inaccurate perception, can damage the judiciary’s reputation in the very ways that the recusal laws intended to prevent. Accordingly, to protect the judiciary’s reputation from harm, judges should take some responsibility to ensure that the facts are accurately presented to the public from the beginning.

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223. *Id.*

224. *Id.*

225. *Id.* at 923.

226. *Id.*

227. *Id.* at 913, 923 (stating that his impartiality could not “reasonably be questioned” where he “never hunted with [Cheney] in the same blind or had other opportunity for private conversation”).

228. *Id.* at 914.

In his memorandum decision, Justice Scalia noted that the Sierra Club was “unable to summon forth a single example of a Justice’s recusal (or even motion for a Justice’s recusal) under circumstances similar to those here.”<sup>229</sup> The absence of precedents supporting recusal can be partly explained by the fact that judges and Justices usually do not give reasons for their recusals. Supreme Court Justices have recused themselves in 500 cases during the last five years, but only very rarely have they given the public any inkling as to why.<sup>230</sup> Perhaps some of those recusals were because the Justice had a personal relationship with a litigant or lawyer, and thus would have served as precedent for Scalia’s recusal from the *Cheney* case. There is simply no way to know. And the dearth of motions to recuse may also be explained by the many procedural and psychological hurdles that discourage litigants from seeking recusal in the first place.<sup>231</sup>

The memorandum did not put the matter to rest, in part because Justice Scalia was the sole judge of his own partiality. Several editorials criticized the Supreme Court’s system of allowing the challenged justice to decide whether to recuse him or herself and called on the Court to change its rules so that all nine Justices will have to decide such questions in the future.<sup>232</sup>

Exacerbating the problem was the defensive and sarcastic tone of the memorandum,<sup>233</sup> which read more like an opposing brief than a legal decision. Justice Scalia appeared to be pained by the press coverage of the trip, noting that he had received “a good deal of embarrassing criticism and adverse publicity” about the matter.<sup>234</sup> He commented somewhat bitterly that, as the Sierra Club has “cruelly but accurately” pointed out, he had become “fodder for late-night comedians.”<sup>235</sup> At different points throughout the memorandum he acknowledged being aware of which newspapers had criticized him, and, in what appeared to be retribution, he very specifically stated which papers reported which facts incor-

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229. *Id.* at 924.

230. *See, e.g.*, Mauro, *supra* note 93.

231. *See* discussion *supra* Part II.B.

232. *See, e.g.*, Campos, *supra* note 216; Editorial, *New Rules*, *supra* note 216 (urging the Court to adopt a new rule requiring the whole Court to determine whether a Justice should step aside because the current practice is “eroding public confidence in the court”).

233. *See, e.g.*, Opinion, *Scalia’s Blind Justice*, INT’L HERALD TRIB., Mar. 23, 2004, at 6 (describing the memorandum as “angry,” “defensive,” and “sarcastic”).

234. *Cheney*, 541 U.S. at 929.

235. *Id.* Justice Scalia’s comment about the Sierra Club’s “cruelty” may have been a joke, if a bit of a wry one. My point here is that, whatever Justice Scalia’s actual mental state, the memorandum created the impression that he was angry and defensive.

rectly.<sup>236</sup> In short, the memorandum is the product of a man who unquestionably has a personal stake in the matter and appears angry and defensive.<sup>237</sup>

Justice Scalia is known for his acerbic opinion writing, and thus this decision might not be so far from the tone he would take in a dissent. But he was oblivious to the impression that such vituperative rhetoric creates when employed in defense of his ability to be detached, neutral, and impartial.

#### V. INCORPORATING TRADITIONAL FORMS OF ADJUDICATION INTO THE LAW OF JUDICIAL DISQUALIFICATION

A primary goal of judicial disqualification is to promote the appearance of justice and the reputation of the judiciary. Thus, it is ironic that the disqualification process has strayed so far from the traditional forms of adjudication that Legal Process theorists, among others, have concluded are essential to maintaining the public's faith in the decisions of unelected judges.

In this Part, I suggest ways in which the core characteristics of adjudication discussed in Part III can be incorporated into the law of recusal.<sup>238</sup> As I do so, I try to balance the need for procedures that guarantee both the appearance and reality that each presiding judge is an impartial decisionmaker against concerns for maintaining a speedy and efficient justice system—qualities that are also necessary to maintain the judiciary's reputation. In addition, I acknowledge the potential for judge shopping, and so reject certain procedures that are likely to be abused. Finally, putting theory into practice, I describe how the suggested reforms would have changed the way in which the recusal question was disclosed and resolved in the *Cheney* case.

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236. *Id.* at 923–24.

237. For example, Justice Scalia stated that he thought counsel for Sierra Club was being hypocritical. Scalia explained that two days before the brief in opposition to the petition in the case was filed, counsel for the Sierra Club wrote to Justice Scalia inviting him to come to speak to one of his Stanford Law School classes the following year. Scalia then pointed out that “[j]udges teaching classes at law schools normally have their transportation and expenses paid.” *Id.* at 928. In describing this incident, Scalia attempted to equate the invitation to lecture at Stanford—a business trip to be paid for by Stanford in return for the benefits Stanford students would gain from his visit—with a vacation with a litigant that was paid for by that litigant.

238. I do not specify whether these reforms should come from Congress or the courts themselves because I do not think the source of the obligation is significant.

*A. Proposals for Reform*

## 1. Enable Litigants to Frame the Recusal Question

The recusal laws should be amended to provide a straightforward means by which litigants can seek judicial disqualification. Section 455 is intended to be self-enforcing, meaning that the recusal issue is supposed to be raised first by the judge and not the parties. Although it is now well established that litigants can file motions to disqualify under § 455, the absence of procedural guidelines for making such a motion compounds the awkwardness any litigant encounters in taking that step. Accordingly, § 455 should be amended to provide that the parties have a right to seek a judge's recusal by motion filed within an appropriate amount of time after obtaining information that suggests that the judge could not be impartial or that his impartiality might "reasonably be questioned."<sup>239</sup> By providing an officially sanctioned method to seek judicial disqualification, the law would normalize disqualification and make it psychologically easier for lawyers and parties to contemplate asking for it.

In addition, § 455 should be amended to include a mandatory disclosure provision that would require judges to inform the parties of any financial interests in the case, personal relationships with litigants or their lawyers, or knowledge of the facts of the specific case before them that the judge might have. The disclosure should be required even when a judge does not think that the information establishes grounds for her recusal.<sup>240</sup>

The Ethics in Government Act already requires federal judges, along with members of Congress and senior executive branch officials, to file financial disclosure reports,<sup>241</sup> but those disclosures come too infrequently to be of much use to litigants in pending cases. Disclosures are made only on an annual basis, meaning that a trip taken with a litigant

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239. Of course, § 455 should still provide that the judge is free to recuse herself on her own motion.

240. Although not required by federal statute, such disclosure is already encouraged by the commentary to the ABA Model Code of Judicial Conduct, which states that 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." MODEL CODE OF JUD. CONDUCT, Canon 2.12, cmt. 2J (Draft May 2004). The Model Code is not binding, however, and judges frequently have not disclosed facts that they did not think justified their recusal. Indeed, Justice Scalia did not feel obligated to disclose his duck hunting trip with Vice President Cheney, and he commented on the trip only after it was reported in newspapers.

241. Ethics in Government Act of 1978, 5 U.S.C. app. 4, §§ 101-111 (1996).

might not be revealed for months or even a year. Moreover, anyone wishing to obtain a copy of these reports must send a written request to the Administrative Office of the Courts, which takes an average of ninety days to respond to requests. In addition, the judge who is the target of the request will be informed of the requester's identity. As a result, only seventy-six members of the public requested these disclosure reports in 2002.<sup>242</sup> Lawyers and litigants explain that they hesitate to request such information knowing that their identities will be revealed to the judge whom they are investigating.<sup>243</sup> The proposal discussed here takes this disclosure requirement significantly further by requiring the judge to provide directly to litigants in pending cases any information that might be considered to have an impact on the judge's partiality.

Understandably, judges might object to mandatory disclosure of the intimate details of their social lives. Loss of privacy is indeed a significant price to pay, but it is one that most political figures willingly accept in return for their positions of authority and public trust. Judges have no more right to total privacy in their personal lives than any other public servant.<sup>244</sup> And it is important to remember that even under a mandatory disclosure regime, judges will not be obligated to report all details of their private lives; they will only be required to disclose to the parties in cases before them significant extrajudicial contacts with the lawyers or parties involved in pending litigation.

## 2. Provide for an Impartial Decisionmaker

The judge who is the subject of a disqualification motion should not be placed in the untenable position of deciding that motion. As a Federal Judicial Center report observed, a "judge wishing to remove any doubt about his or her objectivity may be tempted to have another judge decide the recusal question."<sup>245</sup> Nothing in the law would prevent that. The First Circuit recently commented that "a trial judge faced with a section 455(a) recusal motion may, in her discretion, leave the motion to a dif-

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242. Joe Stephens, *U.S. Judges Getting Disclosure Data Deleted*, WASH. POST, Aug. 5, 2004, at A4.

243. *Id.* Moreover, judges may request redaction of some or all of the material from their financial disclosure forms on the ground that disclosure would endanger them or their families. Members of Congress and the executive branch do not have this option. It appears that a significant number of judges have made use of this redaction procedure, and most of their requests are granted. *Id.* Judges made 661 requests to redact information from financial disclosure reports between 1999 and 2002; nearly ninety percent of those requests were granted. *Id.*

244. See Freedom of Information Act, 5 U.S.C. § 552(b)(6) (1996) (weighing privacy interest against public interest in disclosure).

245. FEDERAL JUDICIAL CENTER, *supra* note 82, at 44.

ferent judge.”<sup>246</sup> Yet the court went on to observe that “no reported case or accepted principle of law compels [the judge] to do so . . . .”<sup>247</sup> Currently, “the norm” is for “the challenged judge to rule on a recusal motion.”<sup>248</sup>

That practice is unfortunate, and the laws governing judicial disqualification should require that motions to disqualify go to a disinterested judge unless the judge who is the target of the motion agrees to recuse himself.<sup>249</sup> At the trial court level, this would mean simply referring the motion to another district court judge. At the appellate level, the motion could be decided by a motions panel made up of three other members of that circuit court. And in the United States Supreme Court, the motion should be decided by the other eight Justices.

Providing for an impartial decisionmaker on the question of recusal serves both to prevent actual injustice and the appearance of injustice. Ensuring that the decision is made by a neutral decisionmaker would protect the integrity of the challenged judge and the judiciary as a whole in those cases where disqualification is not justified.<sup>250</sup> Even more so, referral to a neutral judge would protect the judiciary’s reputation and the parties from harm in those rare cases where a judge is so biased in favor of one party that, if the decision were his alone, he would choose to remain on the case even when he clearly cannot be impartial.

Transfer is particularly important in cases where the challenged judge needs to defend or explain her conduct. As discussed below, the

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246. *In re United States*, 158 F.3d 26, 34 (1st Cir. 1998) (citations omitted); *accord United States v. Heldt*, 668 F.2d 1238, 1271–72 (D.C. Cir. 1981) (same).

247. *United States*, 158 F.3d at 34.

248. FEDERAL JUDICIAL CENTER, *supra* note 82, at 44; *see, e.g.*, *Schurz Communications, Inc. v. FCC*, 982 F.2d 1057, 1059 (7th Cir. 1992); *Chitimacha Tribe of La. v. Harry L. Laws Co., Inc.*, 690 F.2d 1157, 1162 (5th Cir. 1982); *Heldt*, 668 F.2d at 1271 (D.C. Cir. 1981); *United States v. Azhocar*, 581 F.2d 735, 737–38 (9th Cir. 1978).

249. In 1961, the Judicial Conference of the United States passed a recommendation that motions under § 144 be transferred to a different judge to rule on the sufficiency of the affidavit. Judicial Conf. of the United States Ann. Rep. 68–69 (1961). The American Law Institute recently approved Principles Governing Transnational Civil Procedure. Rule 10, which was appended to the rules though not formally adopted by the ALI, concerns the impartiality of the decisionmaker. Rule 10.3 explicitly states that a judge should not be responsible for deciding his or her impartiality: “A challenge of a judge must be heard and determined either by a judge other than the one so challenged or, if by the challenged judge, under procedures affording immediate appellate review or reconsideration by another judge.”

250. A few courts and commentators have expressed the view that transfer of a disqualification motion to a neutral decisionmaker would better serve the goal of the statute to promote public confidence in the judicial process. *See Hawaii-Pac. Venture Capital Corp. v. Rothbard*, 437 F. Supp. 230, 236 (D. Haw. 1977) (suggesting transfer when the judge thinks “that by [transferring the motion] he might better assist in the promotion of public confidence in the impartiality of the judicial process”); Litteneker, *supra* note 5, at 265–67 (advocating “transfer in all cases except where the danger of delay and disruption is substantial”).

challenged judge should be given an opportunity to refute the challenger's allegations or otherwise explain and justify her conduct.<sup>251</sup> Yet once a judge is in the position of defending herself against a claim of bias, she cannot fairly serve as the ultimate decisionmaker on the question of whether her explanation is sufficient to justify remaining on the case.<sup>252</sup>

Some courts have criticized the idea of transferring recusal motions to another judge on the grounds that it would be disruptive, and have expressed the fear that counsel might use such motions strategically to delay proceedings.<sup>253</sup> However, transfer to an impartial judge should not cause significant delay; any judge addressing the motion would have to read the motion papers and issue a final decision on the matter.<sup>254</sup> Although the challenged judge would be more familiar with the facts suggesting bias or interest than an impartial judge,<sup>255</sup> this familiarity is the *very reason* why the challenged judge should not be permitted to issue the final ruling on the motion. Moreover, as one commentator has noted, even if the transferee judge is slower to issue a ruling, a challenger would be less likely to appeal a decision not to recuse issued by an impartial judge, resulting in an overall speeding-up of the recusal process.<sup>256</sup>

A more significant problem with this proposal is that judges might not be any more willing to disqualify their colleagues than they are to recuse themselves.<sup>257</sup> Judges might find it difficult to grant a motion to

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251. See discussion *infra* Part V.A.3.

252. See *Commonwealth v. Cherpes*, 520 A.2d 439, 446–47 (1987) (relying on previous court holdings that a trial judge should recuse if he feels it necessary to explain his conduct).

253. See *In re Swift*, 126 B.R. 725, 728 (Bankr. W.D. Tex. 1991) (“The law is well-settled that the judge whose recusal is sought is ordinarily the judge who rules on the motion, lest such motions be used as tools of delay . . .”); FLAMM, *supra* note 9, § 17.5.2, at 517–20 (discussing arguments in favor of allowing a challenged judge to rule on the motion).

254. Certainly, if the motion is granted then proceedings might be delayed while a new judge gets up to speed with the facts and background of the case. The disruption that would arise from switching judges is a reason to require that motions to recuse be filed immediately after a party learns of facts that would justify disqualification, but it is not grounds for preventing a neutral judge from making the decision in the first instance.

255. See FLAMM, *supra* note 9, § 17.5.2, at 518 (noting that some courts have argued that the challenged judge should decide a recusal motion because that judge is most familiar with his own conduct).

256. Bloom, *supra* note 21, at 697.

257. In a survey of state court judges, the judges responded that they would be more likely to disqualify themselves than recommend a colleague be disqualified under similar circumstances. JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, *JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 1* (1995). However, the result of a survey posing a hypothetical recusal situation might not be the best proxy of whether judges are actually willing to recuse themselves when they have a potential conflict and are asked to do so by one of the litigants. In fact, the authors of the survey themselves noted that judges reported high levels of ambivalence about when to recuse themselves, and recommended that “serious consideration should be given to the

disqualify, fearing it would offend a fellow judge.<sup>258</sup> Although legitimate, this concern does not outweigh the benefits of transferring the recusal decision away from the interested judge. First, transfer would put an end to the worst cases, in which judges insist on presiding even when they have an obvious conflict of interest, because even the most respectful of colleagues would have to remove a fellow judge under such circumstances. Second, even if judges are just as reluctant to remove colleagues as they are to remove themselves from cases, the simple fact that a neutral judge is deciding the issue would create a better public impression than permitting the potentially conflicted judge to decide his own fate. Thus, the appearance of justice will be better served, even if the actual rate of recusal remains unchanged.

In any case, experience shows that judges are willing to risk offending one another when obligated to pass judgment in the course of fulfilling their judicial duties. Judges regularly take public positions opposing each other's views. When judges sit on panels, one judge will often write an opinion that conflicts with the decision of the others. Appellate judges frequently reverse lower courts, and en banc courts often reverse their own colleagues. Judges have grown accustomed to these sorts of judicial disagreements, and it is reasonable to think that the same professionalism would allow judges to take on the task of deciding recusal motions without fear of offending one another.<sup>259</sup>

Admittedly, disagreements over the merits of a case are not as personal, or as sensitive, as requiring a colleague to remove himself from a case over his objection. But these types of decisions do show that judges take opposing positions as a regular part of their job and suggest that judges would also be capable of making the hard choice to require a colleague's recusal were that required of them. Indeed, appellate courts occasionally order the disqualification of district court judges, even under the current deferential standard of review. For example, a panel of D.C.

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issue of whether to adopt a rule allowing or requiring another judge to pass on disqualification motions . . . ." *Id.* at 2.

258. *Cf. Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 n.12 (1988) (commenting that judges may find it "difficult" to "pass[] upon the integrity of a fellow member of the bench").

259. Proof that judges have the stomach for such tasks can be found in their impressive record under the Judicial Conduct and Disability Act. 28 U.S.C. § 372(c) (1996). Studies conducted on behalf of the National Commission on Judicial Discipline and Removal concluded that chief judges take the complaint process seriously and reach the right result in the great majority of cases. *See* Richard L. Marcus, *Who Should Regulate Federal Judges, and How?*, 149 F.R.D. 375, 377 (1993) (stating that "[a]lthough there are individual cases that cause uneasiness, by and large the results look appropriate"); Barr & Willging, *supra* note 180, at 51 (stating the results of chief judges' review of complaints).

Circuit judges required a district court judge to disqualify himself from the highly publicized Microsoft case—a decision that was undoubtedly made even harder by the fact that all the judges involved work in the same courthouse in Washington, D.C.<sup>260</sup> The key is to make the question of whether to disqualify a colleague obligatory and standard—part of the normal judicial routine—rather than the unusual and ad hoc decision it is today.<sup>261</sup>

Some commentators have suggested going further than transferring just the recusal motion, and have advocated instead for a system of peremptory disqualification.<sup>262</sup> Under these proposals, the entire case would automatically be transferred to a new judge upon the claim that the assigned judge is not impartial, without requiring the challenger to prove these allegations. Each party would be given just one opportunity to challenge a judge for interest or bias. Advocates of peremptory disqualification argue that this system ensures that the litigant has an impartial judge and avoids the problem of judges being asked to decide their own partiality.<sup>263</sup>

Peremptory disqualification is less efficient, however, and is more prone to abuse than are automatic transfers of just the recusal motion to an impartial judge. Peremptory disqualification slows down the litigation because a new judge will have to become familiar with the case. It can also serve as a method of judge-shopping, and may be used by litigants to remove judges whose judicial philosophies are hostile to the litigants' claim. Finally, automatic transfer does not permit a judge to refute the allegations of bias, and thus may create the public impression that more judges are biased, or have conflicts of interest, than is actually the case.<sup>264</sup> In short, peremptory disqualification might injure the reputation of the judiciary, thereby undermining the goals of recusal.

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260. *United States v. Microsoft Corp.*, 253 F.3d 34, 116 (D.C. Cir. 2001).

261. Although it would clearly be awkward for eight Justices to decide whether the ninth should be forced to step aside, it is also unseemly for the eight Justices to, in essence, recuse themselves from deciding whether their colleague is permitted to sit on a case, necessitating that this question of law be decided by the one Justice with a personal stake in the matter.

262. See, e.g., Roger M. Baron, *A Proposal for the Use of a Judicial Peremptory Challenge System in Texas*, 40 BAYLOR L. REV. 49, 58 (1988); Helena Kempner Kobrin, Comment, *Disqualification of Federal District Judges—Problems and Proposals*, 7 SETON HALL L. REV. 612, 633 (1976). Several states have enacted peremptory disqualification statutes. See, e.g., ALASKA STAT. § 22.20.022 (Michie 2004); CAL. CIV. PROC. CODE § 170.6 (Supp. 2005).

263. See, e.g., Baron, *supra* note 262; Kobrin, *supra* note 262.

264. FLAMM, *supra* note 9, §§ 3.4–3.5, at 62–66.

### 3. Encourage the Challenged Judge to Respond to a Motion to Disqualify

In conjunction with the requirement that a recusal motion be transferred to an impartial judge, § 455 should be amended to provide that the challenged judge be encouraged to file evidence refuting facts asserted in the recusal motion, and perhaps also an explanation of why disqualification is not justified. As described above, most motions to disqualify are filed by one party and are not responded to by the other, depriving the judge of the benefit of an adversarial presentation of the issue. The challenged judge is the most natural party to respond to a motion to disqualify. He will be familiar with the facts cited by the moving party and is best able to put those facts in context for the decisionmaker. Indeed, the judge will likely do a far better job of responding to the motion than the other litigants, who may not have any knowledge of the circumstances that inspired the motion in the first place.

In the past, a handful of judges have responded to disqualification motions by including in the record refutation of the evidence against them. In *McGuire v. Blount*,<sup>265</sup> for example, the plaintiffs filed a motion asking the judge to recuse himself on the ground that the judge's wife had acquired an interest in the property that was the very subject of the litigation. The plaintiffs did not provide a sworn affidavit or any other evidence to support this claim. The judge denied the motion, stating that his wife had no interest in the property. But he noted for the record that she had been offered the deed to the property, which she had declined to accept. The judge then took the precaution of placing in the file an affidavit of a real estate agent attesting to these facts.<sup>266</sup> The Supreme Court cited approvingly to the judge's inclusion of an affidavit supporting his version of the events, noted there was no evidence to refute it, and refused to require that the judge recuse himself.<sup>267</sup>

More recently, in *United States v. Morrison*,<sup>268</sup> the Second Circuit reviewed the district court judge's refusal to recuse herself after investigating the facts underlying a recusal motion. The defendant sought to disqualify the district court judge based on an alleged adverse business relationship between the defendant, the judge's husband, and a friend of the judge's. The judge asked her husband and the friend to review the

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265. 199 U.S. 142 (1905).

266. *Id.* at 143.

267. *Id.* at 143-44.

268. 153 F.3d 34 (2d Cir. 1998).

materials submitted with the defendant's motion. They both responded that the allegations were false and denied any relationship with the defendant. The judge then declined to recuse herself. Reviewing the procedure, the Second Circuit stated "it was not irregular for [the judge] to ascertain her husband's and friend's possible involvement with the defendant simply by asking them, in a reasonable effort to confirm that [defendant's] incredible claims were indeed not factual."<sup>269</sup>

Thus, although judges typically do not provide evidence to refute a motion to disqualify, reviewing courts have commented favorably on the practice in the rare cases when they have done so. Responses by the challenged judge might become more common if recusal motions were routinely referred to neutral judges, which would then free the challenged judge to defend her conduct with the knowledge that a neutral third party would ultimately decide the matter.

#### 4. Require Judges to Give Reasoned Explanations for Recusal Decisions

Too often, judges recuse themselves without any explanation of why they are choosing to do so. Judges might feel that it is unnecessary to announce their reasons for voluntarily bowing out, and the parties in those cases usually have no interest, and certainly have no right, to insist that the judge explain herself. In contrast, judges who refuse to recuse themselves are much more likely to publish an opinion explaining why. Thus, the body of law supporting the decision to remain on a case in the face of a potential conflict outweighs the minimal precedent explaining when a judge should step aside.

To alleviate this problem, judges should give reasons for deciding to remove themselves (or, if the motion is transferred to a new judge, that judge should articulate the basis for his decision). The explanations need not be long or detailed, particularly in straightforward cases. These decisions will fill the void left by silent recusals, especially in cases where a judge decides to step down merely because his impartiality might "reasonably be questioned," and not because that judge thinks he is biased or incapable of acting as a neutral decisionmaker. Decisions articulating grounds for recusal will provide a body of precedent to guide judges facing such decisions in the future.<sup>270</sup> If nothing else, a judge considering

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269. *Id.* at 48 n.4.

270. *Cf.* Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 99 (1995) (suggesting that district courts should publish their review of magistrate judges' pretrial management decisions to provide further guidance for the

disqualification will get a clearer sense of how often his colleagues have made the choice to step aside (or to require a colleague to step aside), making it psychologically easier for a judge to take the same course of action.

*B. Putting Theory Into Practice: The Effect of the Proposed Reforms on the Cheney Case*

Applying these suggested reforms to the *Cheney* case demonstrates that, if the traditional elements of adjudication were incorporated into recusal law, those laws would better serve the purpose of protecting the reputation of the judiciary.

Under the proposals discussed above, Justice Scalia would have been obligated to disclose the fact that he took the trip with Cheney before the press reported it. If the information had initially come from the Justice himself, rather than the media, it might have softened the public impression of the incident. Rather than a piece of investigative journalism, the story would have been billed as a routine public disclosure by a Justice. Although still newsworthy, the information would have been less likely to convey the impression of impropriety than articles trumpeting a heretofore “secret” vacation between a litigant and a Justice.

Furthermore, immediate and full disclosure of important details of the trip—such as the timing of the invitation and its acceptance, the number of guests who attended, and the travel arrangements—would have given the public a more complete picture of the trip and might have forestalled some of the criticism. Justice Scalia could have made clear from the outset that he and his family members did not benefit financially from flying on Air Force Two—an important fact needed to counter the reasonable assumption that they saved themselves the cost of a flight by traveling with the Vice President. He could also have clarified for the parties and the press that he was never alone with Cheney during the trip, which would have prevented editorialists from speculating that he had hours of private time with the Vice President in which to discuss the case.<sup>271</sup>

This type of information is relevant to the question of whether a Justice should recuse him or herself after vacationing with a litigant, and thus is properly subject to a public disclosure requirement. Justice Scalia implicitly acknowledged as much when he discussed these details in his

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exercise of pretrial authority).

271. *Cheney v. U.S. Dist. Ct.*, 541 U.S. 913 (2004).

defense of the propriety of the trip.<sup>272</sup> The reputation of the judiciary would have been better protected had this information been disclosed up front, before the press reported on the matter and certainly before the Sierra Club sought his removal from the case. Indeed, if Justice Scalia had disclosed that information in advance, it is possible that the Sierra Club would never have sought his removal from the case.

In his memorandum decision, Justice Scalia staunchly defended what he described as the “well-known and constant practice of Justices’ enjoying friendship and social intercourse with Members of Congress and officers of the Executive Branch.”<sup>273</sup> The disclosure requirement proposed in this Article may serve to discourage such social contact. A judge might think twice before socializing with a litigant if she realizes she will have to disclose the details of that event to the parties, and some judges might choose to curtail such socialization with litigants whose cases are pending before them. But those who, like Justice Scalia, feel strongly that they should be permitted to engage in such social contact would be free to do so under this Article’s proposal as long as they fully disclosed the information about any social engagements with litigants in pending cases.

The goal of promoting the appearance of justice would also have been better served if the other eight Justices had decided whether Justice Scalia should sit on the case, rather than leaving the decision to Justice Scalia himself. No matter how reasonable, well written, and persuasive his memorandum decision might be, it is tainted because the author had a personal stake in the matter. There is something odd about a Supreme Court pronouncement on a question of law that so prominently features the pronoun “I.” The memorandum decision is argumentative, personal, and a little defensive. It reads more like an opposing motion filed by a party than an opinion by a neutral decisionmaker.<sup>274</sup> In short, the very authority of the decision is undermined by the fact that its author is seeking to justify his own conduct.

Had the other eight Justices addressed the question of whether Justice Scalia should recuse himself, the decision would undoubtedly have been better received because it would have reflected the views of a majority of the Court and not a single, self-interested Justice. Even if the

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272. *Id.* at 915–22. The less extensive the social interaction, the less relevant information there would be to disclose. So, for example, a Justice who attended the Vice President’s Christmas reception at the time the case was pending would not need to describe travel arrangements or the number of other attendees.

273. *Id.* at 926.

274. See *supra* notes 233–237 and accompanying text.

whole Court had agreed with Scalia that he need not recuse himself, an opinion authored by one of the other Justices would likely have been more moderate in tone, would have taken fewer opportunities to attack Scalia's critics, and would not have made such strident statements about the need to ensure that judges are free to socialize with other high ranking members of government. Both symbolically and substantively, the final decision about whether Scalia should be disqualified would have been improved had it come from the full Court, and would have better served the goal of protecting the Court's reputation. For these same reasons, all recusal decisions would benefit from the procedural reforms suggested in this Article.

#### IV. CONCLUSION

As is clear from the long history of controversy surrounding judicial recusal, including the recent attention given to Justice Scalia's refusal to recuse himself from the *Cheney* case, the law of judicial disqualification has failed to protect the integrity of the judiciary. Almost every commentator discussing problems with the disqualification laws has recommended expanding the grounds for judicial recusals.<sup>275</sup> But the history of judicial disqualification demonstrates that alterations to the substantive standard will do little good as long as members of the judiciary are responsible for construing and applying the disqualification laws to themselves. Moreover, it would be wrong to lower the substantive standards for disqualification so far as to force judges to withdraw from cases simply because the majority of editorial writers or political pundits suggest that they do so.

The solution I propose instead is to incorporate the traditional forms of adjudication into the recusal process. The basic procedural components of litigation—party presentation of disputes to an impartial decisionmaker who issues a reasoned decision based on an identifiable body of law—have long been valued as essential to ensuring accurate results of adjudication and, most important here, maintaining the legitimacy of the judiciary. Legal Process theorists cited these practices as a defense to Legal Realists' attacks on judicial lawmaking, assuming that most of us would accept the legitimacy of decisions made in accordance with these traditional forms that cabin judicial discretion and promote the accuracy of the final result. The traditional adjudicatory model lauded by Legal

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275. See, e.g., Bassett, *supra* note 8; Frank, *supra* note 8; *The Standard*, *supra* note 8, at 763–70; *Bias in the Federal Courts*, *supra* note 8, at 1446–47; Leitch, *supra* note 8, at 527.

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Process theorists fifty years ago continues to be cited today by scholars describing the sources of legitimacy for judicial decisionmaking. Incorporating these traditional forms of adjudication into the law of judicial disqualification will do more to protect judicial integrity than any change to the substantive recusal standards can accomplish.