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Conflicts of Interest in Bush v. Gore: Did Some Justices Vote Illegally?

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ARTICLES

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On December 9, 2000, the United States Supreme Court stayed the presidential election litigation in the Florida courts and set oral argument for December 11.[1] On the morning of December 12–one day after oral argument and half a day before the Supreme Court announced its decision in *Bush v. Gore*[2]–the *Wall Street Journal* published a front-page story that included the following:

> Chief Justice William Rehnquist, 76 years old, and Justice Sandra Day O'Connor, 70, both lifelong Republicans, have at times privately talked about retiring and would prefer that a Republican appoint their successors. . . .
>
> Justice O'Connor, a cancer survivor, has privately let it be known that, after 20 years on the high court, she wants to retire to her home state of Arizona . . . .
>
> At an Election Night party at the Washington, D.C., home of Mary Ann Stoessel, widow of former Ambassador Walter Stoessel, the justice's husband, John O'Connor, mentioned to others her desire to step down, according to three witnesses. But Mr. O'Connor said his wife would be reluctant to retire if a Democrat were in the White House and would choose her replacement. Justice O'Connor declined to comment.[3]

In a story published the following day, Christopher Hitchens, the United States correspondent for the *Evening Standard* of London, wrote that "O'Connor . . . has allegedly told her friends and family that she wishes to retire from the Court but won't do so if there is to be a Democratic president to nominate her replacement."[4] Helen Thomas, a nationally syndicated columnist, wrote that

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1. Bush v. Gore, 531 U.S. 1046 (2000).

2. 531 U.S. 98 (2000).

3. Jess Bravin et al., *Supreme Interests: For Some Justices, The Bush-Gore Case Has a Personal Angle*, WALL ST. J., Dec. 12, 2000, at A1. By letter dated July 8, 2002, I invited Justice O'Connor to comment on this quotation and on the ones appearing in the text at notes 4, 5, 7, 12, and 13, *infra*, but she would not do so.

4. Christopher Hitchens, *Now There Is No Referee Left*, EVENING STANDARD (London), Dec. 13, 2000, at 13.

"[t]he story going around [Washington] is that a very upset Justice Sandra Day O'Connor walked out of a dinner party on election night when she heard the first mistaken broadcast that Vice President Al Gore had won. The ailing O'Connor apparently wants to retire, but not while a Democrat is in the White House and could pick her successor."[5] Various parts of this story were repeated in a number of publications.[6]

The following week, Newsweek published a more detailed account:

> [A]t an election-night party on Nov. 7, surrounded for the most part by friends and familiar acquaintances, [Justice O'Connor] let her guard drop for a moment when she heard the first critical returns shortly before 8 p.m. Sitting in her hostess's den, staring at a small black-and-white television set, she visibly started when CBS anchor Dan Rather called Florida for Al Gore. "This is terrible," she exclaimed. She explained to another partygoer that Gore's reported victory in Florida meant that the election was "over," since Gore had already carried two other swing states, Michigan and Illinois.
>
> Moments later, with an air of obvious disgust, she rose to get a plate of food, leaving it to her husband to explain her somewhat uncharacteristic outburst. John O'Connor said his wife was upset because they wanted to retire to Arizona, and a Gore win meant they'd have to wait another four years. O'Connor, the former Republican majority leader of the Arizona State Senate and a 1981 Ronald Reagan appointee, did not want a Democrat to name her successor. Two witnesses described this extraordinary scene to Newsweek. Responding through a spokesman at the high court, O'Connor had no comment.[7]

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5. Helen Thomas, *High Court, Not Voters, Decided Closest Election Ever*, SEATTLE POST-INTELLIGENCER, Dec. 15, 2000, at A23.

6. *See* Joan Biskupic, *Election Still Splits Court*, USA TODAY, Jan. 22, 2001, at 01A; Adam Cohen, *Can the Court Recover?*, TIME, Dec. 25, 2000, at 76; Jack Anderson & Douglas Cohn, *5 U.S. Justices Just Elected the Nation's Next President*, DESERET NEWS (Salt Lake City), Dec. 17, 2000, at AA04. The story appeared in a large number of other newspapers as well. *See also* Martin Dyckman, *A Way to Mollify Political Suspicions*, ST. PETERSBURG TIMES, Dec. 17, 2000, at 3D; Andrew J. Glass, *Bush Must Choose Quality When Nominating Justices*, MILWAUKEE JOURNAL SENTINEL, Dec. 17, 2000, at 02J; James O. Goldsborough, *But the Institution Suffers a Self-Inflicted Wound*, SAN DIEGO UNION-TRIBUNE, Dec. 14, 2000, at B-13:2, 6, 7 & B-7:1; Michael Olesker, *Bush Can't Keep Country at Arm's Length*, BALT. SUN, Dec. 14, 2000, at 1B; Jonathan Riskind, *Case May Leave Court Politically Stained*, COLUMBUS DISPATCH, Dec. 13, 2000, at 01A; Daniel Schorr, *The Supreme Fix Was In*, CHRISTIAN SCI. MONITOR, Dec. 15, 2000, at 11.

7. Evan Thomas & Michael Isikoff, *The Truth Behind the Pillars*, NEWSWEEK, Dec. 25, 2000, at 46. Although the magazine was dated December 25, the story was distributed a week earlier. Perhaps more than any other reporter, Michael Isikoff aggressively dug out raw materials that were used to impeach Bill Clinton. *See* JOE CONASON & GENE LYONS, THE HUNTING OF THE PRESIDENT: THE TEN-YEAR CAMPAIGN TO DESTROY BILL AND HILLARY CLINTON 50, 204-05, 277-79, 286, 291-92, 295, 297, 302-04, 362, 366-67 (2000); MICHAEL ISIKOFF, UNCOVERING CLINTON (1999).

This, too, was repeated in a large number of publications, both in the United States[8] and abroad.[9]

According to an article in *USA Today* five weeks after the Court decided *Bush v. Gore*, "[p]eople close to the justices confirmed much of the story, which was first reported in the *Wall Street Journal* and *Newsweek* magazine."[10] At that point, a defense tentatively circulated and then disappeared. *USA Today* added that "some people suggest that O'Connor was actually upset that the election was being called for Gore while the West Coast polls were still open."[11] This theory was not again reported in the mainstream media, perhaps because it cannot be reconciled with the comments attributed to Justice O'Connor in the *Newsweek* article or to the comments attributed in many of the articles to John O'Connor, presumably the person most qualified to attest to Justice O'Connor's intentions.

Later, in his book on the court battles that lead to *Bush v. Gore*, Jeffrey Toobin repeated the election night story and included a direct quote from John O'Connor:

> Justice O'Connor said "This is terrible," and she hastened away from the television . . . . Her husband, John, explained her reaction to the partygoers, saying, "She's very disappointed because she was hoping to retire"–that is, with a Republican president to appoint her successor.[12]

Toobin also described another incident, which occurred while the Supreme Court was adjudicating *Bush v. Gore*:

> On . . . the day of the Supreme Court's first opinion on the election, O'Connor and her husband had attended a party for about thirty people at the home of a wealthy couple named Lee and Julie Folger. When the subject of the election controversy came up, Justice O'Connor was livid. "You just don't know what those Gore people have been doing," she said. "They went into a nursing home

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8. *See, e.g., O'Connor Bemoaned News of Gore Victory*, HOUS. CHRONICLE, Dec. 18, 2000, at 10; *O'Connor Spoke up for Bush?*, SAN DIEGO UNION-TRIBUNE, Dec. 18, 2000, at A-13; Tracy Connor, *Supreme Fumed over Al's Early Fla. 'Win'*, N.Y. POST, Dec. 18, 2000, at 26; Anne Gearan, *Justice Holds Her Ground at Center of Supreme Court*, MEMPHIS COM. APPEAL, May 13, 2001, at A14; Charles Lane, *Watch Is On for Signs O'Connor Will Retire*, WASH. POST, Feb. 5, 2001, at A17; Paul Leavitt & Judy Keen, *Newsweek: Gore "Victory" Upset Justice*, USA TODAY, Dec. 18, 2000, at 11A; William Saletan, *Honest Bias at Work in All of Us*, SEATTLE POST-INTELLIGENCER, Dec. 22, 2000, at B7; Michael Willard, *Invisible Asterisk Court Designated Our Next President*, CHARLESTON GAZETTE, Jan. 8, 2001, at 5A; Dave Zweifel, *Ruling for Bush Fits Justice's Plans*, MADISON CAPITAL TIMES, Dec. 27, 2000, at 6A.

9. *See, e.g., Justice Aghast at Early Results Call, Magazine Says*, SCOTSMAN, Dec. 18, 2000, at 9; *Supreme Court Justice Showed Bias—Claim*, IRISH TIMES, Dec. 18, 2000, at 15; William Lowther, *Bush Judge in New Row over "Bias"*, DAILY MAIL (London), Dec. 19, 2000, at 6; Win McCormack, *Conservative Co-Option*, AUSTRALIAN FIN. REV., June 15, 2001, at 1.

10. Biskupic, *supra* note 6, at 01A.

11. *Id.*

12. JEFFREY TOOBIN, TOO CLOSE TO CALL: THE THIRTY-SIX DAY BATTLE TO DECIDE THE 2000 ELECTION 249 (2001). Toobin covers legal affairs for *The New Yorker* and ABC News and has written books on the Lewinsky scandal, the O.J. Simpson murder trial, and the prosecution of Oliver North.

> and registered people that they shouldn't have. It was outrageous." It was unclear where the justice had picked up this unproved accusation, which had circulated only in the more eccentric right-wing outlets, but O'Connor recounted the story with fervor.[13]

Do these reports describe conflicts of interest that would have made Justice O'Connor's vote in *Bush v. Gore* illegal? The question is not limited to Justice O'Connor. The media have also reported events and circumstances that raise conflict-of-interest issues concerning participation in *Bush v. Gore* by Chief Justice William H. Rehnquist as well as Justices Antonin Scalia and Clarence Thomas. No media reports, however, have done so with Justices Stephen G. Breyer, Ruth Bader Ginsburg, Anthony M. Kennedy, John Paul Stevens, or David H. Souter.[14]

At the time *Bush v. Gore* was decided, Chief Justice Rehnquist had often been described in the press as a person who would like to retire but would delay doing so until a Republican president was in office and in a position to nominate a successor who could be confirmed by the Senate.[15]

The press has reported several times that Justice Scalia confided in others that he would like to become the next Chief Justice and that he understood that that could happen only during a Republican presidency. During the time *Bush v. Gore* was being litigated, Justice Scalia's son John worked at the law firm that represented the Bush campaign in the Florida courts, and Justice Scalia's son Eugene was a partner at the law firm that represented the Bush campaign in the Supreme Court, although the press reported that profits from the *Bush v. Gore* litigation were deducted by the firm from Eugene Scalia's income.[16]

On December 4, 2000–while *Bush v. Gore* was pending before the Supreme Court–Virginia Lamb Thomas, Justice Thomas' wife, sent an email to 194 Congressional aides, suggesting that if they wanted assistance in being considered for positions in the next administration, they could forward their resumes to one of Mrs. Thomas' coworkers at the Heritage Foundation, a conservative think tank that collaborates with the Republican Party.[17] In addition, according to the *Wall Street Journal,* during her previous employment with a Republican leader in House of Representatives, Mrs. Thomas "spearheaded a leadership effort to

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13. *Id.* at 248-49.

14. In 2002, the press began to report that Justice Kennedy had developed an interest in being appointed chief justice. Tony Mauro, *Kennedy on Campaign Trail?*, LEGAL TIMES, Apr. 1, 2002, at 7; Jan C. Greenberg, *Speculation Builds over Chief Justice Successor*, CHI. TRIB., Feb. 17, 2002, at 1. These articles do not suggest that Justice Kennedy had that ambition at the time of *Bush v. Gore*. Moreover, these articles are speculative in that they are based entirely on guesses about Justice Kennedy's state of mind. In that way, they are unlike the articles about Justice Scalia, which claim that he has told "friends" and "associates" that he wants to become chief justice. *See* text at notes 252-60, *infra*.

15. *See infra* text at notes 212-16.

16. *See infra* text at notes 252-59 and 299-303.

17. *See infra* text at notes 150-58.

gather embarrassing information about the Clinton-Gore administration."[18] Mrs. Thomas told reporters in December 2000 that she and Justice Thomas never[19] or "rarely"[20] discuss their work lives with each other. Justice Thomas was nominated to the Supreme Court by George W. Bush's father, whose administration then fought hard to get him confirmed in one of the most divisive Supreme Court appointment controversies in history.

If the media reports concerning Chief Justice Rehnquist and Justices O'Connor, Scalia and Thomas are factually accurate, one would wonder whether statutory and constitutional recusal requirements were violated by one or more justices who formed the 5-to-4 majority in *Bush v. Gore*. This article explores the extent to which that might have happened. Part I examines the statutory and constitutional background of the judicial conflict-of-interest requirements governing federal judges. The heart of the article inquires into whether these requirements might have been violated by Justice Thomas (Part II), Chief Justice Rehnquist (Part III), Justice Scalia (Part IV), or Justice O'Connor (Part V). Part VI examines the extent to which conclusions reached earlier in the article might be affected by the quorum requirement in the Supreme Court, by the common law rule of necessity, by the principles of harmless error applicable to recusal issues, by waiver, or by timeliness requirements.

Except for matters that are unquestionably verifiable—such as the employment statuses of Justice Scalia's sons and Justice Thomas' spouse—I do *not* assume the accuracy of the press reports cited to in this article. Anyone who has ever seen a complex and subtle set of facts mangled by reporters trying to make deadlines knows to read a newspaper cautiously. But many of the accounts cited here appeared in publications—such as the *Wall Street Journal* and the *New York Times*—that are known for thoughtful reporting and careful fact-checking.

This article cannot accurately be cited for the proposition that any particular justice did or did not violate conflict-of-interest law by voting in *Bush v. Gore*. A well-equipped law library contains all of the resources needed to determine how the law treats certain facts. But determining what the facts actually *are* requires more. In the field of history, that "more" is the relentless digging of historians committed to resolving a mystery. In law, it is a forum where witnesses can be heard and cross-examined and evidence can be subpoenaed. Ultimately, the question addressed by this article is not whether any of the justices violated conflict-of-interest law by deciding *Bush v. Gore*. Instead, the ultimate question is whether it is worth investigating to find out whether the press reports are true. If the law does not treat these situations as conflicts requiring recusal, there is no point in trying to find out whether they actually existed or happened. But if the opposite is true—if the law does treat them as conflicts

18. Bravin, *supra* note 3, at A1.

19. *See infra* text at note 150.

20. *See infra* text at note 151.

requiring recusal—neither history nor law will be satisfied until we do know the factual truth.

I. THE STATUTORY AND CONSTITUTIONAL BACKGROUND

The law governing conflicts of interest among Supreme Court justices comes from two sources. One is 28 U.S.C. § 455, the federal judicial conflict of interest statute. The other is the due process clause of the Fifth Amendment, which has been interpreted to include a litigant's right to a judge who does not have a personal stake in the outcome of the lawsuit.

A. HISTORY OF FEDERAL RECUSAL STATUTES

The first federal recusal statute, enacted in 1792, applied only to district court judges and required them to recuse themselves from lawsuits where they have been "concerned in interest" (their interests would be affected by the outcome of the lawsuit) or where they have been "counsel for either party."[21] Additional grounds for recusal were added in 1821,[22] 1891,[23] 1911,[24] and 1948.[25]

In the early 1970s, there were three federal recusal statutes, and taken together their recusal rules were primitive. One, still in effect today at § 47 of title 28, forbids a judge to "hear or determine an appeal from the decision of a case or issue tried by him."[26] A second, § 144 of title 28, is also still in effect today but does not govern Supreme Court justices.[27] The third, a now-superseded version of § 455 of title 28, required recusal only from cases where the judge "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" adjudicate the case.[28]

In 1969, the Senate rejected the nomination of Judge Clement Haynsworth of the Fourth Circuit for a seat on the Supreme Court because he had not recused himself in two cases where most Senators believed he had undisclosed conflicts of interest.[29] The then-current ABA *Canons of Judicial Ethics* treated them as

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21. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278-79.
22. Act of Mar. 3, 1821, ch. 51, 3 Stat. 643.
23. Act of Mar. 3, 1891, ch. 517, § 3, 26 Stat. 827.
24. Act of Mar. 3, 1911, ch. 231, §§ 20-21, 36 Stat. 1090.
25. Act of June 25, 1948, ch. 646, § 455, 62 Stat. 908.
26. 28 U.S.C. § 47 (2000).
27. *See infra* note 62.
28. 28 U.S.C. § 455 (1974) (emphasis added).
29. *See* HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 10 (1999); ROBERT SHOGAN, A QUESTION OF JUDGMENT: THE FORTAS CASE AND THE STRUGGLE FOR THE SUPREME COURT 270-71 (1972); JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 400-01 (1980) [hereinafter SIMON, INDEPENDENT JOURNEY]; MELVIN SMALL, THE PRESIDENCY OF RICHARD NIXON 168 (1999); NORMAN VIEIRA & LEONARD GROSS, SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS 46 (1998).

conflicts requiring recusal, even though the then-current version of § 455 (quoted above) did not.[30] The vast majority of federal judges observed the stricter Canons and recused themselves in similar situations,[31] and it was seen by many as a failure of character for Judge Haynsworth not to have done so. Because of the differences between the Canons and the statute, and because of other controversies in 1969 and 1970 involving Supreme Court Justices Abe Fortas[32] and William O. Douglas,[33] many in Congress saw a need to rewrite the statute.[34]

Between 1969 and 1972, the ABA *Model Code of Judicial Conduct* was drafted by the ABA Special Committee on Standards of Judicial Conduct, and it was adopted by the ABA House of Delegates in 1972.[35] Canon 3C of the *Code*—Canon 3E after revisions in 1990 and 1997[36]—set out a more comprehensive and thoughtful set of recusal rules than existed in the federal statutes of 1972.

In 1974, Congress enacted the current version of § 455,[37] which is now the primary federal judicial recusal statute.[38] The revised §455 was derived from, but

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30. John Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROB. 43, 51-58 (1970); William H. Rehnquist, *Sense and Nonsense about Judicial Ethics*, 28 REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 694, 700 (Nov. 1973).

31. Rehnquist, *supra* note 30, at 701.

32. *See* LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 351 (1990); BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE 499-500 (1988); JAMES F. SIMON, IN HIS OWN IMAGE: THE SUPREME COURT IN RICHARD NIXON'S AMERICA 102 (1973).

33. *See* ASSOC. JUSTICE WILLIAM O. DOUGLAS, HOUSE COMM. ON THE JUDICIARY, 91ST CONG., FINAL REPORT OF THE SPECIAL SUBCOMM. ON H. RES. 920 (Comm. Print 1970) [hereinafter Douglas, Final Report]; SIMON, INDEPENDENT JOURNEY, *supra* note 29.

34. *Id.*; *see also* Note, *Disqualification of Federal Judges for Bias under 28 U.S.C. Section 144 and Revised Section 455*, 45 FORDHAM L. REV. 139, 146-47 (1976); Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 736-37 (1973).

35. E. WAYNE THODE, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 1 (1973). Every state except Montana has adopted one or another version of the ABA *Code*. Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned"*, 14 GEO. J. LEGAL ETHICS 55, 58 n.13 (2000).

The Special Committee was chaired by Chief Justice Roger J. Traynor of the California Supreme Court and included Justice Potter Stewart of the U.S. Supreme Court; Judge Irving R. Kaufman of the U.S. Court of Appeals for the Second Circuit; Chief Judge Edward T. Gignoux of the U.S. District Court for the District of Maine; and ten other members. Professor E. Wayne Thode of the University of Utah College of Law was the Special Committee's reporter, and Professor Geoffrey C. Hazard, Jr., of the Yale Law School was its consultant.

36. MODEL CODE OF JUDICIAL CONDUCT Canon 3E (1999).

37. Act of Dec. 5, 1974, Pub. L. No. 93-512, § 88 Stat. 1609 (codified as amended at 28 U.S.C. § 455 (1982)).

38. As amended in 1994, 28 U.S.C. §455 reads, in its entirety, as follows:

> §455. Disqualification of justice, judge, or [magistrate judge]
>
> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with

is not identical to, the ABA *Code*.[39]

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whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

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

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

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or [magistrate judge] shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, [magistrate judge], or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, [magistrate judge], bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

39. H.R. REP. NO. 1453 (1974) *reprinted in* 1974 U.S.C.C.A.N. 6351, 6352-53, 6356. The House Report adopted and reproduced most of the Senate Report, SEN. R. 93-419 (1973). *Id.* at 6351. Essentially, to read the House Report is to read the Senate Report.

B. 28 U.S.C. § 455

Section 455 uses the word "disqualification" rather than "recusal." The case law uses the terms interchangeably, and they mean the same thing.

The statute divides grounds for recusal into those based on appearances (§ 455(a)) and those based on facts that are automatically disqualifying (§ 455(b)). Subsection 455(a) requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Under § 455(a), the *appearance* of partiality disqualifies even if in fact the judge is fully capable of impartially judging the case.[40] The test is "whether an objective, disinterested, lay observer fully informed of the facts . . . would entertain a significant doubt about a judge's impartiality."[41] "It is enough that the average layperson would have doubts about any judge's impartiality under [the] circumstances" that create a recusal issue.[42] When appearances are at issue, a judge "ought to consider how his participation . . . looks to the average person in the street. Use of the word 'might' in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality."[43] The policy behind § 455(a) is "to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible."[44]

How would judges know what the average person in the street would think? Empirical studies, such as survey research, are not part of the answer. Nobody budgets for them, and if people in the street told us what they think about a certain judge's participation in a certain case, the result could upset our preconceptions. "Judges must imagine how a reasonable, well-informed observer of the judicial system would react,"[45] and what courts imagine about this hypothetical person may surprise the public that the hypothetical person is supposed to exemplify. "Judges asked to recuse themselves hesitate to impugn their own standards[, and] judges sitting in review of others do not like to cast aspersions."[46] To do a § 455(a) analysis properly, a court must remember that "these outside observers"—the hypothetical people in the street whose opinions are controlling—"are less

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40. Potashnik v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir. 1980); Davis v. Xerox Corp., 811 F.2d 1293, 1295 (9th Cir. 1987); Webbe v. McGhie Land Title Co., 549 F.2d 1358, 1361 (10th Cir. 1977).

41. Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988). Other circuits phrase the test in slightly different words but with no real change in meaning.

42. United States v. Kelly, 888 F.2d 732, 745 (11th Cir. 1989). To disqualify, an appearance of partiality based on bias usually must have been obtained from an extrajudicial source. Liteky v. United States, 510 U.S. 540, 551-56 (1994). That is not relevant here, however, because no possible bias or prejudice discussed in this article could have come from experience with the parties or the issues during the appeal of *Bush v. Gore*. *See infra* notes 124-26 and accompanying text.

43. *Potashnik*, 609 F.2d at 1111.

44. Liljeberg v. Health Serv. Acquisition Corp., 486 U.S. 847, 865 (1988).

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

46. *Id.*

inclined to credit judge's impartiality and mental discipline than the judiciary itself will be."[47]

Subsection 455(b), on the other hand, enumerates a list of concrete situations in which a federal judge "shall . . . disqualify himself" because partiality is conclusively presumed. Five of those grounds for disqualification are relevant here:

> "[w]here [the judge] has a personal bias or prejudice concerning a party";[48]
>
> where "[h]e knows that he . . . has a financial interest in the subject matter in controversy";[49]
>
> where "[h]e knows that he . . . has . . . any other interest that could be substantially affected by the outcome of the proceeding;"[50]
>
> where "[h]e knows that . . . his spouse . . . has . . . any other interest that could be substantially affected by the outcome of the proceeding;"[51] and
>
> where "a person within the third degree of relationship to [the judge]"—which includes children—"[i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding."[52]

A "proceeding" includes an appeal.[53] A "financial interest" includes "ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party."[54] A federal judge "should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse."[55]

The disqualifying grounds enumerated in § 455(b) cannot be waived.[56] Although the ABA *Model Code of Judicial Conduct* permitted limited exceptions to this rule, Congress felt that the need for "confidence in the impartiality of

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47. *Id.*

48. 28 U.S.C. § 455(b)(1) (2002). This provision is subject to the extrajudicial source doctrine. *See infra* notes 124-26.

49. § 455(b)(4).

50. *Id.* This disqualification requirement is duplicated in § 455(b)(5)(iii), where it covers not only the judge and the judge's spouse, but also anyone "within the third degree of relationship to either of them." § 455(b)(5)(iii). A *financial* interest–"however small"–is disqualifying. § 455(d)(4). But a nonfinancial interest is disqualifying only if it "could be substantially affected by the outcome of the proceeding." § 455(b)(4).

51. § 455(b)(4). This disqualification requirement is also duplicated in § 455(b)(5)(iii).

52. § 455(b)(5)(iii). "[T]he degree of relationship is calculated according to the civil law system." § 455(d)(2). For the range of relatives within the third degree, see note 306, *infra*.

53. § 455(d)(1).

54. § 455(d)(4). The definition is further limited where the interest involves a mutual fund; "an educational, religious, charitable, fraternal, or civic organization"; a policy issued by a mutual insurance company; an interest in a mutual savings association; or government securities. § 455(d)(4)(i)-(iv). None of those are relevant here.

55. § 455(c).

56. § 455(e).

federal judges" required that nothing in § 455(b) be waivable.[57] As the committee reports in both houses put it, even "a small financial interest . . . cannot be waived."[58] A ground for disqualification arising from § 455(a), however, can be waived, but only if the waiver "is preceded by a full disclosure [by the judge] on the record of the basis for disqualification."[59]

All of the grounds for recusal in § 455 are self-activating. A judge is required to recuse her or himself sua sponte even if none of the parties to the lawsuit know that the judge has a conflict of interest or an apparent conflict of interest.[60] If the judge fails to do so and if a party learns of the conflict, the party can move for recusal, but "[n]o action by a party is required to invoke the . . . statute."[61]

C. 28 U.S.C. § 144

Another federal recusal statute exists but applies only to district court judges—and not to appellate judges.[62] The other significant differences between the two statutes are procedural. First, § 144 of title 28 requires a motion from a party, while § 455 does not because it is self-activating.[63] Second, under § 144, there is no fact-finding. A party's claims of "bias or prejudice" are assumed to be accurate if they are sworn to in an affidavit, if they contain credible specific facts (rather than generalized conclusions), and if those claimed facts are of the kind that the law considers disqualifying.[64] And third, because this amounts to something approaching a peremptory challenge, a party is permitted to make only

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57. H.R. REP. NO. 93-1453 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6357. The same language appears at SEN. R. 93-419 at 7 (1973).

58. *See supra* note 55.

59. § 455(e). Another exemption from disqualification exists but is not relevant here. Recusal is not required if a disqualifying ground based on a financial interest held by a judge, spouse, or minor child residing in the judge's household ("other than an interest that could be substantially affected by the outcome") appears or is discovered "after the matter was assigned to" the judge and "after substantial judicial time has been devoted to the matter," and if the person who holds the interest "divests himself or herself of the interest that provides the grounds for the disqualification." § 455(f).

60. United States v. Wolfson, 558 F.2d 59, 62 n.11 (2d Cir. 1977); Roberts v. Bailar, 625 F.2d 125, 128 (6th Cir. 1980); Taylor v. O'Grady, 888 F.2d 1189, 1200-01 (7th Cir. 1989); Bernard v. Coyne, 31 F.3d 842, 843 n.1 (9th Cir. 1994).

61. 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3550 (1984).

62. 28 U.S.C. § 144 (2000). Section 144 provides, in its entirety, as follows:

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

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term [session] at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

63. *Id.*

64. *Id.*

one motion under § 144.[65]

D. THE CODE OF CONDUCT FOR UNITED STATES JUDGES

In 1973, the year before Congress enacted § 455, the Judicial Conference adopted a version of the ABA *Model Code of Judicial Conduct*.[66] Its Canon 3C on disqualification resembles but is not identical to § 455. For Supreme Court justices, however, the differences are irrelevant because the Judicial Conference's code—the Code of Conduct for United States Judges—does not govern them.[67] The Judicial Conference lacks the authority to make rules governing the Supreme Court.[68]

E. THE DUE PROCESS CLAUSE

Some judicial conflicts of interest arise to Constitutional violations. Among the procedural rights provided by the due process clause is the right to have one's case judged by an official who will not benefit personally if one loses. In *Tumey v. Ohio*,[69] during prohibition, a defendant was convicted in a mayor's court of possessing liquor. State law provided that a mayor had the power to adjudicate certain offenses.[70] State law and a village ordinance permitted the mayor to be paid personally each case's court costs as compensation for hearing the case, but only if a defendant was convicted.[71] The Supreme Court held that "it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him."[72] "Every procedure which would offer a *possible temptation* to the average man as a judge to forget the burden of proof required to convict the defendant . . . denies the latter due process of law."[73]

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65. *Id.*

66. Code of Conduct for United States Judges, 175 F.R.D. 362 (1998). Pursuant to the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, the Judicial Conference of the United States develops and proposes procedural rules for federal courts, including the *Federal Rules of Civil Procedure*, the *Federal Rules of Criminal Procedure*, the *Federal Rules of Evidence*, the *Federal Rules of Appellate Procedure*, and the *Federal Bankruptcy Rules*. The *Code of Conduct for United States Judges* was derived from the 1972 ABA *Code of Judicial Conduct*. The 1972 ABA *Code* has been superseded by the 1990 ABA *Model Code of Judicial Conduct*.

67. 175 F.R.D. 363, 364 n.1.

68. *See* E. Wayne Thode, *The Code of Judicial Conduct—The First Five Years in the Courts*, UTAH L. REV. 395 (1977).

69. 273 U.S. 510 (1927).

70. *Id.* at 516-19.

71. *Id.* at 519-20.

72. *Id.* at 523. The due process clause in the Fifth Amendment protects the individual against conduct by officials and employees of the federal government. The due process clause in the Fourteenth Amendment does the same against state governments. Individual rights and governmental obligations under the two clauses are identical.

73. *Id.* at 532 (emphasis added).

A line of Supreme Court cases has expanded and refined this principle. In *Ward v. Village of Monroeville*,[74] for example, the Supreme Court invalidated a conviction in a mayor's court where court fines and fees were used to balance village budgets. Although the mayor received no direct personal benefit from each conviction, he "also had responsibilities for [municipal] revenue production."[75] That deprived a defendant of "a trial before a disinterested and impartial judicial officer as guaranteed by the Due Process Clause."[76] In *Gibson v. Berryhill*,[77] a regulatory state optometry board was held to be incapable of determining whether optometrists employed by corporations should for that reason alone have their licenses revoked. Corporate optometry "did a large business" in the state, and membership on the board was limited to self-employed optometrists, who "would fall heir to this business" if the corporate employees lost their licenses.[78]

In *In re Murchison*,[79] a state judge functioned as a one-person grand jury and both generated and adjudicated criminal contempt proceedings against witnesses. In these proceedings, a single person was thus complaining witness, prosecutor, and judge. The Supreme Court invalidated that practice as well, holding that no judge "can be . . . permitted to try cases where he has an interest in the outcome."[80] Here, money had nothing to do with the judge's conflict of interest. The Court held that, despite the language of *Tumey*, the scope of conflicts that would violate the due process clause is not limited to pecuniary interests and "cannot be defined with precision."[81]

Finally, in *Aetna Life Insurance Co. v. Lavoie*,[82] an insured brought an action in an Alabama state court against an insurer for tortious bad-faith refusal to pay a valid claim. After a jury awarded $ 3.5 million in punitive damages, the insurer appealed to the Alabama Supreme Court, which affirmed in a 5-to-4 decision.[83] A justice in the majority, who also wrote the court's per curiam opinion, had himself brought a similar action against another insurer, which was pending in an Alabama trial court at the time of the state supreme court's decision in *Aetna*.[84] In several ways, the state supreme court's decision clarified, and perhaps changed, state law—all of them improving the justice's litigation position in his own

74. 409 U.S. 57 (1972).
75. *Id.* at 58.
76. *Id.*
77. 411 U.S. 564, 578-79 (1973).
78. *Id.* at 571.
79. 349 U.S. 133 (1955).
80. *Id.* at 136.
81. *Id.*
82. 475 U.S. 813 (1986).
83. *Id.* at 816.
84. *Id.* at 816-18, 822.

case.[85] The U.S. Supreme Court held that his "participation in this case violated" the insurer's "due process rights as explicated in *Tumey*, *Murchison*, and *Ward*."[86] It was irrelevant

> whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "'would offer a *possible temptation* to the average . . . judge . . .'" . . . The Due Process Clause "may sometimes bar trial by judges who *have no actual bias* and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'"[87]

Tumey and *Ward* disqualified individual trial judges, while *Gibson* disqualified an entire regulatory board. No prior due process case had disqualified one judge in an appellate court. "But we are aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote."[88] Because Justice Embry cast the deciding vote and wrote the per curiam opinion, the U.S. Supreme Court vacated the state supreme court's decision.[89]

F. THE QUESTION OF DISCRETION

Appellate courts review different types of issues according to different standards. The three primary ones are de novo review, review for clear error, and review for abuse of discretion. Issues of law are reviewed de novo (about which more in a moment). Fact-finding by a trial judge is reviewed for clear error, which

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85. *Id.* at 822-24. The state supreme court's decision clarified that a tort can be proved, and punitive damages can be obtained, where the insurer pays part but not all of the claim. Previously, it was doubtful whether state law recognized a tort under those circumstances, and earlier state supreme court precedent would have foreclosed punitive damages. The state supreme court decision also clarified that entitlement to a directed verdict on the underlying insurance claim is not a prerequisite to recovery on bad-faith claim, which was arguably unsettled under state law. And the state supreme court held that the $3.5 million punitive damages award was not excessive. The largest punitive award ever affirmed by the state supreme court was $100,000, which the court had reduced from $1.1 million because the larger amount was, in the state supreme court's words, "obviously the result of passion and prejudice on the part of the jury." *Id.* at 823, (quoting Gulf Atlantic Life Ins. Co. v. Barnes, 405 So. 2d 916, 926 (Ala. 1981)).

All of these issues were present in Justice Embry's lawsuit against Blue Cross. His complaint sought recovery for partial payment of claims. Also the very nature of Justice Embry's suit placed in issue whether he would have to establish that he was entitled to a directed verdict on the underlying claims that he alleged Blue Cross refused to pay before gaining punitive damages. Finally, the affirmance of the largest punitive damages award ever (by a substantial margin) on precisely the type of claim raised in the Blue Cross suit undoubtedly "raised the stakes" for Blue Cross in that suit, to the benefit of Justice Embry. Thus, Justice Embry's opinion for the Alabama Supreme Court had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case. *Id.* at 823-24.

86. *Id.* at 825.

87. *Id.* (quoting *Ward*, *Tumey*, and *Murchison* (emphasis added)).

88. *Id.* at 827-28.

89. *Id.* at 828.

means that an appellate court will reverse only if the trial judge made an error that is "clear." Many—but not all and perhaps not even most—procedural issues are reviewed for abuse of discretion, which allows "the judge to choose from several satisfactory options"[90] but will reverse if the judge makes a choice outside that range. The clear error and abuse of discretion standards defer to some extent to the judgment of the trial judge on the theory that the trial judge is closer to the case and has a better feel for it. The de novo standard does not.

An appellate court's de novo review—sometimes called plenary or independent review—assesses whether the trial court correctly applied the law *without deferring* to the trial court's view of the issue. An appellate court exercising de novo review feels free to reverse if—had it been in the trial court's position—it would have decided the issue differently from the way the trial court did. Traditionally, a court exercising this type of review did not mention the phrase de novo or any of its synonyms. There was no need to because de novo review involves no deference to the lower court. De novo review is like a clear pane of glass: if what you see through it is error, you call it that and reverse. Other standards of review are like lenses that add to or change what the unaided eye would see, and those standards cannot be applied without announcing the type of lens used. Although traditionally appellate courts did not mention a de novo standard when applying it, recent custom, especially in federal courts, has been to announce whatever standard of review is being used either in the transition from facts to analysis in a simple opinion or at the beginning of the discussion of each issue in a more complex opinion. Because the traditional and the more recent customs are both being used today—not only in the same appellate court, but often by the same appellate judge—we as readers of appellate opinions know that a de novo standard is being used when we are told that it is—or when we are *not* told about *any* standard of review. For convenience here, I will refer to the former as an explicit use of de novo review and to the latter as an implicit use of de novo review.

Cases scattered across every Circuit have applied an abuse of discretion standard to appeals from decisions to recuse or not to recuse under § 455.[91] Typically, these cases begin their analysis by noting that a decision of whether to

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90. 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 4.21 (3d ed. 1999).

91. The following are early and recent abuse of discretion cases from each circuit.

First Circuit: Blizard v. Frechette, 601 F.2d 1217 (1st Cir. 1979); United States v. Ayala, 289 F.3d 16, 27 (1st Cir. 2002).

Second Circuit: Federman v. Empire Fire & Marine Ins. Co., 597 F.2d 798 (2d Cir. 1979); King v. First Am. Investigators, Inc., 287 F.3d 91(2d Cir. 2002).

Third Circuit: United States v. Dansker, 565 F.2d 1262 (3d Cir. 1977); Gen. Motors Corp. v. New A.C. Chevrolet, Inc., 263 F.3d 296, 336-37 n. 25 (3d. Cir. 2001).

Fourth Circuit: *In re* Virginia Elec. & Power Co., 539 F.2d 357 (4th Cir. 1976); United States v. Anderson, 160 F.3d 231, 233 (4th Cir. 1998).

Fifth Circuit: United States *ex rel.* Weinberger v. Equifax, Inc., 557 F.2d 456 (5th Cir. 1977); Republic of Panama v. Am. Tobacco Co., 217 F.3d 343, 346 (5th Cir. 2000), *enforced*, 250 F.3d 315 (5th Cir. 2001), *rev'd*

recuse under § 455 is within the trial court's discretion.[92] For several reasons, that is not a complete and accurate statement of the law.

First, some cases in *every* circuit do not allow trial judges any discretion at all. Except in the Seventh Circuit, these are primarily implicit de novo cases: they mention no standard of review and conduct a de novo-type of review without any deference to the trial court.[93] And in every circuit, they co-exist with other cases

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sub nom., Sao Paulo State v. Am. Tobacco Co., 535 U.S. 229 (2002). (Concerning *Sao Paulo State*, *see* text at notes 131-35, *infra*.)

Sixth Circuit: United States v. Stulga, 584 F.2d 142 (6th Cir. 1978); Buell v. Mitchell, 274 F.3d 337, 245 (6th Cir. 2001).

Seventh Circuit: (*See* notes 94-95, *infra*, and accompanying text.)

Eighth Circuit: United States v. Trevithick, 526 F.2d 838 (8th Cir. 1975); Moran v. Clarke, 247 F.3d 799, 805 (8th Cir. 2001).

Ninth Circuit: United States v. Sibla, 624 F.2d 864 (9th Cir. 1980); United States v. Martin, 278 F.3d 988, 1005 (9th Cir. 2002).

Tenth Circuit: United States v. Gigax, 605 F.2d 507 (10th Cir. 1979); Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648, 660 (10th Cir. 2002).

Eleventh Circuit: Parrott v. Wilson, 707 F.2d 1262 (11th Cir. 1983); Byrne v. Nezhat, 261 F.3d 1075, 1099-1100 (11th Cir. 2001).

D.C. Circuit: United States v. Jackson, 627 F.2d 1198, 1207 n. 20 (D.C. Cir. 1980); United States v. Roach, 108 F.3d 1477, 1483 (D.C. Cir. 1997).

Federal Circuit: The Federal Circuit "applies the law of the regional circuit where the district court sits . . . in weighing a procedural issue such as recusal." Magnivision, Inc. v. Bonneau Co., 2000 U.S. App. LEXIS 14016 (Fed. Cir. 2000).

92. For example, United States v. Burger, 964 F.2d 1065, 1070 (10th Cir. 1992) ("The decision to recuse is committed to the sound discretion of the district court.").

93. The following are *some* of the cases that have decided recusal issues without deferring to the discretion of the trial court. A comparison of the dates with those of the cases listed in *supra* note 91 shows how the discretionary and de novo lines of cases have existed simultaneously.

First Circuit: United States v. Devin, 918 F.2d 280, 294 (1st Cir. 2001); United States v. Kelley, 712 F.2d 884 (1st Cir. 1983); Brody v. President & Fellows of Harvard Coll., 664 F.2d 10 (1st Cir. 1981).

Second Circuit: Fulton v. Robinson, 289 F.3d 188 (2d Cir. 2002); Criley v. Delta Air Lines, Inc., 119 F.3d 102 (2d Cir. 1997); Pashaian v. Eccelston Prop., Ltd., 88 F.3d 77 (2d Cir. 1966); Groden v. Random House, Inc., 61 F.3d 1045 (2d Cir. 1995); *In re* IBM, 45 F.3d 641 (2d Cir. 1995); United States v. Diaz, 797 F.2d 99 (2d Cir. 1986).

Third Circuit: Haines v. Liggett Group, 975 F.2d 81 (3d Cir. 1992); Mims v. Shapp, 541 F.2d 415 (3d Cir. 1976).

Fourth Circuit: Nakell v. Attorney Gen., 15 F.3d 319, 324 (4th Cir. 1994); People Helpers Found. v. Richmond, Va., 12 F.3d 1321, 1325 (4th Cir. 1993) (explicitly using a de novo standard); United States v. Morris, 988 F.2d 1335 (4th Cir. 1993); Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109 (4th Cir. 1988); *In re* Beard, 811 F.2d 818 (4th Cir. 1987); Rice v. McKenzie, 581 F.2d 1114 (4th Cir. 1978).

Fifth Circuit: *In re* Cont'l Airlines, 981 F.2d 1450 (5th Cir. 1993); Vieux Carre Prop. Owners, Residents & Assoc., Inc. v. Brown, 948 F.2d 1436 (5th Cir. 1991); *In re* Cont'l Airlines, 901 F.2d 1259 (5th Cir. 1990); *In re* Faulkner, 856 F.2d 716 (5th Cir. 1988); United States v. Brown, 539 F.2d 467 (5th Cir. 1976).

Sixth Circuit: Warfield, v. Lebanon Corr. Inst., 181 F.3d 723 (6th Cir. 1999); Roberts v. Bailar, 625 F.2d 125 (6th Cir. 1980).

Seventh Circuit: *(See infra* notes 96-97and accompanying text.)

Eighth Circuit: United States v. Mosby, 177 F.3d 1067 (8th Cir. 1999); United States v. Jenkins, 141 F.3d 850 (8th Cir. 1998); Souder v. Owens-Corning Fiberglass Corp., 939 F.2d 647, 653 (8th 1991) (explicitly using a de novo standard); United States v. Dodge, 538 F.2d 770, 781 (8th Cir. 1976).

that apply an abuse of discretion standard.[94] Rarely will a Court of Appeals panel acknowledge the inconsistency.[95] The Seventh Circuit is different only in that its de novo review is explicit. One line of Seventh Circuit cases explicitly subjects appeals from § 455 decisions to a de novo standard of review,[96] while another

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Ninth Circuit: United States v. Arnpriester, 37 F.3d 466 (9th Cir. 1994); Davis v. Xerox Corp., 811 F.2d 1293 (9th Cir. 1987); United States v. Conforte, 624 F.2d 869 (9th Cir. 1980).

Tenth Circuit: United States v. Young, 45 F.3d 1405 (10th Cir. 1995); Webbe v. McGhie Land Title Co., 549 F.2d 1358 (10th Cir. 1977); United States v. Ritter, 540 F.2d 459 (10th Cir. 1976).

Eleventh Circuit: United States v. Cerceda, 188 F.3d 1291 (11th Cir. 1999); Parker v. Connors Steel Co., 855 F.2d 1510 (11th Cir. 1988); Hunt v. Am. Bank & Trust Co., 783 F.2d 1011 (11th Cir. 1986).

D.C. Circuit: United States v. Barrett, 111 F.3d 947 (D.C. Cir. 1997); *In re* Barry, 946 F.2d 913 (D.C. Cir. 1991).

Federal Circuit: (*See* note 91, *supra.*)

94. *Compare* notes 91 and 93, *supra.*

95. An exception is Holloway v. United States, 960 F.2d 1348, 1351 n.8 (8th Cir. 1992): "The standard for reviewing on direct appeal a trial court's denial of a disqualification motion is unclear in this circuit. We usually have reviewed for abuse of discretion. [citations omitted] In some cases, however, we have conducted de novo review. [citations omitted] Here, we reach the same result under either standard and therefore need not attempt to resolve this apparent inconsistency in our decisions." Another exception is *People Helpers Found. v. Richmond, Va.*, 12 F.3d 1321, 1325 (4th Cir. 1993): "This court reviews questions of judicial bias *de novo.*" Yet another is *Camacho v. Autoridad de Telefonos*, 868 F.2d 482, 490 (1st Cir. 1989): "Here, the judge performed no fact-finding and exercised no discretion. He determined as a matter of law that plaintiffs' [conflict of interest] complaint was insufficient. A court of appeals reviews such determinations de novo." In most reported decisions on recusal issues, the district court judge does not make findings of fact from conflicting evidence and does not announce an exercise of discretion. The most common pattern is for the district judge to decide that the facts alleged by the party moving for recusal, even if true, would not satisfy one of the tests requiring recusal. That is, of course, a decision of law meriting de novo review.

96. The first Seventh Circuit case to adopt an explicit de novo standard was *United States v. Balistrieri*, 779 F.2d 1191 (7th Cir. 1985), which reasoned as follows:

> We have not found in our cases any discussion of the standard we apply in reviewing a judge's decision not to recuse himself under § 144. As we read the statute, it was not the intent of Congress to make recusal under §§ 144 a discretionary determination. . . . Whether the affidavit [alleging bias] is timely and sufficient is a question of law, for which the appropriate standard of review is *de novo*. . . .
>
> Section 455 . . . requires the judge to *disqualify himself* when any one of the statutory conditions is met. . . . We think that appellate review of a judge's decision not to disqualify himself . . . should not be deferential. The motion puts into issue the integrity of the court's judgment. . . . In addition, a judge may be especially reluctant to recuse himself when to do so requires him to admit that his actual bias or prejudice has been proved. Accordingly, we will review decisions against disqualification under § 455(b)(1) *de novo.*

Id. at 1199-1200, 1202-03. The *Balistrieri* court noted that one earlier Seventh Circuit case had applied an abuse-of-discretion standard to a § 455(a) appeal, but *Balistrieri* then held that § 455(a) issues can be raised only through a prompt mandamus petition rather than through appeal after judgment (a peculiarity of Seventh Circuit practice that persists to this day). *See id.* at 1204-05. Some subsequent Seventh Circuit cases have used a de novo standard when deciding these § 455(a) mandamus petitions. *See, e.g.*, Hook v. McDade, 89 F.3d 350, 353-55 (7th Cir. 1996). Others have used an abuse of discretion standard. *See infra* note 95.

Subsequent Seventh Circuit de novo cases include O'Regan v. Arbitration Forums, Inc., 246 F.3d 975, 987-88 (7th Cir. 2001); *In re* Hatcher, 150 F.3d 631 (7th Cir. 1998) (using a de novo standard for § 455(a) and (b)(5)(ii) issues and an abuse of discretion standard for a § 455(b)(1) issue); *Hook*, 89 F.3d at 353-54; United States v. Sykes, 7 F.3d 1331, 1339 (7th Cir. 1993); *Taylor*, 888 F.2d at 1201.

line of Seventh Circuit cases subjects them to an abuse of discretion standard.[97] In every Circuit, the two lines of cases are factually indistinguishable from each other, and there is no way of harmonizing them. They are ships passing in the night, and a Circuit panel is free to board whichever one it pleases.

Courts that allow judges discretion in recusal decisions rarely explain why they do so. When an explanation is offered, it is that the judge being asked to recuse herself or himself "is in the best position to appreciate the implications of those matters alleged in the recusal motion."[98] But the opposite is much more likely to be true. A recusal motion usually attacks the judge's own conduct—something the judge said but perhaps should not have even contemplated saying, a failure to keep track of and disclose to the parties the nature of investments or the employment of relatives, and so on—and the judge is usually the person least able to evaluate the propriety of that conduct. The case law is filled with descriptions of defensive and angry judges denying motions that they recuse themselves. Judges in a different courthouse, and perhaps in a distant city, are usually better able to see the situation in a disinterested way.[99]

Second, where circuit panels claim to have used a discretionary standard of review and have bothered to explain what they meant by that, the explanations show little deference to the judge who is alleged to have a conflict of interest. For example, a discretionary standard allows the judge "a range of choice . . . so long as that choice does not constitute a clear error of judgment."[100] A clear error of judgment can be anything that an appellate court feels strongly enough to reverse. Several Circuits have held that "if the question of whether § 455(a) requires recusal is a *close* one, the balance tips in favor of recusal."[101] That eliminates an enormous amount of discretion because a core idea behind an abuse-of-discretion standard of review generally is to allow lower court judges to decide *close*

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97. The leading Seventh Circuit case imposing an abuse of discretion standard is United States v. Bunch, 730 F.2d 517 (7th Cir. 1984): "We conclude that . . . the decision to grant or deny a recusal motion is subject to limited review by this court and the judgment below may be set aside only for an abuse of discretion or a showing by the defendant of actual prejudice." *Id.* at 519. In support of this, *Bunch* cited six cases from other circuits and two from the Seventh Circuit. Neither of the Seventh Circuit cases—United States v. Johnson, 658 F.2d 1176, 1178-79 (1981) and United States v. Harris, 542 F.2d 1283, 1304 (1976)—actually used an abuse of discretion standard. They both used de novo reasoning without mentioning the words "de novo."

Other Seventh Circuit abuse of discretion cases include Tezak v. United States, 256 F.3d 702, 716 (7th Cir. 2001); United States v. Franklin, 197 F.3d 266, 269 (7th Cir. 1999); *Hatcher*, 150 F.3d 631 (using a de novo standard for § 455(a) and (b)(5)(ii) issues and an abuse of discretion standard for a § 455(b)(1) issue); and United States v. Kimberlin, 781 F.2d 1247 (7th Cir. 1985). Not all of them preserve *Bunch*'s alternative standard (a showing by the aggrieved party of "actual prejudice").

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

99. Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075 (1991).

100. *Kelly*, 888 F.2d at 745.

101. Nichols v. Alley, 71 F.3d 347, 352 (10th Cir. 1995) (emphasis added). *Accord In re* Boston's Children First, 244 F.3d 164, 167 (1st Cir. 2001); Republic of Panama v. Am. Tobacco Co., 217 F.3d 343, 346 (5th Cir. 2000), *enforced*, 250 F.3d 315 (2001), *rev'd sub nom.*, Sao Paulo State v. Am. Tobacco Co., 535 U.S. 229 (2002); United States v. Dandy, 998 F.2d 1344, 1349 (6th Cir. 1993).

situations without being second-guessed by appellate courts. Where the judge has misunderstood recusal law, even appellate panels that otherwise invoke abuse-of-discretion rhetoric will apply a de novo standard of review.[102] This, too, can nearly eliminate the concept of discretion because misapplying the law is often the result of misunderstanding it.

The term *abuse of discretion* actually describes not one standard of review, but several. Depending on the type of issue involved, the deference given to the lower court judge may be wide or narrow.[103] Where courts apply an abuse of discretion standard to a recusal issue, the standard tends to be of the narrow kind.[104] And regardless of the type of issue involved, the phrase "'abuse of discretion' . . . sounds worse than it really is."[105] It means only that a judge's "action cannot be set aside by a reviewing court unless it has a firm and definite conviction that the court below committed a clear error of judgment."[106] A more accurate term might be "misuse" of discretion[107] or "erroneous exercise of discretion."[108]

Third, although § 455's legislative history includes a remark suggesting that the standard of the review could be abuse of discretion,[109] the language of the statute itself suggests that Congress did not intend to permit judges discretion in deciding whether they are disqualified by conflicts of interest. Section 455 (a) provides that a judge "*shall* disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[110] A judge "*shall* also disqualify himself in" each of the circumstances listed in § 455(b)—which are defined with as few adjectives and adverbs as possible so that the duty to recuse is as clear as it can be.[111] None of the circumstances listed in § 455(b) can be waived, and a § 455(a) issue can be waived only if "preceded by a full disclosure [by the judge] on the record of the basis for

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102. United States v. Furst, 886 F.2d 558, 580 (3d Cir. 1989) ("To the extent, however, that the judge's decision rests on an incorrect view of the law[,] our review is plenary.").

103. 2 CHILDRESS & DAVIS, *supra* note 90, at § 11.01.

104. *Id.* at § 12.05. "The Fifth Circuit view that if the trial judge has any question about the propriety of hearing a case, he should exercise his discretion in favor of disqualification, is probably indicative of the attitude of all reviewing courts: when in doubt, disqualify." *Id.*

105. *In re* Josephson, 218 F.2d 174, 182 (1st Cir. 1954).

106. *Id.*

107. Pearson v. Dennison, 353 F.2d 24, 29 n.6 (9th Cir. 1965).

108. Brookfield v. Milwaukee Metro. Sewerage Dist., 491 N.W.2d 484, 493 (1992). "We use the phrase erroneous exercise of discretion in place of abuse of discretion [because w]e have come to believe that the term abuse of discretion carries unjustified negative connotations." *Id.*

109. "[T]he proposed legislation . . . is not designed to alter the standard of appellate review on disqualification issues. The issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion." H.R. REP. NO. 1453 (1973) *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355.

110. 28 U.S.C. § 455(a) (emphasis added).

111. § 455(b) & (d) (emphasis added).

disqualification."[112] When the legislative history is inconsistent with the wording of the statute, the statute controls.

Fourth, of the four Supreme Court cases that have interpreted § 455, none held that a recusal decision is within the challenged judge's discretion.[113] All four cases interpret the statute as Congress drafted it, with mandatory duties not amenable to discretion.

In the most influential of the Supreme Court cases, *Liljeberg v. Health Services Acquisition Corp.*,[114] a health management company sued a real estate developer to gain control of a government-issued certificate of need, without which a hospital the developer wanted to build could not become financially viable.[115] If the developer won, he would buy land from a university on which to construct the hospital, at a profit to the university.[116] The trial judge was a trustee of the university and had either forgotten or not read the communications to him from the university describing negotiations between the university and the developer and, ultimately, an agreement between them to sell the land.[117] Although that agreement was not conditioned on the developer's winning the lawsuit with the health management company, it gave the university the right to nullify the contract if the surrounding land (which the university continued to own) were not rezoned for commercial use, and the rezoning depended on construction of the hospital.[118] The primary litigation issue was whether an oral contract existed between the developer and the health management company, and if so, whether that contract entitled the developer to control the certificate of need.[119] In a bench trial, the judge "credited [the developer's] version of oral conversations" between himself and representatives of the health management company, and that determination caused the developer to win the case.[120] Ten months after issuance of the judgment, the health management company learned that the trial judge had been a university trustee during the trial.[121] The trial judge denied the health management company's motion to vacate the judgment on the ground that the trial judge should have recused himself under § 455(a).[122] The Fifth Circuit reversed. The Supreme Court affirmed, holding that the trial judge had been disqualified because the university received $ 6.7 million for the parcel sold to the developer and the university's surrounding property would appreciate substan-

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112. § 455(e).

113. *Am. Tobacco Co.*, 535 U.S. 229; *Liteky*, 510 U.S. 540; *Liljeberg*, 486 U.S. 847; United States v. Will, 449 U.S. 200 (1980).

114. 486 U.S. 847.

115. *Id.* at 852-55.

116. *Id.* at 853-56.

117. *Id.* at 856-58.

118. *Id.* at 857.

119. 486 U.S. at 853-56.

120. *Id.* at 855.

121. *Id.* at 850.

122. *Id.*

tially once rezoned, both of which were so important to the university that its "representatives . . . monitored the progress of the trial."[123] Throughout, the Supreme Court analyzed the question in a de novo fashion, simply applying law to facts without any deference to the trial judge's views and without even a hint that the trial judge enjoyed discretion in deciding whether to recuse himself.

In *Liteky v. United States*, the Court held that § 455(a) did not abolish the extrajudicial source doctrine[124] developed under an earlier version of the statute and under § 144. Thus, to require recusal under §§ 455(a) and 455(b)(1), a judge's bias would usually have to have developed from some source other than the case being adjudicated.[125] At no point does the Court's opinion (written by Justice Scalia) or the concurrence (by Justice Kennedy) speak of discretion to recuse. Both instead speak of duties to recuse. Here is the first sentence of Justice Scalia's opinion for the Court: "Section 455(a) . . . *requires* a federal judge to 'disqualify himself in any proceeding in which his impartiality might reasonably be questioned.'"[126] That terminology permeates both opinions.

In *United States v. Will*,[127] thirteen district court judges brought class actions against the federal government, arguing that Congress' enactment of "statutes to stop or reduce previously authorized cost-of-living [pay] increases" violated the

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123. *Id.* at 865-66.

124. 510 U.S. 540 (1994). A typical judicial-sourced bias is a judge's intense dislike of a party growing out of the party's behavior in the courtroom or growing out of the party's character as revealed by the testimony. If the judge hated the party before the lawsuit was filed, the source would be extrajudicial. *See id.* at 550-51.

125. *Id.* at 548-56. That is because litigation frequently reveals at least one of the parties to be "a thoroughly reprehensible person," and a judge who reacts to that is not disqualified, as the judge's feelings

> were properly and necessarily acquired in the course of the proceedings, and are indeed (as in a bench trial) necessary to complete the judge's task. As Jerome Frank pithily put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions."

Id. at 551 (citation omitted). There is a "pervasive bias" exception to the extrajudicial source doctrine. Even if the bias arises from the litigation, recusal is required if bias "is so extreme as to display clear inability to render fair judgment," *id.* at 551, or represents "a deep seated favoritism or antagonism that would make a fair judgment impossible," *id.* at 555.

For situations where an appearance of partiality is based on a bias that has only a judicial source, *Liteky* purported to reformulate the § 455(a) test to resemble the test for pervasive bias. *Id.* at 555-56. This provoked sharp disagreement in a concurrence joined by four justices on the ground that it "is not a fair interpretation of the statute, and is quite insufficient to . . . protect the integrity of the courts. . . . The Court's 'impossibility of fair judgment' test bears little resemblance to the objective standard Congress adopted in § 455(a): whether a judge's 'impartiality *might* reasonably be questioned.'" *Id.* at 563 (concurrence by Kennedy, J.) (emphasis added). The concurrence quoted *Liljeberg* that "[t]he goal of section 455(a) is to avoid even the appearance of impartiality" and pointed out that, under the majority's reformulation where bias lacks an extrajudicial source, "a § 455(a) challenge would fail even if it were shown that an unfair hearing were *likely*, for it could be argued that a fair hearing would be possible nonetheless." *Id.* at 563-64 (emphasis added). None of this is relevant to whether some of the justices were disqualified from deciding *Bush v. Gore*. None of the potential appearances of partiality discussed in this article could have come from experience with the parties or the issues during the appeal of that case.

126. *Id.* at 541 (emphasis added).

127. 449 U.S. 200.

Judicial Compensation Clause of the Constitution.[128] The classes included all Article III judges holding office during the periods when the cost-of-living raises were not provided. Among those Article III judges were, of course, the justices of the Supreme Court.[129] The Court did *not* hold that justices or lower court justices have discretion on the question of recusal where a case cannot be reassigned to others because all judges have conflicts of interest. Instead, the Court held that Congress did not intend through § 455 to abolish the common law rule of necessity,[130] and that in the rare situation where *all* judges have conflicts of interest, those to whom the case is assigned have an "absolute duty" to adjudicate it.[131] All of the authorities quoted by the Court spoke in imperative—not discretionary—terms.[132]

In *Sao Paulo State v. American Tobacco Co.*,[133] the Supreme Court reversed a Fifth Circuit decision disqualifying a judge whose name had appeared, by mistake and without his knowledge, on a trial lawyers' association's motion for permission to file an amicus brief while the judge was in private practice and an immediate past-president of the association.[134] The issues addressed by the brief (on which the judge's name did not appear) resembled those raised in the *Sao Paulo* litigation.[135] The Fifth Circuit had held that the trial judge abused his discretion in not recusing himself.[136] But the Supreme Court again ignored the concept of discretion and, reasoning de novo, reversed on the ground that a reasonable person would not question the judge's impartiality if that person knew the facts (that the judge's name had been used in error and that the judge did not know of its use).[137]

And in the leading Supreme Court case on § 144, *Berger v. United States*,[138] the Court did the same thing. The defendants were socialists, all of German or Austrian birth or descent, and were charged with violating a statute that equated opposition to the First World War with espionage.[139] These defendants claimed

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128. U.S. CONST. art. III, § 1 ("The Judges, both of the Supreme and inferior Courts, shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in office.").

129. 449 U.S. at 209-10.

130. *Id.* at 211-12.

131. *Id.* at 215.

132. *Id.* at 213-14.

133. 535 U.S. 229 (per curiam).

134. *Id.*

135. *Id.*

136. *Am. Tobacco Co.*, 535 U.S. 229.

137. *Id.* at 233.

138. 255 U.S. 22 (1921).

139. *Id.* at 28. Victor Berger, the lead defendant, was at the time a once and future member of the House of Representatives. He was elected to Congress in 1910 from Wisconsin as a Socialist, serving one term. He was elected again in 1918, but the House refused to seat him because he had opposed American participation in the First World War. At the special election held in 1919 to fill the vacancy thus created, he was elected yet again, but the House once more refused to seat him. Berger was, however, allowed to take his seat in the House after winning another election in 1922, and he was reelected in 1924 and 1926. *Id.*

that in a early trial of another defendant of the same ethnicity, the district court judge, Kenesaw Mountain Landis (later the first commissioner of baseball), had "in substance" said the following: "If anybody has said anything worse about the Germans than I have I would like to know it so I can use it. . . . One must have a very judicial mind, indeed, not to be prejudiced against the German-Americans in this country. Their hearts are reeking with disloyalty. . . ."[140] One of the dissents argued—without contradiction by the court's opinion—that the transcript of the earlier trial showed that Judge Landis had actually said something else, which "might have been more temperate" and was "aimed at the one convicted" and "not the German people in general."[141] Despite this dispute about what actually had been said, neither the dissenters nor the Court entertained the possibility that Judge Landis might have any discretion about whether to recuse himself. The Court held that he "had no lawful right or power to preside as judge on the trial of "Berger and codefendants."[142] The dissenters argued the opposite without suggesting that he could be reversed only for an abuse of discretion.[143]

Finally, even if a recusal decision under § 455 were discretionary, none of the due process cases permit discretion. Nor could they. If the right to a judge whose own interests are not directly affected by litigation can be ignored at that same judge's discretion, then it is not a right at all, but only an occasional privilege. In all the Supreme Court due process cases—*Tumey v. Ohio*,[144] *In re Murchison*,[145] *Ward v. Village of Monroeville*,[146] *Gibson v. Berryhill*,[147] and *Aetna Life Insurance Co. v. Lavoie*,[148]—the Court reviewed the decisions below de novo, and not a word in any of those decisions even implies that discretion is possible in these circumstances.

II. JUSTICE THOMAS

Shortly before the Supreme Court decided *Bush v. Gore*, Virginia Thomas, Justice Thomas' wife, sent an email to Congressional staffers soliciting resumes

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140. *Id.* at 28. Baseball sought a judge to serve as commissioner to clean up its image after the Black Sox bribery scandal over the 1919 World Series. Although he had a mercurial personality and often exercised terrible judgment, Landis had a physical appearance that suggested the opposite: patience, dignity, carefulness, wisdom. He was hired as baseball commissioner while still a federal judge and served in both positions for a time, earning annual salaries of $7,500 as a judge and $50,000—a huge sum at the time—as commissioner. DAVID PIETRUSZA, JUDGE AND JURY: THE LIFE AND TIMES OF JUDGE KENESAW MOUNTAIN LANDIS 195 (1998). This caused public outrage. The American Bar Association voted to condemn his conduct, and the House Judiciary Committee started an investigation that could have ended with his impeachment, as a result of which Landis resigned from the bench. *Id.* at 195-208. He served as baseball commissioner until 1944.

141. *Berger*, 255 U.S. at 40.

142. *Id.* at 36.

143. *Id.* at 37-42.

144. 273 U.S. 510.

145. 349 U.S. 133.

146. 409 U.S. 57.

147. 411 U.S. at 578-79.

148. 475 U.S. 813.

for jobs in a future administration. At the time, Mrs. Thomas worked for a conservative think tank allied with the Republican Party, and her email was sent with the approval of her employer. In her previous employment, with a House Republican leader, she "spearheaded a leadership effort to gather embarrassing information about the Clinton-Gore administration," according to the *Wall Street Journal*.[149] Justice Thomas owes his position on the Supreme Court to George W. Bush's father, who nominated him and fought for his confirmation against opposition that nearly defeated him in the Senate. And during the 2000 presidential campaign, George W. Bush, the petitioner in *Bush v. Gore*, repeatedly praised Justice Thomas and promised to appoint more judges like him while Al Gore did the opposite. Did these events create an appearance of partiality that disqualified Justice Thomas from participating in *Bush v. Gore*?

A. THE ACTIVITIES OF JUSTICE THOMAS' SPOUSE

On December 12, 2000—the day after the last oral arguments in *Bush v. Gore* and the morning before the Court issued its decision—the *Wall Street Journal* published the following:

> Mr. Thomas' wife, Virginia Thomas . . . adds another dynamic to his role in the case. In 1996, while working for House GOP leader Dick Armey of Texas, Ms. Thomas spearheaded a leadership effort to gather embarrassing information about the Clinton-Gore administration. In a memo from another leadership aide, committees were instructed to comb their files for examples of "corruption . . . dishonesty or ethical lapses in the Clinton administration" and to send the results to Ms. Thomas.
>
> More recently, as a senior fellow at the conservative Heritage Foundation in Washington, Ms. Thomas has been gathering resumes from congressional aides who want to work in the next administration. She recently solicited nominees in an e-mail sent to 194 Capitol Hill aides, including some Democrats. In an interview, Ms. Thomas denied any interest in working for Mr. Bush herself and said she wasn't soliciting resumes on behalf of the Bush campaign, although she acknowledged that Mr. Bush would be more likely than Mr. Gore to get help from Heritage.
>
> Her husband "keeps his professional life very separate from me. There is a Chinese wall," Ms. Thomas said.[150]

(A Chinese wall is an impermeable communications barrier set up in law firms and judges' chambers to prevent conflicts of interest. An appropriately maintained Chinese wall does not permit any communications on the subject it addresses.) On the same day, *The New York Times* published substantially

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149. Bravin, *supra* note 3, at A1.

150. *Id.* By letter dated July 8, 2002, I invited Justice Thomas to comment on this quotation and on the ones appearing in the text at notes 151, 154, and 183, *infra*, but he would not do so.

the same information, together with more extensive comments from Mrs. Thomas:

> "There is no conflict here," Mrs. Thomas said in an interview. She insisted that she rarely discussed matters before the Supreme Court with her husband and that Justice Thomas therefore should not consider recusing himself from the landmark case. . . .
>
> Referring to her husband, . . . Mrs. Thomas said, "We don't talk about Supreme Court business. Clarence just isn't the kind. He protects me. We have our separate professional lives." . . .
>
> Mrs. Thomas said tonight that her recruitment efforts were bipartisan and not on behalf of the Bush campaign.
>
> "The Bush campaign would be as surprised as I was by any implication that I was working with them," she said.
>
> Mrs. Thomas acknowledged, however, that her search was likely to generate more interest among Republicans, because of the foundation's conservative orientation.[151]

A number of other periodicals, both in the United States[152] and

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151. Christopher Marquis, *Contesting the Vote: Challenging a Justice: Job of Thomas's Wife Raises Conflict-of-Interest Questions*, N.Y. TIMES, Dec. 12, 2000, at A26. The *Times* story also included comments from Judge Gilbert S. Merritt of the United States Court of Appeals for the Sixth Circuit:

> "The spouse has obviously got a substantial interest that could be affected by the outcome," he said in an interview from his home in Nashville. . . .
>
> Judge Merritt . . . has long association with the Gore family and was considered a leading contender for the Supreme Court early in the Clinton Administration . . . .
>
> Judge Merritt offered his views about Justice Thomas after someone in the Gore campaign provided *The New York Times* with his name and telephone number. Judge Merritt said he had had no direct contact with the Gore campaign.

The following day, the *Times* printed the following "correction":

> In its 12th paragraph, the article said that the federal judge who raised the conflict question was an associate of Vice President Al Gore's family, and the 14th paragraph reported that The Times had been directed to that judge by "someone in the Gore campaign." The partisan nature of the source should have been made clear more promptly and reflected in attribution in the headline. The headline's plural reference to "questions" exceeded the facts of the article. The article quoted Mrs. Thomas as saying that her transition efforts were nonpartisan, not on behalf of the Bush organization. But those comments . . . appeared only in the latest New York regional editions.

Correction, N.Y. TIMES, Dec. 13, 2000, at A02.

152. Nationally, it was reported in the *New York Times* and *Time* magazine. Cohen, *supra* note 6, at 76; Paul Krugman, *Reckonings; In the Tank?*, N.Y. TIMES, Dec. 13, 2000, at A35. Anderson & Cohn, *supra* note 6, at AA04; Helen Thomas, *Winners and Losers*, DENVER POST, Dec. 24, 2000, at H2. Other examples include *Political Briefs*, DALLAS MORNING NEWS, Dec. 12, 2000, at 17A; Rekha Basu, *Election Was Settled by Manipulation, Not Divine Intervention*, DES MOINES REG., Dec. 15, 2000, at 23A; William Carlsen, *Court Fallout: Prospective Justices May Face Struggle*, S.F. CHRON., Dec. 14, 2000, at A16; Arianna Huffington, *Supreme Court Doesn't Look So Wise to Many Americans*, DALLAS MORNING NEWS, Dec. 17, 2000, at 5J; Robert L. Jackson, *Decision 2000/America Waits*, L.A. TIMES, Dec. 13, 2000, at A25; Kirk Loggins & John Shiffman,

abroad,[153] printed articles saying that Mrs. Thomas had solicited resumes for a possible Bush administration.

On December 21, 2000, *The Washington Times* published the following:

> The Heritage Foundation [has sent] a letter to journalists to correct "baseless stories insinuating some sort of impropriety about Virginia Thomas working at the Heritage Foundation while her husband, Justice Clarence Thomas, ruled on the contested election in Florida."
>
> James R. Weidman, director of media relations at Heritage, wrote: . . .
>
> "As Heritage's senior fellow in government studies, Ms. Thomas oversees our government-oversight project. Among her many activities in this area this year, she coordinated an eight-week training seminar for congressional staffers on how they can better prepare their members of Congress to conduct productive oversight hearings." On Dec. 4, while the election was still in doubt, Mrs. Thomas learned that Mary Rose, a staffer in another department at Heritage, "had been designated as our resume 'point person,' the one who would ride herd over the resumes being sent to us by people interested in working for the next administration," Mr. Weidman said. "Ms. Thomas then e-mailed House and Senate staffers with whom she had been working to acquaint them with this fact. The e-mail went to both Republican and Democratic staffers."
>
> Mr. Weidman added: "Ms. Thomas has not been receiving resumes. She has not been recruiting potential appointees for a Bush administration. She is not affiliated with the Bush transition team in any way, shape or form."[154]

According to its mission statement, the Heritage Foundation is a "a think tank" whose purpose "is to formulate and promote conservative public policies" by developing positions and research and "marketing these findings to . . . members of Congress, key congressional staff members, policymakers in the executive branch, the nation's news media, and the academic and policy communities."[155]

This boils down to two separate but overlapping situations, either of which could exist even if the other did not. The first is the December 4, 2000, email to Congressional staffers, which Mrs. Thomas appears to have admitted to at least two reporters. Nearly all the press interpreted that email as an effort on behalf of the Bush team, although not necessarily one authorized by the Bush team. Mrs. Thomas and others associated with her or with Bush claimed that what she did was non-partisan—from which it necessarily follows that the Heritage Founda-

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Supreme Court's Decision to Stop Recount Spurs Ethical, Political Debate, THE TENNESSEAN (Nashville), Dec. 14, 2000, at 1A; David Nyhan, *Lady Luck Is Following George W.*, BOSTON GLOBE, Dec. 13, 2000, at A27; Saletan, *supra* note 8, at B7; Willard, *supra* note 8, at 5A.

153. For example, *Bush at Last: But Divisive Legacy Remains*, STATESMAN (India), Dec. 16, 2000; Stephen Andrew, *The Scandal of America's Judges*, NEW STATESMAN (London), Dec. 18, 2000, at 11; Martin Kettle, *New Twist in US Drama*, GUARDIAN (London), Dec. 13, 2000, at 1.

154. Greg Pierce, *A Non-Story*, WASH. TIMES, Dec. 21, 2000, at A5.

155. THE HERITAGE FOUNDATION, *available at* http://www.heritage.org/About/mission.cfm (last visited Feb. 3, 2003).

tion would have offered the resumes to Gore if he had become president. (Although one might reasonably doubt the truthfulness of that claim, its truth or falsity does not matter much to recusal, as we shall see.)

The second situation is a broader one and would have existed even if she had never sent the December 4 email. She was and is employed by a conservative think-tank that collaborates with the Republican Party. And she was previously employed by a Republican leader in the House of Representatives. According to the *Wall Street Journal*, in that previous employment, "Ms. Thomas spearheaded a leadership effort to gather embarrassing information about the Clinton-Gore administration"[156]—whatever that might have entailed.

Mrs. Thomas claimed that she and Justice Thomas never (the "Chinese wall" statement)[157] or "rarely"[158] discuss his work at the Supreme Court—or even her work, either as an employee of the Heritage Foundation or, earlier, as an employee of a Republican leader in the House. As inherently incredible as this claim seems, its actual truth or falsity is not particularly relevant to recusal. Because any issue involving Mrs. Thomas would likely be resolved under § 455(a)—which disqualifies a judge where "his impartiality might reasonably be questioned"—the law will assume that the Thomases discuss their work with each other if a disinterested lay observer would assume it.

Mrs. Thomas has therefore not created any conflict of interest that would disqualify Justice Thomas under § 422(b). She was not a party to *Bush v. Gore* or an officer, director, or trustee of a party.[159] She was not a lawyer[160] or a witness in the lawsuit.[161] The law does not consider her political activities to be proof that Justice Thomas had "a personal bias or prejudice concerning a party."[162] She

156. Bravin, *supra* note 3, at A1.

157. *See* text following note 150, *supra*.

158. *See* text at note 151, *supra*.

159. 28 U.S.C. § 455(b)(5)(i). She is, at most, an employee–not an officer, director, or trustee—of a nonparty. She is thus two degrees of separation away from what would be disqualifying under § 455(b)(5)(i), even though her nonparty employer was clearly rooting for Bush to win both the election and the lawsuit. She herself was probably rooting for Bush to win. But nothing in § 455(b) treats a spouse's desires as per se disqualifying. For two reasons, no conflict of interest statute could reasonably require that kind of recusal. First, that would, in effect, prohibit judges from discussing their cases with their spouses, which would be both impossible to enforce and impossible for judges and their spouses to comply with. Second, the proof problems would preclude recusals based on a spouse's desires, except in the rare case where those desires have been so openly expressed that they create an appearance of partiality under § 455(a). If § 455(a) already reaches those instances where recusal for a spouse's desires is possible, there would be no reason for Congress to add a per se disqualification under § 455(b).

160. § 455(b)(5)(ii).

161. § 455(b)(5)(iv).

162. § 455(b)(1). In a state case where the defendant "was charged with violent offenses against his wife" and the trial judge's wife was the president of the county Coalition Against Domestic Abuse, the Indiana Supreme Court "decline[d] to find a rational inference that the judge was thereby biased or prejudiced" under the Indiana equivalent of § 455(b)(1). Allen v. State, 737 N.E.2d 741, 742, 744 (Ind. 2000).

does not have "a financial interest in the subject matter in controversy."[163] Nor does she have an interest "that could be substantially affected by the outcome of the proceeding."[164]

It is easy to imagine circumstances, however, in which a spouse's desires on how a case should be decided have been so openly expressed as to create an appearance of impartiality that would disqualify the judge under § 455(a). The question here is whether Mrs. Thomas did that.

After reviewing the disqualifying grounds involving family members detailed in § 455(b)(5)—none of which would have disqualified Justice Thomas, as we have just seen[165]—the Seventh Circuit observed that "[t]he care with which these rules are drafted should make a court hesitate to treat the general language of § 455(a) as a bar to judicial service whenever a relative has 'something to do with' a party."[166] In two cases where a trial judge's child was employed by a party to the lawsuit (Hewlett-Packard in both instances), courts of appeals held that the trial judge was not necessarily disqualified by § 455(a). There is no basis for recusal where "the district judge's son is one of 83,000 employees [and] holds a nonmanagement position in a division [other than the one] involved in [the] case [so that] the outcome of [the] litigation will not affect either his employment or his financial interest in the company" through a profit-sharing plan.[167] Nor was there an appearance of impropriety in a bankruptcy appeal where the spouse of a court of appeals judge was the U.S. Trustee in Bankruptcy for the district where

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163. § 455(b)(4). Mrs. Thomas might have had a financial interest if, for example, the Bush campaign had promised her a federal job at a higher salary than she was earning at the Heritage Foundation, if Bush became president.

164. §§ 455(b)(4), (b)(5)(iii). The most analogous case is *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307 (2d Cir. 1988). *See infra,* notes 175-81. The Second Circuit held that the trial judge's wife's role as one of the sellers of a business did not create an "interest that could be substantially affected by the outcome of" lawsuits where the buyer had contracted for financing with an investment banker that was a party to those lawsuits. The Second Circuit offered no reason for this other than to assert that courts interpreting § 455(b)(4) "have inferred that 'any other interest that could be substantially affected' . . . means an interest in the subject matter of the litigation or a party to it." *Id.* at 1314. None of the cases cited by the Second Circuit—*Dep't of Energy v. Brimmer*, 673 F.2d 1287 (Temp. Emer. Ct. App. 1982); *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (10th Cir. 1980); *In re Virginia Elec. & Power Co.*, 539 F.2d 357 (4th Cir. 1976)—actually support that statement, and the Second Circuit did not explain why it thought they did. The wife's connection to the sale was not per se disqualifying under § 455(b)(4) and (b)(5)(iii), but for an entirely different reason; the sale "was not a difficult LBO [leveraged buyout] to finance and . . . a number of investment banking firms could provide the financing on terms comparable to those offered by Drexel." *Drexel*, 861 F.2d at 1310 (quoting an affidavit from a former chairman and chief executive officer of Lehman Brothers). Thus, even if Drexel failed to produce financing, another investment banking house would, the sale would close, and the judge's wife would receive $30 million—regardless of how the judge adjudicated the fraud actions before him. Similarly, although Virginia Thomas might be a happier person during a Bush presidency than during a Gore presidency, she could in either situation remain employed on pretty much the same terms at the Heritage Foundation.

165. *See* note 164 and text at notes 162-64, *supra.*

166. *In re* Nat'l Union Fire Ins. Co., 839 F.2d 1226, 1229 (7th Cir. 1988).

167. Datagate, Inc. v. Hewlett-Packard Co., 941 F.2d 864, 871 (9th Cir. 1991). *Accord* Hewlett-Packard Co. v. Bausch & Lomb, Inc., 882 F.2d 1556 (Fed. Cir. 1989).

the bankruptcy case was tried.[168] The appeal was from "a low-profile case where the U.S. Trustee's office ha[d] performed only routine administrative functions."[169] Interpreting language in the District of Columbia version of the ABA *Model Code of Judicial Conduct* nearly identical to § 455(a), the D.C. Court of Appeals held that a judge who is married to a police officer and whose late brother had been the chief of police was not disqualified from a trial for those reasons where the complaining witness was a police officer.[170]

What kind of situation involving a judge's relative does create an appearance of partiality requiring recusal under § 455(a)? Here are two examples: In *United States v. Kelly*, the judge's wife and the wife of a defense witness "were close personal friends," and the judge told the parties "that the situation put him in an embarrassing position, and created the risk that he might bend over backwards to prove that he lacked favoritism toward [the witness], with detrimental results for [the defendant]. Conversely, he stated that if he found [the defendant] guilty he felt he might jeopardize his wife's friendship with [the witness' wife]."[171] The judge discovered the problem when he saw the witness' wife in his courtroom, took her into chambers, and asked why she was present.[172] The judge and his wife subsequently argued over the matter.[173] In *In re Faulkner*, the relative was a cousin who was godmother to one of the judge's children; the judge described his relationship with the cousin as "more like that of 'brother and sister.'"[174] The cousin came close to being a victim of a real estate fraud that led to the prosecution in which the recusal issue arose. Her efforts to extricate herself placed a lending savings and loan at risk, and she herself was subsequently sued in a RICO suit that was not adjudicated by her cousin (the trial judge in the fraud prosecution). She discussed both the fraud and the loan with him before the fraud prosecution was assigned to him.

A poorly decided case—perhaps the most poorly decided case discussed in this article—was *In re Drexel Burnham Lambert, Inc.*, where the judge's wife owned part of a family business that was being sold to another company. The wife's share of the sales proceeds would be $30 million. Because the sale was leveraged, it was conditioned on the buyer's obtaining financing on "terms reasonably

168. *Bernard*, 31 F.3d 842.

169. *Id.* at 845. The court of appeals judge had been advised by the Committee on Codes of Conduct of the Judicial Conference of the United States that "in a high profile case involving your wife which could significantly aid or hinder her career, you would naturally be required to recuse." *Id.* The Committee was created by the Judicial Conference and "consist[s] of federal judges, [who] 'provide advice on the application of the Code of Conduct for United States Judges.'" *Id.* at 844 (quoting the Committee's Jurisdictional Statement). Concerning the *Code of Conduct for United States Judges*, see text at notes 66-68, *supra*.

170. York v. United States, 785 A.2d 651 (D.C. 2001).

171. 888 F.2d 732, 738 (11th Cir. 1989).

172. *Id.* at 738, 745, 747.

173. *Id.* at 747.

174. 856 F.2d 716, 718 (5th Cir. 1988).

satisfactory to the buyer."[175] The buyer contracted separately with Drexel to obtain financing. Neither the judge's wife nor the family business had any contractual relationship with Drexel, which was at the same time the defendant in fraud actions being litigated before the judge. The Second Circuit misinterpreted *Liljeberg v. Health Services Acquisition Corp.*[176] to mean that a judge is disqualified under § 455(a) only where the conflicting interest represents "a direct stake in the outcome of the litigation over which he was presiding."[177] The correct test is "whether an objective, disinterested, lay observer fully informed of the facts . . . would entertain a significant doubt about a judge's impartiality,"[178] and that is the test the Supreme Court enforced in *Liljeberg*.[179] The word "direct" appears nowhere in *Liljeberg*, and none of its synonyms were used by the Supreme Court to qualify its formulations there of the § 455(a) test.

The Second Circuit reasoned that since the buyer of the business rather than the judge's wife had a contract with Drexel, and since Drexel's financing would be delivered to the buyer rather than to the judge's wife, the situation did not create an appearance of impropriety.[180] But that type of reasoning resolves a potential § 455(b) conflict-of-interest issue–not a § 455(a) appearance-of-partiality issue. It provoked a passionate dissent from Judge Lumbard, who invoked the correct § 455(a) test:

> [T]he inescapable relevant fact is that Drexel has been, and is now, retained by the firm that is under contract with Mrs. Pollack [the judge's wife] and members of her family to arrange financing for the cash purchase of . . . their family business, from which members of the family will receive over $84 million and Mrs. Pollack herself, and as trustee, will receive $30 million in cash. It is clear to me that a reasonable person knowing these ultimately conceded facts would reasonably question Judge Pollack's ability to supervise such litigation impartially. Such a reasonable person's next question would be "Why hasn't the judge stepped aside?" Moreover, Judge Pollack's expressed resentment to the suggestion of recusal and his castigation of Drexel and its counsel has confirmed these doubts.[181]

Would the law's disinterested lay observer, informed of the press reports about Virginia Thomas, doubt that Justice Thomas could decide *Bush v. Gore* impartially? Even if one's intuitive sense is that the answer should be yes, the case law shows that it is actually no. Mrs. Thomas had a relationship no closer

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175. 861 F.2d 1307, 1310 (2d Cir. 1988) (quoting sales contract). *See* note 164, *supra*.

176. 486 U.S. 847.

177. *Drexel*, 861 F.2d at 1313.

178. *Parker*, 855 F.2d at 1524. *See* text at notes 41-47, *supra*.

179. "[B]oth the District Court and the Court of Appeals found an ample basis in the record for concluding that an objective observer would have questioned Judge Collins' impartiality." *Liljeberg*, 486 U.S. at 861.

180. *Drexel*, 861 F.2d at 1314-15.

181. *Id.* at 1317.

to—and in some ways more distant from—the Bush campaign than the one of Hewlett-Packard's 83,000 employees who happened to be a trial judge's son. And, with one exception, nothing reported in the press approximates the type of facts that were disqualifying in *Kelly* and *Faulkner*. The exception is the *Wall Street Journal*'s report that, while employed by a member of the Republican house leadership, "Ms. Thomas spearheaded a leadership effort to gather embarrassing information about the Clinton-Gore administration."[182] If that means that she spent a significant amount of time trying to find ways of defaming Al Gore, the analysis here might be different. But the *Journal*'s words could also mean that she did nothing more than investigate whether the executive branch during the Clinton administration was, in various ways, following the law, and that little or none of that involved Gore.

B. JUSTICE THOMAS' POLITICAL HISTORY WITH GEORGE H. W. BUSH, GEORGE W. BUSH, AND AL GORE

> [I]n November 1999, . . . a television interviewer asked Mr. Bush . . . whether his father was correct when he said, in choosing Justice Thomas, that the nominee was the most qualified candidate . . . . "I do," Mr. Bush responded. "And I think he's proven my dad correct."
>
> . . . During one of the presidential debates, the vice president added, "The next president is going to appoint three, maybe even four justices of the Supreme Court. And Gov. Bush has declared to the antichoice groups that he will appoint justices in the mold of Scalia and Clarence Thomas who are known for being the most vigorous opponents of a woman's right to choose."
>
> Left-leaning interest groups picked up the cudgel in campaign ads opposing Mr. Bush, depicting a Supreme Court chamber of horrors if he won. People for the American Way spent $500,000 on one late-campaign television spot that parodied a credit card ad, calling Justices Thomas and Scalia "George W. Bush's favorite Supreme Court justices" and portraying them as ardent opponents of gun control and other "priceless" personal freedoms.[183]

Justice Thomas was nominated to the Supreme Court by George W. Bush's father, George H. W. Bush. During the Senate hearings on the nomination, profound doubts were raised about Justice Thomas' suitability for office, primarily because of the testimony of Anita Hill. Eventually, Justice Thomas was confirmed by the narrowest margin of any justice in history. Throughout this bitter controversy, the elder Bush's administration not only never

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182. Bravin, *supra* note 3, at A1.

183. *Id. See also* Harriet Chiang, *Election Could Shape Supreme Court for Years to Come*, S.F. CHRON., Oct. 24, 2000, at A4; Neil Lewis, *The 2000 Campaign: The Judiciary*, N.Y. TIMES, Oct. 8, 2000, at 28 [hereinafter Lewis, *The 2000 Campaign*]; Stephen B. Presser, *How Bush Would Fix the Supremes*, CHI. TRIB., Nov. 5, 2000, at 21; Warren Richey, *The Next Supreme Court Majority*, CHRISTIAN SCI. MONITOR, Jan. 20, 2000, at 1; David Savage, *More Than Just the Oval Office at Stake*, L.A. TIMES, Oct. 2, 2002, at A1.

wavered in its confidence in Justice Thomas, but it also fought hard to get him confirmed.

During the 2000 election campaign, the younger Bush, the petitioner in *Bush v. Gore*, said several times that he considered Justice Thomas to be a model judge, and that if he were elected president, he would appoint judges of the same kind. Gore, on the other hand, criticized Justice Thomas and promised to appoint judges who would resemble him as little as possible.

Where a judge owes his position to a litigant's father–and where that litigant has gone out of his way to flatter the judge and the opposing party has done the opposite at a time when neither litigant could imagine having the judge decide an election dispute between them—would the law's disinterested lay observer doubt that Justice Thomas could decide *Bush v. Gore*—and thus the 2000 election—impartially? The cases are mixed.

In *United States v. Tucker*,[184] Independent Counsel Kenneth W. Starr petitioned the Eighth Circuit to disqualify Judge Henry Woods of the Eastern District of Arkansas from presiding over the trial of Jim Guy Tucker, the governor of Arkansas and a political ally of then-President William J. Clinton as well as Hillary R. Clinton. The Eighth Circuit cited a number of newspaper articles describing connections between Judge Wood and the Clintons, among them that Judge Woods had once appointed Hillary Clinton as counsel in a school desegregation case and "came to admire her during that period"[185] and that the judge had spent election night in the White House in 1994.[186] The court also cited newspaper articles showing support by the Clintons for Tucker, including a report of a fund-raising gathering where Tucker was greeted with sustained applause, after which Clinton said, "I am especially glad to see Governor and Mrs. Tucker here today and especially grateful for the reception you gave them."[187] The Eighth Circuit held that this created an appearance of partiality and required disqualification under § 455(a).[188]

In *Home Placement Service v. Providence Journal Co.*,[189] the trial judge had been Rhode Island Senator John Chafee's campaign manager several times before being appointed to the district court. A plaintiff sought recusal on the grounds that Senator Chafee "[w]as responsible for the appointment of [the trial judge] to the bench," that Senator Chafee had once been a partner in the law firm representing the defendant, and that Senator Chafee's cousin was "a director and shareholder of the Defendant."[190] The trial judge did not deny the first of these

184. 78 F.3d 1313 (8th Cir. 1996).

185. *Id.* at 1323 (quoting Rex Nelson, *Road to Tucker Trial Full of Twists for Judge Woods*, ARK. DEMOCRAT-GAZETTE, Sept. 3, 1995, at A1).

186. *Id.*

187. *Id.*

188. *Id.* at 1324-25.

189. 739 F.2d 671 (1st Cir. 1984).

190. *Id.* at 674 (quoting the plaintiff's affidavit).

propositions and instead "stated that he felt proud to have a close personal relationship with Senator Chafee for twenty-four years."[191] The First Circuit held that none of this creates an appearance of partiality under § 455(a): "It is common knowledge . . . that the first step to the federal bench for most judges is either a history of active partisan politics or strong political connections or . . . both."[192] This is not actually inconsistent with *Tucker*. Even if the judge owed his appointment to Chafee, the latter had no connection to the lawsuit. The plaintiff produced no evidence of a continuing connection between Chafee and the law firm and no evidence that Chafee cared about the cousin or the lawsuit or had communicated any such thing to the judge, who claimed never to have met the cousin. "The tenuous link between Senator Chafee and the defendant through his cousin, totally unknown to Judge Selya, would not raise even an eyebrow of the reasonable person objectively assessing the Judge's impartiality."[193]

In *Vieux Carre Property Owners, Residents and Associates, Inc. v. Brown*,[194] the plaintiff moved to recuse a district judge on the grounds that he had a "close personal and political friendship" with the local mayor, who had aggressively advocated the project that the plaintiff had sued to prevent, and that the mayor's reelection campaign would be hurt if the project were enjoined.[195] The trial judge rescheduled a hearing on the defendant's motion to dismiss until after the election and then denied the recusal motion. The Fifth Circuit affirmed and held—without explaining why—that there was not "such a close connection between the district judge and the mayor that recusal was necessary after the election."[196] Because the Fifth Circuit gave no explanation for its reasoning, or even any details about the relationship between the mayor and the judge, it is impossible to tell whether *Vieux Carre* is consistent with *Tucker* and *Home Placement*.

In *In re United States*,[197] a criminal defendant had been a state senator and fifteen years earlier, as chair of a legislative committee, had handled an investigation in a way that could be interpreted as having benefited the then-governor. The U.S. Attorney sought to have the trial judge disqualified on the ground that the judge had been close politically with the governor and would thus feel—or appear to the public to feel—a debt of gratitude to the defendant. Because it was not clear that the defendant had actually helped the governor and because of the long period of time between the investigation and the trial, the First Circuit held that there was no appearance of partiality that would require recusal under § 455(a).[198]

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191. *Id.* at 675.
192. *Id.*
193. *Id.*
194. 948 F.2d 1436 (5th Cir. 1991).
195. *Id.* at 1442 (apparently quoting the plaintiff's motion).
196. *Id.* at 1448.
197. 666 F.2d 690 (1st Cir. 1981).
198. *Id.* at 696.

In *Sierra Club v. Simkins Industries, Inc.*,[199] the trial judge had been a member of the Sierra Club from 1969 until 1971, when he was appointed to the bench.[200] The lawsuit was begun in 1984.[201] The Fourth Circuit found no appearance of impropriety because the judge's membership in the Sierra Club had been short and had ended long before the lawsuit began.[202]

In *In re Mason*,[203] the trial judge, before being appointed to the bench, had made campaign contributions of $100 each to two defendants, who were elected officials being sued only in their official capacities. The contributions were not in the distant past. One was in 1983 and the other in 1986. The judge was appointed in 1987, and the recusal issue arose in 1990. Citing *Home Placement*, *In re United States*, and *Sierra Club*, the Seventh Circuit held that "[c]ourts that have considered whether prejudicial political activity is also prejudicial regularly conclude that it is not. . . . In large measure, this is so out of necessity. . . . There are not enough political eunuchs on the federal bench to resolve all cases with political implications . . . ." That was written before *Tucker*, which is the closest of these cases to Justice Thomas' facts.

In the Senate, Justice Thomas was confirmed by the smallest margin in history–forty-eight senators against him and only fifty-two in favor.[204] Al Gore, then a senator from Tennessee, voted nay.[205] Justice Thomas displayed considerable bitterness at the time, describing his confirmation hearings as "a high-tech lynching."[206] Little since then suggests that he has lost that bitterness entirely.[207] Did it create an appearance of partiality against Gore–for Gore's opposition to Justice Thomas' confirmation–that would have required Justice Thomas to recuse himself under § 455(a)? Two lines of cases might be relevant to this question.

In one line of cases, a lawyer for one of the parties had earlier either testified against a judge or defended the judge in a proceeding that had some characteristics of a disciplinary hearing. Because of the life tenure of Article III judges, these cases are exceedingly few in federal courts. But they all stand for the proposition that the judge in such a situation is disqualified.[208] Gore, however, did not testify

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199. 847 F.2d 1109 (4th Cir. 1988).

200. *Id.* at 1116.

201. *Id.* at 1112.

202. *Id.* at 1117.

203. 916 F.2d 384.

204. *The Thomas Confirmation: How the Senators Voted on Thomas*, N.Y. TIMES, Oct. 16, 1991, at A19.

205. *Id.*

206. Richard L. Berke, *Thomas Backers Attack Hill; Judge, Vowing He Won't Quit, Says He is Victim of Race Stigma*, N.Y. TIMES, Oct. 12, 1991, § 1, at 1; Richard L. Berke, *Thomas Accuser Tells Hearing of Obscene Talk and Advances; Judge Complains of 'Lynching'*, N.Y. TIMES, Oct. 11, 1991, § 1, at 1.

207. *See, e.g.*, Neil A. Lewis, *Justice Thomas Suggests Critics' Views Are Racist*, N.Y. TIMES, July 29, 1998, at A1.

208. Two cases involve the same judge, the same lawyer, and the same testimony before an investigating committee, the Fifth Circuit Judicial Council. United States v. Avilez-Reyes, 160 F.3d 258 (5th Cir. 1998); United States v. Anderson, 160 F.3d 231 (5th Cir. 1998). In a third case, the Utah state bar association considered

against Thomas. He was not a member of the Senate Judiciary Committee, did not participate in the confirmation hearings in any capacity, and did not take a leading role in opposing Thomas' nomination. He only voted against him on the Senate floor.

In the other line of cases, a lawyer for one of the parties either supported or opposed the judge in a prior election. Because federal judges are appointed and not elected, these are state cases, under a state version of the ABA *Code*. Unless the judge has done something to show bias, the lawyer's support or opposition is not considered disqualifying. "Where a lawyer voices his opposition to the election of a judge, it is assumed that the judge will not thereafter harbor prejudice against the lawyer."[209] Although the rule might seem naive, any other rule would disqualify judges in large numbers of cases because of the frequency with which lawyers contribute to the campaigns of those running for judicial office. What might a judge do to show bias and overcome the presumption? One judge subjected a lawyer who opposed her to a "tirade."[210] There have been no reports that Justice Thomas did anything concerning Al Gore that could overcome the presumption of a lack of bias.

The issue here is closer than the question of whether Virginia Thomas' activities have created an appearance of partiality. But the cases are at worst no more than mixed and do not provide confidence that Justice Thomas' political role and his relationship to the Bushes have created that appearance.

C. COMBINING THE APPEARANCE OF THE SPOUSE'S ACTIVITIES WITH THE JUSTICE'S POLITICAL HISTORY

Do the activities of Justice Thomas' spouse and Justice Thomas' political history combine to create an appearance requiring recusal, even if neither separately would require it?

One might be tempted to say simply that zero plus zero equals zero. But the math here more closely resembles a question of whether one fraction plus another fraction equals at least one. Is Justice Thomas' political history close enough to disqualifying that if Virginia Thomas' activities were added, the total would equal an appearance of partiality? Assuming that she expended no significant effort in

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resolutions asking the U.S. House of Representatives to impeach the judge or that his disability be certified or his docket be taken from him administratively. United States v. Ritter, 540 F.2d 459, 460 (10th Cir. 1976). The attorney for one of the parties had been president of the state bar and chair of the committee that investigated and reported recommendations (which were adopted) that all the resolutions be defeated except those related to the question of disability. *Id.* In all three cases, the courts of appeals found an appearance of partiality. After a lawyer testified against then-Justice Rehnquist in the 1986 hearings on Rehnquist's nomination to become Chief Justice–accusing Rehnquist of having harassed minority voters while a poll watcher in the 1960's, which Rehnquist denied–Rehnquist recused himself, at least initially, in cases where the lawyer was counsel to one of the parties. Tony Mauro, *Anti-Bork Trial Lawyer Has His Day*, LEGAL TIMES, Aug. 24, 1987, at 9.

209. McDermott v. Grossman, 429 So. 2d 393, 393 (Fla. App. Ct. 1983).

210. *Id.* at 394.

her House job to sabotaging Gore's career, the answer would have to be no. What the press has reported about her seems far enough from disqualifying that even when it is added to Justice Thomas' political history, precedent suggests that the disinterested lay observer imagined by the courts is not likely to doubt his impartiality.[211]

III. CHIEF JUSTICE REHNQUIST

A number of periodicals have published stories to the effect that, at the time *Bush v. Gore* was decided, Chief Justice Rehnquist wanted to retire while a Republican president was in a position to nominate a successor who could be confirmed by the Senate. Here is a sample, in the order in which they were published:

From the *Wall Street Journal* on December 12, 2000:

> In the past, there have been indications that Chief Justice Rehnquist wanted to retire . . . to Arizona, where he practiced law before coming to Washington in 1969 to work in the Nixon Justice Department. In January, he will have been on the bench for 28 years. He is a widower and has an ailing back. During most oral arguments, he gets up at least once and disappears behind the maroon curtains behind the justices' chairs for 20 seconds or so, to stretch.
>
> Mr. Rehnquist's current desires are less clear [than Justice O'Connor's]. "I don't think anyone knows whether the chief is contemplating retirement right now," said Jeff Bleich, a former law clerk. "He was contemplating it about 10 years ago when his wife was ill. But after she passed away, he has really focused on his work, and he hasn't been talking about it since then."[212]

From the *Atlanta Journal-Constitution* on December 17, 2000:

> Many court-watchers believe that Rehnquist has been waiting to outlast the Clinton administration in hopes his successor could be nominated by a Republican president.[213]

From *USA Today* on January 22, 2001:

> Both [Rehnquist and O'Connor] have considered retirement, and it's accepted among court analysts that the two justices, both Republicans, would prefer that a GOP president name their successors.[214]

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211. It is a different question whether a survey of actual human beings, informed of the press reports, would produce the same result. The law treats the answer to that question as irrelevant. See text at notes 45-47, *supra*.

212. Bravin, *supra* note 3, at A1. By letter dated July 8, 2002, I invited Chief Justice Rehnquist to comment on this quotation and on the ones appearing in the text at notes 213, 214, and 215, *infra*, but he would not do so.

213. Bill Rankin, *Move to Right Seems Certain*, ATLANTA J.-CONST., Dec. 17, 2000, at 6G.

214. Biskupic, *supra* note 6, at 01A. *See, e.g.*, Anderson & Cohn, *supra* note 6, at AA04; Mary McGrory, *Supreme Travesty of Justice*, WASH. POST, Dec. 14, 2000, at A03. Other examples include *Personal Agendas Loom Large behind the Big Bench*, AUST. FIN. REV., Dec. 13, 2000, at 7; Glass, *supra* note 6, at 02J; Tony

From the *Washington Post* on June 17, 2001:

> "Make no mistake," said one longtime friend of the chief justice, Rehnquist would prefer to "return" his seat to a Republican president. . . .
>
> Asked during [a] PBS interview if it would make a difference to him that there is a Republican in the White House, Rehnquist did not answer directly but did concede that there had "traditionally" been a "slight preference" by justices to retire during administrations of the party that appointed them.[215]

A. HAS THE MEDIA ACTUALLY REPORTED THAT CHIEF JUSTICE REHNQUIST, IN DECEMBER 2000, HAD AN INTENT TO RETIRE?

How much do these stories claim to report Chief Justice Rehnquist's intent, in early and mid-December 2000, to retire within some defined time frame–as opposed to an intent he may have had at some point during the 1990's and later discarded? How much do these stories report an intent to retire *only* during a Republican presidency? And how much does this reporting appear to be based on comments made by Chief Justice Rehnquist, either privately or publicly, rather than on speculation by the authors and speculation by other people who have not heard from Chief Justice Rehnquist himself what his thoughts are?

Here, there is no equivalent to the election night scene with Justice O'Connor. The reporting seems to reflect expressions of personal interest in retirement at a time years before *Bush v. Gore* when Chief Justice Rehnquist's wife was ill. He might not have retired then because a Democrat was president, although it does not necessarily follow that years later he would retire as soon as a Republican president becomes available. Intentions can change as personal situations change, and the reporting can be read as suggesting ambivalence on the question of retirement together with speculation by others and rumors based on what once

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Mauro, *Fractious Episode Likely to Affect Justices Futures on the Bench*, TEX. LAW., Dec. 18, 2000, at 16 [hereinafter Mauro, *Fractious Episode*]; Presser, *supra* note 183, at 21; Riskind, *supra* note 6, at 1A; Schorr, *supra* note 6, at 11.

215. Charles Lane & Amy Goldstein, *At High Court, a Retirement Watch*, WASH. POST, June 17, 2001, at A4. The PBS reference was to the February 16, 2001, Charlie Rose Show. Here is the dialog, after Rose asked Rehnquist whether he would consider retiring:

> Rehnquist: "Sure."
> Rose: "You were appointed by a Republican. There is now a Republican in the White House. Would that make a difference for you?"
> Rehnquist: "I think traditionally Republican appointees have tended to retire during Republican administrations. And Democratic appointees during [Democratic administrations]. It's not invariable. But there's a slight preference for that."
> Rose: "So you would feel more comfortable retiring when there was a Republican for the reasons you've just said."
> Rehnquist: "I said 'Republican.' I made a general statement about Republican appointees."

Tony Mauro, *Rumor Mill Starts Anew in Wake of Rehnquist's Hints about Retirement*, N.J. L.J., Apr. 9, 2001, at 101.

might have been an intention. Even if everything quoted above about Chief Justice Rehnquist is true, the most reasonable inference is that the media has not reported concrete evidence of an intention to retire on the part of Chief Justice Rehnquist that could have created a conflict of interest at the time *Bush v. Gore* was decided. That does not mean that Chief Justice Rehnquist did not have a conflict of interest. It means that the press reports do not furnish a basis for concluding that he did.

Would it have been a violation of § 455 for Chief Justice Rehnquist to vote to reverse the Florida Supreme Court in *Bush v. Gore* primarily because he preferred Bush as president, the legal reasons given in the per curiam opinion and in his concurring opinion being mere excuses and not genuinely believed conclusions about the law? That certainly would have created an appearance of partiality in violation of § 455(a). It would represent a bias or prejudice in violation of § 455(b)(1). And a preference that Bush rather than Gore become president would certainly be an "interest that could be substantially affected by the outcome of the proceeding" within the meaning of §§ 455(b)(4) and 455(b)(5)(iii). But no alleged facts–such as an overheard admission–that might be evidence that Chief Justice Rehnquist or any other justice voted this way have been reported in the media or elsewhere. And given that absence, a person with either a lawyer's or an historian's sense of evidence cannot go much further.

B. THE MYTHICAL TRADITION OF RETURNING SUPREME COURT SEATS TO A POLITICAL PARTY UPON RETIREMENT

Chief Justice Rehnquist has told an interviewer that "traditionally" justices have had a "slight preference" for timing their returning their seats to the party of the president who nominated them.[216] There is no such "tradition."

Of the nineteen justices who have left the Court through retirement or resignation since 1950, twelve were nominated by Democratic presidents and seven were nominated by Republican presidents. Of the twelve nominated by Democrats, eight retired or resigned during a Republican presidency,[217] and four did so during a Democratic presidency.[218] Of the seven nominated by Republicans, three offered their retirements during a Democratic presidency,[219] and four did so during a Republican presidency.[220] Thus, of the nineteen in total, more than half left the Court during a presidency of the party opposing that of the president who nominated them.

Of the 100 justices who have previously served on the Supreme Court

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216. *See supra* note 215 and accompanying text.

217. Sherman Minton, Stanley F. Reed, Harold H. Burton, Abe Fortas, Hugo L. Black, William O. Douglas, William J. Brennan Jr., Thurgood Marshall.

218. Felix Frankfurter, Arthur J. Goldberg, Tom C. Clark, Edward D.White.

219. Charles E. Whittaker, Earl Warren, Harry A. Blackmun.

220. John Marshall Harlan, Potter Stewart, Warren E. Burger, Lewis F. Powell.

throughout its history—counting Charles Evans Hughes twice because he left the Court twice—forty-six died in office.[221] Only seven left the Court in circumstances that might suggest that they timed their retirements while bearing in mind the identity of the president who would appoint their successors. And, for reasons explained below, the evidence is unclear on whether any of them did so to return their seats to a political party. The remaining forty-seven justices resigned or retired when their health failed or began to fail or age made the work difficult,[222] when they pursued or were offered a job they considered more interesting,[223] when some other matter intervened,[224] or when they just did not want to be on the Court anymore[225]–leaving no evidence that any of them timed their retirements to return their seat to the party of the president who nominated them.

Two justices–Nathan Clifford and Ward Hunt–delayed their retirements to prevent President Rutherford B. Hayes from nominating their successors.[226] Clifford refused to recognize Hayes as legitimately president.[227] In the 1876 presidential election, the results in three states were claimed to be fraudulent, and an electoral commission, which Clifford chaired, was appointed to resolve the dispute.[228] Over Clifford's dissents, the commission found for

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221. James Wilson, James Iredell, William Paterson, William Cushing, Samuel Chase, H. Brockholst Livingston, Thomas Todd, Robert Trimble, Bushrod Washington, William Johnson, John Marshall, Philip P. Barbour, Smith Thompson, Henry Baldwin, Joseph Story, Levi Woodbury, John McKinley, Peter V. Daniel, John McLean, Roger B. Taney, John Catron, James M. Wayne, Salmon P. Chase, William B. Woods, Morrison R. Waite, Stanley Matthews, Samuel F. Miller, Joseph P. Bradley, Lucius Q. C. Lamar, Samuel Blatchford, Howell E. Jackson, Rufus W. Peckham, David J. Brewer, Melville W. Fuller, John Marshall Harlan (the first Harlan), Horace H. Lurton, Joseph R. Lamar, Edward D. White, Edward T. Sanford, Benjamin N. Cardozo, Pierce Butler, Harlan Fiske Stone, Frank Murphy, Wiley B. Rutledge, Fred M. Vinson, Robert H. Jackson. *See* DAVID N. ATKINSON, LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END 11-122 (1999).

222. John Blair Jr, Oliver Ellsworth, Alfred Moore, Gabriel Duvall, Robert C. Grier, Samuel Nelson, Noah H. Swayne, Stephen J. Field, Horace Gray, Henry Billings Brown, William H. Moody, William R. Day, Mahlon Pitney, Joseph McKenna, William H. Taft, Oliver Wendell Holmes Jr., Louis D. Brandeis, Charles Evans Hughes (as Chief Justice, in 1941), Sherman Minton, Harold H. Burton, Felix Frankfurter, Hugo L. Black, John Marshall Harlan II (the second Harlan), Lewis F. Powell, William J. Brennan Jr., Thurgood Marshall, Harry A. Blackmun. *See id.* at 11-182.

223. John Jay, John Rutledge, David Davis, Charles Evans Hughes (as a justice, in 1916), James F. Byrnes, Arthur J. Goldberg. *See id.*

224. John A. Campbell (because his state seceded from the Union), William Strong (to set an example by retiring before his health began to fail), George Shiras Jr. (to keep a commitment he made, when appointed, to retire at age 70), Willis Van Devanter (to encourage Congress to reject President Franklin D. Roosevelt's plan to expand the Supreme Court), Tom C. Clark (to prevent conflicts of interest after his son became Attorney General), Abe Fortas (because of scandal). *See id.*

225. Thomas Johnson, Benjamin R. Curtis, John H. Clarke, George Sutherland, Owen J. Roberts, Stanley F. Reed, Charles E. Whittaker, Warren E. Burger. *See id.*

226. ATKINSON, *supra* note 222, at 60-61.

227. *Id.* at 60; PHILIP GREELY CLIFFORD, NATHAN CLIFFORD, DEMOCRAT (1803-1881) 323 (1922); KEITH IAN POLAKOFF, THE POLITICS OF INERTIA: THE ELECTION OF 1876 AND THE END OF RECONSTRUCTION 315 (1973).

228. ATKINSON, *supra* note 222, at 60; CLIFFORD, *supra* note 228, at 314-19; CHARLES FAIRMAN, FIVE JUSTICES AND THE ELECTORAL COMMISSION OF 1877 xvi (1988) (Supplement to Volume VII of the HISTORY OF THE SUPREME COURT OF THE UNITED STATES); PAUL LELAND HAWORTH, THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876 220, 224 (1906).

Hayes.[229] Hunt had a different reason. His patron, a senator, had a feud with Hayes and wanted to deprive Hayes of the opportunity to nominate Hunt's successor.[230] Because the senator had been instrumental in getting Hunt himself nominated, Hunt felt obliged to remain on the Court until Hayes' term ended.[231]

Justice James C. McReynolds, who probably had the vilest personality of anyone ever to serve on the Supreme Court,[232] despised President Franklin D. Roosevelt and tried to outlast him although he had to give up and retire eleven days after Roosevelt took the oath of office for his third presidential term.[233]

Chief Justice Earl Warren sent a resignation letter (actually two letters) to President Lyndon Johnson in June 1968, but it has never been clear whether Warren retired when he did to enable Johnson to nominate a successor or to prevent Richard M. Nixon from doing so. At the time Warren retired, Nixon was the presumed Republican presidential nominee. Warren was himself a Republican, though of a kind that has since been extirpated from the Republican Party in the realignment that brought conservative Democrats, mostly from the South, into the Republican Party, and liberal Republicans from other regions into the Democratic Party. Warren—who was the Republican governor of California, the 1948 Republican nominee for vice-president, and a candidate for president in the 1952 Republican primaries—knew and understood Nixon very well from the period when Nixon was a congressman and senator from California. Although one is tempted to think that Warren preferred the "liberal" Johnson to nominate the next chief justice,[234] personal relationships and animosities could have played an equal or greater role. Johnson and Warren were friends, and it would be understatement to say that Warren held an extremely low opinion of Nixon's character.[235] Nixon and Warren had been enemies in California politics, and Nixon had tried to sabotage Warren's 1952 campaign for the presidency.[236]

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229. ATKINSON, *supra* note 222, at 60; HAWORTH, *supra* note 229, at 236-37.

230. ATKINSON, *supra* note 222, at 61.

231. *Id.*

232. McReynolds "detested Justices Brandeis and Cardozo" because they were Jewish; "there is no official photograph of the Court in 1924, because McReynolds would not sit next to Brandeis as protocol required." DENNIS J. HUTCHINSON & DAVID J. GARROW, *FOREWARD* TO THE FORGOTTEN MEMOIR OF JOHN KNOX xix (2002). His hatreds covered an extraordinary range of ethnic groups, bodies of thought, and customs, even to men who wore wristwatches (which he considered effeminate). *Id.* at xx. Holmes considered McReynolds a "savage." SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 343 (1989). No justice of the Supreme Court attended his funeral. ATKINSON, *supra* note 222, at 113.

233. *See* ATKINSON, *supra* note 222, at 112.

234. Before sending the resignation letters, Warren went to the White House to meet with Johnson. "An aide's memorandum of the conversation reportedly stated . . . that Warren told Johnson that he was planning to retire from the Court, and that he wanted Johnson 'to appoint as his successor someone who felt as Justice Warren did.'" G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 307 (1982).

235. *Id.* at 306, 312; JACK HARRISON POLLACK, EARL WARREN: THE JUDGE WHO CHANGED AMERICA 9, 104 (1979). Warren and Nixon "detested each other." *Id.* at 286.

236. WHITE, *supra* note 235, at 313; LEO KATCHER, EARL WARREN: A POLITICAL BIOGRAPHY 260-61, 187-94 (1967); POLLACK, *supra* note 236, at 285-87; BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS

Johnson nominated Associate Justice Abe Fortas as chief justice. That infuriated Republicans, who hoped to win the 1968 Presidential election and have a President of their own party choose the next Chief Justice.[237]

In 1975, an infirm Justice William O. Douglas tried to outlast Gerald Ford, who had succeeded Nixon as president. Although Douglas told a friend, "I won't resign while there's a breath in my body—until we get a Democratic president,"[238] the reasons could have been personal resentment as well as political ideology. In 1970, as House Minority Leader, Ford had tried to get the House to impeach Douglas.[239] A House subcommittee produced a 924-page report and found Ford's allegations against Douglas to be groundless.[240] Eventually, Douglas' health deteriorated so much that he had to retire,[241] and Ford nominated John Paul Stevens. Justices Brennan and Marshall, who voted nearly as a bloc with Douglas, retired during a Republican presidency.[242] Douglas might not have been willing to do that. But he might just as likely have been willing to retire during any presidency except Ford's. The evidence is unclear.

Three of these justices—Clifford, Hunt, and McReynolds—clearly did or tried to avoid having their successors nominated by a particular president for personal reasons. For the other two—Warren and Douglas—the motivations look similar but are less clear. But none of the five tried to return their seat to the party of the president who nominated them in the first place. Three of them—Hunt, McReynolds, and Warren—were, in fact, nominated by presidents of the same party as the president they were trying to deprive of an opportunity to nominate.[243]

SUPREME COURT–A JUDICIAL BIOGRAPHY 21 (1983); EARL WARREN, THE MEMOIRS OF EARL WARREN 251 (1977); JOHN D. WEAVER, WARREN: THE MAN, THE COURT, THE ERA 182 (1967).

237. SIMON, INDEPENDENT JOURNEY, *supra* note 29, at 400-01; *see also* SMALL, *supra* note 29, at 166.

In confirmation hearings, the Republicans cross-examined Fortas in a way that nonstop television coverage today would make impolitic. "*Mallory, Mallory*," Senator Strom Thurmond shouted at Fortas, referring to a case decided by the Supreme Court before Fortas became a Justice, "I want that word to ring in your ears—*Mallory*!" MURPHY, *supra* note 32, at 426; *See also* KALMAN, *supra* note 32, at 340; SHOGAN, *supra* note 29, at 170. When Fortas' nomination got to the Senate floor, the Republicans filibustered it; cloture votes failed, and Fortas asked that the nomination be withdrawn. MURPHY, *supra* note 32, at 522-27. Two months later, Nixon was elected President. He nominated Warren Burger as chief justice, and Burger was easily confirmed.

238. ATKINSON, *supra* note 222, at 146.

239. Douglas, Final Report, *supra* note 31; 116 Cong. Rec. 11915-18 (1970). *See also* SIMON, INDEPENDENT JOURNEY, *supra* note 29; SMALL, *supra* note 29, at 170.

240. *See* Douglas, Final Report, *supra* note 33. *See also* 3 DESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, ch. 14, § 14.14-16; SIMON, INDEPENDENT JOURNEY, *supra* note 29, at 409.

241. *See* ATKINSON, *supra* note 222, at 148; *see also* SIMON, INDEPENDENT JOURNEY, *supra* note 29, at 446-51.

242. *See* ATKINSON, *supra* note 222, at 154-58.

243. Hunt was nominated by Ulysses S. Grant. Grant and Hayes were both Republicans. *See* GEOFFREY PERRET, ULYSSES S. GRANT: SOLDIER AND PRESIDENT 368, 376 (1977). McReynolds was nominated by Woodrow Wilson. Wilson and Franklin D. Roosevelt were both Democrats, and Roosevelt served as Wilson's Assistant Secretary of the Navy. *See* LEON H. CANFIELD, THE PRESIDENCY OF WOODROW WILSON: PRELUDE TO A WORLD IN CRISIS 17 (1966); *see also* GEOFFREY C. WARD, A FIRST-CLASS TEMPERAMENT: THE EMERGENCE OF FRANKLIN ROOSEVELT 92 (1989). Warren was nominated by Dwight D. Eisenhower. Eisenhower and Nixon were both

The retirements of two other justices have been speculated about, but there is little hard evidence that either of them retired when they did so that a president of a particular party could nominate their successors. Potter Stewart retired in 1981, shortly after Ronald Reagan became president, and Byron White retired in 1993, shortly after Bill Clinton became president. Stewart had been nominated by Dwight D. Eisenhower, who was, like Reagan, a Republican. White had been nominated by John F. Kennedy, who was, like Clinton, a Democrat. But both justices were centrists. Each was considered unreliable and disappointing by the ideologues in the party of the president who nominated him. For example, Stewart voted with the majority in *Roe v. Wade*[244] while White dissented.[245] White wrote the majority opinion in *Bowers v. Hardwick*,[246] with its memorable assertion that "to claim that a right to engage in [homosexual] conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[247] And Stewart voted with Justices Douglas and Black in all the major obscenity cases.[248] Both Stewart and White were known to prefer that their resignations not occur during a presidential election year,[249] perhaps because of the divisive political behavior that occurred in 1968.[250] That may explain why their retirements occurred a year after a presidential election, although White was quoted in a press report as saying that he preferred to retire during a Democratic administration.[251]

Thus, it is not true that justices have "traditionally" felt it desirable or even acceptable to schedule their retirements so that a president of a particular political party could nominate their successors. Although the reasons why this myth has been created are beyond the scope of this article, the myth itself–and its very recent creation–are a reminder that some political movements now consider the Supreme Court to be not a genuine court but instead another kind of legislature, members of which represent political interests and feel free, as legislators

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Republicans, and Warren had been the Republican governor of California and the Republican candidate for vice president in the 1948 presidential election. Warren and Nixon had in fact run together on the Republican ticket (and won) in California in the 1946 and 1950 elections. Warren was elected governor in both elections. Nixon was elected to the House of Representatives in 1946 and to the Senate in 1950. *See* SMALL, *supra* note 29, at 8-11.

244. 410 U.S. 113 (1973).

245. "The court apparently values the convenience of the pregnant woman more than the continued existence and development of the life or potential life that she carries." *Id.* at 222.

246. 478 U.S. 186 (1986).

247. *Id.* at 194.

248. Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre I v. Slayton, 413 U.S. 49 (1973); Mishkin v. New York, 383 U.S. 502 (1966); Ginzburg v. United States, 383 U.S. 463 (1965). In *Ginzburg*, he wrote, "Censorship reflects a society's lack of confidence in itself. It is a hallmark of an authoritarian regime." 383 U.S. at 498 (Stewart, J., dissenting).

249. *See* ATKINSON, *supra* note 222, at 150, 160.

250. *See* note 238, *supra*.

251. DENNIS J. HUTCHINSON, THE MAN WHO WAS ONCE WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 436 (1998).

sometimes do, to transfer their seats to politically like-minded nominees through politically strategized retirements.

IV. JUSTICE SCALIA

The media have reported two clusters of conflict-of-interest assertions regarding Justice Scalia. One concerns his own career plans. Several reporters claim to have talked to people who say they have heard Justice Scalia say that he is dissatisfied with his present position on the Court and that he would like to succeed William Rehnquist as Chief Justice, something that would be possible only during a Republican presidency, or, if that is not possible and if he continues to feel frustrated as an associate justice, that he might resign. The other cluster of conflict-of-interest assertions concerns Justice Scalia's sons Eugene and John, both of whom were affiliated with law firms representing Bush in *Bush v. Gore*.

A. JUSTICE SCALIA'S CAREER GOALS AND § 455(A)

In November 1999, a year before the 2000 election, *Fortune* magazine published the following:

> . . . Democratic and Republican partisans . . . have been shouting about the need to elect a President of their own because three justices are known to be considering retirement: John Paul Stevens, 79; Chief Justice William Rehnquist, 75; and Sandra Day O'Connor, 69, in that order. . . .
>
> But the surprising chatter in Republican circles is that a fifth justice might bolt: Antonin Scalia, 63. On the court since 1986, Scalia has told associates that he sometimes feels underchallenged by the light workload. He also has grumped about having to write so many dissenting opinions; the court has only three unswerving conservatives, Scalia, Rehnquist, and Clarence Thomas. Friends of Scalia describe him as frustrated and say he has mused aloud that press accounts about which justices might retire after the next President takes office have been wrong to omit him. Scalia wouldn't retire before Bill Clinton left office for fear of being replaced by a liberal. But if Governor George W. Bush or some other conservative Republican won, Scalia could give up his seat. He declines to comment.[252]

In March 2000, *Washingtonian* magazine published the following:

> When Supreme Court Justices think about leaving, conservative ones usually wait until there is a Republican president. But friends of Justice Antonin Scalia say he's thinking the opposite way. Scalia has been in a funk since failing to

252. Jeffrey H. Birnbaum, *Is Justice Antonin Scalia Frustrated Enough to Retire in 2001?*, FORTUNE, Nov. 22, 1999, at 80. By letter dated July 8, 2002, I invited Justice Scalia to comment on this quotation and on the ones appearing in the text at notes 253, 258, and 301, *infra*, but he would not do so.

> persuade his fellow justices to overturn Roe v. Wade–and thus allow states to set their own laws on abortion.
>
> The only fellow justice he now can rely on is Clarence Thomas; even fellow conservatives William Rehnquist and Anthony Kennedy have disappointed Scalia.
>
> With Sandra Day O'Connor and Ruth Bader Ginsburg having been ill and Rehnquist and John Paul Stevens ready to retire, Scalia has decided the November election is make-or-break time. If the Democrats win the White House, Scalia will resign. A Gore presidency would eliminate his chance of becoming Chief Justice and ensure that his jurisprudence will never be anything more than a footnote.
>
> If a Republican wins, Scalia would stay on. There's a good chance a new Republican president would name Scalia or Thomas as Chief Justice. Scalia would love being Chief Justice, especially on a court rid of O'Connor and Stevens.
>
> Ideology and history aren't the only factors. Also weighing on Scalia is money. Supreme Court justices earn $ 167,900 a year. Davis Polk & Wardwell, a New York City law firm, is paying first-year associates—youngsters right out of law school—$ 150,000 to $ 160,000 a year. Graduates with experience as Supreme Court clerks usually make $ 175,000 and commandeer a $ 50,000 signing bonus as well. This means that one year after they leave his chambers. Scalia's clerks will be earning far more than the father of nine–a disparity that is increasingly aggravating not only to Scalia but also to the other justices.[253]

The essence of this article was repeated in several other periodicals,[254] and the *National Review* also reported that Justice Scalia was considering retirement "owing to his frustration with the Court."[255]

In September 2000, the *Legal Times* published an article about a bill to repeal the 1989 statute limiting the amount of money federal judges can earn in honoraria. The following appeared in the article: "On Capitol Hill, it became known as the 'Keep Scalia on the Court' bill. . . . For Scalia, the honoraria ban was one of several factors that caused him to muse aloud from time to time about leaving the Court. To hear knowledgeable sources tell it, Scalia's frustration, as

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253. Kim Eisler, *Supreme Court's High Honor But Low Pay Could Send Justice Scalia Job Hunting*, WASHINGTONIAN, Mar. 2000, at 11. Some of Justice Scalia's dissents have included unusually personal comments that can be interpreted to reflect frustration with colleagues. *See, e.g.*, Webster v. Reprod. Health Serv., 492 U.S. 490, 532, 537 (1989) (Scalia, J., concurring) (arguing that Justice O'Connor's position in the same case is "irrational" and "cannot be taken seriously.").

254. *Personal Agendas Loom Large behind the Big Bench*, *supra* note 215, at 7; Jim Dwyer, *Justice Scalia's Legal Vision Is Blinded by His Ambition*, N.Y. DAILY NEWS, Dec. 11, 2000, at 4; Leah Garchik, *Scalia Contemplates Changing Jobs*, S.F. CHRON., Mar. 1, 2000, at C10; Robert Novak, *Scalia Hints He'll Quit If Gore Wins*, CHI. SUN-TIMES, Apr. 2, 2000, at 32; Mike O'Neill, *Quips, Quotes, Quibbles & Bits*, TAMPA TRIB., Mar. 3, 2000, at Baylife-5 ("Scalia is waiting for the outcome of the presidential election to decide on his future"); Sarah Threadgill, *Who's Who*, WASH.MONTHLY, May 1, 2000, at 14.

255. Daniel E. Troy, *The Court's Mr. Right*, NAT'L REV., Aug. 9, 1999, at 39.

much as anything else, was the trigger for inclusion, deep in a Senate appropriations bill, of a now-public provision lifting the ban on honoraria for the judiciary. The measure . . . has passed the Appropriations Committee but faces an uncertain fate."[256] Two weeks later, the *Legal Times* published a letter from Justice Scalia which included the following: "It is not my practice to respond to erroneous reports in the media, but your front-page story . . . is such a mean-spirited attack upon my personal integrity that I make an exception. . . . I have never suggested to anyone that I would leave the bench *because of that limitation*."[257]

On December 12, 2000–the day after the last oral arguments in *Bush v. Gore* and the morning before the Court issued its decision—the *Wall Street Journal* published the following:

> . . . Clarence Thomas and Antonin Scalia[] have been praised as model jurists by Texas Gov. George W. Bush and vilified by Mr. Gore. . . .
>
> Justices Scalia and Thomas saw their judicial performance become an issue in the campaign they may now decide. Their names entered the fray in November 1999, when a television interviewer asked Mr. Bush, "Which Supreme Court justice do you really respect?" He pointed to Mr. Scalia, saying, "He's an intellect. . . . He's witty, he's interesting, he's firm." . . .
>
> Democrats pounced on the statements, with Mr. Gore once denouncing Mr. Scalia as "the most far-right member of the court." During one of the presidential debates, the vice president added, "The next president is going to appoint three, maybe even four justices of the Supreme Court. And Gov. Bush has declared to the antichoice groups that he will appoint justices in the mold of Scalia and Clarence Thomas who are known for being the most vigorous opponents of a woman's right to choose."
>
> Left-leaning interest groups picked up the cudgel in campaign ads opposing Mr. Bush, depicting a Supreme Court chamber of horrors if he won. People for the American Way spent $500,000 on one late-campaign television spot that parodied a credit card ad, calling Justices Thomas and Scalia "George W. Bush's favorite Supreme Court justices" and portraying them as ardent opponents of gun control and other "priceless" personal freedoms. . . .
>
> There were rumors last year that [Justice Scalia] was ready to call it quits after a particularly frustrating series of losses on abortion and other ideological touchstones. One thing that may be going through his mind at the moment is the possibility of becoming chief justice during a Bush administration.[258]

Other periodicals reported that Justice Scalia has the ambition of replacing

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256. Tony Mauro & Sam Loewenberg, *Who Really Wants to Lift Ban on Fees? Scalia's Frustration Seen as Factor For Reinstating Judges' Honoraria*, LEGAL TIMES, Sept. 18, 2000, at 1.

257. *Letters: Scalia: Article Off Base*, LEGAL TIMES, Oct. 2, 2000, at 85 (emphasis added).

258. Bravin, *supra* note 3, at A1. *See also* Chiang, *supra* note 183, at A4; Lewis, *The 2000 Campaign*, *supra* note 183, at 28; Presser, *supra* note 183, at 21; Richey, *supra* note 183, at 1; Savage, *supra* note 183, at A1.

William Rehnquist as Chief Justice.[259]

Although there is an element of speculation in some of this reporting, the core of it is based on specific comments that Justice Scalia is claimed to have made to "associates" and "friends" close enough in time to *Bush v. Gore* to suggest motivation that could constitute a conflict in interest.[260] It is thus distinguishable from the published reports concerning Chief Justice Rehnquist, which were nearly entirely speculative when they attributed to him an intent to retire as soon as a Republican became president.[261]

In *Pepsico v. McMillan*,[262] a district court judge decided to explore the possibility of leaving the bench and returning to the practice of law. He asked a headhunter to contact several local firms and inquire whether they would be interested in taking on, as a partner, a federal judge who might soon resign. Even though not named by the headhunter, the identity of the judge would inevitably be apparent, given the make-up of the local federal bench. The judge asked the headhunter not to contact firms then litigating cases before him, but because of a misunderstanding, the headhunter called two such firms, who were on opposing sides of the same case. Both firms told the headhunter they were not interested. The judge then agreed to become a partner at a third firm. Before resigning, though, he began the trial of the case in which the first and second firms opposed each other. One of the firms petitioned the Seventh Circuit for a writ of mandamus disqualifying the judge.

The Seventh Circuit granted the writ and ordered the judge to recuse himself, even though it described him as a person of "unblemished honor and sterling character"[263] who "committed no impropriety."[264] In an opinion by Judge Posner, the court held that there was no *actual* bias or prejudice under § 455(b)(1) because the headhunter contacted both firms by mistake, both declined interest, and if the judge "feels any disappointment," it "presumably is with both firms."[265] But there was a reasonable basis for doubting the impartiality of the trial judge in part because the firms' declinations of interest were "asymmetrical": one firm said no, and the other might have said no "at this time" (recollections

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259. *See, e.g.*, Anderson & Cohn, *supra* note 6, at AA04; McGrory, *supra* note 214, at A03. *See also* Carlsen, *supra* note 152, at A16; Mauro, *Fractious Episode*, *supra* note 214, at 16; Schorr, *supra* note 6, at 11.

260. *See supra* note 252-53.

261. It is also distinguishable from the case law that holds that "rumors and speculation will not satisfy the requirements for disqualification of a judge." Anderson v. United States, 754 A.2d 920, 924 (D.C. 2000). In *Anderson*, a newspaper reported that the trial judge "has been mentioned frequently" as a "potential candidate" for U.S. Attorney. *Id.* In other words, several people told a reporter that the judge might make a good U.S. Attorney. The newspaper did not report that the judge wanted the job or had done anything to get it. Interpreting the District of Columbia version of § 455(a), the D.C. Court of Appeals held that speculation of that kind does not "reasonably call into question the judge's impartiality to an average citizen." *Id.* (italics omitted).

262. 764 F.2d 458 (7th Cir. 1985).

263. *Id.* at 460.

264. *Id.* at 461.

265. *Id.* at 460.

differed).[266] "An objective observer might wonder whether [the judge] might not at some unconscious level favor the firm . . . that had not as definitively rejected him."[267] But even if the firms had declined with perfect symmetry, the court would still have disqualified the judge because the headhunter's inquiries–though "accidental"–put the judge in the position of *appearing* to negotiate for employment with those appearing before him.[268] "The dignity and independence of the judiciary are diminished when the judge comes before the lawyers in the case in the role of a supplicant for employment. The public cannot be confident that a case tried under these circumstances will be decided in accordance with the highest traditions of the judiciary."[269]

In *In re Continental Airlines Corp.*,[270] a bankruptcy judge "announced his intentions to enter private practice and to stop handling the Continental bankruptcy cases to avoid conflicts of interest in the event he considered employment with any of the firms appearing before him."[271] After making this announcement, the judge continued for "several months"[272] to adjudicate the matter until he granted partial summary judgments in Continental's favor on certain claims on May 8 and June 26, 1986, and granted fee requests by various firms, including $700,000 to Continental's local bankruptcy firm, on July 1, 1986. On July 2, that firm offered the judge a partnership, and on July 29, he accepted that offer.[273] There was "no allegation that, prior to his rulings in this case," the judge "had sought employment with" Continental's local firm "or that he knew that the firm was actively considering him."[274] But the Fifth Circuit held that these facts violate § 455(a) because they "create the *appearance* that he may have been pursuing employment with" Continental's law firm "while he was presiding over the case."[275] The judge "should either have rejected the offer outright, or, if he seriously desired to consider accepting the offer, stood recused and vacated the rulings made shortly before the offer was made."[276]

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266. *Id.* at 460-61.

267. 764 F.2d at 461.

268. *Id.*

269. *Id.* Courts come to the same conclusion where law clerks negotiate employment with law firms litigating cases on which the law clerks have been involved in chambers. Hall v. Small Bus. Admin., 695 F.2d 175 (5th Cir. 1983). The only exception occurs when the judge insures that the clerk does not work on the future employer's case. Milgard Tempering, Inc. v. Selas Corp., 902 F.2d 703 (9th Cir. 1990); Hunt v. Am. Bank & Trust Co., 783 F.2d 1011 (11th Cir. 1986).

270. 901 F.2d 1259 (5th Cir. 1990).

271. *Id.* at 1261.

272. *Id.*

273. *Id.* at 1262.

274. *Id.*

275. *Id.* (emphasis added).

276. *Id.* at 1262-63. The fee awards were perhaps the most provocative of the orders entered shortly before the partnership offer, but they were not appealed. The partial summary judgments were appealed on the grounds that they were wrongly granted on the merits and that granting them in these circumstances violated § 455(a). Using *Liljeberg*'s test for harmless error where an appellate court finds a violation of § 455(a)–an appellate court

In *Scott v. United States,*[277] a local trial judge in the District of Columbia sought employment with the Department of Justice while trying a criminal case prosecuted by the U.S. Attorney's office, a local unit of the DOJ. Between trial and sentencing, he was offered a job informally, and the formal offer followed eight days after sentencing.[278] The job did not involve criminal prosecutions, and the DOJ officials who offered it were not involved in criminal work.[279] Citing *Pepsico*, the D.C. Court of Appeals held that the circumstances created an appearance of partiality under the local equivalent of § 455(a).[280] "The situation does not change because of the trial judge's general reputation," which was good, "among his colleagues and the legal community."[281]

A Supreme Court chief justice is believed by many to be near retirement, even though his real intentions are not clear.[282] An associate justice is reported to have an ambition to replace him. Two people appear before the associate justice as litigants. The winner will get a four-year term as president and have the power to nominate a chief justice, should a vacancy occur. One of the litigants has openly declared his admiration for the associate justice who reportedly wants to become chief justice. The other litigant would not, under any circumstances, appoint the associate justice to anything.

Informed of all this, would a disinterested lay observer doubt that the associate justice could decide the case impartially? The question is *not* whether the associate justice is in fact influenced, consciously or unconsciously, to vote for the litigant who could nominate him for a promotion. And it is irrelevant whether the associate justice in fact has any real interest in being chief justice. Under § 455(a), the only question is whether a disinterested lay observer, informed of

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should consider "the risk of injustice to the parties in the particular case, the risk that the denial of relief [on appeal] will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process," *Liljeberg*, 486 U.S. at 864–the Fifth Circuit treated the § 455(a) violation as harmless error, but only because summary judgments are subject to a de novo standard of review on appeal. *Cont'l Airlines*, 901 F.2d at 1263. Under a de novo standard of review, where an appellate court reviews the merits of a summary judgment, it "utiliz[es] criteria identical to that used by the court below." *Id.* Because the de novo standard puts the three judges on the court of appeals panel in the position the trial judge had been when he granted the partial summary judgments, their review on the merits accomplishes the same result as remanding for reconsideration by another trial judge not disqualified by § 455, and it accomplishes it faster. But in a separate appeal of a different order—an estimation of the value of an unliquidated claim–granted by the same judge while he was disqualified by § 455(a) for the reasons described in the text, the Fifth Circuit held "that the § 455(a) violation did not constitute harmless error" because that order is subject to an abuse of discretion standard of review on appeal. *Cont'l Airlines*, 981 F.2d at 1463. The deference to the trial court inherent in an abuse of discretion standard prevents an appellate court from accomplishing, through its own merits review, the same result (though faster) that could be obtained through a remand to an undisqualified judge. On standards of review, see text at note 88, *supra.*

277. 559 A.2d 745 (D.C. 1989).

278. *Id.* at 747.

279. *Id.*

280. *Id.* at 750.

281. *Id.* at 750 and 749.

282. *See* text at notes 213-16, *supra.*

what the press has reported, would doubt the associate justice's ability to decide impartially.

Under *Pepsico, Continental*, and *Scott*, the answer to that question is yes. Even if the justice is a person of "unblemished honor and sterling character"[283] who "committed no impropriety,"[284] there is an appearance of partiality–and a violation of § 455(a)–where a judge can be seen by reasonable outsiders as tempted to decide in favor of a litigant who appears to have an inclination to provide the judge with a desired job. And that is undeniably true where the judge's decision itself awards to the litigant the very power to confer the desired job.[285]

B. JUSTICE SCALIA'S CAREER GOALS AND THE DUE PROCESS CLAUSE

The due process cases are explained in Part I(E) of this article.[286] The mayor/judge in *Tumey v. Ohio*[287] was constitutionally disqualified because essentially he was paid by the conviction. The state optometry board in *Gibson v. Berryhill*[288] was disqualified because its members were in a position to absorb the business that would be loosened if corporately employed optometrists lost their licenses. The state supreme court justice in *Aetna Life Insurance Co. v. Lavoie*[289] was disqualified because the precedent he helped create gave him litigation advantages in his own lawsuit. None of these *temptations*–and that is the word used in *Tumey*[290] and quoted in *Aetna*[291]–could reasonably be said to exceed in magnitude the temptation of awarding the presidency to a litigant who openly admires the justice who has been reported to want a nomination to become chief justice.

The due process violation is created by the conflict of interest alone. Both *Tumey*[292] and *Aetna*[293] made it clear that the violation does not depend on whether a judge's personal interests actually influenced his vote. In both cases, the Supreme Court went out of its way to point out that it is the conflict of

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283. *Pepsico*, 764 F.2d at 460.

284. *Id.* at 461.

285. Official Commentary to Canon 3E(1) of the ABA *Model Code of Judicial Conduct* notes that "if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which the law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge." MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) cmt. (1999). Although Congress modeled § 455(a) after what is now Canon 3E(1) (see text at notes 33-37, *supra*), it did not explicitly incorporate the Commentary into the statute. In this case, it did not need to. As the cases discussed in the text demonstrate, the courts have recognized that the policy expressed in this particular Commentary is inherent in the statute.

286. *See* text at notes 67-87, *supra*.

287. 273 U.S. 510.

288. 411 U.S. at 578-79.

289. 475 U.S. 813.

290. 273 U.S. at 532 (emphasis added).

291. 475 U.S. at 825.

292. 273 U.S. 510.

293. 475 U.S. 813.

interests and not a corrupt mind that violates the due process clause.[294] In *Tumey*, the Court held that a "procedure which would offer a *possible temptation* to the average man as a judge to forget the burden of proof required to convict the defendant . . . denies the latter due process of law,"[295] and in *Aetna* the Court quoted the same language to make the same point.[296] In *In re Murchison*, the Supreme Court pointedly observed that "[s]uch a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties."[297] Moreover, *Murchison* held that the conflict need not be created by a pecuniary interest.[298]

Although the *Aetna* conflict was financial, the parallels between that case and *Bush v. Gore* are otherwise eerie—particularly the way a 5-to-4 decision in *Aetna* became possible only because a judge with a conflict of interest voted.

C. JUSTICE SCALIA'S SONS AND § 455

Beginning on December 11, 2000, a number of periodicals, in the United States[299] and abroad,[300] published stories that Eugene Scalia and John Scalia, both sons of Justice Scalia, worked in law firms that represented the Bush campaign.

At the time that *Bush v. Gore* was argued and decided in the Supreme Court, Eugene Scalia was a partner in Gibson Dunn & Crutcher, the firm that handled George Bush's appeal there. Theodore Olson—now Solicitor General of the United States but then a Gibson Dunn partner—was lead counsel for Bush in the Supreme Court. According to the *Wall Street Journal*,

> Mr. Olson and other partners have argued many times before the high court, so the issue of how to handle Eugene Scalia's presence at the firm isn't new. To insulate the younger Mr. Scalia, the firm deducts from his income an amount that reflects its profits from Supreme Court cases.[301]

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294. *Lavoie*, 475 U.S. at 825; *Tumey*, 273 U.S. at 532.

295. 273 U.S. at 532 (emphasis added).

296. 475 U.S. at 825. "It is therefore clear that an 'evil motive' is not a prerequisite to a determination of whether a litigant's due process rights have been implicated." Goodheart v. Casey, 565 A.2d 757, 761 (Pa. 1989).

297. 349 U.S. at 136.

298. *Id.*

299. *Time* magazine, the *New York Times,* and the *Los Angeles Times* reported it. Cohen, *supra* note 6, at 76; Marquis, *supra* note 151, at A26; Jackson, *supra* note 152, at A25. *See also Travesty Tainted Election*, CHARLESTON GAZETTE, Dec. 14, 2000, at 4A; Basu, *supra* note 152, at 23A; Bravin, *supra* note 3, at A1; Goldsborough, *supra* note 6, at B-13:2, 6, 7; B-7:1; Huffington, *supra* note 150, at 5J; Loggins & Shiffman, *supra* note 150, at 1A; Jill Zuckman, *Justice Scalia's Son a Lawyer in Firm Representing Bush Before Top Court*, CHIC. TRIB., Nov. 29, 2000, at 13.

300. *E.g.*, *Bush at Last: But Decisive Legacy Remains*, *supra* note 153; Andrew, *supra* note 153, at 11; Kettle, *supra* note 153, at 1.

301. Bravin, *supra* note 3, at A1. At the time, according to a December 12 CNN story, Gibson Dunn had 242 partners, and the firm had been deducting Supreme Court litigation profits from Eugene Scalia's income for at

In May 2001, Eugene Scalia was nominated by President Bush to be Solicitor for the Department of Labor; after the Senate took no action on the nomination, Mr. Bush gave him a recess appointment in January 2002 to the same position.[302]

Many of the press reports published at the time of *Bush v. Gore* said that John Scalia worked at or was employed by Greenberg Traurig LLP, which represented the Bush campaign in the Florida courts—without specifying whether he was a partner or an associate. On December 12, CNN quoted a Greenberg Traurig partner as saying that John Scalia was offered the position weeks before the election, and that he would not join the firm until early in 2001. Greenberg Traurig's website includes a press release dated January 10, 2001, which says that "John Scalia has joined the firm's Tysons Corner [Virginia] office as a shareholder in the labor and employment law practice."[303]

In 1993, a recusal policy concerning relatives who are partners in firms appearing before the Supreme Court was signed by seven justices—all of the present Court except for Justice Souter, who did not sign, and Justice Breyer, who was not on the Court at the time and whose signature does not appear on the copy distributed by the Supreme Court clerk. Here are the relevant parts of that policy:

> *STATEMENT OF RECUSAL POLICY*
>
> We have spouses, children or other relatives within the degree of relationship covered by 28 U.S.C. §455 who are or may become practicing attorneys. . . . We think it desirable to set forth what our recusal policy will be . . . when the covered lawyer is a *partner* in a firm appearing before us. . . .
>
> The provision of the recusal statute that deals specifically with a relative's involvement as a lawyer in the case requires recusal only when the covered relative "[i]s acting as a lawyer in the proceeding." §455(b)(5)(ii). It is well established that this provision requires personal participation in the representation, and not just membership in the representing firm, *see, e.g., Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1113 (CA5), cert. denied, 449 U.S. 820 (1980). It is also apparent, from use of the present tense, that current participation as lawyer, and not merely past involvement in earlier stages of the litigation, is required.
>
> A relative's partnership status, or participation in earlier stages of the litigation, is relevant, therefore, only under one of two less specific provisions of §455, which require recusal when the judge knows that the relative has "an

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least the preceding two years. Brooks Jackson, *Ethics experts say Scalia, Thomas connections not conflicts of interest* (Dec. 12, 2000) *at* http://www.cnn.com/2000/LAW/12/12/supreme.court.conflict/index.html (last visited Feb. 21, 2003).

302. Deidre Davidson, *Scalia Fight: Why So Ugly?*, LEGAL TIMES, Jan. 14, 2002, at 1.

303. Press Release, Greenberg Taurig LLP, Attorney John Scalia Joins Greenberg Traurig LLP's Tysons Corner Office (Jan. 10 2001), *available at* http://www.gtlaw.com/pub/pr/2001/scaliaj01a.htm (last visited Feb. 21, 2003).

interest that could be substantially affected by the outcome of the proceeding," §455(b)(5)(iii), or when for any reason the judge's impartiality "might reasonably be questioned," §455(a). We think that a relative's partnership in the firm appearing before us, or his or her previous work as a lawyer on a case that later comes before us, does not *automatically* trigger these provisions. If that were the intent of the law, the *per se* "lawyer-related recusal" requirement of §455(b)(5)(ii) would have expressed it. *Per se* recusal for a relative's membership in the partnership appearing here, or for a relative's work on the case below, would render the limitation of §455(b)(5)(iii) to personal work, and to present representation, meaningless.

We do not think it would serve the public interest to go beyond the requirements of the statute and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage. Even one unnecessary recusal impairs the functioning of the Court. Given the size and number of today's national law firms and the frequent appearance before us of many of them in a single case, recusal might become a common occurrence, and opportunities would be multiplied for "strategizing" recusals, that is, selecting law firms with an eye to producing the recusal of particular Justices. In this Court, where the absence of one Justice cannot be made up by another, needless recusal deprives litigants of the nine Justices to which they are entitled, produces the possibility of an even division on the merits of the case, and has a distorting effect upon the certiorari process, requiring the petitioner to obtain (under our current practice) four votes out of eight instead of four out of nine. . . .

[We will recuse ourselves where] the amount of the relative's compensation could be substantially affected by the outcome here. That would require our recusal even if the relative had not worked on the case, but was merely a partner in the firm that shared the profits. It seems to us that in virtually every case before us with retained counsel there exists a genuine possibility that the outcome will have a substantial effect upon each partner's compensation. Since it is impractical to assure ourselves of the absence of such consequences in each individual case, we shall recuse ourselves from all cases in which appearances on behalf of parties are made by firms in which our relatives are partners, unless we have received from the firm written assurance that income from Supreme Court litigation is, on a permanent basis, excluded from our relatives' partnership shares.

William H. Rehnquist
John Paul Stevens
Sandra Day O'Connor
Antonin Scalia
Anthony M. Kennedy
Clarence Thomas
Ruth Bader Ginsburg[304]

304. Statement of Recusal Policy, Supreme Court press release, Nov. 1, 1993.

The reference to *Potashnik* presents an incomplete picture of the holdings in that case. *See* text at notes 308-09 and 316-17, *infra*.

In its fourth paragraph, this Statement asserts that providing every litigant with nine justices is more important than recusal except in extreme instances. That is not the law. Congress explicitly repealed the duty to sit when it rewrote § 455 in 1974. H.R. REP. NO. 1453 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355. There is no exception for Supreme Court justices. No judicial decision in a case or controversy within the meaning of Article III has ever endorsed the theory that providing nine voting justices is more valuable than avoiding all but the most extreme conflicts of interest. This theory originated in then-Justice Rehnquist's memorandum justifying his refusal to recuse himself in *Laird v. Tatum*, 409 U.S. 824, 835, 837 (1972), and was repeated as recently as Chief Justice Rehnquist's memorandum justifying his refusal to recuse himself in *Microsoft Corp. v. United States*, 530 U.S. 1301, 1301-03 (2000) (memorandum of Rehnquist, J.).

In *Laird*, Rehnquist provided the fifth vote in a five-to-four decision holding that the Nixon administration did not violate the Constitutional rights of anti-Viet Nam war activists by having the Army spy on them. Before he was appointed to the Court in 1971, Rehnquist had been the Assistant Attorney General in charge of the Office of Legal Counsel to the President. In that capacity, he had defended the Army's spying in testimony before a Senate committee and in a speech. *Federal Data Banks, Computers and the Bill of Rights: Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 92d Cong., 1st Sess. 600-04. (The speech is reprinted *id.* at 1590-96.) Jeffrey Stempel has argued in detail that Rehnquist's memo justifying his refusal to recuse himself was less than honest in its recitation of the facts that might be considered to create a conflict of interest, in its characterization of the past practices of other justices, and in its description of the case law. Jeffrey P. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589 (1987). When nominated for promotion to Chief Justice in 1986, Rehnquist was severely criticized for failing to recuse himself in *Laird*. *Nomination of William H. Rehnquist to Be Chief Justice of the United States: Report from the Senate Committee on the Judiciary*, 99th Cong., 2d Sess. 66 (1986). *See also Nomination of William H. Rehnquist to Be Chief Justice of the United States: Laird v. Tatum*, 99th Cong., 2d Sess. 12412 (1986); Linda Greenhouse, *Senate, 65 to 33, Votes to Confirm Rehnquist as 16th Chief Justice*, N.Y. TIMES, Sept. 18, 1986, at A1.

In *Microsoft*, the Court denied a petition for certiorari. Microsoft had hired a Boston law firm to represent it in a private antitrust suit that could be affected by the resolution of the federal government's separate antitrust suit against Microsoft. 530 U.S. 1301 (2000). The Chief Justice's son, James P. Rehnquist, a partner in the firm, was actually representing Microsoft in the private antitrust litigation. *Id.* In his memorandum, the Chief Justice did not cite to the Statement of Recusal Policy signed by him and six other justices, perhaps because it has no legal authority.

In 1973–while the Judicial Conference was considering adopting the ABA *Code of Judicial Conduct* to guide federal judges (*see* text at notes 64-66, *supra*)—then-Justice Rehnquist gave a talk at the Association of the Bar of the City of New York and there explained some of his views on recusal. Rehnquist, *supra* note 30, at 694. He criticized the ABA *Code*, *id.* at 702-04. As we have seen, when Congress, a year later, adopted the current version of § 455, it used the ABA *Code* as a model. *See* text at notes 33-37, *supra*.

Rehnquist's comments to the Association of the Bar as well as his positions on recusal issues reflect a deep skepticism about the value of recusing except in extreme cases, and skepticism particularly about the value of recusing due to an appearance of impartiality. In essence, he told the Association of the Bar that if a judge feels he can judge fairly, he should be allowed to do so unless genuine corruption would be the result. "[I]s there any reason why the individual judge may not be left free, subject to such a general standard as Congress has prescribed in section 455, to decide for himself whether or not he has a 'substantial interest' in the litigation?" *Id.* at 703, 712. The version of § 455 that Rehnquist referred to was the one Congress repealed the following year and replaced with the current § 455. The repealed statute required recusal only from cases where the judge "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" adjudicate the case. 28 U.S.C. § 455 (1970) (italics added).

Rehnquist has not agreed that the public's need for confidence in the judiciary could appropriately require recusal in some situations where a judge might be able to adjudicate fairly. Rehnquist told the Association of the Bar that the ABA *Code* "require[s] disqualification in the case of stock ownership by a judge in any litigant, however small the amount of stock . . . . I do not see how this position can be defended on the grounds that it is necessary to avoid the 'appearance of impropriety'; no reasonable person, it seems to me, could fairly conclude

This document is not a decision of a case or controversy under Article III and does not have the authority of precedent. Nor is it part of the Supreme Court Rules.[305] Even if it were, a Supreme Court rule cannot change rights and obligations created through a statute enacted by Congress. Instead, the seven justices' "Statement of Recusal Policy" does nothing more than express the personal intents of the justices who signed it. To the extent it is inconsistent with § 455, it must give way to the statute.

Several cases have dealt with recusal issues where a relative or the spouse of a relative "within the third degree of relationship to either"[306] the judge or the judge's spouse worked at a firm representing a party in the lawsuit but did not work on the lawsuit. That situation raises three issues. First, for the purposes of recusal, is the relative (or the relative's spouse) deemed to be "acting as a lawyer in the proceeding"[307] even though not actually doing work on the lawsuit? Second, does the relative (or the relative's spouse) "have an interest that could be substantially affected by the outcome of the proceeding"?[308] (Here, the law's answer will depend on whether the relative or the relative's spouse is a partner or an associate.) And third, is this a situation in which the judge's "impartiality might reasonably be questioned"? If the answer to any of these questions is yes, the judge is disqualified.

Only two federal appellate courts have considered whether a lawyer relative covered by § 455(b)(5)(ii) is "acting as a lawyer in the proceeding" when the lawyer is a partner in a law firm representing a party but is not actually working on the litigation. In one case, *Potashnick v. Port City Const. Co.*,[309] the Fifth Circuit decided that the answer is no because "section 455(b)(5)(ii) . . . requires actual participation."[310] In the other case, *SCA Services, Inc. v. Morgan*,[311] the

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that the judge's vote might even be subconsciously influenced by the fact that he had an infinitesimal interest in a corporate litigant." *Id.* at 702. Section 455 requires recusal in exactly that situation.

Since Congress rewrote § 455 in 1974, the middle and lower federal judiciary has adapted itself to the stricter statute, and a gap appears to have opened up between recusal practices in the Supreme Court and recusal practices in the courts of appeal and in the district courts. The excuse for this in the Supreme Court has become the argument which then-Justice Rehnquist first made in his decision not to recuse himself in *Laird v. Tatum* and then in his speech to the Association of the Bar, *id.* at 707-08, and which he has repeated in his denials of motions to recuse, and which appears in the "Statement of Recusal Policy" signed by seven justices in 1993: that having every justice vote in the Supreme Court is more important than the appearance of impartiality, and that it is worse to affirm the result below by an evenly divided vote than it is to produce a 5-to-4 result where the fifth and deciding justice has cast a vote concerning which there is suspicion of impartiality.

305. SUP. CT. R. (1999).

306. § 455(b)(5). "The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece." MODEL CODE OF JUDICIAL CONDUCT 4 (1998). Section 455 was adapted from part of the ABA *Code*. *See* notes 35-35 and accompanying text, *supra*.

307. § 455(b)(5)(ii).

308. § 455(b)(5)(iii).

309. 609 F.2d 1101 (5th Cir. 1980).

310. *Id.* at 1113. *Accord Equifax*, 557 F.2d at 463 (relative an associate rather than a partner).

311. 557 F.2d 110 (7th Cir. 1977).

Seventh Circuit pointed out that under "the well-settled principles of agency and partnership law, it is clear that the appearance of [the law firm] in the case before Judge Morgan is the appearance of every lawyer in the firm, including Donald A. Morgan [Judge Morgan's brother],"[312] but then declined to decide the issue because it is not clear that "the language and intent of § 455(b)(5)(ii)" incorporate the same reasoning,[313] and because Judge Morgan was clearly disqualified under § 455(b)(5)(iii) and § 455(a).[314]

Three federal appellate cases have decided whether a lawyer-relative covered by § 455(b)(5)(iii) "has an interest that could be substantially affected by the outcome of the proceeding" when the lawyer is an *associate* in a law firm representing a party but is not actually working on the litigation. All three cases held that an associate by definition has no such interest because the associate is "a salaried employee . . . , not a partner whose income is directly related to the profit margin of the firm and could be substantially affected by the outcome of this case."[315] One case added in dicta that the result might be different "if the district judge's son were a partner in the firm."[316]

Three federal appellate cases have decided the same question where the lawyer is a partner. In *Potashnick*,[317] the Fifth Circuit held that

> when a partner in a law firm is related to a judge within the third degree, that partner will *always* be "known by the judge to have an interest that could be substantially affected by the outcome" of a proceeding involving the partner's law firm. . . . The outcome of any proceeding handled by a law firm may affect the partner's interests as well as certain noneconomic interests, including the reputation and goodwill of the firm. The language of § 455(b)(5)(iii) referring to "an interest" does not require that the interest of the judge's lawyer relative be financial. . . . [Even where, as here, t]he fee received by the firm . . . was based on a fixed hourly rate . . . a win or a loss in any lawsuit could affect a partner's interest in the firm's reputation, its relationship with its clients, and its ability to attract new clients. . . . The statute requires automatic disqualification when the judge in a proceeding knows of his relative's interest, and the outcome of the proceeding may affect that interest.[318]

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312. *Id.* at 114.

313. *Id.*

314. *Id.* at 116-17.

315. *In re* Kansas Pub. Employees Ret. Sys., 85 F.3d 1353, 1364 (8th Cir. 1996). *Accord* Jenkins v. Ark. Power & Light Co., 140 F.3d 1161, 1164-65 (8th Cir. 1998); *Equifax*, 557 F.2d at 463; Stephens v. Stephens, 292 S.E.2d 689 (Ga. 1982).

316. *Equifax*, 557 F.2d at 463.

317. 609 F.2d 1101.

318. *Id.* at 1113-14 (emphasis added). Interpreting the Utah version of the *Code of Judicial Conduct* and noting "the nonpecuniary benefits to the lawyer-relative's firm, such as enhanced reputation and increased goodwill that indirectly benefit the lawyer relative," the Utah Supreme Court adopted the same per se rule. Regional Sales Agency, Inc. v. Reichert, 830 P.2d 252, 256-57 (Utah 1992). For similar reasons, the New Hampshire Supreme Court did the same thing in a case where the judge had apparently had "no contact" with the lawyer-relative "for over twenty years." Blaisdell v. City of Rochester, 609 A.2d 388, 389-90 (N.H. 1992).

In *SCA Services, Inc. v. Morgan*, the Seventh Circuit came to the same result, without a per se rule, and stressed—as the Fifth Circuit did in *Potashnick*—that § 455(b)(5)(iii) includes all interests, not merely financial ones, and that those interests can include the lawyer's "interest in his and his firm's reputation and goodwill."[319] In *Pashaian v. Eccleston Properties Ltd.*, the Second Circuit rejected *Potashnick*'s per se rule and found that the lawyer-relative's interest in the outcome of the case was not substantial and therefore did not require recusal.[320] The lawyer-relative was a partner in Cahill Gordon & Reindel, which had sixty partners at the time and revenues of $117 million, and the Second Circuit thought it "unrealistic to assume . . . that partners in today's law firms *invariably* have an interest that could be substantially affected by the outcome of any case in which any other partner is involved."[321]

These three cases are not necessarily inconsistent with each other. The Fifth Circuit in 1980 was perhaps most familiar with practice by relatively small law firms, for which a per se rule would seem natural and realistic. The Seventh Circuit in 1977 might not have arrived at a per se rule because it had experience with larger firms, although on the facts of *SCA Services*, a substantial interest could be identified. The Second Circuit in 1996 would already have been very familiar with huge international law firms and, on the facts of *Pashaian*, the lawyer-relative's interest really was not substantial. The mistake each court made was to assume that its experience with the practice of law was and would remain universal. Although *Bush v. Gore* was certainly the kind of case that can help a firm's reputation and goodwill, both John and Eugene Scalia were partners in firms large enough so that the reputational and goodwill benefits of a victory, divided among all the partners, would not be particularly substantial.

There remains the question of whether a judge's "impartiality might reasonably be questioned" under § 455(a) because a lawyer-relative is a partner in a firm litigating before the judge, even though the lawyer-relative has not worked on the case. Only one federal appellate case has decided this issue. In *SCA Services*,[322] the Seventh Circuit held that the answer will typically be yes:

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319. 557 F.2d at 115-16.

320. 88 F.3d 77, 83-84 (2d Cir. 1996).

321. *Id.* at 83 (italics added). Interpreting the Pennsylvania version of the ABA *Code of Judicial Conduct*, the Pennsylvania Superior Court came to a similar conclusion in *Reilly v. Southeastern Pa. Transp. Auth.*, 479 A.2d 973, 980-85 (Pa. Super. Ct. 1984). Some partners are salaried and are not paid out of equity income; presumably, they would be treated like associates in this situation. Nobelpharma AB v. Implant Innovations, Inc., 930 F. Supp. 1241 (N.D. Ill. 1996).

322. 557 F.2d 110. Four other federal appellate cases appear at first glance to have dealt with this issue but actually did not. Although the lawyer-relative posed a § 455(b)(5)(iii) issue in *Potashnik*, 609 F.2d at 1110-12, the § 455(a) appearance issue also decided there was not based on the lawyer-relative, but primarily on the facts that the firm had represented the judge in the past and one of the partners had had a business relationship with the judge. In *In re Billedeaux*, 972 F.2d 104 (5th Cir. 1992), the lawyer-relative was a partner in a firm that had represented the opposing party in other cases but not in the one before the judge. In *Hook v. McDade*, 89 F.3d 350 (7th Cir. 1996), the lawyer-relative's firm had not represented any party before the judge; instead, the lawyer-relative reviewed for an insurance company the legal fees charged by the lawyer in a separate case before he became a criminal defendant in the case at issue. And in *In re Nat'l Union Fire Ins. Co.*, 839 F.2d 1226 (7th Cir. 1988), one of the parties, a bank, retained the judge's son in a credit transaction, but the bank did so at

> When one brother is a lawyer in the firm representing a party before his brother who is the judge in the case, the belief may arise in the public's mind that the brother's firm and its clients will receive favored treatment, even if the brother does not personally appear in the case.[323]

This reasoning is difficult to rebut. Interpreting the Mississippi version of the ABA *Code of Judicial Conduct*, the Mississippi Supreme Court came to a similar conclusion:

> The question here is not whether Judge McKenzie would give favor or disfavor in the trial of the Moffetts' case, but whether there is a reasonable appearance of impropriety on the part of the judge because his brother is a senior partner in the law firm representing a principal defendant. The Moffetts, who have a case of great importance to them, are reasonably concerned that kinship might cause them to be at a disadvantage . . . . If the Moffetts lose their case . . . , the public which knows nothing of the parties, the lawyers or the judge, probably would say "Why, no wonder, the judge's brother was one of the lawyers."[324]

If informed that one of Justice Scalia's sons was a partner in the firm representing the Bush campaign in the Supreme Court and that another son had accepted an offer of partnership in the firm representing Bush in the Florida courts, would the law's disinterested lay observer doubt that Justice Scalia could decide *Bush v. Gore* impartially? The issue is not whether he would decide impartially. The issue is whether a disinterested lay observer would *doubt* his impartiality. Although the § 455(a) cases are few, their reasoning is unquestionable and it takes us to the same conclusion as the § 455(a) cases discussed earlier in regard to a judge's own ambition: an appearance of partiality.[325]

V. JUSTICE O'CONNOR

The press reports quoted at the beginning of this article add up to the

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the debtor's request and expense. The son "had recently represented" another bank "in a similar transaction involving the same collateral," and "[t]he debtor, which was to pay [the bank's] legal costs" in the transaction "wanted to avoid the time and expense of educating [the bank's] regular counsel about an unusual transaction." *Id.* at 1227. Because "the borrower suggested the retention and paid the bill," there was no appearance of impartiality. *Id.* at 1229. The son was not a partner or an associate in any firm appearing in the case before the judge. *Id.* at 1230.

323. *SCA Services*, 557 F.2d at 116.

324. *In re* Moffett, 556 So. 2d 723, 725 (Miss. 1990). The same judge was disqualified for the same reason in *Jenkins v. Forrest County Gen. Hosp.*, 542 So. 2d 1180, 1181 (Miss. 1988).

325. This conclusion is consistent with the official Commentary to Canon 3E(1)(d) of the *Model Code of Judicial Conduct*. "The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of a judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that 'the judge's impartiality might reasonably be questioned under Section 3E(1)"–from which § 455(a) is derived–"or that the relative is known by the judge to have an interest in the law firm that could be 'substantially affected by the outcome of the proceeding' under Section 3E(1)(d)(iii)"–from which § 455(b)(5)(iii) is derived–"may require the judge's disqualification." MODEL CODE OF JUDICIAL CONDUCT, Canon 3E(1)(d) cmt. (1998). *See* text at notes 35-39, *supra*.

following:[326] Reporters and a respected book author published accounts in which they cited multiple witnesses who claimed to have heard Justice O'Connor say, before *Bush v. Gore* was decided, that she wanted to retire from the Court but would do so only during a Republican presidency. Several writers appear to have separately investigated an incident at an election night party, and they quote witnesses who claim to have heard Justice O'Connor–on hearing a network predict that Gore would carry Florida–say, "This is terrible." Multiple sources also told the writers that they heard Justice O'Connor's husband explain that she was disappointed because a Gore victory would make it difficult or impossible for her to retire for at least another four years. When asked–at the time *Bush v. Gore* was being decided–about these accounts, Justice O'Connor did not deny them and would not comment. One writer described an additional incident during the time the Court was adjudicating *Bush v. Gore*. This also happened at a party, and here Justice O'Connor was quoted as saying, "You just don't know what those Gore people have been doing. They went into a nursing home and registered people they shouldn't have. It was outrageous." The appellate record before the Court contained no allegations or evidence of this kind.

If these reports are accurate, they raise three recusal issues under § 455 and one under the due process clause. First, § 455(b)(1) disqualifies a judge from participating in a decision where the judge "has a personal bias or prejudice concerning a party,"[327] and the issue is whether the comments attributed to Justice O'Connor in the reports quoted above are the type of out-of-court statements concerning a party that the case law interpreting the statute has treated as disqualifying. Second, § 455(a) disqualifies a judge from participating "in any proceeding in which his impartiality might reasonably be questioned,"[328] and the issue is whether the statements quoted above–reflecting a desire to retire during a Republican presidency, disappointment that Gore appeared to be carrying Florida, and a belief in the nursing home story–form a basis for reasonably questioning Justice O'Connor's impartiality. Third, § 455(b)(4) and § 455(b)(5)(iii) disqualify a judge from participating in a decision where the judge has an "interest that could be substantially affected by the outcome of the proceeding," and the issue is whether a desire to retire under circumstances that would permit one's replacement to be nominated by a Republican president is such an interest. Finally, the due process clause is violated when a judge participates in making a decision from which the judge personally stands to gain a benefit.[329] Because the test is not identical to the "interest that could be substantially affected by the outcome" test under the statute, there is a separate issue of whether Justice

326. *See* text at notes 3-11, *supra*.
327. § 455(b)(1).
328. § 455(a).
329. *See* text at notes 69-89 and 286-98, *supra*.

O'Connor's participation in *Bush v. Gore* might have violated not only § 455 but the Constitution as well.

One might ask why, if Justice O'Connor wanted to retire during a Republican presidency, she has not yet done so? Three potential explanations are fairly obvious. First, she might have come to feel that a retirement early in a Bush presidency would only confirm factually the implications raised by the press reporting quoted at the beginning of this article, and that it might be more politic to wait[330] in order to avoid the appearance of a quid pro quo. Second, a buzz of speculation appeared in the media in spring 2001 to the effect that she might be Bush's choice for chief justice, if Rehnquist should retire.[331] Whether this was a trial balloon from the Bush administration to see how the public would react or just idle media chatter, it might have caused her to think that remaining in office might become interesting.

The third potential explanation is the most complicated. The traditional retirement season is summer. The Supreme Court finishes its term at the end of June and reconvenes in October. A justice can announce a retirement in June with confidence that a replacement can be confirmed by the Senate by October, and that little Court work will be affected by a vacancy while the Court is not in session. In May 2001, Senator James Jeffords announced that he was leaving the Republican party and would vote with the Democrats to organize the Senate.[332] The result was that in June 2001, the Republicans lost control of the Senate. Democrats, furious over what they considered to be a partisan decision in *Bush v. Gore*, now controlled the Senate calendar and the Senate Judiciary Committee, which made it unlikely that any Supreme Court nominee acceptable to Bush's constituency could be confirmed without an uphill struggle. Even before Senator Jeffords left the Republican party, Republicans were saying privately and Bush was being advised that no conservative Supreme Court justice should resign for some time.[333]

A. JUSTICE O'CONNOR'S COMMENTS AND § 455(B)(1)

Few courts have been asked to decide whether a judge should be recused under § 455(b)(1) because of "a personal bias or prejudice concerning a party." Litigants who want a judge recused because of a generalized bias are more likely to complain about an appearance of partiality under § 455(a) because there they need to demonstrate only that the judge *looks* biased, and under § 455(a) they do

330. *See* Mauro, *Fractious Episode*, *supra* note 214, at 16.

331. See Jeffrey Rosen, *A Majority of One*, N.Y. TIMES MAGAZINE, June 3, 2001, at 32.

332. Alison Mitchell, *GOP Senator Plans Shift, Giving Democrats Control in Setback for White House*, N.Y. TIMES, May 24, 2001, at A1.

333. Kirk Victor, *A Ticking Time Bomb in the Senate*, NAT'L J., Feb. 17, 2001, at 490.

not need to prove that the judge in fact *is* biased[334]–which they would have to prove if they complained under § 455(b)(1).[335] At same time, when litigants complain under both grounds, courts prefer to ignore the § 455(b)(1) issue if they decide to disqualify under § 455(a)[336] because it is easier to decide that a judge appears biased than to decide that the judge in fact is biased.

The few § 455(b)(1) cases do not provide precise guidance, but they also do not suggest confidence that the press reports, even if true, would form a basis for deciding that Justice O'Connor violated § 455(b)(1) by not recusing herself. The reported incidents fall somewhere near the middle of a range between two extremes.

Typical of one extreme is a case where a reporter telephoned a trial judge to ask about how a defendant would be resentenced after the initial sentence was reversed on appeal. The judge answered the reporter's question–although he should have refused to speak with the reporter at all[337]–and he was quoted in a newspaper as saying that he "didn't know if he could increase Fortier's sentenc[e] beyond 51 months. 'We haven't sat down and re-evaluated the guidelines yet in view of the [appellate] opinion. I suppose I could do a lot of things. I guess I don't know. . . . That's a matter I haven't researched yet.'"[338] The Tenth Circuit considered these comments "benign" because "they express no opinion, indicate no animus towards Fortier, and demonstrate only that the judge was uncertain of his decision."[339] In contrast, the comments attributed to Justice O'Connor express strong opinions about the subject of the lawsuit–which candidate she would prefer to have carried Florida–and they suggest that she believes a story–the nursing home fable–that would be damaging to Gore but was neither alleged nor proved in the record. In other words, the comments attributed to Justice O'Connor do express an opinion and do indicate an animus.

At the other extreme is an easy case for disqualification. Sitting next to a hotel swimming pool during a bar association meeting, a trial judge said "that he was going to preside at appellant's trial and 'that he was going to get that nigger.'"[340] Because the defendant was indicted before the current version of § 455 was enacted in 1974, his appeal was decided under the older statute. The Fifth Circuit analyzed the comment in terms reflecting the concepts now in § 455(b)(1) and

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334. "Because we conclude that subsection 455(a) mandated disqualification, we do not decide the more difficult question whether subsection 455(b)(1) also required disqualification." *In re* Asbestos Litigation, 977 F.2d 764, 781 (3d Cir. 1992).

335. The only advantage of complaining under § 455(b)(1) is to avoid a waiver problem. Subsection 455(a) problems can be waived, but § 455(b)(1) conflicts cannot. *See* text at notes 52-59, *supra*.

336. *See, e.g.*, United States v. Cooley, 1 F.3d 985, 995-96 (10th Cir. 1993).

337. "A judge should avoid public comment on the merits of a pending or impending action . . . . " Code of Conduct for United States Judges, Canon 3(A)(6), 175 F.R.D. 363, 367 (1998).

338. United States v. Fortier, 242 F.3d 1224, 1229 (10th Cir. 2001).

339. *Id.*

340. United States v. Brown, 539 F.2d 467, 469 (5th Cir. 1976).

reversed. The comments attributed to Justice O'Connor, however, hardly approach this one. The comments attributed to her may reflect an animus, but they do not reflect a cold-blooded intent to rig a proceeding.

Between these two extremes, we do not really know where the line demarking "a personal bias or prejudice" is located. With so few precedents for guidance, a court asked to decide whether the comments attributed to Justice O'Connor reflect enough of an animus to violate § 455(b)(1) in the absence of a recusal would likely avoid the issue if it could instead make the easier decision of whether they create an appearance of partiality under § 455(a).

B. JUSTICE O'CONNOR'S REPORTED COMMENTS AND § 455(A)

Would the law's disinterested lay observer, informed of the reports quoted above about Justice O'Connor, doubt that she could decide *Bush v. Gore* impartially? The issue is not whether she would decide impartially, but whether a disinterested lay observer would *doubt* her impartiality.

Where a plaintiff claimed to have been discriminated against on the basis of sex in Postal Service employment, the trial judge said during a pretrial hearing, "I know Mr. Graves and he is an honorable man and I know he would never intentionally discriminate against anybody."[341] Mr. Graves was the plaintiff's supervising postmaster and made some of the personnel decisions that the plaintiff claimed to be discriminatory.[342] The Sixth Circuit disqualified the judge on the ground that this comment suggested prejudgment of parts of the lawsuit, creating an appearance of partiality under § 405(a). "We intimate no opinion regarding the actual impartiality of the District Judge," the court added. "Instead, it is the *appearance* of impartiality with which we are concerned."[343]

In a pretrial conference in a products liability lawsuit against A.H. Robins Co., Inc., a lawyer for one of the plaintiffs asked the judge whether E.C. Robins, Sr., father of the president of the Robins Company, was "a social friend."[344] The judge replied that he was not "any more than anybody else I know," although Robins was "a neighbor" and "a fine man."[345] The Fourth Circuit held that the judge's comments were so generalized that they forecast no partiality. The Fourth Circuit distinguished the postmaster comment in the preceding case because it went beyond a polite observation of social acceptability. The judge there "went further [when] he stated that Graves would not intentionally discriminate against anyone [and] commented on the ultimate merits of the action," thus creating an appearance of impropriety.[346]

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341. *Roberts*, 625 F.2d at 127.
342. *Id.* at 129.
343. *Id.* at 130 (emphasis added).
344. *In re* Beard, 811 F.2d 818, 824 (4th Cir. 1987).
345. *Id.*
346. *Id.* at 828.

In a third case, a defendant's conviction was reversed in part on appeal, and the case was remanded to the trial court for resentencing.[347] Immediately afterward, the trial judge wrote to a U.S. Senator, enclosing the appellate opinion, and asking the Senator to introduce legislation to overrule the statutory interpretation on which the opinion was based.[348] Even though no such legislation could affect the defendant's resentencing, the Second Circuit held that the letter created an appearance of partiality. Although the Second Circuit did not explain its reasoning, a judge who writes such a letter appears to lack what Edmund Burke called the "cold neutrality of an impartial judge."[349]

Courts resolving whether federal judges other than Supreme Court justices should be disqualified have considered it relevant, though not dispositive, when a judge has violated Canon 3(A)(6)[350] of the Code of Conduct for United States Judges by commenting publicly on a pending case.[351] If Justice O'Connor were any kind of federal judge other than a Supreme Court justice, the comment about the nursing home–if it occurred–would be considered a violation of Canon 3(A)(6).[352] The party where Justice O'Connor was said to have made the nursing home comment was, for the purposes of Canon 3(A)(6), a public place. A gathering of thirty people is large enough to be considered neither private nor confidential. And anyone who has spent a nanosecond in official Washington knows that a public figure who says anything remotely newsworthy at a gathering of people who know how to telephone a reporter can expect to read or hear about it in the media very quickly.

Moreover, in *Pepsico v. McMillan*[353] and *In re Continental Airlines Corp.*[354] (explained in Part III(A)[355]), the Seventh and Fifth Circuits, respectively, held that–even if there is no *actual* bias or prejudice under § 455(b)(1)–a judge is disqualified under § 455(a) if the judge has been put, even by accident, in a position where it can appear to outsiders that the judge has applied for a job with a law firm litigating in the judge's court. "The dignity and independence of the judiciary are diminished" where that appearance has been created.[356] That policy would produce the same result where the judge has been put in the position of

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347. United States v. Diaz, 797 F.2d 99 (2d Cir. 1986).

348. *Id.* at 100.

349. Quoted in United States v. Microsoft, 253 F.2d 34, 115 (D.C. Cir. 2001).

350. "A judge should avoid public comment on the merits of a pending or impending action . . . ." Code of Conduct for United States Judges, Canon 3(A)(6), 175 F.R.D. 363, 367 (1998).

351. United States v. Microsoft Corp., 253 F.3d 34, 112 (D.C. Cir. 2001); *Boston's Children First*, 244 F.3d at 168; *Cooley*, 1 F.3d at 995 n.8; *In re* Barry, 946 F.2d 913, 914 (D.C. Cir. 1991).

352. Supreme Court justices are not governed by the *Code of Conduct for United States Judges*, 175 F.R.D. 362, 363, 364 n.1., because the Judicial Conference lacks the authority to make rules governing the Supreme Court. *See* Thode, *supra* note 68, at 395. *See* text at notes 66-68, *supra*.

353. 764 F.2d 458.

354. 901 F.2d 1259.

355. *See* text at notes 262-76, *supra*.

356. *Pepsico*, 764 F.2d at 461.

appearing to want to retire under circumstances that can happen only if one of the litigants wins, and where she decides in that litigant's favor.

If Justice O'Connor made the comments reported in the press–that she wanted to retire during a Republican presidency, that she was unhappy on election night that Gore appeared to be carrying Florida, and that she believed and was upset by the nursing home story–she was required by § 455(a) to recuse herself because of an appearance of partiality. Those comments, if they were actually made, suggest prejudgment of key aspects of the lawsuit, a willingness to be influenced by factual assertions that were neither pleaded nor proved (and which one of the litigants was given no opportunity to rebut), as well as a personal preference–based on a hope for personal gain–about how the lawsuit should be resolved.

Under § 455(a), it is the *appearance* of partiality that disqualifies. It is irrelevant whether the judge can in fact impartially decide the case.[357] Aware of the comments attributed to Justice O'Connor, "an objective, disinterested, lay observer fully informed of the facts . . . would entertain a significant doubt about [her] impartiality."[358] And, in fact, many of the journalists who reported these comments expressed exactly that doubt.[359]

C. IS A DESIRE TO RETIRE WHEN A REPUBLICAN PRESIDENT CAN NOMINATE A SUCCESSOR AN "INTEREST THAT COULD BE SUBSTANTIALLY AFFECTED BY THE OUTCOME OF THE PROCEEDING" UNDER SECTION 455(B)(4)?

Of course, no case has decided whether a desire to retire at a certain time for political reasons is an interest that would disqualify a judge under §§ 455(b)(4) and 455(b)(5)(iii). Before *Bush v. Gore*, no federal judge had decided, or attempted to decide, a lawsuit that would determine the next president. And, as we have seen, the goal of retiring when a certain political party is in office is, historically, an extremely recent phenomenon.[360]

Section 455(b)(4) requires disqualification in two situations. One is where the judge "has a financial interest in the subject matter in controversy." The other is where the judge has "*any other* interest that could be substantially affected by the outcome of the proceeding." An "interest that could be substantially affected by the outcome of the proceeding" therefore need not be financial.[361]

Among the nonfinancial cases interpreting those words–an "interest that could be substantially affected by the outcome of the proceeding"–none provide

357. *Potashnik*, 609 F.2d at 1111; *Davis*, 811 F.2d at 1295; *Webbe*, 549 F.2d at 1361.

358. *Parker*, 855 F.2d at 1524.

359. The article titles cited in notes 3-11, *supra*, suggest the degree of doubt among the writers and editors who developed those articles.

360. *See* notes 216-50, *supra*, and accompanying text.

361. Virtually the same words appear in § 455(b)(5)(iii), which disqualifies a judge who has "an interest that could be substantially affected by the outcome of the proceeding."

sufficient analogs to tell us whether the retirement intentions attributed to Justice O'Connor represent grounds for disqualification under § 455(b)(4) and (b)(5)(iii). But let us explore a hypothetical that might help.

Assume that a trial judge is about to leave for a two-week vacation. There are no financial consequences because the judge will drive with family to a vacation home the judge owns. A party makes an emergency motion that can be denied immediately on the papers but granted only after a hearing, which will probably take three business days to conduct. The motion is made on Friday afternoon, and the hearing cannot begin until Monday. No other local federal trial judge or magistrate is available because they are all doing trials or are on vacation themselves. The family and the judge can travel only together (perhaps because the judge's spouse does not drive), which means that for all of them a large chunk of the vacation will disappear unless the motion is denied on the papers. This was to have been the first vacation this family would have had together in several years. Does the judge have an "interest that could be substantially affected by the outcome of the proceeding"? If the answer is yes for a vacation, it is yes for a politically timed retirement. If the answer is no, what would be the reason? If the answer is no because a vacation is not big enough to be an "interest" under the statute, it would be hard to say the same thing about a politically timed retirement–which is a way of influencing national law long after one has retired.

D. JUSTICE O'CONNOR'S REPORTED COMMENTS AND THE DUE PROCESS CLAUSE

The due process cases are explained in Parts I(E) and IV(B) of this article.[362] If a judge cannot constitutionally be "permitted to try cases where he has an interest in the outcome,"[363] and if the press reports about Justice O'Connor's retirement intentions at the time of *Bush v. Gore* were accurate, her participation in *Bush v. Gore* violated the due process clause.

VI. QUORUM, THE RULE OF NECESSITY, HARMLESS ERROR, WAIVER, AND TIMELINESS

Corollary issues include whether the Supreme Court would have been deprived of a quorum if Justices Scalia and O'Connor had recused themselves; whether the common law rule of necessity would have prevented their recusals; whether a failure to recuse in these circumstances could have been harmless error; whether Al Gore waived any disqualification objections before the Court's decision; and whether disqualification issues were mooted due to timeliness requirements.

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362. *See* text at notes 69-89 and 286-98, *supra*.

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

A. QUORUM

Recusals by Justices Scalia and O'Connor would not have deprived the Court of a quorum. Six justices constitute a quorum.[364] Without Justices Scalia and O'Connor, the Court would have been left with seven justices voting in *Bush v. Gore*. And even if it lacked a quorum, the Court would have been able to decide *Bush v. Gore*, although the result would have been different. If the Supreme Court lacks a quorum and "if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term," the Court is required by 28 U.S.C. § 2109 to affirm "with the same effect as upon affirmance by an equally divided court."[365] Since enactment of § 2109, the Court has affirmed in this fashion five times.[366]

B. THE RULE OF NECESSITY

The common law rule of necessity predates § 455, and the Supreme Court has held that it survives the enactment of the current version of § 455.[367] Under the rule of necessity, if *all* judges who might hear a case are disqualified from hearing it due to conflicts of interest, none of them will be considered disqualified because the litigants are entitled to a decision.[368] This happens only where the issues raised in a litigation create conflicts of interest for *every* judge who might be assigned—for example, where a plaintiff seeks to raise federal judicial pay,[369] or seeks to exempt all federal judges from a tax,[370] or brings a class action on behalf of all federal judges,[371] or sues every available judge.[372] None of these things, or anything even remotely like them, happened in *Bush v. Gore*.

C. HARMLESS ERROR

Error that does not provide ground for invalidating a court's judgment is called harmless. In *Liljeberg*, the Supreme Court provided a test for separating reversible from harmless error when § 455 is violated. Three factors are to be considered: "the risk of injustice to the parties in the particular case, the risk that

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364. 28 U.S.C. § 1.

365. 28 U.S.C. § 2109. A different procedure is followed in the rare instance where an appeal has been taken from a District Court judgment directly to the Supreme Court. *Id.*

366. United States v. Hatter, 519 U.S. 801 (1996); Haig v. Bissonette, 485 U.S. 264 (1988); Arizona v. Ash Grove Cement, 459 U.S. 1190 (1983) together with a companion appeal, Arizona v. United States District Court, 459 U.S. 1191 (1983); Sloan v. Nixon, 419 U.S. 958 (1974); Prichard v. United States, 339 U.S. 974 (1950).

367. *Will*, 449 U.S. at 216-17.

368. *Id.* at 212-15; *see, e.g.*, O'Malley v. Woodrough, 307 U.S. 277 (1939); Miles v. Graham, 268 U.S. 501 (1925); Evans v. Gore, 253 U.S. 245 (1920).

369. *Will*, 449 U.S. 200; Williams v. United States, 240 F.3d 1019 (Fed. Cir. 2001).

370. *Evans*, 253 U.S. 245.

371. Duplanter v. United States, 606 F.2d 654 (5th Cir. 1979).

372. Pilla v. Am. Bar Ass'n, 542 F.2d 56 (8th Cir. 1976).

the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process."[373] The Court pointed out that the harmless side of this formulation is, among other things, for "busy judges who inadvertently overlook a disqualifying circumstance,"[374] for example in "[l]arge, multidistrict class actions" where "the judge is required to familiarize himself or herself with the named parties and all the members of the class, which in an extreme case may number in the hundreds or even in the thousands."[375]

The Supreme Court has held that the due process right to have one's case decided by an adjudicator untempted by self-interest is among those Constitutional rights the violation of which can never be harmless because they are "structural defects ... which defy analysis by 'harmless-error' standards."[376] Among the others are the right to be represented by counsel in a criminal trial[377] and the right to public trial.[378]

D. WAIVER

Section 455(e) prohibits a judge from "accept[ing] from the parties ... a waiver of any ground for disqualification enumerated in" § 455(b).[379] Thus, only appearances of partiality under § 455(a) can be waived, and they can be waived only after the judge makes "a full disclosure on the record of the basis for disqualification."[380] No justice made any such disclosure in *Bush v. Gore*. Therefore, no disqualification on the part of any justice has been waived.

E. TIMELINESS

Although it resembles waiver, timeliness is a separate issue, and one about which the law is not entirely straightforward. The wording of § 455 does not require the parties to raise disqualification objections at any particular time. The statute instead requires judges to recuse themselves even if no party asks for it. Although a few courts have therefore held that a party is under no obligation to

373. *Liljeberg*, 486 U.S. at 864.

374. *Id.* at 862.

375. *Id.* at n.9. Where an appellant complains that a trial judge who should have recused himself granted or denied a summary judgment, or made another decision that is reviewed on appeal de novo anyway, it may be particularly appropriate to treat the failure to recuse as harmless because de novo review prevents any harm that a biased judge could inflict. United States v. Vespe, 868 F.2d 1328, 1342 (3d Cir. 1989); *Cont'l Airlines*, 981 F.2d at 1463; *Parker*, 855 F.2d at 1526-27.

376. Arizona v. Fulminante, 499 U.S. 279, 309 (1991) (Rehnquist, C.J., speaking for five justices in a decision without an opinion for the Court) (referring to *Tumey*, 273 U.S. 510).

377. Gideon v. Wainwright, 372 U.S. 335 (1963).

378. Waller v. Georgia, 467 U.S. 39, 49, n. 9 (1984).

379. 28 U.S.C. § 455(e).

380. *Id.*

move for recusal promptly,[381] most courts have held the opposite.[382] Some have required an objecting party "to raise the disqualification issue at a reasonable time in the litigation" in order to prevent "knowing concealment of an issue for strategic purposes."[383] Others have required an objecting party to move "at the earliest possible moment after knowledge of the facts,"[384] although examination of what the courts actually did in those cases shows that phrase to be more rhetoric than a precise statement of a rule of law. None of the due process cases, however, imposes any timeliness requirement.

In *Bush v. Gore*, oral argument occurred on December 11, 2000, and the Court issued its decision late in the evening on December 12. On December 11, the media first began reporting that Eugene Scalia and John Scalia were affiliated with law firms that represented the Bush campaign. On December 12, the first media reports began to appear raising conflict-of-interest questions concerning Virginia Thomas, Justice O'Connor, and Chief Justice Rehnquist. George W. Bush's admiration for Justices Scalia and Thomas and Al Gore's disdain for them were, of course, well known months before. The *Fortune* and *Washingtonian* magazine articles appeared in November 1999 and March 2000, but it remains to be seen whether the lawyers representing Al Gore in the Supreme Court were aware of them early in December 2000. The first similar report in a prominent newspaper was the *Wall Street Journal* article of December 12.

At least some of the reporters involved may have asked Al Gore's lawyers for comment before writing their stories, and the Gore lawyers may thus have known of the substance of those stories a day or two before they appeared. But it is very hard to make a serious argument that any timeliness requirement would have expired in the tiny period between the time the Gore lawyers learned of some of disqualification issues and the time the Court brought *Bush v. Gore* to an end by issuing its decision on the evening of December 12.

CONCLUSION

Immediately after the Supreme Court's decision in *Bush v. Gore*, it was widely said that no one could imagine the Court's majority voting the same way if the

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381. *See, e.g.*, *Potashnick*, 609 F.2d at 1115; *SCA Services*, 557 F.2d at 117.

382. *See, e.g.*, United States v. Barry, 938 F.2d 1327, 1340 n.15 (D.C. Cir. 1991); Polizzi v. United States, 926 F.2d 1311, 1321 (2d Cir. 1991); United States v. Owens, 902 F.2d 1154, 1155 (4th Cir. 1990); United States v. York, 888 F.2d 1050, 1053-55 (5th Cir. 1989); *In re* City of Detroit, 828 F.2d 1160, 1167 (6th Cir. 1987); United States v. Murphy, 768 F.2d 1518, 1539 (7th Cir. 1985); *Kansas Pub. Employees Ret. Sys.*, 85 F.3d at 1360; Davies v. Comm'r, 68 F.3d 1129, 1130 (9th Cir. 1995); Willner v. Univ. of Kansas, 848 F.2d 1023, 1029 (10th Cir. 1988).

383. *York*, 888 F.2d at 1053-55. *Accord* United States v. Barrett, 111 F.3d 947 (D.C. Cir. 1997); E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280 (9th Cir. 1992).

384. Satterfield v. Edenton-Chowan Bd. of Ed., 530 F.2d 567, 574-75 (4th Cir. 1975). *Accord*, Apple v. Jewish Hosp., 829 F.2d 326, 333 (2d Cir. 1987); Miller v. Tony and Susan Alamo Found., 924 F.2d 143, 146 (8th Cir. 1991); United States v. Gigax, 605 F.2d 507 (10th Cir. 1979).

identities of the parties had been reversed—if Al Gore had received a plurality in Florida of a few hundred votes, and if George W. Bush had been demanding recounts. But time and subsequent events have obscured that observation and blunted curiosity into the legal effects of the decision and what it signifies about the current nature of the Court as an institution.

If the press reports concerning Justices O'Connor[385] and Scalia[386] are accurate, both of them violated the federal judicial conflict-of-interest statute and the Constitutional due process clause by participating in *Bush v. Gore*. It is difficult to come to the same conclusion regarding Chief Justice Rehnquist simply because the press reports themselves are equivocal on whether facts existed that would have created a conflict of interest.[387] Case law would not require that Justice Thomas recuse himself, even if all the press reports concerning him are true.[388]

The second Justice John Marshall Harlan served on the Supreme Court from 1955 to 1971. He belonged to the Republican party before he was nominated,[389] but after he took his seat on the Court he stopped voting in elections.[390] It was not that Justice Harlan lacked commitment to a point of view. For most of his tenure on the Court, he was its most conservative justice, and he clearly earned the subtitle of one of his biographies: *Great Dissenter of the Warren Court.*[391] One of his law clerks later recalled that "[o]ne day, at breakfast, the Justice casually remarked that he had never voted since he became a judge. It was wrong, he thought, for a member of the Supreme Court to think of himself as a Democrat or Republican, even for the minute it took to cast a ballot."[392]

During Justice Harlan's service on the Court, his refusal to vote in elections was seen as unusual but among the best evidence of his integrity, because it was a simple and unassuming practice that could have no other meaning. But if he were on the Court today, many people would view it not as evidence of integrity but instead as proof of unreliability, a quirkiness that suggests that he might not do what he would have been put on the Court to do. Imagining Justice Harlan on the Court today–and the reaction he would cause in some quarters–crystallizes for those versed in history how the Court itself has been damaged by the willingness of some to think of it as another kind of legislature rather than as a genuine court.

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385. *See* text at notes 326-62, *supra*.

386. *See* text at notes 252-325, *supra*.

387. *See* text at notes 212-15 and following note 215, *supra*.

388. *See* text at notes 149-211, *supra*.

389. ABRAHAM, *supra* note 29, at 197.

390. THE SUPREME COURT AND ITS JUSTICES 185 (Jesse H. Choper, ed., 2d ed. 2001); TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 146 (1992).

391. YARBROUGH, *supra* note 390.

392. Bruce A. Ackerman, *[Untitled], in* JOHN MARSHALL HARLAN II: REMEMBRANCES BY HIS LAW CLERKS (Norman Dorsen & Amelia Ames Newcomb, eds., 2001) (unpaginated).

That damage has spread to some other parts of the federal judiciary. According to Judge Michael J. Luttig of the Fourth Circuit,

> Judges are told "You're appointed by us to do these things." So then judges start thinking, Well, how do I interpret the law to get the result that the people who pushed for me to be here want me to get? . . . I believe that there's a natural temptation to line up as political partisans that is reinforced by the political process. And it has to be resisted, by the judiciary and by the politicans.[393]

393. Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES MAG., Mar. 9, 2003, at 38. Judge Luttig clerked for then-Judge Scalia (on the D.C. Circuit) and Chief Justice Warren Burger, and worked in the White House and the Justice Department during the Reagan and first Bush administrations. He was nominated to the Fourth Circuit by George H.W. Bush in 1991.