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Supreme Court Recusal: From Marbury to the Modern Day

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ABSTRACT	96
INTRODUCTION.	97
I. RULES V. STANDARDS	101
II. SELECTED U.S. SUPREME COURT RECUSAL CONTROVERSIES. . .	104
A. MARSHALL IN <i>MARBURY</i> : JUDGE IN HIS OWN CASE . . . AND HIS BROTHER’S	105
B. JUSTICE BLACK AND <i>JEWELL RIDGE</i>	108
C. STEEL SEIZURE CASE: KEEP YOUR FRIENDS-ON- THE-COURT CLOSE	109
D. THURGOOD MARSHALL: THE EPITOME OF SELF- RESTRAINT?	112
E. JUSTICE REHNQUIST	115
F. JUSTICE SCALIA	117
G. JUSTICE GINSBURG	121
H. JUSTICE BREYER	126
III. HEALTH CARE RECUSAL: RULES V. STANDARDS; RHETORIC REALITY	129
A. JUSTICE AND VIRGINIA THOMAS	130
1. VIRGINIA THOMAS: THE \$686,589.00 WOMAN	130
2. PROPOSITION 8: A DISQUALIFICATION COMPARE AND CONTRAST” BETWEEN THE SUPREME COURT AND THE LOWER COURTS	136

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3. THE ONE SUPREME COURT (OR SUPREME COURT: THE UNFUNGIBLE JUSTICES)	139
B. KAGAN AND THE “TENTH-TO-NINTH” DIFFICULTY OF THE AFFORDABLE CARE ACT	145
CONCLUSION	150

ABSTRACT

For Justices of the U.S. Supreme Court, controversies pitting personal conflicts—whether actual or merely alleged—against the constitutional commitment to the rule of law increasingly form the basis of a caustic and circular national dialogue that generates substantially more heat than light. While the profile of these controversies is undoubtedly waxing, the underlying tensions stretch back at least to Marbury v. Madison. For all its seminal import, in Marbury, Chief Justice John Marshall adjudicated a case involving the validity of judicial commissions Marshall had himself signed and sealed. Equally remarkably, one of those judicial commissions belonged to Marshall’s own brother James.

In the centuries since, issues of actual and/or alleged Supreme Court conflicts have colored the context of landmark decisions, as well as the legacies of jurisprudential giants. Exploring many of the most compelling and controversial recusal sagas in the Court’s history, this Article trains attention on the factually-intensive real-world relationships that Supreme Court Justices have with issues and individuals. In today’s statutory disqualification terminology, these relationships fall—if anywhere—solely into the 28 U.S.C. § 455 nebulous catch-all provision in which a judge must disqualify himself or herself whenever their impartiality “might reasonably be questioned.” The study yields a layered picture that is rich in historical imagery, anecdote, and analytically-critical context. In this respect, the Article includes, but is not limited to, treatments of the midnight Justices in Marbury; the Steel Seizure case and the “damned fool” whom Truman felt was the “biggest mistake he had made” as President; Thurgood Marshall’s long arc with the NAACP; perhaps the best-known duck-hunting trip of all time; Justice O’Connor’s election night outburst preceding Bush v. Gore; profound matters of issue identification involving Justices Ginsburg and Breyer; and finally the controversies surrounding the Patient Protection and Affordable Care Act, including the undisclosed income related to Virginia Thomas’s work opposing the health care legislation and Justice Kagan’s ill-advised e-mails including the memorable “I hear they have the votes, Larry!!”

The exploration serves as a navigational guide to the difficult but necessary task of separating the shrill cries from the serious constitutional concern of genuine Supreme Court conflict. The Article situates the analysis of Supreme

Court disqualification practice, and particularly the circumstances involving Justices Thomas and Kagan vis-à-vis the Patient Protection and Affordable Care Act, within the broader, enduring legal dichotomy of rules as opposed to standards. Pointing to Chief Justice Roberts's recent, relatively bare assertion that when it comes to disqualification, the Supreme Court is simply constitutionally and pragmatically different, the Article asserts that while the Chief Justice's argument is neither emotionally nor intellectually satisfying, in an imperfect world, his argument is also entirely correct.

Finally, and in light of constitutional structure and historical norms, the Article asserts that it was entirely appropriate for both Justices Thomas and Kagan not to recuse themselves from the legal challenge to the Affordable Care Act. That said, the Article asserts that the controversies represent an important teachable moment—a moment in which the justices and the academy alike have the opportunity to elevate, rather than further denigrate, the national dialogue pertaining to high court conflicts.

INTRODUCTION

On perhaps no point of modern legal discourse can such a broad consensus be forged than this: when in the hot seat, Chief Justice John Roberts turns to baseball. During his confirmation hearing before the United States Senate, Roberts famously stated: “Umpires don’t make the rules; they apply them They make sure everybody plays by the rules And I will remember that it’s my job to call balls and strikes and not to pitch or bat.”¹

Chief Justice Roberts’s invocation of the judge-as-umpire metaphor was far from his first,² but the prodigious manner in which he deployed it rendered the metaphor a signature calling card for the swiftly confirmed Chief Justice. Further, Chief Justice Roberts wielded the metaphor so effectively that it has become “accepted as a kind of shorthand for judicial ‘best practices.’”³ Scholars have noted that the metaphor’s penetration into the confirmation hearing lexicon is so profound that it has played a significant role in framing the hearings and political discourse surrounding the confirmations of Justices Samuel Alito, Elena Kagan, and Sonia Sotomayor.⁴

1. Zuzanna Kobrzynski, *Balls and Strikes*, SLATE (Sept. 13, 2005), <http://www.slate.com/id/2126289>.

2. An interesting recent essay “traces the judicial history of the judge-umpire analogy from the late 1880s, finding that the analogy was originally intended for trial judges, and was expressly advanced as a model to be rejected.” Aaron S.J. Zelinsky, *The Justice As Commissioner: Benching the Judge-Umpire Analogy*, 119 YALE L.J. ONLINE 113, 114 (2010).

3. Theodore A. McKee, *Judges As Umpires*, 35 HOFSTRA L. REV. 1709, 1710 (2007); see also Neil S. Siegel, Commentary, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 702 & n.5 (2007) (discussing the “instant success” of Justice Roberts’s analogy).

4. See, e.g., Adam Benforado, *Color Commentators of the Bench*, 38 FLA. ST. U. L. REV. 451, 479, n.7 (2011) (“[I]t appears that Judge Alito tries to act like an umpire, calling the balls and strikes, rather than advocating a particular outcome.”); *id.* at n.9 (“Just prior to the beginning of the hearings, Senator John Cornyn (R-Texas)

Other scholars, however, have noted that the image of just calling “balls and strikes” but “not to pitch or bat” does not always map easily onto the Roberts Court’s jurisprudence.⁵ Regardless of that debate, the effectiveness of the metaphor means it should hardly come as a surprise that Chief Justice Roberts used the baseball metaphor once more to quell some of the extreme vitriol and self-perpetuating false controversy over Supreme Court disqualification practices.⁶

Beneath the title “2011 Year-End Report on the Federal Judiciary” Chief Justice Roberts wastes no verbiage before invoking the national pastime. The opening paragraph of the Chief Justice’s report focuses on a decidedly non-metaphorical historical juxtaposition of baseball and judicial ethics:

In 1920, American baseball fans were jolted by allegations that Chicago White Sox players had participated in a scheme to fix the outcome of the 1919 World Series. The team owners responded to the infamous “Black Sox Scandal” by selecting a [F]ederal [D]istrict [J]udge, Kenesaw Mountain Landis, to serve as Commissioner of Baseball and restore confidence in the sport. The public welcomed the selection of a prominent federal judge to purge corruption from baseball. But Judge Landis’s appointment led to another controversy: Could a federal judge remain on the bench while serving as Baseball Commissioner? That controversy brought to the fore a still broader question: Where do federal judges look for guidance in resolving ethics issues?⁷

Chief Justice Roberts notes that “Judge Landis resolved his situation by resigning his judicial commission in 1922 to focus all his efforts on the national pastime,”⁸ then reveals the purpose of detouring to a 1920s baseball scandal by going on to address whether the Judicial Conference’s Code of Conduct for United States Judges should apply to the Supreme Court.⁹

Court observers, and particularly members of the Supreme Court Bar familiar with the Court’s relatively unfettered power to manage ministerial internal Court affairs, may find Roberts’s following statements a tad disingenuous.

argued that the key question was whether Kagan was able to ‘take off the mantle of political strategist, political adviser, and assume the role of a disinterested, impartial judge, calling balls and strikes.’”).

5. See Geoffrey R. Stone, Op-Ed., *Our Fill-in-the-Blank Constitution*, N.Y. TIMES, Apr. 13, 2010, <http://www.nytimes.com/2010/04/14/opinion/14stone.html> (“According to Justice Antonin Scalia, conservative jurists merely carry out the ‘original meaning’ of the framers. These are appealing but wholly disingenuous descriptions of what judges—liberal or conservative—actually do.”); Editorial, *The Roberts Court Returns*, N.Y. TIMES, Sept. 30, 2007, <http://www.nytimes.com/2007/09/30/opinion/30sun1.html> (“If the justices act as umpires and call balls and strikes, this term could produce some real victories in voting rights, the death penalty and civil liberties. It could result in some terrible setbacks in these areas, however, if—as critics of the Roberts court have said—the court is calling balls and strikes but has moved the strike zone far to the right.”).

6. See generally CHIEF JUSTICE ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY I (Dec. 31, 2011), <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

7. *Id.*

8. *Id.* at 2.

9. *Id.* at 2-3.

Roberts asserts that “[t]he space constraints of the annual report prevent me from setting out a detailed dissertation on judicial ethics. And my judicial responsibilities preclude me from commenting on any ongoing debates about particular issues”¹⁰ In terms of the ostensible space constraints, it is worth noting that the word count of Roberts’s 2011 year-end report is only slightly more than half of Chief Justice William Rehnquist’s 2000 year-end report.¹¹

Similarly, only the most rigid of formalists could take seriously the assertion that Roberts was not “commenting on any ongoing debates about particular issues”¹² While formalism necessitates acknowledging that the Chief Justice’s report does not mention Justices Thomas and Kagan by name, Court observers have widely noted that the various references are so thinly veiled as to leave little doubt as to their functional specificity.¹³ Adam Liptak’s coverage of the report in *The New York Times* put it this way: “The [C]hief [J]ustice . . . made what amounted to a vigorous defense of Justices Clarence Thomas and Elena Kagan, who are facing calls to disqualify themselves from hearing the health care case”¹⁴ To adapt F. Scott Fitzgerald’s meme,¹⁵ when it comes to recusal, the Justices of the United States Supreme Court are different from other jurists. As this Article explains, acknowledging and/or asserting consequences of those differences is far from an uncontroversial endeavor. The modern analogy to Mary Colum’s dismissive, flippant reply to Fitzgerald’s meme—that when it comes to recusal the only difference between the Justices of the Supreme Court and other jurists is that they are Justices of the Supreme Court¹⁶—has substantial support. Some of the support for what this Article dubs the “fungible” Justices-are-just-judges perspective is populist, partisan, and opportunistic. On the other hand, some of the support for the position is deeply intellectual and is grounded in the gravity of genuine conflicts of interest in the nation’s high court. Yet therein lies both the conundrum and the reason the conundrum deserves

10. *Id.* at 3.

11. Compare *id.* (totaling a word count of 2,989), with CHIEF JUSTICE REHNQUIST, 2000 YEAR-END REPORT ON THE FEDERAL JUDICIARY (Jan 1, 2001), <http://www.supremecourt.gov/publicinfo/year-end/2000year-endreport.aspx> (totaling a word count of 5,734).

12. CHIEF JUSTICE ROBERTS, *supra* note 6, at 3.

13. See, e.g., Joan Biskupic, *Chief Justice Defends Supreme Court’s Recusal Policy*, USA TODAY, Dec. 31, 2011, <http://www.usatoday.com/news/washington/story/2011-12-31/supreme-court-recusal-policy/52307886/1>; Jess Bravin, *Chief Justice Responds to Recusal Calls in Health-Care Case*, WALL ST. J., Dec. 31, 2011, <http://online.wsj.com/article/SB10001424052970204632204577133041141039110.html>.

14. See Adam Liptak, *Chief Justice Defends Peers’ Hearing Case on Health Law*, N.Y. TIMES, Dec. 31, 2011, <http://www.nytimes.com/2012/01/01/us/chief-justice-backs-peers-decision-to-hear-health-law-case.html>.

15. F. Scott Fitzgerald famously wrote: “Let me tell you about the very rich. They are different from you and me.” Letter to the Editor, *The Rich Are Different*, N.Y. TIMES Nov. 13, 1988, available at <http://www.nytimes.com/1988/11/13/books/l-the-rich-are-different-907188.html>. A decade after Fitzgerald’s turn of phrase, Ernest Hemingway, over lunch with literary critic Mary Colum, floated a trial balloon based on Fitzgerald’s line, saying, “I am getting to know the rich.” *Id.* Colum tartly replied, “The only difference between the rich and other people is that the rich have more money.” *Id.*

16. See *id.*

focused attention. In an increasingly caustic legal and political environment, separating the shrill cries from the serious concerns requires a nuanced consideration of historical context.

In legal analyses, such historical context is often found wanting. However, in the media, including sound bite and talk journalism, and especially in blogs and social media, historical context is virtually always lacking. This is problematic because these news sources double as powerful ideological echo chambers in which heat, rather than light, is the coin of the realm.

Against that backdrop, this Article seeks to contextualize the analysis of current high court conflicts issues historically, as well as vis-à-vis changes in judicial disqualification law and practice. Part I of this Article begins by addressing the trans-substantive tensions between rules and standards, as well as a brief introduction to federal recusal law and the American Bar Association's *Code of Judicial Conduct*. Without intending to serve as an exhaustive cataloguing of U.S. Supreme Court disqualification doctrine, Part II identifies, collects, and describes ten of the most compelling and controversial recusals and non-recusals in the Court's history. Part II proceeds chronologically, facilitating parallel consideration of the two-century-long doctrinal trend of ever-heightened recusal standards.¹⁷ Choosing not to include clear, bright-line disqualification scenarios, such as stock ownership in a company litigating before the high court,¹⁸ the Article instead trains attention on the kind of factually-intensive gray areas of real-world human interaction that, in today's statutory disqualification terminology, fall—if anywhere—solely into the 28 U.S.C. § 455 catch-all provision. This provision requires recusal whenever the judge's impartiality "might reasonably be questioned."¹⁹

Part III of this Article follows on the historical norms described in Part II by situating the analysis of the circumstances involving Justices Thomas and Kagan vis-à-vis the Affordable Care Act within the broader, and enduring tension between rules and standards. The Thomas analysis considers the disqualification scenario involving Ninth Circuit Judge Stephen Reinhardt ruling on another recent and high-profile legal controversy, California Proposition 8's prohibition

17. Technically, the terms "disqualification" and "recusal" connote slightly different meanings—disqualification is mandatory, recusal is voluntary. This Article uses the terms interchangeably. In practice, the difference is greatly blurred because judges so frequently—and, in the instances involving Supreme Court justices, they always—adjudicate their own qualification to sit. Consequently, disqualification functions as recusal. See James Sample, David Pozen, and Michael Young, *Fair Courts: Setting Recusal Standards*, 36 n.1, BRENNAN CTR. FOR JUSTICE (2008), available at http://brennan.3cdn.net/1afc0474a5a53df4d0_7tm6brjhd.pdf [hereinafter *Setting Recusal Standards*].

18. 28 U.S.C. § 455(d)(4) (2012) ("'[F]inancial 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 . . ."); see, e.g., *Catherines v. Copytele, Inc.*, 608 F. Supp. 1031, 1031 (E.D.N.Y. 1985) (holding that under 28 U.S.C. § 455 (d)(4) the presiding judge was required to recuse himself when one of the parties to the action before him was a wholly-owned subsidiary of a company in which he owned stock).

19. *Id.* § 455 (a).

of same-sex marriage. The Proposition 8 scenarios offer an illustrative point of departure for comparing the disqualifications of Supreme Court Justices and inferior court judges. The Article asserts that Chief Justice Roberts's analysis in his year-end statement, while unsatisfying if applied to the lower federal courts, or even to state supreme courts, is the correct approach. Chief Justice Roberts is correct to assert that, at least when it comes to recusal, Supreme Court Justices really are different from all other jurists.²⁰ Finally, the Article contends that it was entirely appropriate for both Justices Thomas and Kagan *not* to recuse themselves from the challenge to the health care overhaul. This Article further proposes that Justices in the future would serve the national dialectic well to model bases of "non-recusal" decisions of Justices Scalia and Ginsburg in their respective scenarios described in Part II. Specifically, future recusal decisions of Justices should be transparently reasoned and fully disclosed.

I. RULES V. STANDARDS

The difficulties of precise line drawing with respect to Supreme Court recusals are a manifestation of the enduring trans-substantive tensions between rules and standards. This tension involves weighing different considerations, such as the value of formal realizability and generality versus particularity.²¹ However, before discussing these considerations, it is beneficial to provide some background on the differences between rules and standards.

Within the realm of positive law, it is prudent to think of rules and standards as legal directives that are compromised of two parts—one being a trigger "that identifies some phenomenon," and the other being a response that "requires or authorizes a legal consequence when that phenomenon is present."²² Triggers can be either empirical or evaluative, while responses can be determined or guided.²³ Generally, rules are comprised of hard empirical triggers and a hard determinate response, whereas standards are generally comprised of soft evaluative triggers and soft-guided or modulated responses.²⁴

Within the context of formal realizability of rules, the main benefits are the restraint of official arbitrariness and certainty of consequences.²⁵ In the realm of promulgating recusal rules or standards for Justices, restraint of official

20. See CHIEF JUSTICE ROBERTS, *supra* note 6, at 8-9 ("[It] is a consequence of the Constitution's command that there be only 'one Supreme Court.'").

21. According to Duncan Kennedy, extreme formal realizability is characterized as a rule as opposed to a standard. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-94 (1976); *id.* at 1687-88 ("The extreme of formal realizability is a directive to an official that requires him to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way.").

22. Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 381 (1985).

23. *Id.* at 382.

24. *Id.* at 382-83.

25. Kennedy, *supra* note 21, at 1688.

arbitrariness removes the possibility of corruption or political bias.²⁶ However, certainty of consequences is much more useful in modifying behavior in regards to private citizens.²⁷ When promulgating rules, it is important to be cognizant that judges adhere to H.L.A. Hart's concept of an "internal point of view" of the law under the "rule of recognition."²⁸ Specifically, judges must acknowledge that any of the established and prevailing rules or standards represent "common standards of official behavior and appraise critically their own and each other's deviations as lapses."²⁹ As a result, judges are not as constrained by certainty of consequences, as opposed to private citizens who may be motivated by the external point of view of the law, as exemplified by Oliver Wendell Holmes' "bad man" theory.³⁰ A standard, as opposed to the rigidity of a formally realized rule, allows a judge "to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard."³¹

A second consideration is the measure of generality that is achieved in rules and standards: the wider the scope of the rule, the greater the imprecision in effectuating its purpose.³² However, the more general rules are able to create some trans-substantive uniformity.³³ Of course, if particularized rules are promulgated, this increases the chances of uncertainty in borderline cases.³⁴ Conversely, the application of different factual scenarios to standards will fail to create trans-substantive uniformity. In relation to Supreme Court recusal rules and standards, there is formal realizability in rules concerning fiduciary or

26. *See id.*

27. *Id.* at 1688-89.

28. Hart, in describing the rule of recognition, states that it is "[I]n effect a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts." H.L.A. HART, *THE CONCEPT OF LAW* 256 (2d ed. 1994). Hart also makes a distinction between the internal and external points of view of the law. *See id.* at 89 ("[I]t is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the 'external' and the 'internal points of view.'"). *See generally* Stephen Perry, *Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View*, 75 *FORDHAM L. REV.* 1171 (2006).

29. HART, *supra* note 28, at 117.

30. In 1897, Oliver Wendell Holmes presented his "bad man" theory of law, where he observed that,

[I]f you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience The prophecies of what the court will do in fact, and nothing more pretentious, are what I mean by the law.

Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 459, 461 (1897). Moreover, Supreme Court Justices, as a function of their position and internal point of view, are arguably constrained more by constitutional norms than any potential consequence of impropriety. *See* Richard H. Fallon, Jr., *Constitutional Constraints*, 97 *CALIF. L. REV.* 975, 980 (2009).

31. Kennedy, *supra* note 21, at 1688.

32. *Id.* at 1689-90.

33. *See id.* at 1690.

34. *See id.* at 1690.

financial interests.³⁵ However, matters such as friendships, relationships, spousal interests, or prior involvement on an issue, which are harder to define by the rigidity of formally realized rules, are essentially left to the judgment of the Justices.³⁶

Specifically, the federal disqualification statute, 28 U.S.C. § 455, states in relevant part that “any justice [or judge] . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”³⁷ Section 455 also mandates disqualification in specific instances where the judge has a personal bias concerning a party, has personal knowledge of disputed evidentiary facts, has served as a lawyer or in a governmental position on the matter in issue, has a financial interest, and in cases of spousal involvement, among other circumstances.³⁸ The Supreme Court has said there is no scienter requirement in the statute, and the question is whether the public might reasonably believe the judge knew of the facts creating the appearance of impropriety.³⁹ The statute has been interpreted broadly by the Court “to avoid ‘suspicions and doubts’ about the integrity of judges.”⁴⁰

Before the statute’s amendment in 1974, the disqualification standard involved a significantly “harder” evaluative trigger, mandating disqualification where a judge “could be said to be ‘biased’ against one of the litigants or had a significant financial interest in the outcome of the case.”⁴¹ Additionally, recusal was left to the judge’s subjective discretion.⁴² Section 455 in its present form represents a shift from a hard standard of actual bias to a softer question of reasonability.⁴³ The Supreme Court has noted the evidence of congressional intent to promote public confidence in the integrity of the judicial process with the 1974 amendment.⁴⁴

The American Bar Association’s *Model Code of Judicial Conduct* also concerns itself with questions of a judge’s impartiality.⁴⁵ In four canons, the

35. See, e.g., 28 USC § 455(b)(4) (2012).

36. See Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 660 (2005) (“[T]here is no formal procedure for court review of the [recusal] decision of a justice in an individual case. This is because it has long been settled that each justice must decide such a question for himself.”) (quoting William Rehnquist, *Let Individual Justice Make Call on Recusal*, ATLANTA J.-CONST., Jan. 29, 2004, at 15A).

37. 28 U.S.C. § 455.

38. *Id.* § 455(b).

39. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859-60 (1987).

40. Monroe H. Freedman, *Duck-Blind Justice: Justice Scalia’s Memorandum in the Cheney Case*, 18 GEO. J. LEGAL ETHICS 229, 230 (2004).

41. Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 602 (1987).

42. Debra Lyn Bassett, *Judicial Disqualification in the Federal Courts*, 87 IOWA L. REV. 1213, 1225 (2002).

43. *Id.* at 603.

44. See *Liljeberg*, 486 U.S. at 859-60.

45. The ABA’s *Codes* have been adopted in some form by forty-nine states. Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably Be Questioned,”* 14 GEO. J. LEGAL ETHICS 55, 55 (2000).

Code requires a judge to avoid the appearance of impropriety,⁴⁶ perform official duties impartially,⁴⁷ minimize the risk of conflict between personal activities and judicial office,⁴⁸ and avoid engaging in political activity that is inconsistent with the “independence, integrity, or impartiality of the judiciary.”⁴⁹

As in § 455, the *Code*’s disqualification standard requires a judge to disqualify when his or her “impartiality might reasonably be questioned.”⁵⁰ The *Code* lists specific instances where this may occur—including instances of personal bias, spousal involvement, and a party’s judicial campaign contributions, among others—but this list is not exhaustive.⁵¹ The commentary reiterates the catchall standard that a judge disqualify him or herself when “impartiality might reasonably be questioned”, regardless of whether any of the specific provisions apply.⁵² Drafters of the *Model Code* were concerned with conduct that might “[impair] the fairness of the proceeding[s] and [bring] the judiciary into disrepute”⁵³ and emphasize the idea that “confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.”⁵⁴

II. SELECTED U.S. SUPREME COURT RECUSAL CONTROVERSIES

Chronologically, as the title of the Article suggests, the issue of Supreme Court disqualification goes back to the founding,⁵⁵ and continues to vex us in the present. That the issue has always existed, however, should not be read to imply that its existence or import has remained static. Over the last two centuries, the rather limited formal rules that apply to disqualification have expanded incrementally.⁵⁶ Judicial vigilance to those expanding rules has generally waxed, even if, as is also true, that waxing has not been universal.⁵⁷ Yet the public’s heightened attention to recusal, and its commensurate use as an impartiality-undermining sword, rather than an impartiality-protecting shield, is a rather recent and

46. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2010) [hereinafter MODEL CODE].

47. MODEL CODE Canon 2.

48. MODEL CODE Canon 3.

49. MODEL CODE Canon 4.

50. MODEL CODE Canon 2, R. 2.11(A).

51. See MODEL CODE Canon 2, R. 2.11(A)(1)-(6). Other instances include personal knowledge of facts, economic interests, and statements made by the judge during a campaign. *Id.*

52. MODEL CODE Canon 2, R. 2.11 cmt. 1.

53. MODEL CODE Canon 2, R. 2.3 cmt. 1.

54. MODEL CODE Canon 2, R. 2.4 cmt. 1.

55. CHARLES GARDNER GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 5 (2d ed. 2010), available at [http://www.fjc.gov/public/pdf.nsf/lookup/judicialdq.pdf/\\$file/judicialdq.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/judicialdq.pdf/$file/judicialdq.pdf) (noting that “[d]isqualification standards in the United States have been a work in progress, gaining in complexity and strength over time” whereas “[u]nder English common law, the only accepted basis for judicial disqualification was financial interest”).

56. *Id.* at 5-7.

57. *Id.*

dramatic development.⁵⁸ If unabated, this trend will produce perceptions of false equivalencies—think, never cry wolf⁵⁹—that risk delegitimizing recusal as a due process safeguard even in precisely the defense-of-last-resort scenarios in which it is needed most.⁶⁰

A. MARSHALL IN *MARBURY*: JUDGE IN HIS OWN CASE . . .
AND HIS BROTHER'S

There is, of course, broad consensus, even among its many critics, that *Marbury v. Madison*⁶¹ “is one of the great constitutional documents of American history.”⁶² Sanford Levinson and Jack Balkin state it well: “*Marbury* is not just any case. It is a veritable symbol of judicial independence and of commitment to the Rule of Law, the hallmarks, most lawyers believe, of the United States Constitution.”⁶³ That said, however, and to illustrate a point quite pertinent to the thesis of this Article, Levinson and Balkin also note that “asking students to recite the facts of *Marbury* at the beginning of their legal careers is also deeply ironic.”⁶⁴ This is because *Marbury*’s “greatness” is as much a function of Machiavellian strategy as it is of law, prompting scholars to describe the case as “a political coup of the first magnitude.”⁶⁵ Scholarly critiques of this nature have appropriately focused on the selective and strategic framing of the case, and the decision’s consequent, far from inevitable, legal rationale vis-à-vis the Court’s tenuous place in the nascent Republic.⁶⁶

58. See generally M. Margaret McKeown, *Don’t Shoot the Canons: Maintaining the Appearance of Propriety Standard*, 7 J. APP. PRAC. & PROCESS 45 (2005).

59. AESOP, AESOP’S FABLES: THE SHEPHERD’S BOY AND THE WOLF, available at <http://classics.mit.edu/Aesop/fab.1.1.html> (noting that when the wolf finally did come, the “boy, now really alarmed, shouted in an agony of terror: ‘Pray, do come and help me; the Wolf is killing the sheep’; but no one paid any heed to his cries.”).

60. See Deborah Goldberg, James Sample & David Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 534 (2007) (“Invigorating recusal would help courts currently under siege to seize the high ground and recover the respect of a disenchanting public.”)

61. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

62. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 325 (1996); see also Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235, 1244 n.32 (2003) (noting that “[t]here is remarkable consensus about this, shared by *Marbury*’s critics and proponents alike” and citing examples).

63. Sanford Levinson & Jack M. Balkin, *What Are the Facts of Marbury v. Madison?*, 20 CONST. COMMENT. 255, 255-56 (2003).

64. *Id.* at 256.

65. EDWARD S. CORWIN, JOHN MARSHALL AND THE CONSTITUTION: A CHRONICLE OF THE SUPREME COURT 53-85 (1919).

66. See e.g., LAWRENCE GOLDSTONE, *THE ACTIVIST: JOHN MARSHALL, MARBURY V. MADISON, AND THE MYTH OF JUDICIAL REVIEW* (2008) (describing in depth the historical background leading to *Marbury*, as well as the case itself. Goldstone describes the case as a “masterpiece of misdirection” and as “a coup as bold in design and as daring in execution as that by which the Constitution had been framed”); Samuel R. Olken, *The Ironies of Marbury v. Madison and John Marshall’s Judicial Statesmanship*, 37 J. MARSHALL L. REV. 391, 438 (2004) (“Through the guise of distinguishing law from politics, Marshall shaped a case “born out of political defeat into a vehicle for enhancing the constitutional role and prestige of the Court.”); Edward C. Corwin, *Marbury v. Madison and the Tradition of Judicial Review*, 12 MICH. L. REV. 538, 543 (1914) (suggesting that Marshall, on

In addition to *Marbury's* political and legal ramifications, the case was also stunningly personal to Chief Justice Marshall. It was personal both in terms of a direct interest in the outcome (even apart from his interests as Chief Justice) and, remarkably, in his direct involvement in the factual scenario underlying the case itself. The case involved “William Marbury, a would-be justice of the peace, who claimed he was entitled to an order from the Court that President Jefferson deliver his judicial commission.”⁶⁷ Levinson and Balkin note that “Chief Justice Marshall takes judicial notice of the fact that Marbury’s commission was signed and sealed by the Secretary of State.”⁶⁸ Marshall *needs* to take this judicial notice because the key affidavit in the case—submitted by none other than his brother James—“does not affirm that Marbury’s was among the commissions scheduled for delivery, only that [James] believed it might have been.”⁶⁹ The inadequacy of James Marshall’s affidavit, however, was saved by a rather extraordinary convenience: James’s brother “could take judicial notice of these crucial facts for Marbury’s case.”⁷⁰

This was all possible—even facile—because the exact same individual who was (1) James’s brother John Marshall, (2) the newly-seated Chief Justice John Marshall, *and* (3) the recently-departed Secretary of State “who personally affixed the Great Seal of the United States to Marbury’s commission.”⁷¹ Indeed, as Richard Neumann states, in one of the many quirks of the process, “when Marshall signed the commissions, he was both Secretary of State *and* Chief Justice.”⁷² This commingling of offices was owed not to the fact that Marshall took the bench on the very same day, February 4, 1801, that he had received his own commission, but that President Adams “asked Marshall to continue to serve as Secretary of State until the end of the Adams administration, a month later.”⁷³ Thus, with the nation in a pendulum-swinging period of political transition⁷⁴

behalf of the Court, “took the engaging position of declining to exercise power which the Constitution withheld from it, by making the occasion the opportunity to assert a far transcendent power”); David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts 1801-1835*, 49 U. CHI. L. REV. 646, 661 (1982) (“We also see in *Marbury* the work of a masterful tactician, for Marshall managed to lay the basis for enormous judicial power in the future by sacrificing a trivial portion of the Court’s jurisdiction in the immediate case.”).

67. Jeff Bleich & Kelly Klaus, *Deciding Whether to Decide*, 48 FED. LAW. 45, 45 (2001).

68. Levinson & Balkin, *supra* note 63, at 264 n.22.

69. *Id.*

70. *Id.*

71. *Id.*

72. Richard K. Neumann Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 203 (2007) (emphasis added).

73. *Id.* at 203, 203 n.26 (citing ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 558-59 (1916) (“The same thing had happened once before. John Jay was both Secretary of State and Chief Justice for six months during the Washington Administration.”)).

74. Robert J. Reinstein & Mark C. Rahdert, *Reconstructing Marbury*, 57 ARK. L. REV. 729, 739 (2005) (“*Marbury v. Madison* was decided during a period of great political tension in the United States. American democracy had just survived one of its greatest tests when, in the 1800 national elections, the Federalist party

from President Adams to President Jefferson, Marbury's judicial commission—while not trivial to Marbury—was inexorably intertwined not only with that much more substantial transition, but with Marshall himself. Still yet further, Marshall “was a business associate of Charles Lee, Marbury's lawyer, involved with Lee in the purchase of the Fairfax estate manor lands, and had once offered to buy Lee out.”⁷⁵ Marshall's participation in the decision, despite the depth of his participation in the underlying controversy, was but one example of Marshall's selective, even idiosyncratic, approach to recusal in cases involving personal, as opposed to pecuniary, relationships.

Perhaps just as pertinently for purposes of this Article, the matter cannot be fully disconnected from the deep personal antipathy between Marshall and Jefferson.⁷⁶ Richard Neumann notes that Marshall and Jefferson behaved in surprising ways during this confrontation. For example, “Marshall taunted Jefferson by dining with Burr and his lead defense lawyer at the latter's home immediately after releasing Burr on bail.”⁷⁷ All of which lends more than just a little bit of credence to Neumann's caveat that “[c]ompared with the past, the political context in which we live today is not quite what it appears to be.”⁷⁸

In sum, by the standards applicable today, a Supreme Court Justice as conflicted as Marshall in *Marbury* not only would be required to disqualify himself or herself pursuant to § 455,⁷⁹ but, if he or she refused to do so, would almost certainly face impeachment, and quite probably, successful impeachment at that.⁸⁰ Yet, in contrast, as Cliff Sloan, co-author of *The Great Decision: Jefferson, Adams, Marshall, and the Battle for the Supreme Court*, recently told the *National Law Journal*, “no one objected” at the time.⁸¹

This is not to say that judicial disqualification was a complete nullity at the

lost control of Congress and the presidency to the Republican party. John Adams, the Federalist President, was defeated by the Republican challenger, Thomas Jefferson, and the nation experienced its first transfer of power from one political party to another. In other nations, similar events have proved to be the occasion for a military coup, widespread arrests of political prisoners, or the outbreak of civil war; but in the case of the United States, the transfer of power proceeded peacefully.”)

75. Weinberg, *supra* note 62, at 1408 n.604 (quoting letter from John Marshall to Charles Lee dated Apr. 20, 1797) (citing *The Papers of John Marshall* 498-99 (William C. Stinchcombe & Charles T. Cullen eds., 1979)).

76. See Neumann, *supra* note 72, at 165-66.

77. *Id.* at 202.

78. *Id.* at 166. Neumann's point, made in discussing impeachment, as opposed to recusal, is equally apt to both.

79. 28 U.S.C. § 455(a) (2012) (the statute reads, in pertinent part, that “[a]ny justice, judge, or magistrate . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned”).

80. Neumann, *supra* note 72, at 202.

81. Tony Mauro, *Recusal Issue Fading as Health Care Arguments Approach*, NAT'L L.J. (Feb. 15, 2012), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202542392973&slreturn=20120815125815>; see generally, CLIFF SLOAN & DAVID MCKEAN, *THE GREAT DECISION: JEFFERSON, ADAMS, MARSHALL, AND THE BATTLE FOR THE SUPREME COURT* (1st ed. 2009).

time of *Marbury*. On the contrary, and in a pattern that continues on the Court to this day, matters of judicial disqualification that fit neatly into a bright-line rules framework, as opposed to standards framework, were indeed taken seriously. Indeed, Marshall himself was notably absent in *Fairfax's Devisee v. Hunter's Lessee*⁸² due to an interest he had in the land at issue.⁸³

Nor can Marshall's participation in *Marbury* be dismissed as merely the product of an isolated Justice's cavalier approach to conflict. As Sanford Levinson and Jack Balkin note, "Marshall, sitting as a circuit judge, had delivered the lower court opinion in *Stuart v. Laird*"⁸⁴ and yet, "[f]or reasons that are unclear, he recused himself from sitting on the appeal to the Supreme Court" despite the fact that:

[i]n the early days of the Republic when Justices rode circuit, it was common for them to sit in on appeals of their own decisions, just as members of circuit courts today normally do not recuse themselves when a decision they participated in is appealed to the full court en banc.⁸⁵

It warrants acknowledging here that there is not universal agreement as to whether Marshall's recusal in *Stuart* was a matter, as Levinson and Balkin imply, of cautious discretion, as opposed to necessity. Louise Weinberg, for example, writes that "Marshall, of course, recused himself of necessity in *Laird* because he had decided the case below while sitting on circuit."⁸⁶ Even setting that sub-debate to the side, it is hard to deny that Levinson and Balkin are correct in asserting that "the juxtaposition of Marshall's recusal in *Stuart v. Laird* with his notable failure to recuse himself in *Marbury v. Madison* is particularly striking."⁸⁷

B. JUSTICE BLACK AND *JEWELL RIDGE*

During the Supreme Court's October 1944 Term, the Justices heard arguments and ruled in favor of mine workers in a case implicating the Fair Labor Standards Act (FLSA).⁸⁸ Following the Court's 5-4 decision in which Justice Hugo Black joined in the majority opinion, the losing coal company filed a petition for rehearing, basing their conflict of interest argument on the fact that the miners

82. *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 603 (1813).

83. John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43, 45 (1970).

84. *Stuart v. Laird*, 5 U.S. 299, 308 (1803).

85. Levinson & Balkin, *supra* note 63, at 260.

86. Weinberg, *supra* note 62, at 1281.

87. Levinson & Balkin, *supra* note 63, at 260.

88. *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161 (1945); see also Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203, 207-209 (1988) (focusing largely on Justice Jackson's reminiscence of his time on the Supreme Court and his relationship with Justice Black).

were represented by Justice Black's former law partner and personal lawyer.⁸⁹ Justice Black moved to have the issue decided in a *per curiam* opinion, but Justice Jackson objected and filed a concurrence wherein he noted judicial discretion to recuse in the absence of statutes or advisory opinions promoting a uniform policy on withdrawing from a case.⁹⁰

Justice Jackson's own thoughts on *Jewell Ridge Coal Corporation v. Local No. 6167 United Mine Workers of America* and its consequences are notable. In his biographical recounting of the case and its fallout, Jackson admits he suspected Justice Black was guilty of pressuring the Court into handing down a decision quickly in an attempt to influence contract negotiations in the mines.⁹¹ Justice Jackson also points to a dinner where Black was to receive an award. The sponsors of the dinner were litigants before the Court, including lawyers who were awaiting a decision in *Jewell Ridge*.⁹² To Jackson, "Black never left the Senate and his constituents."⁹³ The press was similarly excited, with the *Herald Tribune* calling for a thorough congressional investigation, and the *Baltimore Sun* decrying the Court's "abandonment" of values.⁹⁴ Jackson believed the conflict of interest issues in *Jewell Ridge* led to congressional amendments of both the FLSA and the *Judicial Code*.⁹⁵

C. STEEL SEIZURE CASE: KEEP YOUR FRIENDS-ON-THE-COURT CLOSE

Justice Scalia himself indicated in *Cheney v. United States District Court for District of Columbia*, that "[a] no-friends rule would have disqualified much of the Court in *Youngstown Sheet & Tube Company v. Sawyer*, the case that challenged President Truman's seizure of the steel mills. Most of the Justices knew Truman well, and four had been appointed by him."⁹⁶ Justice Scalia raised several issues of recusal, focusing particularly on Justice Jackson's participation in *Youngstown Sheet & Tube Company v. Sawyer*,⁹⁷ more commonly known as the Steel Seizure case, Justice Jackson's work as Attorney General prior to sitting

89. *See id.* at 208.

90. *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 897, 897 (1945) (reh'g denied).

91. *See Hutchinson, supra* note 88, at 208-09. These admissions were via the now notorious cables from Nuremburg.

92. *See id.* at 236-237.

93. *Id.* at 241.

94. *See* EUGENE C. GERHART, *AMERICA'S ADVOCATE: ROBERT H JACKSON* 263-65 (1958) (detailing press reactions).

95. *Hutchinson, supra* note 88, at 222.

96. *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 917 (2004). Chief Justice Vinson, as well as Justices Minton, Clark, and Burton, were all appointed by President Truman. *See Statistics & Lists: Supreme Court Nominations, Present-1789*, U.S. SENATE, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited Sept. 29, 2012).

97. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

on the Supreme Court bench, and views he had expressed in his *Jewell Ridge*.⁹⁸

As Attorney General to President Franklin D. Roosevelt, Jackson defended a very broad view of the President's seizure power.⁹⁹ More specifically, the government in Youngstown primarily relied on the seizure of the North American Aviation Company in 1941 by the Roosevelt administration while Justice Jackson served as Attorney General.¹⁰⁰ The Roosevelt Administration justified the seizure of the North American Aviation Company by pointing out the Communist involvement of the labor movement and by asserting that the "strike was an act of Communist subversion."¹⁰¹ Justice Jackson addressed this in his concurring opinion in *Youngstown* by suggesting that the similarities between Roosevelt's and Truman's seizures were "superficial," distinguishing *Youngstown* by noting that the Roosevelt seizure was consistent with congressional policy, and the existence of a government contract and government property at the company.¹⁰²

In addition to his duties during his tenure as Attorney General, Justice Jackson placed particular pressure on himself in *Youngstown* when he criticized Justice Black's refusal to disqualify in *Jewell Ridge*. In their petition for rehearing, the coal company in *Jewell Ridge* mentioned the impropriety of Justice Black's participation in the majority opinion on the ground that the miners were represented by Black's former law partner.¹⁰³ In the Court's opinion denying rehearing, Justice Jackson's concurrence acknowledged that there was no legislation that directly dictates the grounds under which a Justice must be disqualified, and therefore the Justices themselves are responsible for determining whether disqualification is appropriate in any particular case.¹⁰⁴ He also indicated, however, that "[p]ractice of the Justices over the years has not been uniform, and the diversity of attitudes to the question doubtless leads to some confusion as to what the bar may expect and as to whether the action in any case is a matter of individual or collective responsibility."¹⁰⁵ According to Dennis J. Hutchinson's account of the feud between Justice Jackson and Justice Black, Justice Jackson refused to merely issue a *per curiam* decision and drafted a concurring opinion so as to "nominally dissociat[e] himself from the merits of the ruling and implicitly criticiz[e] Black for hiding behind the denial and not facing

98. *Jewell Ridge Coal Corp.*, 325 U.S. at 897 (Jackson, J., concurring); *Cheney*, 541 U.S. at 917.

99. See Edward T. Swaine, *The Political Economy of Youngstown*, 83 S. CAL. L. REV. 263, 278 (2010).

100. See Adam J. White, *Justice Jackson's Draft Opinions in the Steel Seizure Cases*, 69 ALB. L. REV. 1107, 1127 (2006).

101. *Id.*

102. See *Youngstown*, 343 U.S. at 648 (Jackson, J., concurring).

103. See Hutchinson, *supra* note 88, at 208.

104. *Jewell Ridge Coal Corp. v. Local No. 6167 United Mine Workers of Am.*, 325 U.S. 897, 897 (1945) (reh'g denied).

105. *Id.*

the music.”¹⁰⁶

Justice Jackson, therefore, considered disqualifying himself from the *Youngstown* case because of the recusal controversies of the Court, which were largely self-created, and his prior work as Attorney General.¹⁰⁷ In a draft opinion of his *Youngstown* concurrence, Justice Jackson “wrote one and a half pages justifying his decision not to recuse: ‘[c]andor requires me to state that I have considered whether I should sit in this case . . .’”¹⁰⁸ In an even later draft, Justice Jackson further addressed his potential disqualification: “Such a role [in the FDR seizures] might suggest withdrawal from this case. Having weighed all of those considerations, I have concluded instead that I may contribute some teachings of practical experience tempered by a decade of detached reflection.”¹⁰⁹ In the published concurrence, Justice Jackson prefaces his analysis by stating:

That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety. While an interval of detached reflection may temper teachings of that experience, they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction. But as we approach the question of presidential power, we half overcome mental hazards by recognizing them.¹¹⁰

Justice Jackson thus acknowledged at the very start of his opinion the influence that his prior position as Attorney General has had on his views. However, he attempted to assuage concerns of impropriety by suggesting his recognition of its influence had assisted him in partially overcoming it.¹¹¹

Justice Jackson is not the only Justice whose participation in *Youngstown* raised potential recusal issues. Chief Justice Vinson, a close friend and appointee of President Truman, had assured President Truman that seizing the mills was within his prerogative and was constitutional.¹¹² Much like Chief Justice Vinson, Justice Clark had also encouraged the constitutionality of the seizure during his

106. Hutchinson, *supra* note 88, at 208.

107. See Swaine, *supra* note 99, at 278.

108. White, *supra* note 100, at 1129-30.

109. *Id.* at 1130 (internal quotation marks omitted).

110. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

111. See Swaine, *supra* note 99, at 277-79.

112. *Id.* at n.65 (noting that Chief Justice Vinson had allegedly met with President Truman privately to consult him on the seizure); see GARY WILLS, *BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE* 126 (2010); Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)*, 33 PEPP. L. REV. 575, 590 (2006); MELVIN I. UROFSKY, *DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941-1953* 209 (1997). Interestingly, another anecdote illustrating the close personal relationship of Chief Justice Vinson and President Truman is their frequent visits and poker games. JAMES E. ST. CLAIR & LINDA C. GUGIN, *CHIEF JUSTICE FRED M. VINSON OF KENTUCKY 190-91* (2002) (illustrating in detail how President Truman routinely sought the Chief Justice’s advice on partisan and other matters).

tenure as Attorney General.¹¹³ In 1949, then-Attorney General Clark, in support of a bill to repeal of the Taft-Hartley Act, asserted that the President had implied constitutional power to seize facilities subject to strike.¹¹⁴ Justice Clark, unlike Chief Justice Vinson, joined the majority finding in favor of the steel companies. While considering the competing interests, Justice Clark met with Chief Justice Vinson and promised the Chief Justice that he would join the majority if three other Justices voted in favor of the seizure.¹¹⁵ Although Justice Clark was a loyal friend to President Truman, once it became clear that only Chief Justice Vinson and Justices Reed and Minton would vote to uphold the seizure, Justice Clark joined the majority and found in favor of the steel companies on the ground that President Truman had not followed the procedures set forth in Taft-Hartley.¹¹⁶ After the *Youngstown* decision, President Truman was most outraged by Justice Clark's siding with the majority, claiming later that appointing "that damn fool from Texas [to] . . . the Supreme Court was the biggest mistake he had made as President."¹¹⁷

D. THURGOOD MARSHALL: THE EPITOME OF SELF-RESTRAINT?

Nominated to the bench by President Lyndon B. Johnson in 1967, Justice Thurgood Marshall was the first African American Associate Justice appointed to the United States Supreme Court.¹¹⁸ Marshall, along with Chief Justice Warren and Justice Brennan, the "leaders of the liberal wing," gave the Court a "solid bloc of five liberal Justices."¹¹⁹ Prior to his appointment to the Court, Marshall made a significant mark in the nation's civil rights jurisprudence as a practicing attorney. Just three years after receiving his law degree from Howard University

113. WILLIAM M. WIECEK, *BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941-1953* 388 (2006).

114. *See id.*

115. ALAN F. WESTIN, *THE ANATOMY OF A CONSTITUTIONAL LAW CASE: YOUNGSTOWN SHEET & TUBE CO. v. SAWYER (THE STEEL SEIZURE DECISION)* 190 (1990).

116. *See id.* at 190; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 660-67 (1952) (Clark, J., concurring).

117. DAVID G. MCCULLOUGH, *TRUMAN* 901 (1992); *see also* Ed R. Haden, *Judicial Selection: A Pragmatic Approach*, 24 HARV. J.L. & PUB. POL'Y 531, 538 n.16 (2001).

118. *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Court*, 1997 ANN. SURV. AM. L. 124, 154 (1997); Mark V. Tushnet, *Honoring Justice Thurgood Marshall: Thurgood Marshall and the Brethren*, 80 GEO. L.J. 2109, 2119, 2126-27 (1992) ("Prior to Marshall's appointment, only one African American had served as a law clerk to any of the Justices.").

119. Tushnet, *supra* note 118, at 2118-21 ("The potential for sustained liberal control of the Court that Marshall's appointment may have promised was not realized . . . James J. Kilpatrick lamented the appointment because it would 'upset the rough balance of liberalism and conservatism that recently has prevailed upon the high tribunal' and would place 'the judicial activists . . . in full control . . .' Marshall's appointment would not skew the Court as much as Kilpatrick and others expected.") (citing James J. Kilpatrick, *Marshall's Appointment Upsets Court Balance*, WASH. SUNDAY STAR, June 18, 1967).

in 1933,¹²⁰ and after first establishing a one-man private practice in Baltimore,¹²¹ Marshall joined the team of staff attorneys in the NAACP's legal office.¹²² In 1938, Marshall became the NAACP's lead chair, and within two short years he earned the title of Chief Counsel of the NAACP Legal Defense and Educational Fund.¹²³

As successor to and protégé of Charles Hamilton Houston, colloquially known as “The Man Who Killed Jim Crow” and “Moses of the civil rights movement” for his integral role in dismantling the Jim Crow laws,¹²⁴ and who was the NAACP's first Special Counsel, Thurgood Marshall sustained the NAACP's legal campaign to end segregation.¹²⁵ Through the mid-1940s, Marshall advocated numerous cases that expanded the rights of African Americans by collapsing “white primaries” in several southern states,¹²⁶ successfully challenging state laws that enforced segregation on interstate buses and trains,¹²⁷ ending the judicial enforcement of racially restrictive covenants,¹²⁸ and striking down Texas and Oklahoma laws requiring segregated graduate schools.¹²⁹ Each of these landmark cases, independently momentous in their own right, culminated in one of the NAACP's most significant legal victories and Marshall's greatest achievement as a lawyer—*Brown v. Board of Education*.¹³⁰

Until retiring from the Supreme Court in 1991, Marshall, in the words of Mark Tushnet, a leading authority on Marshall's life and work,¹³¹ “embodied the

120. PROFILE AND TIMELINE OF THURGOOD MARSHALL, AFRICAN AMERICAN HERITAGE SOURCEBOOK, Sect. 2:3, available at http://www.iasb.uscourts.gov/v2_community/section2.pdf.

121. *Id.*

122. *Id.*

123. *See id.*

124. *NAACP History: Charles Hamilton Houston*, NAACP.ORG, <http://www.naacp.org/pages/naacp-history-charles-hamilton-houston> (last visited Sept. 28, 2012); *NAACP Legal History*, NAACP.ORG, <http://www.naacp.org/pages/naacp-legal-history> (last visited Sept. 28, 2012).

125. *Id.*

126. *See Smith v. Allwright*, 321 U.S. 649 (1944).

127. *See Morgan v. Virginia*, 328 U.S. 373 (1946).

128. *See Shelly v. Kraemer*, 334 U.S. 1 (1948).

129. *See Sweatt v. Painter*, 339 U.S. 629 (1950); *see also McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950).

130. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overturning *Plessy v. Ferguson*, 163 U.S. 537 (1896), finding the “separate but equal” doctrine had no place in public education and that segregated educational facilities were inherently unequal and a denial of equal protection of the laws under the Fourteenth Amendment). As chief counsel for the NAACP, Thurgood Marshall led the constitutional attack on the “separate but equal” doctrine in *Brown*. *See* Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1886 (1991) (describing the three cases presented by Marshall to the Court and the Justices' reactions to each). In his oral argument in *Brown*, Marshall compressed a complex legal argument to “propound simple and illuminating truths that drove [this] constitutional outcome[.]” Stephen Higginson, *Thurgood Marshall: Cases in Controversy*, 15 GEO. MASON L. REV. 741, 741-42 (2008) (describing points of Marshall's legal advocacy in *Brown*, “moments [not] discussed in traditional casebook materials”).

131. *See* Joel B. Grossman, *Law & Politics Book Review*, (ed. American Political Science Assoc. 1995) (reviewing MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961* (1994)).

tradition of the lawyer-statesman.”¹³² Similarly, Anthony Kronman notes that, while Justice Marshall was “devoted to the public good,” he was also “keenly aware of the limitations of human beings and their political arrangements.”¹³³ As such, Marshall made it his judicial responsibility to be both mindful of all those concerned yet removed enough to avoid being “swept along by the tide of feeling that any sympathetic identification with a particular way of life . . . can arouse,” such that he, as dutiful lawyer-statesman, may be sufficiently impartial and “withdraw to the standpoint of decision.”¹³⁴ On the bench, this inherent tension in Marshall’s sense of commitment and obligation manifested in cases involving the NAACP before the nation’s high court.

Various scholars and media reporters have referenced Thurgood Marshall’s commitment to recuse himself in *all* cases involving either the NAACP or the NAACP Legal Defense Fund.¹³⁵ But Marshall’s “categorical self-restraint” was peppered with instances of his participation in such decisions. Though Marshall contributed to the opinions of several NAACP cases as early as 1974, he clarified his position on his decision to no longer recuse himself from NAACP cases in 1984, citing that:

[B]oth the Code of Judicial Conduct and advisory opinions to the Code make clear that judges and justices are free to hear argument, where former law firms are counsel, as long as the matter was not in the office when the judge was there, and as long as the judge no longer receives remuneration from the law firm he has left.¹³⁶

132. Mark V. Tushnet, *The Jurisprudence of Thurgood Marshall*, 1996 U. ILL. L. REV. 1129, 1131 (1996).

133. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 12 (1993).

134. *Id.* at 72.

135. See Ross E. Davies, *The Reluctant Recusants: Two Parables of Supreme Judicial Disqualification*, 10 GREEN BAG 2D 79, 80 (2006); see, e.g., *Request for Justice Antonin Scalia to Recuse Himself From a Case Involving His Friend Vice President Dick Cheney*, TAVIS SMILEY SHOW, NPR (Apr. 13, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=1835003> (Professor Frank Wu challenging Scalia’s judgment not to recuse himself despite an appearance of impartiality in *Cheney v. United States District Court*, iterating “the best example, I think, is the late Justice Thurgood Marshall. You know, for his entire career [1967-1991], he recused himself from cases involving the NAACP or the NAACP Legal Defense Fund, even 25 years after he was no longer associated with them”); Stempel, *supra* note 41, at 624 & n.138 (1987) (critiquing Rehnquist’s refusal to recuse himself in *Laird*, citing Marshall’s alleged pattern of recusal: “Justice Thurgood Marshall, on the Court since 1967, has continued to recuse himself in cases involving the NAACP or the NAACP Legal Defense Fund, as he was NAACP general counsel from 1943 to 1960”); *Justices Decide for N.A.A.C.P. in Boycott Case*, N.Y. TIMES, July 3, 1982, at A1, available at <http://www.nytimes.com/1982/07/03/us/justices-decide-for-naacp-in-boycott-case.html>; Nick King, *Supreme Court Sidesteps Boston Jobs Case*, BOSTON GLOBE, May 17, 1983; Saul Friedman, *Lasting Doubts? Charges Cast Cloud Over Future Decisions*, NEWSDAY, Oct. 16, 1991, at 5; Mark Tushnet, *Marshall Had Policy of Recusing Himself in NAACP’s Cases*, LEGAL TIMES, Sept. 9, 1991, at 30.

136. Justice Thurgood Marshall, Memorandum to the Conference, Oct. 4, 1984, and replies from Chief Justice Warren Burger and Justices William Brennan, Byron White, Harry Blackmun, Lewis Powell, William Rehnquist, John Paul Stevens, and Sandra Day O’Connor, at 4-5 (Oct. 4, 1984), in Papers of Harry A. Blackmun, Library of Congress, Manuscript Division, box 1405, folder 14 [hereinafter Marshall Memorandum].

Dissenting in *Milliken v. Bradley*, Marshall conspicuously stated that the Court's reversal of the lower court's remedy to state-imposed segregation "emasculat[es] our constitutional guarantee of equal protection."¹³⁷ The remedy had been sought by the Detroit branch of the NAACP. The very next year, Marshall joined the opinions of Justices Potter Stewart and William Brennan in *Meek v. Pittenger*, in which the appellants, including the NAACP, claimed that a Pennsylvania statute violated the U.S. Constitution's establishment clause.¹³⁸

Marshall began a memorandum to the other Justices, dated October 4, 1984, explaining his historic pattern to "routinely disqualif[y] [him]self from all cases in which the NAACP has participated as a party or as an intervenor" since his appointment to the bench.¹³⁹ Marshall followed that claim with the declaration that his "continued adherence to this self-imposed blanket rule [wa]s no longer necessary" as the forty-plus years since severing his ties with NAACP has "remove[d] any perceived or actual impropriety that might have attended [his] participation in cases involving the NAACP."¹⁴⁰ All eight of Marshall's colleagues voiced their agreement that the distancing effect of time has evaporated any basis for the categorical rule to "quell any appearance of impropriety."¹⁴¹ Shortly after "abandoning any pretense of routine recusal,"¹⁴² Marshall joined the majority opinions in *NAACP v. Hampton County Election Commission*¹⁴³ and *Davis v. Bandemer*,¹⁴⁴ and continued to participate in NAACP cases where he believed his "prior affiliation [did not] create a reasonable appearance of impropriety."¹⁴⁵

E. JUSTICE REHNQUIST

In *Laird v. Tatum*,¹⁴⁶ a group of anti-war activists challenged the constitutionality of the Army's domestic surveillance program, which was seen as the Nixon

137. *Milliken v. Bradley*, 418 U.S. 717, 782 (1974) (Marshall, J., dissenting); see Davies, *supra* note 135, at 85 ("Marshall's participation in *Milliken* [was not] difficult to detect. He was active at oral argument, and even read aloud an abbreviated version of his opinion when the Court handed down its decision.").

138. See generally *Meek v. Pittinger*, 421 U.S. 349 (1975).

139. Marshall Memorandum, *supra* note 136, at 1.

140. *Id.*

141. *Id.*

142. Davies, *supra* note 135, at 86.

143. See generally *NAACP v. Hampton Cnty. Election Comm'n*, 470 U.S. 166 (1985).

144. See generally *Davis v. Bandemer*, 478 U.S. 109 (1986).

145. Marshall Memorandum, *supra* note 136, at 6; see, e.g., *United States v. Paradise*, 480 U.S. 149 (1987); *Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988); *Spallone v. United States*, 493 U.S. 265 (1990); see generally *Duncan v. Carrollton, Ga., Branch of the NAACP*, 485 U.S. 936 (1988); *Spallone v. United States*, 487 U.S. 1251 (1988); *Tallahassee Branch of the NAACP v. Leon Cnty.*, 488 U.S. 960 (1988); *Martin v. Wilks*, 490 U.S. 755 (1989); *Virginia State Conference NAACP v. Upchurch*, 493 U.S. 1069 (1990); *NAACP, Detroit Branch v. Detroit Police Ass'n*, 498 U.S. 983 (1990); Andrew Blum, *Yonkers Deseg Case Continues*, *NAT'L L.J.*, Apr. 8, 1991, at 33.

146. See generally *Laird v. Tatum*, 408 U.S. 1 (1972).

Administration's attempt to keep a close watch on the activities of American dissidents.¹⁴⁷ Rehnquist sided with a 5-4 majority in finding the issue in *Laird* to lack justiciability.¹⁴⁸ Respondents in *Laird* sought Justice Rehnquist's disqualification based on his leadership role in the Justice Department's Office of Legal Counsel to the White House at the time the administration instituted the surveillance program.¹⁴⁹

Rehnquist based his denial of the motion to recuse in part on a reading of the governing disqualification statute,¹⁵⁰ as well as on his observations that federal courts of appeals have consistently identified a federal judge's "duty to sit."¹⁵¹ For Rehnquist, the Supreme Court has an even stronger duty, for, unlike a district court judge, there is no substitute for a Justice,¹⁵² and the "undesirability" of affirming the judgment below by a 4-4 Court is reason for not "bending over backwards" to disqualify oneself.¹⁵³

Two years after *Laird*, Congress amended the statute governing disqualification to prohibit a judge from hearing a case in which his or her "impartiality might reasonably be questioned."¹⁵⁴ Rehnquist took notice of the amendment and—years later as Chief Justice—remarked on Congress' intent to change "the previous subjective standard for disqualification to an objective one."¹⁵⁵ However, at the time the Court was deciding *Laird*, Canon 3(c) of the *Model Code of Judicial Conduct* had already included the objective standard that was soon to become a part of the statute.¹⁵⁶ Rehnquist dismissed the *Model Code*'s provisions as being "materially different" from the statutory standards, thus foreclosing their consideration.¹⁵⁷

Rehnquist's approach in denying the *Laird* motion has been criticized for, among other things, mischaracterizing his role in the legal oversight of the

147. Stempel, *supra* note 41, at 591.

148. *See Laird*, 408 U.S. at 15. The Court ordered the lower court to dismiss the complaint, effectively foreclosing any possible discovery on Rehnquist's role in the surveillance program. Stempel, *supra* note 41, at 593.

149. Rehnquist's position in the office led the *Laird* respondents to assume the Justice would disqualify himself. Stempel, *supra* note 41, at 592. Additionally, the expert testimony he gave before a Senate committee as an Assistant Attorney General on the very issue before the Court further prompted calls for Rehnquist's recusal. *See Laird v. Tatum*, 409 U.S. 824, 824-25 (1972); *see also* Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in Bush v. Gore*, 61 MD. L. REV. 606, 621 (2002).

150. Before its amendment two years after *Laird*, the disqualification statute required only that a justice disqualify himself when "he has a substantial interest, has been of counsel, is or has been a material witness, or is so related . . . as to render it improper, in his opinion, for him to sit . . ." 28 U.S.C. § 455 (2000).

151. *Laird*, 409 U.S. at 837.

152. *Id.*

153. *Id.* at 838.

154. 28 U.S.C. § 455(a); *see* Ifill, *supra* note 149, at 616.

155. *Liljeberg*, 486 U.S. at 872 (Rehnquist, C.J., dissenting). Despite the amendments to overturn Rehnquist's "duty to sit" doctrine, his reasoning in *Laird* is still popular among federal judges. Ifill, *supra* note 149, at 618-19.

156. Ifill, *supra* note 149, at 618 n.62 (citing MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1972)).

157. *Laird*, 409 U.S. at 825.

surveillance program and misstating the applicable legal standard.¹⁵⁸ Scholars have also taken issue with Rehnquist's dismissal of the *Model Code*'s provisions, finding that the *Code* and the disqualification statute "were far from identical."¹⁵⁹ Rehnquist's approach also presents the predicament of allowing a Justice to decide for her or himself whether or not they should recuse.¹⁶⁰

While the *Laird* motion to recuse was based on Rehnquist's involvement with the domestic surveillance issue as an Assistant Attorney General (AG), one scholar considering the totality of the surveillance cases involving the Nixon Administration argues that Rehnquist's recusal decision in those cases depended on whether Attorney General John Mitchell appeared as a party individually or as an attorney for a client.¹⁶¹ The argument is based in part on a memorandum Rehnquist distributed to the Court in 1981 explaining why he was sitting on the sidelines in *Kissinger v. Halperin*.¹⁶² A generous reading of this memo would find both consistency in Rehnquist's Nixon recusals and non-recusals, and evidence that Rehnquist took the recusal issue seriously enough to explain his decisions to the other Justices.¹⁶³ But nine years earlier when *Laird* was before the Court, Justice Rehnquist failed to discuss AG Mitchell's participation as a factor in his very public justification to participate in the case.

F. JUSTICE SCALIA

In the 2004 case *Cheney v. United States District Court for District of Columbia*,¹⁶⁴ Vice President Cheney was the named party in an official action lawsuit concerning the National Energy Policy Development Group, of which the Vice President was a member.¹⁶⁵ The Sierra Club, a party to the consolidated action, filed a motion to recuse Associate Justice Antonin Scalia on the grounds that his friendship with Vice President Cheney had caused "the American public, as reflected in the nation's newspaper editorials, [to] unanimously [conclude] that

158. See Stempel, *supra* note 41, at 599-604.

159. Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 139 (2004).

160. *Id.* at 158. Rehnquist remained committed to his view that "each Justice must decide [the recusal] question for himself." Letter from Chief Justice William Rehnquist to Senator Patrick Leahy, Ranking Member of the Committee on the Judiciary (Jan. 26, 2004), available at <http://news.findlaw.com/hdocs/docs/scotus/rehnquist12604ltr.html>.

161. *U.S. v. Nixon (Nixon Tapes Case)*, 418 U.S. 683 (1974); *Kissinger v. Halperin*, 452 U.S. 713 (1981); and *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Mitchell appeared in his individual capacity and Rehnquist recused in all cases. In *Laird* and *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977), Mitchell did not appear in his individual capacity and Rehnquist did not recuse in either case. Tuan Samahon, *Reply: Rehnquist's Recusals*, 10 GREEN BAG 2D 205, 205-06 (2007).

162. Samahon, *supra* note 161, at 207 (quoting Memorandum from William H. Rehnquist to the Conference, Re: No. 79-880 *Kissinger v. Halperin* (May 27, 1981)).

163. Samahon, *supra* note 161, at 206.

164. *Cheney v. U.S. Dist. Court*, 541 U.S. 913 (2004) (Scalia, J., mem.).

165. *Id.* at 917-18.

there [was] an appearance of favoritism.”¹⁶⁶ The Sierra Club argued that, by way of public opinion, Justice Scalia’s impartiality “might reasonably be questioned,” thus satisfying the standard for recusal of Supreme Court Justices.¹⁶⁷

The precise incident that predicated the motion to recuse was a duck-hunting trip attended by both Justice Scalia and Vice President Cheney.¹⁶⁸ Justice Scalia invited the Vice President to a yearly hunting camp hosted by a close friend who had expressed admiration for the Vice President.¹⁶⁹ The hunting trip occurred prior to the Court granting certiorari in the case in question and, in fact, before the petition for certiorari was ever filed.¹⁷⁰

Justice Scalia accepted passage for himself, his son, and his son-in-law from Washington to Louisiana, the location of the hunting camp, on Air Force Two, Vice President Cheney’s government jet.¹⁷¹ However, as Justice Scalia was not returning with the Vice President, he and his family purchased round trip tickets for their return trip since round trip tickets cost less than one-way tickets.¹⁷² Justice Scalia asserted that the trip in Air Force Two resulted in absolutely no net financial gain and that the invitation was accepted only out of convenience.¹⁷³

Justice Scalia’s assurances concerning the monetary value of the flight aside, acceptance of a gift is relevant to the impartiality of a judge,¹⁷⁴ and an “obvious recusal factor.”¹⁷⁵ The relevant standard under § 455(a), whether a Justice’s impartiality might reasonably be questioned,¹⁷⁶ expressly applies to the Supreme Court.¹⁷⁷ Indeed, Justice Scalia had previously recused himself for receiving airfare reimbursement from a party before the Court.¹⁷⁸

Justice Scalia admits that he and Vice President Cheney were together on the flight, the car ride from the airport to the dock, and the boat ride to the lodge.¹⁷⁹ The Justice asserts, however, that during the trip he was not alone with

166. *Id.* at 923.

167. 28 U.S.C. § 455(a) (2004) (“Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”); Cheney, 541 U.S. at 923 (Scalia, J., mem.) (quoting *Microsoft v. United States*, 530 U.S. 1301, 1302 (2000)); Miller, *supra* note 112, at 610.

168. *See* Cheney, 541 U.S. at 914-15 (Scalia, J., mem.).

169. *Id.*

170. *Id.* at 915.

171. *Id.*; Monroe H. Freedman, *supra* note 40, at 231.

172. Cheney, 541 U.S. at 921 (Scalia, J., mem.).

173. *Id.*

174. Freedman, *supra* note 40, at 230.

175. Miller, *supra* note 112, at 610.

176. 28 U.S.C. § 455(a) (2004); Cheney, 541 U.S. at 923 (Scalia, J., mem.) (quoting *Microsoft v. United States*, 530 U.S. 1301, 1302 (2000)); Freedman, *supra* note 40, at 230.

177. Freedman, *supra* note 40, at 230; *see* 28 U.S.C. § 455(a) (2004).

178. Freedman, *supra* note 40, at 230.

179. Cheney v. U.S. Dist. Court, 541 U.S. 913, 915 (2004) (Scalia, J., mem.); Freedman, *supra* note 40, at 231.

Vice President Cheney for any appreciable amount of time.¹⁸⁰ All meals were in common, he hunted in a different blind than Vice President Cheney, and the Vice President had a private bedroom.¹⁸¹ According to Justice Scalia, any times alone with Vice President Cheney were “so brief and unintentional that [he] would not recall them—walking to or from a boat, perhaps, or going to or from dinner.”¹⁸² The Justice even forthrightly denies speaking with the Vice President about the case.¹⁸³

Under § 455(a), however, the veracity of a Justice’s statements is irrelevant, because the query of whether impartiality might reasonably be questioned is left unanswered.¹⁸⁴ Justice Scalia’s “trust us rationale” simply undervalues the import of friendship in the recusal calculus and runs roughshod over public perception.¹⁸⁵ Despite Justice Scalia’s denial of impropriety, a reasonable person might question whether *ex parte* communications may have transpired on the various planes, trains, and automobiles.¹⁸⁶

Justice Scalia responded to the accusations of potential favoritism by highlighting the difference between a lawsuit against a private party and an official action lawsuit. Where friendship may be grounds for recusal in the first instance, it is not in the latter instance.¹⁸⁷ Per Justice Scalia, a recusal standard that mandated a Supreme Court Justice to remove him or herself in official action cases involving friends would severely debilitate the Court, as its members are often in the same social circles as members of government.¹⁸⁸ Additionally, although the decisions of Vice President Cheney may be at issue in the official action suit, the results would have no effect on his “reputation and . . . integrity.”¹⁸⁹ Thus, any incentive for Justice Scalia to exhibit partiality for his friend is missing.

According to Monroe Freedman, however, the matter before the Court was “*not* a routine administrative matter.”¹⁹⁰ The issue was in fact whether Vice President Cheney, the Chair of the National Energy Policy Development Group, had lied about the composition of the advisory group.¹⁹¹ Thus, Vice President Cheney’s “reputation and integrity,” contrary to Justice Scalia’s assertion, could not have been more at risk, especially in an election year.¹⁹² To wit, the Vice

180. Cheney, 541 U.S. at 915 (Scalia, J., mem.).

181. *Id.*

182. *Id.*; see Freedman, *supra* note 40, at 231.

183. Cheney, 541 U.S. at 915 (Scalia, J., mem.).

184. Freedman, *supra* note 40, at 231; Roberts, *supra* note 159, at 118-20.

185. Roberts, *supra* note 159, at 119.

186. Freedman, *supra* note 40, at 232.

187. Cheney, 541 U.S. at 916 (Scalia, J., mem.).

188. *Id.*

189. *Id.* at 919.

190. Freedman, *supra* note 40, at 232.

191. *Id.* at 232-33; Miller, *supra* note 112, at 609-10.

192. Freedman, *supra* note 40, at 232-33.

President, as an acknowledged friend of Justice Scalia's,¹⁹³ was significantly more invested than a generic government official who is named the *pro forma* party in a run of the mill administrative law matter.¹⁹⁴

Justice Scalia also clarifies that the question of whether a Justice's impartiality "might reasonably be questioned" is to be appraised "from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances."¹⁹⁵ Through a demonstration of the media's inaccuracies concerning both his relationship with the Vice President and with the law underpinning judicial recusal, Justice Scalia reasonably asserts that the sentiment of the national media, as a proxy for the American public, cannot be the guidepost for whether a Supreme Court Justice should recuse him or herself.¹⁹⁶

However, the Justice's list of inaccuracies and mischaracterizations are simply not materially prejudicial to the analysis. Even "all the surrounding facts and circumstances" that the Justice presents could lead a reasonable person to question his impartiality in the case. Instead, Justice Scalia has re-framed the focus of the inquiry onto the media and its failings, asking the American public to believe that the editorialists of eight out of ten of the newspapers with the largest circulation in the United States are simply unreasonable.¹⁹⁷

True to form, Justice Scalia finishes his memorandum with a flourish: "If it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined."¹⁹⁸ Unfortunately, Justice Scalia's rhetoric continues to shift the frame of focus away from whether his impartiality might reasonably be questioned by the American people to his perception of the unreasonableness of the American people. Justice Scalia is fond of decrying what he calls the "law-profession culture" and how it has infected the Supreme Court, resulting in the Court supplanting its own ideology for that of the American public.¹⁹⁹ The Justice should take a page from his own book, and drop the "father knows best" tone. This "trust us [because] Washington officials know the rules" rationale does nothing to alleviate the fear of unchecked power in the hands of a few.²⁰⁰ The "appearance of impropriety" standard was formulated to alleviate this very fear.²⁰¹

193. *Id.* at 233; Cheney, 541 U.S. at 914 (Scalia, J., mem.).

194. Freedman, *supra* note 40, at 233.

195. Cheney v. U.S. Dist. Court, 541 U.S. 913, 924 (2004) (Scalia, J., mem.) (quoting *Microsoft v. United States*, 530 U.S. 1301, 1302 (2000)).

196. *Id.* at 923-24.

197. See Freedman, *supra* note 40, at 234.

198. Cheney, 541 U.S. at 929 (Scalia, J., mem.).

199. See *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

200. Compare Cheney, 541 U.S. at 923 ("Washington officials know the rules, and know that discussing with judges pending cases-their own or anyone else's-is forbidden."), with Roberts, *supra* note 159, at 118-20 ("It is unchecked corruption, especially of those in power, which is precisely the fear of citizens.").

201. Roberts, *supra* note 159, at 120.

G. JUSTICE GINSBURG

In 1972, the ACLU Women's Rights Project (WRP) was forged, under the leadership of Ruth Bader Ginsburg, to remove "artificial barriers" to men and women standing equal before the law.²⁰² In 1973, Ginsburg became General Counsel to ACLU and, one year later, joined the Board of Directors.²⁰³ In her role as an attorney for the ACLU, Ginsburg authored briefs and delivered oral arguments in seminal U.S. Supreme Court cases such as *Reed v. Reed*, which extended the Equal Protection guarantee to women for the first time in the nation's history,²⁰⁴ and *Frontiero v. Richardson*, which fell just one vote short of applying strict scrutiny to gender discrimination.²⁰⁵ In *Weinberger v. Wiesenfeld*, Ginsburg argued for the application of intermediate scrutiny to sex discrimination.²⁰⁶ The Women's Rights Project filed an amicus brief to the Supreme Court in *General Electric Company v. Gilbert*, and while its argument that pregnancy discrimination should be treated as sex discrimination was ultimately rejected by the Court,²⁰⁷ its efforts led to the passage of the Pregnancy Discrimination Act codifying just that.²⁰⁸

In 1980, Ginsburg's work as a litigator for the ACLU came to an end as she was appointed a judge of the United States Court of Appeals for the District of Columbia Circuit. On August 10, 1993, Ginsburg took her seat as an Associate Justice of the Supreme Court after being nominated by President Clinton. On the bench, Justice Ginsburg authored the opinion in *United States v. Virginia*, rejecting the arguments advanced by the Virginia Military Institute (VMI) in support of its male-only admissions policy, on the ground that VMI failed to provide an "exceedingly persuasive justification" for the sex-based discrimination.²⁰⁹

Of particular pertinence and interest for purposes of this Article, it is worth comparing the huge, though diffuse, impact of the case for women's rights—the cause that defined much of Justice Ginsburg's pre-judicial career, with the trivial, but concentrated, interest in the case of Justice Clarence Thomas's son. In an opinion written by Justice Ginsburg, the Court ruled in its most important sex discrimination case in years that the men-only admissions policy at the state military academy, V.M.I., was unconstitutional. Justice Thomas' recusal was prompted by his son's attendance at the college.²¹⁰

202. Sandra Pullman, *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU (Mar. 7, 2006), <http://www.aclu.org/womens-rights/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff#end>.

203. *Id.*

204. *Id.*; see generally *Reed v. Reed*, 404 U.S. 71 (1971).

205. See generally *Frontiero v. Richardson*, 411 U.S. 677 (1973).

206. See generally *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

207. See generally *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

208. See generally Pullman, *supra* note 202.

209. *U.S. v. Va.*, 518 U.S. 515, 516-17 (1996).

210. Linda Greenhouse, *Legacy of a Term*, N.Y. TIMES, July 3, 1996, at A1.

The above comparison is not meant to imply that Justice Ginsburg's decision was incorrect. Nor is the contrast meant to imply that Justice Thomas's recusal was anything but an easy case—it was precisely that.²¹¹ Rather, the comparison highlights a recurring paradox of recusal, and one that is most commonly applicable to nominal pecuniary interests. Bright-line rules frequently include mandated disqualification in circumstances involving relatively minimal interests, while these same rules are under-inclusive as applied to many circumstances in which the interests are, arguably, substantially more compelling.

An ACLU tribute to Ginsburg's WRP work and that of her staff and successors reflects that Ginsburg's interest in the advocacy aspects of the pursuit of gender equality was not extinguished when she joined the bench. One anecdote—trivial in itself—is noteworthy for its striking resemblance to the congratulatory e-mails by then-Solicitor General Elena Kagan, discussed *infra*.²¹² Mary Heen, a staff attorney at WRP in the early 80s, tells the story:

Ginsburg was appointed to the U.S. Court of Appeals in 1980 before I began as a staff counsel at the ACLU; [thus] I never had the opportunity to work with her. However, she sent me a brief note after seeing a letter to the *New York Times* I had written arguing for the elimination of sex discrimination in insurance. It was a generous and encouraging thing for her to do, and it meant a lot to me to receive it from her.²¹³

Navigating the shoals of that kind of continued personal support for women's issues only became more challenging after Ginsburg ascended from the D.C. Circuit to the Supreme Court in 1993. In March 2004, thirteen Republican members of Congress asked Justice Ginsburg to “withdraw from all future cases having to do with abortion because of her affiliation with the NOW Legal Defense and Education Fund.”²¹⁴

On January 29, 2004, a mere fifteen days after Ginsburg voted in favor of an opinion that challenged a state's duty to provide medical screening for low-income children, consistent with the position of NOW's legal defense fund's amicus, Justice Ginsburg introduced the advocacy group's lecture series,²¹⁵ curiously—to the GOP lawmakers—titled “4th Annual Ruth Bader Ginsburg

211. See, e.g., MODEL CODE Canon 2, R. 2.11(A)(3) (“A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including [when t]he judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or is a party to the proceeding.”).

212. See *infra* Part III.B.

213. Pullman, *supra* note 202.

214. *GOP Lawmakers Ask Ginsburg to Withdraw from Abortion Cases*, L.A. TIMES, Mar. 19, 2004, at A18, available at <http://articles.latimes.com/2004/mar/19/nation/na-ginsburg19>.

215. Ginsburg commented on the lecture series while explaining her refusal to recuse herself on issues over which the NOW legal defense fund took an interest: “I think and thought and still think it's a lovely thing. Let the lecture speak for itself.” As one of the nation's leading supporters of abortion rights, it's no mystery that the

Distinguished Lecture Series on Women and the Law.”²¹⁶

In their letter to Justice Ginsburg, the representatives voiced concern that her endorsement of a NOW distinguished lecture series would “call into question [her] ability to rule with impartiality on any case involving abortion.”²¹⁷ The GOP perspective was one that, even if born of partisan interests, was met with amply credentialed non-partisan support. One of the chief progenitors of the modern field of legal ethics, Monroe Freedman,²¹⁸ pointedly agreed: “this crosses the line.”²¹⁹ According to Freedman, Justices should “draw the line at cause-oriented litigation organizations The NOW legal defense fund is an advocacy group that appears regularly before the [Supreme] Court So the linking of that organization with a [J]ustice is a problem.”²²⁰ Pennsylvania Law Professor Geoffrey Hazard was slightly more guarded, but nonetheless cautioned: “It is not illegal, but as a matter of judgment I would say appearing before the NOW legal defense fund is inappropriate. It is a demonstration of an affiliation.”²²¹

According to Freedman, absent recusal, it is precisely that “demonstration of an affiliation” that produced a win-win for NOW and Justice Ginsburg, but a loss for the public’s faith in the rule of law.²²² Justice Ginsburg, in a step that is hardly a given in the context of Supreme Court Justices, chose to respond directly and specifically to the criticisms regarding the lecture series: “[It] is not a money-making enterprise. I think and thought and still think it’s a lovely thing. Let the lecture speak for itself.”²²³

Even if one draws the line with respect to the lack of a direct pecuniary interest

message would be to “protect and preserve a constitutional right to abortion.” Peter S. Canellos, *Outspoken Justices Cloud High Court’s Appearance*, BOSTON GLOBE, June 15, 2004, at A3.

216. See *Frew v. Hawkins*, 540 U.S. 431 (2004); Marianne M. Jennings & Nim Razook, *Duck When a Conflict of Interest Blinds You: Judicial Conflicts of Interest in the Matters of Scalia and Ginsburg*, 39 U.S.F.L. REV. 873, 888 (2005); see also Jimmy Moore, *Supreme Court Justice Ginsburg Under Fire for Close Ties to Women’s Advocacy Group*, TALON NEWS, Mar. 12, 2004, available at <http://www.freerepublic.com/focus/f-news/1096378/posts>.

217. *GOP Lawmakers Ask Ginsburg to Withdraw from Abortion Cases*, *supra* note 214.

218. Freedman’s contributions to legal ethics earned him the American Bar Association’s highest award for professionalism in recognition of “a lifetime of original and influential scholarship in the field of lawyers’ ethics.” He “has been described by the New York Times as ‘a pioneer in the field of legal ethics,’ and in the Harvard Law Bulletin as ‘a lawyers’ lawyer.’” See ABA Michael Franck Award Citation 1998: Monroe H. Freedman, lawarchive.hofstra.edu/pdf/Directory/Faculty/FullTimeFaculty/ftfac_mfreedman_franck_award.pdf; see also *Monroe H. Freedman Biography*, HOFSTRA LAW, <http://law.hofstra.edu/profiles/faculty/monroe-freedman.html> (last visited Oct. 9, 2012).

219. Richard A. Serrano & David G. Savage, *Ginsburg Has Ties to Activist Group*, L.A. TIMES, Mar. 11, 2004, available at <http://articles.latimes.com/2004/mar/11/nation/na-ginsburg11> (quoting Monroe H. Freedman).

220. *Id.* (internal quotations omitted).

221. *Id.* (internal quotations omitted).

222. *Id.* (“It says something for [NOW] if Justice Ginsburg is associating with them. It also says something that a justice of the Supreme Court should not say.” (internal quotations omitted)).

223. Jennings & Razook, *supra* note 216, at 889.

attached to the lecture, it does not mean that Justice Ginsburg had completely severed herself from NOW's fundraising endeavors. For example, she provided items for NOW auctions, including, notably, what the auction catalog pitched as a "[c]omplete copy of the historic 1996 *United States v. Virginia*, Supreme Court decision which declared unconstitutional male only admissions to the Virginia Military Institute, signed by Supreme Court Justice Ruth Bader Ginsburg."²²⁴

In a lecture to law students at the University of Connecticut at Hartford in March 2004, Justice Ginsburg spoke forthrightly in attempting to minimize the specific matter. Her words, however, arguably minimized the seriousness of the more general concern by asserting that any apparent controversy was actually just a manufactured byproduct of the sometimes-false neutrality of an on-the-one-hand-on-the-other-hand media approach:

I think the *Los Angeles Times* was attempting to appear unbiased. Justice Scalia had been criticized recently for speaking to a group alleged to have supported a measure in Pennsylvania to ban civil unions for gay people That criticism came from one side of the political spectrum. The next day or so the article about me appeared When our public information officer told me of the question the *Los Angeles Times* reporter wanted to put to me, I responded: Here are my remarks—the introductory remarks—I've made at these lectures I was confident the City Bar would make the tapes [of the lecture] available to the reporter. But the reporter apparently wasn't interested in those materials, that is, in the substance of the lectures Would anyone who actually read or listened to the proceedings find them problematic? Probably not, I suspect.²²⁵

To be fair, whether the substance of the lectures—delivered by individuals being honored by NOW and who, in turn, return the honors to Justice Ginsburg and NOW—would actually mitigate the perception problem is at best a matter of subjective judgment on which reasonable people disagree. It seems quite likely that the substance of the lectures, along with the corresponding introductions and references to matters of commitment to “gender equity”²²⁶ and of “working to eliminate gender bias in our laws and in our courts”²²⁷ would, if examined by critics and supporters alike, serve merely to reinforce those pre-existing positions.²²⁸

224. 1998 *Women's Rights Convention and Vision Summit*, NOWPACS, <http://www.nowpacs.org/events/auction98.html> (last visited Feb. 24, 2012).

225. Ruth Bader Ginsburg, *An Open Discussion with Justice Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1039-40 (2004).

226. NEW YORK CITY BAR ASSOCIATION, *The Justice Ruth Bader Ginsburg Distinguished Lecture on Women and the Law 2011*, Parts 1-4, YOUTUBE (Feb. 8, 2011), http://www.youtube.com/watch?feature=player_detail_page&v=jqHa7qFDAvU#t=154s.

227. *Id.*

228. As an aside, perhaps the most compelling anecdote in those lectures comes from *National Public Radio's* Supreme Court correspondent, Nina Totenberg. At approximately the 23 minute mark of the following link, Totenberg remarks:

For her part, Justice Ginsburg not only did not back down from the controversy, but seemed almost to strain in order to continually raise the issue anew. For partisans, however, Justice Ginsburg's comments proved a gift. Take Jed Babbin, Deputy Undersecretary of Defense in the George H.W. Bush administration.²²⁹ Writing in *The American Prospect* in September 2005, Babbin reflected on then-Senator Joe Biden's assertion that, "after [Roberts'] confirmation, there would be no way to hold him accountable in his lifetime on the high court."²³⁰ According to Babbin, "Senator Biden obviously didn't know about Title 28, United States Code, Section [sic] 455. Which brings us to Justice Ruth Bader Ginsburg and the aforementioned law that bars her from voting in the cases nearest and dearest to her ideology."²³¹ Note that if it were a remotely fair representation of § 455 to claim that Justices were barred from voting in all cases "nearest and dearest" to their respective ideologies, so many absurd results would materialize for each of the justices as to render the section a nullity.

Nonetheless it's hard not to argue that Justice Ginsburg did her part to provide critics with new material. In Babbin's framing at the time, Justice Ginsburg, "[s]peaking to the New York Bar Association . . . delivered herself of comments that were entirely political and—more importantly[—] prove beyond a doubt that she has no intention of approaching certain cases impartially."²³² Babbin's basis for that contention is that Ginsburg "said that the president should nominate a 'fine jurist' to replace Sandra Day O'Connor, and that she (Ginsburg) had 'a list of highly qualified women.'"²³³ Realistically, however, it was Ginsburg's next comment that lends at least a veneer of substance to Babbin's critique:

She said there are "some women who might be appointed who would not advance human rights or women's rights." Advance. Not interpret. Not apply the Constitution according to its principles to protect. Advance. Ginsburg's

Moving from business to law, it's a lot easier to spot the icons of our times. They are clearly the first two women to serve on the Supreme Court, Sandra Day O'Connor and Ruth Bader Ginsburg In the thirteen years that these two women served together, not a single year went by when [no] leading male lawyer at oral argument confused the two—calling one by the other's name and in case you haven't noticed, they don't really look anything alike.

NEW YORK CITY BAR ASSOCIATION, *The Justice Ruth Bader Ginsburg Distinguished Lecture on Women and the Law* 2011, YOUTUBE (Dec. 14, 2011), http://www.youtube.com/watch?feature=player_detailpage&v=aB2f6qvxmCA#t=1378s.

229. *Contributors: Jed Babbin*, THE AM. SPECTATOR, <http://spectator.org/people/jed-babbin/all> (last visited Feb. 24, 2012).

230. Jed Babbin, *J'Recuse*, THE AM. SPECTATOR (Sept. 26, 2005, 12:08 AM), <http://spectator.org/archives/2005/09/26/jrecuse>; see also *Second Day of Hearings on the Nomination of Judge Roberts*, N.Y. TIMES, Sept. 13, 2005, available at <http://www.nytimes.com/2005/09/13/politics/politicsspecial1/13text-roberts.html?pagewanted=all> (transcribing the colloquy between then-U.S. Senator Biden and then-Chief Justice Nominee Roberts).

231. Babbin, *supra* note 230 (emphasis added).

232. *Id.*

233. *Id.* (internal quotations omitted).

heartfelt belief is, by her own words, that a Supreme Court Justice's job is to decide cases in a manner calculated to advance the ideologies of "human rights" and "women's rights."²³⁴

H. JUSTICE BREYER

From 1979 to 1980, Justice Stephen Breyer served as Chief Counsel to the Senate Judiciary Committee.²³⁵ While Chief Counsel, he played a key role in the crafting and passage of the Sentencing Reform Act.²³⁶ The Sentencing Reform Act, passed in 1984, created the U.S. Sentencing Commission, an independent agency in the judicial branch.²³⁷ One of the Sentencing Commission's primary purposes is to "establish sentencing policies and practice for the federal courts, including guidelines" that would be consulted by federal judges.²³⁸

In 1985, while serving as a judge in the U.S. Court of Appeals for the First Circuit, Justice Breyer was appointed to the U.S. Sentencing Commission.²³⁹ During his time on the Sentencing Commission, Justice Breyer played such an active role in developing the criminal-sentencing guidelines that he is described as their "primary architect."²⁴⁰

While the Guidelines were being established, a dispute developed in the panel over what would be the best framework for the Guidelines.²⁴¹ Commission staff described Breyer as "a wonderful consensus-builder, a brilliant analyst."²⁴² "He's responsible for the conceptual framework of the [G]uidelines and for striking the key compromises."²⁴³ "Against strong opposition, he persuaded the other seven judges on the panel to base the [G]uidelines on national averages."²⁴⁴ The Guidelines took effect in 1987; they were not only controversial, but quickly gave rise to claims of unconstitutionality.²⁴⁵

234. *Id.* (internal quotations omitted).

235. *Stephen Gerald Breyer—Recent Opinions, Further Readings*, LAW LIBRARY—AM. L. & LEGAL INFO., <http://law.jrank.org/pages/4864/Breyer-Stephen-Gerald.html> (last visited Feb. 25, 2012).

236. *Justice Breyer Should Recuse Himself from Ruling on the Constitutionality of Federal Sentencing Guidelines, Duke Law Professor Says*, DUKE TODAY (Sept. 29, 2004), available at http://today.duke.edu/2004/09/breyertip_0904.html.

237. *About the Commission: Overview of the United States Sentencing Commission*, OFF. OF LEG. & PUB. AFF., available at http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf (last visited Sept. 30, 2012).

238. *Id.*

239. *Stephen Gerald Breyer—Recent Opinions, Further Readings*, *supra* note 235.

240. *See Justice Breyer Should Recuse Himself from Ruling on Constitutionality of Federal Sentencing Guidelines*, *supra* note 236; Monroe H. Freedman, *Judicial Impartiality in the Supreme Court—The Troubling Case of Justice Stephen Breyer*, 30 OKLA. CITY U. L. REV. 513, 530 (2005).

241. *See Freedman*, *supra* note 240, at 529.

242. Naftali Bendavid, *Judicial Traitor or Consensus Builder? Breyer's Role as Sentencing Pioneer Still Rankles*, LEGAL TIMES, May 16, 1994, at 7.

243. *Id.*

244. *Stephen Gerald Breyer—Recent Opinions, Further Readings*, *supra* note 235.

245. *Id.*

In *U.S. v. Wright*, before Justice Breyer took the bench on the Supreme Court, he was the first federal judge to address whether Sentencing Commissioners should recuse themselves in cases involving the application of the Guidelines.²⁴⁶ Judge Breyer requested the assigned local United States Attorney and public defender to provide advice on the recusal issue.²⁴⁷ Both the local U.S. Attorney and the public defender agreed that recusal was not warranted.²⁴⁸ They asserted six reasons why it would not be necessary for Sentencing Commissioners to routinely recuse themselves from cases where the Guidelines would be applied:

- (1) A Sentencing Commissioner's work is "essentially neutral;"
- (2) The legislative history of the SRA suggests that Congress did not believe Sentencing Commissioners routinely would recuse themselves from cases involving the Guidelines;
- (3) Sentencing Commissioners would have particular expertise with the Guidelines; this expertise would be lost if they routinely recused themselves from guidelines cases;
- (4) Judges serving on federal rules committees do not routinely recuse themselves from cases involving the application of those rules;
- (5) State court judges serving on state Sentencing Commissions do not routinely recuse themselves from cases requiring them to apply their work product;
- (6) Routine recusal would unfairly increase the workload of judges who were not Sentencing Commissioners.²⁴⁹

Judge Breyer concluded that he would not recuse himself, stating: "In light of these considerations, I shall not recuse myself in this case, where no special circumstances are present, nor shall I *automatically* recuse myself in *typical* Guidelines cases, unless they involve a serious legal challenge to the Guidelines themselves."²⁵⁰ However, Judge Breyer would "entertain any motion for recusal that is made."²⁵¹

In 1994, Breyer was appointed as an Associate Justice to the U.S. Supreme Court.²⁵² Approximately a decade thereafter, in *Blakely v. Washington*, the Supreme Court decided in a 5-4 decision that a Washington State sentencing process allowing judges, not juries, to decide facts that enhanced sentences was a

246. See generally *United States v. Wright*, 873 F.2d 437 (1st Cir. 1989); see also Ronald J. Krotoszynski Jr., *On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited*, 38 WM. & MARY L. REV. 417, 433 (1997).

247. Krotoszynski Jr., *supra* note 246, at 433-34.

248. *Id.* at 434.

249. *Id.*

250. *Id.*

251. *Id.* at 435.

252. *Stephen Gerald Breyer—Recent Opinions, Further Readings*, *supra* note 235.

violation of the Sixth Amendment.²⁵³ Justice Breyer was one of the four dissenters in *Blakely*.

Prior to *Blakely*'s determination, however, Justice Breyer consulted NYU Law's legal ethics expert, Stephen Gillers, regarding his potential conflict and recusal.²⁵⁴ In a letter dated July 2, 2004, Gillers told Breyer that "his past involvement with the guidelines was not a bar to his participation in the then-pending litigation over whether the Court's ruling in *Blakely*, a state sentencing case, would have the effect of invalidating the federal guidelines."²⁵⁵ According to Gillers, because Justice Breyer was, at the time, no longer on the Sentencing Commission, "there is no longer any reasonable basis to question your impartiality on the issue of the validity of the guidelines. Nor is there any other basis to question your authority to sit in such a case by virtue of your prior service."²⁵⁶

Gillers's view was far from unanimous among the giants of legal ethics. In fact, criticism could scarcely have been more pointed: According to Freedman, Justice Breyer "was deciding on the life or death of his own brainchild And what he wrote vindicated himself. When you are sitting in judgment of your own vindication, I think reasonable people might question your impartiality."²⁵⁷ Constitutional scholar Erwin Chemerinsky—whom, it's worth noting, would generally be presumed, in close cases, to be ideologically aligned with Justice Breyer²⁵⁸—was similarly unsparing: "My own opinion is that he should recuse himself. I don't think a member of Congress who participated in sponsoring a bill or drafting legislation should then, on the federal court, rule on the constitutionality of that, and I think Justice Breyer is in the same position."²⁵⁹

The Supreme Court Term immediately following *Blakely* featured the consolidated cases of *U.S. v. Booker*²⁶⁰ and *U.S. v. Fanfan*.²⁶¹ Booker and Fanfan questioned the constitutionality of the sentencing guidelines and raised the issue of Justice Breyer's potential recusal. Justice Breyer, however, did not recuse himself from the consolidated cases, and indeed authored part of the majority

253. See generally *Blakeley v. Washington*, 542 U.S. 296 (2004).

254. Tony Mauro, *Breyer Consulted Ethics Expert Over Sentencing Case Recusal*, NAT'L L.J. (Jan. 17, 2005), available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=900005421919&slreturn=20120818183357>.

255. *Id.*

256. *Id.*

257. *Id.*; see also Freedman, *supra* note 240, at 530-31 (discussing at length Justice Breyer's participation in the Sentencing Commission and criticizing his subsequent decisions of non-recusal in cases where the viability of the Commission's work was at issue).

258. Adam Liptak, *Furor Ends in Deanship for Liberal Scholar*, N.Y. TIMES, Sept. 18, 2007, available at <http://www.nytimes.com/2007/09/18/education/18professor.html> (describing Chemerinsky as a "prominent liberal").

259. *Justice Breyer Should Recuse Himself from Ruling on Constitutionality of Federal Sentencing Guidelines*, *supra* note 236.

260. See generally *United States v. Booker*, 543 U.S. 220 (2005).

261. *Id.* at 220.

opinion.²⁶² Justice Breyer’s opinion held that the Sixth Amendment requirement that a jury finds certain sentencing facts was incompatible with the Federal Sentencing Act, thus requiring the severance of those provisions from the Act that make the Guidelines mandatory.²⁶³

Justice Breyer has recently been quoted on a Supreme Court Justice’s “duty to sit.”²⁶⁴ According to Justice Breyer, “[y]ou have a duty to sit because there is no one to replace me if I take myself out, and that could sometimes change the result.”²⁶⁵ In fact, *Booker* was a 5-4 decision, and Breyer’s recusal may have led to a 4-4 decision, thereby upholding the lower court ruling.²⁶⁶

III. HEALTH CARE RECUSAL: RULES V. STANDARDS; RHETORIC V. REALITY

In the Roberts Court Era, no case better demonstrates the modern difficulty of separating recusal rhetoric from recusal reality than the legal challenges to President Obama’s 2010 health care overhaul. In the words of Lyle Denniston, “[o]ver the past three years, no issue in American politics has been more polarizing than health care. And, because everyone on all sides expected that the dispute would ultimately be tested in the Supreme Court, the Justices inevitably were going to be drawn into the political fray.”²⁶⁷

In fact, judicial conflict questions in the dispute developed even at the trial court level. In December 2010, after two federal judges appointed by Bill Clinton had upheld the health care law, U.S. District Court Judge Henry Hudson of Virginia became the first judge to overturn part of the health care law.²⁶⁸ In the words of NPR justice correspondent, Carrie Johnson, Judge Hudson “has a colorful background: He’s a former deputy sheriff and GOP congressional candidate. He was an anti-pornography crusader in the Reagan years. And then there’s this: He has an ownership stake in Campaign Solutions Inc., a Republican consulting firm that has advised conservative political candidates”²⁶⁹ opposed to the health care act,²⁷⁰ including Virginia Attorney General Ken Cuccinelli who brought the suit on which Hudson ruled.²⁷¹

262. *Id.* at 244.

263. *Id.* at 245.

264. Ariane Devogue, *Justices Kennedy and Breyer Testify at House Appropriations Hearing*, ABC NEWS, Apr. 14, 2011, <http://abcnews.go.com/Politics/justices-kennedy-breyer-testify-house-appropriations-hearing/story?id=13376677&singlePage=true#.T0fhMErCNhI> (last visited Sept. 30, 2012).

265. *Id.*

266. *See id.*

267. Lyle Denniston, *Analysis: Health Care and Recusal Politics*, SUP. CT. OF THE U.S. BLOG (Nov. 28, 2011, 12:25 AM), <http://www.scotusblog.com/2011/11/analysis-health-care-and-recusal-politics/>.

268. Carrie Johnson, *Health Care Rulings Reignite Judicial Bias Debate*, NPR, (Dec. 16, 2010), <http://www.npr.org/2010/12/16/132086459/health-care-rulings-reignite-judicial-bias-debate>.

269. *Id.*

270. Josh Gerstein, *Health-law Judge’s Prosecutor Past*, POLITICO (Dec. 13, 2010, 7:39 PM), <http://dyn.politico.com/members/forums/thread.cfm?catid=1&subcatid=70&threadid=4851272>.

271. *Id.*

With the seeming inevitability that the U.S. Supreme Court would ultimately have its say on the health care law, the lower court conflict kerfuffles seemed to have—and acknowledge having—the relatively inconsequential dress rehearsal qualities characteristic of preseason sporting events. Hudson severed himself neither from the company nor the case. After Judge Hudson’s ownership interest in Campaign Solutions was disclosed by *The Huffington Post*, however, Cuccinelli cancelled his contract with the firm.”²⁷²

Although, even on an expedited schedule, high court review of the law was then at least a year away, NPR remarked that “[q]uestions about judges, their spouses and political involvement have been cropping up a lot lately.”²⁷³ NPR noted the work of “Virginia Thomas, the wife of Supreme Court Justice Clarence Thomas, at a conservative policy group that has challenged the constitutionality of the Obama health care law,”²⁷⁴ as well as predicted what “could be another round of murmuring when the health care lawsuits finally make their way to the Supreme Court. Republican lawmakers are already trying to get former Obama Solicitor General Elena Kagan, who joined the court earlier this year, to agree to remove herself from hearing the case.”²⁷⁵

Once the Court granted certiorari over the consolidated cases challenging the Act, an intense focus on recusal vis-à-vis Justice Thomas and Justice Kagan was nearly immediate—but it was also largely on the fringes of academic and media discourse. Denniston characterizes the debate’s migration from the periphery to the mainstream by noting that, “[a]t the outer edges of U.S. politics, left and right, a debate has raged over whether two of the Justices ought to take themselves out of any role in deciding the cases,”²⁷⁶ but that with the Court’s grant of review, “the challenges to Justices Elena Kagan and Clarence Thomas have begun to emerge prominently in the mainstream news media.”²⁷⁷

A. JUSTICE AND VIRGINIA THOMAS

1. VIRGINIA THOMAS: THE \$686,589.00 WOMAN

Virginia (Ginni) Thomas, wife of Justice Clarence Thomas, has a long history as a conservative voice in American politics.²⁷⁸ After earning her law degree Mrs. Thomas worked for Republican congressman Hal Daub; she later worked for the U.S. Chamber of Commerce and in the Labor Department under President

272. *Id.*

273. Johnson, *supra* note 268.

274. *Id.*

275. *Id.*

276. Denniston, *supra* note 267.

277. *Id.*

278. Kathleen Hennessey, *Challenging a Judicial Norm; A Justice’s Wife May Test Impartiality Standards by Starting a ‘Tea Party’ Group*, L.A. TIMES, Mar. 14, 2010, at A1.

George H. W. Bush; she then worked for Representative Dick Army of Texas.²⁷⁹ Mrs. Thomas joined the Heritage Foundation in 1998, where her work was amplified by the Foundation's prominence within conservative circles.²⁸⁰ In 2000, while still at the Heritage Foundation, and during the time her husband was deciding *Bush v. Gore*, Mrs. Thomas was recruiting staff for the pending Bush Administration.²⁸¹

Mrs. Thomas spent most of 2010 as a key and highly visible voice in a nationwide campaign against the Obama administration and the health-care reform law in particular.²⁸² In January 2010 Mrs. Thomas created Liberty Central Inc.,²⁸³ a nonprofit lobbying group for conservative principles.²⁸⁴ In what Justice Thomas and his supporters would later admit was a misstep, Mrs. Thomas earned a salary from the group in 2009, yet Justice Thomas failed to disclose this salary on his 2009 federal financial disclosure form.²⁸⁵ Since Liberty Central is a 501(c)(4) nonprofit, it largely does not need to disclose its donors.²⁸⁶ As a result of *Citizen's United v. FEC* (in which Justice Thomas was part of the 5-4 majority)²⁸⁷ Liberty Central is free to spend unlimited sums of its general corporate treasury funds in support of federal political candidates.²⁸⁸ As of January 2011, Liberty Central had \$550,000.00 in donations from unknown donors.²⁸⁹ Mrs. Thomas left the group in Fall 2010.²⁹⁰

In early 2011 liberal advocacy group Common Cause exposed that Mrs. Thomas earned \$686,589.00 working for the Heritage Foundation from 2003 to 2007—a sum Justice Thomas again did not disclose on his federal financial

279. *Id.*; Jeffrey Toobin, *Partners; Will Clarence and Virginia Thomas Succeed in Killing Obama's Health-Care Plan?*, THE NEW YORKER, Aug. 29, 2011, at 40.

280. Toobin, *supra* note 279; see also Press Release, Rep. Louise Slaughter, *Slaughter, 19 Colleagues, Call for Investigation into Justice Thomas' Non-Disclosure; Under Law, Judicial Conference Must Refer Issue to U.S. Attorney General*, (Sept. 29, 2011), http://www.louise.house.gov/index.php?option=com_content&view=article&id=2559:slaughter-19-colleagues-call-for-investigation-into-justice-thomass-non-disclosure&catid=95:2011-press-releases&Itemid=55 [hereinafter Slaughter Press Release] (stating that the Heritage Foundation is a major opponent of the Affordable Care Act).

281. Hennessey, *supra* note 278.

282. Toobin, *supra* note 279, at 46.

283. Hennessey, *supra* note 278.

284. *Id.*

285. Kim Geiger, *Group Targets Thomas Again; a Watchdog Says Supreme Court Justice Failed to Report His Wife's Income*, L.A. TIMES, Jan. 22, 2011, at AA1.

286. Hennessey, *supra* note 278.

287. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

288. *Id.* at 913 (allowing independent expenditures by corporations and unions for federal election campaigns); *A Guide to the Current Rules for Federal Elections*, THE CAMPAIGN LEGAL CENTER (2012), http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1187%3Aa-guide-to-the-current-rules-for-federal-elections&catid=48%3Amain&Itemid=59 (The IRS deems 501(c)(4) organizations as social welfare organizations. They do not need to publically disclose donors under the current election law).

289. Eric Lichtblau, *Thomas Cites Failure to Disclose Wife's Job*, N.Y. TIMES, Jan. 24, 2011, at A16.

290. *Id.*

disclosure forms.²⁹¹ For Justice Thomas, who is a renowned proponent of black-letter plain-meaning²⁹² and a stickler for technical compliance, even where balanced against severe criminal consequences for others,²⁹³ the repeated failure, over the period of years, to comply with the most straightforward of forms was embarrassing, at the very least.²⁹⁴

While this Article indeed asserts that much of the rhetoric pertaining to Justice Thomas and Justice Kagan alike, particularly with regard to the Affordable Care Act, has generated more heat than light, there are nonetheless certain incontrovertible facts, and few are as stark as this: On a repeated basis, over a period during which his spouse earned \$686,589.00 in income from a conservative foundation that opposed the law on both policy and legal grounds, where the federal disclosure form asks, under potential criminal penalty,²⁹⁵ for spousal income, Justice Thomas checked “none.”²⁹⁶

Justice Thomas responded to the firestorm created by the report by filing seven pages of amended disclosures.²⁹⁷ He explained that his omission of his wife’s financial information was because he misunderstood the filing instructions.²⁹⁸ In September 2011 Representative Louise Slaughter and nineteen members of Congress sent a letter to James C. Duff, Secretary to the Judicial Conference of the U.S. requesting that the Conference refer the matter involving Justice Thomas’s financial disclosure to the Department of Justice to be investigated, as required under the Ethics in Government Act of 1978.²⁹⁹ Slaughter contended, “To believe that Justice Thomas didn’t know how to fill out a basic disclosure

291. *Id.*

292. See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 828–29 (2006) (noting that Justice Thomas, like Justice Scalia, has embraced the “plain meaning” approach to constitutional interpretation); see also Lee G. Lester, *Small v. United States: Defining “Any” as a Subset of “Any”*, 40 U. RICH. L. REV. 631, 642–45 (2006) (detailing Justice Thomas’ methodology of plain meaning statutory interpretation in his dissent in *Small v. United States*, 125 S. Ct. 1752 (2005)).

293. See, e.g., *Small v. United States*, 125 S. Ct. 1752, 1759–60 (2005) (Thomas’ plain meaning interpretation of 18 U.S.C. 922(g)(1) would require broad application of the term “any court,” thereby restricting more people from possessing firearms, and thus leaving more people vulnerable to criminal charge); see also *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992) (Justice Thomas, writing for the majority, “courts must presume that a legislature says in a statute what it means and means in a statute what it says there”).

294. See Editorial, *The Law and Justice Clarence Thomas*, L.A. TIMES, Sept. 16, 2011, at A18 (stating that Justice Thomas “should follow—and not just make—the law”); see also Elie Mystal, *Clarence Thomas and His Wife’s \$680,000 of Unreported Income*, ABOVE THE LAW (Jan. 24, 2011, 11:18 AM), <http://abovethelaw.com/2011/01/clarence-thomas-and-his-wifes-680000-of-unreported-income/> (stating that Justice Thomas’ failure to disclose and his wife’s political involvement “doesn’t look good” for the Justice).

295. Clarence Thomas, J., FINANCIAL DISCLOSURE REPORT FOR CALENDAR YEAR 2009, at 6 (2009), available at <http://www.scribd.com/JWatchDC/d/74643724-Clarence-Thomas-Financial-Disclosure-Report-for-2009> [hereinafter the Financial Disclosure Report].

296. *Id.* at 2; Lichtblau, *supra* note 289, at A16.

297. Financial Disclosure Report, *supra* note 295, at 8–13; Lichtblau, *supra* note 289, at A16.

298. Financial Disclosure Report, *supra* note 295, at 8–13; Lichtblau, *supra* note 289, at A16.

299. Slaughter Press Release, *supra* note 280, available at http://www.louise.house.gov/images/stories/Judicial_Conference_Letter_Final_9.29.11.pdf; Ethics in Government Act of 1978, 5 U.S.C. §§ 101–111.

form is absurd . . . To not be able to do so is suspicious.”³⁰⁰ In this instance, dismissing Representative Slaughter’s letter as merely partisan would be a mistake. University of Colorado Law Professor Paul Campos puts the matter bluntly:

Justice Thomas’ false statements regarding his wife’s income certainly constitute a misdemeanor, and quite probably a felony, under federal law (They would be felonies if he were prosecuted under 18 U.S.C. 1001, which criminalizes knowingly making false statements of material fact to a federal agency. This is the law Martha Stewart was convicted of breaking by lying to investigators.) Thomas’ defense is that he didn’t knowingly violate the law, because he “misunderstood” the filing requirements. This is preposterous on its face. Bill Clinton was impeached—and subsequently disbarred—for defending his false statements about his affair with Monica Lewinsky with an excuse that wasn’t as incredible as the one Thomas is now employing.³⁰¹

Common Cause³⁰² deserves credit for its work in exposing Justice Thomas’s financial non-disclosures. That said, the organization, whether out of an ends-justify-all-means approach, or perhaps merely having lost a sense of perspective, quickly began to overreach. Following on its wave of success in the disclosure matter, Common Cause released documents purportedly linking Justice Thomas to conservative billionaires David and Charles Koch.³⁰³ The documents showed that Justice Thomas attended events funded by the Koch’s and that Justice Thomas was featured on promotional materials for those events.³⁰⁴ Common Cause’s claims, however, veered into the wildly conspiratorial: “The Justices’ association with the Koch events may be grounds for a new hearing in *Citizens United*, with Thomas and Scalia recused from participation” Common Cause suggested.³⁰⁵

300. Slaughter Press Release, *supra* note 280, available at http://www.louise.house.gov/images/stories/Judicial_Conference_Letter_Final_9.29.11.pdf.

301. Paul Campos, *Throw Clarence Thomas Off the Bench*, THE DAILY BEAST: U.S. NEWS (Mar. 3, 2011, 7:25 PM), <http://www.thedailybeast.com/articles/2011/03/04/clarence-thomas-criminal-behavior-on-financial-disclosure.html>.

302. By way of disclosure, Common Cause is an organization with whom I often agree, though not in this instance, and for whose New York branch I served as counsel in an unrelated matter. Suffice it to say that as the article reflects, I disagree strongly with the organization’s approach to Justice Thomas and the health care litigation.

303. Jonathan Turley, *Clarence Thomas’ Dangerous Conceit; The Supreme Court Justice Argues that Criticism of Him Is an Attack on the Court Itself. But a Single Justice Doesn’t Define the Institution*, L.A. TIMES, Mar. 6, 2011, at A26.

304. *Id.*

305. Press Release, *Common Cause Seeks Details of Justice Thomas’ Reported “Drop-by” at Koch Industries Political Meeting*, Common Cause (Feb. 28, 2011) available at <http://www.commoncause.org/site/apps/nlnet/content2.aspx?c=dkLNK1MQIwG&b=4773613&ct=9126743>; see also Press Release, *Mounting Evidence Demands Explanations from Thomas, Scalia*, Common Cause (Feb. 28, 2011) available at <http://www.commoncause.org/site/apps/nlnet/content2.aspx?c=dkLNK1MQIwG&b=4773613&ct=9143159> (“[m]ounting evidence that the justices attended the Koch meetings does not square with the Court’s statements

Setting aside the conclusory “linking” of Justice Thomas with the Koch’s, the attempt to build on that “link” so as to necessitate a disqualification in the health care law case specifically—merely because the Koch’s, like many wealthy conservatives, opposed the health care law—is a bridge too far. From a public perspective, however, Common Cause’s effort succeeded in generating attention.³⁰⁶ Thus, while the link between the faulty financial disclosures and the health care case is tenuous, in turn, in February 2011, seventy-four Members of Congress called on Justice Thomas to recuse himself from any case involving Obama’s health-care reform specifically because of his wife’s outspoken opposition to the law.³⁰⁷

on the controversy to date and requires a full accounting, the [Common Cause] asserted.”); Press Release, *What Else Haven’t They Told Us?*, Common Cause (Jan. 21, 2011) available at <http://www.commoncause.org/site/apps/nlnet/content2.aspx?c=dLNK1MQIwG&b=4773613&ct=9042443> (“[d]id Justice Thomas stay at the same posh resort where the Kochs were holding their event or have more extensive involvement with the event or event participants?”).

306. See, e.g., Eric Lichtblau, *Advocacy Group Says Justices May Have Conflict in Campaign Finance Cases*, N.Y. TIMES, Jan. 19, 2011, available at <http://www.nytimes.com/2011/01/20/us/politics/20koch.html>; see also Rich Connell & Tom Hamburger, *Hundreds March Outside Koch Brothers’ Retreat*, L.A. TIMES, Jan. 31, 2011, available at <http://articles.latimes.com/2011/jan/31/local/la-me-koch-brothers-20110131>; David B. Rivkin Jr. & Lee A. Casey, Opinion, *Common Cause v. Scalia and Thomas*, WALL ST. J., Jan. 25, 2011, available at <http://online.wsj.com/article/SB10001424052748703555804576102073480714218.html>.

307. Toobin, *supra* note 279, at 40. At the congressional level, the leader of the Thomas opposition was Representative Anthony Weiner, of Twitter infamy, a fact that may have ultimately blunted the opposition’s force when Weiner ultimately resigned in disgrace. *Id.* The letter from the Members, addressed directly to Justice Thomas, states in full:

As an Associate Justice, you are entrusted with the responsibility to exercise the highest degree of discretion and impartiality when deciding a case. As Members of Congress, we were surprised by recent revelations of your financial ties to leading organizations dedicated to lobbying against the Patient Protection and Affordable Care Act. We write today to respectfully ask that you maintain the integrity of this court and recuse yourself from any deliberations on the constitutionality of this act. The appearance of a conflict of interest merits recusal under federal law. From what we have already seen, the line between your impartiality and you and your wife’s financial stake in the overturn of health-care reform is blurred. Your spouse is advertising herself as a lobbyist who has “experience and connections” and appeals to clients who want a particular decision—they want to overturn health-care reform. Moreover, your failure to disclose Ginny Thomas’s receipt of \$686,589 from the Heritage Foundation, a prominent opponent of health-care reform, between 2003 and 2007 has raised great concern. This is not the first case where your impartiality was in question. As Common Cause points out, you “participated in secretive political strategy sessions, perhaps while the case was pending, with corporate leaders whose political aims were advanced by the [5-4] decision” on the Citizens United case. Your spouse also received an undisclosed salary paid for by undisclosed donors as CEO of Liberty Central, a 501(c)(4) organization that stood to benefit from the decision and played an active role in the 2010 elections. Given these facts, there is a strong conflict between the Thomas household’s financial gain through your spouse’s activities and your role as an Associate Justice of the United States Supreme Court. We urge you to recuse yourself from this case. If the U.S. Supreme Court’s decision is to be viewed as legitimate by the American people, this is the only correct path. We appreciate your thoughtful consideration of this request.

Felicia Sonmez, *House Democrats Say Justice Thomas Should Recuse Himself in Health-care Case*, WASH. POST, Feb. 9, 2011, available at <http://voices.washingtonpost.com/44/2011/02/house-democrats-say-justice-th.html> (including the text of the letter).

It is reasonable conjecture to anticipate that Justice Thomas was unmoved by the letter. In addition to its partisan ends, however, a few prominent academics echoed the letter's sentiments. Monroe Freedman, for example, stated that:

“Thomas should recuse himself because his wife is a lobbyist for groups that are opposed to the health care law. She has brought in a lot of money in family income opposing the health care law. Thomas has a financial family interest in the success of the opposition to health care.”³⁰⁸ Similarly, Michael Gerhardt, who has extensive specific experience in vetting and preparing judicial nominees,³⁰⁹ asserts that “I think it is possible she might have significant interests in the dispute before the Court.”³¹⁰

On the other hand, and even limited solely to that “family interest” (as opposed to also considering the broader “might reasonably be questioned” standard of § 455), scholars come to opposing conclusions. Patrick Longan of Mercer University Law School states, “[t]he standard is whether there is something materially to be gained by the judge or his spouse from the outcome of the litigation . . . It’s hard for me to see how his vote in the case would help [Mrs. Thomas] materially, one way or the other.”³¹¹ Retired Justice John Paul Stevens defended Justice Thomas, stating that he did not have any concern that Justices are failing to disqualify themselves when proper.³¹²

The wrinkle that makes assertions regarding Justice Thomas’s disqualification worth taking seriously is his profound failure—of care, of judgment, and of law—to disclose Mrs. Thomas’s substantial income, and the source of that income. The nexus between that failure, however, and the health care litigation is strained at best. If the source of Mrs. Thomas’s undisclosed income were General Motors, then Justice Thomas’s failure to comply with the disclosure laws would have been just as egregious, but it would have borne little connection to Justice Thomas’s fitness to participate in the Court’s review of the health care law. It is only because the groups for whom Mrs. Thomas worked are advocacy groups with an ideological disposition against government social programs generally, and against the health care law specifically, that even credibly asserting a problematic nexus is possible.

Chief Justice Roberts’ argument with respect to disqualification that is discussed in the introduction to this article can effectively be reduced to the

308. Ariane de Vogue, *Groups Suggest Elena Kagan, Clarence Thomas Should Be Recused from Health Law Challenge*, ABC NEWS LEGAL BLOG (Nov. 16, 2011, 12:25 PM), <http://abcnews.go.com/blogs/politics/2011/11/groups-suggest-elena-kagan-clarence-thomas-should-be-recused-from-health-law-decision/>.

309. *Faculty & Research, Michael J. Gerhardt*, U.N.C. SCHOOL OF LAW, <http://www.law.unc.edu/faculty/directory/gerhardtmichaelj/> (last visited Sept. 30, 2012).

310. Toobin, *supra* note 279, at 47.

311. *Id.*

312. Joan Biskupic, *Retired Justice Stevens On Ethics, Thomas and Colbert*, USA TODAY, Oct. 28, 2011, at 2A, available at <http://www.usatoday.com/news/washington/judicial/supremecourtjustices/story/2011-10-28/justice-stevens-book-colbert/50967680/1>.

shorthand: “We’re the Supreme Court, ergo, we’re different.” This Article asserts that that argument, however simple, is particularly correct as applied to Justice Thomas and the health care litigation. To wit, consider a comparison of Judge Reinhardt’s participation in the appeal of the Proposition 8 ruling to Justice Thomas’s participation in reviewing the health care law.

2. PROPOSITION 8: A DISQUALIFICATION “COMPARE AND CONTRAST” BETWEEN THE SUPREME COURT AND THE LOWER COURTS

Judge Stephen Reinhardt of the Ninth Circuit was one of three judges randomly selected to hear the appeal to the 2010 Northern District of California decision overturning Proposition 8.³¹³ Judge Reinhardt’s wife, Ramona Ripston, is the former executive director of the American Civil Liberties Union of Southern California, one of many organizations to have participated in the fight for same-sex marriage.³¹⁴ Proposition 8 supporters seized on Ripston’s “association with same-sex marriage proponents” as grounds for Reinhardt’s removal.³¹⁵ Reinhardt, however, insisted that he would be able to rule impartially in *Perry*,³¹⁶ whereas he routinely recuses himself from cases where there is a conflict of interest or the appearance of one.³¹⁷

In a sequence with almost eerie parallels to that involving Justice Clarence Thomas’s wife Virginia Thomas, Judge Reinhardt’s wife retired from her position at the ACLU in February of 2011.³¹⁸ It certainly warrants considering, even merely rhetorically, just how many or how few of those who see recusal as but a justifiable means to partisan ends would actually recognize the similarities—and, correspondingly, how few or how many would “split” such as to see recusal as justified in one instance but not the other. As Part I of this Article asserts, perhaps the lone truly salient distinction between the matters is that the Supreme Court, by virtue of its finality, simply is different—i.e., the argument Chief Justice Roberts asserts, however unconvincingly, in the year-end report noted at the

313. Carol J. Williams, *Judge Stephen Reinhardt Refuses to Withdraw from Prop. 8 Case*, L.A. NOW, L.A. TIMES (Dec. 2, 2010, 12:49 PM), <http://latimesblogs.latimes.com/lanow/2010/12/liberal-judge-refuses-to-leave-prop-8-case.html>.

314. *Perry v. Schwarzenegger*, 630 F.3d 909, 911 (9th Cir. 2011).

315. Elaine Woo, *Passing Her Civil Rights Torch*, L.A. TIMES, Feb. 13, 2011, available at <http://articles.latimes.com/2011/feb/13/local/la-me-0213-ramona-ripston-20110213>.

316. See *Perry v. Schwarzenegger*, 630 F.3d 909 (9th Cir. 2011).

317. *Id.* at 913. In an interesting prequel to the Judge Reinhardt recusal controversy, Protect Marriage filed a motion to vacate Judge Vaughn Walker’s 2010 decision ruling Proposition 8 unconstitutional in the district court following Judge Waker’s confirmation of his 10-year relationship with a same sex partner. Maura Dolan, *Gay Judge Wasn’t Required to Remove Himself From Same-Sex Marriage Case*, U.S. JUDGE RULES, L.A. TIMES, June 15, 2011, available at <http://articles.latimes.com/2011/jun/15/local/la-me-0615-gay-judge-20110616>; see Defendant-Interveners’ Motion to Vacate Judgment, *Perry v. Schwarzenegger*, 790 F.Supp.2d 1119 (N.D. Cal. 2011) (No. 3:09-cv-02292), 2011 WL 1544807.

318. See Woo, *supra* note 315; see also discussion *supra* Part III, section A, 1 (discussing Ginni Thomas’ involvement in opposing the Affordable Care Act).

outset of this article. Further, if one takes that distinction seriously, it serves in this comparison as a one-way ratchet in that it countenances in favor of Justice Thomas choosing not to disqualify, while making Judge Reinhardt's decision at least an incrementally closer call simply because—as unsatisfying as it may feel—Supreme Court Justices make up the “one supreme Court” identified in Article III,³¹⁹ and are therefore inherently less fungible and replaceable than the judges of the “inferior courts” as “Congress may from time to time ordain and establish.”³²⁰

In February 2012, Judge Reinhardt authored the Ninth Circuit's decision striking down Proposition 8 as unconstitutional.³²¹ Approximately one year prior to the decision on the substance of Proposition 8, however, Judge Reinhardt issued a lengthy memorandum explaining the bases for his denial of the motion for disqualification.

While generally disfavoring extensive block quotes, in this instance, it is my perspective that as with Justice Ginsburg's comments regarding the NOW lectures, and Justice Scalia's opinion denying recusal in *Cheney*, both of which stand, by their very candor and transparency, in sharp contrast to most matters of judicial disqualification, Judge Reinhardt's treatment of the recusal issue in *Perry* provides a rare window into the perspective of a judge targeted for recusal in a high profile matter, and consequently, the inclusion of only the most lightly abridged version of his remarks is warranted:

My wife's views, public or private, as to any issues that may come before this court, constitutional or otherwise, are of no consequence. She is a strong, independent woman who has long fought for the principle, among others, that women should be evaluated on their own merits and not judged in any way by the deeds or position in life of their husbands (and vice versa). I share that view and, in my opinion, it reflects the status of the law generally, as well as the law of recusal, regardless of whether the spouse or the judge is the male or the female.

* * *

Proponents' contention that I should recuse myself due to my wife's opinions is based upon an outmoded conception of the relationship between spouses. When I joined this court in 1980 (well before my wife and I were married), the ethics rules promulgated by the Judicial Conference stated that judges should ensure that their wives not participate in politics. I wrote the ethics committee and suggested that this advice did not reflect the realities of modern marriage—that even if it were desirable for judges to control their wives, I did not know many judges who could actually do so (I further suggested that the

319. U.S. CONST. art. III, § 1.

320. *Id.*

321. *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012).

Committee would do better to say “spouses” than “wives,” as by then we had as members of our court Judge Mary Schroeder, Judge Betty Fletcher, and Judge Dorothy Nelson). The committee thanked me for my letter and sometime later changed the rule. That time has passed, and rightly so. In 2011, my wife and I share many fundamental interests by virtue of our marriage, but her views regarding issues of public significance are her own, and cannot be imputed to me, no matter how prominently she expresses them. It is her view, and I agree, that she has the right to perform her professional duties without regard to whatever my views may be, and that I should do the same without regard to hers. Because my wife is an independent woman, I cannot accept Proponents’ position that my impartiality might reasonably be questioned under § 455(a) because of her opinions or the views of the organization she heads. Nor can I accept the argument that my wife’s views constitute an “interest” that could warrant my recusal under § 455(b)(5)(iii), as such a reading would require judges to recuse themselves whenever they know of a relative’s strongly held opinions, whether publicly expressed or not. See § 455(b)(5)(iii) (requiring recusal whenever a relative “[i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding”). I likewise cannot conceive how such an “interest” could be said to exist by virtue of the fact that the ACLU/SC as an organization has expressed positions regarding the subject at issue in this case. The ACLU/SC is devoted to advocating for numerous social issues, many of which come before the court, of which same-sex marriage is but one. To suggest that because my wife heads the ACLU/SC she has an “interest” cognizable under § 455(b)(5)(iii) in cases regarding which the organization has expressed a position would be to suggest that I must recuse myself from cases implicating the constitutionality of the death penalty, school prayer, and affirmative action, among many others. Moreover, because § 455(b)(5)(iii) applies not only to the interests of a judge’s spouse, but to the interests of any “person within the third degree of relationship to either” a judge or a judge’s spouse, § 455(b)(5), such a reading would require a judge’s recusal when various other relatives, such as great grandchildren and nephews-in-law, head a public interest organization that has expressed a position concerning a case.³²²

Despite the seemingly hard line Judge Reinhardt draws above, he nonetheless acknowledges, in the memorandum, having a longstanding policy concerning ACLU/SC litigation: “I do not participate in any actions by this court when the organization of which my wife is the Executive Director makes any appearance or files any brief, amicus or otherwise, before this court.”³²³ The precision of Judge Reinhardt’s wording in the last clause of that last sentence—“before this court”—is certainly not accidental. It is, rather, a clear attempt to bolster the distinction between *Perry* and the myriad cases involving ACLU/SC from which

322. *Perry v. Schwarzenegger*, 630 F.3d 909 (9th Cir. 2011).

323. *Id.* at 913.

Reinhardt did disqualify, pursuant to the policy he articulates. In *Perry*, Reinhardt seized on the fact that ACLU/SC's participation in the litigation was limited to the District Court level, and was, for that matter, inconsequential:

The two briefs that the ACLU/SC joined were among twenty-four amicus briefs filed in the district court on behalf of 122 organizations and private individuals. The two briefs were not cited in any way in the district court's findings of fact and law, and the ACLU/SC had no further connection with the case in the district court and none at all as the case came before us.³²⁴

Because ACLU/SC decided not to participate in the case before the Ninth Circuit, Judge Reinhardt was able to assert that the organization's "limited participation in the district court does not endow my wife or the ACLU-SC with any 'interest that could be substantially affected by the outcome of the proceeding.'" ³²⁵ Particularly in that last respect, and in a juxtaposition the layers of which would be lost on few close observers of the federal bench (but no doubt on many citizens engaged in heated rhetoric directed at one jurist or the other) the rejoinders favoring Judge Reinhardt's participation in the Ninth Circuit's review of Proposition 8 are strikingly similar to the rejoinders favoring Justice Thomas's participation in the Supreme Court's review of the Affordable Care Act.

The arguments advanced by those favoring disqualification focus, in each instance, on the activities of the jurists' respective spouses. Each of those spouses played key leadership roles in prominent public policy and legal advocacy organizations. Each jurist is a veteran of the bench whose respective judicial philosophy on a broad range of legal matters has been transparently refined over decades. Yet only one of the two is, in a sense, judicially fungible: Judge Reinhardt. Indeed, this is a point Judge Reinhardt makes himself in his Proposition 8 memorandum, albeit not consciously in the context of any comparison to Justice Thomas. Judge Reinhardt wrote that not only does he not participate in any action in which his wife's organization makes an appearance or files any type of brief, but the clerk's office automatically assigns cases covered by his policy to judicial panels to which he is not a member.³²⁶

3. THE "ONE SUPREME COURT" (OR SUPREME COURT: THE UNFUNGIBLE JUSTICES)

Supreme Court Justices, by virtue of their constitutionally unique role as the "one supreme Court" identified by Article III, as opposed to as members of the "inferior courts as Congress may from time to time establish,"³²⁷ do not have the luxury of having matters assigned to alternative panels analogous to those to

324. *Id.* at 914 (emphasis added).

325. *Id.* (quoting § 455(b)(5)(iii)).

326. *Id.* at 913.

327. U.S. CONST. art. III, § 1.

which Judge Reinhardt alludes. Further, and derivatively, it is, of course, impossible for a Supreme Court Justice to ever be in the unknowing posture vis-à-vis recusal that applies to Judge Reinhardt. If limited to matters adjudicated in the Supreme Court on the merits, any recusal of a Justice is inherently known not only to the Justice himself or herself, but to the public as well simply because there are only nine specific and non-fungible individuals who form the bench.

Clearly, the preceding paragraph constitutes little more than basic civics. Yet one important consequence of those principles of civics is, assuming *arguendo* that all other factors are equal with respect to an alleged conflict in the Supreme Court and an alleged conflict in a lower court, the merits of the case for disqualification are much, much stronger in the lower court. This is true, even if for no other reason than the fact that the lower court jurist is entirely replaceable. Conceding that there are other minor distinctions (in both directions) with respect to the comparison of Justice Thomas and Judge Reinhardt, the case for Judge Reinhardt's disqualification in *Perry*, though weak, and in this author's view, unpersuasive, was nonetheless at least stronger than the case for Justice Thomas' disqualification from the Court's review of the health care law.

The fungibility distinction, however, serves only to make Justice Thomas's non-disqualification case stronger than that of a similarly-situated lower court judge. Comparing Justice Thomas' circumstance to the Supreme Court historical norms described in Part I of the Article, however, offers yet further support for Justice Thomas's non-disqualification. Considered at the most general level, Justice Thomas is well-established, across a broad spectrum of legal issues, as one of the Court's most consistently conservative members. Accordingly, in a close case, he is quite arguably *the* least likely Justice to vote in favor of any sweeping federal regulatory scheme. Moreover, when one considers Justice Thomas' record, there is no indication of any differentiated approach to health care as a field as opposed to any of myriad other substantive areas. In at least this respect, Justice Thomas' posture vis-à-vis the Affordable Care Act is less closely aligned with any issue-specific viewpoint than the Justices in several of the historical examples described in Part I of this Article. Surely, if one considers Justice Thomas separately from Mrs. Thomas, then, vis-à-vis the health care reform, he has *no* issue-specific relationship that rises to the level of Chief Justice Vinson, Justice Clark, or Justice Jackson in the *Steel Seizure* cases;³²⁸ no arguably constituent-esque, nor client-esque relationship akin to Justice Black in *Jewell Ridge*;³²⁹ no regime-creator-then-adjudicator relationship akin to Justice Breyer in *Booker*;³³⁰ and certainly no personal cause-specific connection rising to the almost *raison d'être* levels applicable to Justice Thurgood Marshall nor

328. See *supra* Part I.

329. *Id.*

330. *Id.*

Justice Ginsburg in the racial and gender rights areas respectively.³³¹

The arguments favoring Justice Thomas's disqualification thus rest entirely on his marriage to Mrs. Thomas. As is clear by now, this Article does not find these marital-derivative arguments persuasive, at least as applied to the scenario involving Justice Thomas. Although Supreme Court Justices are not governed by the *Code of Judicial Conduct*, as Chief Justice Roberts' year-end report acknowledges, it remains, even for them, a significant guidepost.³³² With respect to spouses, consider that the 1972 version of the ABA *Code of Judicial Conduct* provided that a candidate for judicial office "should encourage members of his family to adhere to the same standards of political conduct that apply to him."³³³ Reflecting on that provision years later, federal Judge Roger Miner wrote, "[m]y wife, a well-known political activist at that time, responded: 'Consider me encouraged,' and went on to lead some statewide and national campaigns."³³⁴

When the ABA revised the spousal portion of the *Judicial Code* in 1990, the new provision indicated that "[t]he encouragement to adhere to judicial conduct rules now applies only in regard to the judge's own political campaign."³³⁵ The official commentary to that provision indicates further that while "a judicial candidate must encourage members of his or her family to adhere to the same standards of political conduct in support of the candidate that apply to the candidate, family members are free to participate in other political activity."³³⁶ As Judge Miner's reflections strongly hint, the 1972 spousal prohibitions were anachronisms even in their own time. Case law offers additional evidence of real-world progress outpacing the Code. In *Application of Gaulkin*, a 1976 case, the New Jersey Supreme Court reversed one of its earlier decisions that had prohibited spousal political activities,³³⁷ holding, instead that "[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup [W]e no longer see any confirmed justification for extending [the] prohibition [on political activity] to the non-judicial spouse."³³⁸

As Eugene Volokh notes, whatever the *de jure* provisions, as a *de facto* matter, the spouses of sitting federal judges have included even U.S. Senators and a

331. *Id.*

332. Chief Justice John Roberts, *2011 Year-End Report on the Federal Judiciary*, 1, 3-5 (Dec. 31, 2011), <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>; *supra* discussion in Part I.

333. MODEL CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(a) (1972).

334. Roger J. Miner, *Judicial Ethics in the Twenty-First Century: Tracing the Trends*, 32 HOFSTRA L. REV. 1107, 1130-31 (2004).

335. Model Code of Judicial Conduct Canon 5(A)(3)(a) (1990).

336. Model Code of Judicial Conduct Canon 5(A)(3)(a) cmt. (1990); *see also* Eugene Volokh, *Political Activity by Judges' Spouses*, THE VOLOKH CONSPIRACY (Mar. 21, 2010, 9:17 AM), <http://volokh.com/2010/03/21/political-activity-by-judges-spouses/shtml>.

337. *In re Gaulkin*, 351 A.2d 740 (N.J. 1976).

338. *Id.* at 744-46.

Governor,³³⁹ leading Volokh to conclude that he's "not sure that there's really a judicial norm that judge's spouses should stay out of politics, whether partisan politics, advocacy group politics, or public interest litigation."³⁴⁰

With only § 455's "might reasonably be questioned" provision applicable to Justice Thomas, and with the shift in norms even to those jurists for whom, unlike Justice Thomas, the *Code* formally applies, it is logical to turn the standard on its head and consider the scenarios in which Mrs. Thomas's connection to the health care law might cause Justice Thomas's impartiality to "reasonably be questioned." While acknowledging the eternal difficulty of distinguishing correlation with causation, here there is literally no evidence that Justice Thomas's thinking is causally related to Mrs. Thomas's work.

Further, whatever one thinks of Justice Thomas's jurisprudence, there can be little doubt that he is a highly independent thinker, who frequently comes to legal conclusions that prioritize his principles ahead of any perceived interests. As one commentator notes, "[he] was born dirt poor, experienced appalling racism and still occasionally votes against (perceived) black interests. If he can make that separation, why assume he can't make this one?"³⁴¹ Of course, in this instance, it's not at all clear that Justice Thomas's legal philosophy leaves much room for doubt *ex ante*. To that end, another commentator, reflecting on Jeffrey Toobin's article about Justice and Mrs. Thomas in *The New Yorker*, put it this way: "despite the fact that almost every paragraph of his piece drips with contempt for Clarence Thomas, Toobin has made a convincing case that Clarence Thomas's views precede by many years the income his wife made by pushing similar views."³⁴²

Considered in terms of the concentration of any family interest in the case, one need not be dismissive of Mrs. Thomas's contributions to the efforts in opposition to the health care overhaul to acknowledge that, as a relative matter, her contributions were but a miniscule fraction of the collective efforts serving the same end. Inversely, the relative impact of the constitutionality of a national health care overhaul, as compared to its concentrated impact on Mrs. Thomas, and derivatively, Justice Thomas, takes the miniscule fraction and turns it on its head. Are these crude measures of concentration of interest and impact part of any formal, *de jure* disqualification rules? Certainly not, and particularly for members of the Supreme Court to whom the *Code* does not apply, but within a standards framework, they serve the noble role of elucidating "the facts of

339. Eugene Volokh, *Justice Thomas and Judge Reinhardt*, THE VOLOKH CONSPIRACY (Mar. 14, 2010), <http://volokh.com/2010/03/14/justice-thomas-and-judge-reinhardt/shtml>.

340. *Id.* (even if a vibrant Code-based prohibition continued to exist, it would, as discussed in Part I, not formally apply to the Supreme Court).

341. Ravi Somaiya, *Three Reasons it's Fine That Justice Thomas' Wife is a Tea Partyer*, GAWKER (Mar. 14, 2010, 3:20 PM), <http://gawker.com/5493054/three-reasons-its-fine-that-justice-thomas-wife-is-a-tea-partyer>.

342. David Henderson, *Jeffrey Toobin Implicitly Makes a Strong Case that May Surprise His Fans*, LIBRARY OF ECONOMICS AND LIBERTY (Sept. 11, 2011), available at http://econlog.econlib.org/archives/2011/09/the_economics_o_19.html.

a particular situation [so as] to assess them in terms of the purposes or social values embodied in [a] standard”³⁴³ that can helpfully inform the disqualification decision.

Relative concentration of interest and impact indeed served as criteria for the Court in a different, but tangentially connected circumstance of considering the constitutional floor—undoubtedly a standard rather than a rule—for an elected state justice’s disqualification in the context of outsized monetary campaign support. The Court, in *Caperton v. A.T. Massey Coal Incorporated*, concluded that:

[T]here is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular *case* had a *significant* and *disproportionate* influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent. The inquiry centers on the contribution’s *relative size in comparison to the total* amount of money contributed to the campaign, the *total amount spent* in the election, and the *apparent effect* such contribution had on the outcome of the election.³⁴⁴

Each of the italicized portions of the above paragraph from *Caperton* refers, in the context of financial campaign support, to concentration of interest and/or impact measured as a relative matter. In *Caperton* those relative factors were, to use the Court’s own repeatedly emphasized word, “extreme” in their concentration.³⁴⁵ In sharp contrast, even if one were somehow able to monetize Mrs. Thomas’s contributions to, or personal stake in, the overall opposition to the health care overhaul, they not only do not rise to the levels applicable in *Caperton*, they fail to even register—considered on a relative scale—as substantial. This is, of course, not to say that the only disqualification standard applicable to Justice Thomas or any other Justice of the Supreme Court is the constitutional bare minimum. On the contrary, § 455’s “might reasonably be questioned” language makes clear that the standard is substantially more stringent than the due process floor at issue in *Caperton*.³⁴⁶ The similar modality of standards-based analysis, however, is nonetheless helpful in placing the relatively insubstantial nature of Mrs. Thomas’s contribution to, and interest in, the health care law in proper perspective.

If not for Justice Thomas’s egregious, even potentially criminal failures of financial disclosure, and the loose nexus of the undisclosed income to Mrs. Thomas’s work in opposition to the health care overhaul, this Article asserts

343. Kennedy, *supra* note 21, at 1688.

344. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009) (emphasis added).

345. The word “extreme” is used throughout the majority’s opinion, even appearing four times on a single page. See Roy A. Schotland, *Caperton* Capers: Comment on Four of the Articles, 60 SYRACUSE L. REV. 337, 337 n.3 (2010) (citing *Caperton*, 129 S. Ct. at 2265, 2267).

346. See *supra* discussion of 28 U.S.C. § 455, at pp. 11-12.

that, on the spectrum of historical context, Supreme Court practice, and the practices of more fungible inferior court judges, the case against Justice Thomas's disqualification would be exceptionally strong. The force of those arguments is blunted in some measure by the lack of disclosure, but to a subjective and unquantifiable degree. Justice Thomas's penchant for silence, and thus for avoiding the kind of reasoned, transparent explanation of Justice Scalia in *Cheney* or even Judge Reinhardt in *Perry* exacerbates the informational deficiencies.³⁴⁷

By analogy, if Judge Reinhardt had failed to disclose, over a period of years, Ms. Ripston's income from the ACLU/SC, could that failure have altered the calculus in his case enough to change the outcome of his decision not to disqualify from *Perry*? Reasonable observers would surely reach opposite conclusions as to the question. In that hypothetical, however, the consequences of disqualification are minimal: Another judge is blindly selected to sit; the case moves forward with three federal judges; there remains the possibility of en banc review; and the possibility of Supreme Court review, all factors inapplicable to Justice Thomas's participation in reviewing the Affordable Care Act.

The factors pertaining to the finality of a Justice's disqualification will always hold true, absent long-term, and arguably far-fetched transformational changes in Supreme Court practices. For example, Senate Judiciary Chair Patrick Leahy's suggestions are aimed at reducing the consequences of Supreme Court disqualifications by taking advantage of the Court's "deep bench" of retired Article III Supreme Court Justices.³⁴⁸ Thus, the finality factors, certainly cannot, standing alone, be viewed as talismanic. When those factors are combined with a close

347. This is a point recently made well, if harshly, by Georgia State Professor Eric Segall, who writes in the *Los Angeles Times*:

[S]adly, I don't expect much from Thomas given his history. At his confirmation hearings, he made the dubious and startling claim that he could not remember, nor did he "personally engage in," a single discussion of *Roe vs. Wade* (decided 18 years earlier) before that hearing. Add in his consistent, multi-year failure to disclose the sources of his wife's income as federally required, his now six-year silent pout during oral arguments (he hasn't asked a single question), not to mention the Anita Hill allegations, and I would never hold up Thomas as a model of judicial behavior.

If these words appear harsh, it should be remembered that much worse things are being said by journalists and commentators about Newt Gingrich, Mitt Romney and President Obama, among other national political figures, and there is no good reason to immunize Supreme Court [J]ustices from similar criticism.

Eric J. Segall, Op-Ed., *An Ominous Silence on the Supreme Court*, L.A. TIMES, Feb. 12, 2012, available at <http://www.latimes.com/news/opinion/commentary/la-oe-segall-kagan-recusal-20120212,0,4442652.story>.

348. Senator Leahy's proposed legislation would have allowed a retired justice to replace a current justice who has recused herself. Leahy hopes this would encourage justices to recuse themselves with less hesitation when there is even "an appearance of partiality." Robert Barnes, *A Deep Bench of Substitute Justices Goes Unused*, WASH. POST, Aug. 9, 2010, available at <http://www.washingtonpost.com/wpdyn/content/article/2010/08/08/AR2010080802629.html?hpid=topnews>. Retired Justices have remained active in the judiciary. For example, since Justice O'Connor's retirement from the Supreme Court in 2006, she has filled in on and decided cases with every federal appellate court in the nation, except for the one on which she was appointed in 1981. *Id.*

examination of the circumstances specific to Justice Thomas's situation, and are, in turn, examined in light of the historical examples considered in Part I, this Article concludes that Justice Thomas's participation in reviewing the health care law, is not only warranted under the rule of law, but optimal for its perceived legitimacy.

B. KAGAN AND THE "TENTH-TO-NINTH" DIFFICULTY OF THE AFFORDABLE CARE ACT

There can be little doubt that Justice Elena Kagan takes matters of recusal seriously. So seriously, in fact, that veteran Supreme Court reporter Bob Barnes's *Washington Post* curtain-raiser on the opening day of Justice Kagan's first term on the high court opens verbatim, as follows:

Elena Kagan begins hearing cases as the Supreme Court's 112th Justice Monday morning. But anyone who wants to see her in action needs to be sharp. Kagan will hear the first case argued before the court, then slip quietly through the burgundy velvet curtains behind the bench. She'll be out of the action in all three cases Tuesday. Her chair will be empty when the court returns next Tuesday and she'll put in a half-day the next day. Kagan's old job as solicitor general—the "tenth justice"—is initially making it hard to do her new job as the ninth justice.³⁴⁹

The "tenth-to-ninth" difficulty is a near-term challenge for anyone elevated from the position of Solicitor General to Supreme Court Justice—a hurdle that may in part explain why, prior to Justice Kagan, such an elevation had not occurred since Thurgood Marshall, for whom Kagan clerked.³⁵⁰ As has proven true in Justice Kagan's instance, one consequence of the tenth-to-ninth sequence was that Justice Marshall "recused himself from a large portion of cases his first and second years,"³⁵¹ though with the perspective of hindsight, no one seriously denies that "his legacy is more about the cases he helped decide than the ones he sat out."³⁵²

The Affordable Care Act was signed into law in March 2010.³⁵³ From the moment, two months later, that then-Solicitor General Kagan was nominated for the Court, the specter of the tenth-to-ninth sequence, and most dramatically, its

349. Robert Barnes, *Recusals Could Force Newest Justice to Miss Many Cases*, WASH. POST, Oct. 4, 2010, at A15, available at <http://www.washingtonpost.com/wpdyn/content/article/2010/10/03/AR2010100303890.html>.

350. *Id.*

351. *Id.*

352. Wash. Post, *Elena Kagan's Old Job as Solicitor General is Having an Effect on Her New One*, CLEVELAND.COM (Oct. 3, 2010, 10:38 PM), http://www.cleveland.com/nation/index.ssf/2010/10/elena_kagans_old_job_as_solici.html (citing Robert Barnes, *Recusals Could Force Newest Justice to Miss Many Cases*, WASH. POST, Oct. 4, 2010, at A15).

353. Patient Protection and *Affordable Care Act* of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010) [hereinafter *Affordable Care Act*].

potential ramifications for any then-hypothetical Supreme Court adjudication on the health care law, was front and center. On day three of her confirmation hearing, the following exchange occurred between Kagan and Oklahoma Senator Tom Coburn:

COBURN: Thank you. And my—I have two final questions. One, was there at any time—and I’m not asking what you expressed or anything else—was there at any time you were asked in your present position to express an opinion on the merits of the health care bill?

KAGAN: There was not.³⁵⁴

Republican Senators on the Judiciary Committee were not persuaded. Accordingly, they requested more information. Senator Orrin Hatch’s statement reflects the blurring between Kagan-specific concerns, and the expression of broader views as to the health law itself: “Elena Kagan was in the unique role of being the nation’s top lawyer, and the American people have the right to know what role she played in defending this unconstitutional law.”³⁵⁵

In written responses to the follow-up inquiries from Senator Hatch’s colleagues, Justice Kagan stated: “If I personally reviewed a draft pleading or participated in discussions to formulate the government’s litigating position, then I would recuse myself from a case. In my view, this level of participation in a case would warrant recusal.”³⁵⁶ Kagan indicated further that she would recuse even if she was not the formal decision maker, but merely gave advice to those making the decision, “in my view this level of participation in the case would warrant recusal.”³⁵⁷

Kagan’s answers reflect the portion of § 455 requiring disqualification “[w]here [the Justice] has served in governmental employment and in such capacity participated as counsel [or] adviser concerning the proceeding or expressed an opinion concerning the merits of the particular case or controversy.”³⁵⁸ Writing in the *Wall Street Journal*, former Attorney General Michael Mukasey approved of Justice Kagan’s line drawing, stating “[a]bsent evidence to the contrary, there is no reason not to credit [her] denial.”³⁵⁹

The only additional evidence, from which partisans on both sides draw

354. *Senate Committee on the Judiciary Holds a Hearing on the Elena Kagan Nominations*, WASH. POST, June 30, 2010, available at <http://www.washingtonpost.com/wpsrv/politics/documents/KAGANHEARINGS DAY3.pdf>.

355. Warren Richey, *Would Elena Kagan Bow Out of a Health-Care Reform Case?*, CHRISTIAN SCIENCE MONITOR, July 15, 2012, available at <http://www.csmonitor.com/USA/Politics/2010/0715/Would-Elena-Kagan-bow-out-of-a-health-care-reform-case>.

356. *Id.*

357. *Id.*

358. 28 U.S.C. § 455 (2012).

359. Michael B. Mukasey, *The ObamaCare Recusal Nonsense*, WALL ST. J., Dec. 5, 2011, available at <http://online.wsj.com/article/SB10001424052970204012004577070162911944188.html>.

diametrically opposing conclusions, is contained in a series of e-mails obtained from the Justice Department as the result of a Freedom of Information Act request by conservatives opposed to the health care overhaul. With respect to the extent of Kagan's involvement or non-involvement in the DOJ's consideration of challenges to the law, the e-mails are illuminating though far from conclusive.

The e-mails fall into two categories—those involving other members of the Solicitor General's office and those involving Kagan's friend and onetime colleague Laurence Tribe. In the case of the former, the e-mails most notably include the following:

(1) An inquiry from Senior Counsel Brian Hauck in the Associate Attorney General's (AAG's) office to Kagan's then-deputy Neal Katyal stating:

Hi Neal—Tom wants me to put together a group to get thinking about how to defend against the inevitable challenges to the health care proposals that are pending, and hoped that OSG [Office of the Solicitor General] could participate. Could you figure out the right person or people for that? More the merrier. He is hoping to meet next week if we can.³⁶⁰

(2) Katyal responds to Hauck's inquiry by forwarding the message to Kagan and indicating that he is "happy to do this if [Kagan] are ok with it."³⁶¹ Kagan's response, in full to Katyal states: "You should do it."³⁶² (3) Katyal then informed the AAG's office that "Elena would definitely like OSG to be involved in this set of issues," and that "we will bring Elena in as needed."³⁶³ (4) Katyal copied Kagan on his advice to Associate Attorney General Thomas Perrelli that DOJ "start assembling a response" to a draft complaint "so that we have it ready to go."³⁶⁴ (5) On March 21, 2010, Katyal e-mailed Kagan with his advice that she should attend a DOJ meeting with the White House's health-care policy team with Katyal stating, "I think you should go, no?" since this is "litigation of singular importance."³⁶⁵

On May 17, 2010, Katyal forwarded an innocuous and understandable e-mail

360. E-Mail from Brian Hauck, Senior Counsel, Assoc. Att'y Gen.'s Office, to Neal Katyal, former Deputy Solicitor Gen. (Jan. 8, 2010, 10:54 AM) (<http://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf>).

361. E-Mail from Neal Katyal, former Deputy Solicitor Gen., to Elena Kagan, Assoc. Justice, U.S. Supreme Court (Jan. 8, 2010, 10:57 AM) (<http://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf>).

362. E-Mail from Elena Kagan, Assoc. Justice, U.S. Supreme Court, to Neal Katyal, former Deputy Solicitor Gen. (Jan. 8, 2010, 11:01 AM) (<http://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf>).

363. E-Mail from Neal Katyal, former Deputy Solicitor Gen., to Brian Hauck, Senior Counsel, Assoc. Att'y Gen.'s Office (Jan. 8, 2010, 1:05 PM) (<http://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf>).

364. E-Mail from Neal Katyal, former Deputy Solicitor Gen., to Thomas Perrelli, Assoc. Attorney General, and Elena Kagan, Assoc. Justice, U.S. Supreme Court (Mar. 18, 2010, 1:37 PM) (<http://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf> (page 3)).

365. E-Mail from Neal Katyal, former Deputy Solicitor Gen., to Elena Kagan, Assoc. Justice, U.S. Supreme Court (Mar. 21, 2010, 6:19 PM) (<http://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf> (page 5)).

inquiry from Justice Department spokesperson Tracy Schmalzer. Schmalzer's e-mail to Katyal inquired, under the subject line "HCR litigation," "Has Elena been involved in any of that to the extent that SG office was consulted? Know you've been point but expect I'll get this q."³⁶⁶ Katyal responded to Schmalzer "No, she has never been involved in any of it. I've run it for the Office, and have never discussed the issues with her one bit."³⁶⁷ Remarkably, Katyal then forwarded Kagan that response, adding, "This is what I told Tracy about health care."³⁶⁸

The e-mail exchange between Kagan and another Obama legal advisor, Harvard Law professor Laurence Tribe, while not on point with regard to Kagan's degree of involvement (if any) in the litigation, has likely generated at least as much attention as all of the other e-mails combined. Referring to the floor votes with respect to the health care bill's potential but not yet actualized passage, Kagan, a friend and former colleague of Tribe's while she was the Dean at Harvard Law, wrote, "I hear they have the votes, Larry!! Simply amazing."³⁶⁹

The Tribe sequence may make for headlines and talk show fodder but unlike the internal OSG e-mails, it is simply not troubling by the standards of Supreme Court recusal norms. As former Attorney General Mukasey—hardly a person ideologically inclined to be sympathetic to President Obama or sweeping regulatory schemes—argued in his op-ed on the topic, "[s]tatements of opinion to friends or former colleagues do not count here."³⁷⁰

Consider, as a comparative matter, the chasm of difference between Justice Breyer's involvement, described in Part I, as the primary legislative force behind the sentencing guidelines to Justice Kagan's e-mail to Professor Tribe. Justice Kagan not only did not create the scheme, but she is simply cheering, to a friend and colleague, a huge legislative development on an issue that had gripped and divided the nation at least as far back as Bill Clinton's first term.³⁷¹ Indeed, the

366. E-Mail from Neal Katyal, former Deputy Solicitor Gen., to Elena Kagan, Assoc. Justice, U.S. Supreme Court (May 17, 2010, 1:19 PM) (<http://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf>) (forwarding E-Mail from Tracy Schmalzer, Spokesperson, Justice Dep't, to Neal Katyal, former Deputy Solicitor Gen. (May 17, 2010, 1:03 PM)).

367. E-Mail from Neal Katyal, former Deputy Solicitor Gen., to Elena Kagan, Assoc. Justice, U.S. Supreme Court (May 17, 2010, 1:19 PM) (<http://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf>) (forwarding E-Mail from Neal Katyal, former Deputy Solicitor Gen., to Tracy Schmalzer, Spokesperson, Justice Dep't (May 17, 2010, 1:04 PM)).

368. E-Mail from Neal Katyal, former Deputy Solicitor Gen., to Elena Kagan, Assoc. Justice, U.S. Supreme Court (May 17, 2010, 1:19 PM) (<http://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf>).

369. Jake Tapper, *Then-Solicitor General Kagan on Health Care Bill Wrote 'I Hear They Have The Votes!! Simply Amazing'*, ABC NEWS BLOGS (Nov. 16, 2011, 11:32 AM), <http://abcnews.go.com/blogs/politics/2011/11/then-solicitor-general-kagan-on-health-care-bill-wrote-i-hear-they-have-the-votes-simply-amazing/>.

370. Michael B. Mukasey, *The ObamaCare Recusal Nonsense*, WALL ST. J., Dec. 5, 2011, available at <http://online.wsj.com/article/SB10001424052970204012004577070162911944188.html>.

371. See Catherine Hoffman, *National Health Insurance—A Brief History of Reform Efforts in the U.S.* (Kaiser Family Found., Menlo Park, Cal.) (Mar. 2009), available at <http://www.kff.org/healthreform/upload/7871.pdf> (providing history of the Clinton administration's defeat in its health reform efforts to obtain universal

Kagan-Tribe e-mail, even in its exclamation points, call to mind Justice O'Connor's private outburst at an election-night party in November 2000. The most detailed reporting on Justice O'Connor's reaction was done by *Newsweek*, which reported that:

[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 . . . when CBS anchor Dan Rather called Florida for Al Gore. "This is terrible," she exclaimed . . . 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.

Justice O'Connor, of course, later cast a decisive fifth vote in *Bush v. Gore*,³⁷² making Justice O'Connor's decision to participate no doubt a non-disqualification decision presumably favored by many of the partisans now arguing for Justice Kagan's disqualification. In any event, as UCLA Professor Eugene Volokh wrote on his widely-followed blog, "That [Justice Kagan] cheered the law's passage . . . does not require her recusal . . . Even assuming she loves the law, her personal political views do not require her to recuse any more than Justice Scalia's personal or religious views about abortion require his recusal [in abortion-related cases]."³⁷³

The issue of Justice Kagan's involvement in the litigation, however, presents a closer call.³⁷⁴ Much like Justice Thomas's failure to disclose Mrs. Thomas's income, the case favoring Justice Kagan's participation is not without a blemish. While the White House's official posture and Kagan's direct, unequivocal, oral response to Senator Coburn's question in her confirmation hearing reflect a Solicitor General who was entirely walled off from any participation in the administration's litigation strategy in defense of the Affordable Care Act, the internal e-mails indeed reveal a much more nuanced picture.

In Professor Volokh's words, "she worked as Solicitor General while the [Act] was in Congress and the Justice Department began developing its defense strategy. Under normal circumstances, the former SG would need to recuse in a case of this sort."³⁷⁵ Indeed, even if the effort to wall Kagan off from consideration were more successful than it appears to have been, then, as George

coverage, employer and individual mandates, competition between private insurers and government regulation).

372. See *Bush v. Gore*, 531 U.S. 1046 (2000); see also Richard K. Neumann, Jr., *Conflicts of Interest in Bush v. Gore: Did Some Justices Vote Illegally*, 16 GEO. J. LEGAL ETHICS 375 (2003).

373. Jonathan H. Adler, *Mukasey on the ObamaCare "Recusal Nonsense"*, THE VOLOKH CONSPIRACY (Dec. 5, 2011, 8:51 AM), <http://volokh.com/2011/12/05/mukasey-on-the-obamacare-recusal-nonsense/>.

374. Comparing the arguments for disqualifying Justice Thomas and Justice Kagan, a *Washington Post* editorial asserted, in this author's view, correctly, that Kagan's participation is a "more delicate and difficult" matter. Editorial, *Health Care and the High Court*, WASH. POST, Dec. 4, 2011, available at http://www.washingtonpost.com/opinions/health-care-and-the-court/2011/12/02/gIQA1FbjTO_print.html.

375. Adler, *supra* note 373.

Washington Law's Jonathan Turley noted to the *Los Angeles Times*, "[t]he prior anticipation of this problem only magnifies the problem on one level. Kagan looks like a pocket justice—someone selected from the president's inner circle to guarantee a vote on his most important legislative matter."³⁷⁶ Whether one agrees with Turley's conclusion or not, the e-mails certainly reveal that the anticipation of the problem was handled in a sub-optimal manner. Thus, to apply former Attorney General Mukasey's standard of "absent any evidence to the contrary," there is now, at the least, enough evidence to militate strongly in favor not necessarily of Justice Kagan's recusal, but of a transparent and reasoned explanation of her decision to participate in the case.

CONCLUSION

This Article, authored, in the interest of disclosure, by an academic and citizen who favors the health care overhaul, asserts that neither Justice Thomas nor Justice Kagan needed to recuse themselves from reviewing the law. Relative to the Court's historical norms, as considered in Part II, Justice Kagan's decision as to her participation, however, presents a closer call than Justice Thomas's decision as to his own. Ultimately, the profile of the issue, and the nature of the heat, rather than light, that so marked the partisan opportunism and rhetoric surrounding each Justice's participation presents an important and teachable moment. To that end, Chief Justice Roberts's focus on disqualification in his year-end report is a positive step.

In the end, Chief Justice Roberts's defense of the Court's disqualification practices boils down to the assertion that when it comes to disqualification, the Supreme Court is constitutionally and pragmatically different. If taken too far or if invoked as talisman, that reasoning could easily cause more problems than it solves for the rule of law. The Chief Justice's argument is neither fully emotionally nor intellectually satisfying. This Article asserts, however, that in an imperfect world, his argument is also entirely correct.

Neither Justice Kagan nor Justice Thomas explained their decision not to disqualify themselves from the case. Fulsome explanations from Justice Kagan and Justice Thomas along the lines of Justice Scalia's memorandum in *Cheney* and Judge Reinhardt's similarly thorough analysis of his own participation in *Perry* would have served not just one, but two distinct and substantial national interests. First, an elevated dialogue on issues of judicial disqualification would do service to the nation and the precepts on which it was founded. Second, there is a national interest in the legitimacy and perceived legitimacy of the Court's ruling on the merits of the Affordable Care Act. In similar future controversies, the Court's standards-based approach will continue to succeed in warding off

376. James Oliphant, *Kagan, Thomas Pressed to Stay Out of Healthcare Fight*, L.A. TIMES, Dec. 1, 2011, available at <http://articles.latimes.com/2011/dec/01/news/la-pn-kagan-thomas-20111201>.

rules frameworks, or worse, the imposition of rules frameworks by branches external to the Court, only if the Court's members commit to increasing the transparency of the reasoning behind their decisions on disqualification. The teachable moments on disqualification are in the Court's court.