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### Rehnquist, Recusal, and Reform

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# REHNQUIST, RECUSAL, AND REFORM

*Jeffrey W. Stempel\**

## INTRODUCTION

In September 1986, the Senate confirmed William H. Rehnquist as Chief Justice of the United States by a vote of 66 to 33, an unusually close vote for a successful Supreme Court nominee.<sup>1</sup> Although Justice Rehnquist's elevation from Associate to

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\* Assistant Professor of Law, Brooklyn Law School. B.A. 1977, University of Minnesota. J.D. 1981, Yale Law School. Special thanks to Don Elliot, Geoffrey Hazard, Will Hellerstein, Larry Marshall, and Dave Van Zandt, who commented on a draft of this Article. Thanks also to Guido Calabresi, Nancy Fink, Arthur Pinto, David Trager and participants at the Brooklyn Law School faculty forum for ideas and support. Terri Pandolfi, Rayf Berman, and Lyle Brooks provided research assistance above and beyond the call of duty, avarice, or coercion. This Article is dedicated to the late Harold Chase, Professor of Political Science at the University of Minnesota, a teacher and scholar who touched deeply the lives of his students and who believed fervently in the rule of "neutral principles" (see Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959)), but held as the ultimate neutral principle that "special situations require special approaches." I only wish I could give Hal an adequate memorial.

<sup>1</sup> See Greenhouse, *Senate, 65 to 33, Votes to Confirm Rehnquist as 16th Chief Justice*, N.Y. Times, Sept. 18, 1986, at A1, col. 1. Chief Justice Rehnquist received the highest number of negative votes of any Justice confirmed by the Senate. *Id.* at A1, col. 2.

To some extent, Chief Justice Rehnquist was probably, in part, a victim of the modern, more critical, Senate role in the confirmation process. At some times in American history, Supreme Court appointments have been confirmed with little scrutiny and comparative ease. During the first 80 years of the Republic, court appointees were subjected to intense ideological and political scrutiny. In the 20th Century, Senate review was commonly limited to relatively soft questions of the nominee's competence and integrity. Since the unsuccessful attempt in 1968 of President Lyndon Johnson to elevate Associate Justice Abe Fortas to Chief Justice, the Senate has given greater scrutiny to the financial dealings, experience, legal philosophy and judicial competence of Supreme Court and other federal court nominees. See *After Bork Hearings, a 'Strict Scrutiny' Precedent?*, NAT'L L.J., Oct. 12, 1987, at 5, col. 1. President Richard Nixon's unsuccessful attempts to appoint G. Harold Carswell and Clement Haynesworth to the Court and President Reagan's unsuccessful nominations of Judge Robert Bork and district court nominee Jefferson Sessions, and the hairbreadth confirmation of Seventh Circuit Judge Daniel Manion illustrate the current, more arduous path of judicial nominees. Nonetheless, Chief Justice Rehnquist's appointment difficulties, like those of Justice Fortas, are particularly unusual in that they involved elevation of a sitting Justice who has previously received the Senate's seal of approval. However, Justice Rehnquist was originally confirmed by a vote of 68 to 26, also one of the highest negative votes ever for a successful nominee. See *Rehnquist Confirmed by Senate, 68-26*, N.Y. Times, Dec. 11, 1971, at A1, col. 4.

Chief Justice engendered substantial criticism because of his judicial philosophy, past political activity, and possible views on race relations,<sup>2</sup> the most serious threat to his nomination arose from his decision fifteen years earlier to sit and cast the deciding vote in a Supreme Court case in which many questioned both his impartiality and his candor.<sup>3</sup>

That Justice Rehnquist's role in *Laird v. Tatum*<sup>4</sup> became the chief figurative thorn in his side says more about the way our system treats the question of the disqualification of Supreme Court Justices than it does the merits of Justice Rehnquist's decision in that case. This Article discusses the *Tatum* case and Justice Rehnquist's participation in the decision. Like most, I conclude that the Chief Justice made a grave error by participating in *Tatum*.<sup>5</sup>

More important, however, is the substantial systemic defect that permitted this error to occur and stand without review. This Article examines the federal law governing disqualification, the prevailing federal court procedures for deciding disqualification questions, and the Supreme Court's flawed practice of permitting each Justice to make a final and unreviewable decision on matters of recusal. The absence of review by a neutral third party has permitted too many questionable recusal decisions by even the most revered Supreme Court Justices. To correct this result, this Article proposes a statutory amendment providing for review of disqualification motions denied by Supreme Court

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<sup>2</sup> See Greenhouse, *supra* note 1, at A1, col. 2.

<sup>3</sup> *Laird v. Tatum*, 408 U.S. 1 (1972).

Ironically, another of the serious charges leveled against Justice Rehnquist during the confirmation hearings, that as an active local Republican he discouraged minorities from voting at polling places in Phoenix in the early 1960s, was made by former assistant United States Attorney James Brosnahan, now a private practitioner at San Francisco's Morrison & Foerster. As a result, Justice Rehnquist has recused himself in several matters pending before the Court where Brosnahan is counsel. See Mauro, *Anti-Bork Trial Lawyer Has His Day*, *Legal Times*, August 24, 1987, at 9, col. 1.

<sup>4</sup> 408 U.S. 1 (1972).

<sup>5</sup> Chief Justice Rehnquist's participation in *Tatum* was noted with disapproval by several Senators during the hearings and floor debates on his confirmation. See *The Nomination of Justice William H. Rehnquist To Be Chief Justice of the United States: Laird v. Tatum*, 99th Cong., 2d Sess. 12412 (1986) (letters from Professor Geoffrey C. Hazard, Yale Law School and Professor Stephen Gillers, New York University of Law) [hereinafter Hazard letter and Gillers letters]; *Nomination of William H. Rehnquist to Be Chief Justice of the United States: Report from the Committee on the Judiciary, United States Senate*, 99th Cong. 2d Sess. 66 (remarks of Senators Biden, Kennedy, Metzenbaum, Leahy, Simon, Mathias); See also Greenhouse, note 1 *supra*.

Justices.

## I. TATUM AND THE REHNQUIST CONFIRMATION

### A. *The Tatum Case*

In *Laird v. Tatum*,<sup>6</sup> a group of anti-Vietnam War activists challenged the constitutionality of the United States Army's domestic surveillance program. The program, begun in the late 1960s and continuing through the early 1970s, was an attempt by the Nixon Administration to follow the activities of American dissidents. The apparent justification for the program was a belief that there was a better than random possibility that domestic dissidents might also engage in crimes such as sabotage, vandalism, or other prohibited acts.<sup>7</sup> Army Intelligence agents monitored the activity of these dissidents, although the government initially had no knowledge of any subversive activity on their part other than disagreement with some aspects of foreign or domestic policy. The Army compiled substantial data about the affected dissidents from non-observation sources as well.<sup>8</sup>

When the program was discovered and publicized in a *Washington Monthly* article,<sup>9</sup> plaintiff Arlo Tatum and others<sup>10</sup> filed suit in the United States District Court for the District of Columbia against Secretary of Defense Melvin Laird and others contending that the domestic surveillance impermissibly chilled their protected First Amendment rights to free expression, punished their exercise of that right, and violated their Constitutional right to privacy.<sup>11</sup> The defendants moved to dismiss, alleging that the matter was not justiciable.<sup>12</sup> The district court granted defendants' motion.<sup>13</sup> On appeal, a three-judge panel of

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<sup>6</sup> 408 U.S. 1 (1972).

<sup>7</sup> *Id.* at 4-5.

<sup>8</sup> *Id.* at 6-7 (Army Intelligence also gathered documentary evidence about the dissidents' lives and activities).

<sup>9</sup> *Id.* at 2 n.1.

<sup>10</sup> Tatum's co-plaintiffs were other individuals who had been observed pursuant to the program. *Id.* at 6. Laird's co-defendants were Army Intelligence personnel involved in the program. *Id.* at 6-7.

<sup>11</sup> *Id.* at 9-10.

<sup>12</sup> The defendant's argument, which the Court accepted, was that the program's alleged chilling effect was not a sufficiently concrete injury to give plaintiffs standing to sue and that the relief requested would thrust the judiciary impermissibly into the business of the Executive Branch. *Id.* at 15.

<sup>13</sup> *Tatum v. Laird*, No. 459-70 Civ. (D.D.C. Apr. 22, 1970).

the D.C. Circuit reversed, finding that the case was justiciable and that the plaintiffs had standing.<sup>14</sup> Defendants sought and obtained a writ of certiorari.<sup>15</sup>

### B. *Justice Rehnquist's Participation*

According to the anecdotal history of the case, plaintiffs' counsel were surprised that Justice Rehnquist participated in the case. The *Tatum* plaintiffs had assumed that the Justice would disqualify himself from any participation in the case because of his service as head of the Justice Department's Office of Legal Counsel to the White House during the time in which the Administration, presumably with the approval of that office, instituted the domestic surveillance program.<sup>16</sup> In addition, Justice Rehnquist had testified before a Senate committee investigating the government's data banks of individual citizens.<sup>17</sup> Distinguished legal ethics experts believed that Justice Rehnquist should reasonably have been expected to be a deponent had the *Tatum* case gone forward due to his high position in a small law office involved in the matter, and also because his public comments on the case and issue revealed a familiarity that invited exploration.<sup>18</sup> By hearing *Laird v. Tatum*, Justice Rehnquist was ruling on a case in which he was likely to be involved, thereby violating Lord Coke's venerable maxim that "[n]o man should

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<sup>14</sup> *Tatum v. Laird*, 444 F.2d 947 (D.C. Cir. 1971).

<sup>15</sup> 404 U.S. 955 (1971).

<sup>16</sup> See MacKenzie, *Mr. Rehnquist's Opinion*, N.Y. Times, Aug. 25, 1986, at A25, col.

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Why did the [*Tatum*] plaintiffs wait until they had lost before moving to disqualify Justice Rehnquist? They said they feared offending the Court needlessly when it seemed possible he would not participate without having to be asked. Senator [Sam] Ervin had urged caution on them, saying he was sure the Justice would recognize the need to disqualify himself.

*Id.*

<sup>17</sup> *Federal Data Banks, Computers and the Bill of Rights: Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary*, 92d Cong., 1st Sess. 600-604 (1971) [hereinafter 1971 Ervin Hearings].

<sup>18</sup> William H. Rehnquist, *Privacy, Surveillance, and the Law*, Remarks before the National Conference of Law Reviews, Williamsburg, Va. (March 19, 1971) (reprinted in 1971 Ervin Hearings, *supra* note 17, at 1590-1596) ("I believe that no legitimate interest of any segment of our population would be served by permitting individuals or groups of individuals to prevent by judicial action, the government's gathering [of] information . . ."). *Id.* at 1593.

be a judge of his own case."<sup>19</sup>

Apparently impervious to any surprise that may have attended the oral argument, Justice Rehnquist participated in the argument and voted with the five-member Court majority that found the *Laird v. Tatum* case nonjusticiable.<sup>20</sup> After finding the case unsuitable for judicial determination, the Supreme Court mandate ordered the lower court to dismiss Tatum's complaint, thereby ending the litigation and precluding any possible deposition of Justice Rehnquist or other discovery that might have illuminated his role in the domestic surveillance program.<sup>21</sup>

### C. Justice Rehnquist's Memorandum and its Aftermath

#### 1. The Memorandum

The *Tatum* plaintiffs petitioned the Supreme Court for rehearing on the basis of Justice Rehnquist's failure to disqualify himself. The Court denied the petition, ending the matter on the merits.<sup>22</sup> Justice Rehnquist, in an unusual act, wrote separately, for publication, a memorandum explaining and attempting to

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<sup>19</sup> See Gillers letter, *supra* note 5, at 12305; Hazard letter, *supra* note 5, at 12412. Lord Coke's oft-quoted maxim is from *Dr. Bonham's Case*, 8 Co. 114a, 118a (c.p. 1610).

<sup>20</sup> 408 U.S. 1 (1972). Justiciability is a broad term meaning essentially that the matter presented to the court is appropriate for judicial determination. To be justiciable, a case must be one in which a federal court can competently render an informed decision issuing an effective remedy without unduly intruding upon the coordinate branches of the federal government. See C. WRIGHT, *THE LAW OF FEDERAL COURTS* 312 (4th ed. 1983).

Justice Rehnquist's insensitivity to the disqualification issues raised by his participation in *Tatum* is inconsistent with what he later reported to be his approach to his decision to recuse himself in *United States v. Nixon*, 418 U.S. 683 (1974), the famed Watergate tapes case. According to Justice Rehnquist, he easily determined that he was barred as a former member of the Nixon Justice Department from participating in the case and, despite curiosity, absented himself from the spectators gallery as well as the bench when the case was argued in order to avoid even the appearance of impropriety. See W. REHNQUIST, *THE SUPREME COURT 89-90* (1987) ("Although I would like to have heard the arguments just as a matter of interest, I decided that there was no place I could possibly sit in the courtroom and hear them without giving rise to speculation that perhaps I was secretly participating in the case after all, and so I simply remained in my chambers during the argument.").

<sup>21</sup> 409 U.S. 901 (1972).

<sup>22</sup> *Id.* The *Tatum* plaintiffs filed a motion for leave to file a second petition for rehearing based on the evidence that came to light during Justice Rehnquist's confirmation hearings. The Court denied the motion, 55 U.S.L.W. 3258 (Oct. 14, 1986), apparently with Justice Rehnquist's participation, suggesting that the Chief Justice remained uncontrite over the *Tatum* affair despite the Senate hearings.

justify his decision to participate in *Laird v. Tatum*.<sup>23</sup>

In this memorandum, Justice Rehnquist characterized the attack on his impartiality as essentially a criticism of his conservative judicial philosophy regarding access to courts and questions of justiciability.<sup>24</sup> He applied the then-current version of the general judicial disqualification statute<sup>25</sup> to the question as framed by him, and concluded that his generalized legal views did not make him "biased" within the meaning of the statute.<sup>26</sup> He also characterized the recently promulgated American Bar Association (ABA) Code of Judicial Conduct as the essential equivalent of the disqualification statute.<sup>27</sup> Justice Rehnquist concluded that if he was not disqualified by statutory examination, he was *ipso facto* not disqualified by Code examination. Justice Rehnquist continued to press his views 20 months later, in a speech before the Association of the Bar of the City of New York,<sup>28</sup> stressing his distinction between actual bias in a case or toward a litigant (which would disqualify a judge or a Justice) and the judge's judicial philosophy regarding the legal question in the case (which would not).

## 2. Change in the Law; Perceptions of Justice Rehnquist

The general disqualification statute was amended in 1974<sup>29</sup> to enact a stricter, more comprehensive and objective disqualification law.<sup>30</sup> In its final form, the statute, which changed significantly the former law, incorporated Canon 3(c) of the ABA Code of Judicial Conduct.<sup>31</sup> The reformist tide was given additional force by Justice Rehnquist's participation in *Tatum*.<sup>32</sup>

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<sup>23</sup> 409 U.S. 824 (1972).

<sup>24</sup> *Id.* at 835.

<sup>25</sup> 28 U.S.C. § 455 (1970). In 1974, the statute was substantially rewritten. See text accompanying notes 31-34, *infra*. The text of the revised statute is set forth in note 50 *infra*.

<sup>26</sup> 409 U.S. at 824.

<sup>27</sup> *Id.* at 825 (citing ABA, CODE OF JUDICIAL CONDUCT Canon 3C (1972)).

<sup>28</sup> Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 THE REC. OF THE ASS'N. OF THE BAR OF THE CITY OF NEW YORK 694 (Nov. 1973).

<sup>29</sup> 28 U.S.C. § 455 (1982).

<sup>30</sup> H. REP. NO. 1453, 93rd Cong., 2d Sess. 3, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6351.

<sup>31</sup> Compare MODEL CODE OF JUDICIAL CONDUCT (1972) [hereinafter ABA CODE] with 28 U.S.C. § 455 (1974). See also Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43 (1970).

<sup>32</sup> See H.R. REP. NO. 1453, 93d Cong., 2d Sess. 3, reprinted in 1974 U.S. CODE CONG.

However, any focus on either the case, Justice Rehnquist's behavior, or the issue of disqualification standards was short-lived, largely extinguished by the amendment of the disqualification statute. Two law review notes discussed the matter in detail; one focused on Justice Rehnquist's participation in *Tatum*,<sup>33</sup> while the other addressed generally the disqualification standards affecting judges.<sup>34</sup> The former article highlighted some inconsistencies in Justice Rehnquist's recusal memorandum but concluded that his conduct fell within the zone of defensibility.<sup>35</sup> The latter article found Justice Rehnquist's participation, although precluded by the 1972 ABA Code, consistent with the former law, and concluded that a new statute incorporating the Code's standards would go far to remedy the substantive faults of the old body of disqualification law.<sup>36</sup>

Although any reformist outrage over Justice Rehnquist's role in the *Tatum* case soon subsided, the memorandum still possessed doctrinal impact, making its way into some legal texts as a summary of Supreme Court recusal practice<sup>37</sup> and by lower courts for its endorsement of a judicial "duty to sit" in close cases to prevent the disqualification law from being abused and

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ADMIN. NEWS 6351, 6356 (Rather than directly criticize Justice Rehnquist's role in *Tatum*, the House Report instead blamed the ambiguity of the statute for Justice Rehnquist's need to explain his decision in a separate memorandum.).

<sup>33</sup> Note, *Justice Rehnquist's Decision to Participate in Laird v. Tatum*, 73 COLUM. L. REV. 106 (1973).

<sup>34</sup> Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736 (1973).

<sup>35</sup> Note, *supra* note 33, at 124. Although not specifically focused on Justice Rehnquist's participation in *Tatum*, commentary as recent as 1986 but prior to Justice Rehnquist's confirmation hearings had continued to hold the view that his conduct was defensible if not perfectly correct. See Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 502 (accepting Justice Rehnquist's version of facts as stated in *Tatum* memorandum, authors conclude that public utterances on legal issues arising in subsequent Court cases do not disqualify Justice because "bias that comes from the judge's intellectual or political position . . . differs from the type of bias that occurs when an individual adjudicates an issue with which she has had prior involvement"). See also Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U.L. REV. 237, 283-92 (1987) (prior legal opinions should not disqualify judge who remains genuinely willing and able to listen to all arguments and who is not influenced by personal considerations or extrajudicial knowledge of adjudicative facts).

<sup>36</sup> Note, *supra* note 34, at 764.

<sup>37</sup> See, e.g., J. MASHAW & R. MERRILL, *INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM* 405 (1975). See also G. GUNTHER, *CONSTITUTIONAL LAW* 1593 n.3 (9th ed. 1975).

becoming analogous to peremptory challenges of jurors.<sup>38</sup> Justice Rehnquist's conduct in *Tatum* was essentially a non-issue from 1974 until his confirmation hearings in 1986. If anything, his behavior in *Tatum* was validated rather than vilified during that time.

## II. RE-EXAMINING JUSTICE REHNQUIST'S RECUSAL MEMORANDUM

In order to appreciate the shortcomings of the procedural status quo and the need for reform, some critical analysis of the merits of Justice Rehnquist's *Tatum* decision is required. Although preferring not to engage in what may be viewed by some as "Rehnquist bashing," reflection on the merits of his conduct in *Tatum* is essential. His activities in *Tatum* were not worthy of authoritative status, but were perhaps the most glaring example in this century of the deleterious effects of permitting Supreme Court Justices to be recusal law unto themselves.

Before re-examining Justice Rehnquist's conduct and analysis in *Tatum*, a brief discussion of the theoretical basis of disqualification rules is in order. The American judicial system proceeds from the premise that its judges are impartial toward the litigants, disinterested in the specific outcome of the case, and not personally involved in the matters that they adjudicate. Although seldom specifically stated, this view of the system requires that judges who fail to meet these criteria in a given case refrain from participation in that case. The implicit rationale for what most would construe as "common sense" rests on the assumption that judges who are personally involved with a case, who will be affected by the case's outcome, or who are previously committed to a position in that particular case are psychologically unlikely to be able to render an impartial, detached, fairly reasoned adjudication of the matter. In addition, the notion that judges must be impartial and must recuse themselves in cases where they lack impartiality rests on the fear of a biased judge

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<sup>38</sup> See, e.g., *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976); *Kelley v. Metropolitan County Board of Education*, 479 F.2d 810 (6th Cir. 1973); *United States v. Ferguson*, 550 F. Supp. 1256 (S.D.N.Y. 1982); *Idaho v. Freeman*, 507 F. Supp. 706 (D. Idaho 1981); *United States v. International Business Machs. Corp.*, 475 F. Supp. 1372 (S.D.N.Y. 1979); *Smith v. Pepsico, Inc.*, 434 F. Supp. 524 (S.D. Fla. 1977), *Bradley v. Milliken*, 426 F. Supp. 929 (E.D. Mich. 1977); *Virginia Electric and Power Co. v. Sun Shipbuilding and Dry Dock Co.*, 407 F. Supp. 324 (E.D. Va. 1976), *vacated and remanded*, 539 F.2d 357 (4th Cir. 1976).

pursuing a hidden agenda in case disposition and upon the need to preserve public confidence in the fairness of the courts.

These policies and the rule requiring impartiality are thwarted when the judge, even if not subject to financial or other incentives to bias a decision, has committed himself or herself to a result in that case prior to hearing all parties in accordance with prescribed procedures and prior to coming to decision through proper judicial method and reasoning. For example, a judge's pre-trial stated opinion that "the defendant is guilty as sin" would constitute grounds for disqualifying the judge from presiding over the unsavory defendant's trial. However, a judge's pre-trial views on a legal issue likely to arise in the case are not generally considered grounds for recusal. Thus, the judge's statement that "the sixth amendment does not require me to grant a criminal defendant 50 peremptory challenges to the jury venire" would not disqualify the judge.

The key basis for distinction seems to require a focus on the level of generality of the judge's pre-case opinion and whether the judge's views prior to trial indicate prejudgment of the particular case in question or merely prejudgment of legal issues that might arise in the case. Where the judge's statements or committed acts suggest that the judge decided the case outside the bounds of normal adjudicatory procedure and timing, disqualification is appropriate.

#### A. *Justice Rehnquist's Conduct in Tatum: A Merits Analysis*

Justice Rehnquist's actions in *Laird v. Tatum* are subject to criticism on several grounds. First, he failed to raise the issue and to inform or remind the parties of his position in the Justice Department during the period in question, and of his connection to at least the periphery of the case. Second, he mischaracterized his actual role in the legal oversight of the surveillance plan and his bias against the particular plaintiffs and their claims. He also understated his own personal stake in the matter. Third, in his memorandum seeking to justify his conduct, he misrepresented the applicable substantive law and mischaracterized the real issues presented by his participation in *Tatum*. Fourth, he articulated and defended a view of Supreme Court ethics and recusal procedure that is questionable and probably outmoded, if not clearly incorrect. Fifth, and certainly most important from a bottom-line perspective, he heard and decided a case in which at

least three ethical rules forbade his participation.

### 1. Failure to Disclose

Although Justice Rehnquist's role as Nixon Administration spokesman to Congress regarding Congressional concern about surveillance was hardly a secret, neither was it prominent. Because some of Justice Rehnquist's conduct occurred as part of the internal activities of a law office, many, if not most, of the facts about his role and prejudices concerning the *Laird v. Tatum* litigation were obscure, if not absolutely unknowable, to the litigants in *Tatum*.<sup>39</sup> Under these circumstances, the proper course would have been full disclosure by Justice Rehnquist of his involvement and an invitation to the parties to register any objections to his participation.<sup>40</sup>

The prudential advantages of this approach are enhanced by what appears to be a long-standing tradition of litigants not to raise the issue of disqualification, but rather to presume that any individual Justice who should disqualify him or herself will do so.<sup>41</sup> Lawyers practicing before the Supreme Court hold the institution and its members in great respect. The formal and informal rules of etiquette in approaching the Court are strong.<sup>42</sup>

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<sup>39</sup> The Justice Department's Office of Legal Counsel usually is staffed by approximately 15 lawyers. The function of the Office is to render legal advice to the President and Executive Branch. Frequently, the Office renders opinions regarding the constitutionality of matters under consideration by the Executive. The work of the Office is low profile, if not zealously guarded as top secret. The attorneys of the Office have a client relationship with the White House, presumably enhancing their desire for confidentiality.

<sup>40</sup> See ABA CODE, *supra* note 31, Canon 3C(1)(a)-(b) (1972).

<sup>41</sup> The reported Court opinions frequently contain a statement at the end of the decision to the effect that Justice X took no part in the decision. No further official explanation is recorded. The Court's public information officer will not elaborate in response to questions unless given specific information and permission to disclose by the Justice's Chambers. This seldom occurs. Among Court-watchers, these self-announced non-participants are usually explained as recusals because of conflicts of interest or the result of an illness or other unavailability of Justice X.

<sup>42</sup> Stern, Gressman and Shapiro's *Supreme Court Practice*, the leading manual concerning practice before the Court, devotes a good deal of its 960 pages to educating the reader about Court folkways and logistics. R. STERN, E. GRESSMAN & S. SHAPIRO, *SUPREME COURT PRACTICE* (6th ed. 1986). Not coincidentally, I believe, this thorough and respected text says nothing about making disqualification motions to judges. The issue of appellate recusal in general has received little attention by commentators. See, e.g., R. LYNN, *APPELLATE LITIGATION* (1985); R. STERN, *APPELLATE PRACTICE IN THE UNITED STATES* (1981) (manuals make no mention of disqualification practice).

Consequently, few, if any, litigants in a pending case would raise the recusal issue absent factual support, and often that fact base lies largely or exclusively within the knowledge of the potentially affected Justice.<sup>43</sup> Because of this longstanding atmosphere of deference, a Justice should err on the side of disclosure and the highlighting of any potential disqualification problem.

Because Justice Rehnquist did not raise the issue, *Tatum* plaintiffs and counsel could perhaps be criticized for failing to broach the subject and make a record of the matter. The critique seems especially apt in light of plaintiffs' later motion raising the matter which demonstrated knowledge of quite a few facts supporting Justice Rehnquist's disqualification.<sup>44</sup> Although technically correct, such criticism ignores the strong traditions of deference and good manners prevailing in Supreme Court practice and demonstrates that twenty-twenty hindsight always improves litigation strategy. Giving credence to such an argument deflects blame from its proper epicenter: the Chief Justice and the system that permits Justices to sit in judgment on themselves.

## 2. Misstatement of Facts

Although a material omission can be as harmful as a material misrepresentation, generally, failing to raise facts is less culpable than intentionally shading or misstating them. Justice Rehnquist did both. In his recusal memorandum, he represented that he had no direct involvement in the Justice Department's oversight and approval of the domestic surveillance at issue in *Tatum*.<sup>45</sup> Information that came to light at his confirmation hearing as Chief Justice revealed this version of the facts to be incorrect.<sup>46</sup>

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<sup>43</sup> See Hazard letter, *supra* note 5, at 12412 ("The fact that Justice Rehnquist chose not to reveal his role in developing the program challenged in *Laird*, thereby denying the plaintiffs a chance to argue that his participation required disqualification, compounds his impropriety.").

<sup>44</sup> See Plaintiffs' Petition for Rehearing, *Laird v. Tatum* (on file with the Brooklyn Law Review).

<sup>45</sup> 409 U.S. at 826.

<sup>46</sup> *The Nomination of Justice William H. Rehnquist To Be Chief Justice of the United States: Laird v. Tatum*, 99th Cong., 2d Sess. 12307-08 (letter from Professor Floyd Feeney, University of California, Davis, and Barry Mahoney, Attorney, Denver, Colorado).

In addition, in his recusal memorandum, Justice Rehnquist failed to note his status as a potentially key deponent and discovery figure in the case should it survive the government's motion to dismiss. He also failed to admit that he had publicly stated what can be regarded as a view on the merits of the case. Specifically, he neglected to note that as Assistant Attorney General he opined that "no legitimate interest of any segment of our population would be served by permitting individuals or group[s] of individuals to prevent by judicial action, the government's gathering [of] information."<sup>47</sup> In his memorandum, Justice Rehnquist characterized the plaintiffs' petition for rehearing and his disqualification as based solely on his status as an Assistant Attorney General. In fact, plaintiffs had raised other, arguably more compelling reasons, for his recusal.<sup>48</sup>

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<sup>47</sup> See 1971 Ervin Hearings, *supra* note 17, at 621, 1593 (quoting William Rehnquist, "Privacy, Surveillance, and the Law," Remarks before the National Conference of Law Reviews, Williamsburg, Va. (March 19, 1971)). Although this statement can be characterized as a general statement of the Justice's intellectual position on a legal or political issue, which would not under prevailing law disqualify the Justice, this is also a *de facto* statement about the *Tatum* case, then pending in federal court, especially so in light of Justice Rehnquist's knowledge of both the surveillance program and the challenge to it. Under these circumstances, Justice Rehnquist did more than merely express a generalized legal opinion. In context, what he said seems to me an expression of a decision against the argument he knew was to be made by specific plaintiffs in a particular case with which he was not only familiar but previously involved. Under these circumstances, this statement, while not as straightforward as "I think *Tatum* should lose", is tantamount to such a declaration.

As Justice Rehnquist himself observed, Justices can not be expected to be empty-headed clean slates. However, to have truly impartial adjudication, the judge or Justice must be at least reasonably capable of refining or amending his or her abstract legal opinions in light of the facts presented in actual cases. This can not occur when the Justice comments about legal issues with knowledge of their presence in a particular case. In addition, a Justice's prior legal opinion comments linked directly or indirectly to a pending case convey an unacceptable appearance of prejudgment that appears improper to reasonable laypersons and undermines confidence in the judiciary. See *United States v. Thompson*, 483 F.2d 527 (3d Cir. 1973) (judge disqualified for statements of bias toward draft resisters as a class); Leubsdorf, *supra* note 35, at 286-88 (previous legal opinions suggesting inability to render fair hearing should disqualify judge); Comment, *Questioning the Impartiality of Judges: Disqualifying Federal District Court Judges Under 28 U.S.C. § 455(a)*, 60 TEMPLE L.Q. 697, 721 (1987) ("Courts could adopt [pursuant to rationale of *Thompson*] the rule that while policy statements should not generally provide grounds for disqualification, an exception will be made when a statement or action would lead a reasonable person to conclude that the judge is predisposed to violating his or her oath or ignoring a mandate.").

<sup>48</sup> A Justice with even a well-developed but abstract legal view is unlikely to have anticipated the application of that legal perspective in exactly the matter presented by a concrete case heard by the Court. In their recusal motion, the *Tatum* plaintiffs moved

### 3. Mischaracterization of Law and Legal Issues

In addition to shading and occasionally misstating the facts, Justice Rehnquist grossly misstated the applicable legal standard by which he claimed to be governing himself. In his memorandum, he framed the legal question as whether a justice must disqualify himself because of his judicial views.<sup>49</sup> Having set up this straw person, he then proceeded to knock it down quite convincingly. In fact, the correctly phrased legal question should have been whether a justice should recuse himself or herself because of: (a) prior involvement in approving the government conduct at issue; (b) personal knowledge of the facts of the case; (c) likely status as a discovery target in the case; or (d) prior statements about the case suggesting that he or she had prejudged the matter. Phrased correctly, the legal question would have presented a more forceful challenge to Justice Rehnquist's participation in the case. According to the facts then available, he could not have answered the question persuasively in favor of participating in *Laird v. Tatum*. Subsequent disclosures of fact have made the answer to the proper question even clearer.

In his memorandum, Justice Rehnquist also made a serious mischaracterization. He stated that the legal standard for disqualification set forth in 28 U.S.C. section 455, the general federal disqualification statute then in effect,<sup>50</sup> was the essential

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for Justice Rehnquist's disqualification on the basis of: his statements at the Ervin hearings on the merits of the case; his view that government information gathering could never violate the first amendment; his at least titular approval of a Justice Department memorandum concluding that the challenged program was legal; and his role as Administration spokesperson defending the practice. Plaintiff's Petition for Rehearing, *Tatum*, 408 U.S. 1 (No. 71-288), *reh'g denied*, 409 U.S. 901 (1972).

<sup>49</sup> 409 U.S. at 825.

<sup>50</sup> 28 U.S.C. § 455 (1971). The version of 28 U.S.C. section 455 in force during 1971 and 1972 read as follows:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

The pertinent provisions of the ABA CODE OF JUDICIAL CONDUCT approved by the ABA House of Delegates in August, 1972 concerning recusal provide:

Canon 3C: Disqualification

(1) A judge should disqualify himself in a proceeding in which his *impartiality might reasonably be questioned*, including but not limited to instances where:

equivalent of the ABA Code of Judicial Conduct.<sup>51</sup> Physical juxtaposition suggests that the Code, with pertinent portions roughly three times as long as former section 455, is somewhat different from the old statute. More searching substantive analysis confirms this.

Former section 455 required disqualification in situations where the challenged judge or justice could be said to be "biased" against one of the litigants or had a significant financial interest in the outcome of the case. The Code, much of which ultimately became the current version of section 455, made several changes in the old law. Most of the changes dealt with tightening the definitions and rules concerning financial interest or the involvement of business colleagues or relatives in a case.

The Code and new section 455<sup>52</sup> provide that any financial interest, no matter how trivial, in the outcome of a case disqualifies the judge or justice from hearing the matter. The Code also establishes a *per se* rule requiring recusal if any of the parties to the case is represented by a relative of the judge or judge's spouse within the third degree of relationship.<sup>53</sup> In addition, the

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(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

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

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

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (i) is a party to the proceeding, or an officer, director, or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; (iv) is to the judge's knowledge likely to be a material witness in the proceeding; . . .

ABA CODE, *supra* note 31, Canon 3C (emphasis added).

<sup>51</sup> 409 U.S. at 825-829.

<sup>52</sup> The current section 455 adopts virtually intact the Code of Judicial Conduct's comprehensive and stringent prohibitions of a Judge participating in a case in which he has a financial interest or that involves a close relative. More important, the current section 455(a) adopted the Code's requirement that a judge or justice "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (1982).

<sup>53</sup> Under the civil law method of determining degrees of kinship, adopted by the Code, spouses, siblings, children, and the siblings and children of a spouse are all consid-

Code establishes clearer and less discretionary recusal standards in situations where a judge's former law colleague represents a party to the litigation.

The Code's most important substantive difference from the former statute affecting Justice Rehnquist in *Tatum*, however, is its replacement of the requirement of actual bias against a litigant with the more comprehensive and flexible rule requiring recusal whenever a judge or justice's "impartiality might reasonably be questioned."<sup>54</sup> In any but the most irrefutable circumstances, proving actual bias becomes difficult if the accused judge denies bias. Since recusal decisions are usually made in the first instance by the allegedly biased judge, and reviewed with some deference by an appellate court, the actual bias standard came to be viewed by the ABA and Congress as providing too little protection for a system whose authority is largely premised on evenhandedness and public confidence.<sup>55</sup>

Applied to Justice Rehnquist in *Tatum*, the "impartiality reasonably questioned" standard clearly tips the scales in favor of his disqualification. Even under the sketchy facts available in 1973, Justice Rehnquist's impartiality toward the *Tatum* case and plaintiffs was, at a minimum, questionable, and probably doubtful. At any rate, the Code standards for disqualification are clearly stricter than the criteria for former section 455 criteria. Justice Rehnquist's assertion that the two were essentially the same lacks support.

Of course, Justice Rehnquist was only legally obliged to follow the statute prevailing at the time.<sup>56</sup> He could have expressly

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ered to be within the third degree of relationship. First cousins and more distant relatives are outside the third degree of relationship and the corresponding reach of current disqualification statute 28 U.S.C. § 455; ABA CODE, *supra* note 31. See 13A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3548 (1984) [hereinafter WRIGHT & MILLER].

<sup>54</sup> See note 50 *supra*.

<sup>55</sup> H.R. REP. NO. 1453, 93d Cong. 2d Sess. 3, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6351, 6352. In enacting current section 455, the House viewed an actual bias standard as inadequate to assuage public fears of biased judging, saying:

Th[e] statutory and ethical provisions [of section 455] proved to be . . . indefinite and ambiguous . . . [and] conflicting . . . The effect of the existing situation is not only to place the judge on the horns of a dilemma [since he was the sole decider of the substantiality of interest or of the relationships which would be improper and lead to disqualification] but, in some circumstances, to weaken public confidence in the judicial system.

<sup>56</sup> See Thode, *The Code of Judicial Conduct — The First Five Years in the Courts*,

rejected any moral obligation to follow the Code. Such candor, however, would probably have increased attention to, and criticism of, his decision against recusal. The notion of a Supreme Court Justice refusing to adhere to a carefully written Code of Conduct at least ostensibly obeyed by the rest of the bench seems inherently a matter of concern. Rather than evoke such concern by candidly rejecting the Code that prevented his participation in a case in which his impartiality could be reasonably questioned, Justice Rehnquist instead cleverly equated the Code and the former statute. He then jumped over the Code on his way to do battle with the straw person legal argument he had also cleverly but incorrectly constructed to argue against the former statute's application. Viewed from a fourteen year retrospective, Justice Rehnquist's treatment of the applicable legal standards inspires no more confidence than his decision to decide *Tatum*.

#### 4. Perpetuation of Questionable Standards

##### a. The "Duty to Sit"

Finally, the recusal memorandum performed a far more reaching disservice to the judicial system by outlining and seemingly sanctifying customs working against recusal that were then under heavy criticism and due to be buried by Congressional action within two years. Specifically, Justice Rehnquist relied upon the "duty to sit" doctrine.<sup>57</sup> This doctrine holds that in cases where the challenged judge faces a serious and close disqualification decision, the judge should decide in favor of sitting and against recusal in order to minimize intrusions on fellow judges and enhance judicial efficiency, as well as to discourage the bringing of disqualification motions by litigants as a variant of forum or judge shopping.<sup>58</sup>

The duty to sit doctrine should be distinguished from the "rule of necessity," which holds that in cases where there exists

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1977 UTAH L. REV. 395 (Judicial Conference of the United States lacks jurisdiction over Supreme Court). Although this position may be technically correct, there seems no logical reason for Justices not to conform their conduct to the Code, as do other judges, so long as the Code provisions fall within the zone of rationality.

<sup>57</sup> 409 U.S. at 837.

<sup>58</sup> See *Edwards v. United States*, 334 F.2d 360, 362 n.2 (5th Cir. 1964), *cert. denied*, 379 U.S. 1000 (1965); Frank, *supra* note 31, at 51.

no reasonable judicial alternative (usually no provision for appointment of a disinterested judge), the judge facing the case must of necessity hear and decide the case so that the claim does not go unresolved.<sup>59</sup> The rule of necessity runs particularly strong in situations where recusal would operate to deny a litigant any judicial forum for enforcing claimed rights. The classic application of the doctrine has concluded that the federal bench is not disqualified from hearing cases challenging laws affecting federal judicial salaries.<sup>60</sup> The reasoning, largely correct in this instance, holds that if one judge is disqualified for this seeming financial interest, all are disqualified, and the case cannot be heard anywhere in the federal court system.<sup>61</sup>

Although Justice Rehnquist's *Tatum* memorandum spoke only of the duty to sit, it evoked portions of the rule of necessity by characterizing the ground for his disqualification as mere aversion to his judicial philosophy, thus implying that his recusal in *Tatum* would subject all judges with views on legal issues to disqualification.<sup>62</sup> A second look at the facts of *Tatum* suggests this view was unwarranted. Because the legitimate challenges to Justice Rehnquist's participation in *Tatum* focused on the facts of his connection to the case rather than his legal views, his recusal would not have suggested that other judges or Justices must disqualify themselves.

In support of his endorsement of the duty to sit doctrine, Justice Rehnquist cited several cases, the most prominent of

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<sup>59</sup> See *United States v. Will*, 449 U.S. 200, 213-16 (1980).

<sup>60</sup> *Id.* at 215-16.

<sup>61</sup> *Id.* at 215. Although the rule of necessity seems essential at least in some form, one can question whether courts have done all possible to minimize potential bias in cases where the issue affects judges as a class. For example, it is not absolutely required that the judiciary make the initial decision on laws such as that at issue in *United States v. Will*, affecting the collective judicial pocketbook. Temporary special masters or reviewing panels could be established to find facts and make preliminary legal decisions, with participation of the affected judges reduced to review under the clearly erroneous standard.

Furthermore, the conflict of interest possessed by all federal judges also fails to establish an absolute "necessity" since state courts could be relied upon to adjudicate federal constitutional issues, although this would pose the possibility of inconsistent rulings in various jurisdictions. See, Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 492-93 (1986) (citing *Testa v. Katt*, 330 U.S. 386 (1947)).

<sup>62</sup> 409 U.S. at 837, 838-39.

which was *Edwards v. United States*.<sup>63</sup> What Justice Rehnquist failed to mention about *Edwards* was that it had been subjected to substantial criticism.<sup>64</sup> The criticism, ultimately accepted by Congress,<sup>65</sup> continued during consideration of amendments to the disqualification statute.<sup>66</sup> Essentially, the conclusion was that public confidence in the judiciary was undermined by a doctrine that could be read as suggesting that in close cases judges should err in favor of participation. Rather, the judicial tiebreaker should tend in the other direction, compelling recusal in the close cases to avoid any taint of bias in the disposition of the matter.

At the time he wrote to defend his conduct in *Tatum*, Justice Rehnquist clearly was contending with growing professional sentiment in favor of abolishing the duty to sit rationale. Nonetheless, the memorandum, as the product of a Supreme Court

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<sup>63</sup> 334 F.2d 360 (5th Cir. 1964). Justice Rehnquist also cited *Tynan v. United States*, 376 F.2d 761 (D.C. Cir. 1967); *In re Union Leader Corp.*, 292 F.2d 381 (1st Cir. 1961); *Wolfson v. Palmieri*, 396 F.2d 121 (2d Cir. 1968); *Simmons v. United States*, 302 F.2d 71 (3d Cir. 1962); *United States v. Hoffa*, 382 F.2d 856 (6th Cir. 1967); *Tucker v. Korner*, 186 F.2d 79 (7th Cir. 1950); and *Walker v. Bishop*, 408 F.2d 1378 (8th Cir. 1969) for the proposition that the duty to sit doctrine was widely recognized and well established in the federal courts. 409 U.S. at 837.

*Edwards* was the best known of the cases cited by Justice Rehnquist, and the case that became the focus of Congressional scrutiny in abolishing the doctrine. Earlier cases, however, most notably *In re Union Leader*, 292 F.2d 381, *Tucker v. Kerner*, 186 F.2d 79, and *Sanders v. Allen*, 58 F. Supp. 417 (S.D. Cal. 1944) had espoused the doctrine and policy reasons supporting it ("It is the duty of the judge not to permit the use of an affidavit of prejudice as a means to accomplish delay and otherwise embarrass the administration of justice."). *Sanders*, 58 F. Supp. at 420. Taken literally, all of the cases cited above say only that judges should not recuse themselves if the legal standard is not met. Since this states only a truism applicable to all judicial rulings, the connotative message of the cases could also be read as suggesting that judges rule against disqualification in close situations.

<sup>64</sup> See, e.g., Frank, *supra* note 31, at 58-60. Frank argues persuasively that the duty to sit doctrine as espoused in *Edwards* ran counter to the Supreme Court's own approach to close disqualification questions in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), in which the Court required that an arbitrator "disclose to the parties any dealings which might create an impression of possible bias." *Id.* at 149.

<sup>65</sup> See *Judicial Disqualification: Hearing on S.1064 Before Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 2, 74 (1973) (statement of Quentin Burdick (D-N.D.)), Chairman, Senate Judiciary Comm.).

<sup>66</sup> See *Blizard v. Frechette*, 601 F.2d 1217, 1220 (1st Cir. 1979); *Baker v. City of Detroit*, 458 F.Supp. 374, 376 (E.D. Mich. 1978); *WRIGHT & MILLER*, *supra* note 53, § 3549, at 611; S. REP. No. 419, 93d Cong., 1st Sess. 5 (1973), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6351.

Justice, was widely read and deferred to by some. Even after the revised section 455 expressly eliminated the duty to sit doctrine, reported cases continued to invoke it, citing Justice Rehnquist's *Tatum* memorandum.<sup>67</sup> In essence, a single Justice's flawed and self-interested work both lobbied against a useful change and delayed, at least in small part, the full effect of the change. Rather than term this a failing particular to Justice Rehnquist, I prefer to view it as a symptom of a defective system for deciding Supreme Court recusal questions.

#### b. Past Recusal Failings as Inspiration

Perhaps a more important defect in the perspective of Justice Rehnquist's memorandum was its treatment of the past practices of Supreme Court Justices concerning recusal. In essence, he endorsed the past without critically re-examining it, even when dealing with clearly questionable practices. The memorandum argued against the heightening ethical consciousness that was propelling the ABA Code and the revision of section 455. One can argue that Justice Rehnquist was entitled to consider precedent as a factor in his decision. Although this view is at least partially correct, this article contends that the past recusal practices of Justices do not deserve the deference normally accorded case precedents. The latter result from procedurally rigorous adjudication and decision by a neutral judicial body with a record of its proceedings. The former result from an individual Justice's private, unreviewed, and potentially self-interested determination. Past recusal practices may have some status as history, but they should not automatically become guideposts or codes of adequate minimum conduct. Consequently, Justice Rehnquist, although clearly entitled to review these historical episodes, should have begun his analysis from a neutral or skeptical rather than deferential posture.

Justice Rehnquist cited a number of historical instances of Justices participating in questionable cases, and endorsed their behavior.<sup>68</sup> Upon closer examination, the examples he chose

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<sup>67</sup> See, e.g., *Martin-Trigona v. Shiff*, 600 F.Supp. 1184 (D.D.C. 1984); *United States v. Blohm*, 577 F. Supp. 495 (S.D.N.Y. 1983); *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1976), *cert. denied* 434 U.S. 1009 (1977). See also Note, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. Chi. L. Rev. 236, 241 n.26 (1978).

<sup>68</sup> 409 U.S. at 830-33. See notes 70-121 and accompanying text *infra*.

were far from aspirational, or even recommended. Some appear distinctly erroneous and subject to condemnation. Despite its wide sweep, Justice Rehnquist's memorandum only scratched the surface of a Supreme Court history rife with questionable recusal practices and conduct widely condemned by today's standards of disqualification. The next section of this Article proceeds to address these relative low points in the Court's history.

### III. THE COURT AND DISQUALIFICATION: AN UNIMPRESSIVE RECORD

#### A. *Justice Rehnquist's Examples*

##### 1. Justice Holmes

In his memorandum, Justice Rehnquist set forth numerous examples where Justices participated in cases under circumstances he implied were similar to or more serious than his own in *Tatum*. By implication, he suggested that their conduct validated his participation in *Tatum*. A closer look at these examples reveals them to be questionable or erroneous in themselves, and an example of the potential for abuse existing in the current system of Supreme Court recusal practice.

Justice Rehnquist defended his own decision by pointing to the revered Justice Oliver Wendell Holmes who, "after his appointment to this [United States Supreme] Court, sat in several cases which reviewed decisions of the Supreme Judicial Court of Massachusetts rendered, with his participation, while he was Chief Justice of that court."<sup>69</sup> Justice Rehnquist cited four cases that Justice Holmes heard and decided both as a Massachusetts Justice and as a Supreme Court Justice.<sup>70</sup> Not surprisingly, Justice Holmes felt the same way about the outcomes of these cases each time he voted.

By today's law and mores, Justice Holmes' conduct is improper, although perhaps not illegal. Section 47 of the Judicial

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<sup>69</sup> 409 U.S. at 836.

<sup>70</sup> *Id.* (citing *Worcester v. Worcester Consolidated St. Ry. Co.*, 196 U.S. 539 (1905), *reviewing* 182 Mass. 49, 64 N.E. 581 (1902); *Dunbar v. Dunbar*, 190 U.S. 340 (1903), *aff'g*, 180 Mass. 170, 62 N.E. 248 (1901); *Glidden v. Harrington*, 189 U.S. 255 (1903), *aff'g* 179 Mass. 486, 61 N.E. 54 (1901); *Williams v. Parker*, 188 U.S. 491 (1903), *aff'g* 174 Mass. 476, 55 N.E. 77 (1899)).

Code clearly states that, "[n]o *judge* shall hear or determine an appeal from the decision of a case or issue tried by him."<sup>71</sup> The literal text of the section suggests it does not apply to Supreme Court Justices.<sup>72</sup> Nonetheless, in the modern era, Justices appointed to the Supreme Court from lower federal courts appear to have refrained from participating in cases coming to the high Court in which they participated as lower court judges.<sup>73</sup>

During the years 1899-1902, when Justice Holmes performed his dual voting, a similar version of the disqualification law was also in force but, like the present statute, applied only to judges.<sup>74</sup> In 1908, the ABA promulgated Canons of Ethics,<sup>75</sup> many of which were already in force in many states. In 1924, the ABA issued its first Code of Judicial Conduct.<sup>76</sup> Like the current law and Code, they applied by their terms only to judges and not Justices. At the risk of retrospective iconoclasm, one could argue quite convincingly that Justice Holmes' conduct was probably inconsistent with the prevailing view on disqualification during his day as well as the current view.

Holmes' conduct was wrong by any objective standard as well. Supreme Court Justices simply should not hear and decide cases they previously decided as judges. The opportunity for a Justice to act as investigator, jury, and judge of his or her own

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<sup>71</sup> 28 U.S.C. § 47 (1982) (emphasis added).

<sup>72</sup> *Id.* Cf. 28 U.S.C. § 455 (1974) (specifically stating that a "justice" is subject to its provisions).

<sup>73</sup> Obtaining accurate information in this area is difficult because of the private nature of Court proceedings. Non-participation of Justices may not always be declared. See generally Miller and Sastri, *Secrecy and the Supreme Court: On The Need For Piercing the Red Velour Curtain*, 22 *Buff. L. Rev.* 799 (1973). Furthermore, only a mammoth search of the circuit court opinions of elevated judges-turned-Justices would reveal the complete data base, and that inquiry is realistically beyond the scope of this Article. However, we do know that Chief Justice Burger did not participate in the Court's certiorari proceedings concerning D.C. Circuit cases in which he wrote. See *Investment Co. Inst. v. Camp*, 397 U.S. 986 (1970); *General Telephone Co. of California v. FCC*, 396 U.S. 888 (1969); *Star Television, Inc. v. FCC*, 396 U.S. 888 (1969). The same is true of Justice Stewart, (see *Torre v. Garland*, 358 U.S. 910 (1958); *Zoomar, Inc. v. Paillard Prods., Inc.*, 358 U.S. 908 (1958)) and Justice Harlan (see *Shaughnessy v. United States*, 349 U.S. 280 (1955)). Most recently, Justice Scalia recused himself from a Supreme Court case in which he had voted for a rehearing petition in his former capacity as a D.C. Circuit Judge. See Taylor, *Reagan Powers to Bar Alien Visits Are Limited*, *N.Y. Times*, Oct. 20, 1987, at A26, col. 1.

<sup>74</sup> Act of March 3, 1891, ch. 517, § 6, 26 Stat. 827.

<sup>75</sup> See *The Origin and Adoption of the American Bar Association's Canons of Judicial Ethics*, 52 *JUDICATURE* 387 (1969) (citing 34 *ABA Rep.* 88 (1909)).

<sup>76</sup> ABA, *CANONS OF JUDICIAL ETHICS* (1924).

impartiality has produced a glaring impropriety. The same process that allowed this conduct by Justice Holmes permitted Justice Rehnquist to endorse and legitimate this misconduct seven decades later.

## 2. Former Attorneys General Jackson and Murphy

Justice Rehnquist's *Tatum* memorandum also cited, with at least mild approval, questionable conduct of Justices Black, Frankfurter, Stone, Jackson, Murphy, and Vinson.<sup>77</sup> Justice Frank Murphy was the incumbent United States Attorney General when *Schneiderman v. United States*<sup>78</sup> was beginning to make its way through the court system. *Schneiderman* was a denaturalization proceeding prosecuted successfully by the Justice Department at the district and circuit court levels, but reversed by the Supreme Court.<sup>79</sup>

While the *Schneiderman* district court proceedings were pending, Frank Murphy was nominated and confirmed as an Associate Justice.<sup>80</sup> Robert Jackson succeeded him as Attorney General and held that post when the circuit court reviewed *Schneiderman*. Between the circuit court decision and Supreme Court review, Robert Jackson became a member of the Court.<sup>81</sup> When the case came before the Supreme Court, Justice Jackson recused himself, stating that as Attorney General he had "succeeded to official responsibility" for the case and that he considered this a "cause for disqualification."<sup>82</sup> Justice Murphy, however, participated in the decision and wrote the majority opinion.<sup>83</sup>

Justice Jackson had been Solicitor General before and dur-

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<sup>77</sup> 409 U.S. at 830-36.

<sup>78</sup> 33 F. Supp. 510 (N.D. Cal. 1940), 119 F.2d 500 (9th Cir. 1941), *rev'd*, 320 U.S. 118, *reh'g denied*, 320 U.S. 807 (1943).

<sup>79</sup> *Id.*

<sup>80</sup> Justice Murphy was nominated by President Franklin Roosevelt on January 4, 1940 and confirmed by the Senate on January 16, 1940. 86 Cong. Rec. 29, 317 (1940).

<sup>81</sup> Justice Jackson was nominated by President Roosevelt on June 12, 1941 and confirmed by the Senate on July 7, 1941. 87 Cong. Rec. 5, 5061; 87 Cong. Rec. 6, 5848 (1941). The *Schneiderman* circuit court decision was issued on April 28, 1941. 119 F.2d 500 (9th Cir. 1941). The Supreme Court heard oral argument in *Schneiderman* on November 9, 1942 and reargument on March 12, 1943. *Schneiderman* was decided on June 21, 1943. 320 U.S. 807 (1943).

<sup>82</sup> 320 U.S. at 119.

<sup>83</sup> 320 U.S. at 207.

ing Justice Murphy's tenure as Attorney General and was thus arguably more familiar with and committed to the case from its inception than was Justice Murphy. However, this attempted distinction is unpersuasive. The prosecution was initiated by the United States Attorney for the Northern District of California and reviewed by the Ninth Circuit. One doubts that even the most well-informed Attorney General or Solicitor General would have been aware of the case. Nevertheless, most observers would probably be more comfortable if neither one had voted on the matter as Supreme Court Justices.

At a minimum, the *Schneiderman* episode makes the behavior of Supreme Court Justices appear inconsistent, and holds the potential for undermining respect for the Court. The case report contains no helpful information other than Justice Jackson's statement for the record. The chronic absence of a factual record regarding court disqualification decisions constitutes another defect in a system that has no formal means of adjudicating recusal decisions. Perhaps fine distinctions between the two Justices' behavior can be made in terms of degree of personal knowledge, conduct as counsel, prejudgment of the case, or some other factor. Nonetheless, one is left with the impression that the different decisions are most probably only the result only of the differing internal standards of two men and the system that makes each Justice an ethical island for purposes of recusal.

### 3. The Legislator-Justices: Black, Frankfurter, and Vinson

Justice Black was the principal author of the Fair Labor Standards Act ("FLSA" or "the Act") while serving as United States Senator from Alabama.<sup>84</sup> The Senate passed the Act, and its constitutionality was challenged in *United States v. Darby*.<sup>85</sup> Not surprisingly, Justice Black decided that he did not author an unconstitutional law.<sup>86</sup> Justice Rehnquist praised, rather than

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<sup>84</sup> As chairman of the Senate Labor and Education Committee, he presided over hearings on the bill reported to the full Senate. See 409 U.S. at 831.

<sup>85</sup> 312 U.S. 100 (1941). See also G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 199 (1977) (in *Darby*, Justice Black acted to achieve Court construction of Act interpreting legislative power and Act's scope as broad).

<sup>86</sup> See *United States v. Darby*, 312 U.S. 100 (1941). A unanimous Court ruled that the restrictions on employer discretion imposed by the Fair Labor Standards Act were a proper exercise of federal power under the Commerce Clause and did not deprive the employer of property without due process of law. *Id.*

questioned Justice Black's participation in the case.<sup>87</sup> Justice Rehnquist also spoke favorably of Justice Black's participation in later cases construing the Act,<sup>88</sup> particularly *Jewell Ridge Coal Corp. v. Local 6167, U.M.W.*<sup>89</sup> *Jewell Ridge* concerned the issue of whether certain time going to and from coal mines should be included in the maximum work week limited established in the Act. The Court held that this transit time should be included in computing the work week.

Even where as in *Darby*, the court's decision regarding constitutionality turns out to be unanimous, it is unwise to let Justices decide the constitutionality of laws they have written. Presumably a legislator, especially one thoughtful enough to be chosen as a Supreme Court Justice, considers the constitutional implications of any proposed statute upon which he or she must vote. Presumably, the constitutional inquiry is more searching when the legislator authors the bill. The Justice who authored a law under review will be knowledgeable and articulate about that law. Consequently, he may persuade the entire Court of the law's constitutionality. Under these circumstances of potential undue influence, the unanimous Court vote does not make the Judge's participation "harmless error."

One cannot imagine a legislator who has become a Justice having not at least preliminarily decided against any possible constitutional defects in the law. A legislator-Justice's impartiality is clearly subject to reasonable question under section 455(a) and he should not participate in the case. This problem must have been particularly acute in *Darby* due to Justice Black's active role in writing and shepherding to passage the FSLA. It strains the concept of impartiality to suggest that Justice Black was not prejudiced to find his progeny constitutional.

The role of the former legislator adjudicating the constitutionality of his creations could be likened to that of a judge considering a case involving a legal issue on which he has previously expressed a view. In the latter situation, recusal is seldom required. The general rule is that opinions on the law do not disqualify judges. As Justice Rehnquist noted in his *Tatum* memo-

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<sup>87</sup> 409 U.S. at 831 (Rehnquist's memo).

<sup>88</sup> *Id.*

<sup>89</sup> 325 U.S. 161 (1945).

random, judges are supposed to have legal opinions.<sup>90</sup>

This Article suggests, however, that the situation posed by the legislator-turned-Justice ruling on laws he authored resembles more closely a judge's predetermination of a question of fact rather than a mere opinion on the law. The legislator-Justice has presumably made a factual determination that his law is constitutional; this is something more than a mere view of the legal landscape. Yet, even if the Justice's attitude toward his legislative product is construed to be only an opinion of law rather than fact, the Justice should nonetheless be disqualified because of his self-interest.

The general theory of recusal permits a judge to hold legal opinions based on the tacit assumption that the judge arrived at his opinion through impartial analysis.<sup>91</sup> This does not mean that the judge approached the legal issue with no philosophy, ideology, education, or legal experience. It must mean, at a minimum, that the judge does not come to his legal view because of self-interest. The element of disinterested legal analysis is absent when the former legislator acts as judge or Justice to bless his prior product. This differentiates this category of cases from

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<sup>90</sup> 409 U.S. at 838-39. That Justice Rehnquist's *Tatum* memorandum implicitly approves Justice Black's conduct seems odd in light of Justice Rehnquist's awareness of the internal firestorm created by Justice Black's actions. See W. REHNQUIST, *supra* note 20, at 65-66.

<sup>91</sup> The issue of whether a view of a law, even a prejudgment of the constitutionality of the law, serves to disqualify a judge was recently raised with respect to Supreme Court nominee Robert Bork. See Freiwald, *Bork Speaks Out on Recusal Claim*, *Legal Times*, July 13, 1987, at 2, col. 1. The case at issue involved the question of whether the Ethics in Government Act, 28 U.S.C. Section 591 *et. seq.* (1982) provided a private right of action for citizens seeking to enforce the Act. A panel of the D.C. Circuit, of which Judge Bork was a member, ruled that no private right of action existed. See *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987). Counsel for the plaintiffs later argued that Judge Bork should have disqualified himself because of his role in firing former Watergate Special Prosecutor Archibald Cox, and because in 1973 Judge Bork gave Congressional testimony in opposition to a precursor of the Act.

Judge Bork publicly responded to the charges, contending that (1) no party to the case moved for his recusal prior to decision; (2) his opinions on the 1973 legislation were too attenuated from the Act that passed in 1978 because of differences in the legislation; and (3) his opposing views questioned the constitutionality of the legislation, which was not at issue in the case before the D.C. Circuit. If this version of the facts is substantially correct, prevailing authority and practice is against disqualification. See Freiwald, *supra*, at col 2. In the course of the Senate's refusal to confirm Judge Bork to the Supreme Court, many arguments were raised against Bork by his opponents but this incident was not among them. See Greenhouse, *Bork Nomination Is Rejected*, 58-42, *Reagan 'Saddened'*, *N.Y. Times*, Oct. 24, 1982, at A7, col. 3.

those rightly declining disqualification on the basis of a judge's general view of the law or a law written by someone else.

The question of Justices participating in cases requiring construction of statutes they helped author is more defensible than a legislator-Justice's constitutional adjudication but nonetheless is inappropriate. Those opposing recusal can point to the Justice's knowledge of the statute and its enactment history and characterize this as a valuable resource to the other Justices. The counter-argument, however, is that the legislator-Justice nonetheless is biased in favor of saving constructions or interpretations that facilitate his or her concept of the statute, even in cases where other legislative forces did not share the legislator-Justice's perspective.

Although not as problematic as a constitutional attack, the interpretative case still presents too strong a possibility that the legislator-Justice will use the occasion to achieve the statute he or she wanted to write rather than the one the legislature actually passed and the executive signed.<sup>92</sup> As Constitutional Convention delegate Rufus King argued concerning the constitutional propriety of advisory opinions, "[j]udges ought to be able to expound the law as it should come before them free from the bias of having participated in its formation."<sup>93</sup> The same approach should apply to legislator-Justices. At a minimum, participation by the legislator-Justice in the interpretative case poses a great risk of impermissible *ex parte* contacts and influence of off-the-record facts in the Court's decision-making.

The pitfalls of the legislator-Justice participating in the interpretative case are well-illustrated by the very case Justice Rehnquist cites in his *Tatum* memorandum in tacit approval of the practice. Justice Black voted with the majority in *Jewell Ridge Coal Corp. v. Local 6167, U.M.W.*,<sup>94</sup> which interpreted the

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<sup>92</sup> See Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914 (1976). This danger appears to have reached fruition in Justice Frankfurter, whose participation in cases involving labor legislation he authored is discussed at text accompanying notes 97-104 *infra*. See *id.* at 914 n.1; Kadish, *Labor and the Law*, in FELIX FRANKFURTER: THE JUDGE 164 (W. Mendelson ed. 1964).

<sup>93</sup> See Rakove, *Mr. Meese, Meet Mr. Madison*, ATLANTIC MONTHLY, 77, 85 (Dec. 1986); J. MADISON, NOTES OF THE CONSTITUTIONAL CONVENTION 61 (Koch ed. 1984) (debates regarding proposed Council of Revision; Mon., June 4, 1787). King was a distinguished Federalist leader, serving as a delegate from Massachusetts to the Continental Congress and a Senator from New York. See generally R. ERNST, RUFUS KING (1968).

<sup>94</sup> 325 U.S. 161 (1945).

FLSA to include travel time between coal mines as part of the forty-hour work week established in the Act. The majority, in a five-to-four decision, made several declarations regarding Congressional intent in passing the FLSA.<sup>95</sup>

Writing in dissent, Justice Jackson stated that “[n]either invalidation nor disregard of collectively bargained agreements is authorized by any word of Congress, and legislative history gives convincing indications that Congress did not intend the Fair Labor Standards Act to interfere with them as this decision holds it does.”<sup>96</sup> To support this view, the dissenters drew upon floor debates involving Justice Black in his former role as a Senator.<sup>97</sup>

Regardless of the merits of the holding of the case, it is troubling that the chief author of the statute under review cast the deciding vote where legislative intent was a hotly disputed matter. Equally troubling is, given Justice Black’s conduct, Justice Rehnquist’s decision to implicitly lionize him. Justice Rehnquist’s *Tatum* memorandum states that Justice Black’s “Senate role with respect to the Act was never a source of criticism for his participation” in *Jewell Ridge* and other cases interpreting the FLSA.<sup>98</sup>

Justice Rehnquist’s characterization seems to give an unduly narrow reading to the dissent in *Jewell Ridge*. It was also a lost opportunity for Justice Rehnquist to go on record as supporting a higher standard of conduct. Instead, Justice Rehnquist not only endorsed Justice Black’s actions as legislator-Justice, he incorrectly implied that the legal body politic accepted them. Justice Rehnquist went on to approve of similar conduct by Justice Frankfurter, who “played an important, perhaps dominant, part in the drafting of the Norris-LaGuardia Act” yet later participated in and wrote the majority opinion in *United States v. Hutcheson*,<sup>99</sup> which interpreted the scope of that Act.<sup>100</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> 325 U.S. at 170-71 (citation omitted).

<sup>97</sup> 325 U.S. at 172-73.

<sup>98</sup> 409 U.S. at 831.

<sup>99</sup> 312 U.S. 219 (1941). *Hutcheson* addressed whether the use of concerted and organized union picketing and strike activity against a common employer arising out of a jurisdictional dispute between unions violated the Sherman Act’s anti-boycott provisions. In a six to two decision written by Justice Frankfurter, the Court held that the conduct was within the meaning of a “labor dispute” as defined by the Norris-LaGuardia Act and, therefore, protected from prosecution under the Sherman Act. In construing the Norris-LaGuardia Act that he had helped draft, Justice Frankfurter said that it “must

Justice Frankfurter's conduct cited with approval by Justice Rehnquist, provides a variant illustration of the legislator-Justice difficulty. Justice Frankfurter was never an elected representative, but at times he performed quasi-legislative duties, drafting statutes and providing advice for the Roosevelt Administration. So far as historians know, the Administration's proposed bills were then introduced in substantially the same form in which they were written by Frankfurter. Justice Frankfurter is thus often treated as the real author of the Norris-LaGuardia Act which prohibited many court injunctions of labor disputes, and of other legislation.<sup>101</sup>

Justice Frankfurter not only participated in *Hutcheson*, he wrote the Court's majority opinion. If anything, Justice Frankfurter's lack of formal status as a legislator makes his conduct even less reassuring than that of Justice Black. At least some of Senator Black's statutory activity was open, public, and recorded. As Justice Frankfurter was in an unusually good position both to defend the constitutionality of his legislation and to seek interpretations of it consistent with his own views, rather than the actual intent of Congress.

The full extent of Justice Frankfurter's shadow legislator activities, as well as those of his mentor Justice Brandeis, may never be known.<sup>102</sup> Such action clearly seems to have been widespread, having been chronicled by archival research<sup>103</sup> as well as

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not be read in a spirit of mutilating narrowness" and that the Court must give "hospitable scope' to Congressional purpose even when meticulous words are lacking." 312 U.S. at 235. In dissent, Justice Roberts criticized the majority for taking liberties with the text of the Act, accusing the Court of undertaking "radically to legislate where Congress ha[d] refused so to do." *Id.* at 245 (Roberts, J., dissenting) (citation omitted). In light of Justice Frankfurter's shadow legislator-Justice role, Justice Roberts's criticism becomes more troubling, another instance where more stringent recusal practices would impart greater confidence in Court results.

<sup>100</sup> 409 U.S. at 832 (citing *United States v. Hutcheson*, 312 U.S. 219 (1941)).

<sup>101</sup> 409 U.S. at 832. See also B. MURPHY, *THE BRANDEIS-FRANKFURTER CONNECTION* (1982); M. FREEDMAN, *FRANKFURTER AND ROOSEVELT* (1967).

<sup>102</sup> See Murphy, *Elements of Extrajudicial Strategy: A Look at the Political Roles of Justices Brandeis and Frankfurter*, 69 GEO. L.J. 101, 107 (1980) ("lack of public knowledge of these [extrajudicial] activities is, indeed, a tribute to the Justices' success in concealing them").

<sup>103</sup> See B. MURPHY, note 101 *supra*; Murphy, *supra* note 102, at 108-09. Even after joining the Court, Justices Frankfurter and Brandeis continued to lobby and render advice, orally and in writing. See, e.g. M. FREEDMAN, *supra* note 101, at 531-32, 582-85, 603-05, 652-54, 662-64, 671-75.

The problem of the legislator-justice is hardly confined to the 20th Century. Reliable

the recurring anecdote.<sup>104</sup> Undoubtedly, they were not alone.

Also in his *Tatum* Memorandum, Justice Rehnquist observed that Chief Justice Fred Vinson "never hesitated" to sit in cases involving tax legislation he had drafted and prepared while a member of the United States House of Representatives.<sup>105</sup> Although the cases alluded to by Justice Rehnquist appear to involve interpretative cases rather than constitutional challenges, Chief Justice Vinson's review of legislation that he authored raises the same concerns of legislator-Justices Black and Frankfurter.

For example, the Vinson-Trammel Act,<sup>106</sup> enacted in 1934, was designed to limit the profit that a general contractor could make on the manufacture or construction of United States navy vessels. Thirteen years later, the Supreme Court found a nearly identical profit limitation provision contained in the 1943 Renegotiation Act to be well within the scope of Congress' discretionary powers.<sup>107</sup> Not surprisingly, Chief Justice Vinson took the same view of Congress' ability to regulate private contracts for the good of foreign policy as did Representative Vinson.

#### 4. Connection with Counsel, Lack of Recusal Standards

Justice Rehnquist also discussed another aspect of Justice Black's participation in *Jewell Ridge Coal Corp. v. Local 6167*,

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evidence suggests, for example, that Justices Joseph Story and Stephen Field both authored legislation while on the Court. See W. REHNQUIST, *supra* note 20, at 133-34, 156-57. Justice Field appears to have authored a statute enacted to enable him to decide a case as Circuit Justice for the former 10th Circuit and another bill designed to divest the Court of jurisdiction to review his ruling as Circuit Justice. *Id.* at 156-57.

<sup>104</sup> See Breyer, *In Memoriam: Charles E. Wyzanski, Jr.*, 100 HARV. L. REV. 707, 703 (1987) (Breyer recounts a conversation with Judge Wyzanski in which he asked, "Did you know that Louis Brandeis, while sitting on the Supreme Court, influenced unemployment compensation legislation by having his nonlawyer daughter suggest to potential drafters how such a law might be made constitutional?").

<sup>105</sup> *Tatum*, 409 U.S. at 832. In addition, it appears that Chief Justice Vinson was "an intimate 'crony' of the President [Franklin Roosevelt, who appointed him] and participated in regular poker games at the White House" during his tenure on the Court. See W. REHNQUIST, *supra* note 20, at 70.

<sup>106</sup> Vinson-Trammel Act, Pub. L. 73-135, 48 Stat. 503 (1934), 1979-2 C.B. 310; Rev. Rul. 79-230.

<sup>107</sup> *Lichter v. United States*, 334 U.S. 742 (1948). The relevant portion of the Renegotiation Act of 1943 includes: "IV. An Act to prevent the payment of excessive fees or compensation in connection with the negotiation of war contracts," approved July 14, 1943, c. 239, 57 Stat. 564, 565.

*U.M.W.*<sup>108</sup> in his *Tatum* memorandum. Although Justice Black's legislative role in the FLSA seemed sufficiently accepted to preclude attack on the majority opinion for that reason, petitioners, after having lost the case, sought rehearing on the basis that Justice Black's former law partner was counsel for the prevailing party.<sup>109</sup> Justice Black was unmoved by the post hoc recusal motion; he was sufficiently unmoved that he did not even publish a response on the subject as did Justice Rehnquist. However, Justices Jackson and Frankfurter, concurring in the denial of the rehearing petition, engaged in what Justice Rehnquist described as implicit criticism of Justice Black.<sup>110</sup>

Justice Jackson criticized the absence of an authoritative statute or rule governing Supreme Court recusal, noting with understatement 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."<sup>111</sup> Nonetheless, Justice Jackson, like Justice Rehnquist, seemed to accept as inevitable that Justices would rule with finality upon their own recusal challenges.

##### 5. Other Examples of Nonrecusal in the Rehnquist *Tatum* Memorandum

Irrespective of the soundness of the decisions cited in Justice Rehnquist's *Tatum* memorandum, these episodes underscore the current system's tendency to submerge serious disqualification issues while shielding the conduct of Justices from any pre-decision scrutiny by a neutral adjudicator. At a minimum, the *Jewell Ridge* episode suggests that peer pressure provides an insufficient influence on the recusal decisions of individual Justices.

In *North American Company v. Securities Exchange Commission*,<sup>112</sup> a case involving a company's constitutional challenge to two SEC orders under the Public Utility Holding Company

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<sup>108</sup> 325 U.S. 161 (1945).

<sup>109</sup> 409 U.S. at 831.

<sup>110</sup> *Id.*

<sup>111</sup> *Jewell Ridge*, 325 U.S. at 897.

<sup>112</sup> 327 U.S. 686 (1946).

Act,<sup>113</sup> Chief Justice Stone originally recused himself, although the grounds were not disclosed. When he later discovered that his disqualification, along with that of Justices Reed, Douglas, and Jackson<sup>114</sup> resulted in an absence of a quorum, Chief Justice Stone reversed his position and decided to participate in the case so that a quorum would exist.<sup>115</sup> Chief Justice Stone's view of the flexibility of disqualification standards must be regarded as disturbing.

In his *Tatum* memorandum, Justice Rehnquist also cited other examples of nonrecusal by Justice Jackson and Chief Justice Hughes.<sup>116</sup> In essence, both Justices participated in cases presenting legal issues on which both had expressed opinions prior to their Supreme Court careers. Chief Justice Hughes had written against the substantive due process reasoning that had invalidated the California Child Labor Law in *Adkins v. Children's Hospital*.<sup>117</sup> As Chief Justice, Hughes voted with the ma-

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<sup>113</sup> 49 Stat. 803 (1935); 15 U.S.C. § 79 (1982).

<sup>114</sup> 327 U.S. at 711.

<sup>115</sup> See Frank, *supra* note 31, at 44; Frank, *Commentary on Disqualification of Judges—Canon 3C*, 1972 UTAH L. REV. 377. Frank, like Justice Rehnquist in *Tatum*, took pains to note the finite nature of Court membership and viewed absence of a quorum as a major problem to be avoided. As Frank states:

To avoid one such lack of quorum, after first disqualifying himself in the leading Public Utility Holding Company Act case, Chief Justice Stone withdrew his disqualification so that the case could be decided. Undoubtedly because of the limit on the number of Justices, the Supreme Court Justices have not disqualified casually.

Frank, *supra* note 31, at 44.

Although Frank's comment, like that of Justice Rehnquist in *Tatum*, is not incorrect as narrowly stated, this view tends to imply that Justices should not only avoid casualness, but also should err in favor of participation where recusal would prevent a quorum. Frank's suggestion that Chief Justice Stone's change of heart allowed the *North American* case to be decided overstates the situation. The case had already been decided by the Second Circuit and would have remained decided if the Court had lacked a quorum. When the Court obtained its questionable quorum, it unanimously affirmed the Second Circuit, suggesting that quorum absence due to recusal would hardly have presented a major problem. Admittedly, the constitutional challenge to the Act was an important issue on which a Supreme Court ruling was ultimately desirable, but it was not immediately needed. If the Court believed its authoritative statement on the issue was needed or had wanted to reverse, it could have established the same legal rule in the near future by taking certiorari on a similar case on which a quorum was available. For these and other reasons discussed more fully at text accompanying notes 57-67 *supra*, this Article takes strong exception to any implicit suggestion that the desirability of a Supreme Court quorum permits any relaxation of disqualification standards.

<sup>116</sup> 409 U.S. at 832-33.

<sup>117</sup> 261 U.S. 525 (1923). Chief Justice Hughes criticized the legal reasoning of the

majority that overruled *Adkins* in *West Coast Hotel Co. v. Parrish*.<sup>118</sup>

The Hughes situation seems a classic case of a Justice having an interest in legal issues that later are raised in cases that came before them. Without more, such correlations raise no reasonable question as to impartiality. Chief Justice Hughes apparently had no personal knowledge of the facts in *Parrish*, nor had he a financial interest or a relation with the parties, nor had he made any statements regarding the merits of that particular case. He would not conceivably be a witness or deponent in the matter. Thus, although the Hughes situation was factually distinct from the Rehnquist situation in *Tatum*, it provided Justice Rehnquist's memorandum with its most defensible example of judicial non-recusal. It was also, however, another sort of straw man. No one had questioned the propriety of Chief Justice Hughes' participation in *Parrish*. That was hardly the case in *Tatum*. In essence, Justice Rehnquist took a non-controversial event and treated it as analogous to his own situation in *Tatum*.

Justice Jackson's role in *McGrath v. Kristensen*<sup>119</sup> was slightly problematic because as Attorney General he had submitted an official written opinion on the same legal issue but in a different factual context.<sup>120</sup> This episode, as that in *Parrish*, was not analogous to Justice Rehnquist's situation in *Tatum*. In *McGrath*, Justice Jackson changed his mind concerning a more or less generalized legal question, the construction of a statute in a similar legal but different factual context.<sup>121</sup> He apparently had

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case in his book *THE SUPREME COURT OF THE UNITED STATES* 205, 209-11 (1928).

<sup>118</sup> 300 U.S. 379 (1937). The issue in *Parrish* was whether Congress possessed power pursuant to the Commerce Clause to enact legislation regulating working conditions of workers engaged in activities affecting interstate commerce. The *Parrish* Court held Congress had such power, overruling *Adkins*, which had previously answered the question in the negative.

<sup>119</sup> 340 U.S. 162 (1950).

<sup>120</sup> 39 Op. Att'y Gen. 504 (1940).

<sup>121</sup> *McGrath* involved a Danish citizen in the United States on a temporary visa when the Second World War erupted, preventing his return home. He worked in the United States in violation of this temporary visa, thereby causing the government to bring deportation proceedings against him. The Court upheld a circuit court stay of deportation. Justice Jackson not only participated in the case but also concurred specially to explain that his vote as Justice was a repudiation of his earlier opinion as Attorney General of the statute in question. 340 U.S. at 176. Although the position on prior commitments on an issue taken by this Article could be interpreted to argue for Justice Jackson's recusal in *McGrath* (see text accompanying note 119 *supra*) his memorandum

no factual connection with the *McGrath* case, had not commented publicly on it, and was not a likely target for discovery in the case.

In sum, Justice Rehnquist's memorandum, while it succeeded in seizing the rhetorical offensive concerning his participation in *Tatum*, also, upon closer analysis, provided a chronology of questionable past Supreme Court practices and highlighted many shortcomings of the current system.

### B. *The Supreme Court's Checkered History of Disqualification*

A brief scan of Court history reveals even more questionable episodes. Some can be dismissed as historical relics from a time of differing attitudes concerning conflict of interest and other ethical dilemmas. Nevertheless, these events, undoubtedly only the tip of the metaphorical iceberg, also serve to highlight the inadequacies of the status quo. Viewed in retrospect, the actions of Supreme Court Justices do not consistently suggest impartiality above reproach.

For example, Justice John Jay served simultaneously as ambassador to England and Chief Justice while successfully being elected Governor of New York.<sup>122</sup> Chief Justice John Marshall was at least a nominal party in the watershed *Marbury v. Madison*<sup>123</sup> case, as he was the original Secretary of State charged with delivering the judicial appointments at issue.<sup>124</sup>

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as Attorney General was rendered ten years before the *McGrath* decision and was a more or less generalized legal opinion applied to different factual circumstances. Although it was nonetheless a prior official position taken by Jackson, it hardly constitutes a major breach of even the heightened recusal standards advocated in this article.

<sup>122</sup> See J. MACKENZIE, *THE APPEARANCE OF JUSTICE* (1974); 1 FRIEDMAN & ISRAEL, *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS* ix (1969); D'Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 *TUL. L. REV.* 611, 621 (1987).

<sup>123</sup> 5 U.S. (1 Cranch) 137 (1803). See J. MACKENZIE, *supra* note 122, at 1; FRIEDMAN & ISRAEL, *supra* note 122, at 291.

<sup>124</sup> *Marbury* involved an application for a writ of mandamus by plaintiff James Marbury. Marbury had been appointed a judge by the outgoing Adams Administration. The Jefferson Presidency began before Marbury's judicial commission was physically delivered. Jefferson's new Secretary of State, James Madison, who had replaced John Marshall in the post, refused to deliver the commission that would officially make Marbury a judge.

Marbury filed suit in the Supreme Court, contending that Madison had failed to perform a clear ministerial obligation and that Marbury was therefore entitled to a writ

Justice William Johnson, President Jefferson's first appointment to the Court, regularly engaged in lengthy correspondence with Jefferson in which Jefferson sought to influence the internal functioning of the Court. In many of these letters, Jefferson sought to convince Johnson to work to return the Court to the earlier practice of seriatim opinions rather than the single majority opinion pioneered by Jefferson's arch-rival, Chief Justice John Marshall.<sup>125</sup> Although Johnson's conversations with the President concerning internal Court matters are shocking by today's standards, they also illustrate the wisdom of life tenure (Justice Johnson did not leap to implement President Jefferson's suggestions). Justice Johnson also authored legislation while sitting on the Court.<sup>126</sup>

Justice Samuel Chase, appointed by President Washington in 1796, began his political career as a Republican but converted to the Federalist cause with such enthusiasm that while on the Court he actively and publicly campaigned for the presidency of John Adams.<sup>127</sup> This and some celebrated episodes of intemperance on the bench<sup>128</sup> sufficiently angered Congress that Chase was impeached and tried, but acquitted.<sup>129</sup>

Justice Joseph Bradley, who served on the Court from 1870 until 1892, was criticized as having allegedly prearranged a crucial vote as a condition of his appointment by President

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of mandamus ordering Madison to deliver the commission. Chief Justice Marshall neatly sidestepped this potential impasse between the Executive and the Judiciary by holding that the portion of the Judiciary Act of 1789 that authorized such direct applications to the Court was an unconstitutional enlargement of the Court's original jurisdiction. 5 U.S. (1 Cranch) 137 (1803). G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* 25-27 (1986) (hereinafter "STONE").

Chief Justice Marshall, if operating under today's section 455, would have been required to recuse himself. Some years later, he apparently was more sensitive to the issue, recusing himself in a leading case in which he held a financial interest in some of the lands that were the subject of the lawsuit. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (Branch) 603 (1813); Frank, *supra* note 31, at 45.

<sup>125</sup> Morgan, *Mr. Justice William Johnson and the Constitution*, 57 Harv. L. Rev. 328, 333-35 (1944).

<sup>126</sup> *Id.* at 337. While on the Court, Johnson "felt none of the constitutional scruples which helped to inhibit legislative action. In 1820 he drew up a bill embodying a comprehensive national bankruptcy system." *Id.* (citation omitted).

<sup>127</sup> See D'Alemberte, *supra* note 122, at 625.

<sup>128</sup> See *id.* at 626 (describing Chase's partisan, even histrionic charges to jurors, and refusal to discharge grand jury that failed to deliver Sedition Act indictments).

<sup>129</sup> *Id.* at 627.

Grant.<sup>130</sup> According to the charges, Grant appointed Justice Bradley and Justice William Strong with the understanding that they would attempt to secure reversal of *Hepburn v. Griswold*,<sup>131</sup> which held unconstitutional the use of paper money unsecured by gold to repay civil war debts. One year after Justice Bradley joined the Court, the decision was reversed in *The Legal Tender Cases*.<sup>132</sup> Although the allegations against Justice Bradley are disputed, the circumstances surrounding the Court's sudden reversal left many (principally political opponents) suspicious.

Justice Bradley was also criticized for hearing a petition for appointment of a receiver brought by an old friend acting as counsel for the petitioner. His choice of receiver was also criticized by some who alleged misfeasance in the sale of the debtor's properties.<sup>133</sup> While on the Court, Justice Bradley also sat on the Electoral Commission appointed to settle the disputed 1876 presidential election between Republican Rutherford Hayes and Democrat John Tilden. When he cast his vote in favor of seating all twenty three contested Republican Electors, an action that eventually helped Hayes become President, he again became a focus of controversy.<sup>134</sup>

Justice Melville Fuller, appointed by President Cleveland in 1888, participated in a case involving a former client, the Marshall Field Department Stores of Chicago.<sup>135</sup> The case upheld the constitutionality of tariffs imposed on Field. Fuller dissented. Justice Willis Van Devanter, a 1910 Taft appointee, delivered two opinions in cases involving former client the Union Pacific Railroad.<sup>136</sup> Harding appointee Pierce Butler also delivered court opinions involving his former railroad client, the

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<sup>130</sup> See Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 HARV. L. REV. 977, 978-79 (1941).

<sup>131</sup> 75 U.S. (8 Wall.) 603 (1870).

<sup>132</sup> 79 U.S. (12 Wall.) 457 (1871). See also Fairman, *supra* note 130, at 978-79 (arguing that Bradley's vote was not prearrangement of his nomination).

<sup>133</sup> See 2 FRIEDMAN & ISRAEL, *supra* note 122, at 1190. Counsel for the petitioning bondholders for the Memphis, El Paso and Pacific Railroad was "Bradley's old friend Cortland Parker." The receiver, John A.C. Gray, was alleged by some to have sold franchises and lands of the railroad to another railroad company for inadequate compensation in an atmosphere of conflict of interest. *Id.* at 1191.

<sup>134</sup> See CONGRESSIONAL QUARTERLY'S GUIDE TO THE UNITED STATES SUPREME COURT 823 (Witt ed. 1979) [hereinafter GUIDE].

<sup>135</sup> See *Field v. Clark*, 143 U.S. 649 (1892); GUIDE, *supra* note 133, at 829.

<sup>136</sup> *Union Pacific R.R. Co. v. Board of Commissioners*, 247 U.S. 282 (1918); *Kindred v. Union Pacific R.R. Co.*, 225 U.S. 582 (1912).

Great Northern Railroad.<sup>137</sup>

Justices have exhibited widely variant patterns of recusal concerning former clients and law firms. As the foregoing examples suggest, great circumspection was not the general rule prior to the first World War. In present times, Justices ordinarily refrain from sitting in cases involving former firms or clients for a significant number of years. 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 until 1960.<sup>138</sup> Although the trend toward greater caution by the Justices deserves praise, the situation is less satisfying than would be a stringent and consistent recusal policy that did not vary according to the individual Justice.

Justice Frankfurter's activities as an advisor to President Roosevelt and a New Deal "shadow legislator" have already been discussed in the context of Justice Rehnquist's *Tatum* memorandum.<sup>139</sup> A perhaps even more suspect extracurricular activity of Justice Frankfurter recently attained considerable attention when his protege and former law clerk Philip Elman revealed in an interview that he and Justice Frankfurter had numerous conversations regarding internal court discussions.<sup>140</sup> Justice Frankfurter was, in essence, informing Elman, then an Assistant Solicitor General for civil rights cases, of the positions of the Justices regarding segregation, and advising Elman as to how best involve the Government in the litigation chapter of the civil rights movement of the 1940s and 1950s.<sup>141</sup>

These disclosures prompted attention<sup>142</sup> and criticism.<sup>143</sup> Al-

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<sup>137</sup> *Great Northern R.R. Co. v. Weeks*, 297 U.S. 135 (1936); *Great Northern Ry. v. Sullivan*, 294 U.S. 458 (1935). These cases arose after Justice Butler had been on the Court thirteen years.

<sup>138</sup> See FRIEDMAN & ISRAEL, *supra* note 122, at 3090.

<sup>139</sup> See *supra* notes 99-104 and accompanying text.

<sup>140</sup> See Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817 (1987).

<sup>141</sup> *Id.* at 823-33, 839-40, 844. According to Elman, on the *Brown v. Board of Education* case, Justice Frankfurter "told me what was said in conference and who said it." *Id.* at 844.

<sup>142</sup> See Taylor, *Key 1954 Bias Case: A Drama Backstage*, N.Y. Times, Mar. 22, 1987, at A1, col. 4.

<sup>143</sup> See *With All Deliberate Impropriety*, N.Y. Times, Mar. 24, 1987, at A30, col. 1. Elman's description of the litigation segment of the civil rights battle also gave rise to a criticism that he overstated the importance of his own role and that of Justice Frank-

though defended by Elman, the defense was unpersuasive.<sup>144</sup> While Justice Frankfurter's goal, the overruling of *Plessy v. Ferguson*<sup>145</sup> was laudable, his *ex parte* contacts were not. Furthermore, Justice Frankfurter's surreptitious efforts to have Elman and, consequently, the Government of the United States adopt the gradualist "with all deliberate speed" position concerning the pace of integration could well have held back progress toward racial equality. In effect, Justice Frankfurter "coached" Elman. This not only violated the ideal of impartiality by "helping" a litigant but also attempted to shape Court decisions through means other than debate among Justices upon the case record. Furthermore, he revealed deliberative confidences of other Justices. Were Justice Frankfurter's conduct widely imitated, the Court would lose much of its moral authority to render binding decisions.

Justice Abe Fortas's close "kitchen cabinet" relationship with President Lyndon Johnson demonstrated that the problem of the advisor-Justice did not end with Justices Brandeis and Frankfurter. The weight of authority suggests that Justice Fortas was frequently advising the President on matters ranging from Vietnam War strategy to re-election planning. This seemingly was widely known in Washington and tolerated until Justice Fortas's financial dealings brought him under an unfavorable spotlight.<sup>146</sup>

My own view is that Justice Fortas's advisor-Justice status posed a more recurring threat to his impartiality than any of the financial links to stock market movers and shakers which became the focus of opposition to his nomination as Chief Justice.<sup>147</sup> In light of the many Supreme Court matters in which the

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furter in derogation of the key roles played by black advocates such as Justice Thurgood Marshall and Judges William Hastie and Robert Carter. See Kennedy, *A Reply to Elman*, 100 HARV. L. REV. 1938 (1987) and Elman, *A Response to Kennedy*, 100 HARV. L. REV. 1949 (1987).

<sup>144</sup> See Elman, Letter to the Editor, N.Y. Times, Apr. 1, 1987 at A30, col. 3 (defending Justice Frankfurter and himself from charges of impropriety).

<sup>145</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>146</sup> See H. ABRAHAM, JUSTICES AND PRESIDENTS 263-65 (1974); J. MACKENZIE, *supra* note 122, at 27-28. See generally, SHOGAN, A QUESTION OF JUDGMENT (1972).

<sup>147</sup> It was revealed during his confirmation hearings that Justice Fortas had accepted funds from financier Louis Wolfson and that he was also on retainer to the Wolfson Family Foundation. See sources cited at note 146 *supra*. Although this may have been unwise conduct by Justice Fortas, it was less likely to create conflicts of interest in

Executive branch has an interest, it is not unlikely that Justice Fortas participated in cases involving at least some subjects upon which he had advised the President and shaped the government policy under review.<sup>148</sup> Worse yet, no record existed of the Justice's conduct from which to assess the actual number and quality of such conflicts. Although Justice Fortas's activities appear to fall short of the legislative ghostwriting of Brandeis and Frankfurter, they are also troublesome, perhaps more so because of their recency.

An even more recent episode giving some pause is former Chief Justice Burger's "vigorous and open lobbying for particular Bankruptcy Act amendments"<sup>149</sup> coupled with his participation in *Northern Pipe Line Constr. Co. v. Marathon Pipe Line Co.*,<sup>150</sup> in which he dissented from the holding that the 1978 Bankruptcy Act was unconstitutional. Chief Justice Burger defended his conduct as being in the best historical tradition of Justices advocating reforms that would improve the operations of the judiciary,<sup>151</sup> and many, perhaps most observers would

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Supreme Court litigation. The Executive Branch is a far more frequent litigant than any individual.

<sup>148</sup> At hearings concerning his confirmation, Justice Fortas testified that he had never discussed pending Supreme Court cases with President Johnson. See *Hearings on Nomination of Abe Fortas to be Chief Justice of the United States Before the Senate Committee on the Judiciary*, 90th Cong., 2d Sess. 104 (1968). Even accepting this statement as true, it does not exonerate Justice Fortas. When an advisor and the President discuss a wide range of governmental matters, including legislation, it is impossible to predict which of these subjects will be at least peripherally involved in a future Supreme Court case, but it is inevitable that some of them will. For example, Justice Fortas discussed the Vietnam War extensively with President Johnson; the War became the subject of litigation. See Nathanson, *Book Review: The Extra-Judicial Activities of Supreme Court Justices: Where Should the Line Be Drawn*, 28 Nw. U.L. Rev. 494, 501 (1983). In this vein, Justice Fortas's authorship of a pamphlet critical of Vietnam War protest, see A. FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 41-58 (1968), is subject to criticism. Therein, Justice Fortas opined that the first amendment did not protect certain forms of protest against the War, particularly conscientious objection, from government prosecution.

At a minimum, Justice Fortas's continued active membership in the LBJ kitchen cabinet must have undercut the Justice's ability to act as a key member of a coordinate branch of government, willing to rule against the executive. Fortas's favorable views toward the administration and undoubted view that the administration was well-intentioned (intentions he knew of from his advisor role) could have made him less able to curb illegal executive conduct.

<sup>149</sup> See Nathanson, *supra* note 148, at 501.

<sup>150</sup> 458 U.S. 50 (1982).

<sup>151</sup> Nathanson, *supra* note 148, at 501.

agree with him.<sup>152</sup>

Nonetheless, this episode is at least slightly troubling. If a Justice is asked to testify concerning pending legislation, that is one thing. Hitting the hustings to lobby Congress demonstrates perhaps too much commitment to legislation upon which the Court may later be asked to rule. Rather than exonerating this sort of judicial activity, the long history of extra-judicial advising of presidents and Congress seems instead to suggest that it is time for a reassessment. Reading of Chief Justice Stone as "a frequent advisor" of President Hoover making "comments on drafts or speeches and executive messages"<sup>153</sup> does not inspire confidence that Justice Stone could impartially rule on matters previously addressed by speechwriter Stone. Similarly, the assertion that "no one was troubled by" Justice Sutherland's role in voting on legislation<sup>154</sup> when he later wrote an opinion upholding the constitutionality of the legislation gives little comfort.

The excuse that "everybody does it," even when delivered from respected quarters, can not erase the nagging feeling that Justices should not adjudicate matters in which they had a concrete role prior to coming to the Court. A concrete role can helpfully be defined as voting on legislation, authoring legislation, advising Executive branch officials or participating in any significant way in the endorsement or promotion of the specific law or policy reasonably likely to be subject to litigation challenge. This suggested, admittedly strict, recusal standard seems to have no

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<sup>152</sup> For example, Professor Nathanson's review of Professor Murphy's book cited above argues that much of the extra-judicial activity, particularly court reform advocacy, is good, has been done historically because it is good, and that Professor Murphy was unfairly negative in his assessment of the activities of Justices Brandeis and Frankfurter. For a more direct attack on at least the promotion of the Murphy book, if not the book itself, see Cover, *The Framing of Justice Brandeis*, *NEW REPUBLIC*, May 5, 1982, at 17 (marketing of book "raises more serious questions about current ethics in scholarship, publishing and journalism than about Brandeis's judicial conduct").

<sup>153</sup> See Frank, *Conflict of Interest and U.S. Supreme Court Justices*, 18 *AM. J. COMP. L.* 744, 748 (1970) (author estimates that "at least twenty-five percent of the Justices have at some time advised with President after their appointment" [sic]).

<sup>154</sup> See Nathanson, *supra* note 148, at 522. The opinion in question was *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935), concerning the validity of the statute governing proper procedure for discharge of the chairman of the Federal Trade Commission. Professor Nathanson also notes Justice Black's participation in *U.S. v. Darby*, discussed at text accompanying note 85 *supra*, and treats Black's conduct as vindicated by its approving reference from Justice Rehnquist in his *Tatum* memorandum, a circular form of evaluation that supports this article's call for change.

chance of becoming the norm, even in the post-Fortas era, so long as each individual Justice is permitted to rule conclusively on his or her impartiality.

### III. JUDICIAL DISQUALIFICATION LAW AND PROCEDURE TODAY

#### A. *The Statutory Framework*

##### 1. Section 47

Title 28, United States Code, section 47 provides that “[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him.”<sup>155</sup> This codification of a basic maxim, that appellate review is meaningless unless exercised by someone other than the original decisionmaker, dates back to 1893 in its earliest form.<sup>156</sup> The statutory terminology has always referred to “judges” and not “justices.”<sup>157</sup>

The limited number of reported cases involving the statute suggest that it has been neither frequently nor hotly litigated. One suspects that the rule enforces itself in the hands of most judges. Even in the absence of the law, a circuit judge elevated from the district bench would probably instinctively avoid reviewing his or her previous work. Practicalities also limit the potential violations of section 47. District judges who become circuit judges have only a short period of time in which to run afoul of section 47 while their former cases reach the circuit docket.

##### 2. Section 144

Section 144 of Title 28 of the United States Code, which by its terms applies only to district judges, permits a party to disqualify a judge where the movant “makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of the adverse party.”<sup>158</sup> The affidavit must be filed within a reasonable time after commencement of the action, must be

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<sup>155</sup> 28 U.S.C. § 47 (1982).

<sup>156</sup> Act of March 3, 1911, ch. 231, § 21,36 Stat. 1090.

<sup>157</sup> Where Congress has chosen to make statutory requirements applicable to Supreme Court Justices, it has specifically used the word “Justices” in the statute. *See, e.g.*, 28 U.S.C. § 455 (1982).

<sup>158</sup> 28 U.S.C. § 144 (1982).

certified by counsel that it is made in good faith, and shall state "facts" in support of the alleged bias.<sup>159</sup>

A quick reading of section 144 appears to accord litigants one peremptory challenge of a judge for each case. In practice, the statute is more protective of the judge's ability to sit. The time limit for making the challenge is strictly construed, as are the requirements for the affidavits alleging bias.<sup>160</sup> The facts must establish bias or favoritism, not merely permit their inference.<sup>161</sup> As a practical matter, counsel are deterred from making such frontal assaults upon a judge who may hear more of their cases in the future.

### 3. Section 455

As previously discussed in the context of Justice Rehnquist's *Tatum* memorandum, current section 455, enacted in 1974, provides a strict and comprehensive list of disqualification criteria applicable to any "justice, judge, or magistrate."<sup>162</sup> The law regulates recusal of jurists based upon blood relations, former law and business partners, and financial holdings. Section 455(a) also provides a crucial backstop in requiring that the jurist "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."<sup>163</sup>

The "reasonably questioned impartiality" criteria was an important modification of the statute not only because it provides flexibility but also because it provides a lower barrier for recusal than the "personal bias or prejudice" standard of section 144. In addition, section 455 applies to all judges and justices. It provides for recusal even absent a showing of definitive prejudice so long as the movant can demonstrate that a reasona-

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<sup>159</sup> See *Grimes v. U.S.*, 396 F.2d 331 (9th Cir. 1968), Comment, *Questioning the Impartiality of Judges: Disqualifying Federal District Court Judges Under 28 U.S.C. § 455(a)*, 60 TEMPLE L.Q. 697, 705-07 (1987).

<sup>160</sup> Section 144 states that affidavits should be filed within ten days "before the beginning of the term [of court] at which the proceeding is to be heard," a literal impossibility today as terms of court have been abolished. Since the abolition of terms of court, cases have interpreted the deadline in section 144 to require submission of affidavits within a reasonable time. See, e.g., *United States v. Kelley*, 519 F. Supp. 1029, 1050, n.76 (D. Mass. 1981); *United States International Bus. Machs. Corp.*, 539 F. Supp. 47 (S.D.N.Y. 1982). See generally, WRIGHT & MILLER, *supra* note 53, at § 3551.

<sup>161</sup> See Comment, *supra* note 159, at 707.

<sup>162</sup> 28 U.S.C. § 455 (1982).

<sup>163</sup> *Id.*

ble person could entertain serious doubts as to the judge's impartiality.<sup>164</sup>

Section 455(b)(1) to some extent restates and specifies the actual bias standard of section 144 by requiring recusal where the jurist has "personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."<sup>165</sup> Section 455(b)(2) mandates recusal where the judge or justice was involved in the matter of the case while in private practice or where a lawyer with whom he or she has had a previous association has served as an advocate or material witness in the matter.<sup>166</sup> Section 455(b)(3) requires recusal where the judge or justice formerly was in government employment as counsel, adviser, or material witness in the matter or "expressed an opinion concerning the merits of the particular case."<sup>167</sup> Section 455(b)(4) mandates disqualification where the judge, spouse or minor child has any financial interest in the subject matter of the case or in one of the parties to the case.<sup>168</sup> Section 455(b)(5) extends mandatory recusal to cases where the judge, spouse, or any of their relatives short of a cousin is a party, high official of a party, lawyer, is likely to be a material witness, or is known to have an interest that could be "substantially affected by the outcome of the proceeding."<sup>169</sup>

Section 455(c) requires the judge to become informed of the financial interests of the immediate household. Section 455(d) provides definitions of key terms. Section 455(e) prohibits any jurist from allowing a party to waive any of the enumerated recusal grounds of section 455(b)(1)-(5). However, judges may permit the parties to waive the section 455(a) "reasonably ques-

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<sup>164</sup> See, e.g., *Potashnick v. Port City Const. Co.*, 609 F.2d 1101 (5th Cir. 1980) (judge faced with a potential ground for disqualification ought to consider how his participation in a given case appears to average person on the street; use of word "might" in statute intended to indicate that disqualification should follow if reasonable person knowing all circumstances would harbor doubts about judge's impartiality); *United States v. Ferguson*, 550 F. Supp. 1256, 1259-60 (S.D.N.Y. 1982) ("The issue [of impartiality] . . . is not the Court's own introspective capacity to sit in fair and honest judgment with respect to the controverted issues, but whether a reasonable member of the public at large, aware of all the facts, might fairly question the Court's impartiality.").

<sup>165</sup> 28 U.S.C. § 455(b)(1) (1982).

<sup>166</sup> 28 U.S.C. § 455(b)(2) (1982).

<sup>167</sup> 28 U.S.C. § 455(b)(3) (1982).

<sup>168</sup> 28 U.S.C. § 455(b)(4) (1982).

<sup>169</sup> 28 U.S.C. § 455(b)(5)(iii) (1982).

tioned impartiality" ground for recusal provided that the waiver is preceded by full disclosure on the record.<sup>170</sup>

### B. *The ABA Code of Judicial Conduct*

Although federal jurists are bound only to follow the disqualification statutes, most judges appear to accept the notion that they are also, absent compelling circumstances, bound to follow the ABA Code of Judicial Conduct. Justice Rehnquist himself appeared to be of this view in his *Tatum* memorandum, alluding to the Code as though he were at least morally obligated to follow it, although incorrectly concluding it was not materially different from the disqualification statute in force at the time.<sup>171</sup>

Although the Code does not add significant specific requirements to the statutes mentioned above, its language and tone is sufficiently aspirational to suggest that jurists following the Code should opt for recusal in close cases in order to maintain public confidence in the impartiality of the judicial system. This is a significant shift in perspective from the duty to sit doctrine as discussed by Justice Rehnquist.<sup>172</sup>

For example, Canon 1 of the Code calls upon judges to comport themselves well in the interest of preserving judicial integrity and states that the Code will be construed to further that objective. Canon 2 demands that the judge avoid even the "appearance of impropriety" in "all" activities in order to promote public confidence. Canon 3(c) restates section 455(a)'s command of recusal where the judge's impartiality might reasonably be

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<sup>170</sup> 28 U.S.C. § 455(e) (1982). The nonwaiver provision was enacted in part for the financial and relations provisions rather than for the questioning of impartiality provision both because Congress apparently believed that there was greater danger of eroding the per se financial and relations rules by waiver of even comparatively large financial holdings. See *Judicial Disqualification: Hearing on S.1064 Before Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 1, 112 (1973) (statement of Judiciary Committee Counsel). There were also some celebrated examples of routine extractions of waivers of financial conflicts.

For example, Second Circuit Judge Learned Hand was widely known to have owned a small number of shares of Westinghouse stock. He routinely disclosed this to litigants and asked if they wished him to recuse himself. The litigants routinely refused, either because they wanted Judge Hand's mind on the case or because they feared offending him, or both. The choreography of this episode became known as the "Velvet Blackjack". See J. MACKENZIE, *supra* note 122, at 95-118.

<sup>171</sup> See note 50 *supra*.

<sup>172</sup> See notes 162-70 and accompanying text *supra*.

questioned. Canon 5 suggests that judges regulate even socially desirable extra-judicial activities in order to minimize the risk of conflicts of interests, and also sets out some specific rules limiting such activity.<sup>173</sup>

### C. *Disqualification Procedure in the Federal Courts*

While the issue of disqualification is an area in which there is ample law to apply there are nevertheless questions about whether the way it is applied properly accomplishes the purposes underlying the substantive law. Although sometimes sketchy, all court disqualification decisions, except those of the Supreme Court, have some sort of record. Despite occasionally occurring uncomfortably late in the proceedings, recusal rulings in the lower courts are ultimately subject to review.

#### 1. District Court

When a district judge's impartiality is attacked, the movant may follow either the procedure of section 144 outlined above and submit affidavits alleging facts demonstrating actual personal bias or prejudice, or may move for recusal pursuant to section 455, by attempting to make the documentary record most appropriate to the allegation of favoritism. For example, where financial interest or status of the judge or relative as a party official provides the basis for the motion, an affidavit introducing documentary evidence of the conflict would presumably be appropriate. Where the movant accuses the judge of expressing an extra-judicial opinion on the merits of the case, presumably the movant will proffer some evidence of the statement through whatever means available. An allegation of "reasonably questionable impartiality" might take more diffuse forms of argumentation and evidence. In any event, the movant makes the best record available in the absence of discovery, while the opponent does the same in seeking to refute any inference of bias; the judge then decides.<sup>174</sup>

Generally the record is a paper one of affidavits and documents, supplemented by oral argument and representations.

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<sup>173</sup> ABA CODE, *supra* note 31, Canons 1, 2, 3C, 5.

<sup>174</sup> See D. HERR, R. HAYDOCK & J. STEMPEL, MOTION PRACTICE § 19.2, at 410-13 (1985).

Most district judges have held argument on recusal motions. There are seldom true evidentiary hearings on these matters with sworn testimony and cross-examination.<sup>175</sup> Equally rare is discovery on the issue of the judge's fairness.<sup>176</sup> However, both discovery and a trial-type hearing are available to the movant.<sup>177</sup> Many litigants, however, do not press the issue, and most judges probably prefer it that way in order to save time or potential embarrassment.

After presentation, the recusal motion is ruled upon by the district judge whose ability to decide fairly is the very subject of the motion.<sup>178</sup> If the judge grants the motion, in most districts,

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<sup>175</sup> The reported cases surveyed by this author generally treat the facts as uncontested, even if the opinion does not directly state that the parties have stipulated to the facts. In some cases, the court refers to a hearing held concerning a motion for recusal but the context of the opinion usually demonstrates that the "hearing" was actually oral argument on the motion.

This would make sense since under the rule it is the sufficiency of the affidavit which the sitting judge must pass on in order for the plaintiff to prevail. The reported cases surveyed by the author generally treat the allegations of the affidavit as true. In determining whether these allegations are legally sufficient the court will inquire as to whether the affidavit is based on the movant's information and belief, whether the facts set forth are material and stated with particularity, whether they would convince a reasonable jury that bias exists and whether the bias is personal as opposed to judicial in nature. See, e.g., *United States v. Serrano*, 607 F.2d 1145 (5th Cir.), *reh'g denied*, 612 F.2d 579, *cert. denied*, 444 U.S. 965, *cert. denied*, 446 U.S. 910 (1979); *Winslow v. Lehr*, 641 F. Supp. 1237 (D. Colo. 1986); *United States v. International Bus. Machs. Corp.*, 475 F. Supp. 1372 (S.D.N.Y. 1979). In some cases, where the court did refer to a hearing held concerning a motion for recusal, the court indicated that while they were permissible they were at the trial court's discretion. See, e.g., *United States v. Zagari*, 419 F. Supp. 494 (D.C. Ca. 1976); *United States v. Mitchell*, 377 F. Supp. 1312, *aff'd*, 559 F.2d 31 (D.C. Cir.), 181 *cert. denied*, 431 U.S. 933 (1979); *State of Idaho v. Freeman*, 507 F. Supp. 706 (D. Idaho 1981).

<sup>176</sup> As a practical matter, discovery would appear to be unnecessary since under section 144 all factual allegations contained in an affidavit in support of motion for recusal must be taken as true, leaving one judge with one task of determining the affidavit's legal sufficiency. See e.g., *Berger v. United States*, 255 U.S. 22, 36 (1921); *Roberts v. Bailar*, 625 F.2d 125, 127 (6th Cir. 1980); *United States v. Gigax*, 605 F.2d 507, 511 (10th Cir. 1979).

<sup>177</sup> *United States v. Zagari*, 419 F. Supp. 494, 499 (N.D. Ca. 1976) (no evidentiary hearing available under 28 U.S.C. § 144 but hearing is available for § 455 motion). As a general rule, Federal Rules of Civil Procedure 26-37 regarding discovery are applicable to all motions brought in a federal court matter, subject to limitation by the court.

<sup>178</sup> See, e.g., *In re Corrugated Container Antitrust Litigation* 614 F.2d 958, 963 (5th Cir. 1980), *cert. denied*, 449 U.S. 888; *United States v. Haldemand*, 559 F.2d 31, 131 (D.C. Cir. 1976) *cert. denied*, 431 U.S. 933 (1977) (recusal motions are normally first ruled upon by the district judge whose recusal is sought); *but see United States v. Heldt*, 668 F.2d 1238, 1271 (D.C. Cir. 1981) *cert. denied*, 456 U.S. 926 (1982) (trial court judge may at his option transfer the matter to another judge for decision).

the case is referred back to the Clerk of Court for random reassignment to another district judge. If the judge denies the motion, the case proceeds on the merits. The denial of a disqualification motion is never a final order subjecting the case to immediate appeal<sup>179</sup> since the case remains to be decided on the merits. Ordinarily, then, the unsuccessful recusal movant must wait until the conclusion of trial court proceedings and use the judge's recusal decision as a point for appeal from a loss on the merits.

The recusal denial can become a proper interlocutory appeal in three ways: (1) certification pursuant to 28 U.S.C. 1292(b);<sup>180</sup> (2) appeal accepted as a collateral order; or (3) circuit court issuance of a writ of mandamus. Although technically feasible, as discussed below, none is frequently achieved.<sup>181</sup>

Section 1292(b) permits a district judge to certify an ordinarily nonappealable, nonfinal order where he or she determines that the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance ultimate termination of the litigation. The circuit court has discretion to accept or reject the district judge's section 1292(b) certification. Most courts and commentators would probably hold that recusal denials never involve a controlling question of law, since the issue of the judge's bias is distinct from the substantive law controlling the merits of the case's disposition.<sup>182</sup> Although

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<sup>179</sup> In federal district court, only final orders and orders issuing injunctions or invoking similarly drastic equitable remedies are automatically appealable as of right. *See* 28 U.S.C. § 1291 (1982). A final order is one that concludes the litigation on the merits. *See* *Catlin v. United States* 324 U.S. 229 (1945). Since the case on the merits remains to be heard after the denial of a recusal motion, the movant has no right to an immediate appeal.

<sup>180</sup> 28 U.S.C. § 1292 (1982).

<sup>181</sup> *See* Moore, *Appellate Review of Judicial Disqualification Decisions in the Federal Courts*, 35 *HAST. L.J.* 829, 838 (1984).

<sup>182</sup> *See, e.g., In Re Cement Antitrust Litigation* (MDL No. 296) (*Arizona v. Ideal Basic Industries*), 673 F.2d 1020, 1025-1028 (9th Cir. 1982); *Hampton v. City of Chicago*, 643 F.2d 478, 479 n.3 (7th Cir. 1981). *See also* 9 J. MOORE, B. WARD & J. LUCAS, *MOORE'S FEDERAL PRACTICE*, § 110.13 at 187 (2d ed. 1987); WRIGHT & MILLER, *supra* note 53, §§ 3533, 3553, at 659, (concurring with the principle but noting that recently courts have on occasion found the 1292(b) standard satisfied (citing *Davis v. Board of School Commrs. of Mobile County*, 517 F.2d 1044, 1047 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976)); *Rosen v. Dick*, 83 F.R.D. 540, 546-47 (S.D.N.Y. 1979), *aff'd*, 639 F.2d 82 (2d Cir. 1980); *Lazofsky v. Sommerset Bus. Co., Inc.*, 389 F. Supp. 1041, 1045 (E.D.N.Y. 1975); *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 401-403 (S.D. Tex. 1969)). *But see* Moore,

one can, with sufficient imagination, envision facts tying the recusal rationale with the merits of the lawsuit, this seems unlikely and the prevailing view probably correct.

A practical difficulty with section 1292(b) certification is a judge's natural reluctance to state in writing that there is a close question of impartiality where the judge has decided against recusal. Another practical limitation on certification is the difficulty of determining whether correcting any but the most obviously wrong recusal rulings will speed conclusion of the case. Uncertainty over the outcome on the merits and the possibility of settlement weigh heavily against piecemeal review even when the judge may be biased. Thus, successful section 1292(b) interlocutory review of recusal denials is rare.<sup>183</sup>

Equally rare is successful interlocutory review pursuant to the collateral order doctrine. The collateral order doctrine permits an appellate court to take early review of a trial court ruling (1) that conclusively determines an issue completely separate from the merits of the case, (2) that involves an important right of the aggrieved party, and (3) for which effective review cannot be had by waiting for final decision on the merits.<sup>184</sup> Recusal denials almost always satisfy the first two criteria for the collateral order doctrine, but usually are held to be effectively reviewable after a final decision.<sup>185</sup> If, for example, the litigant erroneously denied a recusal motion by the district court loses on the merits, the consolation prize is an easy appellate victory and a second chance on the merits. Unless one can demonstrate that the case was lost only because of a judge's bias, the litigant can hardly be thought to have suffered deprivation of an essential right simply because of the burden of litigating the first trial.

Until recently, the prevailing view was that decisions on dis-

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*supra* note 181, at 865-67 (arguing that disqualification rulings on occasion involve controlling question of law within the meaning of section 1292(b)).

<sup>183</sup> See note 182 and accompanying text *supra*.

<sup>184</sup> See D. HERR, R. HAYDOCK & J. STEMPEL, *MOTION PRACTICE* § 26.9, at 590 (1985); WRIGHT & MILLER, *supra* note 53, § 3553. Courts and commentators often refer to the collateral order doctrine as the *Cohen* doctrine, first expressly recognized by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

<sup>185</sup> See *In Re Corrugated Container Antitrust Litigation (Sterling Committee v. Mead)* 614 F.2d 958, 960-61 (5th Cir. 1980), *cert. denied*, 449 U.S. 893 (1980); see also *Hampton v. City of Chicago*, 643 F.2d 478 (7th Cir. 1981). *But see Moore*, *supra* note 181, at 857-59 (arguing that recusal questions are completely separate from the merits in more cases than appellate courts have generally recognized).

qualifications of counsel and judges were separate from the merits of the case.<sup>186</sup> However, the recent Supreme Court approach concerning the appealability of counsel disqualification has altered this perspective. Since 1985, the Court has seen the issue of counsel's taint as at least partially linked to the merits when the issue turns on counsel's prior conduct with the client or the subject matter of the case.<sup>187</sup> Presumably, the Court would take a similar view in a case involving judicial recusal and would not find the matter sufficiently collateral where the ground proffered for recusal was the judge's prior contact with the case as a lawyer, law partner, material witness, or evaluator of the merits of the case. For these reasons, collateral order attempts to review recusal denials will seldom succeed.

Traditionally, the most likely avenue for interlocutory review of recusal orders has been the writ of mandamus.<sup>188</sup> Authorized by the All Writs Act, 28 U.S.C. section 1651, this writ is available where a judge has clearly exceeded given authority or erred so egregiously as to be tantamount to unauthorized judicial action.<sup>189</sup> If granted, the writ from the circuit court orders the district court to perform a ministerial act, in this case reversing its earlier decision and stepping aside, so that the case may be assigned to another, impartial judge.

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<sup>186</sup> See, e.g., *Freeman v. City of Chicago Musical Instrument Co.*, 689 F.2d 715 (7th Cir. 1982) ("grant of a motion to disqualify counsel . . . serves to 'resolve an important issue completely separate from the merits of the action'"); *In Re Cement Antitrust Litigation*, (MCL No. 296) (*Arizona v. Ideal Basic Industries*), 673 F.2d 1020 (9th Cir. 1982) (agreeing that the issue of judge disqualification was separate from the merits of the litigation but holding that it did not involve a claim or right and, therefore, not within the collateral order doctrine exception).

<sup>187</sup> See *Richardson Merrell Inc. v. Koller*, 472 U.S. 424 (1985). The D.C. Court of Appeals had reversed a disqualification of counsel order on an interlocutory appeal pursuant to section 1291. The Supreme Court vacated the decision, holding that the Court of Appeals lacked jurisdiction to entertain the appeal under the collateral order doctrine. The Court reasoned that to allow interlocutory appeals of attorney disqualification orders would unduly delay proceedings on the merits, undermining the Congressional judgment that the district judge has primary responsibility to police litigants' prejudgment tactics. In addition, the Court held that "as a class," orders disqualifying counsel are not sufficiently separable from the merits of the litigation to qualify for interlocutory appeal, since they often will affect future proceedings and the likely course of trial. The Court cited as examples, attorneys disqualified on the ground that they may later testify as witnesses, and attorneys disqualified for misconduct.

<sup>188</sup> See Moore, *supra* note 181, at 839.

<sup>189</sup> See *Matter of Bankers Trust Co.*, 775 F.2d 545, 547 (1985). WRIGHT & MILLER, *supra* note 53, § 3553, at 653-56.

The use of mandamus for recusal review is controversial. Many judges subscribe to what they regard as the more technically correct view that mandamus is only available where the judge has done something not permitted or refused to do that which he or she is clearly obligated to do.<sup>190</sup> Even a bad recusal decision does not exceed the bounds of judicial discretion and authority in a manner making mandamus appropriate. The less technical, more modern, and probably more widely held view is that mandamus is available where the action below is very wrong and very wasteful, as this produces a ruling that implicitly lies outside the judicial mandate.<sup>191</sup> Therefore, denial of an obviously meritorious recusal motion becomes the judge's refusal to perform a clearly required act. Thus, mandamus would become available to order the judge to perform the act of recusal.

This Article takes no position on the correct view of mandamus but notes only that it has been used with some success to obtain interlocutory review of recusal denials. Even this tactic with the comparatively best track record fails on any absolute scale.<sup>192</sup> For the most part, review of district court recusal denials must await conclusion of the case on the merits. Nonetheless, unlike the Supreme Court, review of district judge recusal denials is available and will be considered by at least a panel of three circuit judges whenever an appeal from final order on the merits is taken.

## 2. The Circuit Court

Challenges to circuit judge impartiality ordinarily arise in a

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<sup>190</sup> See *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 260 (1957) (Brennan, J. dissenting); *Prop-Jets Inc. v. Chandler*, 575 F.2d 1322, 1324-25 (10th Cir. 1978); *Vickers Motors, Inc. v. Wellford*, 502 F.2d 967, 969 (6th Cir. 1974) ("the challenged order or reference, even if erroneous, a question we do not decide, involved no clear abuse of judicial power").

<sup>191</sup> See *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957); *EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1061 (6th Cir. 1982) (mandamus may be used in the supervisory power of a court of appeals to review important issues of first impression and questions necessary to the economical and efficient administration of justice). See also *U.S. Board of Parole v. Merhige*, 487 F.2d 25 (4th Cir. 1973), *cert. denied*, 417 U.S. 918 (1974) (broad and intrusive discovery orders directed against United States Board of Parole were clearly erroneous, and were, thus, set aside by mandamus to prevent disruptive and unwarranted intrusion upon the Board's records and resources).

<sup>192</sup> See Moore, *supra* note 181, at 839. See also WRIGHT & MILLER, *supra* note 53, § 3553, at 652 (noting increasing trend toward interlocutory review of recusal decisions).

slightly different context. After a trial court decision untainted by questions of judicial bias, pending appeal, the litigants are notified of the three-judge panel that will hear their case only a relatively short time before oral argument.<sup>193</sup> Presumably, counsel will have considered possible assignments and conflicts and is prepared to move for change in the panel based on the applicable portion of section 455.<sup>194</sup>

The mechanics of the motion are less defined in circuit court than district court practice. Often a letter to the Clerk or a short motion filed with the court will be the only "record" on the matter.<sup>195</sup> If the facts are contested or not widely known, affidavits and documents may be included. Discovery is unheard of, as are evidentiary hearings. Oral argument on this aspect of the case is almost never scheduled. In the first instance, the circuit judge who is the target of the recusal motion will decide whether to voluntarily disqualify himself or herself. If the judge

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<sup>193</sup> Circuit courts differ markedly in their willingness to disclose panel membership prior to oral argument on an appeal. Some follow a pattern similar to that of the Third Circuit which makes the panel composition officially known to the litigants on the morning of the argument. The theory behind the procedure posits that advance notice of panel membership results in too much counsel effort to "pitch" written and oral argument to a given member or to take advantage of supposed group dynamics of a given panel. By contrast, the D.C. Circuit and the Eighth Circuit announce panel composition weeks before the oral argument date and frequently before the parties' briefs are due. See D.C. Ct. R. 23 (VIII).

<sup>194</sup> This may be an illusory presumption, however, unless counsel cares sufficiently about a given judge's participation to expend time and effort on a recusal motion that may prove totally unnecessary. Even in these cases, the short time between disclosure of the panel composition and oral argument affords little opportunity for discovery, hearing, or separate and reflective consideration of the recusal motion. See D. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 32.2, at 364 (1981).

<sup>195</sup> See note 42 *supra*. As previously noted, the question of proper disqualification procedure is seldom addressed in treatises or manuals concerning appellate practice. However, one manual endorses the recusal inquiry by letter as an "appropriate course." D. KNIBB, *supra* note 194, § 32.2, at 364-65. The author notes that greater difficulty of recusal at the appellate level and notes the matter is usually addressed by the judges privately, based upon required declarations in the filings regarding interested parties to the case. Although the author suggests this system works well, his description underscores the deference paid to the appellate court in this environment:

[Recusal motions] are very rare. The judges of the United States Courts of Appeals are among the most experienced, conscientious, and respected members of this country's judiciary. Their sensitivity to matters of judicial ethics is unsurpassed. That does not mean a lawyer is conclusively wrong if he raises a question about disqualification; it simply means he should do it respectfully and with dignity.

*Id.* § 33.2, at 365.

does, a new panel is drawn. If the judge refuses, the appeal continues on the merits. If the movant loses, he or she seldom addresses the recusal issue during oral argument on the merits unless to correct an obvious court oversight, and even then always at the risk of being accused of poor manners.

The recusal issue is noted and briefed by the aggrieved party for presentation to the circuit court just as it would press on appeal its view of the correct law of contributory negligence, promissory estoppel, hearsay, etc. If the litigant loses on the recusal issue in the circuit court panel, the possibility of en banc review remains, as well as a long shot petition for certiorari. A petition for rehearing before a new panel or rehearing en banc must be filed by a movant wishing to press the issue to a higher authority because of the possible bias of an original panel judge. Often a recusal issue does not arise until after the panel has ruled on the merits. This is probably the result of the short notice of panel composition, the relatively fast pace of an appellate briefing and argument schedule, and the perhaps lower profile of circuit judges and their personal and financial ties.

Although technically available, review of circuit judge conflicts is less searching than that available for reviewing district court decisions. The district court record is usually richer, and review of the district court decision is more clearly embedded into the system. The circuit court's *raison d'être* is, of course, to scrutinize district court actions. By contrast, the circuit court seems less institutionally equipped or oriented for reviewing its own recusal issues. As a result, the more informal system tends to result in greater deference to the initial decision of the judge whose fairness is under attack. This may also result from closer personal ties among members of the circuit bench. By contrast, the circuit review of district court recusal rulings is more arms-length. Nonetheless, it is still possible for the litigant to obtain review by a third party of a circuit judge's refusal to step aside. Beyond that, there again lies the improbable but important petition for certiorari.

### 3. The Supreme Court

- a. A final source of review of other courts; *Aetna Life Insurance v. LaVoie* as an illustration

One can argue that the chances of obtaining Supreme Court

review of even the worst district and appellate recusal decisions are so rare as to amount to no review at all. Although one can argue over whether the review is adequate, at least it exists. The possibility, although slim, that the Supreme Court will review a recusal decision forces district and circuit, as well as state court judges, to take these challenges more seriously than they would if no possibility of higher review existed. Although these judges may yet make errors, far fewer egregious errors will be made so long as there exists even the contingency of higher review by a neutral forum.

At a minimum, the recent Supreme Court case of *Aetna Life Insurance Co. v. LaVoie*<sup>196</sup> proves that the Court is capable of catching and correcting bad disqualification decisions. In *LaVoie*, the Court granted Aetna's petition for certiorari and reversed an Alabama Supreme Court decision in which a justice in the majority was simultaneously a litigant in a case raising similar issues against another insurance company.<sup>197</sup> To make matters worse, the justice in question cast the deciding vote. When Aetna discovered the justice's pending claim, it unsuccessfully sought rehearing. Although state supreme court justices are not subject to federal disqualification statutes, the United States Supreme Court reversed the state decision and held that the failure to recuse constituted a violation of Aetna's fifth amendment rights to due process. The moral of the story: oversight makes for valuable quality control of disqualification decisions.<sup>198</sup>

Viewed in perspective, the error corrected by the Supreme Court in *LaVoie* is not so much the individual justice's error as that of the entire Alabama Supreme Court in permitting itself to decide a case in which the impartiality of one of its members was so badly compromised. In a sense, the United States Supreme Court stated that the Alabama Supreme Court has a col-

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<sup>196</sup> 475 U.S. 813 (1986).

<sup>197</sup> *Id.* at 817.

<sup>198</sup> For further background on the *LaVoie* case, see *Aetna Life Insurance Co. v. LaVoie*, 470 So. 2d 1060 (1984); Note, *Recusal of Judges for Reasons of Bias or Prejudice: A Survey of Florida Law—Proposal for Reform*, 11 *Nova L.J.* 201, 216-21 (1986). The first question presented to the United States Supreme Court in *Aetna v. LaVoie* involved Alabama's 10 percent penalty for losing appeals. Without this question triggering the Court's appellate jurisdiction (because the Alabama Supreme Court had upheld a state statute against constitutional challenge), the Court may not have heard the case. As *LaVoie* indicates, Supreme Court action concerning disqualification although available, is unlikely to be frequent.

lective responsibility to assure that its composition meets minimum Due Process standards. Accepting this premise, it is not much of a leap to suggest that the United States Supreme Court bears a similar responsibility and that the Court as a whole should establish and involve itself in procedures designed to promote impartiality and fairness.

#### b. Recusal practice in the Court

True to the progression of declining safeguards beginning at the district-circuit boundary, recusal decisions at the Supreme Court level are essentially the exclusive province of the Justice asked to recuse himself or herself. At the district court level, the system of enforcing the disqualification laws may be short on fact development and review of a disqualification decision is usually delayed, but there does exist formal and meaningful third party review of the judge's recusal decision. At the circuit court level, the procedure is less linear and focused but judges other than the judge under challenge ultimately review recusal decisions, at least indirectly.

At the pinnacle of the United States judicial system, however, a process-oriented approach has all but disappeared. A litigant wishing to challenge a Justice must make the disqualifying motion directly to the Justice under attack. The challenged Justice makes a decision. The decision is memorialized only in the form of a one page, unpublished order directed to the parties. Only in rare instances are recusal positions explained.<sup>199</sup> The individual Justice's decision on the recusal motion is final and unreviewable.

Only rarely is there evidence of unofficial attention to recusal orders by the other Justices.<sup>200</sup> In fact, unofficial review by the other Justices through jawboning may more frequently work to prevent recusal.<sup>201</sup> However, with the exception of Jus-

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<sup>199</sup> See, e.g., *Tatum*, 409 U.S. 824 (1972) (Justice Rehnquist's memorandum); *Jewell Ridge Coal*, 325 U.S. 897 (1945) (Justice Jackson's concurrence to the denial of the petition for rehearing).

<sup>200</sup> See *Schneiderman v. United States*, 320 U.S. 118 (1943) (Justice Jackson implicitly criticized Justices Black and Murphy, respectively, for participating in the cases).

<sup>201</sup> The likely efforts of the other Court members to successfully convince Chief Justice Stone not to recuse himself in *North American Co. v. SEC*, 327 U.S. 636 (1946), provides a glimpse of what also probably occurs with some frequency. See note 153 and accompanying text *supra* (article discussing Stone switch to make a quorum).

tices consulting their colleagues as sounding boards prior to ruling on a recusal question, each Justice is an island, an autonomous final decisionmaker on questions of his or her own fitness to decide a matter impartially.

To be fair, the low use and success rate of recusal motions probably stems in large part from the Justices' ability to spot a lurking conflict of interest and voluntarily remove themselves from questionable cases, thereby avoiding a formal motion by the potentially aggrieved party. The case reports are full of short and unexplained statements that Justice X took no part in the decision being reported.<sup>202</sup>

Indeed, because of this strong informal tradition of stepping aside where appropriate without being asked, the custom of counsel has been to refrain from seeking recusal by motion until it is obvious that a given Justice subject to challenge will participate. As the *Tatum* case illustrates, this ethos can easily make the recusal challenge postdate decision on the merits. Under such circumstances, challenged Justices can be expected to do their utmost to find a rationale for denying the motion and retaining the finality of a Court decision. Even colleagues who might otherwise counsel recusal will have their views tilted toward avoiding repetitious consideration of cases.

The Court also lacks any formal rule, mechanism, or custom of permitting fact development in aid of a recusal motion. Recusal motions and decisions are generally made only on the basis of facts of public record or those unearthed through informal investigation by the movant or others. Occasionally, the record of another judicial proceeding will provide some data. However, to this author's knowledge, litigants questioning the impartiality of a Supreme Court Justice have never been permitted to develop the facts of the alleged conflict under the auspices of the Court. Occasionally, as in *Tatum*, a Justice will offer a version of the facts in answer to the motion, which hardly passes as meaningful discovery or even scrutiny.

In essence, Supreme Court recusal practice provides an almost unique illustration in American government of substantive law without force when applied to a certain institution. A com-

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<sup>202</sup> Despite the absence of a record in these matters, the consensus of intelligent court watcher speculation is that these absences usually result for reasons of health problems or conflict of interest. See notes 59-67 and accompanying text *supra*.

prehensive statute applies to Justices, but the statute may only be applied if the allegedly biased Justice voluntarily chooses to follow the law faithfully. Where the Justice does not so choose, there exists no corrective mechanism. It is as if the Ethics in Government Act<sup>203</sup> or the Federal Election Campaign Act<sup>204</sup> existed with no enforcement power, permitting Executive officials or Congresspersons to determine finally and for themselves alone whether they were following the law. Such laws would then be mere caricatures. Section 455, as applied to the Supreme Court, borders on a caricature, its only legitimacy deriving from the generally high ethical conduct of the Justices. As Justice Rehnquist's actions in *Tatum* illustrate, the law can easily be avoided.

#### IV. A PROPOSED REVISION OF THE DISQUALIFICATION STATUTE

##### A. *The Change*

The preceding discussion of procedure and past performance underscores the need to improve the recusal system at the Supreme Court level. Change could begin through an internal rule promulgated by the Court itself. Such change is doubtful, however, in light of the Court's historical inaction in this area. The closed atmosphere of the Court seems an unlikely environment from which reform will grow. The past failure of the Court to prevent occasionally gross ethical lapses suggests the body will not reform itself.

A realistic solution requires action by Congress. Specifically, Section 455 must be amended, or a new statute added, to establish clear procedures for neutral review of Justices' recusal decisions. Proposed section 455(f) would read as follows:

If a justice, judge, or magistrate is aware of facts that would prompt a reasonable person to believe that one or more of the grounds for disqualification contained in subsections (a) and (b) above may be applicable to his participation in a pending case, he shall inform the parties fully of these facts and may request that they state for the record their positions on the matter, permitting them a reasonable time for reply. The judicial officer shall then apply the disqualification standards to the situation and make a determination as to whether he may continue to preside over the case or whether he is disqualified.

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<sup>203</sup> 28 U.S.C. § 591 (1978).

<sup>204</sup> 28 U.S.C. § 431 (1971).

Any party aggrieved by the refusal of a Supreme Court Justice to disqualify himself may, on timely motion, obtain review by the full Supreme Court. To be sustained, an individual Justice's decision refusing to disqualify himself must be affirmed by a majority of those Justices participating in the review.

In any review by the Supreme Court, the Justice who is the subject of the disqualification motion shall not participate in the Supreme Court's review or the discussion of the matter. The Court shall give a written statement of reasons for its decision.

The standard of review to be applied to the review of recusal decisions of Supreme Court Justices shall be *de novo*. The Court may permit the parties to conduct discovery as it deems appropriate. Any discovery activities by the litigants later found to be frivolous, or for harassment or other improper purpose shall subject the offending litigant to sanctions as deemed appropriate by the Circuit Court.

In making any motion for disqualification, review or discovery concerning the recusal of a Supreme Court Justice, counsel and the movant must certify that the motion is presented in good faith, is formed after reasonable inquiry, is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and is not for delay or any improper purpose. The Court, upon a finding of a violation of this certification requirement, may impose an appropriate sanction upon the movant, counsel, or both.

The proposed statute accomplishes several improvements in the recusal system. First, it places a clear affirmative duty on all jurists to voluntarily disclose any reasonable basis giving rise to a recusal question. Jurists could no longer take a "wait-and-see" attitude toward the litigants, addressing a close or potentially embarrassing question only if forced by the parties. Although the mandatory tone of the current language of sections 455(a) and (b) suggests that jurists already have this obligation, the amended law would clarify any doubts and prompt jurists to be more forthcoming in alerting the parties to recusal issues.

Second, the new statute codifies the current practice of permitting the jurist whose impartiality is challenged to make the initial ruling on the disqualification issue. This method should continue because the challenged jurist is already familiar with the facts affecting recusal, permitting a streamlined hearing in the matter. Assuming that these judicial officers make the correct assessment in even a substantial proportion of the cases, this will foster judicial economy.

Third, the amendment provides that movants seeking recusal of a Supreme Court Justice will obtain a decision on the motion and review before the Supreme Court considers the mer-

its of the case. Fourth, the amendment provides that the standard of review is *de novo* and establishes the availability of discovery for parties needing to develop facts concerning a potential ground for disqualification. The law also restates the availability of sanctions to punish litigants who abuse the new rights of review and discovery concerning the actions of a Justice. To emphasize the importance of the motion and discourage cavalier use of this process, the amended statute imposes both a requirement and a caution that counsel making any recusal motion certify that the motion is made in good faith, not frivolous, and not made for delay or any improper purpose.

### B. *The Need for Deciding and Reviewing Recusal Before the Merits*

The proposed amendment provides that a Justice's refusal to disqualify himself or herself can be appealed immediately to the full Court and completely reviewed prior to Court consideration of the merits of a pending case. This constitutes a sharp departure from the current practice in the case of district court recusal decisions. The differing nature of the Supreme Court's role justifies the accelerated interlocutory review of recusal denials.

At the district court, the policies informing the final judgment rule are at their apogee. Piecemeal appeals delay final decision on the merits and run counter to the view that judicial economy is best served by presenting the entire controversy between the parties as "one total package."<sup>205</sup> Post-merits review of the judge's failure to recuse himself or herself permits these policies to obtain their effect. To be sure, the party unsuccessfully seeking recusal suffers the inconvenience of delay and possible retrial, but this burden is generally not regarded as being sufficient to countermand the final judgment rule.<sup>206</sup> Furthermore, the unsuccessful recusal movant at least has a chance of

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<sup>205</sup> See 15 WRIGHT & MILLER, *supra* note 53, § 3905-07, at 424, 429-35; J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 581, 582 (1985) [hereinafter FRIEDENTHAL, KANE & MILLER].

<sup>206</sup> See WRIGHT & MILLER, *supra* note 53, § 3907, at 432, ("If the only countervailing consideration [to a rigid final judgement rule] were the burden on the parties," rigid definition would be tolerable); FRIEDENTHAL, KANE & MILLER, *supra* note 203, at 581, 585.

benefitting from the rule should the movant win on the merits or obtain a favorable settlement without the extra cost of litigating the recusal question at the circuit court.

Even where the district court's failure to recuse was almost obviously wrong, affected the trial, and the issue remains alive after final judgment, the circuit court can nonetheless correct the error and easily arrange retrial before another of the relatively plentiful federal district judges.<sup>207</sup> Although the movant has lost time and money, so has the opponent, who presumably benefitted from the presence of the biased judge. As law (and life) goes, that seems relatively fair. If new, untarnished district judges are not available, however, delayed review could complicate error correction and a new trial on the merits.

At the Supreme Court level, this problem is particularly acute. There are only nine Justices,<sup>208</sup> fewer during a vacancy. Once the Supreme Court has decided a case, it is impossible to have a second trial on the merits before an untainted Court unfamiliar with the controversy. Should it be decided after the fact that a Justice participated improperly, the case can only be re-submitted to a group that has already acquired opinions on the matter. The earlier participation of the disqualified Justice will undoubtedly have had some effect on the views and votes of the Court.

There will also exist subtle, subconscious pressure on the Court to preserve the finality of the earlier decision and to avoid creating "additional" work by seriously attempting to reanalyze the merits of the case from ground zero. Only in cases such as *Tatum*, with a one-vote majority, will the post-merits disqualification of a Justice be likely to completely correct the taint brought upon the matter because of improper participation. To give meaningful effect to section 455 at the Supreme Court level, neutral review of recusal matters must precede decision on the merits, thereby preventing the tainted Justice and institutional inertia from fixing a result subject to criticism.

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<sup>207</sup> As of July 1, 1987, there were more than 700 federal district judges and senior district judges in the United States court system. See 812 F.2d at vii (1987). Almost every district has several, although there are some districts with few judges to absorb a successful recusal motion. States like Maine, New Hampshire, North Dakota, Rhode Island, South Dakota, and Vermont have only two or three judges in residence. However, this problem is easily addressed by special assignment of a judge from another district.

<sup>208</sup> 28 U.S.C. § 1 (1982).

## 1. The Quorum and Inconsistency Problems

In his *Tatum* memorandum, Justice Rehnquist implicitly argued that a more rigorous, pre-merits review of recusal decisions might hamper the Court by making it difficult to gather a quorum of six Justices to hear the matter and by permitting the occurrence of inconsistent affirmances of circuit court opinions by an equally divided Supreme Court because of the absence of a crucial odd vote. Justice Rehnquist did not make this argument explicitly, but as a natural outgrowth of his "duty to sit" argument in which he quite expressly raised the quorum and affirmance by equal division arguments.<sup>209</sup>

### a. Quorums and the Court

Seldom are at least two-thirds of the Justices not available to decide a case before them. The problem is sufficiently rare that only one Supreme Court Rule, Rule 4.2, envisions that the Court may lack a quorum at a particular session and provides that "[i]n the absence of a quorum on any day appointed for holding a session of the Court, the Justices attending, or if no Justice is present the Clerk or a Deputy Clerk, may announce that the Court will not meet until there is a quorum."<sup>210</sup> Since the Court has no public records on the matter, we cannot know how many conferences are postponed for want of six Justices. We do know that these conferences are held eventually, as these cases are ultimately decided.

Similarly, only section 2109 of the United States Code<sup>211</sup> ad-

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<sup>209</sup> *Tatum*, 409 U.S. at 837-38.

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

*Id.* at 837.

<sup>210</sup> S. Ct. R. 4.2

<sup>211</sup> 28 U.S.C. § 2109 (1982). Section 2109 provides:

If a case brought to the Supreme Court by direct appeal from a district court cannot be heard and determined because of the absence of a quorum of qualified justices, the Chief Justice of the United States may order it remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court either sitting en banc or specially constituted and composed of the three circuit judges senior in commission

dresses the problem. This section provides that where a quorum is absent, the Court may refer a case brought by direct appeal from a district court to the circuit court in which the district court is located. In all other cases where a quorum is absent and the majority of qualified Justices does not believe a quorum can be mustered in the next term, the Court must affirm the judgment with the same effect as if it had been affirmed by an equally divided court. The provision concerning cases coming to the Court from district courts was formerly contained in substantial part in 15 U.S.C. 29, enacted in 1944.<sup>212</sup>

The most widely known application of the transfer for lack of quorum provision occurred in *United States v. Aluminum Company of America (Alcoa)*.<sup>213</sup> In *Alcoa*, the Justice Department commenced an antitrust suit alleging, *inter alia*, that Alcoa had attempted to monopolize the market for virgin aluminum ingot. Many of the Justices held stock in the company and so disqualified themselves; this left less than six eligible Justices to hear the case. The case was assigned to the Second Circuit,<sup>214</sup> which not only decided the case but produced an opinion that became a classic of antitrust jurisprudence.<sup>215</sup>

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who are able to sit, as such order may direct. The decision of such court shall be final and conclusive. In the event of the disqualification or disability of one or more of such circuit judges, such court shall be filled as provided in chapter 15 of this title.

In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.

<sup>212</sup> Section 2109 is based on portions of both former 15 U.S.C. § 29 and 49 U.S.C. § 45. See 28 U.S.C.A. § 2109 (1982) (Historical Note).

<sup>213</sup> 148 F.2d 416 (2d Cir. 1945).

<sup>214</sup> This case was assigned to the Second Circuit pursuant to 15 U.S.C. § 29. In terms of timing and procedure, *Alcoa* differed from the usual instance of adjudication by a Circuit Court due to lack of a quorum. Because the antitrust action against Alcoa was commenced by the United States, a direct appeal was permitted from the district court to the Supreme Court. When the Court lacked a quorum, the case was referred to the Second Circuit. Ordinarily, appeal from the district court first goes to the circuit court. If the Supreme Court accepts review but finds a quorum lacking, the circuit court opinion is then affirmed as if by an equally divided court; the matter is not referred to the circuit court for reconsideration. Although there is no reported instance of resort to 28 U.S.C. § 2109 with regard to state court judgments reviewed by the Supreme Court, the same procedure applies to such review.

<sup>215</sup> See, e.g., P. AREEDA, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES* (2d ed. 1974);

Section 29 of Title 15 was revised slightly and recodified at 28 U.S.C. section 2109 in 1948,<sup>216</sup> where it has been applied only three times in reported cases. In *Pritchard v. United States*,<sup>217</sup> Chief Justice Vinson and Justices Reed, Frankfurter, and Clark disqualified themselves; thus, the decision of the Sixth Circuit<sup>218</sup> was affirmed as though by an equally divided Court. Pritchard was a prominent Kentucky lawyer convicted at trial (and affirmed on appeal) of stuffing ballot boxes. He had been a law clerk to one and perhaps two Supreme Court Justices and had also been general counsel to the Democratic National Committee, an assistant to the United States Attorney General, and an assistant to the Treasury Secretary.<sup>219</sup> Although the four recusing Justices gave no explanation for their disqualification, one can logically assume that one (or two) had employed Pritchard as a law clerk. The others presumably felt compromised from knowing Pritchard in this or his other governmental activities.

In *Sloan v. Nixon*,<sup>220</sup> four unidentified Justices disqualified themselves, resulting in an affirmance of the dismissal of a pro se complaint seeking a judgment annulling the 1972 Presidential election of Richard Nixon and his judicial appointments. The theory appears to have been fraud on Congress and the electorate sufficient to invalidate judicial appointments during the first term of the Nixon Presidency. The complaint, referred to as frivolous by the district court, was dismissed for lack of plaintiff standing.<sup>221</sup> The circuit court affirmed without opinion.<sup>222</sup> Presumably, the four recusing Justices were Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist, all appointed by President Nixon. To state the obvious, neither the recusals in *Sloan*, nor those in *Pritchard*, altered the course of American jurisprudence.

*Arizona v. Ash Grove Cement*,<sup>223</sup> the remaining reported

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P. AREEDA & D. TURNER, 3 ANTITRUST LAW § 608(c) (1978); M. HANDLER, H. BLAKE, P. PITOFKY & H. GOLDSCHMIDT, TRADE REGULATION: CASES AND MATERIALS 231 (3d ed. 1975); HILL, ANTITRUST ADVISOR §§ 1.16, 1.18, 1.19, 1.2, 2.34, 6.15, 6.31 (1985).

<sup>216</sup> See note 212 *supra*.

<sup>217</sup> 339 U.S. 974 (1950).

<sup>218</sup> 181 F.2d 326 (6th Cir. 1950).

<sup>219</sup> *Id.* at 328.

<sup>220</sup> 419 U.S. 958 (1974).

<sup>221</sup> 60 F.R.D. 228 (S.D.N.Y. 1973).

<sup>222</sup> 493 F.2d 1398 (2d Cir. 1974).

<sup>223</sup> 459 U.S. 1190 (1973).

case invoking section 2109, is of a higher but hardly seminal magnitude. *Ash Grove* was a large antitrust class action in which the plaintiff class alleged widespread price fixing in the cement industry.<sup>224</sup> The precise issue before the Court, from which four Justices recused themselves, involved the propriety and reviewability of a district judge's decision to disqualify himself from the matter due to his wife's ownership of a small amount of stock in one of the defendant companies. The lack of a quorum resulted in the affirmance of the district judge's disqualification on the basis of the inappropriateness of interlocutory review of the recusal decision.<sup>225</sup>

Perhaps the most significant legal pronouncement of the *Ash Grove* decision was the holding that the grant of a recusal motion is not immediately appealable except by mandamus.<sup>226</sup> In light of the strong possibility for financial interest conflicts posed by *Ash Grove*, reasonable speculation suggests that the four recusing Justices or their immediate relatives owned stock in one of the defendant enterprises. Again, however, there was no identification of the recusing Justices and no explanation was given.

In sum, all four cases involving absence of a quorum suggest that the occasional inability of the Court to render an authoritative decision on the merits poses comparatively little risk to the federal judicial system. Three of the cases presenting this problem did not "require," in any meaningful sense, Court clarification or correction of error. *Alcoa* appears not to have suffered from final disposition by the Second Circuit rather than the Supreme Court. Compared to the controversy surrounding even one suspect disqualification decision, cases involving absence of a quorum pale into insignificance. Although frequent Court incapacity for lack of a quorum would present problems, no evidence suggests that stringent enforcement of the disqualification statute would produce such a result. On the contrary, the available empirical evidence suggests that ethical bars to a Justice's participation are infrequent. Less frequent still are cases where more than one Justice would be disqualified by reason of the statute. Occasional absences of a quorum are not a danger to the

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<sup>224</sup> *Id.*

<sup>225</sup> 673 F.2d 1020 (9th Cir. 1982), *aff'd*, 459 U.S. 1190 (1983).

<sup>226</sup> 673 F.2d at 1023-26.

Court and its systemic function.

Continued lackluster enforcement of the disqualification rules, however, could threaten the Court's legitimacy. The proposed section 455(f) can only affect court membership; it does not otherwise alter jurisdiction conferred upon the Court. Section 2109 of Title 28 of the United States Code, should be viewed as a greater Congressional incursion into the Court's domain than proposed section 455(f). Yet, the constitutionality of section 2109 has never been challenged.

## 2. "One rule in Athens, and another rule in Rome"

In his defense of the duty to sit doctrine, Justice Rehnquist suggested that an overdose of recusal would impair the Court's function by reducing its membership and increasing the chance that cases would not be decided by a majority of the Court.<sup>227</sup> Where the Court splits on a case, the decision below is considered affirmed by an equally divided court and remains good law with circuit court precedential value (and perhaps more since the Court did not reverse the Circuit ruling). Such affirmances, however, lack the precedential authority of a Supreme Court majority decision.<sup>228</sup> As Justice Rehnquist noted in his *Tatum* memorandum, there have been instances where even splits in the Court have resulted in an affirmance of conflicting circuit decisions or rules.<sup>229</sup>

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<sup>227</sup> *Tatum*, 409 U.S. at 837-38.

<sup>228</sup> See R. STERN, E. GRESSMAN & S. SHAPIRO, *SUPREME COURT PRACTICE* 2 (6th ed. 1986); 28 U.S.C. § 2109 (1982) (citing *Neil v. Biggers*, 409 U.S. 188 (1972) (affirmance by equally divided court has no effect on authority of circuit court decision)).

<sup>229</sup> 409 U.S. at 838. Justice Rehnquist found that:

[t]he prospect of affirmance by an equally divided Court, unsatisfactory enough in a single case, presents even more serious problems where companion cases reaching opposite results are heard together here. During the six months in which I have sat as a Justice of this Court, there were at least three such instances. Since one of the stated reasons for granting certiorari is to resolve a conflict among other federal courts or state courts, the frequency of such instance is not surprising. Yet affirmance of each of such conflicting results by an equally divided Court would lay down "one rule in Athens, and another rule in Rome" with a vengeance.

*Id.* at 838 n.6.

Restated, Justice Rehnquist's argument is that the Court and the country would have been worse off if the Court had been forced to affirm these differing circuit court decisions by an equally divided Supreme Court. In the context of his own participation in *Tatum*, Justice Rehnquist asserts essentially that the evils of affirmance by an equally

## Although it would be preferable if the Court always acted

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divided Court are sufficiently grave to compel a narrow, constrained, anti-recusal interpretation of 28 U.S.C. Section 455. Neither the cases cited in his memorandum nor the reality of litigation support this viewpoint.

The three sets of cases cited by Rehnquist all involve the Court's consideration of sets of Circuit Court cases that reached opposite holdings or displayed conflicting legal analysis. The Court accepts review of such sets of cases with some frequency, construing its role as one of resolving such conflicts among the federal courts and achieving consistent interpretation of the Constitution and federal statutes. *See* SUP. CT. R. 17 (regarding petitions for certiorari). As Justice Rehnquist states, the Court's ability to render consistency suffers somewhat if it affirms one or more of these lower court rulings by an equally divided Supreme Court. The Justices often could easily avoid this result, however, by declining certiorari where they expect a close decision on the merits and where one or more Justices foresees a need to recuse himself or herself or a strong possibility of recusal.

Circuit court decisions do not end litigation on a legal issue for all time, especially where the circuits conflict. One can reasonably expect that the issue will be litigated again soon in the federal courts. At that juncture, the Supreme Court may accept for review a case in which its entire membership anticipates participating. The worst consequence of such selective use of the writ of certiorari or of equally divided affirmances is a somewhat longer period of conflict in the circuits than Justice Rehnquist would prefer. However, this evil seems less detrimental than a Supreme Court precedent on the merits in cases where a possibly biased Justice has cast the crucial deciding vote.

Once an "authoritative" Court decision on the merits is rendered, it becomes much more difficult to obtain later Court consideration of the issue than in matters where the Court has yet to speak on the merits. *See* G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); R. STERN, E. GRESSMAN & S. SHAPIRO, *SUPREME COURT PRACTICE* 32-40 (6th ed. 1985) (Court's increasing caseload limits case selection to only most pressing matters). Furthermore, the Court has shown considerable patience with circuit court conflicts, allowing them to simmer for several years before resolving them. *See, e.g.,* *Schiavone Construction Co. v. Fortune*, 421 U.S. 21 (1986) (resolving conflict in the circuits that had existed for at least six years regarding proper approach under FED. R. CIV. P. 15 to construing relation back of amended complaint).

The actual cases cited in the Rehnquist memorandum appear to support the foregoing analysis or a more mundane (perhaps obvious) response to Justice Rehnquist — that nonparticipation of a Justice does not always create an equally divided affirmance of conflicting circuit court decisions. For example *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), in which Justice Powell did not participate, was a seven to one decision affirming a New Hampshire Supreme Court ruling and reversing one of the Indiana Supreme Court concerning the propriety of airport use taxes under the Commerce Clause.

The other cases cited by Justice Rehnquist were close. *Gelbard v. United States* and *United States v. Egan*, 408 U.S. 41 (1972) was a five to four decision reversing the Ninth Circuit and affirming the Third Circuit, respectively, on the question of whether witnesses called before a grand jury could be held in contempt for refusing to discuss the contents of their electronically intercepted telephone conversations until they had been afforded an opportunity to challenge the legality of the wiretaps pursuant to 18 U.S.C. § 2515 (1970). *Branzburg v. Hayes*, 408 U.S. 665 (1972), consolidated with *In re Pappas* and *U.S. v. Caldwell*, was a five to four decision holding that a reporter has no first amendment privilege to refuse to appear before a grand jury and answer questions concerning the identity of confidential news sources.

by majority and never made split affirmances of inconsistent cases, it does not follow from this observation that any such inconsistency justifies a relaxed view of judicial ethics and the recusal statute. Split affirmances result not only from Justices recusing themselves but also from Justices absent due to illness or perhaps pressing personal business. The absence of official public records prevents a determination of what grounds most frequently affect Court membership. Nonetheless, if the split affirmation presents a major problem, the Court should have draconian rules requiring participation irrespective of the excuse for noninvolvement. Only completely incapacitating physical problems would then allow the Justice to sit out a case. Of course, neither the Court nor Congress has adopted such rules, a clear indication that the system is willing to live with some split affirmances as a price for letting Justices attend to health or personal problems. The system should be equally willing to accept a split affirmation as a consequence of serious enforcement of the recusal statute.

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Although the nonparticipation of a single Justice could have changed the results in the *Gelbard* and *Branzburg* sets of cases, there is no evidence suggesting that the nonparticipation (for recusal or any other reason) would have resulted in affirmation by an equally divided court. This would have occurred only if a Justice in the majority had been unable to participate.

See also Taylor, *Reagan Powers to Bar Alien Visits Are Limited*, N.Y. Times, Oct. 20, 1987, at A26, col. 1 (discussing Supreme Court's affirmation in *Reagan v. Abourezk*, 108 S. Ct. 252 (1987), by Court equally divided 3-3, of D.C. Circuit decision limiting authority of Executive to deny visas to aliens affiliated with Communist organizations; at the time, the Court had eight members and Justices Scalia and Blackmun disqualified themselves. Then-Supreme Court nominee Robert Bork would have presumably disqualified himself as well since he was a member of the D.C. Circuit panel whose decision (he had dissented below) was under review. This most recent episode illustrates the juxtaposition of rare events that must usually occur to produce affirmation by an equally divided court and underscores that a single Justice's recusal decision may not itself determine whether the Court issues an authoritative opinion).

Although equally divided affirmances or decisions by less than nine Justices are not ideal, neither Justice Rehnquist nor anyone else has made a convincing case that lax judicial disqualification constitutes a lesser evil. As a practical matter, both the issues in the *Gelbard* (wiretaps and grand jury testimony) and *Branzburg* cases (first amendment protections for reporters's sources) were likely to continue to arise throughout the federal system in subsequent years in the absence of a Supreme Court majority decision. An equally divided affirmation therefore need not have waited long to be replaced by an authoritative Court decision, untainted by any close questions of judicial impartiality.

### C. *The Need for Full Court Review*

The Supreme Court has traditions and institutional factors that may limit its ability to police the conduct of its members. The tradition of deference to colleagues on ethical matters, and the source of the Court's absence of sound recusal procedures, reflects in part the "clubby" atmosphere that perhaps pervades any body that lies at the pinnacle of a large organization such as the federal judiciary. Nonetheless, the Court provides a more neutral, less self-interested arbiter of recusal decisions than does the individual challenged Justice.

The Justices undoubtedly think that one does not become a Justice unless intelligent, honorable, and possessed of good judgment, even when the subject judged is oneself. The social, economic, and educational backgrounds of the Justices are strikingly similar,<sup>230</sup> adding to this atmosphere of mutual respect, deference, and reciprocity. Logistics reinforce this climate. The Justices are chambered in one building and work in close proximity virtually the entire year. They are isolated from much of the world except each other and their staffs. Under these circumstances, it would not be surprising for the Justices to give a colleague the benefit of the doubt in deciding a recusal motion rather than risk alienating a fellow club member and trenchmate. However, the individual Justices work in isolation from each other much of the time, suggesting that deference to colleagues through friendship is unlikely to be highly pronounced.

One could remain skeptical of the Court's ability to declare over strong objection that a sibling Justice has erred in applying the code of ethics essentially embodied in section 455 and that review of a Justice's failure to disqualify his or herself should be vested in a separate body. Although Congress has established special courts and ad hoc panels of judges for purposes of hearing special matters,<sup>231</sup> this article rejects that approach for re-

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<sup>230</sup> See J. SCHMIDHAUSER, *JUDGES AND JUSTICES* 41-104 (1979).

<sup>231</sup> See, e.g., 28 U.S.C. § 49 (1982) (Ethics in Government Act mechanism of establishing rotating membership by assignment of Chief Justice to special division of D.C. Circuit); 28 U.S.C. § 1407(d) (designation by Chief Justice of rotating membership on Judicial Panel on Multidistrict Litigation); 28 U.S.C. RULE 6 (Temporary Emergency Court of Appeals composed of Chief Judge from each circuit and other judges designated by Chief Justice). For obvious reasons, the establishment of any special court for recusal review with members appointed by Chief Justice Rehnquist would be unwise in light of

view of recusal decisions. Although the need to promote impartiality in Supreme Court decisions is great and has not always been scrupulously appreciated by the Court, these lapses appear on the whole not to be frequent enough to justify creation of a separate entity to review recusal decisions.

The best institution to most economically and efficiently provide neutral review, is an already existing judicial body such as a Circuit Court of Appeals, the next rung below the Supreme Court on the federal judicial ladder. The District of Columbia Circuit is the most apt Circuit Court for several reasons. First, it is convenient. Second, it is consistently a respected Court. Third, it is consistently an ideologically and geographically diverse Court.<sup>232</sup>

Although this alternative appears attractive because it would provide review by a group distinct from the group of which the challenged Justice is a member, it poses structural and practical problems. Perhaps most vexing are the practical concerns. D.C. Circuit judges reviewing a Supreme Court Justice's failure to recuse himself are unlikely to overlook the possi-

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the controversy surrounding his *Tatum* recusal decision.

<sup>232</sup> The D.C. Circuit is convenient because Supreme Court litigants are required to litigate their cases in Washington. In addition, the D.C. Circuit is convenient to the Supreme Court. Any records in the case necessary for review of a Justice's recusal decision need only be delivered eight blocks away.

Another advantage to having the D.C. Circuit review recusal decisions is that, like the Supreme Court, the Circuit's membership is concentrated in one building. A panel of its judges can be quickly composed to rule expeditiously on recusal matters.

In another respect, the D.C. Circuit has a clear historical and institutional advantage over the other twelve circuit courts if circuit courts were to review the recusal decisions of Justices. The D.C. Circuit is the most national, broadly based federal appellate court. Traditionally, circuit judge appointments have been heavily influenced by legislators, particularly the United States Senators from the states comprising the circuit. See H. CHASE, *FEDERAL JUDGES: THE APPOINTMENT PROCESS* 7-13, 32-33, 43-47 (1972) (noting reduced impact of Senator preferences for Circuit Judgeships). Absent unusual circumstances, a vacancy is filled by a resident of one of the states in the circuit or by someone with at least a strong tie to a state within the circuit. *Id.* at 32-33. See also Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1120 (1977). ("Federal judges are chosen from the geographical area they serve. Generally, they are appointed with the consent and often at the behest of a senator representing the state in which they will sit, frequently after local officials and citizen groups have had the opportunity to make their views on the nominee known.") (citations omitted). In contrast, D.C. Circuit appointments are made almost exclusively by the Executive. The influence of legislators or other political actors upon such appointments is not related to geography. See H. CHASE, *supra*, at 45 ("Since the selection for these posts can be made from any state in the union, any one senator's claim to an appointment cannot be very strong.").

bility of creating ill feeling in a Justice well-positioned to return the favor when D.C. Circuit cases are reviewed by the Supreme Court. There exists a nontrivial danger that Circuit judges of any bench would seldom overrule a Justice's failure to recuse, even if they were so empowered.

Use of a Circuit Court or blue ribbon panel to review recusal decisions would also create discomfort about the essential rank ordering of the federal courts. Use of the Circuit Courts would place lower federal courts in the position of altering the membership of a higher court, at least in individual cases. In addition, the general custom in the judiciary is that each court assesses the qualifications of its members. Placing recusal review in the jurisdiction of a Circuit Court would run counter to this accepted practice by removing this responsibility from the Supreme Court.

#### D. *Constitutional and Prudential Questions*

In attempting to anticipate criticism of the proposed amended section 455, I suspect some will argue: the proposed review scheme undermines necessary autonomy of individual justices and the Court; de novo review and discovery are bad ideas; and the extra procedure is not worth the expected substantive gain. These arguments raise legitimate concerns but are ultimately unconvincing.

##### 1. The Supreme Court's Role in the Constitutional Scheme

As every first-year law student knows, the Constitution states, "[t]he judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>233</sup> Most courts and commentators have taken this to mean that the high Court has the final adjudicative say, if there is to be one, on questions of Constitutional law or other review of federal court cases on the merits.<sup>234</sup> Neither Article III nor any other Consti-

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<sup>233</sup> U.S. CONST. art. III, § 1, cl. 1.

<sup>234</sup> See generally G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 1-75 (1986) [hereinafter G. STONE]; J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 41-48 (1978) [hereinafter NOWAK]; C. WRIGHT, THE LAW OF FEDERAL COURTS 12-12, 32-39 (4th ed. 1983) [hereinafter C. WRIGHT]; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 33-47 (1978) [hereinafter L. TRIBE]; H. FINK & M. TUSHNET, FEDERAL JURISDICTION:

tutional provision or federal policy prohibits Congress from requiring the Court to provide review of the qualifications of its members to participate in cases and the recusal decisions of individual justices. Neither does any inherent aspect of the structure of the federal judicial system permit the Court to refuse to apply apt criteria concerning its membership in each case.<sup>235</sup>

The Court has never had exclusive control over its membership. The President selects Justices with the advice and consent of the Senate.<sup>236</sup> Justices can be impeached by the House and tried in the Senate.<sup>237</sup> Congress can change the size of the Court, thereby reconfiguring its membership, and has done so seven times.<sup>238</sup> Justices may be prosecuted and convicted for crimes by

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POLICY AND PRACTICE 53-73 (1984) [hereinafter H. FINK]; D. CURRIE, FEDERAL COURTS 115-27 (3d ed. 1982) [hereinafter D. CURRIE]; P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 11, 12, 309-72 (2d ed. 1973) [hereinafter HART & WECHSLER].

<sup>235</sup> See generally C. BLACK, STRUCTURE AND RELATION IN CONSTITUTIONAL LAW (1969). Professor Black convincingly argues that some basic and essential principles of constitutional interpretation flow not so much from the express or implicit language of the document but rather are legitimately derived from an examination of the role of the Constitution and the Supreme Court in the American political system. He illustrates this point by reference to cases like *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867). In *McCulloch*, the Court struck down with little hesitation Maryland's tax on the Bank of the United States despite the absence of any textual prohibition of such a tax. In *Crandall*, the Court invalidated Nevada's tax on transport of passengers across state lines for hire despite a similar lack of a specific bar to the law in the text of the Constitution. In these cases, the right of federal freedom from state taxation and the right to travel between states derived from the essential ordering of the federal system set forth in the Constitution. See BLACK, *supra*, at 13-17. That essential ordering for purposes of adjudication, with the Supreme Court standing as final arbiter on the merits of all cases and controversies of federal jurisdiction, is not disturbed by the proposed disqualification statute. Therefore, a "structural" argument against the proposed section 455(f) is no more persuasive than a textual attack.

<sup>236</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>237</sup> U.S. CONST. art. I, § 2, cl. 5; U.S. CONST. art. I, § 3, cl. 6 & 7.

<sup>238</sup> See generally Stone, *supra* note 234, at lxxxii; 28 U.S.C. 1 (1982). In 1789, the Court was established as a six-member body by the Judiciary Act of 1789. In 1807, a seventh Justice was added. In 1837, two more court seats were created and filled. In 1863, a tenth Supreme court seat existed and was filled by Justice Stephen Field. The position was abolished during his tenure and he was not replaced. In 1866, Congress cut the Court's size to six. Two seats becoming vacant thereafter were not filled. In 1869, Congress restored the court to nine Justices. In 1937, President Franklin Roosevelt briefly explored the possibility of increasing the Court to fifteen members through legislation but the proposal drowned in public opposition to this perceived "Court-packing" scheme. See *id.*; GUIDE, *supra* note 134, at 664-65.

the Executive branch or state law enforcement officials.<sup>239</sup> Although conviction would not strip a Justice of his or her post, impeachment would likely follow.<sup>240</sup> Clearly, the Court's membership eligible to vote on an isolated case provides less practical concern than these more comprehensive effects on Court composition and judicial independence.

There is further precedent for the proposed legislation in the former statute which provided for referral of decisions on the merits to a circuit court when a Supreme Court lacks a quorum and in the current section 2109 which provides for affirmance when a quorum is lacking.<sup>241</sup> The replacement of the Court by a circuit court for decision on the merits seems inherently more drastic than requiring the Court to provide review of a Justice's refusal to disqualify himself. This latter process will only affect the size of the Court that will nonetheless make the final decision on the merits.

The proposed Supreme Court review of recusal denials would not run counter to the Constitutional scheme if it were adopted by Supreme Court Rule. If adopted by statute, the procedure should face no greater skepticism.<sup>242</sup> By enacting the proposed section 455(f), Congress would be merely exercising its conceded power to regulate the Court in limited, nonpartisan means not related to the desired result in a given case. Of the

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<sup>239</sup> See *United States v. Claiborne*, 727 F.2d 842 (9th Cir.), *cert. denied*, 469 U.S. 829 (1984); *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.) (*per curiam*), *cert. denied*, 417 U.S. 976 (1974).

<sup>240</sup> This occurred recently in the case of federal district judge Harry Claiborne of Nevada. Judge Claiborne was convicted of federal income tax evasion and was serving a prison sentence but refused to resign his judgeship. Congress held hearings and impeached him, removing him from the post. *But see Catz, Removal of Federal Judges by Imprisonment*, 18 RUTGERS L.J. 103 (1986) (arguing that impeachment must precede criminal prosecution for conviction of federal judge to be valid). The Constitution itself, although providing for an impeachment trial by the Senate, states that a judgment of impeachment is effective only to remove the person from his or her official federal position. Impeachment in and of itself does not subject the individual to incarceration or other punishment. See U.S. CONST., art. I, § 3, cl. 7.

<sup>241</sup> See 28 U.S.C. § 2109 (1982). See also notes 213-14 and accompanying text *supra*, discussing the *Alcoa* case.

<sup>242</sup> Section 2109, providing for referral due to lack of a quorum, has never been questioned as unconstitutional. 28 U.S.C. § 2109 (1982). If Congress can constitutionally provide for affirmance of a decision on the merits to another court when a quorum is lacking Congress can logically pass legislation requiring Court supervision of the concededly constitutional recusal statute, 28 U.S.C. § 455 (1982).

above-listed means by which the Court's membership and authority is subjected to external control, perhaps the most suitable bases for analogy are Congressional authority over the Court's jurisdiction and Congressional control of the Court's size. As previously noted,<sup>243</sup> Congress has altered the Court's size on seven occasions. Although the legislative motive for the alternate expansion and contraction of the court was blatantly political in at least five of these instances, particularly those of the Reconstruction era,<sup>244</sup> commentators have accepted Congressional authority in this realm almost without objection.<sup>245</sup>

The change in size of the Court that engendered the most controversy in modern times, Franklin D. Roosevelt's court-packing plan, never took place. The basic theme of the opposition to the plan was not that the substantial increase in size was unconstitutional but that it was unwise, unnecessary, and pursued for partisan purposes.<sup>246</sup> Not even Roosevelt's foes contended that Congress lacked power to effect the change. Much of the opposition to the proposed Roosevelt increase in Court size might have been muted, as was opposition to the adding of two Justices in 1837, by a provision deferring appointments until the next Administration or staggering appointments over a number of years and presidents. Whatever the controversy occasionally generated by past changes in size and the prevailing view that a game of musical chairs played with the Court best belongs in the historical dustbin, the overwhelming view is that changes in Court size are clearly permitted under the Constitutional scheme. Congressionally-mandated review of the disqualification decisions of an individual Justice in specific cases appears mild by comparison.

Congress's authority to expand federal court jurisdiction, including the appellate jurisdiction of the Supreme Court, is accepted unquestionably.<sup>247</sup> So too is the famous maxim from *Marbury v. Madison*<sup>248</sup> that Congress cannot alter the Court's original jurisdiction. More controversy has surrounded the question of whether Congress may curtail the appellate jurisdiction

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<sup>243</sup> See note 237 *supra*.

<sup>244</sup> See GUIDE, *supra* note 134, at 664-65.

<sup>245</sup> See authorities cited at note 237 *supra*.

<sup>246</sup> See HART & WECHSLER, *supra* note 234, at 41-45.

<sup>247</sup> See authorities cited at note 234, *supra*.

<sup>248</sup> 5 U.S. (1 Cranch) 137, 143 (1803).

of the Court and particularly the jurisdiction of the federal district courts.<sup>249</sup> Scholars have been nearly unanimous in their conclusion that Congress may eliminate portions of this jurisdiction so long as its motive is not the de facto reversal of existing federal stare decisis and so long as the jurisdictional curtailment is not so drastic as to imperil the essential role of the federal judiciary in the Constitutional order.<sup>250</sup> Many, perhaps most, scholars do not impose even these caveats, and conclude that Congress may change all but original Supreme Court jurisdiction at will.<sup>251</sup> Where Congress possesses so much power to alter the Court's lawgiving power on the merits of the law, it surely has authority to provide for neutral review of the recusal rulings of an individual Justice in isolated cases.

The potentially difficult question may then become whether the proposed amendment to section 455 presents Constitutional difficulties when it is used to review a disqualification matter in a pending case arising under the Court's original jurisdiction. Although this objection may seem to have superficial validity, it also misses the mark. Proposed section 455(f) simply does not affect the Court's power to hear the merits of a pending case or controversy, whether arising under the Court's original or appellate jurisdiction. The recusal review procedure neither adds to nor subtracts from the Court's substantive lawgiving and case resolving authority; it deals merely with challenges to the impartiality of the Justices. Although this issue is important, it is not properly viewed as a jurisdictional issue. It is better viewed as an issue of judicial qualification, something Congress and the Executive have always had power to regulate through the appoint-

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<sup>249</sup> See WRIGHT, *supra* note 234, § 10, at 33-34, and authorities cited at note 234 *supra*.

<sup>250</sup> See WRIGHT, *supra* note 234, § 10, at 35 and authorities cited at note 234 *supra*. See also M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 7-34 (1980); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) (arguing that there are some outer limits on Congressional power to curtail federal court jurisdiction); Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229 (1973).

<sup>251</sup> See WRIGHT, *supra* note 234, § 10, at 35-39 ("There is so much authority for the proposition that Congress is free to grant or withhold the judicial power that it might seem unnecessary to belabor the point."). *Id.* at 38. See also Wechsler, *The Courts and the Constitution*, 65 COL. L. REV. 1001 (1965) and authorities cited at note 234 *supra*.

ment process, the establishment of qualifications for court membership or participation, impeachment, and criminal prosecution. Put another way, if Congress has the power to enact a disqualification statute applicable to Supreme Court Justices (as all concede it does), it also inherently possesses power to provide a procedure for effectuating the statute, so long as the procedure does not cross into impermissible jurisdictional territory.

Proposed section 455(f) should escape Constitutional infirmity if for no other reason than that the Court remains intimately involved with and able to finally decide the recusal question and its membership on a particular case. To begin, the Justice who is the subject of the recusal motion makes the initial decision on the motion. Thereafter, the Supreme Court is able to review the Justice's decision. The amended statute does not affect the Court's authority on the substantive law at all. The statute permits the Court ultimate authority on disqualification questions as well.

## 2. De novo review

Appellate panel review of an initial decision is normally subject to a standard that constrains to some extent the ability of the reviewing court to too easily substitute its judgment for the court or judicial officer below. This results in three principal standards of appellate review: clearly erroneous, abuse of discretion, and de novo. Under the clearly erroneous standard, an appellate court will disturb the lower court's decision only when it is left, after reviewing the entire record, with the definite and firm impression that a mistake has been made.<sup>252</sup> This is the most limiting standard in that, theoretically, it permits modification or reversal only when the appeals court is quite sure that the lower court "blew it" and is the standard of review applied to trial court determinations of fact.<sup>253</sup> The "clearly erroneous" standard serves several functions. It reduces appellate workload. It also defers to the trial courts in an area — fact finding — where they are viewed as more competent than appellate courts.

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<sup>252</sup> See, e.g., *United States v. United States Gypsum Co.*, 333 U.S. 364, 395; *rehearing denied*, 333 U.S. 869 (1948). See also WRIGHT & MILLER, *supra* note 53, § 3553, at 659.

<sup>253</sup> See C. WRIGHT, *supra* note 234, at 647-51; R. LYNN, *APPELLATE LITIGATION* 158-59 (1985).

This is especially true where the fact finding requires an evaluation of the demeanor and credibility of live witnesses viewed by the trial judge but not the appellate judges. It also provides a greater measure of stability to decisions.

Under the abuse of discretion standard of review, applicable in reviewing trial court orders that are in the main, an exercise of discretion, the appeals court sets relatively broad parameters within which a lower court decision on the record presented would be defensible. If the decision made below falls within this range or zone of discretion, the appeals court affirms. If the lower court is outside this range, the decision is reversed or modified to fall within the acceptable range.<sup>254</sup>

When the appellate court reviews a matter de novo, the standard of review applicable to trial court determinate of law, it approaches the task as if it were the first judicial body to view the matter. Although it is aware of the lower court's view of the facts and decision, it conducts its own independent inquiry rather than deferring to the lower court findings. After this inquiry, the appeals court "calls it as it sees it" rather than starting with the presumption that the lower court fact findings were accurate.<sup>255</sup>

For purely legal questions, the de novo or plenary standard of review is ordinarily used. For mixed questions of law and fact, review is ordinarily de novo.<sup>256</sup>

Although the ruling of a single Justice denying recusal is based in large part on facts, they are not facts commensurate with facts found by a trial court. Rather, they are facts as announced by the Justice who is under attack, who has something to lose, if not to hide. They are "facts" flowing from the Justice's perceptual cortex, not facts unearthed through discovery, hearing, or trial, weighed by a neutral factfinder, and made of public

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<sup>254</sup> See R. LYNN, *supra* note 253, at 161, finding abuse of discretion review oriented toward affirming trial court decision. ("The criteria for applying the abuse of discretion standard appear to be the same as for the clearly erroneous test. There are at least 40 procedural situations in which the trial court can exercise discretion." (citations omitted)).

<sup>255</sup> See J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 13.4 at 605 (1985) [hereinafter J. FRIEDENTHAL]; R. LYNN, *supra* note 253, at 157 ("The general rule is that no presumption of correctness is given to trial judge opinions about issues of law.").

<sup>256</sup> See J. FRIEDENTHAL, *supra* note 255, § 13.4 at 604. See also R. LYNN, *supra* note 253, at 160 ("If an issue is characterized as a mixed question of law and fact, no deference need be showing.").

record for all to inspect. In short, the facts supporting a Justice's decision not to disqualify himself or herself, even in the rare published opinion such as Justice Rehnquist's *Tatum* memorandum, are not facts of sufficient reliability to invoke the clearly erroneous standard. As the Supreme Court itself stated when viewing the limits of detachment of trial judges:

To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section [28 U.S.C. section 144] is directed. The remedy by appeal is inadequate. It comes after the trial and, if prejudice exists, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.<sup>257</sup>

Because an adequate factual record is lacking, the reviewing court cannot determine on the record whether discretion has been abused, even if the disqualification issue is construed as discretionary. Of course, section 455 is not discretionary but largely mandatory. Furthermore, the statutory yardstick for compliance, even in the realm of the more subjective 455(a), is that of a reasonable person, not the discretion of the challenged judge. De novo review of the facts surrounding a disqualification motion must be required to accomplish effective neutral review by the Court. This is especially true concerning the mandatory non-waivable grounds for disqualification set forth in section 455(b). Recusal pursuant to section 455(a) where a Justice's impartiality could reasonably be questioned, seems in the nature of a mixed question of law and fact and presents the strongest case under the statute for de novo review.

### 3. The Availability of Discovery

For many of the same reasons, the Court must have at least the power to permit and compel discovery, even if it is not consistently or even frequently used. A single Justice's denial of recusal ordinarily occurs without any discovery and usually without a rich factual record resulting from informal investigation. In some cases, the facts as enunciated by the Justice are well-known, uncontested, or inherently plausible. Where they are not, however, discovery occasionally must be available to

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<sup>257</sup> *Berger v. U.S.*, 255 U.S. 22, 36 (1921).

correctly decide the recusal decision. If an adequate factual record is not available, the Court must be permitted to provide for discovery or its review may be mere window dressing.

The discovery to be provided by section 455(f) is governed by Federal Rules of Civil Procedure (Federal Rule or FRCP) 26 through 37.<sup>258</sup> They are familiar to all federal judges and practitioners, easily implemented, relatively clear, and comparatively easy to enforce. In a rare case of difficulty, the Court can provide for a master to supervise discovery and make initial rulings.<sup>259</sup> In short, providing discovery to more accurately determine the facts relevant to a Justice's impartiality should pose a relatively small logistical problem while potentially bringing the substantial benefit of a more fairly constituted Supreme Court.

To minimize the possibility that a recusal movant will use discovery to delay Supreme Court decision on the merits or to harass or embarrass a Justice or party, the statute specifically requires that leave of Court be obtained to conduct discovery and also warns that sanctions are readily available under the Federal Rules to punish the offending party and to make whole the party forced to expend unnecessary time and effort.<sup>260</sup> To emphasize the sobriety with which counsel and the parties should approach the issue of a Justice's disqualification, the amended statute incorporates an additional requirement and warning borrowed from Supreme Court Rule 51.2 governing petitions for rehearing and Federal Rule 11 that counsel seeking recusal certify that the motion is brought in "good faith" and

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<sup>258</sup> FED. R. CIV. P. 26-37.

<sup>259</sup> See FED. R. CIV. P. 53.

<sup>260</sup> The following federal rules and statutes are frequently invoked to sanction litigants or attorneys abusing the judicial process: FED. R. CIV. P. 11 provides that a court shall impose an appropriate sanction against a party or attorney who files a motion or other paper that is not well grounded in fact or supported in law; Rule 16(f) provides that a judge may sanction a party who fails to obey a scheduling or pretrial order; Rule 26(g) provides that the court shall impose sanctions on a party who conducts discovery that is inconsistent with the Rules, interposed for an improper purpose, or is unreasonable or unduly burdensome; Rule 37(a)(4) provides that a party prevailing in a discovery motion should receive its costs and fees from the losing party unless circumstances make such an award unjust; Rule 37(b) provides an array of sanctions for disobedience of a court's discovery order; Rule 45 provides that violation of a subpoena can constitute contempt of court; Rule 56(g) allows sanctions against a party making an affidavit in bad faith in connection with a summary judgment motion. Although courts too frequently overlook weapons in this arsenal, the court possesses effective means to curb discovery abuse in connection with a recusal motion or any other litigant misconduct.

not interposed for "delay or other improper purpose."<sup>201</sup>

Like FRCP Rule 11, section 455(f) requires that the movant also certify that the recusal sought is "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." In other words, the motion must assert in good faith facts that, if true, would compel recusal under established interpretations of section 455 or a good faith argument for a modified but reasonable interpretation of section 455. Recusal sought because of the challenged Justice's role in authoring legislation at issue in the pending case is an example of the latter argument. Although past Court practices would suggest that a prior legislative role in the law under consideration is not an established basis for recusal, counsel should be permitted to argue for such recusal without sanction for the reasons set forth in this article.

The proposed section 455(f) specifically avoids using the language of Federal Rule 11 construing an attorney's signature on a motion to be a certification that the motion is "well grounded in fact" after reasonable inquiry.<sup>202</sup> Because informal fact investigation of a Justice's connections with a case is substantially more problematic than investigating the scene of a car accident, the rule applied in ordinary civil litigation seems inappropriate to Supreme Court recusal. Further, incorporation of such a standard could lead to harsh judicial treatment of unsuccessful motions, thereby chilling advocacy.<sup>203</sup> In the arena of Supreme Court litigation already laden with patterns of deference, even a cool breeze short of a chilling wind holds too much danger of defeating the purpose of section 455(f). The textual admonition of proposed section 455(f) combined with the tacit concern of offending Supreme Court Justices should be ample incentive to dissuade litigants from abusing the discovery privilege provided in the amended law.

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<sup>201</sup> See SUP. CT. R. 51.2; FED. R. CIV. P. 11.

<sup>202</sup> See FED. R. CIV. P. 11.

<sup>203</sup> See, e.g., Nelkin, *Sanctions Under Amended Federal Rule 11 Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986); Joseph, *The Trouble With Rule 11: Uncertain Standards and Mandatory Sanctions*, A.B.A.J. 87 (Aug. 1, 1987); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 635-37 (1987).

#### 4. Is it worth it?

Reform, to justify the expense of its attainment, must be meaningful. A change may be cosmetically or psychically pleasing without producing tangible evidence of improved services. Undoubtedly, some will argue that the presence of an occasional tainted Justice on an occasional close case can be tolerated by the system. I disagree.

The *Tatum* memorandum, the multiple hats of Black, Brandeis, Frankfurter and others, Holmes who voted twice on some cases, are all scars too serious for the system to ignore. They are embarrassing, or at least they should be, if the bench and bar take ethical codes and impartial judging seriously. In *Tatum*, the failure to recuse changed the law and perhaps history as well. In cases of the legislator-Justice and shadow legislator-Justice, the full facts and true impact of these breaches may never be known.

If these lapses are permitted to occur even infrequently in the future, respect for the Court can only be undermined, significantly so if such breaches become well-known to the public. As many commentators have noted, the Supreme Court derives its legitimacy and respect because its decisions are viewed as reasonable, principled, and consistent.<sup>264</sup> If the decisions lack these qualities, they lose force. When the decisions are rendered with the participation of biased judges, they lack this essential quality.

Many have also commented on the perceived counter-majoritarian difficulty of judicial review where it strikes down legislative or executive acts rather than merely adjudicates private disputes.<sup>265</sup> Most have answered the posited dilemma by finding judicial review not to be undemocratic since it was established by a ratified Constitution and provides for the classic act of judging by a detached, impartial and principled judiciary, particularly the Supreme Court.<sup>266</sup> Continued individualistic

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<sup>264</sup> See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* 15-20 (1962); G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 91-119 (1982).

<sup>265</sup> See L. TRIBE, *supra* note 234, § 3-6, at 47-52; J. ELY, *DEMOCRACY AND DISTRUST* 1-19 (1980).

<sup>266</sup> See, e.g., Ackerman, *The Starrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013 (1984); G. STONE, *supra* note 234, at 31-38; L. TRIBE, *supra* note 234, §§ 3-6, at 47-52.

self-indulgence by the Court in matters of recusal and the occasionally discovered egregious errors undermine the structure of judicial review needed to withstand anti-majoritarian criticism.

As Emerson observed, "a foolish consistency is the hobgoblin of small minds."<sup>267</sup> Presumably, he would have praised wise consistency. Enactment of proposed section 455(f) would help achieve that wise consistency. In virtually every area of the law, decisions are made ultimately by an entity with little or no self-interest in the outcome of the decision. Juries find facts. No juror may have a stake in the outcome of the case. District judges conduct trials and also act as factfinders. They obviously can not have a financial or other interest in the outcome of the case. Lawyers cannot take cases or clients that will create a conflict of interest. The advocate must be unfettered by anything other than professional interest in the case outcome.

This basic view seems to hold in virtually every aspect of American culture, from the important to the diversionary. Political candidates do not get to count the votes themselves. Referees, not the athletes, call fouls at sporting events. The usher, not the patron, determines whether proper payment has been made. Requiring the Supreme Court to operate in a similar manner concerning recusal would achieve a most valuable consistency.

In short, the proposed change is vital because it enhances both the chances for actual justice as well as the public's confidence in the judicial system. As Justice Frankfurter wisely stated when not reviewing his own judicial conduct, to be accorded respect, court decisions must not only do justice but also satisfy "the appearance of justice."<sup>268</sup> Because section 455(f) accomplishes this with minimal logistical burden, any fairly conducted cost-benefit analysis overwhelmingly favors this amended law. To a large degree, the legitimacy of our Supreme Court is premised upon its assumed impartiality. Enactment of the proposed statute would drive reality closer to this assumption and aspiration.

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<sup>267</sup> See J. BARTLETT, *FAMILIAR QUOTATIONS* 501 (13th ed. 1955) (citing R. EMERSON, *SELF-RELIANCE* (1841)).

<sup>268</sup> *Offutt v. United States*, 348 U.S. 11, 14 (1954).

