



12-1-2005

Duck, Duck, Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of *Cheney v. United States District Court*

Timothy J. Goodson

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Timothy J. Goodson, *Duck, Duck, Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of Cheney v. United States District Court*, 84 N.C. L. REV. 181 (2005).

Available at: <http://scholarship.law.unc.edu/nclr/vol84/iss1/6>

This Comments is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Duck, Duck, Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of *Cheney v. United States District Court*

INTRODUCTION.....	181
I. STANDARDS FOR RECUSAL IN THE UNITED STATES	
SUPREME COURT.....	186
A. <i>Policies</i>	187
B. <i>Statutory Standards</i>	191
C. <i>The ABA Model Code of Judicial Conduct</i>	192
D. <i>Procedure</i>	193
E. <i>Special Considerations for Recusal in the Supreme Court</i>	195
II. APPLICATION OF STANDARDS TO <i>CHENEY</i>	198
A. <i>Bases for Recusal Addressed in Justice Scalia’s Memorandum</i>	199
1. Justice Scalia’s Friendship with Vice President Cheney	199
2. Was the Flight a Disqualifying Gift?	202
3. Past Recusal Practices in the Supreme Court.....	205
4. What Role Does Public Criticism Play in the Recusal Decision?.....	207
B. <i>The Fundamental Problem with Justice Scalia’s Memorandum</i>	209
III. PROPOSALS FOR IMPROVING RECUSAL PRACTICES IN THE SUPREME COURT.....	213
A. <i>Require Written Opinions on the Recusal Decision</i>	214
B. <i>Subject the Recusal Decision to Review</i>	217
CONCLUSION	220

INTRODUCTION

*Cheney v. United States District Court*¹ arose from the activities of the National Energy Policy Development Group, a task force established by President George W. Bush and chaired by Vice

1. 542 U.S. 367, 124 S. Ct. 2576 (2004). Throughout the remainder of this Comment, the Supreme Court Reporter is used for citations to the opinion on the merits in *Cheney v. United States District Court*, because pinpoint citations to the United States Reports were unavailable at the time of publication.

President Richard Cheney.² Even in its early stages, *Cheney* was given prominent coverage by national media outlets.³ Legal scholars focused on the important executive privilege issues presented by the case, while pundits tracked its potential to impact the political fortunes of the Bush administration.⁴ However, by the time the U.S. Supreme Court heard *Cheney*,⁵ public debate over the merits of the case was being drowned out by a far more audible dispute over the propriety of Justice Scalia's participation in the case.⁶

The focus of that dispute was a duck hunting trip to Louisiana, in which Justice Scalia was joined by Vice President Cheney in early January 2004, while Vice President Cheney's appeal was pending before the Court.⁷ In the face of mounting criticism from the national

2. *Id.* at 2582. Plaintiffs claimed that the group included de facto members from the private sector, thus triggering the administration's duty to make certain disclosures under the Federal Advisory Committee Act. *Id.* at 2583. Even at its early stages, the case was given prominent coverage by the national media, largely because of the alleged ties between the energy policy group and former Enron CEO Kenneth Lay. *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 25 (D.D.C. 2002). At trial, the district court granted the plaintiff's "tightly-reined" discovery. *Cheney*, 124 S. Ct. at 2584 (citing *Judicial Watch*, 219 F. Supp. 2d at 54). The administration then sought a writ of mandamus from the United States Court of Appeals for the District of Columbia to vacate the discovery order, which the court denied. *Id.* at 2584–85. The United States Supreme Court granted certiorari, see *Cheney v. U.S. Dist. Court*, 540 U.S. 1088 (2003), to determine whether mandamus was appropriate to modify discovery orders that might interfere with the president's executive privilege, *Cheney*, 124 S. Ct. at 2582.

3. *Judicial Watch*, 219 F. Supp. 2d at 25.

4. See, e.g., Monroe H. Freedman, *Duck-Blind Justice: Justice Scalia's Memorandum in the Cheney Case*, 18 GEO. J. LEGAL ETHICS 229, 232–33 (2004) ("[T]he issue is whether Cheney, as chair of the advocacy group, has been lying about how the group was constituted. That goes to Cheney's 'reputation and integrity' in the most significant way, and is of particular importance to him in an election year."); Mark J. Rozell, *Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403, 411–14 (2002) (reviewing the facts of *Judicial Watch* and speculating on possible outcomes of an executive privilege claim); Carolyn Bingham Kello, Note, *Drawing the Curtain on Open Government? In Defense of the Federal Advisory Committee Act*, 69 BROOK. L. REV. 345, 392–93 (2003) (analyzing *Judicial Watch* and concluding that "[w]hile there may be nothing wrong with a President making domestic policy recommendations received directly from special interest groups, the public has a right to know when this occurs").

5. Oral arguments took place on April 27, 2004. *Cheney*, 124 S. Ct. at 2576.

6. See Linda Greenhouse, *Administration Says a 'Zone of Autonomy' Justifies Its Secrecy on Energy Task Force*, N.Y. TIMES, Apr. 25, 2004, at 16 ("By last month, when Justice Scalia rejected a motion to recuse himself . . . the issues in the case had been all but submerged in the recusal debate."); Charles Lane, *High Court Hears Case on Cheney Energy Panel; White House Argues for Confidentiality*, WASH. POST, Apr. 28, 2004, at A1 ("The complex legal issues in *Cheney v. U.S. District Court* . . . have been overshadowed in recent weeks by a related debate over Justice Antonin Scalia's refusal to recuse himself from the case.").

7. *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 914–15 (2004) (mem. of Scalia, J.) (setting forth his account of the shared vacation that gave rise to the public controversy).

media, Justice Scalia declined to recuse himself from the case. Sierra Club, a plaintiff in the case, then filed a motion to recuse Justice Scalia.⁸ Sierra Club argued that 28 U.S.C. § 455(a) mandated recusal because the shared vacation created the appearance of partiality.⁹ As evidence of the appearance of partiality, the motion cited editorials calling for Justice Scalia's recusal in twenty of the nation's thirty largest newspapers.¹⁰ Justice Scalia denied the motion in a twenty-one-page memorandum¹¹ in which he pointed out several errors in the newspaper accounts of his trip,¹² asserted that he received no economic benefit from sharing transportation with Vice President Cheney on the trip,¹³ and concluded that the joint vacation afforded no reasonable basis to question his impartiality.¹⁴

In the months following Justice Scalia's memorandum, public commentary on his refusal to recuse did not abate and remained overwhelmingly critical.¹⁵ From the time the story broke and despite his repeated attempts to justify his actions, detractors have roundly criticized Justice Scalia's participation in *Cheney* and have called his personal morals into question.¹⁶ The concern of this Comment, however, is not what *Cheney* reveals about Justice Scalia's personal moral virtue. Instead, this Comment examines *Cheney* to resolve whether recusal practices in the Supreme Court are achieving the goals of judicial impartiality and a public perception of that

8. Motion to Recuse, *Cheney v. U.S. Dist. Court*, 124 S. Ct. 2576 (2004) (No. 03-475). The term "recusal" historically referred to a judge's decision to step down from the bench voluntarily, with "disqualification" standing for removal of a judge by constitutional or statutory mandate. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION § 1.1, at 4-5 (1996). However, any distinction between the two terms has largely vanished and the terms are now used interchangeably. *Id.*

9. Motion to Recuse, *supra* note 8, at 2-3.

10. *Id.* at 3-4.

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

12. *Id.* at 923-24.

13. *Id.* at 921.

14. *Id.* at 929.

15. *See infra* notes 165-67.

16. *See Cheney*, 541 U.S. at 929 ("As the newspaper editorials appended to the motion make clear, I have received a good deal of embarrassing criticism and adverse publicity in connection with the matters at issue here . . ."); *see also infra* notes 165-67. It should be noted that it is possible to interpret the episode as highlighting Justice Scalia's rectitude rather than casting a pall on it: by defending judicial independence from the attacks of a few influential newspaper editors, Justice Scalia may have sacrificed his own ambitions for the position of Chief Justice. *See* Michael A. Fletcher, *Reid Says He Could Back Scalia for Chief Justice*, WASH. POST, Dec. 7, 2004, at A4 (reporting Senate Minority Leader Harry Reid's statement that his support for Justice Scalia as Chief Justice would depend on Justice Scalia overcoming his "ethics problems," including his refusal to recuse himself in *Cheney*); Editorial, *The New Leader's Injudicious Start*, N.Y. TIMES, Dec. 10, 2004, at A40 (same).

impartiality. This Comment also assesses how recusal practices can be modified to more effectively serve those objectives.

Vice President Cheney ultimately prevailed in the Supreme Court by a 7-2 vote.¹⁷ The five-vote margin makes it clear that Justice Scalia's participation in the case did not directly affect its outcome. That fact, however, does not detract from the significance of the recusal issue. Justice Scalia's refusal to recuse has a fundamental importance independent of the specific outcome of *Cheney*, because the case raised questions about the integrity of an institution that relies on trust, confidence, and esteem for its legitimacy and authority.¹⁸

Indeed, the *Cheney* episode seems to be illustrative of a rising scrutiny of the extrajudicial activities of the Supreme Court Justices. Justice Ginsburg has been criticized for her involvement with a feminist group.¹⁹ Chief Justice Rehnquist was disparaged for accepting a flight from a corporation involved in litigation that could appear on the Court's docket.²⁰ Justice O'Connor has even been chastised for her remarks at the funeral of President Reagan.²¹

17. *Cheney v. U.S. Dist. Court*, 124 S. Ct. 2576, 2582 (2004). The dissenters were Justices Ginsburg and Souter. *Id.*

18. See Ronald J. Riccio, *Subjecting War to the Law*, N.J. L.J., July 26, 2004, § 3, at S-7. Riccio notes:

This is why the Scalia recusal issue is not a trivial sideshow or merely fodder for political cartoonists. A genuine and unquestioned commitment to a principled legal analytic rather than personal ideological judgments, partisan politics, or relationships is essential for the Court to sustain its legitimacy and indispensable if the public is to have confidence and trust in the moral sanction of the Court's decisions.

Id.

19. See, e.g., Peter S. Canellos, *Outspoken Justices Cloud High Court's Appearance*, BOSTON GLOBE, June 15, 2004, at A3 (criticizing Justice Ginsburg for refusing to recuse herself from cases in which the National Organization for Women ("NOW") Defense Fund took an interest, even though she had lent her name to their lecture series); Editorial, *The Mystique of Blind Justice*, CHRISTIAN SCI. MONITOR, June 18, 2004, at 8 (stating that Justices Scalia and Ginsburg have been criticized for supporting "politically active groups that have taken an interest in cases pending before the court," such as the conservative Urban Planning Council and the NOW Legal Defense and Education Fund, respectively).

20. See Cragg Hines, *Let's Keep Those Robes Out of the Mire*, HOUSTON CHRON., May 19, 2004, at 24A (asserting that Chief Justice Rehnquist raised questions about his impartiality when he accepted a flight on a jet that was owned by American Electric Power, a Columbus-based utility in the midst of a clean-air suit that was brought by the Environmental Protection Agency and could easily end up in the Supreme Court).

21. See Canellos, *supra* note 19 (asserting that Justice O'Connor's remarks are indicative of an increasing trend toward the appearance of political bias on the Supreme Court).

Recent heightened attention to judicial ethics in the Supreme Court may be traced back to *Bush v. Gore*,²² in which the Court's impartiality was widely attacked.²³

Justice Scalia's actions in *Cheney* and other complaints of unethical judicial behavior have prompted congressional leaders to threaten closer scrutiny of the judiciary.²⁴ For House Judiciary Committee Chairman F. James Sessenbrenner, these instances have raised "profound questions with respect to whether the judiciary should continue to enjoy delegated authority to investigate and discipline itself."²⁵ Responding to this criticism, Chief Justice Rehnquist created a committee on judicial discipline and appointed Justice Breyer as its chair.²⁶ Though that committee is concerned broadly with judicial ethics for all federal judges and its report is not expected until summer of 2006,²⁷ the congressional and public unease counsels that the Court should revisit its own recusal practices in order to preempt a legislative intrusion that may harm the Court's independence. The development of recusal practices has historically been motivated substantially by "political or public opinion jerks or jumps from especially newsworthy episodes."²⁸ *Cheney* was certainly a newsworthy episode,²⁹ and in combination with other indications of the festering distrust of the Supreme Court's impartiality, it signals that a new approach to recusal in the Court ought to be considered. This Comment uses *Cheney* as a lens for examining what improvements can and should be made to recusal practices in the Supreme Court.

22. 531 U.S. 98 (2000).

23. See Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1217 n.16 (2002) ("In perhaps the most publicized case involving recusal issues, no Justice recused himself or herself from hearing *Bush v. Gore*, despite the widely-perceived bias of the Court's Republican appointees."); Sherrilyn A. Ifill, *Can He Be Recused?*, LEGAL TIMES, Apr. 26, 2004, at 60 ("Underlying all this concern about a duck-hunting trip is the lingering public distaste with the Court's ideologically split decision in *Bush v. Gore*. Without question, that case represents a watershed in thinking about the appearance of bias among members of the Court.").

24. See Tony Mauro, *Rehnquist Tries to Build Bridges with Congress*, LEGAL INTELLIGENCER, June 7, 2004, at 4 (reporting comments of Representative Tom Feeny and House Judiciary Committee Chairman F. James Sessenbrenner); see also Stuart Taylor, Jr., *Scalia: Is Justice (Duck) Blind?*, NEWSWEEK, Mar. 29, 2004, at 8, 8 ("Sen. Patrick Leahy, the senior Democrat on the Judiciary Committee, questioned the propriety of the 'strange procedure' that lets the justice in question decide.").

25. Mauro, *supra* note 24, at 1, 13.

26. *Id.*; Riccio, *supra* note 18.

27. Mauro, *supra* note 24; Riccio, *supra* note 18.

28. John P. Frank, *Conflict of Interest and U.S. Supreme Court Justices*, 18 AM. J. COMP. L. 744, 744 (1970).

29. See *infra* notes 165-67.

Part I provides an overview of judicial recusal law as it pertains to the United States Supreme Court. This Part reviews the policy objectives of recusal, summarizes the relevant statutes and canons of the Code of Judicial Conduct, outlines the procedures for recusal, and explains the special considerations that distinguish recusal in the U.S. Supreme Court from recusal in lower courts.

Part II analyzes the central arguments in Justice Scalia's memorandum in *Cheney*, and finds the memorandum to be, on the whole, a defensible application of recusal law in the unique context of the Supreme Court. Given the generally well-reasoned nature of the memorandum, Part II argues that the widespread dissatisfaction with Justice Scalia's participation in *Cheney* reveals a systemic flaw: the problem lies not in Justice Scalia's decision itself, but in the procedures by which the Supreme Court handles recusal decisions.

Part III proposes alternative procedures for recusal that would protect the integrity of the nation's highest court while still allowing it to function vigorously and independently. The proposal in Part III requires Justices to write opinions giving reasons for their recusal decisions both when parties move for recusal and when Justices recuse themselves *sua sponte*. The proposal also provides for review of a Justice's recusal decision by the full panel of the Supreme Court.

I. STANDARDS FOR RECUSAL IN THE UNITED STATES SUPREME COURT

The statute controlling the recusal decision in the Supreme Court is 28 U.S.C. § 455.³⁰ Section 455 requires recusal either when a Justice's participation in the case would create an appearance of bias,³¹ or when a Justice's associations match one of the statutory provisions that establish actual bias.³² In order to facilitate understanding the content of § 455, it is helpful to be familiar with the policies that the statute is intended to effect. As such, this Part begins with a discussion of the policies underlying recusal law.

30. 28 U.S.C. § 455 (2000).

31. *See id.* § 455(a) (requiring recusal from "any proceeding in which his impartiality might reasonably be questioned").

32. *Id.* § 455(b). *See infra* note 58 for the prohibited circumstances.

A. Policies

The chief aim of recusal law is an impartial judiciary,³³ a goal of central importance in the American system of justice.³⁴ Indeed, the Supreme Court has consistently held that an impartial tribunal is a requirement of due process.³⁵ As a policy objective of the law of recusal, impartiality has two components. First, judges must be free of bias³⁶ in order to ensure fairness to the litigants.³⁷ Second, the

33. See *Liteky v. United States*, 510 U.S. 540, 564 (1994) (Kennedy, J., concurring) (stating that the Court cannot change the fact that “justice may appear imperfect to parties and their supporters disappointed by the outcome . . . [but] can, however, enforce society’s legitimate expectation that judges maintain, in fact and appearance, the conviction and discipline to resolve those disputes with detachment and impartiality”); Bassett, *supra* note 23, at 1218 (“The aim of recusal and disqualification is to ensure both actual judicial impartiality, which is a necessary prerequisite of due process, and the appearance of impartiality, which is necessary to ensure confidence in the courts.”).

34. See ABA MODEL CODE OF JUDICIAL CONDUCT pmb. ¶ 1 (1990) (“Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us.”); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 596–97 (1987) (“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.”).

35. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821–22 (1986) (reviewing case law that established that “under the Due Process Clause no judge ‘can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome’”) (alterations in original) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (“The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.”); *Withrow v. Larkin*, 421 U.S. 35, 46–47 (1975) (“[A] ‘fair trial in a fair tribunal is a basic requirement of due process.’”) (quoting *Murchison*, 349 U.S. at 136); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61–62 (1972) (holding that petitioner’s due process rights were violated when his trial for traffic violations was decided by the Mayor, who was responsible for the village’s finances); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (“[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court[,] the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.”).

36. It should be noted at the outset that the concept of “bias” does not extend to a judge’s views of the legal issues in the case. The bias must be personal in nature. See JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 4.04, at 113 (3d ed. 2000) (“Bias and prejudice are only improper when they are personal That a judge has a general opinion about a legal or social matter that relates to the case before him or her does not disqualify the judge from presiding over the case.”). By way of example, it would be improper to seek recusal of Justice Scalia in an abortion case on the grounds that his previous opinions disclose an antipathy to constitutional protection of that practice.

37. See *Liljeberg v. Health Services Acquisitions Corp.*, 486 U.S. 847 (1988), where the Court stated:

We conclude that in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in

court must be perceived to be impartial, thereby promoting public confidence in the judiciary.³⁸

Though the second component has been criticized as distracting judges from the more fundamental concern of what justice requires,³⁹ the Court has made clear that at stake in the perception of impartiality is nothing less than the integrity of the judicial enterprise.⁴⁰ The rationale underlying the maxim that "justice should not only be done, but should manifestly and undoubtedly be seen to be done"⁴¹ is that the courts will not be viewed as a legitimate forum for resolving disputes if the public does not believe in the neutrality of its judges. Accordingly, the Court has extended due process requirements to include the appearance of impartiality as well.⁴² The goal of preserving legitimacy is of paramount importance for the Supreme Court, which has no enforcement powers of its own, and therefore must depend on the widely shared belief that its decisions are legitimate to compel the other branches to carry out those decisions.⁴³

Another benefit of a recusal standard that requires the appearance of impartiality is that it may be a more accurate method for rooting out actual bias, given the psychological limitations of

other cases, and the risk of undermining the public's confidence in the judicial process.

Id. at 864.

38. See *id.* ("We must continuously bear in mind that 'to perform its high function in the best way[,] justice must satisfy the appearance of justice.'") (quoting *Murchison*, 349 U.S. at 136); *Durhan v. Neopolitan*, 875 F.2d 91, 97 (7th Cir. 1989) ("Section 455(a) of the Judicial Code is aimed at avoiding the appearance of judicial partiality and resulting general distrust by the public of the judicial system.").

39. John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 278 (1987) ("The reasonable-appearance-of-injustice test, however, distracts judges, legislators, and commentators from clarifying what is and is not unjust The appearance test invites judges to rest on appearances, instead of looking deeper.").

40. See *Liteky v. United States*, 510 U.S. 540, 564 (1994) (Kennedy, J., concurring) (explaining that appearances are of paramount importance because "the integrity of the judicial system is at stake"); *Liljeberg*, 486 U.S. at 864.

41. See *Liteky*, 510 U.S. at 565 (Kennedy, J., concurring) (quoting *Ex parte McCarthy*, 1 K.B. 256, 259 (1923)).

42. *Peters v. Kiff*, 407 U.S. 493, 502 (1972) ("Moreover, even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias.").

43. Cf. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 34-35 (2d ed. 1988) (evaluating the Supreme Court's assertion of supremacy in *Cooper v. Aaron*, 358 U.S. 1 (1958), and pointing out that the president and Congress "possess the power to develop interpretations of the Constitution which do not necessarily conform to" the Court's).

judges.⁴⁴ As professionals in maintaining neutrality and considering only the relevant matters when rendering a decision, judges may be disinclined to admit when their decision is improperly influenced or biased.⁴⁵ Indeed, scholars have questioned whether judges are even capable of knowing when their decisions are biased.⁴⁶ In light of these questions, and the fact that the judge whose bias is being challenged is the one who decides whether or not to disqualify himself, a standard that focuses the inquiry on the appearance of impartiality is laudable as an effective way of ensuring actual impartiality.⁴⁷

Balanced against the goal of judicial impartiality is the competing objective of judicial independence.⁴⁸ An absolute preoccupation with impartiality and its appearance would, counterintuitively, compromise the neutrality of the judge.⁴⁹ This is so because if judges were expected to recuse themselves based on irrational or unsupported conjecture of judicial bias, the parties in the litigation or a vindictive press would be able to control the assignment of judges.⁵⁰ A judge whose participation is subject to unjustified removal by the

44. See Bassett, *supra* note 23, at 1250 (“[S]tudies of unconscious bias confirm the observation that people who claim, and honestly believe, they are not prejudiced may nonetheless harbor unconscious stereotypes and beliefs. Thus, although judges should be constantly vigilant for potential biases and prejudices, they will not always recognize their own biases and stereotypes.”).

45. See *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990) (“Judges asked to recuse themselves hesitate to impugn their own standards . . .”).

46. See Bassett, *supra* note 23, at 1249–50 (relying on social science experimental studies to argue in favor of a peremptory challenge to federal judges as a way of “tak[ing] into account judges’ inability to detect some unconscious biases”).

47. Commentary on the policy of impartiality has long questioned whether such a goal is possible, given that judges are human and fallible and thus incapable of absolute impartiality. See, e.g., BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921) (“The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by.”). However, even assuming, *arguendo*, the impossibility of the goal, there is no reason why the law should not strive toward such an ideal. The unattainability of an absolutely impartial judiciary does not undermine impartiality as a model.

48. See *United States v. Greenough*, 782 F.2d 1556 (1986) (*per curiam*), where the Court noted:

There are twin, and sometimes competing, policies that bear on the application of the § 455(a) standard. The first is that courts must not only be, but must seem to be, free of bias or prejudice A second policy is that a judge, having been assigned to a case, should not recuse himself on unsupported, irrational, or highly tenuous speculation.

Id. at 1558.

49. See *id.* at 1558 (“If [recusal based on unsupported allegations of bias] occurred the price of maintaining the purity of the appearance of justice would be the power of litigants or third parties to exercise a veto over the assignment of judges.”).

50. *Id.*

parties or the press cannot be said to be neutral. In order to preserve judicial independence, the law of recusal constrains the policy of impartiality with the requirement that a charge of bias be supported by facts,⁵¹ or that appearance of impartiality be evaluated from the perspective of a reasonable observer.⁵²

Another goal of recusal law that must be balanced against judicial impartiality is judicial efficiency. Recusal at the district court level and the court of appeals level necessitates the transfer of the case to another judge. Such transfers are inefficient because they cause delay and, if the recusing judge has already invested some time into the case, a waste of judicial resources.⁵³ At the trial and intermediate appellate levels, judicial efficiency is an important consideration in the law of recusal. In the Supreme Court, a Justice's recusal would not result in a case being transferred, because there is no substitute for a Supreme Court Justice.⁵⁴ Nonetheless, efficiency may still be a consideration, as it is probably correct that the involvement of fewer Justices in a case is less efficient than having the Court's full judicial resources dedicated to the matter.⁵⁵

51. *Id.*

52. *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000) (statement of Rehnquist, C.J., respecting recusal) (citing *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1309 (2d Cir. 1988)). The reasonable observer is a person who is apprised of all the material facts, including those not known by the general public. See FLAMM, *supra* note 8, § 5.8.1, at 170 ("Where a reasonable person knowing all the relevant facts and circumstances would not harbor doubts concerning the judge's impartiality, disqualification is generally deemed to be unwarranted.").

53. See *United States v. Snyder*, 235 F.3d 42, 46 (1st Cir. 2000) ("In any event, the unnecessary transfer of a case from one judge to another is inherently inefficient and delays the administration of justice."); *United States v. McLain*, 701 F. Supp. 1544, 1556 (M.D. Fla. 1988) ("A busy district court cannot accept unwarranted recusals or changes in judges' assignment; they place extra burdens on the other judges and waste judicial resources.") (citation omitted).

54. See *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 915-16 (2004) (mem. of Scalia, J.) (explaining why the doubts should not be resolved in favor of recusal in the Supreme Court, even if that would be a sound policy for the courts of appeals).

55. One reply to this assertion is that decisions may come more easily to a group of fewer Justices, since there are fewer people to disagree and negotiations can take place more quickly. However, the "inefficiencies" that inhere in the size of the Court are intentional and are a productive and useful part of the Supreme Court's decisionmaking process. The inconvenience and slowness of deliberating, discussing, persuading, negotiating, and building a five-person consensus have benefits that recusal law should not seek to eliminate. It is the *fruitless* use of judicial resources that concerns recusal law.

The efficiency consideration in the Supreme Court is distinct from the concern of a split vote, which is addressed *infra* in Part I.E.

B. Statutory Standards

As previously noted, disqualification of Justices in the United States Supreme Court is governed by 28 U.S.C. § 455.⁵⁶ Section 455 requires recusal in two situations. First, a Justice must disqualify himself under § 455(a) from “any proceeding in which his impartiality might reasonably be questioned.”⁵⁷ In other words, recusal is mandatory when any fact reasonably suggests that a Justice *appears* to lack impartiality. Second, recusal is mandatory when a Justice’s associations fall into one of the five circumstances enumerated in § 455(b).⁵⁸ The prohibited circumstances include, *inter alia*, when the Justice has served as a lawyer in the case, when the Justice has a financial interest in the case, or when the Justice or his close relative is a party, a lawyer, or a witness in the case.⁵⁹ The circumstances

56. 28 U.S.C. § 455 (2000). There are two other statutes that control disqualification in the federal courts. *See id.* §§ 47, 144. Section 47 prohibits a judge from hearing an appeal from a case or issue tried by that judge. *Id.* § 47. Section 144 permits a party to disqualify a judge by filing an affidavit stating that the judge is biased and giving facts and reasons for that belief. *Id.* § 144. However, those statutes, by their own language, do not apply to disqualification in the Supreme Court. Section 144 is explicitly limited to “proceeding[s] in a district court.” *Id.* Section 47, unlike § 455, extends only to judges and not Justices. *Compare id.* § 47 (“No judge shall hear . . .”) with *id.* § 455(a) (“Any justice, judge, or magistrate judge of the United States shall disqualify himself . . .”).

57. *Id.* § 455(a).

58. The five circumstances in which a Justice must recuse himself are:

- (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
- (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
- (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
- (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
- (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
 - (ii) Is acting as a lawyer in the proceeding;
 - (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
 - (iv) Is to the judge’s knowledge likely to be a material witness in the proceeding.

Id. § 455(b).

59. *See id.*

listed in § 455(b) are sufficient to establish that a Justice *actually* lacks impartiality.⁶⁰ It is useful to think of the two parts of § 455 in terms of their policy goals: § 455(b) is primarily concerned with ensuring a fair hearing to the litigants by eliminating actual bias, while § 455(a) seeks to protect public confidence in the judiciary by avoiding even the appearance of bias.⁶¹ Since bias may appear to exist where it does not in fact exist, the broader of these two provisions is § 455(a).⁶² The motion for recusal in *Cheney* based its argument solely on § 455(a).⁶³

Because § 455(a) is focused on promoting public confidence in the judiciary, the Court has held that its provisions are to be evaluated on an objective basis, which means that what is relevant is not the reality of bias but its appearance.⁶⁴ Further, appearances are to be evaluated “from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.”⁶⁵ Accordingly, if a fully informed observer could reasonably infer that a Justice was partial, disqualification would be mandatory under § 455(a) even if the Justice harbored no bias and was capable of deciding the case impartially.

C. *The ABA Model Code of Judicial Conduct*

The American Bar Association (“ABA”) promulgated its Model Code of Judicial Conduct (the “Code”) in order to “establish standards for [the] ethical conduct of judges.”⁶⁶ The Code carries no authoritative weight of its own, instead serving as a model for statutes and court rules.⁶⁷ However, the Code has proved very influential in

60. See *United States v. Gipson*, 835 F.2d 1323, 1325 (10th Cir. 1988) (“[Section] 455(b) applies to instances in which the existence of specific circumstances suggest[s] the fact of impartiality and thus mandate recusal [R]ecusal is mandatory when past or present associations of the judge specifically enumerated in § 455(b) create the presumption the judge lacks impartiality.”).

61. See *Liljeberg v. Health Servs. Acquisitions Corp.*, 486 U.S. 847, 865 (1988) (“The very purpose of 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.”); *Gipson*, 835 F.2d at 1325 (contrasting the circumstances in which recusal is required by § 455(a) with those situations in which § 455(b) mandates recusal).

62. *Liteky v. United States*, 510 U.S. 540, 567 (1994) (Kennedy, J., concurring).

63. Motion to Recuse, *supra* note 8, at 2.

64. *Liteky*, 510 U.S. at 548.

65. *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000) (statement of Rehnquist, C.J., respecting recusal) (citing *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1309 (2d Cir. 1988)).

66. ABA MODEL CODE OF JUDICIAL CONDUCT pmb. ¶ 2 (1990).

67. See SHAMAN ET AL., *supra* note 36, § 1.02, at 3 (“Both the 1972 and 1990 Codes . . . are models only; they have no legal effect unless enacted as a statute or court rule . . .”).

the law of judicial ethics.⁶⁸ The 1972 version of the Code was the impetus for the appearances prong of 28 U.S.C. § 455.⁶⁹ Before 1974, disqualification under § 455 was very narrow, only prohibiting a judge from hearing a case in which he had an interest or a relationship to a party.⁷⁰ When Congress rewrote § 455 in 1974, it broadened the statute substantially and tailored the statute's language to closely track the language of Canon 3C of the 1972 version of the Code.⁷¹

In the current version of the Code, Canon 3E addresses disqualification.⁷² At this point, the Code adds little to the analysis of recusal in the United States Supreme Court, because the language of Canon 3E and § 455 are virtually identical.⁷³ However, the Code may be helpful when, for instance, the ABA has issued an opinion that anticipates the particular circumstance at issue in a case. In addition, it is important to note the influence that the Code has traditionally held, because it suggests an opportunity for the ABA to help shape changes in recusal law as they become necessary.⁷⁴

D. Procedure

Unlike 28 U.S.C. § 144, the federal disqualification statute that applies only to district court judges,⁷⁵ § 455 contains no procedural

68. See FLAMM, *supra* note 8, § 23.6.1, at 679 (“The ABA Code of Judicial Conduct (1972) . . . was subsequently adopted in whole or in part in virtually every American state as well as in the District of Columbia.”) (citations omitted); SHAMAN ET AL., *supra* note 36, § 1.02, at 5 (“The widespread adoption of one or the other of the two Codes [the 1972 and 1990 versions,] provides a degree of uniformity from jurisdiction to jurisdiction, and forms the foundation for a national body of law concerning judicial conduct.”).

69. See FLAMM, *supra* note 8, § 23.6.2, at 680–82 (explaining that the provision in the present version of § 455 that disqualifies a judge when his impartiality could “reasonably be questioned” originated in the 1972 version of the Code).

70. *Liteky v. United States*, 510 U.S. 540, 546 (1994).

71. See FLAMM, *supra* note 8, § 23.6.2, at 681 (noting that this process of reconciling the federal judicial disqualification statutory scheme with the then-current Code “was completed with the enactment of the 1974 amendments to § 455, which altered the statute to the point of virtual repeal by changing it to read substantially the same way as former Canon 3C (now 3E) of the Code of Judicial Conduct”).

72. ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3E (1990).

73. Compare *id.* with 28 U.S.C. § 455 (2000); see also Bassett, *supra* note 23, at 1230 (“Despite the lack of inherent force behind the ethical codes, the provisions of Canons 3E and 3F of the *Model Code* closely parallel those of § 455 . . .”).

74. But see Bassett, *supra* note 23, at 1232 (arguing that courts have ignored the Code standards and thereby have downplayed the significance of the appearance of impropriety).

75. Section 144 requires that the affidavit alleging bias must be filed within ten days of the beginning of the proceeding and must state facts and reasons for the belief that the bias exists. A certificate by counsel stating that the affidavit is made in good faith is also required. The statute also limits parties to one such affidavit per case. § 144.

component to govern the enforcement of the statute's substance.⁷⁶ As a result, recusal procedure in the Supreme Court has evolved through case law and pure inertia. One significant aspect of this is that much of the practice of recusal in the Supreme Court could be altered by the Court itself, without need for congressional action.⁷⁷

Despite the lack of procedural guidance in the statute, it is well established that a litigant may enforce § 455 through a motion made directly to the allegedly disqualified Justice.⁷⁸ Such a motion was the impetus for Justice Scalia's memorandum in *Cheney*.⁷⁹ However, recusal need not be initiated by a party. In 1948, Congress converted § 455 into a "self-enforcing" provision.⁸⁰ Thus, a Justice who is disqualified under § 455 is required to recuse himself *sua sponte*.

Because of the esteem that practitioners before the Supreme Court hold for the institution and its members, the long-standing tradition of litigants is to presume that a Justice who should recuse himself will do so.⁸¹ Litigants' reticence to raise the issue of recusal is compounded by the risk of angering or offending the Court, as well as the fact that support for a recusal motion is often available only to the affected Justice.⁸²

The decision of whether a Justice is disqualified by § 455 is made by the Justice in question.⁸³ The most plausible rationale for this rule

76. *Id.* § 455; see also Bassett, *supra* note 23, at 1237-39 (detailing some of the problems that have arisen in the federal circuit courts as a result of the lack of procedural guidance from the statute).

77. See Stempel, *supra* note 34, at 643 (noting that "[c]hange could begin through an internal rule promulgated by the Court itself").

78. See *Davis v. Bd. of Sch. Comm'rs*, 517 F.2d 1044, 1051-52 (5th Cir. 1975) ("Section 455 is the statutory standard for disqualification of a judge. It is self-enforcing on the part of the judge. It may also be asserted by a party by motion in the trial court, through assignment of error on appeal, by interlocutory appeal, as here, or by mandamus.") (internal citations omitted); Stempel, *supra* note 34, at 641 ("A litigant wishing to challenge a Justice must make the disqualifying motion directly to the Justice under attack.").

79. See *Motion to Recuse*, *supra* note 8.

80. See FLAMM, *supra* note 8, § 23.5.1, at 676 (explaining that one of the major changes in the 1948 amendment was the elimination of the requirement that disqualification be initiated by a party).

81. Stempel, *supra* note 34, at 598. However, see *infra* note 178 for cases where parties did move to recuse a Justice.

82. Stempel, *supra* note 34, at 598-99.

83. See *Hanrahan v. Hampton*, 446 U.S. 1301, 1301 (1980) (mem. of Rehnquist, J.) ("[G]enerally the Court as an institution leaves [recusal] motions, even though they be addressed to it, to the decision of the individual Justices to whom they refer . . .") (citing *Jewell Ridge Coal Corp. v. Mine Workers*, 325 U.S. 897 (1945) (denial of petition for rehearing) (Jackson, J., concurring)); FLAMM, *supra* note 8, § 28.3.1, at 850-51 ("[E]ach Supreme Court Justice is, in essence, the authority of last resort on the question of his or her own fitness to hear a given matter.") (citation omitted); Stempel, *supra* note 34, at 641

is that the Justice whose actions are the subject of the recusal question is the person who is most likely to be apprised of all the relevant facts. It is rare for a Justice to write an opinion stating the reasons for his recusal decision.⁸⁴ Generally, the only external indication of a judicial disqualification is a notation in the decision that a certain Justice did not participate.⁸⁵ However, the same notation is used when a Justice is unable to participate for any reason, such as illness.⁸⁶

Since, typically, no reasons are given for a Justice's nonparticipation, even if it is known that a Justice recused himself in a case, the case can offer no guidance for future recusal decisions.⁸⁷ In addition, a Justice's recusal decision is final and not subject to review.⁸⁸ The result is a paucity of recusal case law to which Supreme Court Justices are bound and by which litigants before the Court can be guided in deciding whether to move for recusal.

E. Special Considerations for Recusal in the Supreme Court

The Supreme Court's unique position adds certain complications to the recusal decision that are not present for the other federal courts. However, with one possible exception, these considerations do not urge a different recusal standard for the Supreme Court.⁸⁹

("[R]ecusal decisions at the Supreme Court level are essentially the exclusive province of the Justice asked to recuse himself or herself.").

84. Stempel, *supra* note 34, at 641. For instances in which a Justice did explain his recusal position, see *Cheney v. U.S. Dist. Court*, 541 U.S. 913 (2004) (mem. of Scalia, J.); *Microsoft Corp. v. United States*, 530 U.S. 1301 (2000) (statement of Rehnquist, C.J., respecting recusal); *Laird v. Tatum*, 409 U.S. 824 (1972) (mem. of Rehnquist, J.); *Schneiderman v. United States*, 320 U.S. 118, 207 (1945) (statement of Jackson, J., respecting recusal).

85. See Stempel, *supra* note 34, at 598 n.41.

86. See *id.*

87. See Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657, 659 (1996) ("By tradition, most Supreme Court Justices do not announce their reasons for recusal. It is therefore impossible to know with any precision what the bases were for the great majority of these disqualifications.").

88. Stempel, *supra* note 34, at 641. Justice Jackson went so far as to say that the Court did not have any authority to review a Justice's participation in a case. See *Jewell Ridge*, 325 U.S. at 897 ("There is no authority known to me under which a majority of this Court has power under any circumstances to exclude one of its duly commissioned Justices from sitting or voting in any case.").

89. The recusal standard discussed in this Part is § 455, which applies to all federal judges. It was previously noted that there are two recusal statutes that apply in the lower federal courts, but not to the Supreme Court. See *supra* note 56. This Part does not argue that those statutes should not set up differences between the Supreme Court and the lower federal courts. Rather, it argues that § 455 should not apply differently to the Supreme Court than to the lower federal courts.

Rather, the complications only affect prudential considerations when the existing § 455 standard is not met. Specifically, the Court's unique position should make Justices unwilling to recuse themselves when the legal standard does not demand recusal, but should not influence the determination of whether § 455 mandates recusal.

The first complication introduced by the Supreme Court's position is that, unlike in the district courts or circuit courts, there is no substitute for a disqualified Supreme Court Justice.⁹⁰ Thus, a recusal by one of the Justices introduces the possibility that the remaining Justices will split evenly in the decision.⁹¹ In the Supreme Court, an equally divided vote automatically affirms the judgment of the lower court.⁹² For that reason, some have equated a Supreme Court Justice's recusal with a vote against the petitioner.⁹³ However, this characterization holds only for the immediate case and ignores the precedential effect of the Court's decision. Though an even vote affirms for the respondent in the instant case, it does not carry the precedential weight of a majority decision by the Supreme Court.⁹⁴

It is important, then, to recognize the proper effect of this consideration. The fact that a split vote automatically affirms the lower court is a valid reason for a Supreme Court Justice not to recuse "out of an excess of caution,"⁹⁵ but it does not mean that the

90. *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 915–16 (2004) (mem. of Scalia, J.); *Microsoft Corp. v. United States*, 530 U.S. 1301 (2000) (statement of Rehnquist, C.J., respecting recusal); FLAMM, *supra* note 8, § 28.3.1, at 850–51; Lubet, *supra* note 87, at 662 n.28.

91. *Cheney*, 541 U.S. at 915–16 (memorandum of Scalia, J.); *Microsoft*, 530 U.S. at 1303 (statement of Rehnquist, C.J., respecting recusal); FLAMM, *supra* note 8, § 28.3.1, at 850–51.

92. *Cheney*, 541 U.S. at 915–16 (mem. of Scalia, J.); *Microsoft*, 530 U.S. at 1303 (statement of Rehnquist, C.J., respecting recusal); FLAMM, *supra* note 8, § 28.3.1, at 850–51. For a dramatic illustration of this occurrence, see *Beazley v. Johnson*, 533 U.S. 969 (2001). In that case, three Justices recused themselves and the remaining Justices split on the question of whether to stay the execution of a young black man who was sentenced to death in Texas by an all white jury for the killing of a white businessman. The defendant was seventeen years old at the time of the crime. The result of the split was that the stay was not granted. However, the Texas Court of Criminal Appeals unexpectedly intervened two days later and stayed the execution. See Bassett, *supra* note 23, at 1214–16.

In light of this consideration, seven Justices issued a joint press release in November 1993 giving notice that "[a]bsent some special factor," those Justices would not recuse themselves "by reason of a relative's participation as a lawyer in earlier stages of the case." Press Release, U.S. Supreme Court, Statement of Recusal Policy (Nov. 1, 1993), reprinted in FLAMM, *supra* note 8, app. A, at 1069.

93. See, e.g., *Cheney*, 541 U.S. at 916 ("Moreover, granting the motion [to recuse] is (insofar as the outcome of the particular case is concerned) effectively the same as casting a vote against the petitioner.").

94. FLAMM, *supra* note 8, § 28.3.1, at 851; Stempel, *supra* note 34, at 651.

95. Press Release, U.S. Supreme Court, *supra* note 92.

recusal standard itself should be different in the Supreme Court. In other words, the standard remains the same for Supreme Court Justices and other judges, and this consideration should only influence Justices to hesitate in recusing themselves when recusal is not required by that standard.

A second consideration for the Supreme Court is the added strain on judicial independence caused by the Supreme Court's inability to substitute for a disqualified Justice. One abiding concern of recusal law is that parties may use recusal tactically to force out a judge or justice whom they predict would be adverse to their case, thus directly affecting the outcome.⁹⁶ Because the recusal of a Supreme Court Justice does not result in the reassignment of the case, parties are not faced with uncertainty as to whether a recusal would result in the assignment of a new Justice who is even more adverse to their cause than the present one. As a result, the danger of parties' tactical removal of a Justice may be more potent in the Supreme Court than in other federal courts. Here again, this consideration should not alter the recusal standard for the Supreme Court, rather it merely makes it imprudent for a Justice to recuse out of an excess of caution.

A third consideration setting recusal practices in the Supreme Court apart is the increased likelihood that a Justice will be friends or acquaintances of official parties in the cases. The Supreme Court hears many cases in which an important executive branch official is a party, and Justices are likely to know important politicians.⁹⁷ Disqualifying Justices on the basis of their friendships with important government officials would dramatically affect Court business.⁹⁸ Since an entirely apolitical Court seems to be a practical impossibility, this consideration may be a good reason to have a special rule for recusal in the Supreme Court in cases involving friendships with government officials.⁹⁹

96. See *supra* Part I.A (discussing policy goal of judicial independence in recusal law).

97. See Frank, *supra* note 29, at 745–48 (explaining that presidents tend to select Supreme Court appointments from their closest and most trusted advisors); see also *In re Mason*, 916 F.2d 385, 386 (7th Cir. 1990) (“Politics plays a role in appointment to judicial office Merit selection of federal judges means selection from among a group that rises to attention on other grounds—grounds not exclusively political, but often so.”); *Home Placement Serv., Inc. v. Providence Journal Co.*, 739 F.2d 671, 675 (1st Cir. 1984) (“It is common knowledge, or at least public knowledge, that the first step to the federal bench for most judges is either a history of active partisan politics or strong political connections or . . . both.”).

98. Cf. *Mason*, 916 F.2d at 387 (“There are not enough political eunuchs [sic] on the federal bench to resolve all cases with political implications . . .”).

99. See *infra* Part II.A.1.

II. APPLICATION OF STANDARDS TO *CHENEY*

It is highly unusual for a Supreme Court Justice to write an opinion giving reasons for his refusal to recuse, as Justice Scalia did in *Cheney*.¹⁰⁰ Because Justice Scalia defended his decision with a written opinion, Justice Scalia's memorandum carries some degree of weight.¹⁰¹ Thus, the memorandum should be evaluated not only as a resolution of the particular facts of *Cheney*, but as a rare statement of the modern standards and practices of recusal in the Supreme Court. This Part analyzes the central arguments in Justice Scalia's memorandum and argues that, for the most part, the memorandum faithfully applied recusal law. Given the generally well-reasoned nature of the memorandum, this Part argues that the widespread dissatisfaction with Justice Scalia's participation in *Cheney* reveals a systemic flaw in the Supreme Court's procedures for making recusal decisions.

The facts reported in the memorandum serve as the basis for this analysis. According to the memorandum, the invitation for the Louisiana duck hunting trip was extended by Justice Scalia to Vice President Cheney, on behalf of Justice Scalia's friend, Wallace Carline, who would be their host for the trip.¹⁰² Justice Scalia offered

100. See *supra* Part I.D. Cases other than *Cheney* in which a Justice did give reasons for his refusal to recuse are *Microsoft Corp. v. United States*, 530 U.S. 1301, 1301 (2000) (statement of Rehnquist, C.J., respecting recusal) (declining to recuse when Chief Justice Rehnquist's son was a partner in the firm that represented a litigating party); *Laird v. Tatum*, 409 U.S. 824, 839 (1972) (mem. of Rehnquist, J.) (denying recusal motion when Justice Rehnquist had testified before Congress about a domestic surveillance program, the constitutionality of which was being challenged in the case at bar). For a case in which a Justice explained why he agreed to recuse himself, see *Schneiderman v. United States*, 320 U.S. 118, 207 (1945) (statement of Jackson, J., respecting recusal) ("This case was instituted in June of 1939 and tried in December of that year. In January 1940, I became Attorney General of the United States and succeeded to official responsibility for it. This I have considered a cause for disqualification . . .") (citations omitted).

These cases are not discussed at length in this Comment because they shed little light on the present state of recusal law in the Supreme Court. Both *Schneiderman* and *Laird* predated the current version of § 455, the controlling statute for recusal in the Court. Indeed, Justice Rehnquist's participation in *Laird v. Tatum* seems to have been part of the impetus for the 1974 amendment to § 455. See Stempel, *supra* note 34, at 594 ("The reformist tide [to amend § 455 to impose a stricter, more comprehensive and objective standard for judicial disqualification] was given additional force by Justice Rehnquist's participation in *Tatum*.").

101. See Stempel, *supra* note 34, at 595 (noting that Justice Rehnquist's memorandum refusing to recuse in *Laird v. Tatum* "still possessed doctrinal impact" despite being objectionable on several grounds). However, because the decision was unreviewed, was made by one Justice rather than a panel of Justices, and was potentially self-interested, the memorandum should not be accorded the weight of Supreme Court precedent. See *infra* Stempel, *supra* note 34, at 607; Part II.C.

102. *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 914 (2004) (mem. of Scalia, J.).

to invite Vice President Cheney when he learned that Carline, who owns a business in the oil industry, was an admirer of the Vice President.¹⁰³ After Vice President Cheney accepted the invitation, it was agreed that Justice Scalia, his son, and his son-in-law would fly with Vice President Cheney on his government jet.¹⁰⁴ The trip was planned before the Court had granted certiorari in *Cheney*.¹⁰⁵ There were thirteen hunters on the trip, Justice Scalia was never alone with Vice President Cheney, and they never discussed the case.¹⁰⁶ Vice President Cheney left after two days, while Justice Scalia, his son, and his son-in-law stayed on for four days, returning to Washington on a commercial flight.¹⁰⁷

A. *Bases for Recusal Addressed in Justice Scalia's Memorandum*

The most significant issues raised by the recusal motion and addressed in Justice Scalia's memorandum are discussed below. Specifically, this Section addresses Justice Scalia's friendship with Vice President Cheney, the shared flight as a disqualifying gift, the decisions of past Supreme Court Justices in similar circumstances, and the role of public disapproval in the recusal analysis.

1. Justice Scalia's Friendship with Vice President Cheney

After noting that recusal is required under § 455(a) if his impartiality might reasonably be questioned, Justice Scalia wrote that the only possible basis for an appearance of bias arising from the trip is that it suggests a friendship between Justice Scalia and Vice President Cheney.¹⁰⁸ However, Justice Scalia held that

while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer.¹⁰⁹

The memorandum took issue with the assertion in the recusal motion that the case was not a "run-of-the-mill" challenge to an administrative decision because Vice President Cheney's own

103. *Id.*

104. *Id.* at 914–15.

105. *Id.* at 915.

106. *Id.*

107. *Id.*

108. *Id.* at 916.

109. *Id.*

conduct was central to this case, which placed the Vice President's "reputation and his integrity on the line."¹¹⁰ To the contrary, Justice Scalia urged, the legal issues in the suit had no bearing on Vice President Cheney's reputation and integrity.¹¹¹ Justice Scalia conceded that the case may have political consequences for the Vice President, but

[t]o expect judges to take account of political consequences—and to assess the high or low degree of them—is to ask judges to do precisely what they should not do. It seems to me quite wrong (and quite impossible) to make recusal depend on what degree of political damage a particular case can be expected to inflict.¹¹²

Some forceful critiques of this portion of Justice Scalia's memorandum are available. One glaring deficiency is that Justice Scalia cited no authority for a central premise of this decision, his assertion that the dispositive factor in friendship cases is whether the case involves the friend's personal fortune or freedom.¹¹³ Further, such a rule assumes a dichotomy between personal and official interests that may not exist.¹¹⁴ Indeed, some commentators have plausibly surmised that the stakes in this suit for Vice President Cheney's personal interests were much higher than they would have been in a suit involving a small amount of his personal financial interests.¹¹⁵ Finally, Justice Scalia's dichotomy goes against the grain

110. Motion to Recuse, *supra* note 8, at 9.

111. *Cheney*, 541 U.S. at 920 (mem. of Scalia, J.).

112. *Id.*

113. However, as will be argued in Part III, this shortcoming is more fairly attributable to the paucity of authority on the subject than to Justice Scalia's opinion individually.

114. See Jeffrey Rosen, *Quiet Please*, NEW REPUBLIC, Apr. 5, 2004, at 14, 14 ("In fact, the line between Cheney's personal and official capacity is hardly as bright as Scalia suggests—thanks largely to the Republican assault on executive privilege during the Clinton years."); Robert Solomon, *Powers Separation a Cause for Pause*, CONN. L. TRIB., May 10, 2004, at 18 ("The case involves the conduct of the vice president's Energy Commission and the notion of Dick Cheney as not being personally involved is ludicrous."); Taylor, *supra* note 24, at 8 ("[M]ost ethicists say this case raises questions about Cheney's personal judgment and conduct: the vice president has a major political stake in the outcome.")

115. See, e.g., Martin Dyckman, Editorial, *Eroding Our Trust in the High Court*, ST. PETERSBURG TIMES (Fla.), Apr. 4, 2004, at 3P, available at LEXIS, News & Business Library. Some of the reasons that such a hypothesis seemed plausible were the prominence of the litigation in the national media, the damage that could have been done to Vice President Cheney and the Bush administration if the allegations in the suit (that former Enron CEO Kenneth Lay was a member of the task force) were proven to be true, and the imminence of the next presidential election.

of the general rule that the recusal decision does not depend on whether the interest at issue is economic or noneconomic.¹¹⁶

Despite these shortcomings, Justice Scalia's bright-line rule is defensible as a pragmatic approach that is consistent with both the case law and the policies of recusal law. Even outside the Supreme Court, friendship between a judge and a litigating party has seldom been grounds for judicial disqualification.¹¹⁷ Part of the reason for this may be that judges have a constitutionally protected freedom of association, and recusal law is therefore reluctant to interfere with judges' social lives.¹¹⁸ Indeed, a rule requiring judges to sever all social ties upon elevation to the bench would quite likely hamper their effectiveness as judges.¹¹⁹

Justice Scalia's rule balances the need for impartiality and the appearance of impartiality against the realities of the Supreme Court's unique position. A recusal rule that has Justices consulting public opinion polls every time the Court hears a case involving or

116. *Cf. In re Kan. Pub. Employees Ret. Sys.*, 85 F.3d 1353, 1359 (8th Cir. 1996) ("The interest described in § 455(b)(5)(iii) includes noneconomic as well as economic interests." (citing *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1113 (5th Cir. 1980))).

117. *See Jorgensen v. Cassiday*, 320 F.3d 906, 911–12 (9th Cir. 2003) (upholding the trial judge's refusal to recuse himself when his former law clerk was a party and had threatened to use his influence with the judge); *Bolin v. Story*, 225 F.3d 1234, 1239 (11th Cir. 2000) (affirming denial of recusal motion where judge had "a long-term working relationship with a large majority of the defendants"); *United States v. Lovaglia*, 954 F.2d 811, 816–17 (2d Cir. 1992) (upholding refusal to recuse where judge had a social relationship with victims of defendants' crimes, but that relationship had ended seven years prior to proceeding); *Vieux Carre Prop. Owners v. Brown*, 948 F.2d 1436, 1448 (5th Cir. 1991) (upholding refusal to recuse where judge had close personal relationship with mayor in a case in which the city was a party and the mayor had a significant political stake in the project at issue in the suit); *see also United States v. Leisure*, 377 F.3d 910, 916 (8th Cir. 2004) ("Previous contact between judge and litigant in an unrelated context is not grounds to disqualify a judge . . ."); *In re Executive Office of President*, 215 F.3d 25, 25–26 (D.C. Cir. 2000) (denying a motion to recuse where the case involved the conduct of the President who had appointed the judge); *Little Rock Sch. Dist. v. Ark. Bd. of Educ.*, 902 F.2d 1289, 1289–92 (8th Cir. 1990) (declining to recuse even though judge's personal friends had a financial interest in the subject matter of the case). *But see Moran v. Clarke*, 296 F.3d 638, 649 (8th Cir. 2002) (remanding to district court for further consideration of recusal request because "[t]he image of one sitting in judgment over a friend's affairs would likely cause the average person in the street to pause"); *SHAMAN ET AL.*, *supra* note 36, § 4.15, at 137 ("Whether or not disqualification is required when a friend appears as a party to a suit before a judge depends on how personal the relationship is between the judge and the party.").

118. *See SHAMAN ET AL.*, *supra* note 36, § 10.42, at 362.

119. Jeffrey M. Shaman, *Foreword to LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT* x–xi (2d ed. 1992) ("Involvement in the outside world enriches the judicial temperament, and enhances a judge's ability to make difficult decisions. As Justice Holmes put it, 'the life of the law has not been logic: it has been experience.'").

affecting an administration official with whom they are friends is not a workable solution. Friendships between Supreme Court Justices and holders of high political office have always existed, and recusal practices simply must account for this reality.¹²⁰ The rule on which Justice Scalia based his decision may not remove all undesirable bias, as Justices may favor the interests of their friends. However, the elimination of that potential bias by requiring recusal based on a Justice's friendship with an administrative official could be, in Scalia's phrase, "utterly disabling" to the Court's business.¹²¹

2. Was the Flight a Disqualifying Gift?

In response to the recusal motion's argument that Justice Scalia's flight to Louisiana with Vice President Cheney on Air Force Two was a disqualifying gift,¹²² Justice Scalia's memorandum gave three reasons why the flight was a permissible social courtesy rather than a disqualifying gift. First, Justice Scalia argued, the shared flight with Vice President Cheney was not a gift because it cost the government nothing.¹²³ Second, Justice Scalia, his son, and son-in-law saved no money as a result of the flight since they bought round-trip tickets for their return trip to Washington anyway.¹²⁴ Third, the reason they traveled with Vice President Cheney was not to save money but for purposes of convenience.¹²⁵ The gift analysis is the most troublesome portion of Justice Scalia's memorandum on several grounds.

It is well established in the law of recusal that the proper measure of a gift is whether the thing has value,¹²⁶ not whether it cost the giver anything. Thus, it is irrelevant whether the flight cost anything to the government or to Vice President Cheney. The relevant point is that it held a value for Justice Scalia. By Justice Scalia's own account, it did have a value because it "avoid[ed] some

120. Justice Scalia went so far as to say that "[m]any Justices have reached this Court precisely because they were friends of the incumbent President or other senior officials." *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 916 (2004) (mem. of Scalia, J.).

121. *Id.*

122. Motion to Recuse, *supra* note 8, at 6.

123. *Cheney*, 541 U.S. at 920-21 (mem. of Scalia, J.).

124. *Id.* at 921.

125. *Id.*

126. See ABA MODEL CODE OF JUDICIAL CONDUCT Canon 4(D)(5)(d) cmt. 1 (1990) ("A gift to a judge . . . that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office and might require disqualification of the judge where disqualification would not otherwise be required."); see also FLAMM, *supra* note 8, § 6.2.4, at 178 ("The guiding precept of the Code is that while a judge is not permitted to accept 'valuable' gifts or favors from attorneys, he may accept 'mere social hospitality' from them." (citations omitted)).

inconvenience” to him and “considerable inconvenience” to his friends.¹²⁷ The proposition that there was no gift because the flight was shared for purposes of convenience rather than to save money is unpersuasive. The flight with Vice President Cheney had value for Justice Scalia, his son, and son-in-law, whether the value is cast in terms of saved money or enhanced convenience.

The fact that Justice Scalia’s son and son-in-law flew in Vice President Cheney’s jet should also be considered in the analysis. In the provision prohibiting acceptance of gifts, the Code states that the judge “shall urge members of the judge’s family residing in the judge’s household” not to accept gifts.¹²⁸ Presumably, Justice Scalia’s “married son”¹²⁹ and son-in-law do not reside in Justice Scalia’s household. Nonetheless, the fact that the invitation was extended to two persons with such a close relationship to Justice Scalia adds to the appearance of impropriety.¹³⁰

Next, it is doubtful that Justice Scalia’s purchase of a round-trip ticket sanitized the gift. The flight with Vice President Cheney had valuable advantages over the commercial ticket that Justice Scalia purchased. Flying in Vice President Cheney’s jet was more comfortable than coach in a commercial airliner.¹³¹ In addition, the flight with Vice President Cheney relieved Justice Scalia of the expense and inconvenience of transportation from New Orleans, where his commercial flight would have arrived, to Patterson, where the flight with Vice President Cheney arrived.¹³²

Justice Scalia attempted to justify his acceptance of the flight by pointing out that courtesies from government officials to Justices, such as dinner invitations, are commonplace.¹³³ He surmised that the value of his flight was likely lower than the value of dinner at the White House, which would be proper.¹³⁴ This justification does not serve. Social courtesies are acceptable not simply because their value is negligible, but also because they are commonplace and avoidable only at great cost to the freedoms and social lives of judges.¹³⁵ The

127. *Cheney*, 541 U.S. at 921 (mem. of Scalia, J.).

128. ABA MODEL CODE OF JUDICIAL CONDUCT Canon 4(D)(5) (1990).

129. *Cheney*, 541 U.S. at 921 n.2 (mem. of Scalia, J.).

130. See 28 U.S.C. § 455(a) (2000).

131. *Cheney*, 541 U.S. at 921 (mem. of Scalia, J.).

132. *Id.* at 915, 921.

133. *Id.* at 921.

134. *Id.*

135. See SHAMAN ET AL., *supra* note 36, § 7.28, at 252 (“[I]t is quite undesirable to preclude judges from accepting innocent invitations Consequently, the Code actually

acceptable social courtesies from administrative officials to Justices do not set a bar for de minimis gifts, below which anything goes. Otherwise, it would be acceptable for Vice President Cheney to simply give Justice Scalia an amount of money less than the auction value of dinner at the White House. Clearly, such an action would not be countenanced by recusal law.¹³⁶

Justice Scalia likened his flight with Vice President Cheney to the frequent invitations of shared transportation extended to members of Congress by the executive branch.¹³⁷ His analogy is misleading because there is no need for members of Congress to be impartial or appear impartial toward an executive official. A Justice who has a case before him involving that official, however, is required to be and appear impartial toward the official and is thus subject to different standards.¹³⁸

There is ambiguity inherent in a standard that carves out an exception to the prohibition on gifts for "ordinary social hospitality," but does not define that term.¹³⁹ As such, the gift/social hospitality analysis relies on common sense and ordinary usage to balance a Justice's legitimate interest in carrying on social relationships against the appearance of impropriety.¹⁴⁰ When a Justice is accepting from a pending litigant a flight to a shared vacation, the gift seems a long way from what the Code drafters envisioned for an ordinary social hospitality.¹⁴¹ Justice Scalia's memorandum attempted to argue that usage in the Supreme Court has defined acceptance of flights from government officials as proper, but it failed to clearly establish that such a practice is entrenched or generally accepted by the Court. This is a portion of the opinion that would have been more credible if the source of the information about generally accepted practices on

bars a very small class of loans, gifts, and favors, while allowing wide latitude to ordinary social hospitality.").

136. See *In re Morrissey*, 313 N.E.2d 878, 881-82 (Mass. 1974) (disciplining a judge for accepting money gift from a litigant whose case was pending).

137. *Cheney*, 541 U.S. at 921 (mem. of Scalia, J.).

138. Namely, the recusal standards. See *supra* Part I (outlining the recusal standards as they pertain to the U.S. Supreme Court).

139. See ABA MODEL CODE OF JUDICIAL CONDUCT Canon 4(D)(5)(c) (1990) (listing "ordinary social hospitality" but not explaining its definition).

140. SHAMAN ET AL., *supra* note 36, § 7.28, at 252.

141. See E.W. THODE, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 84-85 (1973) (noting that the drafters of the Code "felt that there are common sense limits and that the standard is understandable and defensible; for example, the offer to a judge of a month at the mountain cabin of a lawyer friend who practices in the judge's court is clearly not ordinary social hospitality, and acceptance is prohibited." (quoted in SHAMAN ET AL., *supra* note 36, § 7.28, at 252 n.258)).

the Supreme Court had been someone other than the Justice whose impropriety was at issue.

3. Past Recusal Practices in the Supreme Court

Justice Scalia's memorandum found the recusal motion deficient because the motion failed to cite any cases with parallel facts in which a Supreme Court Justice recused himself.¹⁴² Justice Scalia then defended his participation by pointing to two instances in which a Supreme Court Justice vacationed with an administration official while the official's case was pending and the Justice did not recuse himself.¹⁴³ In January 1963, Justice Byron White joined Attorney General Robert Kennedy on a ski vacation while two cases were pending in which Kennedy, in his official capacity, was a party.¹⁴⁴ In April 1942, Justice Robert Jackson spent the weekend with President Franklin D. Roosevelt while *Wickard v. Filburn*,¹⁴⁵ a case of great importance to the President, was pending.¹⁴⁶

Some commentators have criticized this portion of Justice Scalia's memorandum by pointing out other instances in the Supreme Court's history when Justices were far more sensitive to the appearance of bias.¹⁴⁷ The more salient critique is that for several reasons, historical recusal decisions of Supreme Court Justices are simply not very helpful to the modern recusal analysis.

First, historic recusal practices are not very informative because Justices do not generally give reasons for their recusal decisions.¹⁴⁸ Since we are seldom told why a Justice recused himself or decided against recusal, we cannot evaluate whether that decision is worthy of

142. *Cheney*, 541 U.S. at 922 (mem. of Scalia, J.).

143. *Id.* at 924–26.

144. *Id.* at 924–25.

145. 317 U.S. 111 (1942).

146. *Cheney*, 541 U.S. at 925–26 (mem. of Scalia, J.). *Wickard* was important to President Roosevelt because the constitutionality of much of his New Deal legislation depended on *Wickard's* reading of Congress's power under the Commerce Clause. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 250–55 (2d ed. 2002).

147. For example, Justice Thurgood Marshall recused himself in all cases that involved the NAACP because of his previous service as the general counsel of that organization. See Stempel, *supra* note 34, at 624. In another instance, Chief Justice Taft divested himself of a valuable annuity left to him by Andrew Carnegie because he was “profoundly concerned that the usefulness and influence of the Court should not be lessened on this account” See Frank, *supra* note 28, at 744 (quoting A. MASON, WILLIAM HOWARD TAFT 274 (1964)).

148. See *supra* Part I.D.

being followed.¹⁴⁹ The fact that Justices do not usually write opinions justifying their recusal decisions also means that it is unfair to expect a recusal movant to point to specific instances where Justices recused themselves for the same reason being argued. For that reason, Justice Scalia's criticism of the recusal motion for the paucity of Supreme Court case law therein is unfair. Indeed, Justice Scalia cited no case law supporting the central legal premise of his memorandum.¹⁵⁰

Furthermore, historical practices are unhelpful because much of the Supreme Court's handling of recusal, including the two instances discussed by Justice Scalia's memorandum, preceded the current version of the federal statute governing recusal in the Supreme Court.¹⁵¹ In 1974, § 455 was amended and broadened substantially.¹⁵² Because of its broader reach, many of the recusal decisions of Supreme Court Justices before 1974 would not pass muster under the present version of the statute.¹⁵³ Thus, any analysis based on the recusal decisions of Justices predating the 1974 amendment is potentially misleading.

Historical recusal practices should not be given the weight of precedent for the additional reason that they were not decided by a disinterested panel.¹⁵⁴ Recusal decisions are made individually by the Justice and are not subsequently reviewed.¹⁵⁵ The value of recusal decisions is reduced by the potential for self-interest as well as the fact that they are never subjected to review. Indeed, in the two cases that Justice Scalia cited, the participation of the Justices was never challenged and the Justices therefore never made a formal decision

149. See *infra* Part III.A (proposing that Supreme Court Justices write opinions defending their recusal decisions in order to address this concern).

150. See *infra* Part III.A (noting that Justice Scalia gives no legal support for his proposition that recusal is not required when a Justice's friend has an official interest, rather than a personal one).

151. See *supra* Part I.B (discussing 28 U.S.C. § 455 (2000), the statute governing recusal in the Supreme Court).

152. See FLAMM, *supra* note 8, § 23.6.3, at 682 ("Prior to 1974, § 455 had consisted of little more than the then-current version of the 1821 prohibition against a judge presiding over any case in which he held an interest or was related to a party; the 1974 revision to § 455 resulted in massive changes." (footnotes omitted)).

153. See Stempel, *supra* note 34, at 608–28 (reviewing participation in cases of historical Supreme Court Justices, including Justices Holmes, Black, and Vinson, that would likely violate modern recusal standards).

154. See Stempel, *supra* note 34, at 607–08 ("[T]he 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.").

155. See *supra* Part I.D.

about recusal. The mere fact that the Justices participated in those cases does not make their participation proper. And the fact that the judiciary has misbehaved historically does not justify continued misbehavior. Furthermore, by basing his recusal decision in part on those historical actions, Justice Scalia to some degree puts the Court's imprimatur on those activities.¹⁵⁶ The standard for recusal should not be defined by the actions of Justices that may have been unethical to begin with.

4. What Role Does Public Criticism Play in the Recusal Decision?

The recusal motion cites editorials at length in order to support its argument that the shared duck hunting trip created an appearance of partiality on the part of Justice Scalia.¹⁵⁷ Responding to these arguments, Justice Scalia held that the editorials should not carry any weight because they were based on erroneous facts¹⁵⁸ and basing recusal decisions on the opinions of newspaper editors would give the press a veto power over a Justice's participation in a case.¹⁵⁹

Justice Scalia's concern about a veto power by the press is rooted in a commitment to judicial independence, which has long been a defining policy of recusal law.¹⁶⁰ Indeed, case law specifically supports the proposition that erroneous media accounts cannot be allowed to dictate the recusal decision.¹⁶¹ Courts have also rejected the argument that newspaper reporting—even accurate reporting—of a judge's decision not to recuse himself does not disqualify the judge

156. Even though recusal decisions from Supreme Court Justices might not be worthy of authoritative status for the reasons being given, courts and scholars have, in the past, relied on them as authoritative interpretations of the law of recusal. See Stempel, *supra* note 34, at 595 (noting that despite the impropriety of Justice Rehnquist's actions in *Laird v. Tatum*, his "memorandum still possessed doctrinal impact, making its way into some legal texts as a summary of Supreme Court recusal practice and by lower courts for its endorsement of a judicial 'duty to sit'" (footnote omitted)).

157. Motion to Recuse, *supra* note 8, at 3–5.

158. *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 922–24 (2004) (mem. of Scalia, J.).

159. *Id.* at 926–27.

160. See *supra* Part I.A (outlining the policies of recusal law).

161. *United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986). The court stated:

Although public confidence may be as much shaken by publicized inferences of bias that are false as by those that are true, a judge considering whether to disqualify himself must ignore rumors, innuendos, and erroneous information published as fact in the newspapers To find otherwise would allow an irresponsible, vindictive or self-interested press informant and/or an irresponsible, misinformed or careless reporter to control the choice of judge.

Id. (quoting *In re United States*, 666 F.2d 690, 694 (1st Cir. 1981)).

by virtue of a public perception of bias.¹⁶² These cases are in keeping with the appearances standard of § 455(a), because that statute does not ask whether the public actually questions the judge's impartiality. Rather, the inquiry is whether a neutral observer, apprised of all the material facts, would reasonably question the judge's impartiality.¹⁶³ Thus, even where media accounts manifest a public perception of the judge's impartiality, that perception must be reasonable in order for the judge to be disqualified under § 455(a). Further, where the public is not apprised of all the material facts, their opinion about the judge's impartiality is unhelpful to the § 455(a) inquiry.

According too great a weight to media accounts may, as Justice Scalia argued, "give elements of the press a veto over participation of . . . Justices."¹⁶⁴ The independence of the Court requires that the participation of Justices not be subject to the whims of certain influential editors. On the other hand, a reluctant Justice should not be able to avoid recusal where it would be proper simply because the national media is urging that course. Moreover, public response, as manifested in the national media, should have some place in the § 455(a) analysis. When the public is substantially informed about the facts of the Justice's involvement, public opinion can serve as a counterweight to the natural and sometimes unreasonable tendency of Justices to find that their own impartiality cannot reasonably be questioned.¹⁶⁵ Thus, though public opinion and media accounts should not be given dispositive weight, Justices should consider them in evaluating the appearance of bias, particularly when the public opinion is widespread, largely uniform in its disposition, and substantially informed by accurate reporting about the facts of the Justices' participation.

In *Cheney*, Justice Scalia had good reason to be dismissive of the criticism in the press of his participation because much of this

162. See *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 871 (9th Cir. 1991) ("The fact that the judge's decision [not to recuse] was reported in the newspapers is not persuasive of a public impression of partiality." (citing *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 882 F.2d 1556, 1569 (Fed. Cir. 1989))); *In re City of Detroit*, 828 F.2d 1160, 1168 (6th Cir. 1987); FLAMM, *supra* note 8, § 5.7.2, at 168 ("It is generally agreed . . . that media reports that suggest judicial impropriety or bias cannot act as a barometer of the reasonable person's standard, particularly where it appears that erroneous information has been published as fact" (footnote omitted)).

163. See *supra* Part I.B (explaining the reasonable observer standard under § 455(a)).

164. *Cheney*, 541 U.S. at 927 (mem. of Scalia, J.).

165. See *infra* Part III.B (arguing that this tendency is one reason why recusal decisions should be reviewed by the full panel of the Court).

criticism was based on inaccurate reporting of the circumstances of the trip.¹⁶⁶

B. *The Fundamental Problem with Justice Scalia's Memorandum*

As the analysis above shows, Justice Scalia's decision not to recuse was defensible on several grounds. With the possible exception of the "gift" portion of the memorandum, his opinion relied on principles and policies that are well established in recusal law. From the perspective of recusal law, then, what is perhaps most unsatisfactory about *Cheney* is that in the aftermath of a generally well-reasoned memorandum, the public response has been strident, sustained, and almost uniformly critical.¹⁶⁷ The detractors have

166. See *Cheney*, 541 U.S. at 923–24 (mem. of Scalia, J.) (pointing out the erroneous facts reported in several press accounts).

167. See, e.g., Editorial, *Caesar's Wives*, RICHMOND TIMES DISPATCH, Mar. 27, 2004, at A16 ("Many critics have called on Scalia to recuse himself, and although Scalia is a personal friend of the lead attorney on the opposite side as well, he might have been wise to do so."); Editorial, *Cheney Should Answer Questions on Energy*, DENVER POST, June 28, 2004, at B-07 ("Scalia had no business participating in the case . . ."); Editorial, *Constitution: Scalia May Love It, But Live It?*, CLARION-LEDGER (Jackson, Miss.), Apr. 9, 2004, at 12A, available at LEXIS, News & Business Library ("How can he rule impartially accepting favors from the defendant? Yet, he refuses to step down. How can the public have confidence in the judiciary with such ongoing conduct?"); Martin Dyckman, Editorial, *Eroding Our Trust in the High Court*, ST. PETERSBURG TIMES (Fla.), Apr. 4, 2004, at 3P, available at LEXIS, News & Business Library ("Scalia enriches the literature of jurisprudence nearly every time he writes, but his 21-page memorandum refusing to recuse himself from the *Cheney* case was more a masterpiece of propaganda than of law."); Larry Fahn, *Future Generations Be Damned! The Sorry Environmental Legacy of the Bush Administration*, TIKKUN, May 1, 2004, at 29 ("Notwithstanding the clear appearance of a conflict, Justice Scalia refused to recuse himself."); Editorial, *Fight to Protect Open Secret Only Raises More Suspicions*, U.S.A. TODAY, June 25, 2004, at 8A ("[J]udges are supposed to avoid contact outside the court with parties to cases before them, but Scalia defiantly refused to recuse himself By ignoring appearances, Scalia looks as though he is using his position to help out an old friend."); Ernst-Ulrich Franzen, Editorial, *Making Sausage in Secret*, MILWAUKEE J. SENTINEL, June 25, 2004, at 18A, available at LEXIS, News & Business Library ("[Scalia's] opinion only reaffirms that the hunt was a bad idea He should have recused himself."); Richard F. Friedman, Editorial, *Scalia Should Not Help Decide Cheney Case*, DETROIT NEWS, Mar. 24, 2004, at 9A ("Justice Scalia has defended his nonrecusal vigorously, but by sitting on the case he risks creating [an] appearance of impropriety . . ."); Cragg Hines, Editorial, *Scalia's Ducking of Recusal Injures Court*, HOUSTON CHRONICLE, Mar. 21, 2004, at 2 ("Scalia's decision runs counter to both the judicial code . . . and federal law . . ."); Marianne M. Jennings, *Kerrys and Justices Adrift on a Sea of Complexity*, DESERET MORNING NEWS (Salt Lake City), Mar. 29, 2004, available at LEXIS, News & Business Library ("Scalia defiantly refuses to recuse himself from the case despite what looks like a conflict, smells like a conflict and quacks like a conflict."); Editorial, *Judicial Ethics Under Review*, N.Y. TIMES, May 27, 2004, at A28 ("There was widespread outrage when word got out that Justice Antonin Scalia had gone duck hunting with Vice President Dick Cheney while Mr. Cheney had an important case pending in the Supreme Court. That outrage grew when

Justice Scalia was allowed to remain on the case.”); Editorial, *Justice in a Bind*, N.Y. Times, Mar. 20, 2004, at A12 (“Justice Scalia, having lowered the bar for judicial ethics by refusing to acknowledge the reasonableness of questions about his impartiality, has guaranteed that the Supreme Court will end up embarrassed, no matter which way it rules.”); Editorial, *The Justice in the Bubble*, L.A. TIMES, Apr. 12, 2004, at B10 (“Scalia had already carved out his separate zone of ethics by refusing to recuse himself from [Cheney] . . .”); Editorial, *Justice Scalia Dodges Issue*, CHATTANOOGA TIMES FREE PRESS, Mar. 22, 2004, at B6, available at LEXIS, News & Business Library (“The public has every reason to be concerned about Mr. Scalia’s judicial temperament and his lack of sensitivity, and to fear the precedent his refusal to recuse sets for the nation’s judiciary.”); Editorial, *Justice Scalia Off Target in Cheney Case*, CINCINNATI ENQUIRER, Mar. 21, 2004, at 2F, available at LEXIS, News & Business Library (“[By refusing to recuse,] Scalia missed a chance to reassure the American people.”); Editorial, *Justice’s Judgment Suspect*, ROCKFORD REGISTER STAR (Rockford, Ill.), Mar. 22, 2004, at 7A, available at LEXIS, News & Business Library (“Scalia’s refusal to step away from a case involving the vice president damages the legitimacy of the court.”); Brian H. Kehrl, *The Task at Hand: Will Cheney’s Secret Energy Meetings See the Light?*, IN THESE TIMES, May 10, 2004, at 13 (“Despite the apparent conflict of interest, Cheney’s duck-hunting buddy Justice Antonin Scalia has refused to recuse himself from the case.”); Steve Lambert, *Scalia All Too Willing to Duck Issue of Integrity*, SAN BERNADINO SUN, Apr. 4, 2004, available at LEXIS, News & Business Library (“What he fails to acknowledge is human nature - and that he, Scalia, cannot win this one in the court of public opinion.”); Editorial, *The Law, and the Justice*, TIMES UNION (Albany, N.Y.), Apr. 13, 2004, at A8, available at LEXIS, News & Business Library (“Justice Scalia so arrogantly dismiss[ed] the notion that refusing to recuse himself from a case involving his duck-hunting buddy, Vice President Dick Cheney, suggested a conflict of interest.”); Editorial, *Lax Ethics on High Court*, PALM BEACH POST (Fla.), Mar. 21, 2004, at 2E, available at LEXIS, News & Business Library (criticizing the lax ethics and “bad judgment” of both Justice Scalia and Justice Ginsburg for their extra-judicial activities); Ed Lowe, *If It Looks Like a Duck . . .*, NEWSDAY (N.Y. City), Mar. 24, 2004, at A8, available at LEXIS, News & Business Library (“Whether out of supreme arrogance or sublime stupidity, Scalia refused [to recuse].”); Editorial, *Mr. Cheney’s Day in Court*, N.Y. TIMES, Apr. 27, 2004, at A24 (“When Justice Scalia’s hunting trip became public, there were widespread calls for him to recuse himself. The Supreme Court said that the decision was Mr. Scalia’s, and that he had chosen not to. That may resolve the question legally, but it remains troubling.”); Editorial, *The Mystique of Blind Justice*, CHRISTIAN SCI. MONITOR, June 16, 2004, at 8 (suggesting that Justice Scalia should have recused himself in order “to avoid even the appearance of a potential conflict of interest”); *Not Ducking*, ECONOMIST, Mar. 27, 2004 (“[T]he question is not whether Mr Scalia’s impartiality has in fact been impaired, but whether a reasonable person could think that it might have been. And, so far, he has not fully convinced [commentators] that this was not the case.”); Editorial, *Panel to Study Judicial Misconduct Is a Step in the Right Direction*, HARTFORD COURANT, June 2, 2004, available at LEXIS, News & Business Library (arguing that Justice Scalia’s participation in Cheney makes him “tainted by conflict of interest”); *The Question: To Recuse, or Not?*, CONN. L. TRIB., June 21, 2004, at 17, available at LEXIS, News & Business Library (“[Scalia’s] lengthy justification deals with the technical legal issues surrounding recusal and not with how it appears to a public that is increasingly cynical about the legal system.”); Editorial, *Refusing to Recuse*, ST. PETERSBURG TIMES (Fla.), Mar. 21, 2004, at 2P, available at LEXIS, News & Business Library (“Justice Antonin Scalia’s 21-page explanation of why he refuses to recuse himself from a case involving Vice President Dick Cheney after the two of them went duck-hunting proves that justice is more deaf than blind.”); Editorial, *Scalia: Court’s Credibility Needlessly at Risk*, CLARION-LEDGER (Jackson, Miss.), Mar. 22, 2004, at 10A, available at LEXIS, News & Business Library

included columnists and editorialists, as well as scholars¹⁶⁸ and members of the bar.¹⁶⁹ That the opinion did not engender public

(“Supreme Court Justice Antonin Scalia should save the court embarrassment and recuse himself . . .”); Editorial, *Scalia Reversing Himself?*, PALM BEACH POST (Fla.), Apr. 13, 2004, at 10A, available at LEXIS, News & Business Library (“Supreme Court Justice Antonin Scalia has revealed his tin ear for judicial ethics by refusing to recuse himself . . .”); Editorial, *Scalia: What Do You Know About How It Looks?*, JOURNAL & COURIER (Lafayette, Ind.), Mar. 20, 2004, at 7A, available at LEXIS, News & Business Library (“Scalia’s refusal [to recuse] appears suspect, at least.”); Editorial, *Scalia’s Bizarre Road Show*, NEWS & RECORD (Greensboro, N.C.), Apr. 15, 2004, at A8 (“Scalia stubbornly refuses to recuse himself, even though the hunting trip smells to high heaven like a conflict of interest.”); Editorial, *Scalia’s Quack Opinion*, JOURNAL NEWS (Westchester County, N.Y.), Mar. 20, 2004, at 6B, available at LEXIS, News & Business Library (“In refusing to recuse himself . . . , Scalia puts himself above ethical rules dictating conduct for all who stand in judgment in robes.”); Robert Scheer, Editorial, *The Dangers of a ‘What the Heck’ Vote*, L.A. TIMES, Sept. 28, 2004, at B13 (opining that Scalia’s actions in *Cheney* show that he is inclined to “green-light the actions of . . . [Bush, a] wildly activist president”); Lisa Stein, *Judging Judges*, U.S. NEWS & WORLD REP., June 7, 2004, at 13 (reporting “scorching criticism” of Justice Scalia’s refusal to recuse); Editorial, *Supreme Arrogance*, BUFFALO NEWS, Mar. 29, 2004, at B6, available at LEXIS, News & Business Library (“[Scalia’s] stubborn refusal to [recuse himself] tarnishes not just him, but the entire court.”); Editorial, *Supreme Court Needs More Ethics Scrutiny*, HONOLULU ADVERTISER, May 28, 2004, at 16A, available at LEXIS, News & Business Library (“Regardless of what [Scalia and Cheney] talked about, we’re uncomfortable with cozy judicial-executive relationships. Even the suggestion of bias should compel a judge to disqualify himself from a case.”); Editorial, *Supreme Court Should Revisit Rules on When Members Face Conflicts of Interest*, MORNING CALL (Allentown, Pa.), Mar. 22, 2004, at A6, available at LEXIS, News & Business Library (“It’s hard to see how the actions of Mr. Cheney challenged in the case don’t involve him personally.”); Editorial, *A Welcome Study of Judicial Ethics*, CHATTANOOGA TIMES FREE PRESS, June 14, 2004, at B6, available at LEXIS, News & Business Library (“[Scalia’s] duck-hunting excursions with Dick Cheney while the vice president was involved in a case before the high court rightfully alarm those concerned about judicial bias.”). *But see Scalia Shoots Down His Critics*, N.Y. POST, Mar. 21, 2004, at 28, available at LEXIS, News & Business Library (“[Scalia] makes a cogent and persuasive argument to justify his decision to stay on the case . . .”).

The geographic and ideological distribution of the criticizing papers argues against the interpretation that the editorials represent a personal vendetta on the part of a few influential publishers. Many of the editorials criticized Justice Scalia’s actions at the same time as the actions his colleague, Justice Ginsburg, whose jurisprudence is generally the opposite of Scalia’s. Thus, it would not be fair to characterize the response as simple knee-jerk partisan politics.

168. *See, e.g.*, Freedman, *supra* note 4, at 235 (“Scalia’s opinion denying the recusal motion engages in fallacious arguments and misstates and misapplies the Federal Disqualification Statute. A Justice of the Supreme Court of the United States owes litigants, and the public, a greater respect for the law of the United States.”); Paul Campos, *Scalia Ducking the Issue*, ROCKY MOUNTAIN NEWS (Denver), Mar. 30, 2004, at 31A, available at 2004 WLNR 1225530 (“[Scalia’s memorandum] engages in 21 pages of egotistical bluster and posturing, in the course of which he makes various claims that, as lawyers say, don’t pass the red-face test.”); Stephen Gillers, *Scalia’s Flawed Judgment*, NATION, Apr. 19, 2004, at 21, 21 (arguing that Justice Scalia’s memorandum creates damage beyond *Cheney* case because “Scalia’s opinion tells thousands of federal and state judges that it can be OK to vacation with friends who have cases before them and to

confidence is worthy of concern because one of the chief aims of recusal law is to preserve the public's trust in the integrity of the judicial system.¹⁷⁰

It is not inconsistent to assert that the public reaction to the memorandum is relevant while at the same time agreeing with Justice Scalia's proposition that his recusal decision cannot rely on opinions expressed in the national media. First, the editorials predating the memorandum may have relied on erroneous information about the trip, while editorials after Justice Scalia's memorandum benefited from Justice Scalia's corrections to the popular account.¹⁷¹ More importantly, allowing public opposition to have a determinative effect on the recusal decision would compromise judicial independence, while attention to ex post public reaction does not pose such a danger.

To the extent that Justice Scalia's memorandum was a faithful exercise of recusal law, the public reaction to that memorandum

accept the generosity of those friends while their cases are pending"); Ifill, *supra* note 23, at 60 ("Scalia's justification for staying on the case despite his January duck-hunting trip with the vice president reveals a major gap between the justice's perception of his actions and the public's perception."); Rosen, *supra* note 114, at 14 ("[Scalia's memorandum] does more to undermine public confidence in his own judicial temperament than did the duck-hunting trip itself."); Robert Solomon, *Powers Separation a Cause for Pause*, CONN. L. TRIB., May 10, 2004, at 18 ("Legal scholars criticized Justice Scalia's opinion as wrong, if not intellectually dishonest. That a judge can go duck hunting with the plaintiff and then decide his case impartially is a difficult notion for lawyers."). *But see* Ronald D. Rotunda, *Election-Year Hunting*, NAT'L REV. ONLINE, Mar. 30, 2004, <http://www.nationalreview.com/comment/rotunda200403300900.asp> ("[T]he calls for Scalia's recusal—and impeachment—have very little to do with justice and everything to do with politics."); David G. Savage & Richard A. Serrano, *Ethics and the Supreme Court*, COURIER-JOURNAL (Louisville, Ky.), Mar. 28, 2004, at 1D (quoting professor Charles Fried dismissing criticism of Scalia's actions in *Cheney* as "contemptible, election year garbage").

169. *See* Richard L. Bazelon, *Maybe the Justice Should Have Just Ducked Out*, LEGAL INTELLIGENCER, Mar. 24, 2004, at 5 ("Scalia's role in obtaining special benefit for Cheney from a person owning an energy exploration services company goes beyond simple friendship and socializing. This factor, added to the timing and extent of private contact afforded by the trip, suggests that Scalia's 'impartiality might reasonably be questioned.'"); Gerry Cater, *Washington DC: Judgment Day*, LEGAL WEEK, Aug. 26, 2004, available at <http://www.legalweek.com/Viewitem.asp?id=21011&keyword=washington> ("[In the wake of Scalia's refusal to recuse,] the public was left with an impression of a self-complacent judiciary unable or unwilling to impose the requirements of independence and neutrality on itself."). *But see* Hansell Jordan, *Scalia's Decision Is Proper*, DES MOINES REGISTER, Apr. 1, 2004, at 11A (defending Justice Scalia and his actions in *Cheney* by drawing on author's experience as a law clerk to Scalia).

170. *See supra* Part I.A.

171. This is significant because cases discounting the importance of media accounts as a barometer of public perception of partiality often point to the inaccuracies present in the newspapers' reporting of the facts. *See, e.g., supra* note 161.

suggests that recusal law as it currently exists in the Supreme Court is not accomplishing one of its chief ends.¹⁷² The increasing scrutiny of other Justices' extrajudicial activities is further evidence of that conclusion. Developments in the law and practice of recusal have historically been motivated substantially by public reactions to newsworthy judicial actions.¹⁷³ The outcry following the *Cheney* episode should signal to the Court that further refinement of the recusal procedure is appropriate.

The next Part proposes steps for improving the practice of recusal in the Supreme Court, in light of *Cheney*.

III. PROPOSALS FOR IMPROVING RECUSAL PRACTICES IN THE SUPREME COURT

In the closing pages of his memorandum, Justice Scalia focused in on one of the central concerns of recusal law, public confidence in the Court's decisions: "The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find foot-faults."¹⁷⁴ Justice Scalia's approach, then, for ensuring public confidence is to presume categorically that a Justice is not corruptible by friendship or favors. If there is little chance that a Justice will be disqualified on the basis of friendship or favor, Justice Scalia's logic runs, there will be scant incentive for the press to suggest that improprieties are afoot. Thus, the public will be protected from the notion that the Justices of the Supreme Court are corruptible and their confidence will thereby be preserved.¹⁷⁵

While Justice Scalia's approach has the virtue of protecting the Court's independence, it goes too far by seeking to protect the Court from criticism altogether. In this respect, Justice Scalia's memorandum is symptomatic of an approach to recusal in the Supreme Court that seeks to promote public confidence by keeping the issue below the radar rather than by implementing concrete procedures that would give the public good reason to be confident. A more reasoned approach to promoting public confidence is not to

172. See *supra* Part I.A (explaining that one of the central policies of recusal law is promoting public confidence in the judiciary).

173. Frank, *supra* note 28, at 744.

174. *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 928 (2004) (mem. of Scalia, J.).

175. See *id.* ("While the political branches can perhaps survive the constant baseless allegations of impropriety that have become the staple of Washington reportage, this Court cannot.").

simply silence the critics by taking away their ability to point out “foot-faults,” but to allow the press to function vigorously and then judge dispassionately the resulting allegations of bias.

Two principal ways for the Supreme Court to give the public good reason to be confident are for Justices to consistently write opinions regarding their recusal decisions and then to subject those written decisions to review. The former promotes the development of recusal case law, which allows the public to oversee the quality and consistency of the Court’s recusal decisions. The latter accounts for the potential for error and self-interest in a recusal decision rendered by the Justice whose impartiality is being questioned.

No new laws need be passed for these practices to be implemented; the Court could make these changes to its procedures entirely on its own.¹⁷⁶ Although these measures would impose additional duties on the Court, it is clear that the stakes are high. Mounting scrutiny of the Justices’ impartiality toward litigants threatens the public confidence in the Court’s integrity. The recommended measures would make the Court’s recusal decisions more transparent and more disinterested. Equally important is that the measures would not sacrifice the vigorous and independent functioning of the Court in making Justices more accountable for their recusal decisions.

A. *Require Written Opinions on the Recusal Decision*

Justice Scalia’s personal interest/official action dichotomy is the central proposition from which the rest of his memorandum flowed. As such, it is significant that Justice Scalia cited no authority to support it. This is a major failing not of Justice Scalia’s memorandum, but of recusal practices in the Supreme Court. Justice Scalia could cite no precedent because there is no precedent: even if this is the rule, it is not written in any recorded opinions. When Justices recuse themselves, they do not reveal why.¹⁷⁷ When Justices

176. The first proposal requires no legislation, because the proposal merely seeks to have Justices undertake substantive, written analyses of recusal issues in the place of the current single-phrase pronouncements “Justice X did not participate” and “Motion to recuse Justice X is denied.” See *infra* Part III.A. The second proposal requires no legislation because the practice of permitting the challenged Justice alone to decide the recusal question is nothing more than a tradition of the Court. See *infra* note 189 and accompanying text.

177. See *supra* Part I.D and accompanying notes (pointing out that it is rare for Justices to explain their recusal decisions in a written opinion).

refuse to recuse themselves, their decision is seldom challenged.¹⁷⁸ Even when a party moves for recusal, the motion is nearly always disposed of summarily, in a one-sentence denial.¹⁷⁹ Thus, it is rare for a Justice to issue a substantive opinion on recusal, whether in support of recusal or against it. The result is that there is almost no recusal case law in the Supreme Court, which denies the public a metric against which to measure the propriety of a Justice's participation.¹⁸⁰

Supreme Court Justices have widely varying records on recusal.¹⁸¹ A developed body of recusal case law would bring a measure of uniformity to the Justices' recusal decisions. Enhancing predictability would be to everyone's advantage: Justices could feel more assured that their decision is correct, and parties could rest their recusal motions on firmer precedential footing.¹⁸² Indeed, if there were a previous case with similar circumstances in which a recusal decision had been rendered, it would be unlikely that a recusal motion would be necessary.¹⁸³ Finally, the Justice would be able to

178. See *supra* Part I.D and accompanying notes (describing the tradition of etiquette in the Supreme Court that inhibits most practitioners from challenging a Justice's recusal decision).

179. See *Ernest v. U.S. Att'y*, 474 U.S. 1016 (1985) (denying motion to recuse Justice Powell); *Kerpelman v. Att'y Grievance Comm'n*, 450 U.S. 970 (1981) (denying motion to recuse Chief Justice Burger); *Hanrahan v. Hampton*, 446 U.S. 1301 (1980) (mem. of Rehnquist, J.) (elaborating for a full paragraph on why one Justice is deciding a motion made to the full Court, but disposing of the substance of the fourteen-page motion and response brief in one sentence); *Mobil Oil Corp. v. Fed. Power Comm'n*, 415 U.S. 945 (1974) (denying motion to recuse Justice Douglas); *Serzysko v. Chase Manhattan Bank*, 409 U.S. 1029 (1972) (denying motion to recuse Justices Powell and Rehnquist); *Guy v. United States*, 409 U.S. 896 (1972) (denying motion to recuse Justices Blackmun and Rehnquist); *Gravel v. United States*, 409 U.S. 902 (1972) (denying motion to recuse Justice Rehnquist); *Huie v. Bd. of Comm'rs of the Ala. State Bar*, 400 U.S. 874 (1970) (denying motion to recuse Chief Justice Burger and Justice Black). Notable exceptions to the one-sentence dismissal characterization are *Cheney* and *Laird v. Tatum*, 409 U.S. 824 (1972) (mem. of Rehnquist, J.), in both of which the challenged Justice issued a lengthy opinion defending his participation.

180. The recusal opinions from lower federal courts are informative, but they do not take account of the unique circumstances of the Supreme Court, see *supra* Part I.E, and are therefore not as useful as other Justices' opinions on recusal.

181. See Tony Mauro, *Decoding High Court Recusals*, LEGAL TIMES, Mar. 1, 2004, at 1 (reporting great variance in the number of times each Justice has recused per year and recounting comments of former law clerks that Justices have a broad range of methods for deciding when to recuse).

182. Cf. *Jewell Ridge Coal Corp. v. Mine Workers*, 325 U.S. 897, 897 (1945) (Jackson, J., concurring) (“[Recusal 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.”).

183. See *supra* Part I.D (noting that § 455 is self-enforcing, so that the Justices normally recuse themselves *sua sponte*).

explain his position and the public would have the opportunity to evaluate the reasoning of the Justice's recusal decision. As the case law grows, public confidence in a Justice's decision could be reassured if that decision was consistent with previous decisions rendered under similar circumstances and subsequently reviewed.¹⁸⁴

One question that arises under this recommendation is *when* a Justice should be required to write an opinion on the recusal decision. Requiring Justices to defend their participation in every case would be both unrealistic and overly burdensome, because in most cases there is simply no recusal issue to address. A more efficient approach would be to only require written opinions when recusal is a close question. However, this approach suffers from a debilitating lack of enforceability: under such a regime, Justices would likely avoid writing opinions by simply never recognizing recusal as a close question.

Perhaps the best approach is to require a written opinion either when Justices recuse themselves or whenever a party moves for recusal. Requiring Justices to give reasons for their recusal when they recuse themselves *sua sponte* lays a foundation of cases in which recusal is appropriate, making the recusal decision clearer for later cases presenting the same circumstances. Only requiring written decisions when Justices recuse themselves *sua sponte* is not enough, however, because it does nothing in cases where recusal is appropriate but a Justice refuses to recuse.

Second, then, Justices should be required to defend their recusal decision whenever a party moves for recusal.¹⁸⁵ Relying on the adversarial process to compel recusal opinions has the benefit of avoiding overbreadth. Because parties want to avoid angering the Court with frivolous accusations of impropriety,¹⁸⁶ they would only move for recusal when there is a strong factual and doctrinal basis for disqualification. The primary difficulty with relying on the parties to prompt recusal opinions is that they may not be in a position to know the facts that would support a motion to recuse, even when those facts are present.¹⁸⁷ Consequently, an important component of this

184. Note that Justice Scalia's discussion of the practices of former Supreme Court Justices did not quite accomplish this, for the reasons discussed in Part II.A.3.

185. A written, substantive evaluation of recusal motions would be contrary to the usual practice of one-sentence denials. *See supra* note 178.

186. *See supra* Part I.D (describing the tradition of etiquette in the Supreme Court that inhibits most practitioners from challenging a Justice's recusal decision).

187. *See* Stempel, *supra* note 34, at 599 ("[F]ew, 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.").

proposal is that Justices must be forthright in disclosing facts that bear on the recusal analysis.¹⁸⁸

B. *Subject the Recusal Decision to Review*

Much of the criticism of Justice Scalia's memorandum stemmed from the fact that its author was the target of the recusal motion.¹⁸⁹ However, the tradition of permitting each Justice to make his or her own decision on recusal is firmly entrenched in the Supreme Court. Even when parties have attempted to outmaneuver the practice by addressing their recusal motion to the full Court, the challenged Justice has solely decided the motion.¹⁹⁰ Scholars have long criticized this practice,¹⁹¹ and even the courts have shown their skepticism about its wisdom.¹⁹² The practice seems to be at odds with one of the most fundamental principles of judicial ethics, that "[n]o man should be a

188. Cf. *id.* at 598 (arguing that the proper course in *Laird v. Tatum* would have been for Justice Rehnquist to make full disclosure to the litigants of his involvement with the subject matter of that case).

189. See, e.g., Joan Biskupic, *Scalia Scoffs at Notion that He's Biased Toward Cheney*, USA TODAY, Apr. 26, 2004, at 2A ("[Commenting on the *Cheney* case,] Northwestern University law professor Steven Lubet, who specializes in legal ethics, says the practice of having individual justices—rather than the full court—decide whether a conflict of interest exists does not inspire public confidence."); Stephen Gillers, *supra* note 168, at 21 ("A proverb tells us that no person should judge his or her own cause. Yet on this issue, at least, the Justices judge themselves."); Ifill, *supra* note 23, at 60 ("Scalia's memo makes clear that a justice is often not in the best position to determine whether his participation in a case raises an appearance of bias.").

190. See *supra* note 83 and accompanying text.

191. See Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 559 (1994) (arguing that "[m]otions containing allegations of an appearance of partiality should be decided by another judge" and that "the challenged judge is perhaps the last person who should rule on the motion"); Bassett, *supra* note 23, at 1234 ("This practice and procedure of having the challenged judge determine the existence of a perceived bias undercuts the statute's effectiveness."); Leubsdorf, *supra* note 39, at 242 (arguing that it is "bizarre" to require that "the very judge whose acts are alleged to be warped by unconscious bias to decide whether there is an adequate showing of bias"). Another commentator notes:

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 comprehensive 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.

Stempel, *supra* note 34, at 642–43.

192. See *In re Bernard*, 31 F.3d 842, 843 (9th Cir. 1994) ("[T]he somewhat surprising (and not entirely comfortable) reality is that the motion is addressed to, and must be decided by, the very judge whose impartiality is being questioned Like it or not, therefore, the responsibility for ruling on the . . . motion [to disqualify] devolves on me alone.").

judge of his own case.”¹⁹³ The inconsistency has been the source of Congressional consternation and discomfort as well.¹⁹⁴

Skepticism of recusal decisions rendered by the Justice whose impartiality is being questioned is based in part on the doubt that any judge is psychologically capable of ignoring his own interest in the recusal determination.¹⁹⁵ Justice Scalia’s highly defensive tone in his *Cheney* memorandum gives credence to this concern.¹⁹⁶ Justice Scalia’s tone suggests that he perceived the recusal motion and the public criticism of his trip as a personal affront.¹⁹⁷ The offense he took at the criticism may have precluded him from fairly evaluating whether his impartiality could reasonably be questioned. It is necessary to point out that to recognize this possibility is not to argue that Justice Scalia is incompetent or unethical. To the contrary, the argument is that this reaction is a natural psychological response. The shortcoming, then, lies with the system, which gives final and irreversible status to a decision that so clearly has the potential for error. Review of the Justice’s recusal decision would cure this deficiency.¹⁹⁸

One of the best reasons for allowing the Justice to make the recusal decision is that he is the person most fully informed about the

193. Stempel, *supra* note 34, at 592–93 (quoting Lord Coke in *Dr. Bonham’s Case*, 8 Co. 114a, 118a (c.p. 1610)).

194. See *supra* notes 24–27 and accompanying text. The Congressional discomfiture seems to reach back to at least the last time the recusal statute was modified. See *Judicial Disqualification: Hearing on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 93d Cong. 12 (1973) (statement of Sen. Birch Bayh) (“Surely litigants who believe that they cannot get a fair trial before a particular judge should not have to convince the very same judge of his bias.”).

195. *In re Bernard*, 31 F.3d at 844 (“[H]uman nature being what it is, we would all like to believe that no objective observer would ever doubt our impartiality.”) Recognizing these inherent limitations, Judge Kozinski describes how he relied on the advice of an independent committee to assist him in rendering his decision not to recuse. See *id.* at 844–45.

196. See, e.g., *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 928–29 (2004) (mem. of Scalia, J.) (rejecting the argument that his acceptance of the flight disqualified him because “[i]f it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined”); *id.* at 929 (“As the newspaper editorials appended to the motion make clear, I have received a good deal of embarrassing criticism and adverse publicity in connection with the matters at issue here—even to the point of becoming (as the motion cruelly but accurately states) ‘fodder for late-night comedians.’”). On the other hand, these excerpts may simply be exemplary of Justice Scalia’s rather acerbic writing style.

197. See Jeffrey Rosen, *supra* note 114, at 14 (arguing that even though Justice Scalia’s participation in *Cheney* is defensible, the “overly combative” tone of his memorandum spoiled its persuasiveness).

198. Professor Stempel has also advocated full Court review of Supreme Court recusal decisions. See Stempel, *supra* note 34, at 654–56.

facts underlying the alleged bias.¹⁹⁹ The value of this practice became clear in *Cheney*, where Justice Scalia's account of the trip differed in important respects from the facts as reported in the media and the recusal motion.²⁰⁰ Once the Justice's version of the facts is known, however, there is little reason to protect his decision from review. Moreover, there is some indication that the other Justices on the Court already exercise a degree of influence on each others' recusal decisions.²⁰¹ This review should be done above-board, by allowing parties to appeal a Justice's recusal decision to the full Court.²⁰²

Some may be concerned that other Justices will use the review as an opportunity to eliminate Justices who would likely vote differently from them. Leaving aside the argument that few Supreme Court Justices would be so brazen, it would be against a Justice's own interest to follow that practice because he may be the subject of a recusal motion in the next action. Thus, even a Justice who was motivated solely by self-interest would confine his review of the recusal decision to its merits.

More realistically, Justices may find it distasteful to sit in judgment of their colleagues.²⁰³ However, if the § 455(a) standard is correctly understood, Justices should not view this as an attack on

199. See *In re Kan. Pub. Employees Ret. Sys.*, 85 F.3d 1353, 1358 (8th Cir. 1996) (“[The recusal decision is committed to the judge] because [t]he judge presiding over a case is in the best position to appreciate the implications of those matters alleged in a recusal motion.” (quoting *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988))).

200. *Cheney*, 541 U.S. at 923–24 (mem. of Scalia, J.).

201. See *Microsoft Corp. v. United States*, 530 U.S. 1301, 1301 (2000) (statement of Rehnquist, C.J., respecting recusal) (“I have therefore considered at length whether [my son's] representation [of Microsoft] requires me to disqualify myself on the Microsoft matters currently before this court. I have reviewed the relevant legal authorities and consulted with my colleagues.”) (emphasis added); *An Open Discussion with Justice Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1039 (responding to an interviewer's question whether Justices make recusal decisions individually: “In the end it is a decision the individual Justice makes, but always with consultation among the rest of us.”). But see Stempel, *supra* note 34, at 641 (“Only rarely is there evidence of unofficial attention to recusal orders by the other Justices. In fact, unofficial review by the other Justices through jawboning may more frequently work to prevent recusal.”).

202. Minus, of course, the Justice whose opinion is the subject of the appeal. Because eight Justices are left, this sets up the possibility of an evenly split vote. However, even in those probably rare instances where that would occur, it would be more satisfactory to have a Justice's questionable recusal decision affirmed by a split panel than to have no review at all. See also Stempel, *supra* note 34, at 654–56 (articulating the need for full Court review of a Justice's recusal decision).

203. Bassett, *supra* note 23, at 1237; see also Stempel, *supra* note 34, at 643 (“The closed atmosphere of the Court seems an unlikely atmosphere from which reform will grow. The past failure of the Court to prevent occasionally gross ethical lapses suggests the body will not reform itself.”).

their colleagues: an evaluation of the appearances of bias from the perspective of a reasonable person says nothing about whether those biases actually exist.²⁰⁴ Furthermore, where the question is appearance of bias rather than actual bias, other Justices are probably better equipped than the challenged Justice to evaluate the validity of the allegations.²⁰⁵

CONCLUSION

Recusal law aims to achieve both impartiality and the appearance of impartiality. The *Cheney* episode indicates that the second goal is not being met by the Supreme Court's current recusal practices. Furthermore, the public outcry following *Cheney* seems to be part of a growing trend of accusations of bias in the nation's highest court. This growing culture of skepticism suggests a need to reexamine the Court's recusal practices and procedures. Because of the Supreme Court's unique position, any reforms to its recusal practices must strike a balance between preserving the Court's integrity by promoting public trust in its impartiality and allowing the Court to continue to function vigorously and independently. Requiring Justices to write opinions respecting their recusal decisions, and then subjecting those decisions to review by the full panel, effectively strikes that balance and gives the public a meaningful procedure on which to base their confidence in the judicial process.

TIMOTHY J. GOODSON

204. See *supra* Part I.B.

205. This follows from the fact that appearances are to be evaluated from the standpoint of a disinterested third party and the other Justices are further removed from the case than the Justice whose impartiality is in question.