

Duck When a Conflict of Interest Blinds You: Judicial Conflicts of Interest in the Matters of Scalia and Ginsburg

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It's acceptable practice to socialize with executive branch officials when there are not personal claims against them. That's all I'm going to say for now. Quack, quack.

—Justice Antonin Scalia¹

THE DUCK FEATHERS flew after Justice Antonin Scalia, a close friend of Vice President Dick Cheney, flew to Louisiana with the Vice President on a government plane. This sojourn occurred just after the Supreme Court had granted certiorari in a case in which the Vice President was the named petitioner.² Scalia's above quoted comment responded to mounting pressure from the press as well as from the opposing parties and amicus that he recuse himself from that case.³

While Scalia was roasted by the media, battles along political ideological lines emerged. Attention heightened when conservative groups resorted to the time-tested saying of, "That's a pot calling the kettle black" and pointed to various activities of Justice Ruth Bader Ginsburg. Thanks to the vigilance of the pot group, or perhaps the kettle group, we soon learned that on January 29, 2004, Justice Ginsburg addressed the National Organization for Women's ("NOW") Legal Defense and Education Fund annual dinner.⁴ Just fifteen days prior to her address Justice Ginsburg had taken the position advanced

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1. David Von Drehle & Gina Holland, *Justice Scalia: No Apologies for Hunting Trip with Cheney*, WASH. POST, Feb. 12, 2004, at 35.

2. The case is *Cheney v. U.S. Dist. Court*, 124 S. Ct. 2576 (2004).

3. See Editorial, *Beyond the Duck Blind*, N.Y. TIMES, Mar. 15, 2004, at A20 (labeling Scalia's refusal to disqualify himself in this case "bad judgment"); Editorial, *Scalia Should Duck This One*, MILWAUKEE J. SENTINEL, Mar. 20, 2004, at 14A (arguing that Justice Scalia's unwillingness to recuse himself in this case damages the Court).

4. Richard A. Serrano & David G. Savage, *Ginsburg Has Ties to Activist Group*, L.A. TIMES, Mar. 11, 2004, at A1 [hereinafter *Ties*].

by NOW in its amicus brief in *Frew v. Hawkins*.⁵ The case dealt with the rights of children under Medicaid programs.⁶ Justice Ginsburg was giving the fourth lecture in a series of NOW Legal Defense and Education Fund that is called, "The Justice Ruth Bader Ginsburg Distinguished Lecture Series on Women and the Law."⁷

The Scalia and Ginsburg controversies resulted in a passionate debate, which involved legal scholars and kitchen table participants and raised important questions about impartiality at the supreme level of judicial review where there are no substitute judges, and there is life tenure. The purpose of this Article is to describe the details of the Scalia and Ginsburg issues and other types of conflicts that can and do exist among the United States Supreme Court judges, provide the backdrop for the legal and judicial ethical code standards for conflicts, and suggest standards within the context of non-code ethical standards.

Conflicts of interest are best managed at the United States Supreme Court level through public disclosure. Nevertheless, such a voluntary policy and accompanying disclosure presumes that individuals recognize their own conflicts of interest as well as appreciate their serious nature and the need for effective management as a means of building and ensuring public trust. Judicial integrity requires rigorous self-discipline and favoring cautions and declarations over evasion. While such a voluntary, self-policing approach may be the best solution to conflicts at the United States Supreme Court level, it does require the Justices to recognize that slipping standards generally have made our society somewhat insensitive to conflicts and their management. In today's interconnected environments, many are either not seeing conflicts of interest or deeming them so trivial that disclosure is unnecessary. Such sloppy self-determination undermines the reputation of individual Justices and the Court. Hindsight analysis of these failures by individual Justices damages the Court's reputation and its perceived independence. If unilateral management of conflicts is the solution to judicial conflicts of interest at the highest levels of our judiciary, then vigilance and wide-sweeping disclosure must increase along with sensitivity to all activities by the Justices.

This Article is organized into five parts. Part I traces Justice Scalia's now infamous duck hunting trip in light of his involvement in

5. 540 U.S. 431 (2004).

6. *See id.*

7. The lecture series is co-sponsored by the New York State Bar, and the Bar paid Justice Ginsburg's expenses for travel to and from the dinner. *Ties, supra* note 4, at A20.

the Cheney case. Part II examines Justice Ginsburg's involvement with NOW and the potential conflicts her activities may pose. Part III explores generally the problems of conflicts of interest, while Part IV identifies and discusses those conflicts typically associated with the judiciary. Advocating goals of transparency and judicial balance, Part V notes that the autonomy of the United States Supreme Court necessitates the retention of the status quo—individual judicial discretion in making conflict of interest decisions—but argues that decisions, such as those of Justices Scalia and Ginsburg will almost certainly have a negative effect on the Court.

I. The Factual Backdrop for Scalia and Cheney: No Ducking Facts or Issues

A. The Bush Administration's National Energy Policy Development Group

This recent raging and blinding debate over judicial conflicts began when President Bush formed, in his second week in office, his National Energy Policy Group ("NEPD") or National Energy Policy Development Group ("NEPDG"),⁸ commonly referred to as the Energy Task Force, a group created to discuss energy policy in the United States and provide a program for managing United States energy resources.⁹ Mr. Cheney was charged by the President to develop all energy policy that dealt with issues such as oil supplies, oil prices, alternative energy sources, barriers to energy capture and developments, and oil dependence. The topics of energy production and conservation will always have a polarizing effect, but the NEPD had more than the usual battle lines drawn between energy producers and environmental groups.¹⁰ The NEPD held a series of meetings with energy producer executives from around the country and across various energy industries from oil production to electric utilities.

8. The Court refers to the body as NEPDG, and Congress refers to the group as NEPD, but the authors have determined that they are indeed one and the same group. They are usually referred to in publications as the Energy Task Force (no acronym used).

9. The NEPD was appointed when Mr. Bush took office in January 2001 and issued its report on May 16, 2001. NAT'L ENERGY POLICY DEV. GROUP, RELIABLE, AFFORDABLE, AND ENVIRONMENTALLY SOUND ENERGY FOR AMERICA'S FUTURE (2001), available at <http://www.whitehouse.gov/energy/National-Energy-Policy.pdf> (last visited June 25, 2005). Members of the group, chaired by Vice President Cheney, included: Gale Norton, Colin Powell, Norm Mineta, Paul O'Neill, Donald Evans, Ann Veneman, Spencer Abraham, Joe Allbaugh, Christie Todd Whitman, Joshua Bolten, Mitchell Daniels, Lawrence Lindsay, and Ruben Barrales. *Id.* at v.

10. See *infra* notes 15–20.

By April 2001, the Democrats of the House Committee on Energy and Commerce had called for an investigation of the NEPD by the Government Accountability Office ("GAO"). There were months of legal wrangling between Mr. Cheney's office, the GAO, and the House Democrats over the authority of the GAO to investigate.¹¹ The final report's release in May only heightened the tensions and scrutiny, and the GAO pursued its investigation by asking the NEPD to release the dates of its meetings, the lists of participants at those meetings, their locations, and the subject matters of those meetings.¹² When the media began carrying reports about the task force and its recommendation, the GAO found that the documents released pursuant to its request fell short.¹³ Representatives Henry Waxman and John Dingell, the chairs of the House Democrats for the Energy and Commerce Committee, sent a letter to the Vice President demanding disclosure and explanations for what they called conflicts of interest.¹⁴

B. The Litigation over the Policy Group

The attention of the House, the media, and government administration also brought the attention of special interest groups. The public watchdog group, Judicial Watch, a nonprofit with a history of seeking full disclosure on all government processes, sought to obtain the same information that the GAO had requested.¹⁵ The other group

11. See House Comm. on Energy & Commerce Democrats, Investigation of the Energy Task Force: Chronology of Correspondence.

12. Letter from David M. Walker, Comptroller General of the United States, to Rep. J. Dennis Hastert, Speaker of the House of Representatives (Aug. 17, 2001), available at http://www.house.gov/commerce_democrats/EnergyTaskForce/gaorpt-81701.pdf.

13. The first report that caught the House Democrats' attention was a *Los Angeles Times* article. Judy Pasternak, *Bush's Energy Plan Bares Industry Clout*, L.A. TIMES, Aug. 26, 2001, at A1. The article indicated the final recommendations in the report favored Halliburton, a company for whom Mr. Cheney served as CEO prior to returning to public life via his run for the Vice Presidency and that Joe Allbaugh's wife, a lobbyist, was employed by many of the companies favored in the policy recommendations. Another aspect of the news article was that Peabody Coal was given unusual access to the NEPDG, and it had contributed \$900,000 to the Bush campaign. *Id.*

14. Letter from Reps. Henry Waxman & John Dingell to Vice President Cheney (Aug. 29, 2001), available at http://www.house.gov/commerce_democrats/EnergyTaskForce/cheneaug29.pdf (last visited June 25, 2005).

15. Judicial Watch was the key party in the litigation seeking disclosure of the members and deliberations of the Health Care Task Force chaired by Hillary Rodham Clinton during the Clinton Administration. The court ruled that the Health Care Task Force was not subject to the Federal Advisory Committee Act ("FACA"). *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993).

at the forefront of the disclosure demands was the Sierra Club.¹⁶ The GAO filed suit against Mr. Cheney seeking release of the information, and the public battle found Mr. Cheney, along with members of Congress, Judicial Watch, and the Sierra Club, interviewed on a number of news shows.¹⁷

The very public and contentious nature of these issues, as well as the eventual litigation, are critical parts of the discussion of its eventual disposition at the United States Supreme Court, including Scalia's involvement. Mr. Cheney's position with regard to preserving the shroud of secrecy was based in presidential privilege, which is grounded in the need for the executive branch to have candid discussions with experts and members of industry.¹⁸ His adamant position is perhaps a critical factor in the Scalia recusal issues.¹⁹ The position of the others with an interest in the case and in the NEPD was that public policy should not be established in secret.²⁰

16. The Sierra Club has extensive involvement in elections, and its website reflects its anti-Bush/Cheney sentiments. See Sierra Club, Politics and Elections, <http://www.sierraclub.org/politics/> (last visited June 25, 2005).

17. Elizabeth Bumiller, *Cheney Set to Do Battle to Keep His Enron Papers Secret*, N.Y. TIMES, Jan. 28, 2002, at A1; *Fox News Sunday* (Fox News television broadcast Jan. 27, 2002).

18. Mr. Cheney noted on a Sunday news program,

GAO is a creature of the Congress Their jurisdiction extends to agencies created by statute. That's not me. . . . [A]s part of the office of the President and Vice President of the United States, I'm a constitutional officer. And the authority of the GAO does not extend in that case to my office.

Fox News Sunday, *supra* note 17. Mr. Cheney also stated,

[w]hat's really at stake here is the ability of the President and the Vice President to get . . . good, solid, unvarnished advice without having to make it available to a member of Congress. . . . What I object to, and what we've told the GAO we won't do is make it impossible for me or future Vice Presidents to ever have a conversation in confidence with anybody You just cannot accept that proposition without putting a chill over the ability of the President and Vice President to receive unvarnished advice.

Id. See also Letter from Reps. Henry Waxman & John Dingell to Vice President Cheney (Jan. 30, 2002), available at http://www.house.gov/commerce_democrats/EnergyTaskForce/waxmanjdd13002.pdf.

19. The *New York Times* reported, "Vice President Dick Cheney said today that the White House was prepared to go to court to fight the release of documents demanded by Congress as part of the investigation into any influence the Enron Corporation had in formulating the Bush Administration's energy policy." Bumiller, *supra* note 17, at A1.

20. See Statement of Carl Pope, Executive Director, Sierra Club, President's Energy Plan Makes the Wrong Choices, available at http://www.sierraclub.org/globalwarming/bush_plan/pressrelease2.asp (last visited June 25, 2005) for the view of the Sierra Club and the backdrop.

The Vice President's task force proposed a policy that would benefit big energy companies while doing nothing to promote true energy independence. . . . Americans have a right to know who wrote this policy. Besides what we know about

Judicial Watch beat the GAO to court and filed suit against Mr. Cheney and the NEPD on July 26, 2001 in federal district court in Washington, D.C. for violation of the Federal Advisory Committee Act ("FACA").²¹ FACA mandates public access to some records of advisory committees: "Subject to [the requirements of the Freedom of Information Act ("FOIA")], the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying. . . ."²²

Enron's influence, we don't know the most basic information about the energy industry lobbyists who helped draft the task force recommendations.

Press Release, Nat'l Res. Def. Council, *NRDC Asks Court to Force Immediate Release of Secret Energy Task Force Details* (Jan. 30, 2002), available at <http://www.nrdc.org/media/pressreleases/020130.asp>. See also Nat'l Res. Def. Council, *How NRDC Brought the Records to Light*, <http://www.nrdc.org/air/energy/taskforce/bkgrd.asp#vaughn> (last visited June 25, 2005) for a discussion of the records withheld, the perceptions of the court proceedings, and the concerns about input on national energy policy.

Judicial Watch declared:

"Executive privilege was improperly invoked by Richard Nixon, Bill Clinton, and now the Bush [A]dministration We feel confident that the Supreme Court will reject this abuse and that the American people will eventually learn the nature of the Energy Task Force and the recommendations it made to President Bush on the supposed behalf of the American people."

Judicial Watch, *Judicial Watch Sues VP Cheney over Energy Task Force*, <http://www.judicialwatch.org/cases/67/factsheet.htm> (last visited June 25, 2005). The group continued to state: "The Bush [A]dministration should stop invoking the Constitution to protect itself from accountability and any resulting political fallout. The American people have a right to know whether lobbyists became *de facto* members of the Energy Task Force who wrote our nation's energy policies." *Id.*

21. *In re Cheney*, 334 F.3d 1096 (D.C. Cir. 2003); *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20 (D.D.C. 2002). Also named as defendants in the suit were the members of the NEPD and several "non-federal employees" who were alleged to have participated in the meetings of NEPD, including Ken Lay (former CEO and Chairman of Enron), Mark Racicot, national chairman of Committee to Elect President Bush and Governor of Montana, Haley Barbour, former chair of the Republican National Committee, and Thomas Kuhn, President of the Edison Electric Institute. The intensity of interest in the NEPD and the litigation was only heightened by the revelation of Mr. Lay's name as one of the private parties because at this time, Enron began its downward spiral into bankruptcy, and Mr. Lay had been a substantial contributor to Mr. Bush's campaign for President and his previous runs for Governor of Texas. See Steven Weiss, *The Fall of a Giant: Enron's Campaign Contributions and Lobbying*, http://www.opensecrets.org/alerts/v6/alertv6_31.asp; see also Marianne M. Jennings, *A Primer on Enron: Lessons from a Perfect Storm of Financial Reporting, Corporate Governance and Ethical Culture Failures*, 39 CAL. W. L. REV 163 (2003) (providing the full time line and background on Enron, the timeline of its collapse and its political donations) [hereinafter *Primer on Enron*].

22. 5 U.S.C. app. 2 § 10(b) (2000).

The Sierra Club had filed suit in Northern California, and the district court there transferred the case to the D.C. court,²³ where the cases were consolidated by the federal district court. Mr. Cheney and three of the private parties to the suit then moved for dismissal of the case.²⁴ The court dismissed the private parties in the case in an opinion that reflected frustration with the defendants' attorneys in the case.²⁵ In what was a rather complex opinion on the interaction of FACA and the Administrative Procedures Act ("APA"), the federal district court ruled that while there was no private right of action under FACA, the federal "mandamus statute may provide an avenue to remedy violations of statutory duties even when the statute that creates the duty does not contain a private cause of action."²⁶ The court held that

23. *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20 (D.D.C. 2002).

24. *Id.* at 24. The court does not identify which of the three parties moved for the dismissal along with the Vice President.

25. There was judicial commentary on the lack of preparation:

At that hearing, government's counsel admitted to this Court that the briefs submitted did not represent the government's best efforts, and requested further opportunity to research and brief the important issues raised by this case. Despite the serious inadequacies in the government's briefing to date, the Court found that it was in the interest of justice to allow the plaintiff to amend its complaint and the defendant to re-brief its motion to dismiss.

Id. at 26.

There was also commentary on legal skills and disingenuousness:

The Court discussed several serious deficiencies in the legal arguments raised by the government, particularly the government's failure to cite controlling adverse authority from the D.C. Circuit on the issue of mootness, despite government's counsel having also been counsel in those cases. In addition, the Court discussed what appeared to be government counsel's mischaracterization of Supreme Court precedent on the constitutional separation of powers issue. Defense counsel conceded that it had argued for the application of a constitutional standard that did not reflect controlling law without informing the Court that it was doing so.

Id. at 25–26.

In a footnote, the court elaborated:

In this case, and in at least one other before this Court, *Stillman v. Doe*, Civ. Action No. 01-1342(EGS) (D.D.C.), the government has proceeded by mischaracterizing the existing standard and invoking the concurring opinion of three Justices of the Supreme Court in *Public Citizen* as controlling authority. The fact that the government has stubbornly refused to acknowledge the existing controlling law in at least two cases, does not strike this Court as a coincidence. One or two isolated mis-citations or misleading interpretations of precedent are forgivable mistakes of busy counsel, but a consistent pattern of misconstruing precedent presents a much more serious concern.

Id. at 50 n.14. Interestingly, Justice Scalia's dissenting opinion in one case reviewed by the lower court (*Morrison v. Olson*, 487 U.S. 697 (1988)) was important as was the fact that in another case on a similar issue, he had recused himself (*Public Citizen v. Dep't of Justice*, 491 U.S. 440 (1989)).

26. *Judicial Watch*, 219 F. Supp. 2d at 42.

the statutory language of FACA made it unequivocally clear that a mandamus action could lie under FACA:

The duty to make documents related to an advisory committee available to the public is non-discretionary. Section 10(b) states: Subject to [FOIA], the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist. 5 U.S.C. App. 2 § 10(b). The language of this section leaves no room for discretion: the records "shall be available for public inspection."²⁷

Nevertheless, while the mandamus action could lie, the court was not prepared to decide the issue of whether mandamus would lie until the parties had completed discovery in the case. Indeed, the court noted that the constitutional issue of whether FACA applied to those situations in which there were presidential deliberations was one that not only required determination, but that the determination could not be made until there was adequate discovery. The court ordered the parties to develop a discovery plan, and Mr. Cheney petitioned the court of appeals for a writ of mandamus vacating the district court's discovery orders, directing the district court to rule on the basis of the administrative record and ordering his dismissal as a party.²⁸

In a two to one decision, the appellate court dismissed the appeal noting that the arguments made by the dissenting judge were not made by the defendants, and the court was not inclined to raise them *sua sponte*.²⁹ The dissenting judge noted that there was no private cause of action under FACA (as the lower court had concluded), but further stated that the APA did not apply and that there was no cause of action against an advisory committee, particularly under a manda-

27. *Id.* at 43.

28. *In re Cheney*, 334 F.3d 1096, 1099 (D.C. Cir. 2003).

29. The majority noted:

Finally, most of the arguments raised in the dissenting opinion have never been presented to the District Court and they were not raised for consideration in the Government's brief to this court or in the oral argument before this court. In other words, the dissent's position rests on a view of FACA that has never been urged by the Government. "Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, or where 'injustice might otherwise result.' Suffice it to say that this is not such a case."

Id. at 1112 (quoting *Singleton v. Wulff*, 428 U.S. 106, 121 (1976)).

mus proceeding.³⁰ Despite the contentiousness of the opinions, the judges did agree on one thing: the lack of clarity in the decision on the Clinton Health Care Task Force,³¹ or the *AAPS* case as it is called, that places the litigants and the courts in the confused state of what is and is not required of advisory groups. The dissent notes that even discovery cannot remedy the legal questions that exist because of FACA and *AAPS*:

My colleagues are confident that the district court can rein in the discovery, but I cannot see how this can be done in any non-arbitrary way. The *AAPS* opinion provides no standards. And my colleagues never articulate their conception of *de facto* membership. Left open is an extensive area to be explored in depositions, interrogatories, and document production. Consider just a few of the possibilities. Suppose it turns out that a private individual attended 6 of the Group's 12 meetings. Would that make him a *de facto* member? Would it matter if discovery revealed that some of the members the President appointed attended the same number of, or even fewer, meetings? What if the private individual attended all meetings but did not speak, or was present only for a short period each time? Would it matter whether the private individual had a place at the table or sat on the side with the Group's staff? Or whether the private individual attended only a few meetings, but was quite influential in the formulation of the final recommendations? Should there be discovery into what impact the person's presence or statements had on the other members, and how would that discovery proceed? Suppose the private individual submitted memoranda or other documents. Is there to be discovery for the purpose of determining whether the other members of the Group took those documents into account in performing their information gathering function or in formulating their view of energy policy? (One of the complaints alleges that a corporate CEO handed

30. The dissenting judge took the time to express his concerns about the criticality of their ruling and the constitutionality of FACA:

As applied to committees the President establishes to give him advice, FACA has for many years teetered on the edge of constitutionality. See Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 *YALE L.J.* 51 (1994). The decision in this case pushes it over. The case comes to us in a peculiar posture. We have mandamus on top of mandamus. Both sides have invoked the All Writs Act, 28 U.S.C. § 1361. . . . Mandamus, the majority tells us, is "drastic"; it is available only in "extraordinary situations"; it is hardly ever granted; those invoking the court's mandamus jurisdiction must have a "clear and indisputable" right to relief. These words are directed at the federal officers' petition in this court, but they apply equally to plaintiffs' suits in the district court. See *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002). In my view, the federal officers have a clear right to relief in the court of appeals because the plaintiffs do not have a clear right to relief in the district court. I would therefore grant the writ and order the district court not only to bar discovery but to dismiss the actions.

In re Cheney, 334 F.3d at 1113 (Randolph, J., dissenting).

31. *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993).

the Vice President a three-page memorandum on the subject of energy.) Would it be of any consequence that the private person met individually with some of the members the President appointed? (There are also allegations to this effect.) And if so, is there to be discovery of who said what, and how this affected the work of the Group?

These problems and others are a direct result of *AAPS* and its lack of any principled standard for determining who is and who is not a *de facto* member of a Presidential committee. For the judiciary to permit this sort of discovery, authorized in the name of enforcing *FACA*—a statute providing no right of action, . . . strikes me as a violation of the separation of powers. The intrusion into the inner workings of the Presidency, the disruption this intrusion is bound to entail, the probing of the mental processes of high-level Cabinet officers inherent in the type of discovery that *AAPS* sanctions, the deleterious impact on the advice the President needs to perform his constitutional duties—all this and more present “formidable constitutional difficulties,”³²

Following the denial of a rehearing en banc, the Vice President filed a writ of certiorari with the United States Supreme Court, which was granted on December 15, 2003.³³ On January 5, 2003, the duck hunting incident transpired. The blinding factual backdrop for that recusal follows in the next section.

C. The Factual Backdrop for the Scalia Recusal

It seems the good Justice, a son (who had never once hunted), and a son-in-law (hunting experience unknown) hopped a Gulfstream jet with Vice President Richard B. Cheney. The foursome (along with Secret Service agents and Cheney staff members, also of unknown hunting experience) flew to Patterson, Louisiana where they met up with nine other hunters and three of Mr. Wallace Carline’s staff for five days of duck hunting.³⁴ On February 23, 2004, the Public Citizen Litigation Group as well as the Sierra Club hauled them all into court by filing a motion to recuse.³⁵

Less than a month later, in a twenty-one page memorandum, Justice Scalia replied officially to the Sierra Club’s request by categorically refusing to disqualify himself from hearing this case.³⁶ Because

32. *In re Cheney*, 334 F.3d at 1115 (Randolph, J., dissenting).

33. *Cheney v. Dist. Court*, 540 U.S. 1088 (2003).

34. Mr. Cheney left on Wednesday. Justice Scalia and his son and son-in-law stayed for the full five days of hunting and returned on a commercial aircraft that flew them from New Orleans to Washington.

35. See Appellant’s Motion to Recuse, *Cheney v. Dist. Court*, 540 U.S. 1088 (2003) (No. 03-475), available at 2004 WL 397220.

36. *Cheney v. U.S. Dist. Court*, 541 U.S. 913 (mem).

the individual disqualification decision by the Supreme Court Justice is final in recusal cases, Scalia's memorandum, at least ostensibly, settled the matter.³⁷ The Court ruled in the case on June 2004 with a decision favoring, if not fully vindicating, Cheney's claims.³⁸ Justice Scalia did support the seven-member majority in the case.³⁹ That the case was not a split decision should not mute judicial conflicts analysis or criticism in this case. Outcome should not control principle, and the outcome neither analyzes nor explains Scalia's decision to remain part of the judicial panel.

D. Scalia's Reasoning for Non-Recusal

The criticism aimed at Scalia focused on his insensitivity to a conflict of interest. The Justice's hunting trip with his friend, the Vice President, who was a party to a pending Supreme Court case,

37. United States Supreme Court Justices have settled on certain rules applicable to recusal cases. These rules require disqualification in cases in which the judge has a financial stake in the outcome (e.g., holds stock in a corporation that happens to be a party to the case), in which a relative of the judge is a party to the case, or in which the judge has manifested an inability to hear the case in an unbiased manner. An example of the latter case would be one in which the judge has made public statements revealing some bias. See *Cheney*, 541 U.S. at 916 (addressing the rules, Justice Scalia acknowledged his decision to disqualify himself from the so-called "pledge of allegiance case" (*Elk Grove Unified Sch. Dist. v. Newdow*, 540 U.S. 945 (2003))).

38. *Cheney v. Dist. Court*, 124 S. Ct. 2576 (2004). The Court's ruling in briefest terms was:

Because the issuance of the writ is a matter vested in the discretion of the court to which the petition is made, and because this Court is not presented with an original writ of mandamus, see, e.g., *Ex parte Peru*, 318 U.S. 578, 586 (1943), we leave to the Court of Appeals to address the parties' arguments with respect to the challenge to AAPS and the discovery orders. Other matters bearing on whether the writ of mandamus should issue should also be addressed, in the first instance, by the Court of Appeals after considering any additional briefs and arguments as it deems appropriate. We note only that all courts should be mindful of the burdens imposed on the Executive Branch in any future proceedings. Special considerations applicable to the President and the Vice President suggest that the courts should be sensitive to requests by the Government for interlocutory appeals to reexamine, for example, whether the statute embodies the de facto membership doctrine.

The judgment of the Court of Appeals for the District of Columbia is vacated, and the case is remanded for further proceedings consistent with this opinion.

Id. at 2593. Justice Ginsburg, joined by Justice Souter, filed a dissenting opinion in the case. *Id.* at 2595 (Ginsburg, J., dissenting).

39. *Id.* at 2576 (majority opinion). Scalia sided with the seven-member majority that required the Court of Appeals to rule on Cheney's writ of mandamus, but also agreed with Justice Thomas's dissent that the District Court exceeded its authority. Justices Scalia and Thomas, in effect, dissected the writ-upon-writ discussed in the dissenting opinion in the court of appeals decision. See *id.* at 2594 (Thomas, J., concurring in part and dissenting in part).

amounted to the acceptance of a favor from, and therefore at least a potential partiality to, that party. Scalia's memorandum chastised the press for getting the facts wrong.⁴⁰ He had a number of responses to the assertion of a conflict.

First, Scalia assures that he did not spend time alone with the Vice President and certainly did not discuss the case, because, as Scalia notes, everyone in Washington, D.C. knows that is something you just cannot do.⁴¹ It is in this area that Scalia offers what must surely go down in philosophical and ethical annals as an exception to conflicts rules: We were never in the same duck blind together:

We spent about 48 hours together at the hunting camp. It was asserted that the Vice President and I "spent time alone in the rushes," "huddled together in a Louisiana marsh," where we had "plenty of time . . . to talk privately" (Los Angeles Times); that we "spent . . . quality time bonding together in a duck blind" (Atlanta Journal-Constitution); and that "[t]here is simply no reason to think these two did not discuss the pending case" (Buffalo News). As I have described, the Vice President and I were never in the same blind, and never discussed the case.⁴²

A second leg of support for Scalia's decision to deny the motion for recusal was that Cheney's role as party to this litigation was routine and certainly congruent with that of any agency head or cabinet official:

It is said, however, that this case is different because the federal officer (Vice President Cheney) is actually a *named party*. This is by no means a rarity. At the beginning of the current Term, there

40. Justice Scalia's son and son-in-law, not his daughter as some claimed, accompanied him on the flight with Cheney. *Cheney*, 541 U.S. at 921. Other facts that were wrong in the press include:

- Wallace Carline is not an energy executive or oil industrialist. He owns a small company that rents equipment for oil rigs;
- It was not a private jet, but a government jet (as required by security concerns for the Vice President);
- An energy or oil company did not pay for the flight;
- He was not Cheney's guest; they were both Carline's guests;
- Cheney did not invite Scalia; Scalia invited Cheney, and the invitation was made before the writ in the NEPDG case was filed by the Vice President; and
- The trip was forty-eight hours, not several days.

Id. at 914–15.

41. Justice Scalia put in parenthesis: "(Washington officials know the rules, and know that discussing with judges pending cases—their own or anyone else's—is forbidden.)" *Id.* at 927. Taking judicial notice of the fact that no one in Washington either breaks rules or discusses anything they should not flies in the faces of Bob Woodward, Carl Bernstein, Michael Isikoff, Mark Feldt (a.k.a. Deep Throat), and a host of Washington-based reporters who have broken stories that involved both rule-breaking and discussions that were forbidden by law, propriety, and other conversation-constraining mores.

42. *Id.* at 927.

were before the Court (excluding habeas actions) no fewer than 83 cases in which high-level federal Executive officers were named in their official capacity—more than 1 in every 10 federal cases then pending. That an officer is named has traditionally made no difference to the proposition that friendship is not considered to affect impartiality in official-action suits. Regardless of whom they name, such suits, when the officer is the plaintiff, seek relief not for him personally but for the Government; and, when the officer is the defendant, seek relief not against him personally, but against the Government.⁴³

Justice Scalia also argues that no conflict existed because he took nothing of value from the Vice President. He appears to believe that some sort of monetary gain is necessary before the issue of a conflict of interest can arise. The reasoning appears to go as follows: Because Justice Scalia had only a coach ticket (one concludes first class might be a conflict), there was nothing of value given to him, ergo, no conflict. He explains:

Let me speak first to the value, though that is not the principal point. Our flight down cost the Government nothing, since space-available was the condition of our invitation. And, though our flight down on the Vice President's plane was indeed free, since we were not returning with him we purchased (because they were least expensive) round-trip tickets that cost precisely what we would have paid if we had gone both down and back on commercial flights. In other words, none of us saved a cent by flying on the Vice President's plane.⁴⁴

Somehow the value of a private jet flight (one way) escapes his analysis. The monetary savings are not the issue, the benefit to him is.

Next, in a classic freshman error in ethical analysis, Justice Scalia resorts to the rationalization, "Everybody else does it," and thus, it is ethical and not a conflict of interest. This argument appears to be Scalia assuring us that everyone on the Court socializes and indeed had socialized with the Cheneys after the petition had been filed. Nevertheless, he assures, they had no impropriety either:

While this matter was pending, Justices and their spouses were invited (*all* of them, I believe) to a December 11, 2003, Christmas reception at the residence of the Vice President—which included an opportunity for a photograph with the Vice President and Mrs. Cheney. Several of the Justices attended, and in doing so they were fully in accord with the proprieties.⁴⁵

Scalia maintains that no conflict of interest existed because he took the plane ride with the Vice President so as not to inconvenience

43. *Id.* at 921–22.

44. *Id.* at 923.

45. *Id.* at 924.

the transportation logistics. Again, Justice Scalia appears to be offering practical reasons for doing what he did:

The purpose of going with him was not saving money, but avoiding some inconvenience to ourselves (being taken by car from New Orleans to Morgan City) and considerable inconvenience to our friends, who would have had to meet our plane in New Orleans, and schedule separate boat trips to the hunting camp, for us and for the Vice President's party. (To be sure, flying on the Vice President's jet was more comfortable and more convenient than flying commercially; that accommodation is a matter I address in the next paragraph.)⁴⁶

Judicial carpooling could also save time and money, but distance from defendants, lawyers, and jurors removes that *ex parte* taint from the proceedings.

Scalia uses the issue of a bobtailed, or *tied*, Court to argue that recusing himself will actually hurt the Sierra Club. Self-recusal by a Supreme Court Justice reduces the deciding members by one, thus creating the real possibility of a tie vote. This, argues Scalia, actually favors the respondent who wins in the case of a tie.⁴⁷ Other courts, such as the court of appeals, can simply replace the recused judge with another judge on the court.⁴⁸ The Supreme Court, *however*, does not have the luxury of cherry-picking substitutes for disqualified judges.

Scalia insists that socializing with government litigants has always been done. He argues that he, like many of his predecessors on the Court, can be impartial in a case in which a Justice admits a friendship with a named party to the case. In fact, he cites two cases in which Justices cavorted with named parties during pending cases. In the first, Justice Byron White went skiing with Attorney General Robert Kennedy when two pending cases involving "Robert Kennedy, in his

46. *Id.* at 921. The point Justice Scalia makes in the next paragraph is that all the government officials accept rides on government planes and that doing so is not a violation of the Ethics Act. *Id.* "Everybody does this," is, of course, also one of the profound syllogisms of philosophy and ethics.

47. "The Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case." *Id.* at 916. Scalia also quotes the 1993 Court policy on recusal:

[W]e do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage. Even one unnecessary recusal impairs the functioning of the Court.

Id. A later section develops the issue of a bobtailed Court more fully. See *infra* notes 158-63 and accompanying text.

48. *Cheney*, 541 U.S. at 916.

official capacity as Attorney General," were before the Court.⁴⁹ In the other, Scalia cited Justice Robert Jackson's close personal friendship with President Franklin Roosevelt and the Justice's car ride with Roosevelt to a party in Virginia as a pending case involving the scope of New Deal actions under the Commerce Clause was before the Court.⁵⁰

In a classic response to many caught in a conflict of interest issue, Justice Scalia issued the popular, "How could you think that I could be bought for so little?" Indeed, his penultimate paragraph in the decision on the recusal motion includes the following:

The question, simply put, is whether someone who thought I could decide this case impartially despite my friendship with the Vice President would reasonably believe that I *cannot* decide it impartially because I went hunting with that friend and accepted an invitation to fly there with him on a Government plane. If it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined.⁵¹

Finally, Scalia argues that newspaper editors should not decide judicial conflicts because they do not know the law. He cites the motion of the Sierra Club that includes data on the position of editorial boards of newspapers around the country: eight of the ten newspapers with the largest circulation in the United States, fourteen of the larg-

49. *Id.* at 918. The two cases were *Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963) and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Actually, Justice Scalia has a number of examples. One can only imagine the research his law clerks had to do to dig up the following:

Justice Stone tossed around a medicine ball with members of the Hoover administration mornings outside the White House. 2 HERBERT C. HOOVER, MEMOIRS OF HERBERT HOOVER 327 (1952). Justice Douglas was a regular at President Franklin Roosevelt's poker parties; Chief Justice Vinson played poker with President Truman. DAVID McCULLOUGH, TRUMAN 511 (1992); J. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 220-21 (1980). A no-friends rule would have disqualified much of the Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the case that challenged President Truman's seizure of the steel mills. Most of the Justices knew Truman well, and four had been appointed by him. See McCULLOUGH, *supra*. A no-friends rule would surely have required Justice Holmes's recusal in *Northern Securities Co. v. United States*, 193 U.S. 197 (1904), the case that challenged President Theodore Roosevelt's trust-busting initiative. See SHELDON NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 264 (1989) ("Holmes and Fanny dined at the White House every week or two.").

What on earth is a medicine ball? And can you use it in a duck blind?

50. *Cheney*, 541 U.S. at 918. The case was *Wickard v. Filburn*, 317 U.S. 111 (1942). Justice Scalia notes that although Roosevelt was not the named party—Wickard was Roosevelt's Secretary of Agriculture—the President was vitally interested in the outcome of *Wickard*, which defined the scope of federal authority (i.e., Commerce Clause jurisdiction) as exercised by the Roosevelt administration.

51. *Cheney*, 541 U.S. at 928-29.

est twenty, and twenty of the thirty largest called for Scalia's recusal. Scalia is dismissive: "The implications of this argument are staggering. I must recuse because a significant portion of the press, which is deemed to be the American public, demands it."⁵²

Nothing in these reasons is a credible response to the assertion that Justice Scalia had a conflict of interest. Nor does Scalia's response ever address the public perception that his duck hunting trip with Cheney created an appearance of partiality that can have a long-term, negative effect on the Court.⁵³ Indeed, the dismissive shallowness of the points outlined above indicates a failure to grasp the very basics of conflicts of interest along with a lack of sensitivity about appearance and perceptions. Without closer scrutiny, the issue of judicial conflicts is swept up in a whimsical fashion that Scalia capitalizes upon because of the nature of the activity. The crux of judicial recusal depends, in this case, on whether Justice Scalia has violated the established principles of conflict of interest as they apply to judicial disqualification. The sections dealing with conflicts of interest and their application to judicial recusal cases are covered following a summary of the Ginsburg issues.

II. Ginsburg and NOW: It Is a "Lovely Thing"

A. The Factual Backdrop

When the Sierra Club filed its motion to have Justice Scalia recuse himself, conservative watch-dog groups engaged in tit-for-tat and demanded that Ruth Bader Ginsburg recuse herself from several cases involving abortion issues because of a lectureship called, oddly, the Justice Ruth Bader Ginsburg Distinguished Lecture Series on Women and the Law. The lecture series named in honor of the Justice is sponsored by NOW Legal Defense and Education Fund.⁵⁴ The watch-dogs pointed out that Justice Ginsburg was prepared to vote on cases in which NOW had filed amicus curae brief. Indeed, just two weeks prior to a NOW Legal Defense Fund speech and appearance, Justice Ginsburg had cast a favorable vote for NOW's position as an amicus in a

52. *Id.* at 926.

53. Steven Lubit, *Was Cheney Aiming for More Than Ducks?*, STAR TRIB. (Minneapolis), Feb. 3, 2004, at 15A. Lubit claims that Scalia's response to calls for recusal merited a more serious and thoughtful answer: "In contrast, Scalia has displayed an unfortunate, and ill-timed, chumminess with the Vice President. Worse, he has flaunted it by brushing off legitimate questions about his impartiality." *Id.*

54. The name has been changed to Legal Momentum. See Legal Momentum Home Page, <http://www.legalmomentum.org> (last visited July 18, 2005) for more information.

case.⁵⁵ Twelve Republican members of Congress also wrote a joint letter to Justice Ginsburg demanding her recusal in all cases in which NOW has filed “friend of the court” briefs.⁵⁶

Justice Ginsburg’s response to the criticism was that the lecture series of her namesake “is not a money-making enterprise. I think and thought and still think it’s a lovely thing. Let the lecture speak for itself.”⁵⁷

Before being appointed to the United States Supreme Court, Justice Ginsburg had a career-long history of activism on women’s rights and was affiliated with similar groups in an employment as well as volunteer capacity.⁵⁸ She has not severed those ties despite the fact that these groups are regular parties or, at a minimum, amicus, in the most

55. *Frew v. Hawkins*, 540 U.S. 431 (2004). The case was one brought by a group of mothers who were participants in the Medicaid program. Under a consent decree with the federal government, Texas was required to meet certain federal requirements, including that it have an Early and Periodic Screening, Diagnosis, and Treatment (“EPSDT”) program for children. As mothers of children eligible for EPSDT services in Texas they sought injunctive relief against state agencies and various state officials, claiming that the Texas program did not meet federal requirements. NOW’s position was that the state was required, Eleventh Amendment notwithstanding, to comply with the federal mandates. The decision was a unanimous one, and Justice Kennedy wrote the opinion for the Court. *See id.*

56. Melanie Hunter, *Republicans Ask Justice Ginsburg to Recuse Herself From Abortion Cases*, CNSNEWS.COM, Mar. 23, 2004. The letter from the Congressmen to Justice Ginsburg included the following:

It is well known that NOW Legal Defense engages in active lobbying on behalf of pro-abortion activists and regularly submits briefs to the Supreme Court in a variety of cases. . . . As a matter of fact, an entire section of the NOW Legal Defense website is dedicate [sic] to cases that are heard before the High Court. Furthermore, the NOW Legal Defense homepage highlights your speaking engagement and pictures you next to the President of the organization, Kathy Rodgers.

Id.

57. David G. Savage & Richard A. Serrano, *Ginsburg Stands by Involvement with Group; The Supreme Court Justice Says She and Her Colleagues Should Avoid Recusing Themselves from Cases Because They Can’t Be Replaced*, L.A. TIMES, Mar. 13, 2004, at A14 [hereinafter *Stands*].

58. Justice Ginsburg’s employment history:

1972–1973 Founder and Director, ACLU Women’s Rights Project

1973–1980 General Counsel, ACLU

1972–1980 Professor, Columbia University School of Law

1974 Published with KENNETH DAVIDSON & HERMA HILL KAY, TEXT, CASES, AND MATERIALS ON SEX-BASED DISCRIMINATION

1977–1978 Fellow, Center for Advanced Study in Behavioral Sciences, Stanford, California

1980–1993 Judge, United States Court of Appeals for the District of Columbia Circuit

1993– Present Associate Justice of the United States Supreme Court

Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women’s Rights Project*, 11 TEX. J. WOMEN & L. 157, 242 (2002).

contentious and sociologically sensitive cases that come before the Court.⁵⁹

59. In an introduction of the Justice for a speech at Southwestern University Law School, Professor James Kushner used the following list of Justice Ginsburg's dissents in cases, cases in which groups she has or has had affiliations with were either parties or amicus:

So, if we take a look at her dissents while serving on the court, a Ginsburg Court would create a society with the following: The disabled could sue states for employment discrimination based on handicap. *Univ. of Ala. v. Garrett*, 531 U.S. 356, 376 (2001) (Breyer, J., dissenting). . . . Cable television would be freed from program content regulation under the "must carry" provisions and First Amendment protection would be enhanced. *Turner Broad. v. FCC*, 520 U.S. 180, 229 (1997) (O'Connor, J., dissenting). Members of the uniformed services could wear religious headgear like a yarmulke. *Goldman v. Sec'y of Def.*, 739 F.2d 657, 660 (D.C. Cir. 1984) (Ginsburg, J., dissenting), *aff'd sum nom.* *Goldman v. Weinberger*, 475 U.S. 503 (1986) (Congress ultimately accepted Justice Ginsburg's position in 10 U.S.C. § 774 (2000) by allowing the wearing of religious apparel while wearing a uniform). . . . The Ku Klux Klan could not erect a cross on the State Capitol grounds. *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 817 (1995) (Ginsburg, J., dissenting). State universities would not be funding religious publications with student fees. *Rosenberger v. Univ. of Virginia*, 515 U.S. 819, 865 (1995) (Souter, J., dissenting). Congress would not be subsidizing religious schools. *Mitchell v. Helms*, 530 U.S. 793, 868 (2000) (Souter, J., dissenting). Remedial instructors could not teach in parochial schools. *Agostini v. Felton*, 521 U.S. 203, 240 (1997) (Souter, J., dissenting). Schools would not be able to promote religion by offering meeting places and school facilities to religious entities including children's religious clubs. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 135 (2001) (Souter, J., dissenting). Congress could stop children from taking guns to school. *United States v. Lopez*, 514 U.S. 549, 615 (1995) (Breyer, J., dissenting). States could regulate cigarette advertising targeted at children. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 591 (2001) (Stevens, J., dissenting). Congress would have the power to require the police to check the criminal records of those buying guns. *Printz v. United States*, 521 U.S. 898, 939 (1997) (Stevens, J., dissenting). Congress would be authorized to allow a cause of action for gender-based violence. *United States v. Morrison*, 529 U.S. 598, 655-56 (2000) (Breyer, J., dissenting). Kansas City and other American cities would have a chance to desegregate schools. *Missouri v. Jenkins*, 515 U.S. 70, 142 (1995) (Souter, J., dissenting). The district judge in desegregation cases would be allowed to order adequate funding to raise student achievement to approximate that of a desegregated system. *Id.* States would be permitted to use Congressional districting authority to assure that racial minorities have a reasonable opportunity to elect their chosen representatives. *Bush v. Vera*, 517 U.S. 952, 1003 (1996) (Stevens, J., dissenting). Congress would be authorized to use affirmative action. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting). The United States could provide foreign aid that is directed to organizations that engage in population control, abortions, or abortion counseling. *DKT Mem'l. Fund, Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 302 (D.C. Cir. 1989) (Ginsburg, J., concurring in part and dissenting in part). States could require the Boy Scouts to cease sexual orientation discrimination in the selection of scout leaders. *Boy Scouts of Am. v. Daly*, 530 U.S. 640, 663 (2000) (Stevens, J., dissenting). Topless and all nude bar dancing would be accorded the First Amendment protection enjoyed by other forms of entertainment, dance, and art. *Erie v. Pap's*

B. Ginsburg's Reasons for Non-Recusal

In a lecture to law students at the University of Connecticut at Hartford in March 2004, Justice Ginsburg also offered her reasons for not seeing a conflict in her affiliations with advocacy groups coming before the Court. First, she noted that the groups are nonprofits and that she does not make money from the groups. However, the flaw in the analysis is that the groups do indeed use Justice Ginsburg's name and the lecture series for raising funds.⁶⁰ The lecture series is a sponsored event with donations and tickets, and the funds are used for purposes of advancing cases and positions as well as legislative involvement. Justice Ginsburg is loaning her name to a venture that may be non-profit but is not without funds and the need for raising them.⁶¹ She also noted that if she owned just one share of GM stock, she would recuse herself from a case involving GM.⁶²

As Scalia,⁶³ Justice Ginsburg offered the "if there's a tie, it hurts the petitioner" argument. Justice Ginsburg said at the same speech at the University of Connecticut,

On the Supreme Court, if one of us is out, that means there are only eight. There is a risk we will not be able to decide the case—that it will be divided evenly. Some of my colleagues think a recusal in the Supreme Court is equivalent to a vote against the petitioner.⁶⁴

Justice Ginsburg also argues that there is no one to replace a United States Supreme Court Justice in the event of recusal. She as-

A.M., 529 U.S. 277, 317 (2000) (Stevens, J., dissenting). And, a Ginsburg Court would allow Florida to count its Presidential ballots. *Bush v. Gore*, 531 U.S. 98, 123 (2000) (Stevens, J., dissenting).

James Kushner, *Introducing Ruth Bader Ginsburg and Predicting the Performance of a Ginsburg Court*, 2003 Sw. U. L. Rev. 181, 186–88.

60. However, Justice Ginsburg has provided items for a NOW auction for raising funds for its Political Action Committee. Nat'l Org. for Women, 1998 Women's Rights Convention and Vision Summit NOW PAC Auction Items, <http://www.nowpacs.org/events/auction98.html> (last visited Feb. 12, 2004).

61. *Ties*, *supra* note 4, at A1. The website for Legal Momentum has a screen for donations, several screens for selling items, and several screens with its United States Supreme Court victories (see *supra*, note 59 for Justice Ginsburg's votes in those cases) and its pending cases in which it is a party or an amicus. To be fair and balanced, as the Fox News folks would say (see Fox News Channel Home Page, <http://www.foxnews.com>), Justice Scalia traipses about the country speaking to similar groups such as the Urban Family Council, but, he is not above duck hunting with a party in a case. See CBS News, *Scalia Speech Under Scrutiny*, <http://www.cbsnews.com/stories/2004/03/08/supremecourt/printable604612.shtml>, for the Urban Council speech, which was also in February 2004.

62. *Ties*, *supra* note 4, at A1.

63. See *supra* notes 47–48 and accompanying text.

64. *Stands*, *supra* note 57, at A14.

tures that when she was on the federal court of appeals, and there was any doubt, she did recuse herself because they could just then slip in any old judge to take her place.⁶⁵

Justice Ginsburg maintains that the appearance of partiality is not a conflict of interest. She notes that the hoopla over Justice Scalia's and her activities do not focus on actual judicial standards, rules, or codes of ethics, but just the appearance of impropriety and a perceived lack of impartiality.⁶⁶

As the *Los Angeles Times* describes it, "Ginsburg described those stories [about Scalia and the duck hunting] as 'on one side of the political spectrum.' The story about her relationship with the NOW legal defense fund came later, she said, because 'the L.A. Times wanted to give equal treatment' to a liberal Justice like herself."⁶⁷ In her mind the only justification for raising the issue was that attacks must be balanced along ideological lines. This argument is a "we must give equal time to liberal bashing after a good conservative bashing" dismissal of the meritorious issues raised in the conflicts questions.

Justice Ginsburg indicates that she does not know where all of this debate on conflicts is headed but that, "[i]n the end, it's a decision the individual Justice makes, but always with consultation among the rest of us."⁶⁸

Justice Ginsburg emphasizes the need for judicial autonomy and independence. In a speech she gave at the University of Melbourne on the topic of judicial independence she reveals that federal judges need to be free to do the following: (1) bring their views and ideologies to the bench; (2) be free from inquiry and impeachment for their decisions; and (3) be free to travel, write, and give lectures as a professional service even when the lectures include paid travel and involve exotic locations.⁶⁹

65. Justice Ginsburg described her conflicts issues on the court of appeals as follows, "if there was any doubt, I would say, 'I'll skip this one.'" *Id.*

66. *Id.* This may be the only time in their tenure together that Scalia and Ginsburg find themselves in the same boat and on the same side of an issue. See Lawrence Sirovich, *A Pattern Analysis of the Second Rehnquist U.S. Supreme Court*, 100 PNAS 7432, 7432-37 (2003), available at http://camelot.mssm.edu/publications/larry/supreme_court_ms_final.pdf (last visited July 20, 2005).

67. *Stands*, *supra* note 57, at A14.

68. *Id.*

69. See Ruth Bader Ginsburg, *Remarks on Judicial Independence*, 72 AUSTRALIAN L.J. 611 (1998).

Justice Ginsburg even chastises the other branches of government and the public for hounding judges because of “a certain jealousy (federal judges have life tenure and face no periodic campaigns).”⁷⁰

It is in those remarks, more so than anything said before or after, that Justice Ginsburg reveals the same disdain for perception and views of those outside the Court and the judiciary.⁷¹ In criticizing Rep. Tom DeLay’s proposal for more activism in impeachment of federal judges who do not follow the law, she remarked, “Mr. DeLay, who is not a lawyer, but, I’m told, an exterminator by profession, places on his list of judicial pests a district court judge in San Antonio, Texas who held up a certification of the election of two Republican victors in races for county sheriff and county commissioner.”⁷² The federal judge was correct in his holding and Mr. DeLay wrong, but the disdain with which this Justice treats him is surprising.

Justice Ginsburg’s telling quote in her speech on ideology and the bench comes not from judicial precedent or even jurisprudence but from *New York Times* editorial writer Bob Herbert, “An intimidated judge is a worthless judge.”⁷³ There is no qualification offered on how and why a judge may be intimidated.

As with Justice Scalia, Justice Ginsburg’s reasoning begs the question of whether they have a conflict of interest. Neither she nor Scalia ever address this issue. They only argue why, even if there is a conflict, they are justified in remaining on the bench during a case. In not addressing the specific conflict or even acknowledging its potential, they weaken the judiciary through their inability to grapple with the perceptions of the public regarding the lack of impartiality. The flawed reasoning, coupled with the insensitivity toward an ethical standard apart from their perceived self-importance and circumstantial criticality, only serve to heighten the intensity of outside remedies for judicial overstepping. The following sections do provide the backdrop for the analysis and discussion that both Justices Ginsburg and Scalia should have had at the time the issues of their conflicts of interest arose.

70. *Id.* at 621.

71. Justice Ginsburg has extensive words on the *Bush v. Gore* case, and those words are all from the commentary about the Court, whether it should have intervened at all, and whether its intervention was appropriate. *Id.*

72. *Id.*

73. *Id.* at 622 (citing Bob Herbert, *A Plan to Intimidate Judges*, N.Y. TIMES, Dec. 4, 2000, at A29).

III. Conflicts of Interest

A. General Principles

As much as we “know them when we see them,”⁷⁴ not a great deal is written about conflicts of interest. An unscientific review of the topics in four ethics texts found that “conflicts of interest” was not listed as a separate topic.⁷⁵ Nonetheless, conflicts of interest are an issue in every profession, for every company, and in all government agencies.⁷⁶

74. The quote is a reference to Justice Potter Stewart’s view on what constitutes pornography, “I shall not today attempt further to define the kinds of material I understand to be embraced . . . [b]ut I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

75. See generally THOMAS DONALDSON, PATRICIA WERHANE & MARGARET CORDING, *ETHICAL ISSUES IN BUSINESS: A PHILOSOPHICAL APPROACH* (2002); AL GINI, *CASE STUDIES IN BUSINESS ETHICS* (2003); ON MORAL BUSINESS (Max L. Stackhouse et al. eds., 1995); PETER SINGER, *ETHICS* (1994).

76. In medicine, see, for example, David Orentlicher, *Paying Physicians More to Do Less: Financial Incentives to Limit Care*, 30 U. RICH. L. REV. 155, 161–62 (1996); Daniel P. Sulmasy, *Physicians, Cost Control, and Ethics*, 116 ANNALS INTERNAL MED. 920, 920–21 (1992); Robert M. Veatch, *Physicians and Cost Containment: The Ethical Conflict*, 30 JURIMETRICS J. 461, 466–70 (1990) (discussing costs and patient obligations and the conflict between the physician’s oath and the need to economize). In journalism, see, for example, Soc’y of Prof’l Journalists, *Code of Ethics*, available at http://www.spj.org/ethics_code.asp (last visited May 31, 2005), providing the following guidelines:

Act Independently

Journalists should be free of obligation to any interest other than the public’s right to know.

Journalists should:

- Avoid conflicts of interest, real or perceived;
- Remain free of associations and activities that may compromise integrity or damage credibility;
- Refuse gifts, favors, fees, free travel and special treatment, and shun secondary employment, political involvement, public office and service in community organizations if they compromise journalistic integrity;
- Disclose unavoidable conflicts;
- Be vigilant and courageous about holding those with power accountable;
- Deny favored treatment to advertisers and special interests and resist their pressure to influence news coverage; and
- Be wary of sources offering information for favors or money; avoid bidding for news.

Id. See, for example, Wells Fargo, *Code of Ethics: Avoid Conflicts of Interest*, available at <http://www.wellsfargo.com/about/corporate/ethics/section5.jhtml> (last visited Feb. 9, 2005), for a sample corporate policy on conflicts:

Team members must avoid conflicts of interest or the appearance of conflicts of interest in their personal and business activities. The appearance of a conflict of interest may be just as damaging to the reputation of Wells Fargo as the existence of an actual conflict of interest. A conflict of interest is a situation in which your personal interest or outside economic interest in a matter:

- interferes with your duties and responsibilities to Wells Fargo;

Whether codified formally, adopted as policy in an employee handbook, or handled on an ad hoc basis, rules governing conflicts of interest, because they anticipate rather than respond directly to agency problems, are prophylactic.⁷⁷ Such conflicts arise in agency relationships because of misalignment of incentives between principals and agents.⁷⁸ The last few years have offered a plethora of conflicts cases that have been covered extensively by the media. Anecdotally, conflicts of interest have been a subject of media scrutiny as well as media involvement. Sometimes the misalignment of incentives caused by conflicts of interest manifests itself in acts of corruption such as those that brought down corporate giants such as Enron,⁷⁹ WorldCom,⁸⁰ and Adelphia.⁸¹ In each of those cases, corporate

-
- may be inconsistent or incompatible with your obligation to exercise your best judgment in pursuit of the interests of Wells Fargo;
 - results in an improper personal benefit as a result of your position with Wells Fargo;
 - encroaches on the time that you should devote to your work with Wells Fargo;
 - or
 - raises a reasonable question about or the appearance of such interference.

See also Duke Energy, Code of Business Ethics, Conflicts of Interest, available at <http://www.duke-energy.com/investors/governance/ethics/conflict.asp> (last visited Aug. 6, 2004) (“A conflict of interest exists any time an employee faces a choice between what is in his or her personal interest (financial or otherwise) and the interests of Duke Energy. When a conflict of interest arises, others may question our integrity. Therefore, employees are accountable for acting in Duke Energy’s best interests and carefully avoiding even the appearance of acting inappropriately. If you find yourself in a position where your objectivity may be questioned because of individual interests or family or personal relationships, notify your supervisor immediately.”).

See N.Y. State Governor’s Office of Employee Relations, Conflicts of Interest, available at <http://www.goer.state.ny.us/train/onlinelearning/ETH/200.html> (last visited Aug. 15, 2005) for a sample government policy (“New York State ethics laws instruct State employees in how they can avoid conflicts of interest. Some conflicts of interest may be easy to identify and avoid. For example, awarding contracts to friends or family members, or filing an appeal on behalf of a client against your own State agency, would constitute conflicts of interest. This module examines particular actions which could comprise a conflict of interest.”).

77. See ANDREW STARK, *CONFLICT OF INTEREST IN AMERICAN PUBLIC LIFE* 23 (2000).

78. Ethics and Agency Theory: An Introduction 4 (Norman E. Bowie & E. Edward Freeman eds., 1992). Applied first as a means by which economists can develop a theory of the firm, agency theory evolved into a more normative tool hoping to “develop the proper system of incentives so that the interests of managers comes into alignment with the interests of shareholders.” *Id.* at 4.

79. See *Primer on Enron*, *supra* note 21, at 163 for a full discussion of the officer corruption at Enron; see also Robert Prentice, *Contract-Based Defenses in Securities Fraud Litigation: A Behavioral Analysis*, 2003 U. ILL. L. REV. 337 (2003) (criticizing the economics orientation of agency theory as it applies to corporate fraud cases, such as Enron, based on the theory’s generalized as opposed to behavioral approach).

80. See Marianne M. Jennings, *Restoring Ethical Gumption in the Corporation: A Federalist Paper on Corporate Governance—Restoration of Active Virtue in the Corporate Structure to Curb the*

agents—CEOs and other executives—acted, or are alleged to have acted, in a manner contrary to the best interest of their principals, multinational corporations.⁸² Conflicts were not limited to corporations. The professions themselves also experienced questions about alignments of loyalties and duties to clients. The litigation against the financial analysts and the reforms in audit practice were the result of conflicts of interest.⁸³ Cases in which favors are exchanged for kick-

'Yeehaw Culture' in Organizations, 3 WYO. L. REV. 387 (2003) [hereinafter *Restoring Ethical Gumption*] for a full discussion of the conflicts and mishaps at WorldCom and Adelphia.

81. *Id.*

82. For example, at Enron, Andrew Fastow was busily spinning debt off Enron's books into special purposes entities ("SPEs") under the now-defunct FASB 125. Mr. Fastow was also serving as a principal in many of the SPEs and earning commissions for the transfer of assets from Enron to the SPEs. *Primer on Enron*, *supra* note 21, at 208. Interestingly, Enron's conflict of interest policy provided,

Employees of Enron Corp., its subsidiaries, and its affiliated companies (collectively the "Company") are charged with conducting their business affairs in accordance with the highest ethical standards. An employee shall not conduct himself or herself in a manner which directly or indirectly would be detrimental to the best interests of the Company or in a manner which would bring to the employee financial gain separately derived as a direct consequence of his or her employment with the company.

ENRON, CODE OF ETHICS, EXECUTIVE AND MANAGEMENT 12 (2000). At WorldCom, the board made such extensive personal loans to former CEO Bernie Ebbers that the WorldCom stock that he pledged as collateral for the loans became so amassed that sales of shares to satisfy the loans would have sent the market for the stock into a tailspin because the size of the block could have moved market price. *Restoring Ethical Gumption*, *supra* note 80, at 447. At Adelphia, company funds were used for investments in the Rigas's children's private business ventures and competition by family members for the purchase of cable systems. *Id.* at 486–87.

83. Jack Grubman's (Salomon Smith Barney Analyst) involvement in allocation of IPO shares to Bernie Ebbers of WorldCom in exchange for favorable financial reports on WorldCom was legendary even prior to WorldCom's collapse. Susan Pulliam et al., *WorldCom Is Denounced at Hearing*, WALL ST. J., July 9, 2002, at A3. See *Restoring Ethical Gumption*, *supra* note 79, at 446–48 and Charles Gasparino et al., *Salomon Made IPO Allocations Available to Ebbers, Others*, WALL ST. J., Aug. 28, 2002, at A1, for more details. E-mails, the crux of the revelations, and conflicts cases against analysts revealed interesting relationships. Mr. Grubman was the father of twins who he wanted to see admitted to one of Manhattan's most prestigious preschools, 92nd Street Y. Mr. Grubman wrote a memo to Sanford Weill, the chairman of Citigroup, with the following language:

On another matter, as I alluded to you the other day, we are going through the ridiculous but necessary process of pre-school applications in Manhattan. For someone who grew up in a household with a father making \$8,000 a year and for someone who attended public schools, I do find this process a bit strange, but there are no bounds for what you do for your children.

Anything, anything you could do Sandy would be greatly appreciated. As I mentioned, I will keep you posted on the progress with AT&T which I think is going well.

Thank you.

backs,⁸⁴ agents embezzle their principal's funds, vendors are given preference by customers and employees based on family or friendship rather than merit,⁸⁵ and self-dealing operations where agents profit from direct dealings with, and at the expense of, their principal are other examples.⁸⁶ These actions are both unseemly and potentially criminal because the agent acted on his individual incentive and at his

Charles Gasparino et al., *Ghosts of E-Mails Continue to Haunt Wall Street*, WALL ST. J., Nov. 18, 2002, at C1, C13. Citigroup pledged \$1 million to the school at about the same time Grubman's children were admitted. *Id.* at C1.

Mr. Weill, Mr. Grubman's CEO, asked Mr. Grubman to "take a fresh look" at AT&T, a major corporate client of Citigroup. *Id.* at C1. Mr. Weill served on the board of AT&T and AT&T's CEO, C. Michael Armstrong, served as a Citigroup director and Mr. Weill was courting Armstrong's vote for the ouster of his co-chairman at Citigroup, John Reed. *Id.* at C1.

A follow-up e-mail from Mr. Grubman to Carol Cutler, another New York analyst, connected the dots:

"I used Sandy to get my kids in the 92nd Street Y pre-school (which is harder than Harvard) and Sandy needed Armstrong's vote on our board to nuke Reed in showdown. Once the coast was clear for both of us (i.e., Sandy clear victor and my kids confirmed) I went back to my normal self" on AT&T.

Id. at C1. At the same time as all the other movements, Mr. Grubman upgraded AT&T from a "hold" to a "strong buy." After Mr. Reed was ousted, Mr. Grubman downgraded AT&T again. Mr. Grubman said that he sent the e-mail "in an effort to inflate my professional importance." Gretchen Morgenson, *Deals Within Telecom Deals*, N.Y. TIMES, Aug. 28, 2002, § BU, at 10. These are conflicts on top of conflicts on top of conflicts.

84. The case against Frank Quattrone of Credit Suisse First Boston was one involving felony charges brought for his destruction of documents that were related to his company's system for awarding first crack at IPO shares in exchange for investment banking business from those who were given the shares for their personal portfolios. Andrew Ross Sorkin, *Ex-Banker Tells Court File Cleanup Was Policy*, N.Y. TIMES, Oct. 10, 2003, at C1, C9. There was money to be made if you got first crack at these shares. For example, the shares of VA Linux Systems Inc, climbed 697.5% on their first day of public sales. Linda Himmelstein & Steve Hamm, *Inside Frank Quattrone's Money Machine*, BUS. WK., Oct. 13, 2003, at 104. Those who received the allocations were called "Friends of Frank." And they in turn brought their investment banking business for their own companies to Credit Suisse First Boston, Frank's company. Thor Valdmanis & Greg Farrell, *Quattrone Guilty*, USA TODAY, May 4, 2004, at 1B.

85. See Himmelstein & Hamm, *supra* note 84, at 104.

86. Purchasing agent Jim G. Locklear was a housewares buyer with J.C. Penney and was responsible for the very successful J.C. Penney Home Collection, a color-coordinated line of dinnerware, flatware, and glasses that was eventually copied by most other tabletop retailers. Locklear took sales of Penney's tabletop line from \$25 million to \$45 million per year and was named the company's "Buyer of the Year" several times. Nevertheless, Locklear was taking payments from Penney's vendors directly and through front companies. Some paid him for information about bids or to obtain contracts, while others paid what they believed to be advertising fees to various companies that were fronts owned by Locklear. Between 1987 and 1992, Locklear took in \$1.5 million in "fees" from Penney's vendors. Andrea Gerlin, *How a Penney Buyer Made Up to \$1.5 Million on Vendors' Kickbacks*, WALL ST. J., Feb. 7, 1995, at A1, A18. He entered a plea and was sentenced to eighteen months in prison and fined \$50,000. Penney was also awarded a \$789,000 judgment against him. Andrea Gerlin, *J.C. Penney Ex-Employee Sentenced to Jail*, WALL ST. J., Aug. 28, 1995, at A1.

principal's expense.⁸⁷ More recently, conflicts charges have arisen as media commentators, pundits, have revealed that even as they advocated reform proposals in their writings, they were being paid by reform groups for consulting, research, public relations, and other activities related to the reforms.⁸⁸

Conflict of interest policies hope to prevent, manage, or mitigate the consequences arising from situations that can spawn such acts.⁸⁹ While the conflict itself may be unseemly, the ultimate goal of such rules is to prevent an agent from deviating from the principal's wishes.⁹⁰ Accepting gifts from outsiders with whom one's company or agency has contracts or other relationships creates the negative appearance of impropriety despite the acceptor's appeal that such gifts did not influence his decisions as the company's agent.⁹¹ Accepting

87. Stark, *supra* note 77, at 22.

88. Armstrong Williams was a proponent of the "No Child Left Behind" education reforms of the federal government in both his syndicated columns and on his television show. He did not, however, disclose that he had been paid \$240,000 by the United States Department of Education for public relations work on the initiative. David D. Kirkpatrick, *TV Host Says U.S. Paid Him to Back Policy*, N.Y. TIMES, Jan. 8, 2005, at A1, A10. Columnist Maggie Gallagher was paid \$21,500 by the Department of Health and Human Services to help promote the Bush Administration's marriage initiative. Howard Kurtz, *Writer Backing Bush Plan Had Gotten Federal Contract*, WASH. POST, Jan. 26, 2005, at C01, available at <http://www.washingtonpost.com/wp-dyn/articles/A36545-2005Jan25.html>.

89. A common provision in many conflicts of interest policies is "when in doubt, ask before acting." For example, the Wells Fargo policy on conflicts provides, "[i]f a conflict or potential conflict of interest arises in circumstances not discussed under the rules that follow or if application of a rule to a set of circumstances is unclear, you should consult your supervisor or Code Administrator." Wells Fargo, *supra* note 76. And in another segment the same is repeated, "[i]f a conflict or potential conflict of interest arises in circumstances not discussed under the rules that follow or if application of a rule to a set of circumstances is unclear, you should consult your supervisor or Code Administrator." *Id.*

For example, some physicians have adopted a policy of charging pharmaceutical representatives for the right to meet with them for discussing a new drug. The amount they receive is then given back to the physician's practice as a means of reducing costs, something the doctors say ultimately benefits their principals, the patients. Cheryl Jackson, *Ohio Group Tells Drug Reps: We'll Listen—If You Pay*, AM. MED. NEWS, Aug. 20, 2001, at 1, 4.

90. Jackson, *supra* note 89, at 1, 4.

91. See Nolan Clay, *Gifts Had No Influence, Fisher Says*, DAILY OKLAHOMAN (Oklahoma City), July 12, 2004, at A1 (reporting on Oklahoma state Insurance Commissioner and United States Senate candidate, Carrol Fisher, who claimed that accepting money for a charity from those his agency regulates never affected his official decision making). Justice Scalia noted in his opinion similar reasoning,

There are, I am sure, those who believe that my friendship with persons in the current administration might cause me to favor the Government in cases brought against it. That is not the issue here. Nor is the issue whether personal friendship with the Vice President might cause me to favor the Government in cases in which he is named. None of those suspicions regarding my impartiality (erroneous suspicions, I hasten to protest) bears upon recusal here. The question, simply

the gift looks untoward, but the greater indiscretion is allowing that gift to influence an agent's decision at his principal's expense.⁹² Pro-

put, is whether someone who thought I could decide this case impartially despite my friendship with the Vice President would reasonably believe that I cannot decide it impartially because I went hunting with that friend and accepted an invitation to fly there with him on a Government plane. If it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined.

Cheney v. U.S. Dist. Court, 541 U.S. 913, 928–29 (2003) (mem.).

92. In some cases, the test for whether a conflict of interest exists is whether the party would feel comfortable having the public be aware of the conduct, gift, or interests that are at odds with each other. For example, the American College of Physicians (the largest medical professional organization outside the American Medical Association) has conflicts of interest rules for the relationships between physicians and drug companies. More specifically, the rules govern what physicians can and cannot accept from pharmaceutical companies. The conflicts guideline for perks from drug companies is whether the accepting physician would "be willing to have these arrangements generally known." Daniel Sulmasy, Am. Coll. of Physicians, Position Paper, *Physicians and the Pharmaceutical Industry*, 112 ANNUALS INTERNAL MED. 624, 624 (1990).

The American Medical Association ("AMA") has created a \$1 million educational campaign to discourage doctors from accepting even the smallest of gifts from pharmaceuticals because of the reality and perception that these gifts influence doctors' decisions on which drugs to prescribe. Interestingly, the pharmaceutical companies themselves donated \$675,000 of the \$1 million. Experts estimate that drug companies spend about \$1,500 per physician per year in trying to attract the physicians' attention to particular drugs in order to have the doctors prescribe them. Those figures come from the \$15.7 billion drug companies spent on marketing in 2000. That figure for marketing was \$9 billion in 1996. Jackson, *supra* note 89, at 1, 4.

Below is a list of the various types of benefits and gifts drug companies have given doctors over the past few years to try and get them to consider prescribing their new offerings:

- An event called "Why Cook?" in which doctors are given the chance to review drug studies and product information at a restaurant as their meals are being prepared—they can leave as soon as their meals are ready and they are treated to appetizers and drinks as they wait;
- An event at Christmas tree lots where doctors can come and review materials and pick up a free Christmas tree;
- Flowers sent to the doctors' offices on Valentine's Day with materials attached;
- Manicures as they study materials on new drugs;
- Pedicures as they study materials on new drugs;
- Free car washes and they can study materials as their cars are being washed;
- Free books with materials enclosed;
- Free CDs with materials attached;
- Bottles of wine sent with materials attached;
- Events at Barnes & Noble where doctors can browse and pick out a book for themselves for free so long as they take along some materials on a new drug; and
- Some doctors say that they can often enjoy dinner on a drug company as often as five times per week.

The AMA frowns on the "dine and dash" format because its rules provide that dinners are acceptable so long as the doctors sit and learn something from a featured speaker. The AMA also limits gifts to those of a "minimal value" that should be related to their patients, such as note pads and pens with the new drug's name imprinted on them. The chairman

phylactic conflict of interest rules stem from the difficulty in proving the latter—that the agent’s dealings with an outsider occasioned an act or omission contrary to the principal’s best interest—and from the relative ease of identifying and addressing such conflicts and their potential harm *ex ante facto*.⁹³

Andrew Stark explains conflict of interest rules as addressing “acts that give rise to encumbered states of minds, not the ultimate acts that flow from them.”⁹⁴ In law, the ultimate act would likely be labeled *malum in se* because it typically amounts to an impermissible taking of the principal’s property—*theft*.⁹⁵ When the federal government and states adopt conflict of interest laws in their criminal codes, they are essentially attempting to prevent these types of actions by prohibiting the ostensible conflicts that may foster the ultimate *malum in se* crimes.⁹⁶ Criminal laws aimed at stemming conflicts of interest are therefore *malum prohibitum* laws, not evil or criminal on their face, but worthy of criminal regulations because of their potentially nasty consequences.⁹⁷ One can easily imagine that critics would assail

of the AMA Committee says the following about the gifts, “There are doctors who say, ‘I always do what’s best for my patients, and these gifts and dinners and trips do not influence me.’ They are wrong.”

Chris Adams, *Doctors on the Run Can ‘Dine’n’Dash’ in Style in New Orleans*, WALL ST. J., May 14, 2001, at A1.

93. See generally CONFLICT OF INTEREST IN THE PROFESSIONS (Michael Davis & Andrew Stark eds. 2001). One of the editors compares conflict of interest rules to dirt in a sensitive gage. Whether or to what extent that dirt affects the gage’s ability accurately to portray what it measures does not diminish the facts that it may affect the reading and likely demands attention. *Id.* at 11–12.

94. STARK, *supra* note 77, at 23.

95. *Malum in se*, a wrong in itself, would apply to acts of theft. See BLACK’S LAW DICTIONARY 1112 (Rev. 4th ed. 1968).

96. For example, at the federal level, there are criminal laws on bribery, grafts, and conflicts of interest found at 18 U.S.C. §§ 201–209 (2000). The sections are sometimes referred to as the Federal Gratuity Act and outline impermissible gifts as well as provide criminal punishment for those who violate the guidelines. Section 201 provides that anyone who:

otherwise than as provided by law for the proper discharge of official duty . . . directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official . . . shall be fined under this title or imprisoned for not more than two years, or both.

18 U.S.C. §201(c)(1)(A) (2000).

97. *Malum prohibitum* crimes are those that may not be inherently immoral, but are “wrong” because they are prohibited. See BLACK’S LAW DICTIONARY 1112 (Rev. 4th ed. 1968). Stark notes this distinction between ultimate, wrong acts (*malum in se*) and conflict of interest crimes, primarily *malum prohibitum*. STARK, *supra* note 77, at 24.

conflict of interest crimes as premature—they regulate potentially innocent precursor activities instead of proven, harmful conduct.⁹⁸

B. Regulating Conflicts of Interest: Removal or Management?

Conflict of interest regulation can be quite diverse, but it falls within two distinct categories: removal or management. Removal, the cleanest form of regulation, is not always possible. In those situations, we move to the various layers of managing conflicts.

1. Removal and Conflicts of Interest

Removal does just that—it eliminates the conflict *ex ante* facto, thus eliminating potentially more serious consequences.⁹⁹ Those in-

98. STARK, *supra* note 77, at 24–25. Noting that both the American Bar Association and American Civil Liberties Union have criticized *malum prohibitum* conflict of interest laws because they focus on the penultimate rather than ultimate (*malum in se*) act. *Id.* In fact, Justice Scalia has been such a critic. In *United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999), Justice Scalia found a violation requires proof of a *quid pro quo*, some connection between the gifts and the government action. Otherwise, as Scalia described it, all gifts to government officials would be criminalized:

Talmudic sages believed that judges who accepted bribes would be punished by eventually losing all knowledge of the divine law. The Federal Government, dealing with many public officials who are not judges, and with at least some judges for whom this sanction holds no terror, has constructed a framework of human laws and regulations defining various sorts of impermissible gifts, and punishing those who give or receive them with administrative sanctions, fines, and incarceration. . . .

. . . .

[Such an interpretation] would criminalize, for example, token gifts to the President based on his official position and not linked to any identifiable act—such as the replica jerseys given by championship sports teams each year during ceremonial White House visits Similarly, it would criminalize a high school principal's gift of a school baseball cap to the Secretary of Education, by reason of his office, on the occasion of the latter's visit to the school. That these examples are not fanciful is demonstrated by the fact that counsel for the United States maintained at oral argument that a group of farmers would violate § 201(c)(1)(A) by providing a complimentary lunch for the Secretary of Agriculture in conjunction with his speech to the farmers concerning various matters of USDA policy—so long as the Secretary had before him, or had in prospect, matters affecting the farmers. . . . Of course the Secretary of Agriculture always has before him or in prospect matters that affect farmers, just as the President always has before him or in prospect matters that affect college and professional sports, and the Secretary of Education matters that affect high schools.

Id. at 400, 406–07.

Both the language of the opinion and its outcome were foreshadowings of Justice Scalia's somewhat liberal attitudes about conflicts of interest and government officials. What is a baseball cap, lunch, or duck hunting trip among friends so long as nothing is pending and it is all generic influence?

99. STARK, *supra* note 77, at 235.

volved recognize the conflict and, via various methods, hope to mitigate or eliminate these consequences.¹⁰⁰ Removal includes two different strategies.

In the first, the principal requires, or the agent voluntarily chooses, disqualification. In such a case, the agent removes herself from the environment that poses the conflict, thus eliminating it.¹⁰¹ Under the provisions of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"),¹⁰² auditors are now removed from the conflicts of interest that were common practice prior to the collapses of WorldCom, Enron, Adelphia, Sunbeam, and other companies in which auditors served dual roles of outside auditor as well as management consultant and a host of other roles that were generally more lucrative for the audit firms than the audit fees themselves.¹⁰³ The conflict for auditors was that pleasing the client on the audit side became the perceived prerequisite for retention of the more financially rewarding consulting business.¹⁰⁴

100. *Id.*

101. *Id.*

102. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (to be codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C.). Sarbanes-Oxley is the term used colloquially, along with SOX, to describe all of the reforms passed by Congress in response to the collapses of Enron, WorldCom, and other companies that had engaged in accounting improprieties.

103. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 § 201, 116 Stat. 745 (to be codified at 15 U.S.C. § 78j-1). Prior to Sarbanes-Oxley, the audit to consulting fee ratios were clearly tilted toward consulting. Following each company is a number in parenthesis that indicate the ratio of the company's nonaudit fees to its audit fees (as of 2001): Allegheny Energy (3.1); Ameren (2.3); American Power Conversion (5.1); Apple Computer (12.6); Avon (2.9); Best Buy (4.4); Boston Properties (4.8); Bristol Myers Squibb (4.5); Constellation Energy Group (4.1); Delphi Automotive Systems (7.7); Dominion Resources (1.2); Duke Energy (3.5); Equitable Resources (3.9); First Energy (5.9); Gap (13.5); Halliburton (1.1); John Hancock Financial (9.75); Johnson & Johnson (4.6); Kmart (10.4); Lafarge North America (3.1); Liz Claiborne (2.2); Manpower (3.6); Marriott International (4.7); McGraw-Hill (2.2); Motorola (16); PG&E (3.6); Reliant (5.1); TXU (3); VF (5.2); and Walt Disney (4.1). Deborah Solomon, *After Enron, a Push to Limit Accountants to . . . Accounting*, WALL ST. J., Jan. 25, 2002, at C1; Gary Strauss, *Companies Take Action to Regain Investor Trust*, USA TODAY, July 17, 2002, at 1B.

104. The list of activities now classified as conflicts under Sarbanes-Oxley include:

1. Bookkeeping or other services related to the accounting records or financial statements of the audit client;
2. Financial information systems design and implementation;
3. Appraisal or valuation services, fairness opinions, or contribution-in-kind reports;
4. Actuarial services;
5. Internal audit outsourcing services;
6. Management functions or human resources;
7. Broker or dealer, investment adviser, or investment banking services;
8. Legal services and expert services unrelated to the audit; and

Other types of conflicts may not have statutory prescriptions but require voluntary removal. For example, a human resource director for a private corporation may seek reassignment such that her spouse may qualify for a job with the same company and not be reviewed by the former director. The conflicts involving journalists and commentators noted earlier are not governed by statute but by professional codes of ethics. Judicial conflicts may or may not be statutorily proscribed.¹⁰⁵ Likewise, with public officials and appointees, the conflicts standards may or may not be covered by statute. The proper course of action may not be offered by codified standards and the result is differing results in the determination of grounds for removal or recusal.¹⁰⁶ When the standards differ, regulating the conflict involves moving to its management.

2. Managing Conflicts of Interest

For the most part, regardless of whether there is a statutory mandate or a matter of conflicts interpretation and appearances, a judge facing a conflict of interest would likely recuse himself or herself from the case that provokes the conflict. However, as in other fields in which a conflict arises, there are alternatives such as disclosure and/or divestiture.¹⁰⁷ These alternative approaches are often grouped to-

9. Any other service that the Public Company Accounting Oversight Board ("PCAOB") determines, by regulation, is impermissible.

15 U.S.C.A. § 78j-1(g) (West, 2003).

105. For example, most states specifically prohibit judges from participating in cases in which a relative is a party, a witness, or a victim. *See, e.g.*, OHIO REV. CODE ANN. § 2501.13; *In re Disqualification of Nadel*, 546 N.E.2d 926 (Ohio 1989) (disqualifying judge as well as other judges in that county circuit from hearing a case in which judge's wife and infant were victims of crimes of kidnapping, assault, and aggravated robbery). However, where the conflict raised involves friendship of the judge or judge's staff, there is not a statutory prohibition, but there is the application of discretion on the appearance of the conflict. *See, e.g.*, *Celestino v. Schneider*, 616 N.E.2d 581 (Ohio Ct. App. 1992) (holding that friendship with a parent of a party is not necessarily a conflict that requires judicial recusal); *State v. Scott*, 578 N.E.2d 841 (Ohio Ct. App. 1989) (holding that judge's bailiff being married to defense lawyer did not require recusal). Federal standards are similar under 28 U.S.C. § 455(a) (2000). That is, a judge is not required to recuse himself or herself simply because of personal familiarity with the parties or witnesses. *Hirschkop v. Va. State Bar Ass'n*, 406 F. Supp. 721 (E.D. Va. 1975).

106. For a complete discussion of federal standards on judicial conflicts, see 8 FEDERAL PROCEDURE § 20:63-20:89 (2005). Mere acquaintance is insufficient to require recusal. *In re Beard*, 811 F.2d 818 (4th Cir. 1987). But, statements about character may or may not require recusal depending on the extent of the statement. *Roberts v. Bailar*, 625 F.2d 125 (6th Cir. 1980).

107. For example, in the field of journalism, the disclosure by financial reporters and analysts that they owned stock was no longer deemed sufficient for ensuring integrity in coverage. New policies at CNBC require journalists and commentators covering financial

gether in a process referred to as managing the conflict. Managing conflicts of interest can be effective, even when it does not eliminate the conflict.

When the conflict is of a financial nature one management tool is divestiture. Sometimes the agent can eliminate the conflict by divesting himself of a financial interest that provokes the conflict. A judge, for example, can sell stocks or place them in a blind trust so that she can rule in cases involving the stock issuers without the existence or even appearance of a conflict of interest.¹⁰⁸

Another means of managing a conflict is simply to acknowledge its existence and balance its effects. The disclosure and management can occur at varying level in the relationship and processes involved. With regard to judicial and quasi-judicial roles, there is the generic conflict between the oath or pledge to be fair and unbiased and the inevitable ideological framework each of us uses for management of issues, disputes, and policies. Managing these types of conflicts can involve a global recognition that there are inherent and inevitable biases brought to the bench and/or regulatory table when political and judicial figures are chosen.

We understand, for example, that appointments to certain state and federal commissions are political and that commissioners bring some level of bias into their service.¹⁰⁹ Rather than micro-manage the individual biases, we manage the overarching process to afford checks and balances for those inherent biases. For example, the relevant statute governing the Michigan State Ethics Commission requires that no more than four of the seven members of the state's Board of Ethics be members of the same political party.¹¹⁰ Whether the commissioners bring biases and conflicts into their role tends to be offset by a broad

issues there to no longer own individual stocks. The conflicts policies apply to on-air talent as well as staff. They are able to own stocks via pension funds. Patrick McGeehan, *CNBC Impose New Rules on Trading by Employees*, N.Y. TIMES, Jan. 13, 2004, at C11. The most common policies, however, remain ones of recusal and disclosure. Reporters at the *Wall Street Journal* may not write about companies in which they own stock. *Id.* See also Marrienne M. Jennings, *Where Are Our Minds and What Are We Thinking? Virtue Ethics for a "Perfidious" Media*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 637, 685 (2005) for a more detailed summary of policies. Other networks require on-air disclosure or ownership and/or recusal. *Id.*

108. In general, divestiture eliminates the conflict—in private business, it squares with the notion of fiduciary. Stark notes that it had its origins with the judiciary. STARK, *supra* note 77, at 10.

109. Balancing allows individual agency members to bring strong interests into their deliberations, but also insists that the mix of members is generally representative of the population it seeks to represent. *Id.* at 10–11.

110. MICH. COMP. LAWS ANN. § 4.1700(74) (West 2003). The irony of such a law is not lost on the authors.

acknowledgement that such biases may follow them and by a canny effort to balance those biases based on membership rules.

This balancing provides effective management for ideological conflicts. The appointment process for United States Supreme Court Justices carries overarching balances for those ideological types of biases in that the Justices are presidential appointees, rising to the bench during different administrations and always confirmed by the United States Senate, a body that has certainly let its concerns about ideology known in the hearing and vote processes on Justices.¹¹¹ Balancing does not necessarily acknowledge specific cases of conflict of interest and may not be the best way to manage specific conflicts. Nevertheless, a policy decision to manage biases and conflicts in this manner, mitigating the potential for a conflict by diversifying members and thus reducing the conflict inherent in an agency's collective voice, can be an effective foil for individual conflicts.¹¹²

Nevertheless, Justice Ginsburg's present conflict, at issue in this discussion, is different from the global ideological conflicts that are resolved through the appointment process. Her conflict relates to a relationship, not just her ideology and, as such, requires not just more discussion but additional tools for management of conflicts beyond the global tool of balancing. Justice Ginsburg's conflict is an ongoing relationship with a continuing party to women's rights cases as well as her allowing her name to be used by that party's for its activities and fundraisers.

Likewise, Justice Scalia has brought his ideological views on abortion to the bench and those views are managed by the balancing of appointments to the Court. However, the conflict alleged presently is not ideological, but involves personal friendship and interaction with a party in a case. Understanding that humans cannot separate themselves from a lifetime of experience and interaction, ideological conflicts are managed. Specific conflicts require more individual management via either recusal and restraint or other forms of conflict management.

111. The hearing processes on Judge Robert Bork (who was not confirmed) and Justice Clarence Thomas (who was confirmed) were two of the most heated battles grounded in ideology of the two judges. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1999); ANDREW PEYTON THOMAS, *CLARENCE THOMAS, A BIOGRAPHY* (2001), for more information.

112. Even now, one can see the potential relevance of this management tool for the conflicts confronting Supreme Court Justices. This Article will later examine balancing as it applies to the Supreme Court. See *infra* notes 191–92 and accompanying text.

A final means for managing a conflict of interest is disclosure, which is usually minimally required for disqualification, divestiture, and balancing. The purpose of disclosure can be to alter the parties (for possible challenges and resulting changes of judges in lower courts), explain recusal, or head off charges of bias through advance disclosure. In those cases in which recusal is not possible, disclosure may be the means by which the public interest is served via close public supervision instigated by the disclosure of the conflict. In this case, disclosure, as a conflicts management tool, may be an apt and exclusive means of addressing conflicts of interest. Insofar as the disclosure comprehensively sets out a conflict of interest, it alerts those affected—principals in the case of business decision-making and the public in the case of a public servant—that the agent admits the existence of potential conflict of interest. Such disclosure would typically include some affirmation by the agent that her conduct will conform to that required by her principal, whatever the rules may be, and a periodic accounting—i.e. continuous disclosure—updating actions within the purview of the potential conflict.¹¹³

IV. Judicial Conflicts of Interest

With two important exceptions, judicial conflicts of interest mirror those in other settings, but the two exceptions, insofar as they may be atypical in cases involving corporate agents, are significant. While judges are responsible for reporting, managing, and disqualifying themselves, as in cases of financial and familial conflicts of interest, they must also deal with and respond to potential ideological conflicts, as in the case of Justices Scalia and Ginsburg.¹¹⁴ That judges must also answer to a remarkably more amorphous principal, the public, also

113. See STARK, *supra* note 77, at 250. Andrew Stark states that disclosure “both attenuates and exaggerates the prophylactic nature of conflict-of-interest regulation.” *Id.* at 251. It allows the principal, or, in the case of judicial conflicts of interest, the public, to judge whether the conflict exists, and to what extent the agent confronted with the conflict manages it well or at all. *Id.* at 252–53.

114. A recusal motion was denied in a case in which the trial judge disclosed to the parties that a key government witness was the son of his deceased godparents. *United States v. Cole*, 293 F.3d 153 (4th Cir. 2002), *cert. denied*, 537 U.S. 950 (2002). The judge had not had any contact with the witness for more than ten years and had last seen him when he happened to walk into a courtroom in which the witness was being sentenced. *Id.* The judge also stated that he had reviewed the CODE OF JUDICIAL CONDUCT for United States Judges and governing statutes and that he could be fair and impartial in presiding over trial and issuing various rulings. *Id.* The court ruled that the judge was not biased simply because he knew the witness. *Id.* So, the judge was right not to recuse himself, but the public revelation of his lack of follow-up with friends and family had to be embarrassing [cold and unfeeling maybe, but not biased].

deviates from some of the conventional wisdom surrounding agency theory as it relates to conflicts of interest. Public interest requires not only that judges act impartially, but that they also appear to act impartially, a rather amorphous but important institutional concern. The following subsections trace the general conflict of interest rules associated with judging and focus on the two exceptions, ideological conflicts and the public as principal.

A. Judicial Disqualification Rules

Assuming a federal judge has not divested himself of potential financial conflicts of interest, he must disqualify himself if he “has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding,”¹¹⁵ “served as a lawyer in the matter in controversy,”¹¹⁶ served in a government capacity “concerning the proceeding or expressed an opinion concerning the merits of the particular case,”¹¹⁷ “has a financial interest in the subject matter in controversy,”¹¹⁸ a spouse or relative is a party, officer, director trustee, lawyer or has an interest in the litigation that could “be substantially affected by the outcome.”¹¹⁹ As important, and clearly relevant in Justice Scalia’s duck hunting case, is the overarching statutory prescription for disqualification, which states that a judge should disqualify “himself in any proceeding in which his impartiality might reasonably be questioned.”¹²⁰

These disqualification rules have a removal role; they seek to eliminate from the adjudication process those judges who have subjective knowledge or some inclination that prevents impartiality, a financial stake in a case’s outcome, or some other objective basis for recusal. Although one might surmise that judges can easily recognize cases provoking financial conflicts of interest, this is not always so. As evidence of this, several federal judges exhibited various levels of incredulity when they discovered, after the fact, that they were shareholders in companies named as parties to litigation before them.¹²¹

115. 28 U.S.C. § 455(b)(1) (2000).

116. *Id.* § 455(b)(2). The statute would also require disqualification if the judge was associated with the lawyer currently before the court. *Id.*

117. *Id.* § 455(b)(3).

118. *Id.* § 455(b)(4). The statute extends the financial stake to the judge’s spouse and minor child. *Id.*

119. *Id.* § 455(b)(5).

120. *Id.* § 455(a).

121. Charles Bierbauer, *Eight Federal Judges Had Conflict of Interest*, CNN.COM, Sept. 13, 1999, <http://www.cnn.com/ALLPOLITICS/stories/1999/09/13/judges.conflict/>.

Neither does prior involvement as an attorney insure judicial disqualification, if the judge happens to be on the Supreme Court. During his nomination hearings for elevation to Chief Justice, Justice Rehnquist was the object of derision because of his failure as Associate Justice to recuse himself in a case in which he had previously served as head of the Justice Department's Office of Legal Council.¹²²

There are also the specific ideological conflicts, or those cases in which the personal views of a judge have been stated publicly in advance of the case.¹²³ A judge's general opinion about a legal or social matter relating to a pending case does not automatically render a judge biased or prejudiced within the meaning of the judicial canons.¹²⁴ However, a judge who declares in court to the prosecutor that he himself would have charged the defendant with a felony and not a misdemeanor has created the appearance of a conflict.¹²⁵ Still, that perception problem rears its vocal head, and self-recusal becomes necessary in those cases in which impartiality is compromised or appears to be so by the sheer emotion of the judge's views.¹²⁶ Justice Scalia, for example, acting on an apparent bias revealed by public statements he made while the case was pending, recused himself from the "Pledge of Allegiance" case.¹²⁷

122. See Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 592-95 (1987) (documenting Rehnquist's involvement in the case of *Laird v. Tatum*, 408 U.S. 1 (1972), both as an administrator and then as Associate Justice).

123. See *infra* note 127 and accompanying text (regarding Justice Scalia's recusal for views on the "Pledge of Allegiance").

124. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(5) (2000). See, e.g., *Cleveland Bar Ass'n v. Cleary*, 754 N.E.2d 235 (Ohio 2001).

125. It is unclear which way the conflict goes. The statement could indicate the judge is irritated with the prosecutor and unlikely to give him a fair shot at the trial, or the statement could indicate that the judge thinks the defendant is guilty as sin and clearly headed for the maximum penalty the misdemeanor provides. This is an unusual case in that a conflict exists on both sides, and the appellate court agreed that the judge needed to go, allowing the parties to fill in whatever conflict they saw for the conflict was in this case, in the eye of the beholder. *Disciplinary Counsel v. Karto*, 760 N.E.2d 412 (Ohio 2002); MODEL CODE OF JUDICIAL CONDUCT Canons 1, 3B(2), 3B(7), 3E(1)(a) (2000); MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(5) (2000).

126. There are also cases in which the views affect not only the outcome, but also the plea bargain. For example, a judge who was a vocal opponent of probation offered a defendant a lesser sentence if she would agree to have her baby and put it up for adoption as opposed to having an abortion and a longer prison term. See *Cleary*, 754 N.E.2d at 240; MODEL CODE OF JUDICIAL CONDUCT Canon 3B(5) (2000).

127. See *Elk Grove Unified Sch. Dist. v. Newdow*, 540 U.S. 945 (2004). While the case was on appeal, Justice Scalia made public statements that he believed the pledge was constitutional as written. See Linda Greenhouse, *Supreme Court to Consider Case on 'Under God' in Pledge to Flag*, N.Y. TIMES, Oct. 15, 2003, at A1 (noting the potential for a four-to-four vote in the case, given Scalia's position).

Currently, some question both Justices Scalia and Ginsburg for their involvement in, respectively, the case involving Vice President Cheney¹²⁸ and Justice Ginsburg's willingness to lend her name for a lectureship sponsored by NOW.¹²⁹ Granted, both of these cases raise issues of conflict of interest, but only the subjective judgments of Justices Scalia and Ginsburg can decide whether these apparent conflicts affect their impartiality.¹³⁰ Neither of these conflicts originates from pecuniary or familial sources. This lack of direct conflict distinguishes these cases from those typically confronting private concerns. While private agency problems *can* arise in cases like these, judicial conflicts of interest *often* do. These subjective, non-slam-dunk types of conflicts require judicial interpretation, restraint, and sensitivity to the perception of impartiality.

B. Self-Recusal in Close-Call Conflicts

For subjective disqualifications, a judge, charged with the sacred obligation of impartiality, must decide that the case, parties, or circumstances surrounding the litigation create a conflict that only disqualification overcomes. As noted earlier, when there is no codified standard, we rely on the judicial temperament. For example, a judge who is related to neither a party, nor an attorney presenting a case may disqualify herself if prior dealings with one of the attorneys has unalterably biased her against that attorney.¹³¹

More problematic, but no less a potential source of a conflict, are those instances in which there may be a strong objective basis for questioning the impartiality of a sitting judge. For example, a judge need not be disqualified from trying the murder case of a defendant who shot and killed the chief of police because the judge attended the chief's memorial service.¹³² He must disqualify himself, however, if he serves on the board of an organization involved in a memorial fund

128. See *supra* notes 34–39 and accompanying text.

129. See *supra* notes 54–59 and accompanying text.

130. There are lower court cases in which the friendship between a judge and a lawyer in the case are deemed not to be *per se* conflicts but conflicts to be self-policed by the parties involved. See, e.g., *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985). For example, a relationship from the past will probably not affect the ability of the judge to hear the case. *Sofford v. Schindler Elevator Corp.*, 954 F. Supp. 1457 (D. Colo. 1997), *summary judgment granted*, 954 F. Supp. 1459 (D. Colo. 1997).

131. A judge who had referred a case to a lawyer appearing before him some fifteen years earlier need not recuse himself from the case, even though it was a heck of a referral, famous enough for everyone to remember! *Sofford*, 954 F. Supp. at 1457–1458, *summary judgment granted*, 954 F. Supp. 1459 (D. Colo. 1997).

132. *State v. Browning*, 224 N.E.2d 398, 399 (Ohio Ct. Com. Pl. 1967).

for the chief.¹³³ Reliance on judicial temperament can prove problematic, as the two present circumstances indicate. The issue of the conflict did not occur to either Justice until third parties intervened.

Duck hunting trips with old friends and political allies and name-loaning to decidedly political and like-thinking organizations are other examples. In such cases, one may surmise that some fair means of evaluating the potential conflict and determining the appropriate response would exist. For the Supreme Court, the method of review and disposition of conflicts of interest is decidedly subjective, notwithstanding the federal disqualification statute. Each Supreme Court Justice has the authority to unilaterally determine whether disqualification is appropriate for a given case¹³⁴

Further, these unilateral declarations and decisions regarding conflicts are made in an era when standards for conflicts of interest have eroded slowly but certainly. Conflicts remain conflicts, but our tolerance for conflicts has increased as conflicted parties' righteous indignation has found us accepting their solemn avowals that their conflicts could not possibly influence them.¹³⁵ Tolerance for conflicts has desensitized all of us, including the judiciary, to the need for vigilance in both recusal and management of conflicts. The extensive re-

133. *Id.* at 398.

134. *See supra* notes 115–130 and accompanying text.

135. For example, commentator and columnist Maggie Gallagher indicated that she did not see the conflict and that even if there was a conflict, she forgot about being paid the \$21,500. Kurtz, *supra* note 88, at C01. Auditors and their professional organizations long resisted regulation of the conflicting roles of auditor and consultant on the grounds that the consulting was not something that would influence their audit work. Analysts maintained that soft dollar payments from companies for their research as well as incentive systems for pay from their investment banker employers did not taint their independence or reports. Audit and compensation committee members of boards insisted that they were independent for purposes of their roles there despite consulting, employment, and other arrangements with these companies on whose boards they say. Federal legislation now controls all of these areas and eliminates the conflicts because the practices clearly required something more than disclosure or other management tools. *See* Sarbanes-Oxley discussion, *supra* notes 102–103. *See* 15 U.S.C.A. § 780-6 (West 2003), for the specific section on analysts. *See* Am. Inst. of Certified Pub. Accountants Home Page, <http://www.aicpa.org>, for specifics on auditor independence, which, prior to Sarbanes-Oxley defined independence of auditors on the basis of a financial interest of the auditor or his/her family in the audit client and did not address the conflicts of interest now defined under Sarbanes-Oxley. *See* 15 U.S.C.A. § 78j-1(g) (West 2003 & Supp. 2005). Prior to post-Enron reforms, audit and compensation committee members of boards often held consulting contracts with the company in a financial conflict of interest that was widely practiced and accepted. The New York Stock Exchange adopted rules in 2004 to curb the conflicts of interest revealed in the Enron, WorldCom, Tyco, Adelphia, and other scandals. *See* N.Y. STOCK EXCH., NYSE DIRECTORS' CODE OF BUSINESS CONDUCT AND ETHICS (2004), available at <http://nyse.com/pdfs/codeofethics.pdf>.

forms in journalism standards and corporate governance over the past three years demonstrate that in those fields the tolerance for conflicts had increased to the point at which regulation defining conflicts and independence became necessary. When an amoral atmosphere regarding conflicts of interest has permeated such major parts of the culture, it is perhaps necessary for all fields, including the judiciary, to revisit the notion of conflicts, to revisit the purpose of the ethical standard on conflicts, and to regroup in terms of defining and managing conflicts. The final sections provide the backdrop for the retooling on judicial conflicts.

C. Overarching Principles for Judicial Conflicts of Interest

Justice may not be blind, but it must be impartial. In a judicial setting, conflicts of interest pose impartiality problems for judges, attorneys, parties to the lawsuit, and the public. No matter its source, subjective or objective, originating from internal or external sources, pecuniary or not, judicial bias cannot stand. Judicial disqualification laws apply not only to conflicts of economic or familial interests, but also those conflicts arising from subjective bias. As important, though, are cases of objective bias where a judge's "impartiality might reasonably be questioned."¹³⁶ The classic conflicts include those in which the judge is related to the parties, and recusal is mandatory.¹³⁷

Nevertheless, there are those affiliated relative cases in which the relative is not a party to the case, but has a tangential relationship to one of the parties. For example, despite objections raised during the contentious *Bush v. Gore* case, Justice Thomas did not recuse himself when the press pointed out that his wife, Virginia Lamp Thomas, worked for the Heritage Foundation, a think-tank that was in the pro-

136. 28 U.S.C. § 455(a) (2000). See *supra* note 120 and accompanying text.

137. Even a relation to a party once removed was grounds for Justice Clarence Thomas's recusal in the Virginia Military Institute case. Because his son was a student there, Justice Thomas recused himself from that decision. *United States v. Va. Military Inst.*, 508 U.S. 946 (1993). But in *Bunting v. Mellen*, 541 U.S. 1019 (2004), Justice Thomas did not recuse himself from the petition for writ of certiorari in a case involving supper prayer at VMI because his son had graduated. Alumni status is not deemed to create impartiality. *Easley v. Univ. of Mich.*, 906 F.2d 1143 (6th Cir. 1990), *reh'g denied en banc* 906 F.2d 1143 (6th Cir. 1990), *cert. denied*, 499 U.S. 947 (1990); *Brody v. Harvard Coll.*, 664 F.2d 10, (1st Cir. 1981), *cert. denied*, 455 U.S. 1027 (1982). Service on the board of trustees of an alma mater is grounds for recusal when the alma mater has a financial stake in the outcome of the case. *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847 (1988). In this case, the district judge served on the board of trustees for Loyola University, which had a financial stake in the determinations in the case regarding rights to real property, and the judge had participated in board discussions about the property rights and the potential litigation. *Id.*

cess of reviewing resumes and making recommendations for appointments to the Bush administration. Nor did Justice Scalia recuse himself in that same case because his son was a partner at Gibson, Dunn & Crutcher, and Theodore Olson, also a partner there, argued the Bush side of the case before the Court and eventually became Solicitor General of the United States by the Bush Administration.¹³⁸

Justices Scalia and Ginsburg, like their colleagues on the Supreme Court, must each address the issue of conflict of interest with a view toward eliminating actual or apparent bias. Two questions follow. Are both Justices correct not to disqualify themselves in the cases presented? The problem in answering this question in Justice Scalia's case is that any objective appraisal of his decision depends of the acquisition and interpretation of somewhat unavailable or uncertain facts. Although those provided by the media are incomplete and occasionally wrong,¹³⁹ the "duck" rule still suggests that Justice Scalia's activities were at least unwise and provoke an objective stigma. Conversely, if we accept the facts provided by Justice Scalia—and, given the dispositive nature of his view, we are often confined to those provided by the Justice—then perhaps he was capable of being impartial in the Cheney case.¹⁴⁰

Yet the presence of the classic rationalizations advanced in conflicts situations and other types of ethical dilemmas suggest that Justice Scalia did not see the issue from a candid analysis of his impartiality but rather from the defensive mode of justification of his conduct to the public via an opinion intended for media consumption and reporting. Indeed, the closing lines of the opinion make clear, along with his chastisement about incorrect facts, that Justice Scalia could not have been objective about the motion to recuse because of the personal pain the media hoopla apparently brought.¹⁴¹

138. *Bush v. Gore*, 531 U.S. 98 (2000).

139. See *supra* note 40 and accompanying text (documenting claims of inaccurate accounts of Scalia's duck hunting trip).

140. There have been decisions on close friendship cases in which courts have noted that there comes a point at which the friendship is so close that it becomes impossible for the judge to remain aloof given the relationship of the parties. See, e.g., *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1983), *cert. denied*, 475 U.S. 1012 (1982); see also *United States v. Kelly*, 888 F.2d 732 (11th Cir. 1989).

141. The closing lines of the recusal opinion were:

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." Motion to Recuse 6. If I could have done so in good conscience, I would have been pleased to demon-

Further, Justice Scalia's description of the issue recognizes the judicial conflicts standard, but assures that such is not the issue in the case:

There are, I am sure, those who believe that my friendship with persons in the current administration might cause me to favor the Government in cases brought against it. That is not the issue here. Nor is the issue whether personal friendship with the Vice President might cause me to favor the Government in cases in which he is named. None of those suspicions regarding my impartiality (erroneous suspicions, I hasten to protest) bears upon recusal here. The question, simply put, is whether someone who thought I could decide this case impartially despite my friendship with the Vice President would reasonably believe that I cannot decide it impartially because I went hunting with that friend and accepted an invitation to fly there with him on a Government plane.¹⁴²

Justice Ginsburg's situation may be more problematic because the issue of affiliation with a party to the case has already been addressed by the lower courts with a different result than the non-recusal reached by the good Justice. In *In re Aguinda*,¹⁴³ a federal court of appeals dealt with the issue of impartiality in a case in which a judge had attended a legal seminar that was sponsored by one of the parties to litigation.¹⁴⁴ The judge in the case had attended a seminar in which his expenses were paid at an institute that received funding from one of the parties in the case.¹⁴⁵ The court held that such attendance and related sponsorship did not require recusal unless the following special circumstances applied: (1) a presentation does not relate to legal issues material to the disposition of a claim or defense in action before a judge who attended the presentation, (2) the funding by a party of a seminar's sponsor is too remote or minor to appear to a reasonable person to have an influence on the judge, and (3) the

strate my integrity, and immediately silence the criticism, by getting off the case.

Since I believe there is no basis for recusal, I cannot.

Cheney v. U.S. Dist. Court, 541 U.S. 913, 929 (2004) (mem.). Living in denial has been a pattern across professions and groups when it comes to conflicts of interest. *See id.* at 926.

142. *Id.* at 928.

143. 241 F.3d 194 (2d Cir. 2001).

144. *Id.*

145. The institute was the Foundation for Research on Economics and the Environment ("FREE"), and one of its corporate sponsors was Texaco, a party to a case involving the Sierra Club who had brought the motion for recusal. Brief of Respondent Sierra Club, Cheney v. U.S. Dist. Court, 542 U.S. 367 (2004) (No. 03-475), available at 2004 WL 522599; Reply Brief for the Petitioners (Appellate Petition), Cheney v. U.S. Dist. Court, 542 U.S. 367 (2004) (No. 03-475), available at 2003 WL 22720970.

nature of a party's funding of a sponsoring organization does not create an appearance of either control or impropriety.¹⁴⁶

The topics for the Ruth Bader Ginsburg lecture series are women's rights, gender equality, and related legal issues. Indeed, when Justice Ginsburg was the speaker she spoke of her history of fighting for gender equality. NOW, the sponsor of the event, was a party to the case, albeit an amicus. While her expenses were paid by a co-sponsor, the New York State Bar, the funding for the series itself comes from NOW. Further, Justice Ginsburg is not a mere attendee at a symposium or lecture.¹⁴⁷ The lecture series is named for her, an honor and recognition bestowed on a Justice who will decide cases in which it has taken a position. Ex ante those decisions were favorable to NOW, with Justice Ginsburg's support. The appearance existed, at least to those outside the Court, as the earlier discussion of the situation outlined.¹⁴⁸

V. The Recusal Process: Practice, Issues, and Reforms

The second question in judicial conflicts is at least as important as the first. Is the system of unilateral review by Supreme Court Justices the most appropriate method of addressing judicial conflicts of interest? Even if Scalia's and Ginsburg's decisions were incorrect, it may not be fair to attribute them to some systemic method of decision-making in such cases.

This section briefly examines the two most important features of an effective judicial conflict of interest policy: transparency and a defensible process of review. This Article notes that the conflicts among Supreme Court Justices tend to be transparent, but that unilateral review and disposition by the Justices is lacking. It nonetheless argues that, notwithstanding popular¹⁴⁹ and scholarly positions¹⁵⁰ to the contrary, singular review and decision-making is the only defensible means available in such cases. Before examining transparency and process, this Article notes the peculiar manner in which agency, the

146. See *Aguinda*, 241 F.3d at 194.

147. There is an older case that held that a mere lecture by a judge at a law school did not require recusal in a case involving the dean of the law school. *MacNeil Bros. Co. v. Cohen*, 264 F.2d 186 (1st Cir. 1959). However, the date of the case is problematic because of so many statutory and other changes in codes regarding conflicts of interest.

148. See *Hagan v. Coggins*, 77 F. Supp. 2d 776 (N.D. Tex. 1999) (holding that recusal was warranted when outside perception was that it was necessary).

149. See *supra* notes 40-73 and accompanying text.

150. See, e.g., Stempel, *supra* note 122.

relationship giving rise to such conflicts, applies to public officials such as judges.

A. An Agency View of the Federal Judiciary

If conflicts of interest are inherent in agency problems, then agency theory must have some descriptive appeal in judicial conflicts of interest. The theory does apply, but there are risks associated with attempting to find congruency between conflicts of interest in private versus public environments. The conflicts facing public officials, including judges, are often not as concrete as those facing, for example, corporate officers, and the responses to public conflicts of interest are often not as well conceived or applied.

These differences arise, at least in part, because of a very pronounced difference in the principals associated with private as opposed to public agency problems. Private principals, and the interests they hope to protect and enhance, tend to be well-defined. Judges exist to further the public interest, and it is the public and its amorphous and diverse interests that guide the actions of all public servants, including judges. The public interest, "the needs and welfare of the general body of citizens,"¹⁵¹ is remarkably complex. While the protected interests of private principals tend to be pecuniary and measurable, those furthering the public interest, the principal of the judiciary, are often the object of debate, remarkably less pecuniary and therefore decidedly hard to measure.

This difficulty in assessment is especially so in cases in which neither financial nor familial conflicts apply, such as cases of ideological conflicts of interest. In such cases, objective views about the existence of a conflict and judicial impartiality are subsumed by a political reality in which roughly half of the polity will likely agree with the judge's decision, while the other half, as in the cases of Justices Scalia and Ginsburg, downplays the conflict and claims of partiality.

B. The Need for Transparency

While the definition of public interest is somewhat fleeting, the public interest in a democracy demands transparency.¹⁵² Autonomous voters have the right to the information necessary to make reasoned choices about the direction of the republic. These are among John

151. Classics of Administrative ethics 118 (Willa Bruce ed., 2001).

152. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 293-94, 341-45, 348, 369 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

Locke's principles of equality.¹⁵³ Applied to the judiciary, transparency means that the public has a right to know about actual and potential conflicts of interest facing a judge. Toward this end, the judicial nomination process often serves to recognize and manage potential conflicts. Federal judges routinely acknowledge and address potential conflicts during nomination and review.¹⁵⁴ That the nomination system also invites questions and answers involving potential ideological conflicts of interest has complicated the process because judicial ideology invariably precedes the nomination, but creates different issues in a conflict of interest analysis.¹⁵⁵

We also rely heavily on the press, the political process, and the judge herself in identifying conflicts of interest. The system works only if the public knows about an actual or apparent conflict and its means of resolution. Judging by his apparent disdain for having to tackle the recusal issue in the Cheney case, Justice Scalia may have chosen to be reticent about his duck hunting trip and its relationship to that case.¹⁵⁶ The good news, however, is that the legal, political, and news environments operated to expose the potential conflict and necessitate a response. Whether Scalia's response and choice not to recuse himself were sufficient to mute the criticism is distinct from the desirable result of exposure and response. In fact, it is rare in our polity that the public is satisfied that the information on which decisions are made is complete and truthful. Transparency as an ideal may demand this, but our democracy seems more than capable of surviving on sufficient, as opposed to full, information.

153. *Id.*

154. This, of course, is part of the problem because the nomination process for the Supreme Court centers on ideology, the most contentious political issue. One author suggests that ideology is an essential part of the appointment process, but differentiates ideology from agenda—the latter emphasizing furthering ideology rather than deciding cases. See Steven H. Goldberg, *Putting the Supreme Court Back in Place: Ideology, Yes, Agenda, No*, 17 GEO. J. LEGAL ETHICS 175, 192 (2004).

155. See *id.* (providing guidelines for Senate questioning of Supreme Court nominees that elevate ideology over agenda). This significance of ideology as a source of judicial conflict of interest is developed more thoroughly *infra* notes 164–178 and accompanying text.

156. There is nothing in his memorandum responding to the motion to recuse that remotely suggests that Justice Scalia would have raised the issue of conflict of interest, except for the recusal motion. On the contrary, the memo constantly emphasizes his friendship with Vice President Cheney, the unwritten rule that matters before the Court are inappropriate sources of their conversations, and Scalia's categorical ability to be impartial in the case. *Cheney v. U.S. Dist. Court*, 541 U.S. 913 (2004) (mem.).

C. A Defensible Process for Reviewing Judicial Conflicts

The procedure by which Supreme Court Justices respond to conflicts of interest, whether self-perceived or brought upon them by the media, is as important as the exposure of conflicts of interest. The system works only if direct stakeholders in the judicial process—parties to litigation, their attorneys, and fellow judges—see it work and embrace, if not always agree with, its conclusions. Just as important is that all others, including indirect stakeholders, such as the other Justices, the other branches of the government, and members of the republic, must have sufficient confidence in the system to support its conclusions.

Viewed in this manner, the unilateral review system settles the issue, but often at the expense of the objective view of the Court. It is ad hoc, uneven and less-than-inspirational to those affected. Once again, the Scalia case is an example. His memorandum was essentially the only accepted method of responding to claims of conflict of interest and is likely most notable for exhibiting incredulity at the claim that he should disqualify himself rather than remorse that his duck hunting foray inspired claims of conflict. As bad, if not worse, Justice Ginsburg's response in a speech at a law school was informal and offered only after decisions had been rendered in the cases in which the party with whom she had the conflict had participated. The final product of these claims and counterclaims is somewhat unclear, but the combined effects of calls for recusal and Scalia's and Ginsburg's responses have quieted the debate, but left unsettled questions about whether the current system requires change.¹⁵⁷

D. Support for Unilateral Review

There are two important reasons to support the current method of resolving conflicts of interest confronting Supreme Court Justices. These are the bobtailing effect of judicial recusal by the Justices and the slippery slope of indirect conflicts, most particularly those arising because of ideology. Although both have previously been mentioned, they require additional development.

157. Chief Justice Rehnquist has not been particularly reassuring. When interviewed about the Scalia and Ginsburg hoopla and asked about whether he would recuse himself if a case involved one of his fellow players in his regular poker games, the Justice responded, "No. If it were a regular game . . . and the only occasion on which I saw the person was at the monthly game, no, I don't think I'd recuse myself." *Ties, supra* note 4, at A20.

1. The Bobtailing Effect

A bobtailed Court can be a problem. While Justice recusal is not uncommon,¹⁵⁸ members of the Supreme Court have categorically embraced a presumption against recusal because of the problems arising from disqualification.¹⁵⁹ In defense of their decisions not to recuse themselves, Justices Scalia and Ginsburg defended this presumption by citing the problems arising from an eight member court, including Scalia's assertion: "the possibility that, by reason of a tie vote, it [the Court] will find itself unable to resolve the significant legal issue presented by the case."¹⁶⁰

In fact, there have been interesting doctrinal turns occasioned by a bobtailed Supreme Court. An example would include the Court's struggle during the 1970s to set out a principled doctrine applying procedural due process requirements to creditor-debtor relations. The case of *Fuentes v. Shevin*,¹⁶¹ holding unconstitutional the majority of the states' collateral repossession laws for their failure to provide debtors pre-repossession hearings,¹⁶² has, for example, been criticized as the product of a four-to-three decision.¹⁶³ Unlike athletic teams or even the federal Courts of Appeals, the Supreme Court has a constitutionally finite membership reduced for any case by the number of judicial vacancies, including those arising from recusal.

158. See Stempel, *supra* note 122, at 608–28 (tracing the rather checkered recusal history of Supreme Court Justices).

159. The Court's Judicial Recusal Policy states:

We do not think it would serve the public interest to go beyond the requirements of the [disqualification] statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in a firm before us or acted as a lawyer at an earlier stage. Even one unnecessary recusal impairs the functioning of the Court.

Cheney, 541 U.S. at 915–16.

160. *Id.* at 916–17. See *supra* note 64 and accompanying text (documenting Justice Ginsburg's use of the bobtailing effect in her decision not to recuse herself in NOW cases).

161. 407 U.S. 67 (1972).

162. *Id.* at 97.

We hold that the Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor. Our holding, however, is a narrow one. We do not question the power of a State to seize goods before a final judgment in order to protect the security interests of creditors so long as those creditors have tested their claim to the goods through the process of a fair prior hearing.

Id.

163. *N. Ga. Finishing v. Di-Chem.*, 419 U.S. 601, 615 (1975) (Blackmun, J., dissenting). Blackmun's assertion was that cases subsequent to *Fuentes* had restricted its application. When the *Fuentes* decision reappeared in *North Georgia Finishing*, Blackmun expressed surprise that *Fuentes*, a 4–3 "bobtailed" decision had apparently been resurrected. *Id.*

2. Ideological Conflicts

Ideology can pose even more complicated problems, especially if one defines most judicial conflicts of interest as ideological. It is, after all, ideology that accompanies the Justice's appointment and colors his decisions. As Justice Rehnquist notes, "[p]roof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."¹⁶⁴ Stated differently, we assume that judicial nominees must exhibit a certain level of scholarship in constitutional theory, but this doctrinal ideology also signals a judicial predisposition in most cases. Assuming ideology so influences a judge's position that she cannot provide the parties a fair hearing, the conflict between her ideology and ability to judge is unalterable and sufficient grounds for disqualification.¹⁶⁵ If the polity disdains conflicts of interest that detract from a judge's ability fairly to evaluate a case, then it simply cannot tolerate ideological conflicts.

Nevertheless, we do seem to tolerate ideological conflicts of interest, at least apparent ones. Justices Scalia's and Ginsburg's conflicts implicate neither financial interest in nor familial relationship with a party before the Court, but are nonetheless contentious. Scalia's claim that he received no gift from Cheney, based largely on the premise that the plane that flew Scalia, his son, and son-in-law to Louisiana was going that way with or without the Justice,¹⁶⁶ may be correct—at least technically—but does not diminish the perception that the favor and fellowship opportunities reinforce a long-term ideological partnership between the Justice and Vice President. Even if, as Scalia insists, the two never discussed the case, the public may reasonably wonder whether the Justice's "impartiality might reasonably be questioned."¹⁶⁷ And Ginsburg's continuing relationship with NOW provokes a similar appearance.¹⁶⁸ By retaining that relationship, Justice Ginsburg com-

164. *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (mem.).

165. However, experts consulted at the time of the Ginsburg/Scalia debate were concerned about debate as well as conflicts: New York University law professor Stephen Gillers, an expert on legal ethics summarized his views as follows, "This is a judgment call. We have to be careful here. Some might say judges should lead monastic lives, but I don't believe that. I think judges and [J]ustices should participate in broad legal debates, but within restraints." *Ties*, *supra* note 4, at A20.

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

167. More precisely, the public may wonder whether the Justice can unilaterally fathom whether or to what extent there are objective grounds to question his or her impartiality, consistent with the disqualification statute. 28 U.S.C. § 455(a) (2000).

168. Geoffrey C. Hazard, a University of Pennsylvania law professor and author of a treatise on legal ethics said that Justice Ginsburg's activity crossed a line between ideology

promises her objective ability to fairly evaluate a case in which the organization happens to be a party.

Ideology can pose genuine conflicts of interest, but also defies traditional methods of responding to such conflicts. David Luban identifies three unsatisfactory reasons and one more plausible explanation for not folding ideology into our treatment of conflicts of interest.¹⁶⁹ First, one may argue that blood (familial ties) and money (financial stakes) are thicker than ideology.¹⁷⁰ If this were so, argues Luban, then the Crusades would not have happened.¹⁷¹

Second, people may want or at least tolerate political (ideological) judging.¹⁷² This tolerance may be accurate in those cases in which the political judging squares with the politics of the observer; however, there exists no evidence that the American public is willing to tolerate a general infusion of politics into the judging business.¹⁷³

Third, ideological predisposition is relatively innocuous unless the judge also has "a personal bias or prejudice concerning a party."¹⁷⁴ Luban asserts that ideology can pose conflicts, notwithstanding the parties, if the judge is predisposed against "product liability plaintiffs" or "affirmative action opponents."¹⁷⁵

Finally, Luban suggests that we simply have not been able to fashion conflicts of interest rules for ideological conflicts.¹⁷⁶ Of these explanations, he views this one as most convincing.¹⁷⁷ Indeed, ideology tends to defy the objective categorization associated with conflicts of interest rules. The presumption is that a judge's own subjective decision whether to recuse herself in a case for other than financial or familial reasons is, except for the extreme constitutional measures

and affiliation with a group whose sole purpose is litigation before the United States Supreme Court, "It is not illegal, but as a matter of judgment I would say appearing before the NOW legal defense fund is inappropriate. . . . It is a demonstration of an affiliation." Ties, *supra* note 4, at A20 (quoting Professor Geoffrey C. Hazard).

169. See David Luban, *Law's Blindfold*, in CONFLICT OF INTEREST IN THE PROFESSIONS 23, 29, (Michael Davis & Andrew Stark eds., 2001).

170. *Id.* at 29.

171. See *id.* ("The greatest blood-lettings in human history have been motivated by politics and religion, not family or finance.")

172. *Id.*

173. See *id.* If the polity were tolerant of "political" judges, Luban states, then we would not see the "chronic criticism of judges imposing their own convictions instead of following the law." *Id.*

174. *Id.* (quoting the CODE OF JUDICIAL CONDUCT).

175. *Id.*

176. *Id.* at 30.

177. See *id.*

such as impeachment,¹⁷⁸ the only appropriate means of responding to ideological conflicts. Yet some argue there is a better way of handling claims of bias and disqualification for the brethren. The next section summarizes and counters those arguments.

E. Suggested Reforms and Their Shortcomings

Calls for reform of the Supreme Court by persons or institutions external to the Court are rare. Franklin Roosevelt's effort to increase by four the number of Supreme Court Justices was neither well received nor practicable, largely because of the Court's constitutional status and Congress's traditional unwillingness to tinker with the number of Supreme Court Justices.¹⁷⁹ As an autonomous branch of government, the Court has no internally objective method of fleshing out and responding to conflicts of interest. Whereas a panel of court of appeals judges can review disqualification request of their brethren, without the potential for bobtailing,¹⁸⁰ the Supreme Court cannot be the object of any exogenous review procedure that varies from their status as a branch of government. Absent a constitutional amendment, neither Congress nor the President may pursue information

178. U.S. CONST. art. III, § 1 (United States Supreme Court Justices "shall hold their offices during good behavior . . ."). Impeachment is the only recognized manner of removing a reluctant judge from that position.

179. Congress does have the power to alter that number. 28 U.S.C. § 1 (2000). Upset by Supreme Court decisions against his New Deal reforms, President Roosevelt, in 1937, submitted to Congress a plan to allow him to appoint additional Justices, ostensibly to pack the Court with New Deal supporters. In one of his fireside chats, President Roosevelt defended this idea:

If by that phrase "packing the Court" it is charged that I wish to place on the bench spineless puppets who would disregard the law and would decide specific cases as I wished them to be decided, I make this answer: that no President fit for his office would appoint, and no Senate of honorable men fit for their office would confirm, that kind of appointees to the Supreme Court.

But if by that phrase the charge is made that I would appoint and the Senate would confirm Justices worthy to sit beside present members of the Court, who understand modern conditions, that I will appoint Justices who will not undertake to override the judgment of the Congress on legislative policy, that I will appoint Justices who will act as Justices and not as legislators—if the appointment of such Justices can be called "packing the Courts," then I say that I and with me the vast majority of the American people favor doing just that thing—now.

Audio recording: Franklin D. Roosevelt, Fireside Chat on Reorganization of the Judiciary (Mar. 9, 1937), available at <http://www.hpol.org/fdr/chat.ram> (last visited May 31, 2005).

180. The federal circuit courts of appeal hear cases typically in panels of three judges. The total number of eligible judges in each circuit varies, but no circuit includes fewer than six judges. See 28 U.S.C. §§ 44–46 (2000).

about, report, or manage the Supreme Court's conflicts of interest, except within constitutionally mandated impeachment procedures.¹⁸¹

The only remaining method of objective review of such conflicts is internal within the Court. Jeffrey Stempel suggests a full review by the assembled Court of any recusal motion in which the individual Justice refuses self-recusal.¹⁸² He argues that a majority of the remaining Justices must sustain their colleague's decision for it to be final.¹⁸³ This bench approval would promote a more rigorous examination of disqualification cases in line with the applicable statute.

As appealing as this procedure may seem, it has obvious drawbacks. First, there is reason to believe that the reviewing decision by the remaining Justices will not dispose of the matter. If a single judge is the object of the recusal motion, then it may be difficult to eke out a majority of the remaining eight Justices. Requiring five of the remaining eight Justices to agree with their brethren appears to shift the presumption against recusal to one favoring disqualification. This is not only antithetical to the presumptive impartiality we attribute to all judges, but also disproportionately favors those seeking recusal whether their reasons are justified or strategic. Those who may benefit by the recusal of a potentially unsupportive Justice will enjoy an advantage they previously did not have.

Such a full-Court review also seems fraught with collective action problems. Justices who are inclined to assert impartiality, especially in close cases, such as those confronting Justices Scalia and Ginsburg, must now contend with their brethren who tend to espouse similar sentiments. In such cases, the group norm would likely be to support one's colleague—i.e. cooperate.¹⁸⁴ Failure to do so—for example, voting to recuse a Justice who contests disqualification—is tantamount to

181. U.S. CONST. art. III, § 1. Under 28 U.S.C. § 1, Congress can increase the number of Justices from which a panel of seven to nine sit for a given case, but there is little reason to believe this will ever happen.

182. Stempel, *supra* note 122, at 644.

183. *Id.*

184. A collective action problem, stated generally, pits individual against collective maximization, assuming rational decision making. Typified by the prisoners' dilemma, individual maximization produces collective minimization, whereas some level of individual sacrifice produces societal maximization. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984). There is strong evidence that cooperative norms presently influence judicial recusal decisions by Supreme Court Justices. As Justice Scalia stated in his memorandum opinion in the *Cheney* case, the presumption disfavors recusal. *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 916–17 (2004) (mem.). By their own admission, Supreme Court Justices also routinely discuss recusal possibilities among themselves, suggesting both a level of cooperation consistent with collective action cases and potentially negative consequences arising from internal disputes associated with recusal. See Sherrilyn A. Ifill, *Litigating the*

a defection, the consequences of which, given the vagaries of game theory, are certainly not discrete to that case.¹⁸⁵ Assuming only four of eight Justices side with their colleague who contests recusal, then, given Stempel's prescription, that Justice must recuse himself. One can easily imagine that motions for recusal coupled with this method of internal review could create the single most contentious issues for the Court. Good faith among the brethren may give way to tit-for-tat gamesmanship.¹⁸⁶ Parties may also be more inclined to seek judicial recusal, given this method of internal review, further transforming the internal operations of the Court by politicizing the recusal process.

The alternatives to the current method of responding to recusal motions before the Supreme Court are limited and potentially worse than retention of the status quo. In fact, leaving the decision about whether to respond to ostensible conflicts of interest to the individual Justice, including Justices Scalia and Ginsburg, is preferable to and more practicable than alternatives. The next section revisits the cases of Scalia and Ginsburg in light of this premise.

F. Retaining Individual Review

The Supreme Court has the capacity to rise above internal problems such as those confronting Justices Scalia and Ginsburg, both facing calls for recusal based on their friendships or close affiliations with actual or potential litigants before the courts. Supporting the well-established method of dealing with calls for disqualification is not the same as embracing the decisions by individual Justices. Nor does it diminish the potential for further problems arising from claims of conflict of interest.

Indeed, Justice Scalia had to have known that an appearance of conflict of interest would arise from, and that he was at least injudicious for accepting a plane ride to, his Louisiana duck hunting foray with Vice President Cheney. The tone of his response refusing disqual-

Presidency: The Election 2000 Decision and Its Ramifications for the Supreme Court, 61 MD. L. REV. 606, 622-27 (2002).

185. The tendency to defect is especially strong in a one-time or finite iteration game, because there rarely are ensuing predictable consequences. Conversely, when parties, including judges, know that their interactions are ongoing, they are more likely to cooperate with one another. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 164-66 (1991) (addressing the "hope" of cooperation associated with repeated "play").

186. See *id.* Tit-for-tat is a game theory strategy described by cooperation followed by mirroring the other player's move, cooperation, or defection. See generally JOHN McMILAN, *GAMES, STRATEGIES AND MANAGERS* (1992).

ification was arrogant, not because of his refusal to recuse himself, but because he downplayed the obvious appearance of impropriety accompanying his decision to make that trip.¹⁸⁷

Similarly, the politics of the matter would predict that other Justices, in this case Justice Ginsburg, may face calls for disqualifications based on her affiliations. She may likewise consider the possible effects her affiliations have on the stature of the High Court and the positive response by all involved to her choice no longer to be associated with NOW's lecture series. Justice Ginsburg's arrogance in her speeches also indicates an intolerance of the view of the common man on these conflicts.¹⁸⁸

1. Achieving Transparency, if Not Conflict Relief

The singular-Justice method for responding to claims of judicial conflict of interest is appropriate, if not ideal. Assuming some levels of good faith, the normal operations of the adversary system, and an active and independent press, the chances for exposure of potential conflicts of interest are high. The inclinations of individual Justices, the parties to litigation and/or the curious press will tend to insure transparency, a minimum requirement of any effective conflict of interest policy. Revelation of a potential conflict amounts to disclosure, calling for an interested public to examine the merits of the respective claims of conflict and response.

That the Justice's response is dispositive ignores its importance in vindicating this method of response over other, impracticable or constitutionally questionable alternatives. That formal response is part of the process hoping to answer whether this Justice can review and decide a case impartially. One need not be convinced by the Justice's memorandum to understand that it provides vital information about the Justice's view of claimed conflicts and his manner of dealing with them. Indeed, there are those who could argue that both Scalia and Ginsburg did themselves no favors with their responses. The result may be a longstanding mistrust and impact on their credibility.

Further, such a result has a bobtail effect on the ideological groups who have embraced them. They have rendered a setback to those they purported to hold as friends. Ironically, the harm befalls the principal they were accused of helping through the conflicts. Those who argue that the Justice is wrong and by his failure to recuse

187. Most would likely interpret "quack, quack" as arrogant. See Von Drehle & Holland, *supra* note 1, at 35.

188. See *supra* notes 70-72 and accompanying text.

has unalterably affected the way the public perceives the Court ignore a judicial history including other claims of bias and conflict of interest.¹⁸⁹ The Court has nonetheless survived and retained its stature as recognized legal interpreter of last resort.¹⁹⁰

2. Balancing as a Judicial Norm

One can also defend the current singular-Justice review based on balancing. Although there is little empirical evidence to support it, the public must anticipate that its Supreme Court Justices will bring varying and divisive doctrinal ideologies onto the Court and that, insofar as the institutions exist to balance these competing ideologies, especially via the nomination process, the public will understand and respect its operation as a primarily legal, but irrefutably somewhat political, entity.¹⁹¹ Indeed, balancing appears to be the de facto method of managing ideological conflicts of interest confronting Supreme

189. For example, Supreme Court Justices have often maintained close ties with Presidents, including acting as Presidential advisors during their tenures on the Court. Modern notables among these Justices were William Douglas (advisor to Franklin Roosevelt), Abe Fortas (Lyndon Johnson), Felix Frankfurter (Franklin Roosevelt), and Fred Vinson (Harry Truman). See generally Richard K. Neumann, Jr., *Conflicts of Interest in Bush v. Gore: Did Some Justices Vote Illegally?* 16 GEO. J. LEGAL ETHICS 375 (2003). There is little evidence that these Justices routinely recused themselves when actions of the administration came before them. See THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS (Lee Epstein et al. eds., 1994). Another notable case involves Oliver Wendell Holmes, Jr. and his close personal and professional relationship with Theodore Roosevelt. Nominated by Roosevelt and assumed by the President to embrace fully his progressive politics, Holmes dissented in *Northern Securities Co. v. United States*, 193 U.S. 197 (1904), a key case during Roosevelt's first term, involving the scope of federal antitrust laws championed by the President. Angered by Holmes's dissent, Roosevelt is quoted as saying he "could carve out of a banana a judge with more backbone." THE SUPREME COURT: ILLUSTRATED BIOGRAPHIES, 1789-1993, at 289 (Clare Cushman ed., 1993).

190. The *Bush v. Gore*, 531 U.S. 98 (2000), decision on the 2000 presidential election could undermine the faith and confidence in the Court. *Newsweek* reported that Justice O'Connor was concerned about not having a Republican President because she wanted a Republican to choose her successor and a Democrat's victory meant she would have to postpone her retirement. Joan Biskupic, *Election Still Splits Court*, USA TODAY, Jan. 22, 2001, at 1A; see also Evan Thomas & Michael Isikoff, *The Truth Behind the Pillars*, NEWSWEEK, Dec. 25, 2000, at 46. There are some on the conservative side of the house who see Justice O'Connor as unnecessarily concerned inasmuch as she has been the longstanding swing vote on the Souter, Breyer, Ginsburg triumvirate for the opposite ideology. In effect, so-called conservatives have been known to utter in response to these stories, "What difference could it possibly make if a Democrat appoints her successor?" She is known as a centrist, not a Republican ideologue. Charles Lane, *Courting O'Connor: Why the Chief Justice Isn't the Chief Justice*, WASH. POST, July 4, 2004, at W10.

191. Some would take little comfort in this balancing process as the judicial nomination process for even the federal district court or the federal courts of appeals appears to be stalled hopelessly in the Senate along ideological grounds. Law professor Peter Berkowitz outlines the ideological blockades in that process. Peter Berkowitz, *The Senate*

Court members. The recusal cases involving Justices Scalia and Ginsburg bear this out. Absent financial or familial conflicts, and indiscreet comments about pending cases, the Justices enjoy the freedom, unavailable to any other federal judge, to make their own call. The disingenuous conclusion appears to be that it all balances in the end. However, by contributing to the very politicization of the Court that some lament,¹⁹² this judicial balancing act involving conflicts of interest must surely take a toll on the Court.

Conclusion

This was not a pretty sight, this Scalia and Ginsburg hoopla. Justice Scalia may never be the same following the shots he took for duck hunting with the Vice President. And Justice Ginsburg seemed genuinely taken aback by the resulting criticisms of her self-assumed benign affiliations.

That it was not a pretty sight is reassurance that the process works. There is a means that avoids the evils of bobtailing and the usurpation of power from the Judicial Branch. That we may have decided the issue of the conflicts of Scalia and Ginsburg differently from their positions taken is not the issue. That they were forced to air facts, concerns, views, and justifications and/or rationalizations is. The public disclosure of the conflict is one means of management. The attempted balancing of the Court's structure through the political process is another means of management. The only level of conflicts management we did not reach in the two situations was removal, i.e., recusal. Nevertheless, given our efficacy in the first two management tools, such action was not necessary because it would compromise other principles to which we owe a greater duty: accountability of all under the law (something satisfied by what Justice Scalia described as humiliating) and the autonomy of the highest court in the land.

Let the Justices' own decisions seal their and the Supreme Court's fate. When the dust has cleared, we are guessing citizens would prefer Justices who do measurably less hob-knobbing and affiliating than the good Justices Scalia and Ginsburg. Surely they know the drumming that awaits when their decisions are questionable. However, even if we can agree with their decisions not to recuse themselves, they and other Justices and judges should understand that it is

Judiciary's Opportunity: The Stalemate Can End, NAT'L REVIEW ONLINE, Apr. 22, 2002, available at <http://www.nationalreview.com/comment/comment-berkowitz042202.asp>.

192. See, e.g., BORK, *supra* note 111 (addressing and criticizing the author's failed nomination to the Supreme Court).

not their decision that perhaps gives us pause. It is their decision made without the benefit of public disclosure, something brought about only when ideological groups and the resulting media force descended.

Perhaps what most defines the gravity of the conflict is the level of concealment. If the conflict is as non-existent as the Justices have assured us it is, why the reluctance with regard to disclosure? Practicalities of the Court may require the adoption of self-recusal analysis, but disclosure of that analysis and result serve to support it as a resolution for conflicts. Concealment only undermines the unilateral discipline we are willing to allow.

