

**Vagueness At the Highest Level: How the Supreme Court  
Confirmation Hearings Brought An Infrequently Discussed Legal  
Topic Back Into the Spotlight—Recusal**

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## **Abstract:**

Recusal has been present in one form or another in most civilized societies dating back to the sixteenth century. Today, recusal law finds its place in American jurisprudence at §§ 144 & 455. The scarce case law and lack of scholarly attention given to recusal perpetuates its aura of ambiguity and makes application of recusal standards to real factual situations difficult. When D.C. Circuit judge John Roberts interviewed with high White House officials seven days prior to hearing Hamdan v. Rumsfeld—a case where President Bush was a defendant and also the personal designator of Salim Hamdan as an enemy combatant—the contemporaneous events seemed to place the future Chief Justice in the scope of the § 455(a) recusal standard. An in depth look into other controversial § 455(a) situations, which involved high profile justices, will evince the need for recusal reform. After careful consideration of several scholars' recusal reform proposals, this Comment recommends the formation of an independent oversight committee composed entirely of retired federal judges.

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## I. Introduction

In the last six months, the Supreme Court has seen two new members join the bench. During both confirmation hearings, each candidate answered hundreds of questions, which many times were tough-minded--causing the Justice to sidestep an answer or give an unsatisfactory response to an inquisitive Senator.<sup>1</sup>

Additionally, the newly appointed Justices were both grilled on questions of recusal;<sup>2</sup> an area of law that maintains an aura of ambiguity and vagueness.<sup>3</sup> While the media did not hone in on the recusal issues presented during the confirmation hearings, this Comment will illuminate the importance of recusal by analyzing a controversial situation that involved Chief Justice Roberts.<sup>4</sup>

Public confidence in judicial fairness and impartiality legitimizes the American government.<sup>5</sup> In the Federalist Papers, Alexander Hamilton states the importance that life tenure and a permanent salary have in allowing the judicial branch to act impartial, an especially important attribute as "the weakest of the three departments of power."<sup>6</sup> The Constitution requires that Federal judges are appointed as a result of their fair-mindedness, impartiality, and unbiased nature;<sup>7</sup> however, no appointed judge decides the merits of a case with a *tabula rasa*.<sup>8</sup> Under 28 U.S.C. §§ 144 and 455, bias or prejudice towards a party is the prerequisite for a judge<sup>9</sup> to recuse<sup>10</sup> himself from hearing a case.<sup>11</sup>

The history of recusal in American jurisprudence finds its primary focus in the twentieth century, yet it dates back to as early as the eighteenth century.<sup>12</sup> This Comment begins with an introduction to the history of recusal through legislative change, scandal, benchmark decisions, and American Bar Association recommendations. Next, a background discussion of the main case Hamdan v. Rumsfeld will detail a situation where recusal became an issue. Following the introduction of recusal and Hamdan, this Comment will compare Justice Roberts' situation in Hamdan to other highly publicized recusal episodes. Subsequent to the recusal case analysis, this Comment will investigate leading scholars' suggestions to improve recusal law, which will be followed by an oversight committee proposal. Finally, this Comment will conclude with a summary of the arguments laid out in the analysis and predict the implications of changing the recusal process.

## **II. Background**

The standard that a judge should act impartial in deciding the outcome of an adversarial meeting dates back to ancient times.<sup>13</sup> In American jurisprudence, however, the significant changes to recusal law and its application to federal judges gained prominence in the early twentieth century.<sup>14</sup> The first recusal statute was passed by Congress in 1792.<sup>15</sup> In 1821,

Congress broadened the 1792 statute by amending it to require district court judges to recuse themselves when either litigant was related or connected to the judge.<sup>16</sup> Congress added a second recusal statute in 1911--because of public criticism of the judiciary<sup>17</sup>--which allowed a party to file an affidavit to disqualify a district court judge who displayed general bias or prejudice.<sup>18</sup> The Congress codified both the first and second recusal statutes in 1948. The former recusal statute is present day 28 U.S.C. § 455, while the latter is present day 28 U.S.C. § 144.<sup>19</sup> Additionally, the 1948 amendments changed the recusal statutes from "for cause"<sup>20</sup> provisions to self-enforcing provisions that required judges to decide whether they should be disqualified for impartiality.<sup>21</sup>

The 1970's brought significant controversy to the judicial branch that prompted reform by the American Bar Association (hereinafter "ABA") and Congress. In 1968, the confirmation hearings of Justice Fortas revealed that he consulted the White House on important matters including the Detroit riots of 1967.<sup>22</sup> A Supreme Court Justice consulting the White House on important domestic issues violated separation of powers and resulted in public distrust of the federal courts.<sup>23</sup> The Judicial branch suffered a second black eye when Judge Clement Haynsworth Jr. failed to be confirmed to the Supreme Court on account of his lapses in ethical judgment.<sup>24</sup>

Swift action was needed to "resuscitate" the ethical standards of the federal judiciary and the ABA stepped up to the challenge. In 1969, a group of renowned legal leaders headed by Roger J. Traynor commenced meeting to reform the judicial standards.<sup>25</sup> The ABA's House of Delegates<sup>26</sup> unanimously voted in favor of the Traynor committee changes to the Code of Judicial Conduct.<sup>27</sup> Most notably, the committee stressed the importance of an appearance standard, a tougher guideline that helped judges determine when recusal was appropriate.<sup>28</sup> Furthermore, in April 1973, the U.S. Judicial Conference<sup>29</sup> adopted a similar, but more stringent form of the ABA's Code.<sup>30</sup> These legal governing bodies set the stage for Congress to enact new standards of their own.

Congress knew the time was right to amend the judicial disqualification statutes--as a result of the change in judicial standards by the ABA and U.S. Judicial Conference, the Haynsworth pecuniary improprieties, the Fortas separation of powers controversy, and the Rehnquist conflict of interest situation<sup>31</sup>--and enacted legislation that ameliorated many of the deficiencies of § 455.<sup>32</sup> The Senate and House Judiciary Committees submitted detailed reports prior to amending § 455.<sup>33</sup> Both Reports explained the underlying reasons behind the changes made to the recusal statute; however, this Comment will solely refer to the House Report because it includes more commentary and was published a year later.<sup>34</sup>

Congress wanted to synthesize the ABA's Code of Judicial Ethics with § 455 because a dual standard, ethical and statutory, existed that confused judges when deciding whether recusal was appropriate.<sup>35</sup> Congress also placed great importance on the Judicial Conference applying the new disqualification Canon<sup>36</sup> to all federal judges.<sup>37</sup> Most importantly, Congress replaced the subjective standard--"in his opinion" with an objective standard "his impartiality might reasonably be questioned"--to renew public confidence in the judicial process.<sup>38</sup> Since the 1970's, neither § 455 nor § 144 have undergone significant statutory language change. In spite of the stagnant congressional action, modern court cases have led to important growth in the interpretation of recusal.

Historically, Congress and the ABA shaped recusal law, however, a few cases played a significant role in the early development of recusal principles because their rulings publicized the enforcement gaps in the recusal process.<sup>39</sup> Aside from Laird v. Tatum,<sup>40</sup> few cases made noteworthy changes to recusal law until the 1980's. In 1988, Liljeberg v. Health Services Acquisition Corp.<sup>41</sup> affirmed the importance of the statutory recusal law changes of the 1970's when the Supreme Court applied the objective standard<sup>42</sup> to recusal in order to preserve public confidence in the judicial process.<sup>43</sup> Additionally, Liljeberg clarified the retroactive status of §



455, which is critical to the effectiveness of the recusal statute.<sup>44</sup> Liteky v. United States<sup>45</sup> provided the next momentous change in recusal law because the decision explained the oft misinterpreted extrajudicial source rule.<sup>46</sup> In Cheney v. United States District Court for the District of Columbia,<sup>47</sup> the media highlighted the problems inherent in the recusal standards; the issue of whether Justice Scalia would recuse himself from hearing the case became such a public spectacle<sup>48</sup> that he released a memorandum explaining in detail why recusal was inappropriate.<sup>49</sup>

The history of recusal viewed through legislative change, ABA recommendations, scandal, and benchmark decisions, verifies the complicated nature of determining whether disqualification is necessary; Hamdan v. Rumsfeld provides the ideal setting for scrutinizing recusal standards. As Justice Jackson poetically put it, "The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant."<sup>50</sup> Hamdan places the court in a position to shape the scope of presidential powers, which layman and the media, seem to question more and more;<sup>51</sup> the appearance of an Executive juggernaut who selects Justices that he believes will not oppose

his legislation reinforces why the Roberts' situation should be closely examined.

Judge John Roberts was one of three judges who presided over the controversial Hamdan.<sup>52</sup> A two-tier analysis of Hamdan reveals the significance of the case to both recusal law and the war on terror. The first tier deals with the allegations that Justice Roberts should have recused himself from hearing Hamdan because he was contemporaneously interviewing with top White House officials.<sup>53</sup> The second tier examines the high stakes involved in the administration's war on terror, which could sink or swim depending on Hamdan's outcome.<sup>54</sup>

#### **A. An Appearance of Impropriety?**

Judge Roberts met with Attorney General Alberto Gonzales on April 1, six days before Hamdan's oral arguments.<sup>55</sup> Additionally, Roberts met with other high White House officials on May 3.<sup>56</sup> The job-clinching interview between President Bush and Judge Roberts took place on July 15, the same day Roberts joined the Hamdan decision.<sup>57</sup> No public knowledge of the meetings existed until Judge Roberts filled out a questionnaire for the Senate Judiciary Committee prior to the confirmation process;<sup>58</sup> the attorney who represented Salim Hamdan also lacked awareness of the meetings.<sup>59</sup>

## **B. *Hamdan v. Rumsfeld***

Salim Ahmed Hamdan was captured in Afghanistan during hostilities in that country that resulted from the terrorist attacks of September 11, 2001.<sup>60</sup> After Hamdan's capture, the United States military transferred him to the Guantanamo Bay detention facility.<sup>61</sup> On July 3, 2003, President Bush designated Hamdan for trial by military commission because it was believed Hamdan was a member of al Qaeda or involved in terrorism against the United States.<sup>62</sup>

In the first Hamdan trial, the District Court concluded that a competent tribunal never determined whether Hamdan was entitled to prisoner of war ("POW") status under the Geneva Conventions.<sup>63</sup> Furthermore, until a competent tribunal determined Hamdan's status, he could only be tried by court-martial under the Uniform Code of Military Justice ("UCMJ").<sup>64</sup> Next, the court found that the Military Commissions' rules of procedure were inconsistent with a court-martial convened under the UCMJ, making them unlawful.<sup>65</sup> Last, the court inferred that the creation of the military commissions by the President broadened the executive powers inherent in the Constitution.<sup>66</sup>

On appeal, the government prevailed over Hamdan. The Circuit Court for the District of Columbia concluded that no separation of powers issue existed because Congress authorized the President to create the Military Commission that was to try

Hamdan.<sup>67</sup> The circuit court determined that the 1949 Geneva Convention did not apply to Hamdan,<sup>68</sup> and even if it did, Hamdan could not enforce the Convention provisions in court.<sup>69</sup> Therefore, the President's determination<sup>70</sup> that Hamdan was a member of al-Qaeda nullified the jurisdictional issue, which allowed the Military Commission<sup>71</sup> to try Hamdan rather than the court-martial under the UCMJ.<sup>72</sup>

The myriad issues present in the Hamdan proceedings evince the complex nature of the legal arguments raised by both sides.<sup>73</sup> The background information discussed the major issues found in both the original trial and appeal; however, the forthcoming analysis will primarily concentrate on the separation of powers issue because this issue gives the Roberts' situation distinction.<sup>74</sup>

### **III. Analysis**

#### **A. Recusal in a Nutshell**

A look at the big picture clarifies the situation. First, an objective observer--the threshold of interpreting the §455(a) appearance standard<sup>75</sup>--could conclude that Judge Roberts' chances of nomination would decrease if he took an unfavorable position on the administrations use of Military Commissions. Second, Salim Hamdan brought a separation of powers claim<sup>76</sup> against the President for establishing the Military Commissions and

President Bush was a defendant in the case<sup>77</sup>--both very serious issues. Third, Judge Roberts never informed the public or Hamdan's counsel of the interviews.<sup>78</sup> Fourth, unlike the Supreme Court, the appeals court may rotate in a different judge if one of the initial judges recuse.<sup>79</sup> Fifth, the same day the Circuit Court released the Hamdan decision in favor of the Bush Administration, Roberts and President Bush had an interview.<sup>80</sup> An application of the previously mentioned facts to section 455(a)--"Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned"<sup>81</sup>--suggests "questions of impartiality", requiring Judge Roberts' recusal.

Justice Stevens delivered the preeminent § 455(a) decision in Liljeberg, stating that "advancement of the purpose of the provision - to promote public confidence in the integrity of the judicial process - does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew."<sup>82</sup> Stevens' opinion reiterated the congressional intent of § 455--err on the side of caution when the appearance of bias is present.<sup>83</sup>

Did Judge Roberts err on the side of caution? High White House officials<sup>84</sup> interviewing Judge Roberts as a possible

Supreme Court nominee was completely ethical; in fact, the ABA's Model Code of Judicial Conduct approves of interviewing potential appointment nominees.<sup>85</sup> However, the ethical dilemma exists because of the timing of the interviews in relation to the Hamdan trial proceeding and the heavy involvement by President Bush--designating Hamdan as an enemy combatant and being the primary defendant in the trial.

The April 1 interview with Attorney General Gonzalez clearly indicated the administration considered Judge Roberts as one of the top candidates to fill a Supreme Court vacancy.<sup>86</sup> Six days later, Roberts heard the oral arguments in the Hamdan appeal<sup>87</sup>--a trial where the administration's war on terror policies were seriously questioned.<sup>88</sup> No one will ever know whether Roberts joined the opinion because he realized a possible Supreme Court nomination loomed in the near future, but the enormity--the administrations use of Military Commissions to try alleged terrorists<sup>89</sup>--of the Hamdan decision certainly raises ethical questions.<sup>90</sup>

#### **B. High Profile Cases Where a Recusal Controversy was Present:**

The Roberts' recusal controversy is most easily understood when placed in the context of other highly debated court cases. In the next two sections, this Comment will discuss two Supreme Court cases where a Justice's appearance of impropriety was

questioned. Additionally, in both cases the Supreme Court decided significant Constitutional decisions,<sup>91</sup> which depending on the outcome, would create noteworthy change throughout our country. Each case analysis will begin with background information, followed by an introduction of the recusal controversy, and end with a comparison of the case's situation to Roberts' situation.

### **i. The Duck Hunt**

Following the 1974 statutory change to recusal law, the Supreme Court avoided controversies stemming from these changes for a lengthy period of time. The highest court's luck ran out<sup>92</sup> when Justice Scalia went on a duck-hunting trip with Vice President Dick Cheney while Cheney v. United States District Court for the District of Columbia was pending before the Supreme Court.<sup>93</sup> Cheney involved an energy group--created by President Bush and chaired by Vice President Cheney--whose primary goal was to institute a national energy policy.<sup>94</sup> The Sierra Club<sup>95</sup> alleged that the energy group violated the Federal Advisory Committee Act ("FACA") because the group never publicly disclosed information from their meetings, yet, non-government individuals fully participated in the closed door meetings as de facto members.<sup>96</sup> The Supreme Court ruled in favor of Vice President Cheney.<sup>97</sup>

The news coverage of the duck-hunting trip shadowed the Supreme Court decision.<sup>98</sup> Prior to the oral arguments, countless news sources raised ethical questions regarding the legality of Justice Scalia engaging in personal activities with a future defendant.<sup>99</sup> As a result of the media coverage the Sierra Club filed a motion to recuse Justice Scalia.<sup>100</sup> The months of speculative improprieties waned on the associate justice, and on March 18, 2004, Justice Scalia released a memorandum vehemently denying any and all suggestions that he should recuse himself from Cheney.<sup>101</sup> In fairness to Justice Scalia, the memorandum clarified the facts in such a manner that it appeared Vice President Cheney and Justice Scalia never discussed the case.<sup>102</sup> The significance of this memorandum is that it essentially quashed the argument that Justice Scalia's personal and professional worlds were forming a nexus of impropriety--which would have violated the appearance standard of § 455(a). Some scholars believe that drafting memoranda when questions of recusal are present would solve much of the public skepticism aimed at the recusal process.<sup>103</sup>

Scalia's memorandum had quickly written off the Sierra Club's allegations because their motion based the majority of its argument on newspaper articles--misstating the facts--rather than pure legal arguments.<sup>104</sup> Contrary to his usual flawless rhetoric, Justice Scalia misapplied the § 455(a) standard in his



memorandum when he stated "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 a friend."<sup>105</sup> The Justice substituted the tougher standard might question impartiality with "what a reasonable person believes about the Justice's impartiality."<sup>106</sup> Additionally, "[T]he point is not that Scalia cannot decide the case impartially, but again, that a reasonable person might question whether he can do so."<sup>107</sup> When Justice Scalia stretched the language of § 455(a), it appeared to implicate him; however, in light of the actual facts of the hunting-trip and the regularity that Justices personally associate with Executive officials,<sup>108</sup> it seems fair to give Justice Scalia the benefit of the doubt.<sup>109</sup> To the dismay of Justice Scalia, his memorandum had little or no effect on his critics.<sup>110</sup> While the memorandum did little in gaining support, it helped the public understand the reasoning behind why a Justice decided against recusal,<sup>111</sup> which is more than can be said for the way Justice Roberts handled Hamdan.<sup>112</sup>

In both Cheney and Hamdan, the court decided a separation of powers issue involving high profile defendants;<sup>113</sup> the recusal controversy surrounding both cases involved the § 455(a) appearance of impropriety standard.<sup>114</sup> Even when taking into consideration Scalia's memorandum, an objective observer could

reasonably question both the judge and Justice's impartiality; on the one hand, Roberts had an opportunity to serve for the most prestigious court in the free world, and on the other hand, Scalia had an opportunity to ensure a lower court did not patronize his friend.<sup>115</sup> Nevertheless, Scalia defended himself against disqualification via the memorandum, which he did not even have to do, Roberts did not.<sup>116</sup> The Supreme Court had no replacement if Justice Scalia recused from Cheney;<sup>117</sup> conversely, finding a replacement for Judge Roberts at the appeals court level presented very little problem.<sup>118</sup> Both situations appear to fail the § 455(a) standard--"whether his impartiality might reasonably be questioned"--because it looks as if both judges had a logical reason to favor a litigant. In light of all the facts, a litigant's right to a fair trial suffers the most when a Supreme Court Justice recuses himself because he or she can not be replaced;<sup>119</sup> therefore, Roberts refusal to disqualify himself may be perceived as more serious.

While Cheney does not help interpret the §455(a) impartiality standard, the case publicizes a serious problem that our most hallowed courtrooms currently suffer--judges who believe the recusal standard is overly vague,<sup>120</sup> and as a consequence, ignore the standard. Additionally, the Scalia memorandum elucidated the Justice's interaction with the Vice President; a tool, that if utilized more frequently would uphold

the purpose of the appearance standard--to satisfy the public's confidence in an autonomous judiciary.<sup>121</sup> Last, the detailed account of the Roberts' recusal controversy compared with Scalia's controversy in Cheney reinforces the lack of teeth the recusal standard possesses and buttresses the argument for recusal reform.

### **ii. The Pledge of Allegiance Case**

Prior to the Cheney episode, Justice Scalia's first recusal controversy involved a First Amendment case which originated in the state of California.<sup>122</sup> Newdow is similar to both Hamdan and Cheney because the appearance standard of § 455(a) ultimately guided the Associate Justice to recuse himself.<sup>123</sup> Again, Newdow like Cheney, does not help with the interpretation of the appearance standard; however, Newdow provides an example of a situation where a Justice must recuse himself from deciding a highly contested issue, and furthermore, evinces the need for recusal reform due to the unclear standard of § 455(a).

On January 12, 2003, Justice Scalia spoke at a Fredericksburg, Virginia religious freedom event sponsored in part by the Knights of Columbus.<sup>124</sup> As the main speaker, Scalia indicated that the Ninth Circuit decision in Newdow v. United States Congress misinterpreted the Establishment Clause.<sup>125</sup> As history often repeats itself, Justice Scalia's comments on the

merits of Newdow stirred up controversy because the Supreme Court granted certiorari nine months after his speech.<sup>126</sup> Michael Newdow raised a constitutional challenge on behalf of his daughter, arguing that recitation of the Pledge of Allegiance violates the First Amendment.<sup>127</sup> Specifically, Newdow stated that the phrase "under God" violates the Establishment clause of the First Amendment.<sup>128</sup> Prior to the oral arguments before the Supreme Court, Michael Newdow filed a motion to recuse Justice Scalia based on his January 12 comments.<sup>129</sup> Newdow believed that Justice Scalia's comments evidenced that the Justice had already decided his position without reading the briefs; a situation where an objective person might reasonably question the judge's impartiality.<sup>130</sup> Justice Scalia recused,<sup>131</sup> but unlike Cheney, no memorandum explaining the reasoning behind his decision accompanied his action. While a legal memorandum is not a requirement of recusal, when a judge provides these details--especially a Supreme Court Justice--it guides other judges in deciding what actions would, and would not, be appropriate to justify recusal. The Supreme Court ruled in favor of the school district, but not on Constitutional grounds;<sup>132</sup> the Court found that Newdow lacked the requisite standing requirement<sup>133</sup> to bring a claim on behalf of his daughter.<sup>134</sup>

While Scalia deprived the public of an insightful memorandum,<sup>135</sup> the actions which caused the respondent to

question the Justice's impartiality were legally straightforward.<sup>136</sup> A Justice commenting on a particular case before he hears the arguments implies a prematurely formed opinion; an opinion that an objective observer might reasonably question would allow the Justice to decide the legal issue impartially. Conversely, the facts surrounding the Roberts appearance of impropriety do not apply to § 455(a) as easily.<sup>137</sup> Roberts never made a statement explaining his ambition to become a Supreme Court Justice or his outward support of the Military Commissions. The lack of a public record to this effect differentiates Roberts' situation with Scalia's. Contrasting Newdow with Hamdan helps reinforce the vague appearance standard inherent in § 455(a). While the facts in Newdow made its application to the appearance standard easier, the lack of a memorandum stating the legal reasoning continued the misunderstanding of recusal law,<sup>138</sup> which is one of the chief reasons that Hamdan is so controversial.<sup>139</sup>

The magnitude of the potential outcome from the Supreme Court decision differed dramatically between Newdow and Hamdan. No one can deny that the Establishment Clause separating church and state is a critical legal issue in American jurisprudence;<sup>140</sup> however, the Supreme Court ended up deciding an issue of standing rather than Constitutionality.<sup>141</sup> Alternatively, in Hamdan, the stakes were exceptionally high for the Bush

administration's war on terror.<sup>142</sup> As one of three judges hearing Hamdan, Roberts knew that the administration urgently needed the Circuit Court to find that the Military Commissions--created by President Bush--did not violate the separation of powers inherent in the Constitution. Joining the majority opinion in full, Roberts' approval of the Military Commissions to prosecute terrorists probably went over well in his interview with President Bush later that day.<sup>143</sup> In light of the aforementioned reasons, it appears entirely rational that an outside observer might reasonably question Roberts' impartiality where President Bush was the defendant.<sup>144</sup>

Ultimately, the appearance standard<sup>145</sup> is the recusal statute that would govern both Hamdan and Newdow. Two concepts within both situations must be observed to understand their connection. First, Scalia's critical comments of the Ninth Circuit Court's opinion on a legal matter that was granted Certiorari, provided a straightforward example of an appearance of bias by a Supreme Court Justice;<sup>146</sup> whereas, judge Roberts'--a D.C. Circuit Court Judge--apparent bias resulted from a communication he had with a future litigant, the Bush Administration, which was undoubtedly a more tenuous bias.<sup>147</sup> Both situations present distinguished, high level judges taking actions where it would be "reasonable" for his "impartiality" to be "questioned." Second, while legal commentators have

established that the Newdow situation was relatively straightforward,<sup>148</sup> the implications of the Constitutional question argued in Newdow does not reach the level of volatility that the questions raised in Hamdan reach.<sup>149</sup> As explained earlier, the high Court did not even decide Newdow on the First Amendment issue.<sup>150</sup> But, had such an issue been decided, the repercussions of that ruling could not have reached the level of importance of the separation of powers issues decided by the Circuit Court in Hamdan.<sup>151</sup>

#### **D. Reforming Recusal--Winning back the Public Trust**

An in depth look into Hamdan, Cheney, and Newdow, provides some insight into the inexact science of applying recusal law to real life situations. In recent years, several scholars have devised recusal standards to bring clarity to the law.<sup>152</sup> While individual aspects of each standard show promise, this Comment proposes its own standard, which focuses much of its attention on maintaining impartiality to optimize public trust.

##### **i. The Process Oriented Approach**

Legal scholar Amanda Frost takes a comprehensive look at the ineffectiveness of the current recusal law and concludes that including the legal process components<sup>153</sup> in recusal procedure would ultimately make recusal more effective and

trustworthy.<sup>154</sup> The five components include: "litigants, not courts, initiate disputes; the disputes are presented through an adversarial system in which two or more competing parties give their conflicting views; a rationale must be given for decisions; decisions must refer to, and be restricted by, an identifiable body of law; and the decisionmaker must be impartial."<sup>155</sup> Frost proposes that the self-enforcing<sup>156</sup> nature of § 455 should be amended so that an easily applied procedure exists where litigants can seek a judicial disqualification.<sup>157</sup> Additionally, Frost believes that § 455 should be amended so that judges are required to disclose all information--where questions of impartiality might arise--directly to the litigants, as opposed to only disclosing information upon a litigant's request.<sup>158</sup> Next, Frost concludes that the court should refer recusal motions to a neutral judge rather than the judge in question because this would protect the integrity of the judiciary.<sup>159</sup> Finally, Frost states that a judge who faces a recusal motion should be encouraged to file a statement explaining why recusal is not justified;<sup>160</sup> if the judge does decide to disqualify himself, Frost believes that he or she should explain his or her decision for removal to "provide a body of precedent to guide judges facing such decisions in the future."<sup>161</sup>



Professor Frost's reforms certainly could have suppressed much of the public clamor that resulted from the Roberts recusal situation. If Judge Roberts had disclosed the information regarding his interviews with administration officials prior to oral arguments, the public and Hamdan's lawyer would have had less reason to suspect any impropriety. Also, if Hamdan's lawyer filed a motion because he was not satisfied with Roberts' disclosure, a neutral judge deciding on the merits of the motion along with the supplemented explanation<sup>162</sup> by Roberts would surely alleviate the appearance of an impropriety. However, the Frost standard places a lot of extra responsibility on the judge who faces recusal,<sup>163</sup> especially since many judges take it personally when their impartiality is challenged.<sup>164</sup>

## **ii. Increase Recusal Motions Approach**

Legal scholar Debra Bassett concentrates on applying her recusal reform to the Supreme Court, but the standard is just as relevant to the lower courts.<sup>165</sup> At times, the Bassett standard appears to be a carbon copy of the process oriented approach;<sup>166</sup> nevertheless, Bassett chiefly emphasizes disclosure of potentially germane information by judges--increasing the flow of information from the judiciary to the public.<sup>167</sup> Professor Bassett proposes that the self-enforcing standard for disqualification should remain,<sup>168</sup> but that the court draft a new

statement of recusal.<sup>169</sup> Bassett believes that "statements of interest" will serve as a means to bring transparency to the judiciary because the statements will become a public record of any and all potential biases.<sup>170</sup> As the key component of Bassett's reform, "Statements of interest" provide courts with a pragmatic solution to an often difficult task--maintaining efficiency<sup>171</sup> and the perception of flawless integrity.<sup>172</sup>

Although the "statements of interest" probably would have informed Hamdan's lawyer and the public about the relationship between the Bush administration--defendants in the case--and Roberts; the former Circuit Court judge inferred that the interviews<sup>173</sup> did not create an appearance of impropriety because Hamdan sued President Bush in his official capacity.<sup>174</sup> Contrary to the process oriented approach, the lack of a neutral decisionmaker deciding whether Roberts appeared impartial, shows Bassett's weakness; as Roberts implied in the Senate questioning, no rules had been broken. Therefore, it appears that as long as the recusal decision was up to Roberts, he was going to hear Hamdan.

#### **E. The Oversight Committee Approach**

A look into the congressional purpose of § 455(a) reveals that the 1974 amendment functioned to "promote public confidence in the impartiality of the judicial process."<sup>175</sup> The main component of an effective recusal law standard would necessitate a completely neutral viewpoint to maintain public confidence.<sup>176</sup>

While Professor Bassett's proposition left disqualification solely to the discretion of the judge;<sup>177</sup> Professor Frost stressed the importance of a neutral decisionmaker and placed the onus--of determining the appropriateness of disqualification--on another judge.<sup>178</sup> However, this Comment proposes that an independent oversight committee composed of retired federal judges decide whether the recusal motion is justifiable.<sup>179</sup> Leaving disqualification to the sole discretion of the judge in question does not uphold a high enough standard.<sup>180</sup> Additionally, many judges find disqualifying a fellow colleague too difficult.<sup>181</sup> Retired federal judges would have a whole career to document their fairness and at this point in their lives would certainly not want to tarnish the reputation they spent years building.<sup>182</sup>

The selection process would involve two branches of the government. The President would generate a twenty judge short list<sup>183</sup> from the pool of retired judges<sup>184</sup> and pass the list onto the judicial branch. Two Senior Circuit Court judges from each of the thirteen circuits would vote on five of the candidates;<sup>185</sup>

the top five vote grossing retired judges would be appointed to the oversight committee.<sup>186</sup> However, the Chief Justice of the Supreme Court would have the power to veto one of the appointed judges;<sup>187</sup> the veto power is necessary because the oversight committee would have the authority to recuse Supreme Court Justices. Justices would, of course, continue to have the ability to recuse themselves, but as the Roberts' situation proves, determining one's disqualification is not an easy task.

The oversight committee approach would differ from the Frost and Bassett approaches because the committee would be capable of eliminating the subconscious biases<sup>188</sup>--due to the detached nature of the retired judges--present in a judge and his colleagues. Unlike § 455(b), which lists specific circumstances calling for a judge's recusal,<sup>189</sup> the oversight committee would concentrate on deciding disqualification in the difficult situations, such as where an appearance of impropriety motion is filed. The committee would require the justice in question to submit any pertinent information regarding his potential for bias. After carefully considering all relevant information--the motion and judge submission--the oversight committee will issue a thoughtful opinion determining whether recusal is appropriate. While displacing a judge may cause contempt towards the committee, over time, the opinions will

form a body of recusal law that will help judges understand when recusal is, and is not, appropriate.<sup>190</sup>

This Comment cannot answer whether the independent oversight committee would have disqualified Roberts from Hamdan; however, the committee would have thoroughly scrutinized whether the interviews with the Bush administration could cause the public to question Roberts' impartiality. The sole fact that a detached oversight committee is making the decision rather than a judge or colleague should suppress any public distrust. While nobody doubts Chief Justice Roberts is a man of high integrity, the appearance that his loyalty could consciously or subconsciously sway his opinion,<sup>191</sup> is enough to require an oversight committee to make the final decision.

The past few years have shown that the Supreme Court is not as infallible as once thought.<sup>192</sup> In 1993, the high court released a statement asserting that the Court would limit the coverage of § 455 to its Justices.<sup>193</sup> The recent controversies indicate that even the most judicious minds in the world may have their impartiality questioned. However, allowing the independent oversight committee to determine questions of impartiality--for all federal courts--will "promote public confidence in the impartiality of the judicial process."<sup>194</sup>

Undoubtedly, the application of the oversight committee raises questions. Is there a separation of powers issue? The

judiciary might argue that the oversight committee takes away the independence vested upon their branch by the Constitution; nonetheless, this is not a statute dictating how the judiciary should rule on law, and the Constitution permits limited regulation of the judicial branch.<sup>195</sup> The involvement of each branch in the implementation of the oversight committee should evince Constitutional compliance. Won't the Commission have too many motions to deal with? It is no secret that the federal docket is severely backed up,<sup>196</sup> however, no one can predict whether this would translate into a backed up oversight committee. In the beginning, the committee will have their hands full, but as more decisions become published and the body of recusal law grows, fewer litigants will file motions because the recusal standards will provide them guidance.

The public wants to believe that the judiciary is an impartial actor.<sup>197</sup> In the slim chance that a situation of impropriety or "an appearance of impropriety" presents itself, the public confidence in the judicial branch will remain unwavering because a detached oversight committee will see to it that justice is preserved.

#### **IV. Conclusion**

The rich history of recusal in American jurisprudence is a testament to the importance our Founding Fathers placed on

integrity. While most federal judges exemplify honesty, their political or personal relationships can sometimes leave others with a skewed perception. This Comment covered several situations where the impartiality of a judge was questioned; sure enough, these situations reinforced the notion that recusal law in American jurisprudence remains vague. Certainly, the judiciary faces a quandary when applying the current recusal standards; in spite of this, several scholars have proposed well reasoned reforms that show promise. The oversight committee approach recommended by this Comment combines the most rational components of the scholarly suggestions with the most perceptible gaps in recusal law. Chief Justice Roberts got appointed to the Supreme Court for his accolades, not for his bias. But, an objective observer could have questioned his impartiality based on the timing of the interviews with the trial proceedings, which clearly violates § 455(a). The oversight committee would have quashed the Hamdan controversy while creating important guidelines for future judges and litigants to follow. Just how clear-cut was Roberts' opinion not to disqualify himself? The Supreme Court granted Hamdan certiorari on November 7, 2005, and Chief Justice Roberts recused himself from that decision.<sup>198</sup>

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<sup>1</sup> See Bill Mears, Roberts Sidesteps Questions on Pledge, Eminent Domain, **Cnn.com**, Sept. 14, 2005, <http://www.cnn.com/2005/POLITICS/09/14/roberts.hearings/index.html> (explaining that Roberts evaded several questions asked by Democratic Senators on the Judiciary Committee during the confirmation hearings); Nina Totenberg, Alito to Face Further Grilling by Senate Panel, **National Public Radio**, Jan. 11, 2006, <http://www.npr.org/templates/story.php?storyId=5148967> (discussing the tough questions that Samuel Alito was asked during his confirmation hearing, specifically on Presidential Powers—a critical issue to the current Administration and Congress).

<sup>2</sup> **Black's Law Dictionary** 1025 (7<sup>th</sup> ed. 2000) (defining recusal as "[r]emoval of oneself as judge or policy-maker in a particular matter, esp. because of a conflict of interest.").

<sup>3</sup> See Leslie W. Abramson, Professionalism in the Practice of law: A symposium on civility and judicial ethics in the 1990's: Deciding recusal motions: who judges the judges?, 28 **Val. U. L. Rev.** 543, 560 (1994) (discussing the confusion judges may encounter when applying recusal standards).



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<sup>4</sup> Jess Bravin, Recusal Questions for Roberts, **Wall St. J.**, Aug. 26, 2005, at A4.

<sup>5</sup> **Annotated Model Code of Judicial Conduct**, Canon 1 (American Bar Ass'n 2004). See also Seth E. Bloom, Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges, 35 **Case W. Res. L. Rev.** 662, 663 (1985) ("Public confidence is essential to effective functioning of the judiciary because, 'possessed of neither the purse nor the sword,' the judiciary depends primarily on the willingness of members of society to follow its mandates.").

<sup>6</sup> **The Federalist No. 78**, at 412 (Alexander Hamilton) (J.R. Pole ed., 2004).

<sup>7</sup> **U.S. Const.** art. III, § 1.

<sup>8</sup> See *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (mem.) (Rehnquist, J.) (noting that it is unrealistic to believe Justices come to the bench without forming or stating opinions on constitutional issues as a result of previous legal experience).

<sup>9</sup> In this Comment the word "judge" will refer to magistrates, judges, and justices.

<sup>10</sup> This comment will use the words recusal and disqualification interchangeably, however, they are not always synonymous in judicial procedure. Nonetheless, for purposes of

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this comment their equal treatment will suffice. See e.g., Karen Moore, Appellate Review of Judicial Disqualification Decisions in the Federal Courts, 35 **Hastings L.J.** 829, 830 n.3 (1984) (explaining that the term “recusal” refers to a voluntary decision of the judge to step down; whereas, “disqualification” is the term used by a party who asks the judge to withdraw from hearing the case).

<sup>11</sup> See 28 U.S.C. § 144 (2000) (requiring a party in a district court proceeding to file an affidavit stating the personal bias or prejudice of the judge hearing the case, so that a different judge is assigned to the hearing); 28 U.S.C. § 455 (2000) (stating that part (a) states an objective standard, which requires a judge whose impartiality may reasonably be questioned; part (b) lists specific circumstances that would require a judge to recuse himself from hearing a case).

<sup>12</sup> Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278; *Liteky v. United States*, 510 U.S. 540, 544 (1994).

<sup>13</sup> Amanda Frost, Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal, 53 **Kansas L. Rev.** 531, 539 (2005). See Richard D. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges § 1.2, at 6 (1996) (noting that judges had a duty to be impartial under early Jewish law, the Roman Code of Justinian, and early common law).

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<sup>14</sup> Frost, supra note 13, at 540-44. See generally **John P. MacKenzie, The Appearance of Justice** 180-192 (1974) (explaining that it was baseball's "Black Sox" scandal of 1919 that prompted the first Canons of Judicial Ethics).

<sup>15</sup> See Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278-279 (stating that federal district court judges may be barred from hearing cases where they had served as counsel to either party or had an economic interest in the litigation).

<sup>16</sup> See Frost, supra note 13, at 540 ("[A] judge recuse himself if he is 'so related to, or connected with, either party, as to render it improper for him, in his opinion, to sit on the trial of such suit or action.'" (quoting Act of Mar. 3, 1821, ch. 51, 3 Stat. 643)).

<sup>17</sup> See **MacKenzie**, supra note 14, at 182 (explaining that the principal draftsmen of the 1924 canons observed that the public's distrust of the Federal judiciary was growing, which he believed would make changes to the judicial guidelines a necessity).

<sup>18</sup> Act of Mar. 3, 1911, ch. 23, § 21, 36 Stat. 1087, 1090.

<sup>19</sup> Legal professionals unfamiliar with the recusal standards set forth in § 144 and § 455 often confuse the two. Section 144 is a statute that requires litigants to pursue recusal through the filing of an affidavit that lists specific grievances;

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whereas, § 455 places the onus of recusal on the judge. While this comment discusses both sections, it is important to understand that the focus will be primarily on § 455 because of that statute's application to *Hamdan v. Rumsfeld*.

<sup>20</sup> **Flamm**, supra note 13, § 2.4, at 40 (“‘For cause’ provisions permit a judge to be removed only when the party applying for the relief is able to demonstrate—usually by means of some sort of evidentiary showing—that legally sufficient cause for requiring the judge to step down exists.”).

<sup>21</sup> See **Frost**, supra note 13, at 541 (explaining that the 1948 amendment broadened the scope of recusal law with changes such as placing discretion of whether recusal is appropriate in the hands of the judge).

<sup>22</sup> See **MacKenzie**, supra note 14, at 24 (discussing the furious political battle that ensued when President Johnson attempted to appoint Justice Fortas to the Chief Justice position in 1968).

<sup>23</sup> Id. at 27-28.

<sup>24</sup> See Id. at 80, 89 (“[W]hile a judge in the Deering-Darlington case, he owned stock . . . . The charge, then, was that Haynsworth had had an undisclosed financial interest that required his disqualification, but he sat in the case anyway to the great prejudice of one of the parties . . . . The Darlington

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case was not just an important one. It was the major labor case of a decade.”).

<sup>25</sup> Id. at 192.

<sup>26</sup> The control and administration of the ABA is vested in the House of Delegates.

<sup>27</sup> Id. at 205.

<sup>28</sup> See Id. at 201 (explaining that constant public scrutiny made it necessary for courts to adopt a standard that even a lay person could understand--an appearance standard provided such a desired threshold, which was tougher on judges and easier to understand).

<sup>29</sup> 28 U.S.C. § 331 (2000). This statute establishes the U.S. Judicial Conference as the principal policy making body for the United States Courts.

<sup>30</sup> See MacKenzie, supra note 14, at 205 (noting that the U.S. Judicial Conference eliminated the “duty to sit” doctrine--which required a judge to hear a case until a litigant provided unambiguous evidence proving his bias--and adopted the “appearance of propriety” doctrine that required recusal upon any appearance of impropriety).

<sup>31</sup> See Laird v. Tatum, 409 U.S. 824 (1972) (mem.) (Rehnquist, J.) (stating that as a government attorney the Justice had made public statements regarding the merits of the

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issue in controversy, however, he refused to recuse himself because of his duty to sit).

<sup>32</sup> Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609, 1610.

<sup>33</sup> **H.R. Rep. No. 93-1453** (1974), reprinted in 1974 U.S.C.C.A.N. 6351 (detailing many controversies that have made it necessary for Congress to take action and change the recusal standard; furthermore, explaining why an appearance standard will reinforce the autonomy of the judiciary in the minds of the public).

<sup>34</sup> Id.

<sup>35</sup> See **H.R. Rep. No. 93-1453** (1974), at 3 reprinted in 1974 U.S.C.C.A.N. 6351, 6352 (noting the importance that the Judiciary Committee placed on the Judicial Conference and several states adopting the new Code).

<sup>36</sup> See **Model Code of Judicial Conduct** Canon 3C (1972) ("A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned.").

<sup>37</sup> **H.R. Rep. No. 93-1453**, at 3 (1974) reprinted in 1974 U.S.C.C.A.N. 6351, 6352 (stating that the new disqualification statute is 3C).

<sup>38</sup> Id. at 5 reprinted in 1974 U.S.C.C.A.N. 6351, 6355.

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<sup>39</sup> See *Tumey v. Ohio*, 273 U.S. 510, 511 (1927) (stating that where a judge has a personal pecuniary interest in the outcome of a case he presided over the defendant's due process rights have been violated); See also *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 148 (1968) (stating that a new hearing must ensue where there was even the slightest pecuniary interest on the part of a judge during the judicial proceeding).

<sup>40</sup> 409 U.S. 824 (1972) (stating that 28 U.S.C. § 455 was not applicable to a Supreme Court justice where during his years of working for the government he had not been counsel, a material witness, or connected in any way with the case at bar; additionally, the appearance of impropriety due to a public statement on the issue at bar was not covered by § 455). This case influenced Congress to reform § 455 from a subjective to an objective standard and placed courtroom limits on former government officials who later became judges.

<sup>41</sup> 486 U.S. 847 (1988).

<sup>42</sup> See **Flamm**, supra note 13, § 5.2, at 143 ("[T]he 1974 amendments to the primary federal disqualification statute, 28 U.S.C § 455, did away with this subjective standard. Thus, the present federal disqualification standard is an objective one,

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pursuant to which self-disqualification is called for whenever a judge's impartiality might 'reasonably be questioned.'").

<sup>43</sup> See *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864-65 (1988) ("The problem, however, is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible."); See generally John Leubsdorf, Theories of Judging and Judge Disqualification, 62 **N.Y.U. L. Rev.** 237, 243 (1987) (explaining that the appearance standard creates a cloudy standard where a judge might not be partial, but where his or her appearance could reasonably be questioned--all in the name of maintaining public confidence in an independent judiciary).

<sup>44</sup> See Id. at 861 ("[T]he provision can also, in proper cases, be applied retroactively, the judge is not called upon to perform an impossible feat. Rather, he is called upon to rectify an oversight and to take the steps necessary to maintain public confidence in the impartiality of the judiciary.").

<sup>45</sup> 510 U.S. 540 (1994).

<sup>46</sup> See *Liteky v. United States* 510 U.S. 540, 554-55 (1994) (holding that views determined by the judge's participation in the legal proceeding will not disqualify the judge from hearing



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the case unless "a deep-seated favoritism or antagonism that would make fair judgment impossible" ensues from the proceeding); See also **Flamm**, supra note 13, § 4.6.1, at 130-31 ("[T]he alleged bias must have arisen not from judicial knowledge, opinions, conduct, or comments that derived from the evidence adduced in a pending or a prior proceeding, but by virtue of some factor that arose outside of the incidents that have taken place in the courtroom itself.").

Liteky put in plain words that the extrajudicial source rule--or as Justice Scalia termed it extrajudicial source factor--could apply to both § 144 and § 455; however, a per se rule--stating that a judge shall recuse himself whenever a source outside the legal proceeding creates personal bias--was rejected because it is too difficult to set a bright line in terms of bias, which would command a recusal action by a judge.

<sup>47</sup> 541 U.S. 913 (2004).

<sup>48</sup> See Id. at 929 (mem.) (Scalia, J.) ("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.'").

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<sup>49</sup> See Id. at 914-16 (stating the facts of the hunting trip--that were misrepresented by the media--and explaining why these facts applied to recusal law corroborate his decision not to disqualify himself).

Cheney remains a hotly debated case because of the impact politics are playing in the media. The analysis portion of this comment will take an in depth look into the volatile atmosphere, which is created when politics and recusal collide in the courtroom.

<sup>50</sup> Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

<sup>51</sup> See Jim VandeHei, Bush Reasserts Presidential Prerogatives, **Wash. Post**, Jan. 27, 2006, at A6 (explaining that President Bush continues to claim his Presidential powers allow him to spy on Americans and withhold White House aids from testifying in court on sensitive matters).

<sup>52</sup> Hamdan v. Rumsfeld, 344 F.Supp. 2d 152 (D.D.C. 2004). See also Amy Goodman, Senate Dems Frustrated by Roberts' Refusal to Answer Questions on Wide Range of Topics, **Democracy Now**, Sept. 15, 2005,

<http://www.democracynow.org/article.pl?sid=05/09/15/142216#transcript> ("[Y]esterday, Judge Roberts was under scrutiny for deciding on the Hamdan ruling shortly before his interview by

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President Bush for the Supreme Court vacancy. Some experts on legal ethics have been divided about whether Judge Roberts should have recused himself from the case."); Stephen Gillers, David J. Luban, & Steven Lubet, Improper Advances, **Slate**, Aug. 17, 2005, <http://www.slate.com/id/2124603/> ("Roberts' vote [in Hamdan] was not a mere add-on. His vote was decisive on a key question of presidential power that now confronts the nation."). But *cf.* Posting of Brad Wendel to Legal Ethics Forum, [http://legalethicsforum.typepad.com/blog/2005/08/should\\_roberts\\_.html](http://legalethicsforum.typepad.com/blog/2005/08/should_roberts_.html) ("[A]ny disposition Roberts might have to side with the administration in Hamdan was not caused by gratitude for being considered for the Supremes--rather, Robert's candidacy was "caused" in some sense by this preexisting disposition [to side with the administration].").

<sup>53</sup> See Supreme Court Nomination: Hearing Before the S. Comm. on the Judiciary, 109<sup>th</sup> Cong. Day 3 (Sept. 14, 2005) (Statement of S. Feingold, Member, S. Comm. on the Judiciary) (discussing the question and answer portion of the confirmation hearings where Senator Feingold asked judge Roberts about possible ethical violations that resulted from the contemporaneous timing of the White House interviews and the Hamdan trial).

<sup>54</sup> Compare Hamdan v. Rumsfeld, 415 F.3d 33, 37-38 (2005) (stating that the President did not violate the "separation of

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powers inherent in the Constitution when he established military commissions” and procedures for the military commissions because Congress authorized the President to do so), with Brief for Amici Curiae of Fifteen Law Professors in Support of Petitioner-Appellee and Urging Affirmance at 3, *Salim Ahmed Hamdan v. Donald H. Rumsfeld*, No. 04-5393 (D.C. Cir. July 15, 2005) (“The President’s Military Order and the regulations implementing it seek to combine the powers of the Executive with that of the Judiciary. It seeks to unite in the Executive the powers of the grand jury, prosecutor, defense lawyer, judge, jury, appeals panel, sentencing authority, and, in some cases, executioner.”), and Emily Bazelon, Thank You, Mr. President, **Slate**, July 26, 2005, <http://slate.msn.com/id/2123055/> (stating that Judge Roberts’ vote as one of three panel members on the D.C. Circuit provided the Bush Administration overreaching Constitutional authority and the power to try suspected terrorists in military tribunals, which lack many due-process protections ).

<sup>55</sup> Hearing, supra note 53, at 3 (testimony of Judge John Roberts).

<sup>56</sup> Id.

<sup>57</sup> Id.

<sup>58</sup> Bravin, supra note 4, at A4.

<sup>59</sup> Id.

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<sup>60</sup> Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 165 (D.D.C. 2004).

<sup>61</sup> Id.

<sup>62</sup> Id.

<sup>63</sup> See Id. at 162 ("There is nothing in this record to suggest that a competent tribunal has determined that Hamdan is not a prisoner-of-war under the Geneva Conventions. Hamdan has appeared before the Combatant Status Review Tribunal, but the CSRT was not established to address detainees' status under the Geneva Conventions . . . . The government's legal position is that the CSRT determination that Hamdan was a member of or affiliated with al Qaeda is also determinative of Hamdan's prisoner-of-war status, since the President has already determined that detained al Qaeda members are not prisoners-of-war under the Geneva Conventions. The President is not a 'tribunal,' however.").

<sup>64</sup> See Id. at 165 (stating that due to the uncertain nature of Hamdan's status as a POW under the Third Geneva Convention he may not be tried for war crimes except by a court-martial convened under the Uniform Code of Military Justice; the military commissions established by the U.S. provide a defendant less rights, which is inconsistent with the Third Geneva Convention).

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<sup>65</sup> See Id. at 172 (“I cannot stretch the meaning of the Military Commission’s rule enough to find it consistent with the UCMJ’s right to be present. 10 U.S.C. § 839. A provision that permits the exclusion of the accused from his trial . . . . is indeed directly contrary to the UCMJ’s right to be present. I must accordingly find on the basis of the statute that, so long as it operates under such a rule, the Military Commission cannot try Hamdan.”).

<sup>66</sup> See Id. at 158-60 (“The major premise of the government’s argument that the President has untrammelled power to establish military tribunals is that his authority emanates from Article II of the Constitution and is inherent in his role as commander-in-chief. None of the principal cases on which the government relies, has so held . . . . Were the President to act outside the limits now set for military commissions by *Article 21*, however, his actions would fall into the most restricted category of cases . . . . [I]n which “the President takes measures incompatible with the expressed or implied will of Congress.”).

<sup>67</sup> See *Hamdan v. Rumsfeld*, 415 F.3d 33, 37-38 (D.C. Cir. 2005) (explaining that the President did not violate the separation of powers inherent in the Constitution because four sources of authority allowed him to create the military

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commissions to try terrorists, especially the Congress's joint resolution "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the attacks and recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." (quoting Authorization for Use of Military Force, **Pub. L. No.** 107-40, 115 Stat. 224, 224 (2001)).

<sup>68</sup> Id. at 40-42 (explaining that the Convention neither applies to al Qaeda--"al Qaeda is not a state and it was not a "high Contracting Party"--nor Hamdan--"he does not fit the Article 4 definition of a "prisoner of war" entitled to the protection of the Convention"--and the President's determination of how these terrorists will be defined in terms of the Geneva Convention is entitled deference).

<sup>69</sup> See Id. at 38-40 (explaining that precedent--Johnson v. Eisentrager--clearly demonstrates the Geneva Conventions are not judicially enforceable because "the convention specifies rights of prisoners of war, but "responsibility for observance and enforcement of these rights is upon political and military authorities." (citing Johnson v. Eisentrager, 339 U.S. 763, 789 (1950))).

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President Bush--as a political and military authority--determined that Hamdan was not a prisoner of war.

<sup>70</sup> Press Release, Dep't of Defense, President Determines Enemy Combatants Subject to His Military Order (July 3, 2003), <http://www.defenselink.mil/releases/2003/nr20030703-0173.html>.

<sup>71</sup> See Hamdan, 415 F.3d at 42 (stating that the court rejected Hamdan's argument--that the Military Commission procedures violate human rights under Common Article 3(1)(d)--because his focus was on how the commission may try him rather than whether the commission had jurisdiction).

<sup>72</sup> Prisoner of war status under Geneva would have given jurisdiction to a court-martial proceeding.

<sup>73</sup> Hamdan raises enough challenging legal questions to write a separate comment, however, recusal is the focus of this comment.

<sup>74</sup> The number of judges who have recused themselves in American legal history is so great that this Comment could not begin to determine those figures. The Roberts confirmation presents such a unique circumstance because of the high stakes involved to both the former Circuit judge and our current Administration. While many judges have requested to sit down from the bench when the facts seem to merely hint at impropriety; Chief Justice Roberts decided to not err on the



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side of caution--an action which both the 1974 Congressional hearings and the few important Supreme Court recusal decisions specifically address.

<sup>75</sup> See *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460 (7<sup>th</sup> Cir. 1985) (explaining that the test for the appearance standard is "whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case.").

<sup>76</sup> See *Hamdan v. Rumsfeld*, 415 F.3d 33, 37 (2005) ("The argument is that Article I, § 8, of the Constitution gives Congress the power to constitute Tribunals inferior to the Supreme Court, that Congress has not established military commission, and that the President has no inherent authority to do so under Article II.").

<sup>77</sup> See *Gillers, et al.* supra note 52 ("President Bush was a defendant in the case because he had personally, in writing, found "reason to believe" that Hamdan was a terrorist subject to military tribunals.").

<sup>78</sup> See *Bravin*, supra note 4, at A4 (explaining that as a result of the disclosure of the Roberts' questionnaire to the Senate Judiciary Committee, many legal ethicists believe that Roberts should have at least notified the defendant's lawyer,

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Cmdr. Swift, of his dealings with the White House so the lawyer had the opportunity to consider a recusal motion).

<sup>79</sup> See *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 915 (2004) (mem.) (Scalia, J.) (“Let me respond, at the outset, to Sierra Club’s suggestion that I should “resolve any doubts in favor of recusal.” That might be sound advice if I were sitting on a Court of Appeals. There, my place would be taken by another judge, and the case would proceed normally.”); see also *Microsoft Corp. v. United States*, 530 U.S. 1301, 1303 (2000) (“Finally, it is important to note the negative impact that the unnecessary disqualification of even one Justice may have upon our Court. Here -- unlike the situation in a District Court or a Court of Appeals -- there is no way to replace a recused Justice.”); Debra Bassett, Recusal and the Supreme Court, 56 **Hastings L.J.** 657, 693 n.151 (2005) (explaining that Federal circuit courts decide cases in panels of three, unless the judge recuses or is disqualified, in which case another appellate judge may hear the case (citing 28 U.S.C. § 46(b) (2000))).

Judge Roberts knew that if he recused from Hamdan a qualified federal judge would take his place and the court would not “miss a beat.” 28 U.S.C. § 46(b) (2000).

<sup>80</sup> Bravin, supra note 4, at A4.

<sup>81</sup> 28 U.S.C. § 455(a) (2000).

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<sup>82</sup> *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859-60 (1988).

<sup>83</sup> See **Federal Judicial Center, Analysis of Case Law Under** 28 U.S.C. §§ 455 & 144, 16 (2002) (noting that the First, Fifth, Sixth, Tenth, and Eleventh Circuits have stated that on close questions of recusal, the judge should decide in favor of stepping down); see generally **H.R. Rep. No. 93-1453**, at 5 reprinted in 1974 U.S.C.C.A.N. 6351, 6355 (explaining that if there is a factual basis that makes it appear as though the judge may not be impartial he should stand down from hearing the case).

<sup>84</sup> *Gillers, et al.* supra note 52, (explaining that--prior to and throughout the Hamdan legal proceeding--judge Roberts was interviewing with top White House officials without disclosing this information to anyone).

<sup>85</sup> See **Annotated Model Code of Judicial Conduct Canon 5B(2)(a)** (2004) (explaining that a potential candidate or judge may have communications with any selection or nominating commission designated to screen candidates).

<sup>86</sup> *Gillers, et al.* supra note 52 (stating that Chief Justice Rehnquist was expected to retire, not Justice O'Connor).

<sup>87</sup> See generally *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 461 (7<sup>th</sup> Cir. 1985) (discussing a situation that is similar to

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Roberts' talks with White House officials, but may be considered more offensive because it deals with negotiations for future employment; "we think recusal is required when, at the very time a case is about to go to trial before a judge, he is in negotiation -- albeit preliminary, tentative, indirect, unintentional, and ultimately unsuccessful -- with a lawyer or law firm or party in the case over his future employment.").

<sup>88</sup> See generally Posting of Lyle Denniston to SCOTUSblog, [http://www.sctnomination.com/blog/archives/2005/07/analysis\\_john\\_r\\_1.html](http://www.sctnomination.com/blog/archives/2005/07/analysis_john_r_1.html) (July 25, 2005, 07:29 AM) ("When Judge Roberts appears before the Senate Judiciary Committee reviewing his nomination to the Supreme Court, his views on separation of powers issues - and on presidential authority, specifically - are sure to be probed at length . . . . [T]he Hamdan opinion reveals a substantial degree of judicial deference by Roberts to presidential power.").

<sup>66</sup> See Michael C. Dorf, "The Nation's Second-Highest Court" Upholds Military Commissions, **Find Law's Legal Commentary**, July 20, 2005, <http://writ.news.findlaw.com/dorf/20050720.html> (stating that the D.C. Circuit's decision in *Hamdan v. Rumsfeld* extended the Bush Administration's Executive power; "[i]f the D.C. Circuit did not exactly give the President a blank check, it certainly extended him a very large line of credit.").

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<sup>90</sup> Legal scholar Ronald Rotunda argues that if Federal Judges recuse themselves from hearing cases where the Federal Government is a litigant—once they find out they are in consideration of an appointment to the high court—several court dockets would need to be shuffled to make such accommodations, which would burden an already encumbered area of American jurisprudence. Memorandum from Ronald D. Rotunda, Professor, George Mason University, to Arlen Specter, Chairman, S. Comm. on the Judiciary, at 9 (Aug. 22, 2005) (on file with Roberts hearings). This Comment avoids the problem Rotunda suggests would have accompanied a recusal by judge Roberts as a result of the government being a litigant: President Bush was a defendant in Hamdan and his personal involvement in deciding that Salim Hamdan was an enemy combatant makes him a direct defendant; however, the majority of cases where the Federal Government is a litigant and Executive officials are not being sued directly, the Solicitor General is the defendant—we will call this one-step removed. **The United States Department of Justice, Office of the Solicitor** General, Functions of the Office, <http://www.usdoj.gov/osg/aboutosg/function.html>, (2006).

Therefore, Rotunda's argument that several judges in contention for a high court nomination will have to recuse themselves from

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hearing cases that involve the government only holds true when an Executive Official is directly involved.

<sup>91</sup> In Cheney v. United States District Court for the District of Columbia, the Supreme Court determined that the District Court's orders to allow extremely broad discovery, impaired the functioning of the Executive branch. This separation of powers issue was significant enough for the high court to overturn the appellate court and disallow the broad discovery. In Newdow v. United States Congress, the petitioner believed that recitation of the Pledge of Allegiance violated the Establishment clause of the First Amendment--a very significant issue in our current cultural polarization.

<sup>92</sup> While the Newdow situation preceded Cheney, the public scrutiny of the duck-hunt was much more controversial and is the primary reason this Comment stresses Cheney as causing the Supreme Court's luck to run out.

<sup>93</sup> See Cheney v. U.S. Dist. Court, 541 U.S. 913, 915-16 (2004) (mem.) (Scalia, J.) (stating that the duck hunting trip was planned long before the Court granted cert. to hear Cheney).

<sup>94</sup> See Cheney v. U.S. Dist. Court, 542 U.S. 367, 124 S. Ct. 2576, 2582 (2004) (explaining that the energy group was directed to develop a national energy policy that would promote

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"dependable, affordable, and environmentally sound" energy for the future).

<sup>95</sup> The Sierra Club, <http://www.sierraclub.org/> (last visited Feb. 15, 2006) (stating that "[t]he Club is America's oldest, largest and most influential grassroots environmental organization."--which conveys a logical reason for their concern with America's energy policy).

The most outspoken respondent was the Sierra Club.

<sup>96</sup> Cheney, 124 S. Ct. at 2583 (explaining that the complaint filed by the Sierra Club alleges that non-federal employees participated in the non-public NEPDG meetings, which would mean that FACA would apply--subjecting the group to a variety of open-meeting and disclosure requirements that were never met; therefore, the energy group should not benefit from the Act's exemption of public disclosure requirements).

<sup>97</sup> Id. at 2953 (stating that the Circuit Court misinterpreted United States v. Nixon and terminated its inquiry into whether a writ of mandamus would be appropriate in a situation where an overly broad discovery order by the District Court could impair the executive branches performance of its constitutional duties--raising separation of powers issues).

<sup>98</sup> Dana Mulhauser, Half Court, **The New Republic Online**, June 25, 2004,

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<http://www.tnr.com/doc.mhtml?i=express&s=mulhauser062504>

(discussing the impact Justice Scalia's refusal to recuse himself may have had in the high court's finding of law).

<sup>99</sup> See, e.g., Michael Janofsky, Scalia's Trip With Cheney Raises Questions of Impartiality, N.Y. Times, Feb. 6, 2004, at A14 (stating that as a result of Mr. Cheney's trip with Justice Scalia, Democrats in Congress and legal ethics experts believe that Justice Scalia should recuse himself from hearing the case where Mr. Cheney is the defendant--explaining the validity of his energy task force); Charles Lane, High Court Questioned On Allowing Scalia Trip, Wash. Post, Jan. 23, 2004, at A4

(commenting on the fact that Scalia traveled with Cheney to duck hunt after the Supreme Court agreed to hear a case involving Cheney's energy task force and that the Justice stated that people could not reasonably question his impartiality based on the trip); Dana Milbank, Scalia Joined Cheney on Flight; Justice's Ride on Air Force Two Adds New Element to Conflict Issue, Wash. Post, Feb 6, 2004, at A4 ("Bill Allison of the Center for Public Integrity said that taxpayers would cover the cost of flying Scalia, standard procedure for Air Force Two passengers, but that the invitation from Cheney could add to appearances of a conflict of interest. 'It does raise the level of closeness a little bit higher,' Allison said. 'It makes it



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seem more like Cheney was courting Scalia.’); David G. Savage, Trip With Cheney Puts Ethics Spotlight on Scalia; Friends hunt ducks together, even as the justice is set to hear the vice president’s case, **L.A. Times**, Jan. 17, 2004, at A1 (explaining that even though Scalia and Cheney are longtime friends and avid hunters, several legal ethics scholars question whether the timing of their trip may raise doubts about whether Scalia can decide the case impartially).

<sup>100</sup> See *Cheney v. U.S. Dist. Court*, 541 U.S. 913 (2004) (mem.) (Scalia, J.) (“The organization moved for the recusal of a United States Supreme Court Justice.”).

<sup>101</sup> Id.

<sup>102</sup> See Id. at 915 (stating that the trip was set long before cert. was granted; the men never slept in the same room, hunted in the same blinds, or ate in separate quarters). But see Caprice L. Roberts, The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort, **57 Rutgers L. Rev.** **107, 118-19** (2004) (“[W]e must take him at his word that he and Cheney did not speak about the pending matter. This trust us rationale, as it applies to (not) discussing the issues of the case while publicly displaying friendship during the case’s pendency, inherently risks ignoring the reality of friendship and undervaluing public perception.”).

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<sup>103</sup> See discussion infra Part D(i).

<sup>104</sup> Cheney, 541 U.S. at 922. See also Roberts, supra note 102, at 120 (“Instead of relying purely on the hypothetical objective person to show that the Justice’s impartiality was reasonably in question, the Sierra Club supplied a plethora of news accounts raising impartiality questions based on Justice Scalia’s actions.”).

<sup>105</sup> Cheney, 541 U.S. at 928-29.

<sup>106</sup> Monroe H. Freedman, Duck-Blind Justice: Justice Scalia’s Memorandum in the Cheney Case, **18 Geo. J. Legal Ethics** 229, 234 (2004).

<sup>107</sup> Id.

<sup>108</sup> See Cheney, 541 U.S. at 916 (“[F]rom the earliest days down to modern times Justices have had close personal relationships with the President and other officers of the Executive.”).

<sup>109</sup> See generally **Flamm**, supra note 13, § 5.63, at 159 (“[A]s a practical matter, because the challenged judge will usually decide the disqualification motion himself . . . . [T]he challenged judge’s subjective view as to what a reasonable person would believe is, in many instances, dispositive.”).

<sup>110</sup> See Dahlia Lithwick, Je Refuse!, **Slate**, Mar. 18, 2004, <http://www.slate.com/toolbar.aspx?action=print&id=2097350>

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("[F]or all of Scalia's intellectual force, rhetorical genius, and passion, this memorandum will not silence his critics . . . . [W]e also all now demand transparency, ideological litmus tests, and full disclosure. We have lost faith in judicial integrity, and Scalia's call to trust me may be too late."); see also Roberts, supra note 102, at 118-19 ("Justice Scalia demonstrates his power for prose, as is often the case, but he dismisses the recusal motion primarily based on its form rather than the heart of the attack . . . . Self-declaration of one's own impartiality does not answer the call of the question posed by the judicial recusal standards; rather, it is an unhelpful and unpersuasive tautology.").

<sup>111</sup> See generally Bassett, supra note 79, at 703 ("Under the Supreme Court's current recusal practices, a Justice's decision not to participate in a case typically is not explained, leaving Court-watchers to guess the reason for a particular Justice's non-participation.").

<sup>112</sup> Hearing, supra note 53, at 3 (Statement of S. Feingold, Member, S. Comm. on the Judiciary) (explaining that Judge Roberts has been overly hesitant to discuss Hamdan).

<sup>113</sup> In both cases the executive officer was sued in his official capacity rather than on a personal level. This concept

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is important to understand because the consequences of an unfavorable ruling in a personal capacity are much more severe.

<sup>114</sup> See *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 914 (mem.) (Scalia, J.) (2004) (explaining that the appearance standard shall apply to the facts as they existed, not as others report them); *Gillers, et al.* supra note 52 (stating that the controversy lies in the public's perception of a courtroom impropriety).

<sup>115</sup> See *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 124 S. Ct. 2576 (2004) ("This Court has issued mandamus to, *inter alia*, restrain a lower court whose actions would threaten the separation of powers by embarrassing the Executive Branch.").

<sup>116</sup> The fact that Justice Scalia wrote a memorandum has no significance in applying his duck-hunting trip to the appearance standard—his trip still had the appearance of a personal relationship with a future litigant. However, the memorandum lays a foundation for change, which if applied properly could have prevented the duck-hunt debacle because the American public would lack reason to question the Justice's intentions.

<sup>117</sup> See *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 915 (mem.) (Scalia, J.) (2004) ("On the Supreme Court, however, the consequence is different: The Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote,

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it will find itself unable to resolve the significant legal issue presented by the case.”).

<sup>118</sup> 28 U.S.C § 46(b) (2000).

<sup>119</sup> **Sup. Ct. R.** 4.

<sup>120</sup> See Flamm, supra note 13, Addendum to Appendix A, at 1068 (explaining that the important position the Supreme Court plays in American jurisprudence makes it inappropriate to be excessively cautious when a Justice faces a recusal situation).

<sup>121</sup> *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859-60 (1988).

<sup>122</sup> *Elk Grove Unified Sch. Dist. V. Newdow*, 542 U.S. 1, 9 (2004).

<sup>123</sup> See Cheney v. U.S. Dist. Court, 541 U.S. 913, 915 (mem.) (Scalia, J.) (2004) (stating that he recused himself in *Newdow* because of the appearance of impropriety standard, which the Sierra Club questioned him in *Cheney*).

<sup>124</sup> Suggestion for Recusal of Justice Scalia at 3, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (No. 03-7).

<sup>125</sup> See Id. at 3 (“Justice Scalia apparently indicated that the Ninth Circuit decision in the instant case was based on a flawed reading of the Establishment Clause. Yet it is highly unlikely that the Justice had ever read any of the briefs in the case.”). See also Jacqueline L. Salmon, Scalia Defends Public

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Expression of Faith; Recent Rulings Have Gone Too Far, Justice Says During Tribute to Va. Gathering, **Wash. Post**, Jan. 13, 2003, at B3 (“In a short speech . . . . Scalia criticized court decisions in recent years that have outlawed expressions of religious faith in public events. He cited as an example a California federal court ruling last summer that the words under God in the Pledge of Allegiance were a violation of the separation of church and state.”).

<sup>126</sup> Elk Grove Unified Sch. Dist. v. Newdow, 540 U.S. 945 (2003), cert. granted, 72 U.S.L.W. 3266 (U.S. Oct. 14, 2003) (No. 02-1624).

<sup>127</sup> Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 4 (2003).

<sup>128</sup> Id.

<sup>129</sup> Recusal Motion, supra note 97, at 3.

<sup>130</sup> See Id. (“Under such circumstances - where he prematurely indicated that a lower court’s decision was wrong in a case he would likely hear - one might certainly reasonably question his impartiality.”).

<sup>131</sup> Newdow, 542 U.S. at 5.

<sup>132</sup> See Id. at 26-27 (“When hard questions of domestic relations are sure to affect the outcome, the prudent course is

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for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law.”).

<sup>133</sup> Id. at 22-23 (“Newdow’s standing derives entirely from his relationship with his daughter, but he lacks the right to litigate as her next friend . . . . [T]he interests of this parent [Michael Newdow] and this child are not parallel and, indeed, are potentially in conflict.”).

<sup>134</sup> Id. at 27 (stating that a California order giving exclusive legal rights of the child to the mother prohibits “[Michael Newdow’s] claimed right to shield his daughter from influences [reciting the Pledge of Allegiance] to which she is exposed.”).

<sup>135</sup> Roberts, supra note 102, at 125 (“The lack of any reasoned elaboration from Justice Scalia regarding his decision to recuse in Newdow leaves the public with a limited understanding of the basis for recusal in the first place.”).

<sup>136</sup> See Bloom, supra note 5, at 696-97 (“Prejudgment of the legal merits of the case is the easiest situation to resolve. When the prejudgment involves the application of law to specific facts in a particular case, disqualification is appropriate. “Unlike the development by judges of consistent views on legal principles, prior formulation or expression of opinion on the

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merits of a pending case is not an activity which the public expects of judges or has reason to encourage.”).

<sup>137</sup> See generally Memorandum from Ronald D. Rotunda, Professor, George Mason University, to Arlen Specter, Chairman, S. Comm. on the Judiciary, at 8 (Aug. 22, 2005) (on file with Roberts hearings) (“When Roberts had a conversation with the Attorney General in early April of 2005 (before there was any opening on the Court), it is common knowledge that he was not the only judge being considered for possible elevation to the Supreme Court. Even the day before (and the morning of) the final announcement on July 19, news reports told us who they thought the nominee would be, and the various names that were published were hardly limited to Roberts.”). But see Tom Brune, Roberts meeting ‘illegal’, **Nation**, Aug. 18, 2005, <http://www.newsday.com/news/nationworld/nation/ny-uscort184388315aug18,0,5829402.story> (stating that as a result of the White House interviewing John G. Roberts for the Supreme Court position as he heard a challenge to the president’s military tribunals, three legal ethicists said the White House broke the law).

<sup>138</sup> See generally Roberts, supra note 102, at 168-71 (explaining that recusal accompanied by a memorandum would help



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create a body of knowledge that would provide guidance to the public, lawyers, and judges).

<sup>139</sup> While no scholars have directly argued that a memorandum--similar to the one from Cheney--clarifying the legal reasoning for Judge Roberts decision to hear Hamdan would have cleared any appearance misconceptions, the polarized opinions in the legal community clearly support a conclusion that Hamdan exploits the weaknesses of the appearance standard's unclear application. See Gillers, et al., supra note 52 (stating that the timing of the interviews and the fact that President Bush personalized designated Hamdan an enemy combatant makes the Roberts' situation applicable to the standard, which should have resulted in his recusal). But see Rotunda, supra note 90, at 13 (stating that the Gillers' standard is harsher than the actual standard set forth in § 455(a), and that Roberts did not need to recuse himself because there was never an appearance of impropriety).

<sup>140</sup> See Everson v. Board of Educ. Of Ewing, 330 U.S. 1, 15-16 (1947) ("The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . In the words of [Thomas] Jefferson, the clause

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against establishment of religion by law was intended to erect "a wall of separation between church and state.").

<sup>141</sup> Newdow, 542 U.S. at 26.

<sup>142</sup> If the district court's opinion prevailed, the Geneva Conventions would apply to the alleged terrorists, resulting in trial by court-martial rather than--the due process lacking--Military Commissions.

<sup>143</sup> Bravin, supra note 4, at A4 ("On July 15, when Judge Roberts met with President Bush for the job-clinching interview, he joined a ruling in favor of the defendants, who included Mr. Bush.").

<sup>144</sup> See Gillers, et al. supra note 52 ("The problem is that if one side that very much wants to win a certain case can secretly approach the judge about a dream job while the case is still under active consideration, and especially if the judge shows interest in the job, the public's trust in the judiciary (not to mention the opposing party's) suffers because the public can never know how the approach may have affected the judge's thinking."). But see Rotunda, supra note 90, at 13 ("Judge Roberts did not apply for a job; he did not negotiate the terms of employment; he did not initiate a meeting; he was no suppliant; he simply accepted the invitation of the Attorney General to meet to discuss a possible Supreme Court vacancy.").

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<sup>145</sup> 28 U.S.C. § 455(a) (2000).

<sup>146</sup> See Roberts, supra note 102, at 123-24 (explaining that Justice Scalia's comments at the rally raised serious doubts that he could decide the case impartially).

<sup>147</sup> See Rotunda, supra note 90, at 3-8 (explaining that Gillers incorrectly reads the vague § 455(a) catch all phrase, "impartiality might reasonably be questioned," which as a result, broadens the standard inappropriately, making its application to situations like Hamdan questionable).

<sup>148</sup> Roberts, supra note 102, at 123-24.

<sup>149</sup> See Gillers, et al., supra note 52 ("What is immediately at stake, however, is the appearance of justice in the Hamdan case and the proper resolution of an important legal question about the limits on presidential power.").

<sup>150</sup> Elk Grove Unified Sch. Dist. V. Newdow, 542 U.S. 1, 22-23 (2003).

<sup>151</sup> See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (Jackson, J., concurring) (stating that the foundation of American liberty is that our law ensures the maintenance of the separation of powers, "[w]ith all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by

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parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.”).

<sup>152</sup> See Frost, supra note 13, at 535 (“The solution I offer is to incorporate into recusal law the core tenets of adjudication identified fifty years ago by Legal Process theorists as essential to maintaining the judiciary’s legitimacy.”); Bassett, supra note 79, at 702-03 (“This article proposes that the Court encourage recusal motions from parties appearing before the Court . . . . An increase in the filing of recusal motions would increase the information available to the Court and to the public.”).

<sup>153</sup> Frost extracted five procedural components of adjudication from the myriad scholarship of Legal Process theorists, which are essential to legitimize the process. See Id. at 556-57 (“These procedures are thus legitimating not only because they provide a theoretical justification for the exercise of judicial power in a democracy, but also because they serve to further the Framers’ intended role for the courts in our constitutional structure.”).

<sup>154</sup> Id. at 556.

<sup>155</sup> Id. at 555-56.

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<sup>156</sup> **Flamm**, supra note 13, § 26.3.4, at 748 (“[Section] 455 is stated in terms of a self-enforcing obligation, and courts generally agree that §455 was intended to ensure that federal judges would disqualify themselves in appropriate circumstances without any action on the part of a party.”).

<sup>157</sup> See **Frost**, supra note 13, at 582 (“Accordingly, § 455 should be amended to provide that the parties have a right to seek a judge’s recusal by motion filed within an appropriate amount of time after obtaining information that suggests that the judge could not be impartial or that his impartiality might “reasonably be questioned.”); see also Gina Holland, Scalia Won’t Step Aside from Cheney Legal Issue, **Lansing St. J.**, Mar. 19, 2004, at 5A (noting that “[T]here are no clear procedures for litigators who seek to disqualify Supreme Court Justices.”)

<sup>158</sup> **Frost**, supra note 13, at 583 (“The proposal discussed here takes this disclose requirement significantly further by requiring the judge to provide directly to litigants in pending cases any information that might be considered to have an impact on the judge’s partiality.”).

<sup>159</sup> Id. at 584 (“Providing for an impartial decisionmaker on the question of recusal serves both to prevent actual injustice and the appearance of injustice.”). See also *Hawaii-Pac. Venture Capital Corp. v. Rothbard*, 437 F. Supp. 230, 236 (D. Haw. 1977)

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(proposing that a situation could arise where a judge who faced recusal refers the motion to another judge to promote “public confidence in the impartiality of the judicial process.”).

<sup>160</sup> Frost, supra note 13, at 588 (“The challenged judge is the most natural party to respond to a motion to disqualify. He will be familiar with the facts cited by the moving party and is best able to put those facts in context for the decisionmaker.”).

<sup>161</sup> Id. at 589.

<sup>162</sup> See Cheney v. U.S. Dist. Court, 541 U.S. 913 (2004) (mem.) (Scalia, J.) (explaining in great detail why recusal was inappropriate in light of the circumstances); see also Laird v. Tatum, 409 U.S. 824 (1972) (mem.) (Rehnquist, J.) (stating that an explanation for recusal is appropriate in certain situations).

<sup>163</sup> Frost, supra note 13, at 582-90 (having to disclose any and all financial interests, personal relationships, prior knowledge of issues in a case; drafting a statement of innocence to refute the motion; and after the judge has gone through the aforementioned protocol, submitting a statement explaining the reasons why recusal was appropriate).

<sup>164</sup> See **Flamm**, supra note 13, § 1.10.5, at 25 (“Just as judges generally do not like to admit having committed legal

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error, they are typically less than eager to acknowledge the existence of situations that may raise questions about their impartiality . . . . [I]t must be acknowledged that the filing of a judicial disqualification motion may antagonize the challenged judge either consciously or subconsciously.”); Bassett, supra note 79, at 672 (“[M]any judges respond to potential recusal situations with a defensive—sometimes arrogant—“I am not biased; I can be fair.””); Donald C. Nugent, Judicial Bias, 42 **Clev. St. L. Rev.** 1, 5 (1994) (“[J]udges are typically appalled if their impartiality is called into question.”).

<sup>165</sup> Bassett, supra note 79, at 702.

<sup>166</sup> Id. at 703-05 (stating that the standard would encourage litigants to file recusal motions and draft “statements of interest” that “disclose[s] on the record information that [the] judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.”).

<sup>167</sup> Id. at 704 (“[I]f Justices were consistently to acknowledge all potential interests in the litigation before them [through “statements of interest”], such acknowledgements might invigorate public confidence in the Court—while at the same time preserving the Court’s critical function.”).

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<sup>168</sup> Bassett provides no rationale of why self-enforcement is good or bad, but from her support of the status quo it appears that she believes the current standard is effective. But see Bloom, supra note 5, at 697 (stating that transfer of a recusal motion to a different judge comports more closely to the objective standard of § 455(a) and could be more effective for preserving judicial integrity).

<sup>169</sup> Bassett, supra note 79, at 703 (stating that the new Statement of Recusal Policy should clarify the narrow approach so that a Justice only recuse when there is actual bias or an appearance of impropriety). Bassett's "quick and dirty" approach leaves the reader guessing what the professor suggests would help elucidate the high courts already narrow policy.

<sup>170</sup> Id. at 704.

<sup>171</sup> See Id. at 704 ("[P]ermitting all of the Justices to participate in the vast majority of cases.").

<sup>172</sup> Id. ("The institution of "statements of interest" would avoid fear by the public of unknown, unacknowledged relationships, interest, or biases that Justices might have in a particular case, and would serve a policing function for the Justices as well.").

<sup>173</sup> Gillers, et al. supra note 52 ("[The] Senate questionnaire reveal[s] that Roberts had several interviews with



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administration officials contemporaneous with the progress of the Hamdan appeal.”).

<sup>174</sup> See Hearing, supra note 53, at 2-3.

<sup>175</sup> **H.R. Rep. No.** 93-1453, at 5 (1974), reprinted in 1974 U.S.C.C.A.N. 6351, 6355.

<sup>176</sup> See Nugent, supra note 164, at 3 (“Fundamental to the notion of a fair trial and tribunal is the principle that a judge shall apply the law impartially and free from the influence of any personal biases.”). See generally Leubsdorf, supra note 35, at 277 (suggesting how difficult it is for a judge to know for whether they are completely impartial, “[y]et even honest judges may be swayed by unacknowledged motives.”).

<sup>177</sup> See Bassett, supra note 79, at 695 (explaining that recusal would remain the decision of the Justice, but that a new Supreme Court recusal statement would help clarify the appearance standard’s application to the Supreme Court).

<sup>178</sup> See Frost, supra note 13, at 583-87 (explaining that a neutral decisionmaker will increase public confidence in the judiciary).

<sup>179</sup> See Bruce Ackerman & Ian Ayres, **Voting with Dollars: A New Paradigm for Campaign Finance**, at 129, (2002) (“[retired judges have] been socialized into the cast of mind necessary for

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the successful operation of the FEC-cultivating habits of impartiality in the name of the rule of law.”).

<sup>180</sup> See Leubsdorf, supra note 43, at 277 (“[T]hough judges should be free to withdraw voluntarily, no sensible judicial system would leave disqualification entirely to the discretion of the judge in question.”).

<sup>181</sup> See Leubsdorf, supra note 43, at 277 (“When a judge is challenged, considerations of decorum and the tendency of judges to protect each other will make full exploration of the facts even more difficult.”); see also *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 n.12 (1988) (“A finding by another judge - faced with the difficult task of passing upon the integrity of a fellow member of the bench - that his or her colleague merely possessed constructive knowledge, and not actual knowledge, is unlikely to significantly quell the concerns of the skeptic.”). But See *Frost*, supra note 13, at 586 (“In any case, experience shows that judges are willing to risk offending one another when obligated to pass judgment in the course of fulfilling their judicial duties.”).

<sup>182</sup> See Bruce Ackerman & Ian Ayres, **Voting with Dollars: A New Paradigm for Campaign Finance**, at 129 (2002) (explaining that a better way to ensure that the F.E.C. would be impartial is to make the composition of the governing body consist of

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retired federal judges; retired judges would have numerous decisions that would allow for a full assessment of their fairness.)

<sup>183</sup> It seems that it would be difficult for any President to find 20 retired judges who match his ideology--reinforcing the autonomy of the oversight committee.

<sup>184</sup> Federal Judiciary Archives, Judges of the United States Federal Courts Database, <http://www.fjc.gov/public/home.nsf/hisj> (documenting that 166 federal judges have retired since January 1, 2000).

<sup>185</sup> Like retired judges, many Senior Circuit Court judges do not want to mar an esteemed career.

<sup>186</sup> Cf. American Psychological Association, Are Six Heads as Good as Twelve?, <http://www.psychologymatters.org/jurysize.html> (1998) (stating that "[l]arger groups [are] more contentious, debate more vigorously . . . . [M]a[k]e more consistent and predictable decisions).

Applying the jury size concept to the retired judge oversight committee is logical because a normal appellate panels consists of three members.

<sup>187</sup> If the Chief Justice decided to veto a judge, the sixth highest vote grossing judge would be appointed to the oversight committee.

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<sup>188</sup> See *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 461 (7th Cir. 1985) (explaining that the appearance standard must take into account a judge's unconscious bias); Bassett, supra note 79, at 671 ("[S]tudies of unconscious bias confirm the observation that people who claim, and honestly believe they are not prejudiced may nevertheless harbor unconscious stereotypes and beliefs . . . . [T]hey [judges] will not always recognize their own biases and stereotypes."). See also Leubsdorf, supra note 43, at 277 (explaining that while the judge hearing the case knows his or her feelings about the parties better than anyone else, unacknowledged motives can sway a judge's opinion in a manner that he or she cannot take into account).

<sup>189</sup> 18 U.C.S. § 455(b) (2000).

<sup>190</sup> Cf. Frost, supra note 13, at 589 (explaining that the recusal decisions that judges will write--articulating the grounds for their recusal, especially in cases where the appearance standard is applicable--"will provide a body of precedent to guide judges facing such decisions in the future."); Todd D. Peterson, Restoring Structural Checks on Judicial Power in the Era of Managerial Judging, 29 **U.C. Davis L. Rev.** 41, 99 (1995) (stating that the publishing of reviews could produce a body of precedent to guide future magistrate judges).

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<sup>191</sup> Laura E. Little, Loyalty, Gratitude, and the Federal Judiciary, 44 **Am. U. L. Rev.** 699, 731-32 (1995) (“[T]he most likely individual in the Executive Branch to stand out as the judge’s benefactor is the President . . . . What is quite likely is for the Executive Branch to have an interest in the case before the judge - either because the Executive or an Executive agency is a litigant, has taken a policy position on the case (through the Solicitor General or otherwise), or has a general institutional interest in a certain outcome . . . . [T]he Administration as a whole rises out as the benefactor, and the President stands as the symbol most deserving of the judge’s loyalty and gratitude.”).

<sup>192</sup> See supra notes 99, 125 (discussing two public controversies that involved a Supreme Court justice).

<sup>193</sup> See **Flamm**, supra note 13, Addendum to Appendix A, at 1068.

<sup>194</sup> **H.R. Rep. No.** 93-1453, at 5 (1974), reprinted in 1974 U.S.C.C.A.N. 6351, 6355.

<sup>195</sup> When Congress amended § 455 in 1974 they undertook an action intended to direct the behavior of all federal judges. See Jeffrey W. Stempel, Rehnquist, Recusal, and Reform, 53 **Brook. L. Rev.** 589, 658 (1987) (“Congress would be merely exercising its conceded power to regulate the Court in limited,

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nonpartisan means not related to the desired result in a given case.”).

<sup>196</sup> See Interview by Norman P. Aquino with Diane P. Wood, Circuit Court Judge for the 7th Circuit, in Chicago, IL. (Feb. 14, 2005) <http://www.law.uchicago.edu/news/judiciary.html> (discussing the problem of severely clogged dockets in our Federal Judiciary and suggesting some solutions to abate this predicament).

<sup>197</sup> **MacKenzie**, supra note 14, at 36 (“Americans want their judges to be immune from popular clamor so that they can do justice in the cases before them based on evidence rather than sentiment.”).

<sup>198</sup> Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), cert. granted, 74 U.S.L.W. 3287 (U.S. Nov. 7, 2005) (No. 05-184).