

# Do Appearances Matter?: Judicial Impartiality and the Supreme Court in *Bush v. Gore*

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# DO APPEARANCES MATTER?: JUDICIAL IMPARTIALITY AND THE SUPREME COURT IN *BUSH V. GORE*\*

SHERRILYN A. IFILL\*\*

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\* The admonition "appearances do matter," is taken from Justice O'Connor's majority opinion in *Shaw v. Reno*, 509 U.S. 630 (1993), a voting rights case in which the Court struck down the creation of majority-minority congressional districts because, according to Justice O'Connor, the irregular shape of the district bore "an uncomfortable resemblance to political apartheid." *Id.* at 647. Justice O'Connor declared that in political redistricting "appearances do matter." *Id.*

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## INTRODUCTION

In his passionate dissent in *Bush v. Gore*,<sup>1</sup> Justice John Paul Stevens predicted that “the Nation’s confidence in the judge as an impartial guardian of the rule of law” would be deeply shaken by the Court’s decision to stop the recount for the disputed presidential election and ultimately to decide the outcome in favor of candidate George W. Bush.<sup>2</sup> Justice Stevens’s prediction seemed to have been borne out in the weeks and months following the Court’s December 12, 2000 decision. Scores of lawyers, court watchers, and journalists expressed profound disappointment with the Court’s decision.<sup>3</sup> In the days following December 12, voters sent angry telegrams and letters to the Court.<sup>4</sup> Some, suggesting that the Court had stolen their right to vote, sent their voter registrations cards to the Court.<sup>5</sup> Lawyers admitted to practice in the Supreme Court bar reportedly withdrew their admission from the Court.<sup>6</sup> In an ad appearing on January 13, 2001, in the *New York Times*, 585 law professors denounced the decision.<sup>7</sup> This firestorm of criticism has abated somewhat. Some polls appear to suggest that at the very least voters have attempted to put *Bush v. Gore* behind them.<sup>8</sup> Yet, lingering doubts remain about the legitimacy of the Supreme Court’s role in ending the 2000 presidential election dispute.<sup>9</sup>

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1. 531 U.S. 98, 123 (2000) (Stevens, J., dissenting).

2. *Id.* at 129.

3. See Randall Kennedy, *Contempt of Court*, AM. PROSPECT, Jan. 1, 2001, at 15 (calling the Supreme Court’s decision a “scandal”); see also Robert G. Kaiser, *Slim Majority Raises Fear of Court Partisanship*, WASH. POST, Dec. 10, 2000, at A32 (describing the surprise and astonishment of many legal scholars after the Court granted certiorari); Mary McGrory, *Supreme Travesty of Justice*, WASH. POST, Dec. 14, 2000, at A3 (describing the decision as a “travesty” motivated purely by political and personal desires); Jeffrey Rosen, *Disgrace: The Supreme Court Commits Suicide*, NEW REPUBLIC ONLINE, Dec. 14, 2000, available at <http://www.thenewrepublic.com/122500/rosen122500.html> (criticizing the opinion as a “shabby piece of work” that has destroyed the faith of Americans in the Court).

4. Joan Biskupic, *Election Still Splits Court*, USA TODAY, Jan. 22, 2001, at 1A.

5. *Id.*

6. *Id.*

7. Nat Hentoff, *A Herd of Legal Minds: Professors Take on the Supreme Court*, WASH. TIMES, Feb. 19, 2001, at A17.

8. See Janet Elder, *The 43rd President: The Polls*, N.Y. TIMES, Dec. 18, 2000, at A22 (reporting that a majority of people polled, 54%, believe the Court made the right decision when it stopped the Florida recount and that Americans have other priorities); see also Herbert M. Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32, 38 (2001) (concluding that there have been minimal changes in the Supreme Court’s overall approval rating since *Bush v. Gore*).

9. See Akhil Reed Amar, *Should We Trust Judges?*, L.A. TIMES, Dec. 17, 2000, at 1 (criticizing the opinion in *Bush v. Gore* as being logically, historically, and constitutionally flawed); see also Jack M. Balkin, *Supreme Court Compromises Its Legitimacy*, BOSTON GLOBE, Dec. 12, 2000, at A23 (pointing out the irony of the decision and arguing that the Court

In this Article, I focus on a set of allegations that surfaced and quickly died during the first weeks of December 2000. These allegations suggested that several of the Justices on the Court should have disqualified themselves from participation in *Bush v. Gore* in order to avoid the appearance of bias. The Justices—Scalia, O'Connor, and Thomas—were alleged, as a result of either their conduct or their connection to litigants in the case, to have an interest in the outcome of the litigation from which their impartiality might reasonably be questioned.<sup>10</sup> At the time, most legal ethics experts concluded that the Justices had not violated ethical rules or guidelines governing judicial conduct and recusal.<sup>11</sup> I examine these allegations of judicial conflict and reach a different conclusion. I contend that these and other allegations of conflict involving Justices Scalia, Thomas, and O'Connor constituted grounds upon which the Justices should have felt compelled to recuse themselves from participation in the case, or taken other less severe measures, to avoid the appearance of impartiality. Instead, by failing to take any action to ameliorate the appearance of bias in *Bush v. Gore*, these Supreme Court Justices effectively exempted themselves from the requirements of 28 U.S.C. § 455(a) and Canon 3(E) of the Model Code of Judicial Conduct, which prohibit

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ruled purely on ideological and political grounds); Linda Greenhouse, *Collision with Politics Risks Court's Legal Credibility*, N.Y. TIMES, Dec. 11, 2000, at A1 (stating that the Court "has now placed itself in the midst of the political thicket where it has always most doubted its institutional competence"); Edward Lazarus, *For the Supremes, a Basic Test of Legitimacy . . .*, WASH. POST, Dec. 11, 2000, at A27 (predicting that the Court would rule in favor of Bush, scuttling the principle of "states' rights" and calling into question the Court's legitimacy).

10. One of Justice Scalia's sons is a partner in the law firm that represented then-candidate Bush in *Bush v. Gore*. Another of Scalia's sons had recently become an associate at another firm representing then-candidate Bush. Brooks Jackson, *Ethics Experts, Say Scalia, Thomas Connections Not Conflicts of Interest* (Dec. 12, 2000), available at <http://www.CNN.com/2000/LAW/12/12/supreme.court.conflict>; Bob Woodward & Charles Lane, *Scalia Takes a Leading Role in Case*, WASH. POST, Dec. 11, 2000, at A1. Justice O'Connor is alleged to have made comments on election night that revealed a bias in favor of candidate Bush. JEFFREY TOOBIN, TOO CLOSE TO CALL: THE THIRTY-SIX-DAY BATTLE TO DECIDE THE 2000 ELECTION 249 (2001). Virginia Lamp Thomas, the wife of Justice Thomas, as a senior fellow of the conservative think-tank Heritage Foundation, actively sought the resumes of potential candidates to serve in the new presidential administration during the pendency of *Bush v. Gore*. Christopher Marquis, *Job of Thomas's Wife Raises Conflict-of-Interest Questions*, N.Y. TIMES, Dec. 12, 2000, at A26.

11. See Jackson, *supra* note 10 (reporting that ethics experts concluded that neither Justice Scalia nor Justice Thomas had a conflict of interest in *Bush v. Gore*); see also Robert L. Jackson, *Calls for Recusal of Thomas, Scalia Are Undue, Experts Say*, L.A. TIMES, Dec. 13, 2000, at A25 (explaining that some legal ethics experts found no reason for Justices Scalia and Thomas to recuse themselves). But see *Democrat Urges Scalia to Bow Out of Florida Case*, CHARLESTON GAZETTE, Dec. 11, 2000, at 9A (quoting Lanny Davis, former special counsel to President Clinton, who suggested that Scalia should "explain why recusal, at least for appearances' sake, isn't desirable").

judges from hearing cases in which their "impartiality might reasonably be questioned."<sup>12</sup> Moreover, the failure of the Justices to act in this regard reflects a broader problem: the lack of clear guidelines governing the recusal practices of the Justices in cases where the appearance of bias is at issue.

In Part I of this Article, I provide some background on the "appearance" of bias standard contained in Canon 3(E) of the Model Code of Judicial Conduct and the federal judicial disqualification statute, 28 U.S.C. § 455(a). Both require that judges withdraw from participating in cases in which their "impartiality might reasonably be questioned."<sup>13</sup> In Part II, I examine the specific facts that gave rise to allegations that the participation of Justices Scalia, Thomas, and O'Connor in *Bush v. Gore* compromised the appearance of impartiality of those Justices in the case.<sup>14</sup> I contend that the participation of these Justices in *Bush v. Gore* likely violated the spirit and letter of 28 U.S.C. § 455(a) and Canon 3(E) of the Model Code.

In Part III, I examine the only formal attempt to disqualify a judge from hearing one of the *Bush v. Gore* election challenges based

12. 28 U.S.C. § 455(a) (2000); MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (2000). Some might contend that the case of *Bush v. Gore* is so unique that it is a distorted lens through which to explore the issue of judicial impartiality on the Supreme Court. But in my view, while many of the judicial bias issues raised by *Bush v. Gore* are idiosyncratic, many others are paradigmatic of the problems that plague the overall system for monitoring and evaluating the Court's compliance with the appearance of impartiality standard promulgated by Congress in 28 U.S.C. § 455(a) and by the American Bar Association in the Model Code of Judicial Conduct.

13. Only 28 U.S.C. § 455, however, is an enforceable statutory provision. The Model Code provisions are "statements of norms" developed by the American Bar Association's Standing Committee on Ethics and Professional Responsibility after consultation with judges, the bar, and the public. The Canons contained in the Code provide guidelines for the appropriate "ethical conduct of judges." MODEL CODE OF JUDICIAL CONDUCT Preamble (2000).

14. I recognize, of course, that many other actual or potential conflicts involving these same Justices or other Justices on the Court and the litigants in *Bush v. Gore* may exist. For example, prior to the December 10, 2000 Supreme Court argument in *Bush v. Gore*, conservative columnist Robert Novak reported that Justice Kennedy enjoyed a close friendship with Laurence Tribe, counsel for Al Gore in the Supreme Court during the first argument. Robert Novak, *Gore's Last, Desperate Chance*, CHI. SUN-TIMES, Nov. 30, 2000, at 35. This Article is not meant to constitute an investigation of all potential conflicts of interest between members of the High Court and the litigants in *Bush v. Gore*. Nor do I intend to offer here a substantive critique of the outcome or judicial reasoning of the Supreme Court's decision in *Bush v. Gore*. Others have already presented persuasive and thorough critiques of the majority's deeply flawed decision. See David A. Strauss, *Bush v. Gore: What Were They Thinking?*, in THE VOTE: BUSH, GORE, AND THE SUPREME COURT 184, 186 (Cass R. Sunstein & Richard A. Epstein eds., 2001) (stating that "[t]he decision in *Bush v. Gore* was not dictated by the law in any sense"); see also Jamin B. Raskin, *Bandits in Black Robes: Why You Should Still Be Angry About Bush v. Gore*, WASH. MONTHLY, Mar. 2001, at 25, 25 (calling the decision the worst in history).

on the appearance of bias. The recusal motion filed against Judge Nikki Clark—the only African-American trial judge to hear one of the *Bush v. Gore* cases—demonstrates that although the Justices on the Supreme Court may be insulated from challenges based on the appearance of bias, minority judges remain vulnerable to race-based challenges to their impartiality under 28 U.S.C. § 455(a).

In Part IV, I argue that Justices on the Supreme Court have a special obligation to provide leadership and guidance to judges and the bar in avoiding the appearance of bias. That obligation was never more important than during *Bush v. Gore*, a case that would decide the presidential election for a deeply divided country. In *Bush v. Gore*, several Justices could and should have undertaken a variety of measures—including but not limited to recusal—that would have diminished the appearance of judicial bias in that case. I try to identify some of these actions in Part IV.

## I. JUDGING, IMPARTIALITY, AND APPEARANCES

### A. *The Importance of Appearances in Judicial Decision-Making*

Judicial impartiality is one of the core elements of due process.<sup>15</sup> Just as litigants are entitled to an impartial jury, so too are litigants guaranteed the right to appear before a judge who is free of bias.<sup>16</sup> But in addition to prohibiting actual judicial bias, the Supreme Court has held that the *appearance* of judicial bias can also threaten due process.<sup>17</sup> In the words of the Supreme Court, “justice must satisfy the appearance of justice.”<sup>18</sup>

That judicial decision-making must *appear* to be free of bias is premised on the widely held belief that public confidence is essential to upholding the legitimacy of the judiciary.<sup>19</sup> Judges have no armies to enforce their decisions.<sup>20</sup> In the federal courts, and in a dozen states,

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15. See *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (observing that it is a violation of due process to subject a criminal defendant to a judge with an interest in the outcome of the proceeding).

16. See *id.* at 535 (concluding that defendants have the right to have an impartial judge).

17. See *Offutt v. United States*, 348 U.S. 11, 17 (1954) (explaining that a judge has an obligation to maintain composure and a solemn tone in proceedings to ensure fairness to the parties).

18. *Id.* at 14.

19. See MODEL CODE OF JUDICIAL CONDUCT Canon 1 cmt. (2000) (commenting that “[d]eference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges”).

20. See *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992) (stating that the Court could not “independently coerce obedience to its decrees”).

the judiciary is appointed and thus does not even carry the imprimatur of legitimacy that legislators derive from being elected "by the people."<sup>21</sup> Instead, the judiciary—especially the appointed judiciary—derives its authority and legitimacy from the willingness of the people and sister branches of government to accept and submit to its decisions.<sup>22</sup> Because public confidence is so essential to maintaining the integrity of the bench, even the appearance of bias, parochialism, or favoritism can threaten the judicial function.<sup>23</sup>

Despite this now standard argument, the public perception of judges and the judiciary as nonpolitical, neutral decision-makers, has been deeply eroded during the past fifty years.<sup>24</sup> Indeed, judicial decision-making has increasingly come under fire for being "activist," "partisan," "imperial," or "legislative."<sup>25</sup> The legitimacy of the judiciary as a whole has been challenged by a variety of constituencies—from conservative activists and politicians to minority voters.<sup>26</sup> State judicial

21. Lindsay G. Robertson, *Neutral Principles and Judicial Legitimacy*, 54 OKLA. L. REV. 53, 55 (2001).

22. See *Planned Parenthood*, 505 U.S. at 865 ("The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.").

23. In this Article, I do not take issue with this line of reasoning. Rather, assuming that this argument is a sound one—as many do—I explore whether Justices on the Court were sufficiently attentive to the appearance of bias in *Bush v. Gore*. Justices O'Connor, Souter, Kennedy, and Breyer have spoken passionately about the importance of deciding cases in ways that promote the Court's legitimacy. See *Bush v. Gore*, 531 U.S. 98, 157-58 (2000) (Breyer, J., dissenting) (arguing that public confidence in the Court is a "public treasure" and important to protect basic liberty); see also *Planned Parenthood*, 505 U.S. at 864-67 (discussing the basis of the Court's power and the need to guard against undermining the legitimacy of the Court).

24. Jack Wade Nowlin, *The Constitutional Illegitimacy of Expansive Judicial Power: A Populist Structural Interpretive Analysis*, 89 KY. L.J. 387, 389-90 (2001).

25. See 146 CONG. REC. S7758 (daily ed. July 27, 2000) (statement of Sen. Leahy) (articulating a serious concern "about whether the Court has embarked on a program of judicial activism"); 146 CONG. REC. S7598 (daily ed. July 26, 2000) (statement of Sen. Biden) (attacking the "imperial judiciary" and its federalism jurisprudence); Erwin Chemerinsky, *The Rehnquist Court and Justice: An Oxymoron?*, 1 WASH. U. J.L. & POL'Y 37, 37 (1999) ("[T]he Rehnquist Court is an activist, conservative Court. . . . It is conservative . . . in the sense that it is animated by the right-wing political agenda.").

26. See, e.g., Linda Greenhouse, *Judges as Political Issues*, N.Y. TIMES, Mar. 23, 1996, at A1. In about a dozen cases brought during the 1980s and 1990s, African-Americans, Latinos, and Native Americans challenged methods of electing judges that prevented minority voters from electing judicial candidates of their choice. See *Clark v. Edwards*, 725 F. Supp. 285, 287 (M.D. La. 1988), *appeal dismissed*, 958 F.2d 614 (5th Cir. 1992) (challenging the method of electing family court, district court, and court of appeals judges in Louisiana as violating the Fourteenth and Fifteenth Amendments); see also *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 838 (5th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994) (challenging the single-district method of electing trial judges in Texas as discriminatory against Mexican-American and African-American voters). In those cases, minority groups,

election contests have become increasingly politicized and contentious. In 1985, a candidate running for Chief Judge of the Texas Court of Appeals broke the \$1 million mark for campaign spending.<sup>27</sup> The role of special interest groups in judicial campaigns has further changed the landscape of judicial election contests in many states. These groups launch sophisticated and targeted campaigns against judicial candidates often using inflammatory language, distorted facts, or racial appeals.<sup>28</sup>

The federal judiciary has not been immune from this increasingly contentious climate. Nominations and confirmation hearings for federal court seats have become overtly hostile,<sup>29</sup> political,<sup>30</sup> and racial.<sup>31</sup>

in essence, challenged the structural exclusion of minority-supported judges from the bench. For a description of how plaintiffs in these cases sought structural impartiality through diversity on the bench, see generally Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997) [hereinafter Ifill, *Judging the Judges*]. I argue that a judiciary that persistently excludes the perspectives of minorities and other traditionally excluded groups cannot be impartial. *Id.* at 98-99; see also Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 405 (2000) [hereinafter Ifill, *Racial Diversity on the Bench*] (arguing that racial diversity among judges is necessary to achieve cultural pluralism in legal decision-making).

27. See "60 Minutes Examines" Controversy Over Donations to Judges, Hous. Post, Dec. 7, 1987, at 2A (describing the controversy over lawyers' contributions to the campaigns of Texas Supreme Court judges); see also Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1394-96 (2001) (describing the changing nature of judicial campaigns). It has been estimated that \$62,000,000 is spent on judicial election contests annually. See Roy Schotland, *Financing the 2000 Election: Change and Challenge*, in FINANCING THE 2000 ELECTIONS (David Magleby ed., forthcoming 2002).

28. See Champagne, *supra* note 27, at 1404 (quoting a North Carolina Supreme Court justice's description of these tactics). The voting record of incumbent judges is often examined and labeled "soft on crime," "activist," or "anti-death penalty." Racial appeals are also deployed by interest groups. For example, in 1988 in New Orleans, Louisiana, a group calling itself "the Committee to Preserve Judicial Integrity" mailed out a flyer to white neighborhoods in the City showing photographs of five white incumbent judges contrasted with photos of five black candidates challenging the incumbents for seats on the bench. The flyer urged "Let's protect the integrity of the Courts . . . Re-elect our Judges." Committee to Preserve Judicial Integrity News Flyer (on file with author); see also Champagne, *supra* note 27, at 1394 (describing actions of deputy district attorneys in Los Angeles that "encouraged opposition to judges they believed were soft on crime").

29. The Supreme Court nominations of Judge Robert Bork and Justice Clarence Thomas are widely regarded as among the most contested and volatile in the history of the Court. Of course many forget that the nomination of Thurgood Marshall to the Second Circuit Court of Appeals and then to the Supreme Court was at least as, and perhaps more, contentious. See generally *Nomination of Thurgood Marshall, of New York, to be Associate Justice of the Supreme Court of the United States: Hearings Before the Sen. Comm. on the Judiciary*, 90th Cong. (1967); JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 332-38 (1998). Justice Marshall's grilling at the hands of segregationist southern senators on the Judiciary Committee was characterized by overtly hostile and racist challenges to Marshall's fitness and qualification to serve. WILLIAMS, *supra*, at 334-37.

Attacks on judicial decision-making have increased as well<sup>32</sup>—with some of these attacks coming from the bench itself.<sup>33</sup> Federal judges feel increasingly compelled to respond to public attacks on judicial decision-making.<sup>34</sup>

Although politics, ideology, race, and gender considerations have long played a role in the nomination and selection of federal judges, these machinations were traditionally conducted behind the scenes.<sup>35</sup>

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30. The Republican-dominated Senate moved along President Clinton's nominations to the federal bench at a snail's pace, despite a critical shortage of federal judges in several jurisdictions. Recently, Republicans have charged the now-Democrat-controlled Senate with politically motivated delays of President Bush's nominees to the bench. See David G. Savage, *Senate Confirms 1st Round of Judges*, CHI. TRIB., July 21, 2001, at N10 (describing the ongoing political struggle in confirming federal judges). Chief Justice Rehnquist recently criticized the political delay of judicial nominations by the formerly Republican-controlled Senate and by the now-Democrat-controlled Senate. Linda Greenhouse, *Rehnquist Sees a Loss of Prospective Judges*, N.Y. TIMES, Jan. 1, 2002, at A16.

31. For eight years Senator Jesse Helms reportedly blocked hearings on African-American judicial candidates proposed by President Clinton to fill vacancies on the Fourth Circuit Court of Appeals. Debra Baker, *Waiting and Wondering*, A.B.A. J., Feb. 1999, at 52, 53. The Fourth Circuit, which includes Maryland, Virginia, West Virginia, and North Carolina has the largest black population of any federal circuit, yet no black judge had ever served on the Fourth Circuit until the year 2000. *Id.* In 2000, President Clinton bypassed the Senate confirmation process to make a recess appointment to the Fourth Circuit. See Savage, *supra* note 30. As a result, Roger Gregory, a Virginia lawyer, became the first black to sit on the Fourth Circuit. In 2001, President Bush officially appointed Judge Gregory to the Fourth Circuit. Judge Gregory was confirmed by the Senate. *Id.*

32. In 1996—a presidential election year—attacks on federal court judicial decision-making became particularly virulent. See Linda Greenhouse, *Judges as Political Issues*, N.Y. TIMES, Mar. 23, 1996, at A1 (noting that Republican presidential candidates “outdid one another” in their attempts to rid the nation of “liberal judges”). The appointment of more conservative justices to the nation's federal courts became a presidential campaign issue during that year. See *id.* (noting that two Republican presidential hopefuls, Patrick Buchanan and Bob Dole, made the federal judiciary a regular topic of their campaign speeches).

33. See, e.g., Charles Lane, *Disorder in the Court: Judges Squabble Over Proceedings Surrounding Ohio Man's Stay of Execution*, WASH. POST, Nov. 12, 2001, at A3 (describing a dispute between judges on the United States Court of Appeals for the Sixth Circuit over a stay of execution for a death row convict).

34. See Neil MacFarquhar, *Federal Judge to Resign, Citing Political Attacks on Judiciary*, N.Y. TIMES, June 5, 1996, at B4 (citing Third Circuit Judge H. Lee Sarokin's self-described inability to ignore political attacks as the reason for his resignation); see also *Second Circuit Chief Judges Criticize Attacks on Judge Baer*, N.Y.L.J., Mar. 29, 1996, at 4 (describing a statement authored by judges on the United States Court of Appeals for the Second Circuit condemning attacks on judicial decision-making as a threat to the independence of Article III judges).

35. See, e.g., JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* 227-33 (2001) (describing in detail the intensely political and often crude considerations that influenced President Nixon's selection of then-Assistant Attorney General William Rehnquist to fill a vacant seat on the Supreme Court); see also *id.* at 181, 183-84 (alleging that then-Chief Justice Burger privately threatened to resign if President Nixon appointed a woman to the Court).

The image presented to the public was one that reinforced the image of the judiciary as a neutral locus of considered and dispassionate decision-making. In fact, the federal judiciary itself has taken great pains to foster an image of neutrality. The Supreme Court in particular has aggressively worked to protect the image of its decision-making as above the fray of politics, personal interest, or internecine battles.<sup>36</sup> By emphasizing cohesiveness, unanimity, and collegiality, the Justices have fostered an image of the judiciary as principled and apolitical.<sup>37</sup> Even after the sharply divided decision in *Bush v. Gore*, several of the Court's Justices made certain in their public statements to downplay or debunk reports of lingering tension in the Court's chambers. A day after the decision, Justice Thomas used a previously scheduled talk with high school students to insist that where the Court is concerned, "don't try to apply the rules of the political world."<sup>38</sup> Other Justices made similar remarks during this period, emphasizing as well that no rancor existed between the Justices as a result of the sharply divided decision.<sup>39</sup> These rather unconvincing efforts at damage control in the weeks following December 12, 2000 reflect the importance the Justices attach to maintaining an image of unity and camaraderie as a shield against negative public scrutiny.<sup>40</sup>

Justices on the Court also act in more formal ways to protect the image of the Court's decision-making as far removed from the kind of political calculations that characterize legislative and executive decisions. In highly controversial cases involving important public and divisive policy issues, members of the Court have often worked hard to garner sufficient votes to issue unanimous opinions in order to both

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36. See Lewis F. Powell, Jr., *What Really Goes on at the Supreme Court*, in DAVID M. O'BRIEN, JUDGES ON JUDGING: VIEWS FROM THE BENCH 83, 83-86 (1997); see also WILLIAMS, *supra* note 29, at 353 (explaining that Justice Marshall felt that the Court was "like family"); cf. David Von Drehle, *Nine Decisive Votes, Deep Political Peril*, WASH. POST, Dec. 12, 2000, at A1 (noting that in recent years the Court's legitimacy has remained intact while the Presidency and the Congress have been damaged in the public eye in the wake of President Clinton's impeachment proceedings).

37. See DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 372-78 (3d ed. 1993) (discussing the relationship between public opinion and the Supreme Court, and noting that "the Court's prestige rests on preserving the public's view that justices base their decisions on . . . the law, rather than on their personal policy preferences").

38. Neil A. Lewis, *Justice Thomas Speaks Out on a Timely Topic, Several of Them, in Fact*, N.Y. TIMES, Dec. 14, 2000, at A23.

39. See HOWARD GILLMAN, THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION 172-73 (2001) (citing the remarks of Justices Rehnquist, Scalia, and Breyer).

40. See *id.* at 173 ("One need not wonder whether the judges doth protest too much to realize that the specter of illegitimate partisan decision-making was in the air.").

protect the Court as an institution and to insulate individual Justices from partisan or ideological attacks.<sup>41</sup> Unanimous opinions also encourage public acceptance of difficult or even unpopular Court decisions by suggesting a kind of unassailable inevitability to the Court's determinations.<sup>42</sup>

By refusing to act, the Court can also protect its image. Denying certiorari review, for example, is one of the most powerful ways the Court acts to avoid controversial cases that have potentially broad and politically divisive public policy impact.<sup>43</sup> Likewise, the Court's adherence to stare decisis protects its members from charges of judicial bias or partiality. In effect, stare decisis preserves the rule of law, but also helps judges deflect public criticism and censure.<sup>44</sup>

Even when the Court takes on cases involving highly divisive issues, its decisions can reflect the Justices' concern with maintaining public confidence. In *Planned Parenthood v. Casey*, Justices O'Connor, Souter, and Kennedy spoke candidly about the Court's need to decide

41. See RICHARD KLUGER, *SIMPLE JUSTICE* 693-99 (1976) (discussing Chief Justice Earl Warren's ultimately successful efforts to issue a unanimous opinion in *Brown v. Board of Education*); see also HERBERT A. JOHNSON, *THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801-1835*, at 100 (1997) (crediting Chief Justice Marshall for creating "the 'opinion of the Court' device" to shield individual Justices from negative attention associated with publicly divisive or unpopular opinions).

42. See, e.g., *United States v. Nixon*, 418 U.S. 683, 713 (1974) (ordering the President to comply with a subpoena seeking the Watergate tapes). *United States v. Nixon* was a unanimous 8-0 decision, after Justice Rehnquist—a former Assistant Attorney General under President Nixon—recused himself from the case. *Id.* at 685; see also *Cooper v. Aaron*, 358 U.S. 1, 4-5 (1958) (issuing a unanimous opinion ordering defiant state officials to comply with a federal court order requiring desegregation of Arkansas high schools). Elsewhere I have cautioned, however, that reliance on unanimous opinions to promote acceptance of difficult decisions inhibits the expression representation function of judging. Ifill, *Racial Diversity on the Bench*, *supra* note 26, at 472-73; see also Robert Robinson, *The Polyphonic Courtroom: Expanding the Possibilities of Judicial Discourse*, 101 DICK. L. REV. 3, 18 (1996) (criticizing the typical majority opinion as suppressing individual judicial viewpoints and discouraging debate).

43. See H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 243 (1991) (maintaining that the Court will likely deny certiorari to a petition that raises an intractable problem). Some argue, however, that the Court's avoidance of difficult and contentious questions, particularly when it does so selectively, impoverishes our "long-term constitutional dialogue" and leaves potentially unconstitutional "temporary or local majoritarian impulses" unchecked. LISA A. KLOPPENBERG, *PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF LAW* 16 (2001); see also Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1494-96 (2000) (suggesting that because the judiciary is insulated from majoritarian pressures, it has an advantage in protecting individual rights).

44. See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 22 (1993) ("[I]f judges considered every case afresh they would . . . lose the protection from criticism and attack that comes from being able to blame an unpopular decision on someone else (that is, on earlier judges).").

cases in ways that are "sufficiently plausible to be accepted by the Nation."<sup>45</sup> They recognized that "[t]he Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle . . . ."<sup>46</sup> In effect, Justices O'Connor, Souter, and Kennedy explicitly acknowledged that the Court's decision-making must not only *be legitimate*, but must also *appear to be legitimate* in order to preserve the public's sense of confidence in the Supreme Court's authority.<sup>47</sup>

*B. Evaluating the Appearance of Bias Under 28 U.S.C. § 455(a)*

In accordance with the demands of due process, 28 U.S.C. § 144 entitles a litigant to seek the removal of a judge from hearing a case when "the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party."<sup>48</sup> In effect, § 144 clearly disqualifies a judge from hearing a case when he or she is *actually* biased in favor of or against a litigant or has an interest in the outcome of the litigation.

28 U.S.C. § 455, however, contains a more comprehensive framework than § 144 for determining recusal questions. In addition to requiring disqualification when there is proof of actual bias, § 455 prohibits judges from hearing cases in which their "impartiality might reasonably be questioned."<sup>49</sup> Amended in 1974 to include this "appearance" standard, § 455 mirrors language that had been adopted earlier in Canon 3(C) of the Model Code of Judicial Conduct.<sup>50</sup> The effect of the amendment of § 455 was to do away with the need of showing actual bias and to impose an objective standard for evaluating recusal questions.<sup>51</sup> Rather than focusing on a judge's sense of whether his disqualification is warranted, the new § 455(a) standard

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45. 505 U.S. 833, 866 (1992).

46. *Id.* at 865.

47. Professor Deborah Hellman argues that given the views they expressed in *Casey*, these Justices were especially obligated to be attentive to the appearance of their actions in *Bush v. Gore*. Deborah Hellman, *Judging by Appearances: Professional Ethics, Expressive Government, and the Moral Significance of How Things Seem*, 60 MD. L. REV. 653, 672-73 (2001).

48. 28 U.S.C. § 144 (2000). The removal provision provides in pertinent part:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

*Id.*

49. *Id.* § 455(a).

50. *Liljeberg v. Health Servs. Acquisitions Corp.*, 486 U.S. 847, 858 n.7 (1988).

51. *Id.*

requires a judge to determine whether a reasonable person would question the ability of the judge to impartially hear and decide the case.<sup>52</sup> As Chief Justice Rehnquist later remarked, Congress, when it amended § 455 in 1974,

was concerned with the “appearance” of impropriety, and to that end changed the previous subjective standard for disqualification to an objective one; no longer was disqualification to be decided on the basis of the opinion of the judge in question, but by the standard of what a reasonable person would think.<sup>53</sup>

Nevertheless, neither the Model Code nor § 455(a) contain specific guidelines to aid lawyers and judges in determining how to evaluate when a “reasonable person” would question the impartiality of the judge. The Supreme Court has approved the Fifth Circuit Court of Appeals’ determination that recusal is required when “a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge” of facts that create “an appearance of partiality.”<sup>54</sup> By practice in federal court and in most states, however, the challenged judge is herself initially entrusted with the task of determining whether her actions or interests give rise to the appearance of bias.<sup>55</sup> This reality is problematic. While there may be strong reasons for a challenged judge to hear a motion for recusal based on *actual* bias,<sup>56</sup> there is little reason to believe that a judge against whom disqualification is sought under § 455(a) is in the best position to determine whether her connection to the litigation at issue “appears” biased to a reasonable person.

In fact, a challenged judge is in an especially poor position to make recusal determinations under the “appearance” of bias stan-

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52. *Id.* at 859-60.

53. *Id.* at 872 (Rehnquist, C.J., dissenting).

54. *Liljeberg*, 486 U.S. at 860-61 (quoting *Health Servs. Acquisitions Corp. v. Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986)).

55. See Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 545-46 (1994) (surveying state practices granting a challenged judge the authority to determine recusal motions).

56. *Id.* at 559. The judge himself is likely to have or know the information most relevant to a determination of actual bias, such as financial connection to one of the parties, familial relationship with one of the parties, or participation as a lawyer in the litigation at an earlier stage. See *id.* (presenting the argument of those who believe judges should rule on their own recusal motions because they best know their “thoughts” and “feelings”). By contrast, the appearance of bias is best evaluated from the perspective of another judge, as it does not depend on the presence or absence of *actual* direct interest in the litigation. *Id.* at 559-60.

dard.<sup>57</sup> Judges are discouraged, by a variety of institutional pressures, from recusing themselves from cases in which there is no charge or proof of actual bias. For example, the common law Rule of Necessity requires that judges sit in cases when recusal would leave the litigants with no judicial forum in which to vindicate their rights, even if the judge may have an interest in the outcome of the litigation.<sup>58</sup>

Even in the absence of "necessity," judges often feel a strong compulsion to sit and hear cases in which there is no allegation of actual bias.<sup>59</sup> Justices on the Supreme Court are particularly vulnerable to this pressure. In *Laird v. Tatum*, decided prior to the amendment to § 455, Justice Rehnquist deemed the "duty to sit" particularly compelling for Supreme Court Justices because no other judge can substitute for an absent Justice.<sup>60</sup> Rehnquist therefore discouraged Supreme Court Justices from "'bending over backwards' . . . to deem oneself disqualified."<sup>61</sup>

That view continues to influence the Court's recusal practices even though the 1974 amendment to § 455 overturned the "duty to sit" doctrine relied on by Justice Rehnquist in *Laird*.<sup>62</sup> By its very terms, amended § 455 now requires that judges do precisely what Jus-

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57. *Id.* at 559.

58. *United States v. Will*, 449 U.S. 200, 214 (1980). For this reason, federal judges have been permitted to hear cases involving judicial salaries. *Id.* at 217. If recusal were strictly applied to those claims, no federal judge could hear those cases. *Id.*; see also STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW & ETHICS* 596 (5th ed. 1998) (explaining that Congress, in enacting § 455, did not intend to alter the Rule of Necessity). But see *United States v. Hatter*, 519 U.S. 801, 801 (1996) (affirmed for absence of quorum).

59. See, e.g., *Feichtinger v. State*, 779 P.2d 344, 348 (Alaska 1989) (quoting *Amidon v. State*, 604 P. 2d 575, 577 (Alaska 1979)). In *Feichtinger*, the court warned, "[w]hile we agree that judges must avoid the appearance of bias, it is equally important to avoid the appearance of shirking responsibility." *Id.* at 348.

60. 409 U.S. 824, 837 (1972) (mem. of Rehnquist, J.).

61. *Id.* at 838. Supreme Court Justices are particularly concerned that the regular recusal of Justices may enable savvy litigators to strategize and manipulate the certiorari petition process. Because four Justices are required to grant cert, if only one Justice recuses himself from a cert decision, for example, a litigant is required to obtain the votes of four out of eight, instead of four out of nine Justices.

62. See, e.g., Supreme Court of the United States, Statement of Recusal Policy, Nov. 1, 1993 (on file with author) [hereinafter Statement of Recusal Policy] (describing the Justices' negative view of "unnecessary recusal"). The fact that Justice Rehnquist may have deliberately avoided addressing, in his *Laird* opinion, whether the duty to sit trumps the "appearance" of impartiality doctrine, and given the fact that the "duty to sit" doctrine was the subject of significant criticism at the time *Laird* was decided, reliance on the *Laird* rationale is even more problematic. Although not part of the federal recusal statute at the time, the appearance standard had already been included in the Model Code of Judicial Conduct when *Laird* was decided. MODEL CODE OF JUDICIAL CONDUCT CANON 2 (1972). Yet Justice Rehnquist in *Laird* did "not read these particular provisions as being materially different." *Laird*, 409 U.S. at 825. As a result, Justice Rehnquist saw "no occasion . . . to give them separate consideration." *Id.*

tice Rehnquist counseled against in *Laird*—"bend over backwards" to avoid hearing cases in those instances in which their impartiality might appear to be compromised, regardless of whether *actual* bias exists. In close cases, § 455(a) warrants recusal rather than a "duty to sit," and encourages judges to err on the side of caution in evaluating whether to withdraw from hearing a case.<sup>63</sup> Yet judges continue to be influenced by the arguments advanced in *Laird* in support of the "duty to sit" doctrine.<sup>64</sup>

To be certain, Justices on the Supreme Court face legitimate concerns that are not at issue for judges on other courts who are faced with recusal motions. The fact that no other judge can replace a recused Supreme Court Justice means that a Justice's recusal from a case raises the possibility of a 4-4 evenly divided decision. The effect of such a split is affirmance of a lower court decision.<sup>65</sup> And because certiorari decisions require the approval of four Justices, recusal from consideration of a certiorari petition places a greater burden on the party seeking cert, by compelling the party to obtain four votes out of eight, rather than four votes from nine Justices.<sup>66</sup> Nevertheless, in scores of cases each year, one or more of the Justices recuses him or herself without doing violence to the orderly operation of the Court and its decision-making function.<sup>67</sup> Given the countervailing and ar-

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Commentators have explored and critiqued in some detail Justice Rehnquist's incorrect reading of the Code provisions. See, e.g., Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 596-608 (1987). As a result of his either inaccurate or misleading reading of the Model Code, Justice Rehnquist never addressed whether, under the appearance of impartiality standard, he should have disqualified himself from participating in the hearing and determination of *Laird* itself. See *id.* at 601-04.

63. See *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989) (interpreting the 1974 amendment of § 455 and concluding that § 455 "requires judges to resolve any doubts they may have in favor of disqualifications"). Indeed some evidence suggests that the controversy surrounding Rehnquist's refusal to withdraw from participation in the *Laird* case figured into Congress's deliberations in incorporating the Model Code's "appearance" standard into § 455(a). See H.R. REP. NO. 93-1453, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355 (criticizing the "duty to sit" concept).

64. See *Republic of Panama v. Am. Tobacco Co.*, 250 F.3d 315, 317-19 (5th Cir. 2001) (Parker, J., concurring) (voting to reconsider a recusal motion en banc based on then-Justice Rehnquist's discussion in *Laird*); see also *United States v. Jackson*, 30 F.3d 199, 206 (1st Cir. 1994) (Pettine, J., concurring) (citing *Laird* for the proposition that a judge's view regarding the subject matter of a case fails to provide grounds for recusal); *Wessman v. Boston Sch. Comm.*, 979 F. Supp. 915, 916 n.2 (D. Mass. 1997) (referring to then-Justice Rehnquist's memorandum in *Laird* as "a standard for recusal decisions").

65. See, e.g., *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 516 U.S. 233 (1996); *United States v. Pink*, 315 U.S. 203, 216 (1942).

66. See O'BRIEN, *supra* note 37, at 246-56 (discussing the development of the so-called "Rule of Four").

67. See Erwin N. Griswold & Ernest Gellhorn, *200 Cases in Which Justices Recused Themselves*, WASH. POST, Oct. 18, 1988, at A25 (stating that between 1987 and 1988, the Supreme

guably more important interest in maintaining the integrity and legitimacy of the Court, affirmances caused by split decisions from an evenly divided Court and a greater burden on parties seeking cert may simply be the unavoidable and necessary cost of strict compliance with § 455(a).

*C. The Particular Difficulty of Discerning the Supreme Court's § 455(a) Recusal Standards*

Because Supreme Court recusal decision-making is somewhat shrouded in mystery, it is difficult to identify uniform or consistent standards used by the Justices in making recusal determinations based on the "appearance" of bias.<sup>68</sup> Supreme Court Justices are not required to issue written decisions explaining decisions to withdraw from hearing a case.<sup>69</sup> And of course the disqualification decisions of Supreme Court Justices are not subject to review by other judges or courts. Moreover, there is no public indication that the Justices utilize any formal internal process in which Justices collectively review § 455(a) recusal motions raised by litigants, or collectively evaluate impartiality concerns raised by the Justices themselves.<sup>70</sup>

Instead, it appears that the Justices on the Court enjoy the unreviewable power to determine individually whether and when to disqualify themselves from cases in which their impartiality could reasonably be questioned.<sup>71</sup> Historically, this appears to have produced a highly idiosyncratic application of the "appearance" standard. For example, for years Justice Thurgood Marshall reportedly recused himself from many cases in which the NAACP or the NAACP Legal Defense and Educational Fund, Inc. (the LDF) was counsel.<sup>72</sup> He also recused himself from participating in the determination of whether to

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Court sat without a full court in one out of every fifteen cases, and that further increases in disqualifications are expected).

68. See Stempel, *supra* note 62, at 641-43 (discussing recusal practices in the Supreme Court).

69. O'BRIEN, *supra* note 37, at 226.

70. *Id.*; see also William H. Rehnquist, *The Supreme Court's Conference*, in O'BRIEN, *supra* note 36, at 87, 87-90 (describing in detail the Court's Conference, but making no mention of how the Court considers recusal issues). It is obvious that some informal consultative process is used, however. See, e.g., *Microsoft Corp. v. United States*, 530 U.S. 1301 (2000) (order denying appeal). In a statement explaining his decision not to recuse himself from the case, Chief Justice Rehnquist wrote, "I have reviewed the relevant legal authorities and consulted with my colleagues." *Id.*

71. See Stempel, *supra* note 62, at 621-28 (providing various episodes in Supreme Court history in which a Justice's impartiality could be reasonably questioned).

72. See, e.g., *Devine v. NAACP Legal Defense & Educ. Fund, Inc.*, 469 U.S. 1203, 1204 (1985) (mem.); *Lansing Bd. of Educ. v. NAACP*, 438 U.S. 907 (1978) (mem.); *NAACP v. New York*, 413 U.S. 345, 347 (1973).

grant the LDF permission to file amicus briefs in a variety of cases.<sup>73</sup> Marshall served first as counsel to the NAACP and then as founder and director-counsel to the LDF for thirty-five years, before he was named Solicitor General in 1961.<sup>74</sup> Yet Marshall continued to recuse himself from LDF cases more than twenty years after he had left the organization and begun his life as a government lawyer and judge.<sup>75</sup> Marshall's caution does not seem to be required by § 455(a). Whether recusal was warranted in those cases or not, Marshall's withdrawal stands in stark contrast to the position taken by Justice Rehnquist in *Laird v. Tatum*. Laird challenged Justice Rehnquist's participation in the case on the grounds that as an Assistant Attorney General in the Nixon Administration, Rehnquist had testified before a Senate Committee about the precise issue before the Court in *Laird* and had participated in discussions about the *Laird* case during that time as well.<sup>76</sup> Given Justice Marshall's actions in NAACP cases and Justice Rehnquist's in *Laird*, it is clear that the Justices do not adhere to a uniform interpretation of their recusal obligations under § 455(a).

The virtual insulation of their recusal practice under § 455(a) from close, critical, and informed<sup>77</sup> scrutiny leaves the door open for Supreme Court Justices to apply a more subjective standard in § 455(a) recusal cases, rather than the "reasonable person" standard

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73. See, e.g., *Peters v. Kiff*, 405 U.S. 914 (1972) (mem.); *McGautha v. California*, 440 U.S. 814 (1970) (mem.); *Sibron v. New York*, 389 U.S. 950 (1967) (mem.).

74. John P. MacKenzie, *Thurgood Marshall*, in IV THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 3062, 3066-90 (Leon Friedman & Fred L. Israel eds., 1969).

75. See, e.g., *Missouri v. Jenkins*, 491 U.S. 274, 274 (1989); *Tallahassee Branch of NAACP v. Leon County*, 486 U.S. 1003, 1003 (1988). Justice Marshall's abundance of caution may reflect his shrewd acknowledgement of the reality that as the Court's only African-American Justice, he would likely be subject to heightened scrutiny and charges of bias. The particular vulnerability of African-American judges to charges of bias based on their race is discussed in Ifill, *Judging the Judges*, *supra* note 26, at 114-19, and in this Article, *infra*, at pt. III. Marshall is not the only Justice to exercise an abundance of caution in recusal matters. Justice Stevens reportedly disqualified himself from hearing a case, *Turnock v. Ragsdale*, 493 U.S. 987 (1989) (mem.), in which his niece was counsel—an act clearly not required by the statute, which only bars Justices from hearing cases in which a relative "within the third degree of relationship [to the Justice], is acting as a lawyer in the proceeding." 28 U.S.C. § 455(b)(5)(ii) (2000). See Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657, 660 n.15 (1996). The third degree of relationship is generally understood to include spouses, children, children of a spouse, and grandchildren, but not nieces and nephews. 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3548, at 607 n.3 (2d ed. 1984).

76. *Laird v. Tatum*, 409 U.S. 824, 824-25 (1972) (mem. of Rehnquist, J.).

77. The fact that the Justices do not provide written explanations for each of their recusal decisions makes it difficult for outside observers to evaluate the Court's recusal practices and the standards used by individual Justices.

required by Congress in the amended statute.<sup>78</sup> The fact that some Justices rarely provide written opinions explaining their recusal decisions, while others more routinely issue written recusal decisions,<sup>79</sup> reflects the kind of personal, individualized approach the Justices take towards recusal questions. In fact, according to one report, several of the Justices refrain from providing written explanations of decisions to recuse themselves from cases so as not to “embarrass another justice who chooses not to recuse in similar circumstances.”<sup>80</sup> If this is true, then the Justices encourage and protect a fiercely independent approach to their recusal determinations.

The broad latitude afforded the Justices in making these determinations may be further aided by the tradition of deference and politesse that characterizes Supreme Court practice. Although recusal motions are filed against Justices on the Court, most litigants do not seek disqualification—certainly not one based merely on the appearance of bias—because to do so suggests a lack of confidence in a Justice’s ability to evaluate the issues objectively. In the rarified world of Supreme Court practice, such an action may constitute a breach of protocol.<sup>81</sup> Without hard evidence of actual bias, a litigant in the Supreme Court may fear exposing a Justice to embarrassing scrutiny before his or her colleagues on the bench and before the public.

Perhaps for this reason, litigants sometimes appear to *suggest* indirectly that a Justice’s connection to a case creates the appearance of bias, rather than formally move to disqualify the Justice from the case. For example, in 1996, Professor Laurence Tribe included in the brief accompanying his petition for certiorari on behalf of the University of Texas in *Texas v. Hopwood*<sup>82</sup> a footnote describing the 1982 role of then-Assistant Secretary of Education Clarence Thomas encouraging the University to undertake admissions policies that would be likely to increase the number of minorities in its graduate and professional

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78. Even the practice of some Justices to refrain from explaining their decision to withdraw from participation in a case, and the practice of others to provide written explanations of recusal decisions, reflects the kind of personal choice that governs the Justices’ conduct in this area.

79. See Tony Mauro, *Souter Watch*, LEGAL TIMES, Dec. 3, 1990, at 15 (highlighting Justice Souter as one of the majority of Justices who regularly refuse to explain their recusal decisions, and identifying Chief Justice Rehnquist and Justice O’Connor as the only members of the Court who routinely disclose their reasons for recusal).

80. *Id.*

81. See Stempel, *supra* note 62, at 599 (describing the “strong traditions of deference and good manners prevailing in Supreme Court practice” that may influence a litigant’s decision not to seek recusal of a Justice).

82. 84 F.3d 720 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

schools.<sup>83</sup> At the time, some speculated that Tribe sought to provoke the recusal of Justice Thomas without moving outright for the Justice's recusal.<sup>84</sup> Tribe strongly denied the suggestion.<sup>85</sup>

In a more recent case, rather than formally move for disqualification, the attorney for a man convicted and sentenced to death for the murder of the father of Judge John Luttig of the Fourth Circuit Court of Appeals faxed a letter to the clerk of the Court asking Justice Thomas to recuse himself from the case.<sup>86</sup> Justice Thomas's close personal relationship with Judge Luttig was revealed in an October 2000 *New York Times Magazine* article profiling Judge Luttig.<sup>87</sup> The article also described Luttig as a key figure in the confirmation of Justice Souter to the Court. Justice Scalia, for whom Judge Luttig had served as a law clerk, had already voluntarily recused himself from the case. The lawyer for the death-row convict stated that he would file a motion for recusal against Justice Thomas if he received no response to the letter.<sup>88</sup> Ultimately, Justices Scalia, Souter, and Thomas disqualified themselves from participation in the decision to deny cert in that case.<sup>89</sup>

In point of fact, there are no clear procedures for litigators who seek to disqualify Supreme Court Justices—a fairly remarkable fact given the complex set of rules and procedures that govern practice before the Court. Stern and Gressman's *Supreme Court Practice* is the "bible" for litigators in the Court.<sup>90</sup> While the text provides detailed instructions on the nuts and bolts of Supreme Court practice—from how to prepare the joint appendix to be submitted to the Court to how to address the Justices during oral argument—this nearly 1000 page litigation volume never even mentions recusal or disqualification, let alone how to seek disqualification of a Justice.<sup>91</sup> In effect, a lawyer who questions the impartiality of a Supreme Court Justice is

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83. Petition for a Writ of Certiorari at 9 n.3, *Texas v. Hopwood*, 518 U.S. 1033 (1996) (No. 95-1773).

84. See Tony Mauro, *Thomas Recusal?*, *LEGAL TIMES*, May 20, 1996, at 9 (providing the text of the footnote and suggesting it may be "in the university's interest not to have Thomas voting in the case").

85. *Id.*

86. Jim Yardley & Raymond Bonner, *Justice Thomas' Recusal Sought in Texas Death Case*, *N.Y. TIMES*, Aug. 13, 2001, at A13.

87. Jeffrey Rosen, *The Next Court*, *N.Y. TIMES*, Oct. 22, 2000, § 6 (Magazine), at 74.

88. Yardley & Bonner, *supra* note 86.

89. *Beazley v. Johnson*, 242 F.3d 248 (5th Cir.), *stay of execution denied*, 533 U.S. 969 (2001), *cert. denied sub nom. Beazley v. Cockrell*, 122 S. Ct. 329 (2001).

90. ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* (7th ed. 1993).

91. *Id.* Other commentators have remarked on this curious fact as well. See, e.g., Stempel, *supra* note 62, at 598 n.42.

given no direction on how to prepare a challenge to a Justice's participation in the hearing of the case. The absence of specific procedures for filing recusal motions to the Court implicitly discourages recusal motions by suggesting that they are outside the realm of "regular" Supreme Court practice. It also reinforces the notion that the Justices themselves, rather than litigants, are expected to take the lead in initiating recusal practices.

Indeed, in 1993, seven members of the Court collectively took the lead and created a uniform recusal policy for one category of cases. Released as a press statement, the Justices' 1993 "Statement of Recusal Policy" set out a procedure by which Justices would disqualify themselves from hearing cases in which their relatives are partners in firms appearing before the Court.<sup>92</sup> The recusal requirements for these kinds of cases are governed by 28 U.S.C. § 455(b)(5)(ii).<sup>93</sup> In the Statement, the Justices announced that they would recuse themselves from cases in which their relatives are partners in law firms appearing before the Court "unless we have received from the firm written assurance that income from Supreme Court litigation is, on a permanent basis, excluded from our relatives' partnership shares."<sup>94</sup> The wording of the Statement suggests that the opposite would also be true—

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92. Statement of Recusal Policy, *supra* note 62. Justices Souter and Blackmun did not sign the Recusal Policy.

93. 28 U.S.C. § 455(b) (2000) provides that in addition to instances in which a judge's "impartiality might reasonably be questioned," as set out in § 455(a), a judge must also recuse him or herself:

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

94. Statement of Recusal Policy, *supra* note 62, at 2.

that in cases in which the Court has received such written assurances from their relatives' law firms, the Justices *will* participate in deciding cases involving those law firms.<sup>95</sup>

In the Statement, the Justices re-emphasized their negative view of recusal in cases where actual bias is not at issue:

We do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier state. Even one unnecessary recusal impairs the functioning of the Court.<sup>96</sup>

The Justices highlighted the special problems of recusal on the Supreme Court "where the absence of one Justice cannot be made up by another."<sup>97</sup> They also raised the concern that lawyers might begin "strategizing" recusals, and that the certiorari process may be "distort[ed]."<sup>98</sup>

While the adoption of this policy was in one sense an admirable attempt to create a uniform and public standard for recusal of cases involving § 455(b)(5), the Recusal Policy signals the Court's failure to fully appreciate the scope of § 455(a). The Justices' Recusal Policy ignores the fact that a Justice's participation in a case in which a relative is a partner in a firm appearing before the Court may create the *appearance* of bias even if the Justice's relative receives no share of the financial benefits derived from the firm's Supreme Court practice. In other words, the Statement of Recusal Policy fails to recognize the potential § 455(a) "appearance" problems raised by cases in which the relatives of Justices are partners in law firms appearing before the Court.

In fact, the Recusal Policy is directly at odds with the guidance offered in the Commentary to Canon 3 of the Model Code. There, the Committee on Ethics specifically cautions that although "[t]he fact that a lawyer in a proceeding is affiliated with a law firm . . . does not of itself disqualify the judge[.] . . . [u]nder appropriate circumstances, the fact that 'the judge's impartiality might reasonably be questioned' . . . may

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95. Such examples are discussed *infra* notes 101-116 and accompanying text (discussing Chief Justice Rehnquist's decision not to recuse himself in the *Microsoft* case despite his son's involvement); *infra* notes 117-125 and accompanying text (discussing Justice Scalia's involvement in *Bush v. Gore* and his son's partnership in the law firm that represented George W. Bush in the election contest and protest litigation).

96. Statement of Recusal Policy, *supra* note 62, at 1.

97. *Id.* at 2.

98. *Id.*

require the judge's disqualification."<sup>99</sup> In essence, the Code explicitly calls for § 455(b) determinations to be made in tandem with the requirements of § 455(a). By contrast, the Court's Recusal Policy takes § 455(a) considerations out of its recusal evaluation of these cases.

In effect, the 1993 Recusal Policy constitutes the Court's blanket and prejudged determination that a Justice's impartiality is not reasonably questioned when a relative is a partner in a firm appearing before the Court, so long as the Justice's relative receives no direct financial benefit from the matter before the Court. Rather than applying an objective reasonable person standard on a case-by-case basis, as § 455(a) requires,<sup>100</sup> the Recusal Policy simply reflects the Justices' own sense of what *to them* would constitute a reasonable basis upon which to question a judge's impartiality and applies that standard across the board.

In September 2000, Chief Justice Rehnquist had occasion to further clarify the Court's Recusal Policy and its relationship to § 455(a) determinations. In *Microsoft v. United States*,<sup>101</sup> Chief Justice Rehnquist issued a statement explaining his decision not to withdraw from the decision in that case, even though his son James defended Microsoft in a variety of private antitrust matters.<sup>102</sup> Chief Justice Rehnquist's decision not to recuse himself in *Microsoft* drew criticism from some prominent legal ethics experts.<sup>103</sup> His forthright disclosure of the issue and direct and public statement explaining the rationale behind his decision not to recuse himself drew praise from others.<sup>104</sup>

In a statement explaining his decision in *Microsoft*, Chief Justice Rehnquist provided an analysis of recusal under both § 455(a) and (b)<sup>105</sup> that reveals how the Court has failed to appropriately integrate a rigorous § 455(a) analysis into its Recusal Policy. In his statement in

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99. MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(d) cmt. (2000) (emphasis added). In fact, years earlier the ABA had adopted the more stringent position that "an equity partner in a law firm generally has 'an interest that could be substantially affected by the outcome of the proceeding in all cases where the law firm represents a party before the court.'" ABA Comm. on Codes of Conduct, Advisory Op. 58 (1978) (revised 1998). The Code does not contain such a strict interpretation of Canon 3, but the Commentary clearly suggests that the Committee intended for judges to exercise caution in these cases and to consider the "appearance" or 3(E) implications of recusal.

100. 28 U.S.C. § 455(a) (2000).

101. 530 U.S. 1301 (2000) (order denying appeal).

102. *Id.* at 1301-03.

103. See, e.g., Tony Mauro, *Rehnquist Won't Bow Out: Refusal to Recuse in Microsoft*, LEGAL TIMES, Oct. 2, 2000, at 12 (noting that Professor Stephen Gillers, a legal ethics expert, concluded that Chief Justice Rehnquist should have recused himself from the *Microsoft* case).

104. See *id.* (reporting the comments of judicial ethics expert Professor Steven Lubet).

105. *Microsoft*, 530 U.S. at 1302.

*Microsoft*, the Chief Justice determined that § 455(b)(5)(iii), which governs recusal in cases in which a relative of a judge “[i]s known . . . to have an interest that could be substantially affected by the outcome of the proceeding,”<sup>106</sup> did not compel his recusal from hearing the *Microsoft* case. He concluded that “there is no reasonable basis to conclude that the interests of my son or his law firm will be substantially affected by the proceedings currently before the Supreme Court.”<sup>107</sup> Rehnquist appears to have based this conclusion, in part, on the unremarkable fact that “Microsoft has retained Goodwin, Procter & Hoar on an hourly basis at the firm’s usual rates.”<sup>108</sup> In a particularly revealing passage, Rehnquist stated, “[e]ven assuming that my son’s non-pecuniary interests are relevant under the statute [28 U.S.C. § 455], it would be unreasonable and speculative to conclude that the outcome of any Microsoft proceeding in this Court would have an impact on those interests . . . .”<sup>109</sup> What is striking about this statement is that it reveals the Chief Justice’s skeptical view about the relevance of nonpecuniary interests to recusal determinations—interests clearly relevant to an evaluation of recusal under § 455(a). Rehnquist’s skepticism in this regard is further revealed in his brief discussion of § 455(a), which he determined also did not compel his recusal from the *Microsoft* case. His explanation was simple:

I have already explained that my son’s personal and financial concerns will not be affected by our disposition of the Supreme Court’s *Microsoft* matters. Therefore, I do not believe that a well-informed individual would conclude that an appearance of impropriety exists simply because my son represents, in another case, a party that is also a party to litigation pending in this Court.<sup>110</sup>

Chief Justice Rehnquist’s summary analysis and explanation of why recusal is not warranted by § 455(a) is deeply flawed. It seems quite clear that the disposition of the federal government’s mammoth antitrust case against *Microsoft* could well have an effect on smaller private antitrust cases against the computer giant. As Stephen Gillers notes, “[p]rivate antitrust litigation involving *Microsoft* would almost certainly be influenced by the outcome of the government’s case against the software giant.”<sup>111</sup> Indeed Rehnquist himself conceded

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106. *Id.* (quoting 28 U.S.C. § 455(b)(5)(iii) (1994)).

107. *Id.*

108. *Id.*

109. *Id.* (emphasis added).

110. *Id.*

111. Mauro, *supra* note 103.

that “[a] decision by this Court as to Microsoft’s antitrust liability could have a significant effect on Microsoft’s exposure to antitrust suits in other courts.”<sup>112</sup> Certainly a reasonable, well-informed person might conclude, as Professor Gillers did, that in light of that reality Rehnquist “should step aside.”<sup>113</sup>

Yet Chief Justice Rehnquist brushed aside this fact with the following rationalization:

[B]y virtue of this Court’s position atop the Federal Judiciary, the impact of many of our decisions is often quite broad. The fact that our disposition of the pending Microsoft litigation could potentially affect Microsoft’s exposure to antitrust liability in other litigation does not, to my mind, significantly distinguish the present situation from other cases that this Court decides. Even our most unremarkable decision interpreting an obscure federal regulation might have a significant impact on the clients of our children who practice law.<sup>114</sup>

Ultimately, Chief Justice Rehnquist concluded that “[g]iving such a broad sweep to § 455(a) seems contrary to the ‘reasonable person’ standard which it embraces.”<sup>115</sup> Yet Chief Justice Rehnquist’s analysis appears to strip § 455(a) of the power to impose recusal on Supreme Court Justices in cases in which the interests of their lawyer-relatives’ clients might be affected by disposition of pending Supreme Court litigation. Under the Chief Justice’s reasoning in *Microsoft*, one might well conclude that Supreme Court Justices need *never* disqualify themselves from cases in which their relatives are lawyers for parties appearing before the Court, so long as no direct financial interests are at stake. Giving such a narrow sweep to § 455(a) would seem at odds not only with the “reasonable person” perspective from which § 455(a) questions are to be evaluated, but also with Congress’s express “concern[ ] with the ‘appearance’ of impropriety.”<sup>116</sup>

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112. *Microsoft*, 530 U.S. at 1302.

113. Tony Mauro, *Rehnquist to Participate in Microsoft Case*, LEGAL INTELLIGENCER, Sept. 27, 2000, at 4 (quoting Stephen Gillers).

114. *Microsoft*, 530 U.S. at 1302-03.

115. *Id.* at 1303.

116. *Liljeberg v. Health Servs. Acquisitions Corp.*, 486 U.S. 847, 872 (1988).

## II. THE APPEARANCE OF JUDICIAL BIAS ON THE SUPREME COURT IN *BUSH V. GORE*

### A. *Justice Scalia and the Appearance of Bias*

1. *The Lawyer/Relative Question.*—The conflict between the Court's 1993 Statement of Recusal Policy and § 455(a) was tested by Justice Scalia's participation in *Bush v. Gore*. In the days immediately prior to the second oral argument in *Bush v. Gore*, several newspapers reported for the first time that one of Justice Scalia's sons, Eugene Scalia, was a partner at Gibson, Dunn & Crutcher, the law firm representing George W. Bush in the election contest and protest litigation.<sup>117</sup>

Expert opinions on whether Justice Scalia should have disqualified himself from hearing the case concluded, for the most part, that no real conflict existed.<sup>118</sup> References were made to the Court's 1993 Statement of Recusal Policy for handling cases in which a relative of a sitting Justice is employed by a law firm appearing before the Court. Gibson, Dunn & Crutcher apparently had provided a written assurance to the Court that Eugene Scalia would receive no partnership benefits from Supreme Court cases.<sup>119</sup> Justice Scalia did not recuse himself from participating in *Bush v. Gore*. In fact, Justice Scalia took on a leadership role in granting candidate Bush's request to stop the recount, and in deciding the election in favor of candidate Bush.<sup>120</sup> Scalia's participation in *Bush v. Gore* exposes the clear conflict between the Court's 1993 self-created Statement of Recusal Policy and the obligations imposed by § 455(a).

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117. See, e.g., Woodward & Lane, *supra* note 10. Another of Justice Scalia's sons was an associate in yet another firm that formed part of the Bush legal defense. I focus on the bias issue raised by Eugene Scalia's partnership in Gibson, Dunn & Crutcher.

118. See Jackson, *supra* note 10 (quoting Stephen Gillers, who concluded that Justice Scalia was not required to recuse himself). But see *Democrat Urges Scalia to Bow Out of Florida Case*, *supra* note 11 (quoting Lanny Davis, former special counsel to President Clinton, who suggested that Scalia should explain "why recusal, at least for appearances' sake, isn't desirable").

119. See Mauro, *supra* note 103 (describing Gibson, Dunn & Crutcher's "elaborate procedures . . . developed to ensure that [Eugene Scalia] does not benefit monetarily from the firm's Supreme Court practice").

120. Justice Scalia wrote the widely criticized decision explaining the majority's decision to stop the recount. *Bush v. Gore*, 531 U.S. 1046, 1046 (Scalia, J., concurring) (2000). For an analysis of Justice Scalia's leadership role in deciding *Bush v. Gore*, see Woodward & Lane, *supra* note 10. For a critique of Justice Scalia's stay decision and leadership role in *Bush v. Gore*, see GILLMAN, *supra* note 39, at 124-25; RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 166-67 (2001); Strauss, *supra* note 14, at 189-91.

In the context of *Bush v. Gore*, a reasonable person, and certainly Vice President Gore, might well have believed that Justice Scalia would be favorably inclined towards the client of the firm where his son was a partner—particularly in a case of the magnitude, controversy, and partisan nature of *Bush v. Gore*. Yet, the 1993 Statement and Justice Scalia ignored this potential reality.

Justice Scalia's participation in *Bush v. Gore* reveals the flawed reasoning behind the Court's decision to premise its recusal policy in cases involving relatives who are partners in law firms appearing before the Court on whether the lawyer/relative stands to gain partnership profits from Supreme Court litigation. The policy takes no account of the prestige benefit of winning a case in the Supreme Court—especially a controversial case. The principal benefit to the firm of Gibson, Dunn & Crutcher of taking and winning *Bush v. Gore* was reputational rather than financial. The entire firm of Gibson, Dunn & Crutcher received this benefit.<sup>121</sup> For example, in naming Gibson, Dunn & Crutcher one of the top five law firms in Los Angeles, *Corporate Board Member Magazine* noted that "Gibson, Dunn & Crutcher may have done best in terms of prestige. The firm took on the Supreme Court case[ ] of *Bush v. Gore* . . . arguing for the plaintiff-cum-president."<sup>122</sup> Ensuring that Eugene Scalia would not receive a portion of the fees derived from the firm's Supreme Court practice would not prevent the younger Scalia from receiving the reputational benefit that would attach to all of the firm's partners if Bush prevailed in the litigation.<sup>123</sup>

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121. Gibson, Dunn & Crutcher may also have made a different, more long-term calculation in its decision to represent candidate Bush. Lawyers at the firm may have reasonably concluded that a Bush win would be financially beneficial to the firm as many of the policies advanced by Bush during his campaign might, if put into practice, benefit several of Gibson, Dunn's major clients. For example, Bush's controversial campaign support for the creation of a national missile defense system might, if enacted, benefit defense contractor Northrop, Grumman, one of Gibson, Dunn & Crutcher's Los Angeles clients. See [www.gibsondunn.com/Recruitment/brochure.oppabound\\_p05.html](http://www.gibsondunn.com/Recruitment/brochure.oppabound_p05.html) (last visited May 14, 2002) (listing Northrop Grumman as a Gibson, Dunn & Crutcher client). In this regard, all of Gibson, Dunn's partners may have stood to gain from a Bush win.

122. Thomas Horton, *Leaders in 50 Metro Areas: Los Angeles*, CORP. BOARD MEMBER, Special Legal Issue 2001, available at [http://www.boardmember.com/issues/2001\\_LAW](http://www.boardmember.com/issues/2001_LAW).

123. For example, potential clients, learning that this is the firm that "won" *Bush v. Gore*, might be favorably inclined to hire the lawyers at Gibson, Dunn & Crutcher. Eugene Scalia was recently nominated by President Bush to serve as the Solicitor for the Department of Labor, the top lawyer charged with managing what has been described as the second-largest legal department in the federal government. Cindy Skrzycki, *Labor Choice Decried Ergonomics Rule*, WASH. POST, June 12, 2001, at E1. While President Bush no doubt would have nominated Scalia—a well known conservative labor lawyer—to the post whether or not Gibson, Dunn & Crutcher were the law firm that represented him in *Bush v. Gore*, it is also true that it was easy to predict that if Al Gore had become President he would not have

In sum, the Court's method of dealing with cases in which relatives are partners in law firms appearing before the Court does not adequately address the appearance of conflict in *Bush v. Gore*. A serious and careful § 455(a) evaluation might well have compelled Justice Scalia to disqualify himself from hearing the case to avoid the appearance of bias. The blanket nature of the Recusal Policy, and Justice Scalia's apparent determination that not even the unique and critically important case of *Bush v. Gore* warranted a departure from the policy,<sup>124</sup> demonstrates the Court's failure, refusal, or inability to properly and consistently submit to the requirements of § 455(a).<sup>125</sup>

2. *Additional Grounds for Appearance of Bias Concerns.*—There are additional reasons that Justice Scalia's participation in *Bush v. Gore* might have raised the appearance of bias. On several occasions during the presidential campaign, then-candidate Bush expressed his admiration for Justices Scalia and Thomas. Indeed the candidates' views

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nominated Eugene Scalia to the Labor post, or any other post in his administration. Given this reality, a reasonable person could conclude that the Scalias had an interest in the outcome of the election—one that cannot be measured in purely financial terms. In fact, although Eugene Scalia will take a pay cut as he moves from partnership in a large law firm to this public sector job, he was reportedly "honored and pleased" to accept President Bush's invitation to this prestigious post. Clearly, financial gain is not the only, or even the best way to measure a lawyer's professional interests.

124. As Chief Justice Rehnquist recognized in *Bush v. Gore*, "[w]e deal here not with an ordinary election, but with an election for President of the United States." 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring)).

125. Of course, presuming that Justice Scalia would be favorably predisposed to his son's firm assumes that both father and son enjoy a positive and supportive relationship. It is certainly not outside the realm of possibility for a father to have no desire to assist or promote the professional interests of his son. But certainly in the absence of an assertion to the contrary, a reasonable person might justifiably assume that Justice Scalia would be pleased by the success of his son's firm in the highest profile case to come to the Court in decades. Indeed, such an assumption is implicit in the disqualification language of Canon 3(E) of the Model Code and 28 U.S.C. § 455(a)(5), prohibiting a judge from hearing a case in which a spouse or person within the third degree of relationship to either of them acts as a lawyer in the case or "[i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455 (a)(5)(iii) (2000). The Model Code's language is slightly different, prohibiting a judge from hearing a case in which a spouse or someone within the third degree of relationship to either of them "is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding." MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(i)(d)(iii) (2000).

And, of course, both the Model Code and § 455 express not only a concern with actual bias, but express equally the importance of judges avoiding the *appearance* of bias. MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1); 28 U.S.C. § 455(a). One need not presume, therefore, that Justice Scalia *actually* would be so unprofessional as to put a personal interest in his son's professional advancement above the rule of law. Instead, the relevant question is whether a "reasonable person" might conclude, based on the facts set out above, that a Justice might be so inclined.

on the Justices became a key campaign issue. At one point, candidate Bush stated that if he had the opportunity to nominate a Justice to the Supreme Court, he would nominate a Justice like Justice Scalia or Justice Thomas, both of whom he held up as his judicial role models.<sup>126</sup> Certainly, the mere fact that a presidential candidate speaks highly of the work of a judge before whom he later appears as a party is not in and of itself sufficient grounds for recusal.<sup>127</sup> But in this case, the nature of Bush's comments could have had two more significant meanings for Justice Scalia that raise appearance of bias concerns.

First, although any judge would be gratified to hear an executive promise to appoint like-minded judges to sit on the same bench, for a judge on a court as ideologically split as the current Supreme Court, a promise such as that offered by then-candidate Bush had special significance. In real terms, the appointment of Justices to the High Court who share the views of Justices Scalia and Thomas would result in an even stronger lurch to the right in a variety of highly controversial cases—cases in which Justices Scalia and Thomas have to date been unable to garner a majority for their often extreme and uncompromising interpretation of important constitutional questions.<sup>128</sup> For example, if Justices O'Connor and Stevens resigned from the bench and were replaced on the Court by Justices with views more closely aligned with those of Justice Scalia, many argue that *Roe v. Wade* might well be overturned.<sup>129</sup> To the extent that Justice Scalia,

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126. David G. Savage, *Supreme Stumpers: The Next President Could Reshape the Court and the Legal Arena*, A.B.A. J., Oct. 2000, at 26, 26.

127. *But see* Spires v. Hearst Corp., 420 F. Supp. 304 (C.D. Cal. 1976). In *Spires*, a district court judge granted a recusal motion filed by employees of the *Los Angeles Herald* based on the fact that, prior to discovery in the case, the paper wrote a flattering profile of the judge. *Id.* at 307. Apparently, "there was no newsworthy event in which the judge was involved that explained or justified the Paper's decision to profile the judge at all or at that time." Hellman, *supra* note 47, at 660. The judge concluded that his impartiality "might reasonably be questioned." *Spires*, 420 F. Supp. at 307.

128. As Frank Michelman has noted, "Justices of an ideologically charged and divided Court have ideologically self-serving reasons to wish their ideological allies in a position to control the coming composition of the Court." Frank I. Michelman, *Suspicion, or the New Prince*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT*, *supra* note 14, at 123, 133.

129. *See* Planned Parenthood v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in part and dissenting in part) (contending that the right to an abortion is not a constitutionally protected liberty). The possibility of such a shift on the Court is discussed in Rosen, *supra* note 87. Vice President Gore remarked on the effect of Supreme Court appointments on the survival of *Roe v. Wade* frequently during the campaign. *See* Stewart M. Powell, *Gore Lambastes Two Justices as Bush's Models to Fill Vacancies*, *HERALD-SUN* (Durham, N.C.), June 29, 2000, at A10 (describing a Gore speech in the Midwest in which Gore warned that the result of the presidential election may influence a woman's right to choose); *see also* Savage, *supra* note 126, at 26 (quoting Gore as saying "[t]he last thing this country needs is a Supreme Court that overturns *Roe v. Wade*").

like most judges, would strongly prefer to have his strong and sincerely held views prevail in majority decisions, rather than languish in dissent, Bush's campaign promise may have given Justice Scalia an interest in the outcome of the presidential election.<sup>130</sup> Even if Justice Scalia did not develop a bias in favor of Bush as a result of the candidate's praise for Scalia's jurisprudence, Bush's remarks may have given a reasonable person cause to question Scalia's impartiality in a case in which the Justice would help determine the outcome of the presidential election.

Indeed, Vice President Gore's negative comments about Justice Scalia might also cause a reasonable person to question the Justice's impartiality toward the Vice President. In counter to candidate Bush, during the campaign candidate Gore strongly criticized Justices Scalia and Thomas, calling their dissent in the case upholding the legality of partial birth abortion "bitter in tone and divisive in nature."<sup>131</sup> The Vice President also reportedly referred to another of Justice Scalia's dissents as "a particularly convoluted bit of logic."<sup>132</sup> Moreover, candidate Gore challenged Bush's promise to name judges to the Court like Justices Scalia and Thomas in the October 3, 2000 presidential debate:

[W]hen the names of Scalia and Thomas are used as benchmarks for who would be appointed, those are code words, and nobody should mistake this, for saying that the governor would appoint people who would overturn *Roe v. Wade*. I mean, it's very clear to me. And I would appoint people who have a philosophy that I think would make it quite likely that they would uphold *Roe v. Wade*.<sup>133</sup>

Gore reportedly named Justices Thurgood Marshall and William Brennan as his judicial role models.<sup>134</sup>

For the same reasons that candidate Bush's campaign statements praising Justices Scalia and Thomas's jurisprudence might have created the appearance of bias in favor of Bush, so too candidate Gore's strong statements criticizing Justices Scalia and Thomas might cause a reasonable person to think that Justice Scalia was biased against the Vice President.

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130. See Posner, *supra* note 44, at 18 (noting that judges "even on the Supreme Court . . . obtain satisfaction from casting votes that are not merely symbolic expressions, but count").

131. Powell, *supra* note 129.

132. *Id.*

133. Election 2000 Presidential Debates, Oct. 3, 2000, available at [http://www.c-span.org/campaign2000/transcript/debate\\_100300.asp](http://www.c-span.org/campaign2000/transcript/debate_100300.asp).

134. Savage, *supra* note 126, at 26.

Bush's campaign flattery of Justice Scalia may have undermined the appearance of Justice Scalia's impartiality in another way. Some commentators speculated at the time of his comments that candidate Bush was indicating implicitly his intention to elevate Justice Scalia to the position of Chief Justice when Chief Justice Rehnquist steps down.<sup>135</sup> A Bush electoral victory could theoretically pave the way for Justice Scalia to advance to the highest level of professional achievement for any judge, that of Chief Justice of the United States.<sup>136</sup> That an opportunity to become Chief Justice might, even unconsciously, affect a judge's decision-making is not far-fetched. As some studies have revealed, judges are conscious of how their decision-making affects their career advancement.<sup>137</sup> In any case, § 455 and the Model Code are not concerned solely with whether a judge would *in fact* act on such a personal interest. Instead § 455 and the Model Code are focused on whether a litigant—in this case Vice President Gore—might reasonably believe that Justice Scalia might be, even unconsciously, motivated by such a concern. I contend that such a belief is reasonable.

*B. Justice O'Connor and the Appearance of Bias*

According to several published reports, Justice Sandra Day O'Connor had a very particular interest in the outcome of the election.<sup>138</sup> It was reported that at an election night dinner attended by close friends, Justice O'Connor remarked "[t]his is terrible" when several television news reports declared Gore the likely winner of the election.<sup>139</sup> According to the report, when Justice O'Connor left the room, her husband explained that she was distressed by the possibility of Gore winning the election because she wanted to retire, and would only do so under a Republican president in order to ensure that a Republican would appoint her successor.<sup>140</sup> If this account and the

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135. See, e.g., Wayne Woodlief, *In the Supreme Court of Public Opinion*, BOSTON HERALD, May 28, 2000, at 29.

136. I am grateful to Mark Rahdert, Associate Dean at Temple University, for raising this point during a discussion of *Bush v. Gore* at the Temple Political and Civil Rights Law Review's 2001 Symposium on "Constructive Disenfranchisement." See Symposium, *Constructive Disenfranchisement: The Problems of Access and Ambiguity Facing the American Voter*, 11 TEMP. POL. & CIV. RTS. L. REV. (forthcoming 2002).

137. See Posner, *supra* note 44, at 5 (suggesting that the potential appointment of federal court of appeals judges to the Supreme Court figures in the thinking of some judges).

138. See, e.g., Evan Thomas & Michael Isikoff, *The Truth Behind the Pillars*, NEWSWEEK, Dec. 25, 2000, at 46, 46 (reporting Justice O'Connor's reaction to early reports on the outcome of the election).

139. *Id.*

140. *Id.*

explanation offered by Justice O'Connor's husband are true, then Justice O'Connor expressed a personal interest in the outcome of the election from which a reasonable person might question her impartiality in *Bush v. Gore*.

Of course, all active and concerned voters—including presumably judges—may feel a personal interest in the outcome of a presidential election. But the interest reportedly expressed by Justice O'Connor extends beyond the mere desire of a partisan to see “her candidate” or political party prevail. Instead, Justice O'Connor's intention to coordinate her long-desired retirement with the election of a Republican president reveals a more direct interest—indeed a personal bias—towards Republican candidate Bush. While in general judges are not prevented from having a strong and personally felt bias in favor of a particular presidential candidate, such a bias was deeply problematic for a Justice sitting on a sharply divided Court whose decision would constitute the last word on the outcome of the election.

In his recent book, *Too Close to Call*, Jeffrey Toobin relates a story that, if accurate, suggests a shocking level of bias by Justice O'Connor.<sup>141</sup> According to Toobin's sources, Justice O'Connor commented on what she called the “outrageous” actions of “those Gore people,” whom she accused of going “into a nursing home and register[ing] people that they shouldn't have.”<sup>142</sup> As the legality of voter registration methods was not among the factual or legal issues presented in *Bush v. Gore*, Justice O'Connor could only have gleaned this information from newspaper accounts or from rumor. In fact, Toobin notes that this story was one that “had circulated only in the more eccentric right-wing outlets.”<sup>143</sup> If Toobin's account of Justice O'Connor's remarks on December 4 is true, then she was biased against Gore based on unproven accusations of actions she attributed to the candidate. As such, Justice O'Connor should not have participated in the hearing or decisions in *Bush v. Gore* at the Supreme Court.

### C. Justice Thomas and the Appearance of Bias

In November and December 2000, Virginia Lamp Thomas, wife of Justice Clarence Thomas, was actively engaged on behalf of the conservative Heritage Foundation in soliciting resumes for candidates to fill key positions in the possible Bush administration.<sup>144</sup> The Heri-

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141. TOOBIN, *supra* note 10, at 248-49.

142. *Id.* at 248.

143. *Id.* at 249.

144. Marquis, *supra* note 10.

tage Foundation is an influential conservative think-tank where Mrs. Lamp Thomas was employed as a senior fellow.<sup>145</sup> After allegations of bias appeared in several newspapers, representatives of the Heritage Foundation explained that the "head-hunting" work of Mrs. Lamp Thomas was "designed to help the next president, whoever he may be, to organize an effective administration."<sup>146</sup>

On its face, the Heritage Foundation's explanation adequately answers concerns about bias. The Foundation had no (publicly known) official role in the Bush campaign or transition. Instead, the Foundation performed a task that was consistent with its interests and concerns and theoretically could assist either presidential candidate in organizing his administration. Certainly a Gore administration would be free to select from among resumes collected by the Foundation in its search for competent candidates to fill important governmental positions. In reality, of course, the likelihood that Vice President Gore would utilize the head-hunting services of the Heritage Foundation is as remote as the likelihood that President Bush would utilize similar services if they were offered by the NAACP or the Sierra Club. Certainly Mrs. Lamp Thomas's solicitation efforts would more likely yield success in a Bush presidency. Nevertheless, the mere fact that one candidate's proclivities would make them more inclined to look favorably on resumes collected by the employer of a Justice's wife does not give rise to actual bias or even a reasonable appearance of bias.

Reasonable persons, including the Vice President, may have had reason to question Justice Thomas's impartiality for other reasons, however. First, like Justice Scalia, Justice Thomas was singled-out by candidate Bush during the campaign as an example of the kind of Justice he would appoint to the Supreme Court.<sup>147</sup> While there is little chance that Justice Thomas could have read into those remarks a promise of being appointed as Chief Justice during the Bush presidency,<sup>148</sup> Justice Thomas, like Justice Scalia, would benefit from sharing the bench with like-minded judges. One need only read Justice Thomas's passionate concurrences in cases like *Holder v. Hall*,<sup>149</sup> to understand how deeply felt and extreme some of his views are.<sup>150</sup>

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145. *Id.*

146. Jackson, *supra* note 10.

147. Savage, *supra* note 126, at 26.

148. Justice Thomas is among the three most junior members of the Court and would not likely be selected as Chief Justice over more senior members of the conservative wing of the Court.

149. 512 U.S. 874, 891 (1994) (Thomas, J., concurring).

150. In *Holder*, Justice Thomas, joined by Justice Scalia, advocated the dismantling of twenty-five years of the Court's jurisprudence in voting rights cases. Ironically, Justice

When Bush promised to appoint Justices like Scalia and Thomas, he signaled his commitment to provide Justice Thomas with support for his ideologically extreme views.

There may have been yet another reason to question Justice Thomas's impartiality in *Bush v. Gore*. In his recently published book exploring the election crisis of 2000, author and lawyer Jeffrey Toobin contends that Justice Thomas invited arch-conservative columnist George Will as his personal guest to hear the December 1 oral argument in *Bush v. Gore*, ensuring the columnist access to a highly coveted seat in the courtroom.<sup>151</sup> If Toobin's allegation is true, then Thomas's actions could create "in reasonable minds a perception"<sup>152</sup> that his impartiality was compromised.

George F. Will is a well-known and unrelentingly conservative columnist and television commentator. He appears weekly on *This Week*—an ABC News show that focuses on issues of government, and his column appears several times a week in major daily newspapers.<sup>153</sup> Between November 7 and December 1 when *Bush v. Gore* first came before the Supreme Court for oral argument, columnist Will wrote nearly a dozen articles about the election controversy. In each, Will excoriated Vice President Gore's attempt to obtain a recount in several counties in Florida, disparaged any decision from the Florida Supreme Court that favored candidate Gore, and regularly condemned the Democratic Party.<sup>154</sup> Will described Gore as having a "corrupting

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Thomas argued that the Court's decisions supporting the idea that diluting the vote of minorities denies equal voting rights have so engaged the courts in an "inherently political task" that "the preservation of 'the actual and perceived integrity of the judicial process'" is threatened, *id.* at 936-37 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)), a claim that might be more appropriately applied to the Court's actions in *Bush v. Gore*. Thus, Justice Thomas's concurrence imagines a world in which the progress made by blacks and other minorities in the political process—largely as a result of the Court's decisions over twenty-five years upholding Congress's prohibition against vote dilution in the Voting Rights Act—would be dismantled.

151. TOOBIN, *supra* note 10, at 214.

152. MODEL CODE OF JUDICIAL CONDUCT Canon 2(A) cmt. (2000). The Model Code Commentary states that "[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *Id.*

153. It is important to note that Will is not a journalist—one whose job is to impartially report the news. Will is an opinion columnist. His popularity stems from his strongly-held conservative beliefs, which he advances in columns containing stinging barbs and caustic put-downs of Democrats, liberals, and occasionally even moderate Republicans.

154. See, e.g., George F. Will, *Gore, Hungry for Power*, WASH. POST, Nov. 12, 2000, at B7 (editorializing that "the Clinton-Gore era culminates with an election as stained as the blue dress [and] a Democratic chorus complaining that the Constitution should not be the controlling legal authority . . .").

hunger for power” and as engaging in “serial mendacity.”<sup>155</sup> In a particularly vicious slap at Gore’s campaign manager, Will described William Daley as one “for whom the manufacturing (literally the making by hand) of votes is a family tradition.”<sup>156</sup> Will referred to the ballot recount in Palm Beach as “slow-motion larceny.”<sup>157</sup> Will also accused the Florida Supreme Court of “airily rewriting Florida’s election law and applying it retroactively to this election,”<sup>158</sup> a view later advanced by the three concurring Justices in *Bush v. Gore*—albeit in less flowery terms.<sup>159</sup> And in a column appearing just a few days prior to the oral argument before the Supreme Court, Will predicted that “if the court rules for Bush, this will be judicial intervention in defense of the prerogatives of the two political branches of Florida’s government . . . against Florida’s rogue Supreme Court.”<sup>160</sup> Will then concluded by arguing that the Court’s intervention on behalf of Bush “*would be an appropriate end to an election in which the most important policy difference between the candidates concerned the kind of judges they would nominate.*”<sup>161</sup>

Ironically, Will’s commentary zeroes in precisely on the reason why Justice Thomas should have been concerned about the appearance of his impartiality in *Bush v. Gore*, and why he should not have invited George Will to the oral argument of the case. Given the centrality of judicial philosophy and nominations as an issue in the presidential election, as well as Governor Bush’s specific identification of Justice Thomas as a judicial role model, Justice Thomas should have exercised special care to avoid both the reality and appearance of bias. The Model Code warns that judges should “expect to be the subject of constant public scrutiny.”<sup>162</sup> As such, the Code reminds judges that they must “accept restrictions on [their] conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.”<sup>163</sup>

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155. *Id.*

156. George F. Will, *Slow-Motion Larceny*, WASH. POST, Nov. 14, 2000, at A43.

157. *Id.*

158. George F. Will, *This Willful Court*, WASH. POST, Nov. 23, 2000, at A43.

159. See *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring) (concluding that “the Florida Supreme Court’s interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required”).

160. George F. Will, *Florida’s Rogue Court*, WASH. POST, Nov. 28, 2001, at A27. Justice Thomas ultimately shared this view. See *Bush*, 531 U.S. at 115 (Rehnquist, J., concurring) (“This inquiry does not imply a disrespect for state courts but rather a respect for the constitutionally prescribed role of state legislatures.”).

161. Will, *supra* note 160 (emphasis added).

162. MODEL CODE OF JUDICIAL CONDUCT CANON 2(A) cmt. (2000).

163. *Id.*

Rather than accepting this burden as the price of maintaining public confidence in the judiciary, Justice Thomas (if Toobin is correct) personally invited a columnist who had unleashed a persistent and venomous attack on Vice President Gore, the Florida Supreme Court, and the Democratic Party, and who had opined in some detail on precisely the issues that were to come before Justice Thomas. Of course, it would be absurd to suggest that there was any cause and effect relationship between George Will's columns and Justice Thomas's decision in *Bush v. Gore*. No doubt Justice Thomas would have reached the same conclusions and employed the same reasoning in *Bush v. Gore* with or without the advance public relations support offered by Will's columns. Yet here again, the issue is less actual bias, and more *the appearance* of bias. Why—in the most high profile, partisan, and bitterly contested case of national import to reach the Court in years—would a Justice not exercise special caution to ensure that he did not give the impression that he had prejudged the case? Certainly the Model Code would seem to suggest that a judge in any case, let alone one of the magnitude of *Bush v. Gore*, should feel himself obligated to exercise such a heightened level of care. By inviting a well-known, highly visible, partisan columnist as his guest at the *Bush v. Gore* argument, Justice Thomas did not exercise that level of care.

### III. THE ATTEMPT TO RECUSE JUDGE NIKKI CLARK

Despite the strong potential sources of bias and the appearance of bias among the three Supreme Court Justices described above, neither candidate, nor any other litigant in the *Bush v. Gore* litigation, sought the disqualification of any of the United States or Florida Supreme Court judges.

Instead, the only motion filed seeking the recusal of a judge in the many iterations of the *Bush v. Gore* litigation was candidate Bush's attempt to seek the disqualification of Florida trial court judge Nikki Clark in a suit in which candidate Gore was not even a litigant.<sup>164</sup> That case—*Jacobs v. Seminole County Canvassing Board*<sup>165</sup>—was brought by a Democratic activist against the election boards of Seminole and Martin counties.<sup>166</sup> This suit was deemed by some “a potential time bomb for Republicans.”<sup>167</sup> In both Martin and Seminole counties, Republican voting activists had altered or added missing information re-

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164. George Lardner Jr. & James Grimaldi, *Absentee Ballot Suit Worries Republicans*, WASH. POST, Dec. 1, 2000, at A25.

165. 773 So. 2d 519 (Fla. 2000).

166. Joe Follick, *Gore's Hopes Rest on Key Lawsuit Witnesses*, TAMPA TRIB., Dec. 7, 2000, at 8.

167. Lardner & Grimaldi, *supra* note 164.

quired by Florida state law—such as voter registration numbers—to thousands of absentee ballots that had been submitted lacking the necessary information to local election officials.<sup>168</sup> Rather than rejecting the deficient absentee ballots outright, the election officials in Seminole and Martin counties had permitted members of the Republican election apparatus to come in and furnish the correct or missing information on the ballot envelopes.<sup>169</sup>

That Republican officials engaged in these actions was uncontroverted. The sole issue before Judge Clark in *Seminole County* was whether, as a result of these actions, those absentee ballots should be declared invalid.<sup>170</sup> Because the absentee ballots, like the majority of those cast in Seminole and Martin counties, were cast for George Bush, the rejection of those absentee ballots would have eliminated Bush's narrow statewide victory in Florida and changed the outcome of the national election.<sup>171</sup>

On November 29, 2000, Governor Bush sought the removal of Judge Clark from hearing the Martin and Seminole County absentee ballot case.<sup>172</sup> In his recusal motion, Bush cited the fact that Judge Clark had submitted her name to Florida Governor Jeb Bush—George Bush's brother—for a vacant appellate judge seat, and Governor Jeb Bush, only a few weeks earlier, had not selected her.<sup>173</sup> The candidates' brief insisted "the Republican Party will not receive a fair trial in this Court on account of the perceived bias of Your Honor."<sup>174</sup> Bush and Cheney further argued that because, based on these facts, they had "a well-founded fear that justice in [the] case may be overshadowed by the *appearance of impropriety*, Your Honor's disqualification is necessary."<sup>175</sup> Judge Clark denied the motion.<sup>176</sup> Undeterred,

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168. *Id.*

169. Karla Schuster, *Absentee Challenges Put to Test: 2 Judges Hear Suits Totaling 25,000 Votes*, SUN-SENTINEL (Ft. Lauderdale), Dec. 7, 2000, at 19A. Judge Terry Lewis presided over the case in Martin County, while Judge Nikki Clark was assigned to hear the companion case in Seminole County. *Id.*

170. Alicia Caldwell, *Seminole Ballot Case Hinges on Remedy*, ST. PETERSBURG TIMES, Dec. 6, 2000, at 9A.

171. Lardner & Grimaldi, *supra* note 164.

172. George W. Bush and Richard Cheney's and the Republican Party of Florida's Suggestion of Disqualification of Trial Judge, *Jacobs v. Seminole County Canvassing Bd.*, No. 00-2816 (Fla. Cir. Ct. Nov. 29, 2000), available at <http://www.c-span.org/campaign2000/Florida/CV-00-2816j.pdf>.

173. *Id.* ¶ 3.

174. *Id.* ¶ 4.

175. *Id.* ¶ 6 (emphasis added).

176. *Jacobs v. Seminole County Canvassing Bd.*, No. 00-2816 (Fla. Cir. Ct. Nov. 29, 2000) (order denying motion to disqualify), available at <http://www.c-span.org/campaign2000/Florida/CV-00-2816k.pdf>.

George Bush appealed to the Florida Court of Appeals, which also promptly rejected the motion.<sup>177</sup> Bush's attempt to recuse Judge Clark is remarkable. It stands as the only attempt by either candidate to outright disqualify a judge from hearing one of the many cases that made up the *Bush v. Gore* challenges.

Lawyers use the tool of recusal sparingly. A smart lawyer recognizes that a failed recusal motion leaves that same attorney to litigate a case before a judge whom the attorney has accused of bias and prejudice.<sup>178</sup> As discussed earlier, judges are discouraged from granting them.<sup>179</sup> Bush's attempt to recuse Judge Clark is remarkable for another reason: it seems patently clear that Bush had no legitimate grounds upon which to seek Judge Clark's recusal.

By all credible accounts, the suggestion that Judge Clark might be biased against presidential candidate George Bush because she had not been selected for an appellate judgeship by Governor Jeb Bush was merely a pretext.<sup>180</sup> Instead, the real reason behind Bush's recusal motion was likely premised on illegitimate grounds—Judge Clark's race. As Jeffrey Toobin writes, the Bush team "moved to recuse Nikki Clark because she was black—period."<sup>181</sup>

Judge Clark enjoyed an excellent reputation as a fair, nonpartisan judge.<sup>182</sup> In fact, candidate Bush's local lawyers in Tallahassee tried unsuccessfully to convince the Bush legal team that they "had nothing to fear" from Judge Clark.<sup>183</sup> There was no indication that the failure of Governor Jeb Bush to appoint Judge Clark to the Court of Appeals—a job Judge Clark applied for along with eight other candidates—was controversial or a source of rancor for the Judge.<sup>184</sup> In fact, Judge Clark's sister, Kristin Clark Taylor, had reportedly worked as the director of media relations for President George H.W. Bush in

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177. TOOBIN, *supra* note 10, at 209.

178. *See id.* (explaining that a failed recusal motion may "poison a lawyer's relationship with a judge from the beginning of a case").

179. *See supra* note 58 and accompanying text (discussing the institutional pressures that discourage judges from recusing themselves).

180. *See* TOOBIN, *supra* note 10, at 208 (stating that the reason the Bush lawyers gave for Judge Clark's recusal was "absurd").

181. *Id.* at 209.

182. *See* Thomas Fitzgerald & Peter Nicholas, *Circuit Judge a Democrat, But Nonpartisan in the Courtroom*, SAN DIEGO UNION-TRIB., Dec. 7, 2000, at A15; Donna Leinwand, *Absentee Case Judge Said to Be Fair*, USA TODAY, Dec. 6, 2000, at 3A; *see also* TOOBIN, *supra* note 10, at 208; David Von Drehle et al., *In a Dark Hour, a Last Minute-Reprieve*, WASH. POST, Feb. 2, 2001, at A1.

183. TOOBIN, *supra* note 10, at 208.

184. William Sherman, *Ballot Tamper Suit a Wild Card*, N.Y. DAILY NEWS, Dec. 1, 2000, at 4.

the White House—a connection Judge Clark could have, but chose not to bring up during her interview with Governor Jeb Bush for the appellate court seat.<sup>185</sup> Yet Daryl Bristow, one of the Bush lawyers, later described his fear that “Judge Clark would have her own pressures coming from her own constituencies that would be partisan in nature. . . . There was too much at stake to ignore the issue.”<sup>186</sup> It seems unquestionable that the “constituency” referred to by Bristow was racial.<sup>187</sup> Another of Bush’s lawyers (who refused to participate in the recusal motion against Judge Clark) candidly observed that Judge Clark “was erroneously stereotyped by both sides . . . . She was a black woman, so she was presumed to be liberal and pro-Gore, plus she had been turned down by Jeb Bush.”<sup>188</sup>

Historically, white litigants have often sought the recusal of black judges in cases involving race. In the most famous among these cases, *Pennsylvania v. Local Union 542*<sup>189</sup> and *Blank v. Sullivan & Cromwell*,<sup>190</sup> African-American federal district court judges A. Leon Higginbotham and Constance Baker Motley, respectively, examined and strongly rejected recusal motions which suggested that black judges are biased on racial issues while white judges are not.<sup>191</sup> Other minority judges have rejected similar challenges.<sup>192</sup> Their opinions have become the standard for responding to recusal motions of this sort.

The slow, but steady increase of African-Americans on the bench over the past thirty years<sup>193</sup> has done little to diminish challenges to

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185. Von Drehle et al., *supra* note 182.

186. TOOBIN, *supra* note 10, at 209 (emphasis added).

187. Other judges appointed by Democrats had presided over aspects of the many *Bush v. Gore* cases without challenge from Bush’s lawyers.

188. Von Drehle et al., *supra* note 182.

189. 388 F. Supp. 155 (E.D. Pa. 1974).

190. 418 F. Supp. 1 (S.D.N.Y. 1975).

191. In *Local Union 542*, Judge Higginbotham considered a motion by the defendants, mostly white members of a union, to recuse the judge in a racial discrimination case after the judge gave a speech before an association of black historians. 388 F. Supp. at 157. Judge Higginbotham exhaustively examined the “essence” of the complaint, which he said boiled down to race. *Id.* at 162-63. Noting that judges of various race, ethnicity, and religion participated in church and community affairs while maintaining impartiality on the bench, the court concluded defendants’ motion had no merit. *Id.* at 180-81. In *Blank*, Judge Motley rejected a recusal motion made in a sex discrimination suit based, in part, on the judge’s race, sex, and prior work in civil rights litigation. 418 F. Supp. at 4-5.

192. See *LeRoy v. City of Houston*, 592 F. Supp. 415, 416 (S.D. Tex. 1984) (denying defendant’s motion to recuse a black judge in a challenge to the city’s allegedly discriminatory election practice); see also *Baker v. City of Detroit*, 458 F. Supp. 374, 375 (E.D. Mich. 1978) (denying plaintiff’s motion to disqualify a judge, based on the judge’s association with the city’s mayor, in a suit by white police officers alleging racial discrimination).

193. See AMERICAN BAR ASS’N, MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 9-10 (1998). According to a study conducted by the American Bar Association,

the impartiality of black judges. In many cases, judicial nominations and election contests have been characterized by suggestions that black judges are incapable of judging cases impartially.<sup>194</sup> Media reports about high profile legal cases regularly identify the race of black judges, but not that of white judges.<sup>195</sup> Courts reviewing civil rights challenges to the method of electing judges in the South have implicitly suggested that black judges elected from districts in which the population is majority black will threaten the impartiality of the bench.<sup>196</sup> Bush's recusal motion in the Seminole and Martin County case falls squarely within the unfortunate history of these race-based recusal cases.

Of course, black judges may indeed bring particular perspectives to the bench that reflect the unique historical and contemporary experiences of racial minorities in the United States. There is little doubt that black judges, like other black citizens, are influenced by their racialized experiences.<sup>197</sup> But the influence of these experiences on judicial decision-making is no more illegitimate than the experiences and perspectives of white judges or women judges on their decision-making. As Judge Motley stated in *Blank*:

[I]f background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds.<sup>198</sup>

Indeed judicial diversity—whether racial, gender, or experiential—enhances the quality of judicial decision-making.<sup>199</sup>

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African-Americans constituted only 3.3% of judges on the nation's federal, state, and local courts in 1994. *Id.* at 10. Over 90% of all federal appellate judges are white. *Id.* at 9.

194. See, e.g., *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 869 (5th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994) (stating that the plaintiff's attempts to give African-American voters an opportunity to elect candidates of their choice to the state trial bench would undermine "judicial fairness" and create a "semblance of bias and favoritism towards the parochial interests of a narrow constituency"). See generally Ifill, *Judging the Judges*, *supra* note 26, at 112-19 (discussing impartiality and minority judges).

195. See, e.g., Lane, *supra* note 33 (discussing a dispute in the Sixth Circuit and identifying "GOP-appointed members" and "African American" "Democratic appointees").

196. *League of United Latin Am. Citizens*, 999 F.2d at 869.

197. See *Pennsylvania v. Local Union 542*, 388 F. Supp. 155, 163-65 (E.D. Pa. 1974) (containing Judge Higginbotham's reflection on being a black judge); see also Ifill, *Judging the Judges*, *supra* note 26, at 119-28 (discussing at length how race can influence judicial decision-making).

198. *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4 (S.D.N.Y. 1975).

199. Ifill, *Judging the Judges*, *supra* note 26, at 119.

The race of a judge alone is not a reasonable basis upon which to question a judge's impartiality. Impartiality does not require and indeed could not require that judges surgically remove from their consciousness the effect of their life experiences and values. As I have argued in other contexts, diversity on the bench actually promotes impartiality by ensuring both structural impartiality of the entire judiciary as well as the individual impartiality of judges.<sup>200</sup> To the extent that the Bush recusal motion against Judge Clark was premised on the presumption that Judge Clark's race (and perhaps gender) created an appearance of bias, it was indefensible.<sup>201</sup>

Disturbing as it is to imagine, the Bush attorneys may have had tactical reasons for filing and pursuing the unsupportable recusal motion against Judge Clark.<sup>202</sup> By charging her with bias, Bush's lawyers

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200. *Id.*

201. The fact that two other black judges in the *Bush v. Gore* cases were not similarly challenged by Bush's lawyers does not purge the recusal motion filed against Judge Clark of its racial taint. Certainly two judges on the Florida Supreme Court—Leander Shaw and Peggy Quince—are black and were also appointed by Democratic governors. See *Spotlight on Florida Supreme Court Justices*, Court TV Online, Nov. 20, 2000, at [http://www.courtstv.com/national/decision\\_2000/112000\\_justices\\_ap.html](http://www.courtstv.com/national/decision_2000/112000_justices_ap.html). Bush lawyers did not seek the recusal of either of these judges. But Nikki Clark was the only black *trial* judge assigned to hear one of the election challenge cases. As a trial judge, she alone would determine the relevant issues in the Seminole and Martin county cases. Unlike an appellate judge, she would not sit as part of a multi-member deliberative body where her ostensibly race-based bias in favor of candidate Gore would be mediated by white (and therefore impartial) colleagues. This perspective is consistent with the outcome of voting rights challenges in judicial elections cases, in which the right of minority voters to seek representation on the appellate bench was upheld, while similar attempts by minority voters to gain representation on the trial judge bench were rejected. Compare *Chisom v. Edwards*, 839 F.2d 1056, 1064-65 (5th Cir. 1988), *cert. denied sub nom. Roemer v. Chisom*, 488 U.S. 955 (1988) (holding that the at-large election of Louisiana Supreme Court justices violated the Fourteenth and Fifteenth Amendments), with *League of United Latin Am. Citizens v. Clements*, 902 F.2d 293, 295 (5th Cir. 1990) (rejecting the extension of *Chisom* to the election of at-large trial judges).

202. Like all good lawyers, the attorneys in *Bush v. Gore* recognized the importance of the trial judges in determining and shaping the factual issues that ultimately would come before the state and federal appellate courts. Moreover, as Governor Bush's legal team seemed to view the entire Florida Supreme Court as biased against them, there was little reason to single out the two black judges from among the seven on the state supreme court who, by virtue of having been appointed to the bench by a Democratic Governor, were perceived by the Bush team as being biased in favor of Al Gore. See GILLMAN, *supra* note 39, at 68-69 (describing the Republican reaction to the Florida Supreme Court's decision in *Gore v. Harris*); see also TOOBIN, *supra* note 10, at 113 (noting that seven of the nine Florida Supreme Court Justices were chosen by Democratic governors). This was a strange assumption to make about the Florida Supreme Court, and little of the factual history of *Bush v. Gore* bears out the conclusion that the Florida Supreme Court was biased against Bush. In fact, the Florida Supreme Court had ruled against Al Gore in two critically important cases—the challenge to the use of the butterfly ballot in Palm Beach, *Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240, 1242 (Fla. 2000), and the absentee ballots cases in Seminole and Martin counties, in which the Florida Supreme Court affirmed the

may have simply wanted to put Judge Clark on notice. In a high profile case like *Bush v. Gore*, where resolution of the issues in any of the cases could have decided the outcome of the presidential election, every judge must have been aware of the intense scrutiny by the media, political parties and candidates, the bench, and the bar.<sup>203</sup> In such a case, any good judge would attempt to exercise tremendous caution and care in every aspect of the cases before her. A motion charging a judge with bias in this tense context would only heighten a judge's sense of caution. Ultimately Judge Clark denied the plaintiffs' demand that the absentee ballots be discarded in *Seminole*—a decision that was upheld by the Florida Supreme Court.<sup>204</sup> While her decision is certainly defensible, we may never know whether the Bush recusal motion affected, even unconsciously, Judge Clark's decision-making. Interestingly, after the Florida Supreme Court ordered the recount of ballots, the task of supervising the recount reportedly fell to Judge Clark.<sup>205</sup> She declined to accept the remand,<sup>206</sup> however, and the recount was supervised instead by Judge Terry Lewis until the Supreme Court issued its stay of the recount on December 4, 2000.<sup>207</sup>

The attempt to recuse Judge Clark on the flimsiest grounds, particularly in light of the more compelling potential sources of disqualification for several Justices on the Supreme Court, demonstrates that § 455(a) recusal motions can be manipulated in ways that undermine judicial impartiality by reinforcing a conception of partiality that marginalizes African-American and other minority judges.<sup>208</sup> In this context the Court's potential leadership role in helping define the appropriate parameters for § 455(a) recusal determinations is particularly important.

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trial judges' denial of the plaintiffs' claims. *Jacobs v. Seminole County Canvassing Bd.*, 773 So. 2d 519, 524 (Fla. 2000). And Chief Judge Wells, also a Democratic appointee to the bench, dissented from the Florida Supreme Court's order requiring the recount of ballots. *Gore v. Harris*, 772 So. 2d 1243, 1262 (Fla. 2000) (Wells, C.J., dissenting), *rev'd sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).

203. See TOOBIN, *supra* note 10, at 125 (stating that Florida Supreme Court Chief Justice Wells realized the high level of scrutiny that the Florida Supreme Court would face).

204. *Jacobs*, 773 So. 2d at 524.

205. See TOOBIN, *supra* note 10, at 240. According to Toobin, the Florida Supreme Court directed Judge Sauls to supervise the recount, but he recused himself from further proceedings. *Id.* Judge Clark was the next judge in line. *Id.*

206. *Id.*

207. GILLMAN, *supra* note 39, at 119-22.

208. *But see* John McIntyre, *Court Rules Bias Law Can Be Applied to Judges*, STAR TRIB. (Minneapolis), Feb. 1, 1996, at 7B (describing a Minnesota judge's ruling that rules preventing preemptory strikes of jurors based on race also apply to race-based judicial recusal motions).

IV. PROMOTING THE APPEARANCE OF IMPARTIALITY IN *BUSH V. GORE*

The conduct of several of the Justices in *Bush v. Gore* suggests that judges cannot be counted on to recognize what kinds of connections or conduct would cause a reasonable person to question their impartiality, let alone take steps to ameliorate those concerns. How then could the Justices on the Court have acted to promote the appearance of impartiality as required by the Model Code and § 455(a)? Below, I explore a variety of actions that could have been taken by Justices on the Court to minimize actual bias and to avoid the appearance of judicial bias in *Bush v. Gore*.

A. *Limitations on the Candidates' Right to Seek Judicial Recusal*

At the outset, it is important to recognize an important political reality. In *Bush v. Gore* it was practically impossible for either candidate-litigant to openly seek the recusal of any of the Supreme Court Justices, regardless of the appearance of judicial bias. Both candidates sought the presidency. Because prior to *Bush v. Gore* the United States Supreme Court enjoyed unparalleled public approval,<sup>209</sup> a presidential candidate who attacked the legitimacy of the High Court could only imperil his own stature and credibility on the national and international stage, precisely at the moment that he was trying to vindicate his entitlement to the presidency. This was an important political reality of which the Justices and certainly the candidates must have been aware during the pendency of *Bush v. Gore*.

As a result, any move to disqualify a Justice from participating in *Bush v. Gore* would have had to come from the Justices themselves. This reality should have prompted from the Justices an even more vigilant check on the appearance of bias issue because the litigants could not in effect vindicate this important due process interest on their own behalf without causing irreparable harm to their reputation and credibility as presidential candidates. Moreover, the Court's obligation to publicly exercise particular care and attention to the appearance of impartiality in *Bush v. Gore* was simply compelled by its leadership role as the highest and most respected court in the nation. In this role, the Court failed to seize a unique opportunity to demon-

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209. In August 2000, the Supreme Court's approval rating was 62%. John C. Yoo, *In Defense of the Court's Legitimacy*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT*, *supra* note 14, at 223, 226.

strate to the nation's judges the importance of § 455(a) considerations to promoting the integrity of the bench.<sup>210</sup>

*B. Abstention, Recusal, Disclosure, and Restraint*

I contend that the Justices on the Court had before them four options, each of which would have promoted a greater appearance of impartiality in *Bush v. Gore*. First, the Court could have abstained from taking the case in the first instance, and certainly could have refrained from stopping the vote. This was clearly the option that many experts assumed the Court would exercise.<sup>211</sup> While many have argued that the Court was compelled to take the case in order to avoid a constitutional crisis, even stronger arguments can be made that the Constitution provides that such a crisis is appropriately resolved in the political branches of government—not the Court.<sup>212</sup> What the Court averted by taking the case was an unpleasant, contentious, fiercely partisan, prolonged political battle for the Presidency—the kind of battle uniquely suited to Congress.<sup>213</sup> Rather than averting a crisis, the Court “saved” us from witnessing the more unattractive and messy aspects of democracy.<sup>214</sup> But this is quite different than a “constitutional crisis.”<sup>215</sup> Had this battle played out in Congress, those who were perceived as acting against the nation's interest or acting in bad faith would face voters in the next election who would be able to vent their anger at the political process.<sup>216</sup>

Second, one or more of the Justices could have recused themselves from the case. The “rule of necessity” was not implicated in

210. The special vulnerability of minority judges to unfounded 28 U.S.C. § 455(a) challenges as demonstrated in *Bush v. Gore* further supports that this kind of leadership is needed.

211. Michelman, *supra* note 128, at 131-35; see GILLMAN, *supra* note 39, at 96, 126-28 (citing experts' praise for the restraint shown in the Court's first *Bush v. Gore* decision and experts' derision after its stay of recount).

212. See Samuel Issacharoff, *Political Judgments*, in THE VOTE: BUSH, GORE, AND THE SUPREME COURT, *supra* note 14, at 55, 71-73 (describing the statutory framework for state legislatures and Congress to resolve contested presidential elections); see also GILLMAN, *supra* note 39, at 192-96 (criticizing the premise that the political institutions would be unable to resolve the dispute over the 2000 election).

213. See Elizabeth Garrett, *Leaving the Decision to Congress*, in THE VOTE: BUSH, GORE, AND THE SUPREME COURT, *supra* note 14, at 38, 50 (describing Congress as “the politically accountable branch of government and the branch most likely to reflect the political judgment of America's citizens”).

214. See *id.* at 52 (noting that if the election came before Congress, then some of the rhetoric there “would surely have appeared extreme and unreasonable”).

215. *Id.* at 49-50.

216. *Id.* at 39-40; Michelman, *supra* note 128, at 133.

*Bush v. Gore*.<sup>217</sup> The withdrawal of one or two of the Justices from hearing *Bush v. Gore* would still have left the remainder of the Justices free to hear and decide the case. Two or more Supreme Court Justices recused themselves from participating in the hearing or determination of several cases during the 2000-2001 Term.<sup>218</sup>

And there are a variety of ways to address the concerns raised by Justices on the Court about the effect of recusal on Supreme Court practice. For example, one scholar has noted that the potential injustice caused by increasing the burden on parties seeking certiorari is caused by the Supreme Court's self-created policy of requiring four votes to grant cert.<sup>219</sup> Nothing in the Constitution or in any federal statute mandates the four-vote cert rule.<sup>220</sup> The Supreme Court is at liberty to reduce the number of votes needed for cert in cases where Justices recuse themselves from cert decisions.<sup>221</sup> Likewise, concerns about lawyers "strategizing" recusal can also be addressed. For example, in a case ironically involving Gibson, Dunn & Crutcher, the Second Circuit Court of Appeals dismissed the law firm as appellate counsel from a bankruptcy case after the court determined that the party's retention of Gibson, Dunn & Crutcher as their appellate counsel drew into question the ability of one of the judges on the panel, Judge Robert Sack, to decide the case impartially.<sup>222</sup> The court noted, "[i]t cannot have escaped the notice of the Gibson, Dunn firm and its several partners that one of the members of this Court's panel . . . was a member of that firm from 1986 until 1998."<sup>223</sup> The Supreme Court

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217. See *supra* note 58 and accompanying text (discussing the common law Rule of Necessity).

218. A Lexis search conducted on April 30, 2002, revealed at least 75 instances in which the Court announced that one or more Justices "took no part" in decisions during the October 2000-June 2001 Term. Between 1992 and 1995, there were 376 instances in which "one or more Justices 'took no part'" in a decision from the Court. Stephen Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657, 659 n.14 (1996). In August 2001, three Justices—Scalia, Thomas, and Souter—recused themselves from a request to stay the execution of Napoleon Beazley. *Beazley v. Johnson*, 533 U.S. 969 (2001). While not publicly stated, the media inferred that the reason for the recusals was the Justices' relationship with Judge Luttig, who is the son of the murder victim. Frank Green, *Three-Justice Withdrawal Rare*, RICHMOND TIMES-DISPATCH, Aug. 15, 2001, at A7.

219. See John Paul Stevens, *Deciding What to Decide: The Docket and the Rule of Four*, in O'BRIEN, *supra* note 36, at 91-98 (describing the obscure origin of the Rule of Four and arguing that the rule may result in the Court taking too many cases); see also Lubet, *supra* note 218, at 662.

220. Lubet, *supra* note 218, at 662 n.26.

221. *Id.*

222. Mark Hamblett, *Court Removes Firm From Appeal Because Former Partner is One of Judges on Panel*, LEGAL INTELLIGENCER, Mar. 15, 2000, at 4.

223. *In re F.C.C.*, 208 F.3d 137, 139 (2d Cir. 2000).

could take similar action to deal effectively with lawyers who "strategize" recusal.

Moreover, the choices before the Justices in *Bush v. Gore* were not limited simply to abstention or recusal. The Justices could have taken other measures to diminish the appearance of bias. One of the most important of these is disclosure. Justices on the Court could have disclosed the potential conflicts that gave rise to reports of bias. Justice Scalia, for example, should have immediately disclosed the fact that his sons were lawyers at law firms hired by Bush.<sup>224</sup> Such disclosure is urged in the Model Code, which admonishes judges to "disclose 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>225</sup> Thus, even if Justice Scalia believed that there were no grounds to justify his recusal from the case, the Model Code suggests that he should nevertheless disclose information that would be "relevant" to the issue. The effect of Justice Scalia's own disclosure of the potential conflict would itself lessen the appearance of impropriety. The disclosure of his sons' relationships with the firms representing George Bush would not have compelled Justice Scalia's recusal from the case. As explained above, it is not likely that Vice President Gore would have sought Justice Scalia's recusal. By disclosing the relevant information himself, however, Justice Scalia would have created a climate of candor that would have fostered an appearance of integrity and impartiality.

Finally, Justices on the Court could have exercised greater restraint.<sup>226</sup> The most obvious example of this is Justice Scalia's ill-advised leadership role in the case. His opinion explaining the Court's decision to grant the stay revealed an inability to even acknowledge and address the obvious arguments in favor of continuing the recount. Justice Scalia's determination that candidate Bush would suffer irreparable harm if the recount continued, because if Gore prevailed in the recount it would "cast[ ] a cloud upon what [Bush] claims to be the legitimacy of his election,"<sup>227</sup> simply ignored the obvious argument that the irreparable harm to Gore would be just as great if the recount were halted. Justice Scalia's reasoning was nakedly one-sided. Even more disturbing, it suggested that, as David Strauss ar-

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224. See *supra* note 117 and accompanying text (discussing one of Justice Scalia's son's affiliation with Gibson, Dunn & Crutcher).

225. MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1) cmt. (2000) (emphasis added).

226. Obviously, Justice Thomas need not have invited conservative columnist George F. Will to the oral argument of the case. TOOBIN, *supra* note 10, at 214.

227. *Bush v. Gore*, 531 U.S. 1046, 1047 (Scalia, J., concurring).

gues, “there is a legitimate interest in suppressing truthful information—information about what the recount ordered by the Florida Supreme Court would have disclosed—in order to protect the President of the United States from political harm.”<sup>228</sup> Even some who agree that the recount should have been stopped have questioned the soundness of Justice Scalia’s opinion in support of the stay.<sup>229</sup> Given the appearance problems created by Eugene Scalia’s partnership at Gibson, Dunn & Crutcher, Justice Scalia should have refrained from becoming the point-person on the Court for the pro-Bush majority.

In the end, the experience of *Bush v. Gore* invites the Court to rethink its current practices with regard to recusal based on the “appearance” of bias. Judges—even Supreme Court Justices—may simply not be in the best position, without clear procedures and some form of review, to themselves make sound § 455(a) judgments. Judges are not average “reasonable people.” Judges—especially Supreme Court Justices—are highly educated people of above-average intelligence, who work in an insular, homogenous, intellectual, and highly structured environment. To imagine that Supreme Court Justices will be able to perceive what gives the “appearance” of bias in the same way as the average, reasonable person reflects a kind of egalitarian wishful thinking, rather than sound policy.<sup>230</sup>

In order to assist Justices in the task of assessing the “appearance of bias,” the Court should adopt more formalized, publicly disclosed procedures for addressing § 455(a) questions. The Court might consider creating a rotating panel of Justices who address recusal questions. Each recusal motion based on § 455(a), or appearance concerns, would be reviewed by at least two other Justices. All recusal decisions should be written—however briefly—and publicly reported. The Court could also create a standing committee of special masters—judicial ethics experts—who advise the Court on § 455(a) appearance questions and publicly issue advisory opinions to the Court on § 455(a) issues.<sup>231</sup> In the short term, these measures may be per-

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228. Strauss, *supra* note 14, at 190.

229. See, e.g., POSNER, *supra* note 120, at 166-67 (criticizing the effectiveness of Justice Scalia’s concurrence and asserting that Justice Scalia’s decision to publicize his grounds for the stay increased charges of partisanship against the Court).

230. Reports that some of the Justices were stunned and alarmed by the public’s reaction to the Court’s decision in *Bush v. Gore* is perhaps an indication of the Justices’ distance from how average people think. See Biskupic, *supra* note 4.

231. I am pessimistic about the Court’s willingness to act on its own in this area. Professor Jeffrey W. Stempel proposed fifteen years ago that Congress amend § 455 to address some of the recusal problems that I discuss in this Article. See Stempel, *supra* note 62, at 643-44. He proposed the following amendment to the statute:

ceived as unnecessarily burdensome and an excess of caution. In the long term, preserving the nation's confidence in the legitimacy of the Court will more than justify these measures.

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

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

*Id.* at 644. Of course, this proposal would not have had much effect in *Bush v. Gore*, where the litigants were not likely to file a motion seeking recusal of one of the Justices. But Professor Stempel also suggested amending the statute to require disclosure by a judge of "facts that would prompt a reasonable person to believe that one or more of the grounds for disqualification . . . may be applicable . . ." *Id.* at 643. Judges would be required to permit the parties a reasonable time to reply to the disclosure. *Id.* I strongly support resuscitating Professor Stempel's proposal to amend § 455 in this regard.