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Federal Judicial Disqualification: A Behavioral and Quantitative Analysis

INTRODUCTION

The issue of judicial recusal has become front-page news. House Democrats have called on Justice Thomas to recuse himself from cases challenging the constitutionality of the Patient Protection and Affordable Care Act[1] because of his wife's role as a paid lobbyist against that Act.[2] Republicans are calling for the recusal of Justice

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1 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified as amended in scattered sections of 26 and 42 U.S.C.).

2 Felicia Sonmez, *House Democrats Say Justice Thomas Should Recuse Himself in Health-Care Case*, WASH. POST, Feb. 9, 2011, http://voices.washingtonpost.com/44/2011/02/house-democrats-say-justice-th.html.

Kagan from the same cases because of her service as Solicitor General when the Obama administration was considering how to structure health care reform legislation to survive constitutional challenge.[3] Over the past two centuries, judicial recusal standards have been tightened repeatedly. Nevertheless, in case after high-profile case, they still sometimes fail to ensure the kind of legitimating impartiality we demand of our courts.

In the meantime, psychology has expanded the range of tools available for making the "realistic appraisal of psychological tendencies and human weakness"[4] believed relevant to understanding when recusal is warranted. We are at least beginning to understand the role of heuristics in human judgment—heuristics that sometimes trigger cognitive illusions and faulty decision making. Such illusions are particularly problematic when a judge is called upon to decide whether he can decide impartially—in effect, to decide whether he is competent to perform, in a particular case, the role to which he has dedicated his life. Finally, the past decade has seen widespread use of statistical data to advance our understanding of how courts function. To date, no such data have been reported with regard to how judicial recusal and disqualification actually operate in the federal courts.

This Article reports preliminary results of a survey of the 1080 cases decided between 1980 and 2007, inclusive, in which U.S. courts of appeals reviewed decisions by U.S. district court judges not to recuse themselves. The overall reversal rate over that twenty-eight-year period was only 8.1%—relatively low. Reversal rates were somewhat higher in criminal cases (10.3%) than in civil cases (6.3%). They did not appear to depend on whether the recusal issue was first raised while the case was pending (8.7%) or after judgment was entered (7.0%). There was a marked jump in recusal appeals in 2001, but no corresponding jump in reversals. Interestingly, reversal rates varied markedly from circuit to circuit, from a high of 21% in the Third Circuit to a low of 0% in the Federal Circuit.

Researchers coded the cases by ground or grounds asserted for recusal. "General bias against a party" accounted for thirty-five reversals (40% of all reversals), the largest number of any ground asserted. Nevertheless, that category recorded a reversal rate of only 7.7%. The two sets of grounds for which research showed the highest

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[3] *See, e.g.*, Mark Sherman, *Sen. Hatch: Kagan Should Sit out Health Care Case*, ABC NEWS, Feb. 4, 2011, http://abcnews.go.com/US/wireStory?id=12843110.

[4] Withrow v. Larkin, 421 U.S. 35, 47 (1975).

reversal rates were (1) the trial judge was legally prohibited from hearing the case (19.2%) and (2) the trial judge had some special relationship, positive or negative, with an attorney appearing in the case (general bias against counsel: 16.7%; personal relationship with counsel: 16.2%; professional relationship with counsel: 14.0%). The two sets of grounds for which research showed the lowest reversal rates were (1) racial bias (racial bias against party: 4.0%; racial bias against counsel: 0%) and (2) prior adverse rulings (adverse rulings: 3.1%; procedural dismissal or remand: 0.8%).

What we do *not* yet have is a comparable data set for recusal decisions, for or against, where parties have not appealed the decisions from the district courts. Such decisions are typically not reported. Nor are judges' affirmative decisions to recuse themselves appealable. We therefore do not have a comparable set of appellate decisions exploring the flip side of the question—when judges have a duty to sit. (Only ten court of appeals decisions in the sample addressed duty-to-sit issues.) For these reasons, and because the present study is exploratory and was not designed to test specific hypotheses, this Article does not offer formal statistical analyses. Instead, it reports and discusses the data in historical and behavioral contexts.

Part I outlines recent cases and developments in the area. The situation, suffice it to say, is not completely satisfactory. As one commentator has observed, "The laws governing judicial recusal are failing at one of their primary objectives: protecting the reputation of the judiciary."[5] Part II explores the history of the law of judicial recusal. Even today, standards and procedures are unclear, affording enormous discretion to judges, who are asked to apply recusal rules impartially to themselves. Part III discusses developments in human decision-making theory that may begin to identify contexts in which judges are least likely to be able to apply the recusal rules objectively to themselves. Part IV presents the results of a survey of U.S. appellate court cases decided between 1980 and 2007 on appeals from refusals of district court judges to recuse themselves. The data suggest that the enormous discretion currently given judges has resulted in substantial geographic disparity in application of the rules—that is, in different recusal cultures, circuit to circuit. The data also appear to be consistent with predictions behavioral theory might

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[5] Amanda Frost, *Keeping up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 531 (2005).

make as to when judges are less likely to be able to make objectively defensible assessments of their own abilities to decide impartially. Part V, finally, concludes and outlines future possible work in the area.

I
RECENT CASES AND DEVELOPMENTS

One of the most widely publicized recent recusal controversies involved Justice Antonin Scalia of the U.S. Supreme Court. In 2004, Justice Scalia declined to recuse himself in a case to which Vice President Dick Cheney, a longtime friend, was a party, *Cheney v. United States District Court for the District of Columbia*.[6] Three weeks after certiorari was granted at Cheney's request, Cheney flew Scalia, his son, and his son-in-law from Washington to Patterson, Louisiana, without charge in a government-owned Gulfstream jet; the four of them joined another nine guests on a three-day duck-hunting trip in Louisiana.[7] The Sierra Club moved for recusal.[8] Justice Scalia refused and took the unusual step of filing an opinion explaining his refusal.[9] He noted that a rule requiring Justices to recuse themselves whenever personal friends were named parties in their official capacities would be disabling (invoking, in effect, the duty to sit).[10] He concluded,

> The question, simply put, is whether someone who thought I could decide this case impartially despite my friendship with the Vice President would reasonably believe that I *cannot* decide it impartially because I went hunting with that friend and accepted an invitation to fly there with him on a Government plane. If it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined.[11]

His decision was widely criticized.[12]

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[6] Cheney v. U.S. Dist. Court for D.C. (*Cheney I*), 541 U.S. 913 (2004) (Scalia, J.) (explaining why he did not recuse himself from *Cheney v. U.S. District Court for the District of .Columbia* (*Cheney II*), 542 U.S. 367 (2004)).

[7] *Cheney I*, 541 U.S. at 914–15.

[8] *Id.* at 913.

[9] *Id.*

[10] *Id.* at 916.

[11] *Id.* at 928–29.

[12] *See, e.g.*, David Feldman, Note, *Duck Hunting, Deliberating, and Disqualification:* Cheney v. U.S. District Court *and the Flaws of 28 U.S.C. § 455(A)*, 15 B.U. PUB. INT. L.J. 319, 319 (2006); Frost, *supra* note 5, at 531; Jeffrey M. Hayes, *To Recuse or to Refuse: Self-Judging and the Reasonable Person Problem*, 33 J. LEGAL PROF. 85, 102 (2008);

In another recent high-profile case, the "Jena 6" case, Judge Mauffray referred to the six African American teenage defendants, charged with attempted murder for allegedly beating a white classmate unconscious, as "troublemakers" and "a violent bunch."[13] The judge insisted he could remain impartial; a fellow district court judge, however, concluded that he should be disqualified.[14]

In *Caperton v. A.T. Massey Coal Co.*, Massey's president, Don Blankenship, contributed three million dollars to the campaign of Brent Benjamin, who was running for a seat on the West Virginia Supreme Court of Appeals.[15] Blankenship's donations accounted for over two-thirds of Benjamin's total campaign funds.[16] Benjamin was successful in the election, took the bench, and joined a majority of the court in overturning a fifty-million-dollar damage award against Massey.[17] Caperton sought rehearing, requesting disqualification of Justice Benjamin and one other justice, Justice Maynard.[18] (Justice Maynard had been photographed vacationing on the French Riviera with Blankenship while the case was pending.)[19]

Massey, in turn, sought disqualification of yet a third justice, Justice Starcher, who had publicly criticized Blankenship's role in Justice Benjamin's election.[20] Justices Maynard and Starcher recused themselves, but Justice Benjamin refused to do so.[21] Reversing the state supreme court, the U.S. Supreme Court held that due process required recusal, observing there was a "serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds . . . when the case was pending or imminent."[22] The U.S. Supreme Court therefore reinstated the fifty-million-dollar award against Massey.

Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need for a* Per Se *Rule on Friendship (Not Acquaintance)*, 33 PEPP. L. REV. 575, 611 (2006).

13 *Judge Ousted for Remarks*, CHI. TRIB., Aug. 2, 2008, http://www.chicagotribune.com/news/nationworld/chi-nat_jena-sixaug02,0,3313978.story.

14 *Judge Taken Off Remaining 'Jena 6' Cases*, CNN, Aug. 1, 2008, http://www.cnn.com/2008/CRIME/08/01/jena6.appeal/index.html.

15 Caperton v. A.T. Massey Coal Co., 129 S.Ct. 2252, 2257 (2009).

16 *Id.*

17 *Id.* at 2257–58.

18 *Id.* at 2258.

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.* at 2263–64.

Judicial disqualification issues arise in less high-profile proceedings as well. In 2008, in McKinney, Texas, a defendant requested a new trial after discovering that the judge and prosecutor in his case had been having an affair during the period leading up to his trial.[23] At trial, the defendant was convicted of murder and sentenced to death.[24] While both judge and prosecutor admitted to the affair, the Texas Court of Criminal Appeals rejected the defendant's request for a new trial on the ground that he should have raised the issue earlier.[25] The court's opinion did not explore whether the affair prejudiced his trial.[26]

A study on the effect of campaign contributions on decisions by the Ohio Supreme Court found that, in 200 out of 1500 cases involving significant campaign contributions (over $1000) during the twelve-year period studied, the justice receiving the funds failed to recuse himself from the case.[27] Of the ten justices studied, six sided with their contributors more than seventy percent of the time.[28] In a class action against DaimlerChrysler, two Ohio Supreme Court justices each received $1000 in campaign contributions from the company while the case was pending before them.[29] They joined the majority, ruling in favor of DaimlerChrysler.[30]

There is some evidence that the most biased judges may be least willing to recuse themselves.[31] Others are reluctant to recuse themselves on the ground that they are already required to act in a way "that promotes independence, integrity, and impartiality of the judiciary" and, of course, do so.[32] In a majority of states, as in the

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23 *Ex parte* Hood (*Hood I*), No. WR-41168-11, 2008 WL 4946276, at *1 (Tex. Crim. App. Nov. 19, 2008).

24 *Id.*

25 *Ex parte* Hood (*Hood II*), No. WR-41168-11, 2009 WL 2963854, at *1 (Tex. Crim. App. Sept. 16, 2009); *Hood I*, 2008 WL 4946276, at *2.

26 James C. McKinley, Jr., *Judge-Prosecutor Affair, but No New Trial in Texas Death Penalty Case*, N.Y. TIMES, Sept. 16, 2009, http://www.nytimes.com/2009/09/17/us/17texas.html?scp=1&sq=&st=nyt.

27 Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at 22.

28 *Id.*

29 *Id.*

30 *Id.*

31 STANDING COMM. ON JUDICIAL INDEPENDENCE, AM. BAR ASS'N, REPORT OF THE JUDICIAL DISQUALIFICATION PROJECT 14 (2008) [hereinafter JUDICIAL DISQUALIFICATION PROJECT], *available at* http://www.ajs.org/ethics/pdfs/ABAJudicial disqualificationproject report.pdf.

32 MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2007).

federal courts, recusal or disqualification motions are still reviewed by the target judge.[33] In a minority of states, a different judge rules on the disqualification motion,[34] acknowledging, in effect, that the problems inherent in judicial recusal decisions are worse when judges are required to judge themselves. A third approach is to allow the target judge to review the motion for legal sufficiency but ask a different judge to review the motion on the merits.[35]

Due to recent publicity about the effects of campaign contributions, a few states have revised their recusal and disqualification rules. On November 5, 2009, the Michigan Supreme Court adopted new formal rules.[36] Previously, justices on the court had followed an unwritten rule requiring them to step down in the event of a conflict of interest.[37] Under the new rules, if there is a suggestion of impropriety or bias and the justice decides not to recuse himself, the other justices on the court can review that decision.[38] In structuring the new rules, however, the court declined to require parties to disclose campaign contributions made to specific justices.[39]

Wisconsin's highest court recently ruled that recusal is not automatically required when a judge or justice receives campaign contributions from a party before the court.[40] The court emphasized the need to protect First Amendment rights, reasoning that a judge's campaign activities are protected speech.[41] If the public was not happy with the results, the court noted, it could remove the offending judge at the ballot box.[42]

Finally, on February 23, 2011, in anticipation of controversy over whether Justices Thomas and Kagan should participate in hearing cases challenging the new health care Act, over one hundred law

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33 JUDICIAL DISQUALIFICATION PROJECT, *supra* note 31, at 31.

34 *Id.*

35 *Id.*

36 *Michigan Supreme Court Adopts Disqualification Rules*, CHI. TRIB., Nov. 5, 2009, http://archives.chicagotribune.com/2009/nov/05/local/chi-ap-mi-judicialethics-ru.

37 *Id.*

38 *Id.*

39 *Id.*

40 Alex De Grand, *In Battle over Judicial Recusal, First Amendment Trumped Due Process Rights*, WISBAR INSIDETRACK (Nov. 4, 2009), http://www.wisbar.org/AM/template.cfm?section=insidetrack&template=/customsource/insidetrack/index.cfm (follow "Archive" hyperlink, then follow "November 4, 2009" hyperlink).

41 *Id.*

42 *Id.*

professors asked Congress to set neutral standards for Supreme Court recusals.[43]

II
A BRIEF HISTORY OF FEDERAL JUDICIAL RECUSAL AND DISQUALIFICATION

In the early English common law, it was simply assumed that a judge would abide by his oath to decide impartially in all cases.[44] To question his neutrality was to question his integrity. It is not clear that modern law has entirely escaped this conceptual frame. Every federal judge is required to take an oath that he will "faithfully and impartially discharge and perform all the duties incumbent upon [himself]."[45] A motion to recuse necessarily questions his fidelity to that oath.

Perhaps as a result, the early law of recusal in the United States operated only in very limited circumstances.[46] Even actual bias was not a basis for disqualification.[47] Only situations and cases that demonstrated a blatantly palpable sense of impropriety were addressed.[48] It was said that a man could not be a judge in his own case. In addition, a judge could be disqualified for having a financial interest in the case.[49] Otherwise, the judge's oath assured impartiality.

In 1792, Congress codified the common law of judicial disqualification as it then existed: a judge could be disqualified if he was "concerned in interest" or if he had "been of counsel for either party."[50] Over time, Congress has modified and added to this simple provision. In 1891, it enacted 28 U.S.C § 47, which provides that "[n]o judge shall hear or determine an appeal from the decision of a

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43 R. Jeffrey Smith, *Professors Ask Congress for an Ethics Code for Supreme Court*, WASH. POST, Feb. 23, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/02/23/AR2011022304975.html.

44 JUDICIAL DISQUALIFICATION PROJECT, *supra* note 31, at 6.

45 Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 135 (2004).

46 JUDICIAL DISQUALIFICATION PROJECT, *supra* note 31, at 4.

47 *Id.* at 7.

48 *Id.* at 6–7.

49 *Id.* at 7.

50 *Id.*

case or issue tried by him."[51] Its purpose was to prevent trial judges from hearing appeals from their own decisions.[52]

In 1911, Congress passed 28 U.S.C. § 144, which allowed, and still theoretically allows, peremptory challenges of district court judges for "personal bias or prejudice":

> 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.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.[53]

Congress's intention was clear. Nevertheless, § 144 disqualifications are rare. Although some have suggested that the statute is being "eviscerated by judicial interpretation,"[54] courts have not been obviously hostile to its enforcement. In *Berger v. United States*, for example, the Supreme Court explicitly rejected the Government's suggestion that

> the motion and its supporting affidavit, like other motions and their supporting evidence, are submitted for decision and the exercise of the judicial judgment upon them. In other words, the action of the affidavit is not "automatic," to quote the Solicitor General, but depends upon the substance and merit of its reasons and the truth of its facts, and upon both the judge has jurisdiction to pass.[55]

The Court accepted instead the defendants' assertion "that the mandate of the section is not subject to the discretion or judgment of the [target] judge."[56]

The problem appears to lie in the structure of the statute itself. The statute requires an allegation of actual "personal bias or prejudice" and a statement of facts supporting that allegation.[57] Judges are

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51 28 U.S.C. § 47 (2006).

52 *Id.*

53 *Id.* § 144.

54 Richard E. Flamm, *History of and Problems with Federal Judicial Disqualification Framework*, 58 DRAKE L. REV. 751, 763 (2010).

55 Berger v. United States, 255 U.S. 22, 30–31 (1921).

56 *Id.* at 30.

57 28 U.S.C. § 144.

rarely imprudent enough to supply such facts. In addition, the affidavit must normally be filed at least ten days *before* the term in which the case is to be heard.[58] The mere fact that a judge develops views adverse to the complaining party as a result of evidence taken in the trial is not enough.[59] Even actual and unlawful bias is not enough, unless good cause is shown for the moving party's failure to have filed the necessary papers prior to the start of term. In any event, § 144 only applies to trial judges.

By contrast, 28 U.S.C. § 455 applies to all federal judges, trial and appellate. The initial version, enacted in 1948, provided,

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.[60]

Over the ensuing decades, Congress came to perceive three problems with this initial version.[61] First, the phrase "in his opinion" appeared to delegate to the target judge himself almost complete discretion in applying the rule.[62] Second, the phrase "is so related to or connected with any party or his attorney as to render it improper" was so vague as to have little practical effect.[63] Finally, the courts quickly added a "duty to sit," creating a strong countervailing criterion that limited the section's effectiveness.[64]

In 1972, the American Bar Association issued a Code of Judicial Conduct, which the Judicial Conference adopted a year later, with minor modifications, as the Code of Conduct of U.S. Judges.[65] In

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58 *Id.*

59 *Berger*, 255 U.S. at 31.

60 28 U.S.C. § 455 (1970).

61 FED. JUDICIAL CTR., RECUSAL: ANALYSIS OF CASE LAW UNDER 28 U.S.C. §§ 455 & 144, at 2 (2002).

62 *Id.*

63 *Id.*

64 *Id.*

65 MODEL CODE OF JUDICIAL CONDUCT, Canon 3C (1972) (current version at MODEL CODE OF JUDICIAL CONDUCT, R. 2.11 (2007)); JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 9–11 (1973), *available at* http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1973-04.pdf.

1974, Congress enacted substantial revisions to § 455 to parallel Canon 3C of that Code.[66]

The section currently requires recusal in two different, somewhat overlapping situations.[67] Subsection (a) requires that a judge recuse himself where his "impartiality might reasonably be questioned" for any reason, not merely because of his relationship to a party or his counsel.[68] Congress intended to make clear that an *appearance* of partiality would be enough to require recusal; actual impropriety was not necessary.[69] In addition, the new language was framed in objective terms, deleting language suggesting that a judge need only recuse himself if "in his opinion," it was inappropriate to continue.[70] Congress's purpose, following the lead of the ABA, was to build up the public's confidence in the judicial system, which had been shaken in the past.[71]

The current appearance-based standard and the old probability-of-bias standard are profoundly different in approach. The appearance-based standard of current § 455 focuses on the *public's perception* of the court, whereas the probability-of-bias standard focused on *actual likelihood of bias*.[72] Even today, however, the probability-of-bias standard often seems to be applied in place of the required appearance-based standard.[73]

The second part of § 455, subsection (b), lists five specific circumstances in which a judge's recusal is required:

> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
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> (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;

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66 Frost, *supra* note 5, at 546.

67 Arthur D. Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 69 U. PITT. L. REV. 189, 192 (2007).

68 28 U.S.C. § 455(a) (2006).

69 Feldman, *supra* note 12, at 326–27.

70 Matthew E. Kaplan, Comment, *Judicial Process at Risk: Scales of Justice Unequal Under Present Federal Judicial Disqualification Statutes*, 8 U. MIAMI BUS. L. REV. 273, 284 (2000).

71 Frost, *supra* note 5, at 546–47.

72 Dmitry Bam, Note, *Understanding* Caperton*: Judicial Disqualification Under the Due Process Clause*, 42 MCGEORGE L. REV. 65, 75 (2010).

73 *Id.*

> (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;
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> (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;
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> (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:
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> (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;
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> (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.[74]

The financial interest restriction of § 455(b)(4) has been the subject of more controversy than other parts of that subsection.[75] This is due in part to the breadth of the definition of "financial interest": "ownership of a legal or equitable interest, *however small*."[76] Under this definition, a judge owning a single share of stock has a financial interest.[77] Even if a judge does not recall owning that share, hearing the case in such circumstances is a violation of § 455(b)(4).[78] In addition, the statute prohibits not merely a financial interest in the judge himself, but also in the judge's spouse or any of his minor children that live in his household.[79] Lapses of memory make inadvertent violations of this subsection difficult to avoid.

Section 455(b)(1) ("Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding") triggers serious practical and empirical problems. District court judges are unlikely to admit actual bias; moving parties may therefore be reluctant to assert actual bias as

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74 28 U.S.C. § 455(b) (2006).

75 Hellman, *supra* note 67, at 196.

76 28 U.S.C. § 455(d)(4) (emphasis added); Hellman, *supra* note 67, at 192.

77 Hellman, *supra* note 67, at 192.

78 *Id.* at 193.

79 *Id.* at 192.

their ground for recusal.[80] Subsection (a), by contrast, covers the same set of issues by focusing on appearances; to recuse himself under subsection (a) a judge need not admit actual bias. He need merely note that a reasonable person might perceive the possibility of bias, however unwarranted that perception might be. Appellate court analyses, in turn, often conflate the two—perhaps in part to avoid having to impugn the target judge. In any event, separately coding the two is extremely difficult; the study reported here does not attempt to do so.

The remaining subsections of § 455(b) have not generated much controversy in the case law.[81] Each addresses a kind of conflict that is normally fairly obvious: for example, where a party in the proceeding is a close relative of the judge or where the judge has previously served as counsel for one of the parties.[82]

Finally, the legislative history to the 1974 amendments makes clear that Congress explicitly intended to eliminate any "duty to sit."[83] It is unclear whether, and to what extent, a perceived duty to sit affects district court judge recusal decisions; as has been noted, such decisions rarely appear in writing. Only ten court of appeals decisions in the 1080-case sample studied noted the issue, and only one of the ten reversed the decision not to recuse.

The issue remains current and important in the U.S. Supreme Court. A Statement of Recusal Policy, issued by seven of the nine Justices in 1993, announced how each of the seven would assess issues presented when a relative was "'an associate in the law firm representing one of the parties before this Court' but has 'not participated in the case before the Court or at previous stages of the litigation,' . . . when the covered lawyer *has* participated in the case at an earlier stage of the litigation, or when the covered lawyer is a *partner* in a firm appearing before us."[84] The seven wrote,

> Even one unnecessary recusal impairs the functioning of the Court. . . . In this Court, where the absence of one Justice cannot be made up by another, needless recusal deprives litigants of the nine Justices to which they are entitled, produces the possibility of an even division on the merits of the case, and has a distorting effect upon the certiorari process, requiring the petitioner to obtain (under

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80 *See id.* at 196.

81 *Id.*

82 *Id.*

83 FED. JUDICIAL CTR., *supra* note 61, at 2.

84 SUPREME COURT OF THE UNITED STATES, STATEMENT OF RECUSAL POLICY 1 (Nov. 1, 1993).

> our current practice) four votes out of eight instead of four out of nine.[85]

Supreme Court Justices, in other words, continue to believe that they have a strong duty to sit that countervails a potential appearance of bias. In declining to recuse himself in *Cheney*, Justice Scalia cited the foregoing language.[86]

Section 455 does not itself set forth procedural rules. Judges are expected to recuse themselves *sua sponte*, even if the parties do not object.[87] Once recusal is in issue, the challenged judge decides for himself whether recusal is warranted.[88] If a trial judge does not recuse himself, appellate review is available. If a judge on a court of appeals declines to recuse himself, the moving party may have recourse, in theory, to the Supreme Court, but such recourse is never availed of in practice. If a Justice of the Supreme Court declines to recuse himself, there is no recourse, even in theory.[89] Very infrequently, some Supreme Court Justices do provide written explanations of their recusal decisions, but such explanations are not required.[90]

III

COGNITIVE ILLUSIONS AND UNCONSCIOUS BIAS

We now know that humans often rely on mental shortcuts—"heuristics"—to make complex decisions.[91] Heuristics, although possibly hardwired, present themselves as rules of thumb, educated guesses, intuitive judgments, or simply common sense. Reliance on heuristics facilitates efficient decision making, but it can also produce severe and systematic errors in judgment.[92] The use of unconscious mental shortcuts to evaluate facts can create misperceptions—"cognitive illusions"—which can then skew our decisions.[93]

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85 *Id.* at 1–2.

86 *Cheney I*, 541 U.S. 913, 915–16 (2004).

87 Frost, *supra* note 5, at 548.

88 *Id.*

89 Hellman, *supra* note 67, at 203.

90 *Id.*

91 Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1128 (1974). For a detailed description of this work, see JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982).

92 Marybeth Herald, *Deceptive Appearances: Judges, Cognitive Bias, and Dress Codes*, 41 U.S.F. L. REV. 299, 304 (2007).

93 Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 778 (2001).

Cognitive illusions, like optical illusions, deceive us without our being fully aware that we are being deceived.

Five common heuristics—and the cognitive illusions they cause—influence decision making in law, as they do in all other fields of human endeavor:

> anchoring (making estimates based on irrelevant starting points); framing (treating economically equivalent gains and losses differently); hindsight bias (perceiving past events to have been more predictable than they actually were); the representativeness heuristic (ignoring important background statistical information in favor of individuating information); and [the unfortunately named] egocentric biases (overestimating one's own abilities).[94]

These are among the best-documented cognitive illusions in psychological literature.

Studies have shown that judges are not immune to the effects of heuristics and the resulting cognitive illusions.[95] In the recusal context, heuristics may be relevant at two levels. First, judges need to be aware of how heuristics affect their substantive decision making. A judge unconsciously affected by cognitive illusions is less likely to render sound decisions. In general, however, susceptibility to cognitive illusions is not likely to constitute grounds for recusal. We *all* use heuristics. Someone equally human will replace a judge who recuses himself on this ground. Second, and more importantly, judges making recusal decisions, and those who worry about the law of judicial recusal need to be aware of how heuristics can bias a judge's decision to recuse himself—or, more likely, *not* to recuse himself.

Judges have published very few explanations about their decisions, and this makes illustrating the effects of these heuristics difficult. This Article examines three examples of explained recusals: Justice Scalia's written memorandum defending his decision not to recuse himself in *Cheney v. United States District Court for the District of Columbia*;[96] Justice Rehnquist's written decision to sit in *Laird v. Tatum*,[97] in which he ultimately cast the deciding vote; and Ninth

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94 *Id.* at 784.

95 Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 497 (2005); *see also* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 420 (2007) (concluding that implicit memory biases taint the legal decision-making process).

96 *Cheney I*, 541 U.S. 913 (2004).

97 Laird v. Tatum (*Laird II*), 409 U.S. 824 (1972).

Circuit Judge Stephen Reinhardt's written decision not to recuse himself in *Perry v. Schwarzenegger*, one of the California gay marriage cases,[98] which has not yet reached a conclusion.

It is not my intention to be critical of the judges in question. I use their writings because precious few alternatives exist. Before setting forth how the various heuristics work and exploring how they might have operated in these three cases, it may be useful to set forth the facts underlying each of the three.

Cheney v. United States District Court challenged the legality of the activities of an advisory committee on energy policy, the National Energy Policy Development Group, established by President George W. Bush and chaired by Vice President Richard Cheney.[99] Two organizations, Judicial Watch, a nonprofit government watchdog group, and the Sierra Club, an environmentalist organization, alleged that the advisory committee had violated the Federal Advisory Committee Act (FACA) by not making public all the documents that it had generated.[100]

FACA exempts committees composed entirely of federal officials.[101] Judicial Watch and the Sierra Club argued that the exemption did not apply because private lobbyists had participated in the committee's meetings—in other words, that the advisory committee on energy policy was meeting with private parties behind closed doors.[102] Vice President Cheney and the committee asked the court to dismiss on the ground that FACA, thus construed, would violate the constitutional separation of powers by requiring judicial oversight of internal executive branch deliberations.[103]

National media outlets prominently covered *Cheney*.[104] Initially, legal scholars focused on the executive privilege issues presented by the case, and political pundits debated its potential impact on the Bush

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98 Perry v. Schwarzenegger (*Perry IV*), 630 F.3d 909 (9th Cir. 2011).

99 *Cheney II*, 542 U.S. 367, 373 (2004).

100 *Id.* at 373–74.

101 *Id.*

102 *Id.* at 374.

103 *Id.* at 375.

104 Timothy J. Goodson, Comment, *Duck, Duck, Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of* Cheney v. United States District Court, 84 N.C. L. REV. 181, 182 (2005); *see also* Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp., 219 F. Supp. 2d 20, 25 (D.D.C. 2002); Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 659 (2005) (stating the hunting trip caused a "loud—and sustained—outcry").

administration.[105] When *Cheney* reached the U.S. Supreme Court and Justice Scalia declined to recuse himself, however, the recusal issues overshadowed these substantive issues.[106]

In early January 2004, while Vice President Cheney's appeal was pending before the Court, Justice Scalia, his son, and his son-in-law joined the Vice President on a duck-hunting trip to Louisiana.[107] Justice Scalia planned the trip before the Court had granted certiorari. According to Justice Scalia's memorandum, on behalf of Justice Scalia's friend, Wallace Carline, who was hosting the duck-hunting trip, Justice Scalia invited Vice President Cheney to participate.[108] After the Vice President accepted the invitation, it was agreed that Justice Scalia, his married son, and his son-in-law would fly with Vice President Cheney on his government jet.[109] Justice Scalia purchased a round-trip, commercial airline ticket, but only used the return portion.[110] There were thirteen hunters on the trip.[111] Justice Scalia was never alone with Vice President Cheney, and they never discussed the case.[112] Vice President Cheney left after two days of duck hunting, while Justice Scalia, his son, and his son-in-law stayed for four more days, returning to Washington on a commercial flight.[113]

After Justice Scalia determined that recusal was not necessary, Sierra Club filed a motion to recuse Justice Scalia under 28 U.S.C. §

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105 Goodson, *supra* note 104, at 182; *see also, e.g.*, Monroe H. Freedman, *Duck-Blind Justice: Justice Scalia's Memorandum in the* Cheney *Case*, 18 GEO. J. LEGAL ETHICS 229, 232–33 (2004) (arguing that suing Cheney in his capacity as chair of the Energy Group regarding whether he lied about how the group was constituted "goes to Cheney's 'reputation and integrity' in the most significant way, and is of particular importance to him in an election year"); Mark J. Rozell, *Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403, 411–14 (2002) (discussing Cheney's refusal to provide requested information to the General Accounting Office (GAO) and his claim that the GAO lacked the authority to seek information from the task force); Carolyn Bingham Kelló, Note, *Drawing the Curtain on Open Government? In Defense of the Federal Advisory Committee Act*, 69 BROOK. L. REV. 345, 392–93 (2003) (explaining that the public has a right to know when the President is making policy recommendations received from special interest groups so that it is able to participate in the democratic process).

106 Goodson, *supra* note 104, at 182.

107 *Cheney I*, 541 U.S. 913, 914–15 (2004).

108 *Id.* at 914.

109 *Id.* at 914–15.

110 *Id.* at 921.

111 *Id.* at 915.

112 *Id.*

113 *Id.*

455(a), asserting that the shared vacation created an appearance of partiality.[114] The motion cited editorials calling for Justice Scalia's recusal in twenty of the nation's thirty largest newspapers as evidence of such an appearance.[115] Denying the motion to recuse, Justice Scalia wrote a twenty-one-page memorandum in which he stated that going on a hunting trip with, and accepting transportation in a private jet from, a party then before the Court afforded no reasonable basis upon which to question his impartiality.[116]

Laird v. Tatum challenged Defense Department surveillance of individuals who opposed the Vietnam War.[117] Justice Rehnquist had served as the head of the Justice Department's Office of Legal Counsel and played a part in assessing and approving the surveillance program.[118] He appeared as a witness for the Justice Department during congressional hearings on that program.[119] When *Laird v. Tatum* came before the Supreme Court in 1972, however, Justice Rehnquist refused to recuse himself, ultimately casting the deciding vote in favor of the surveillance program he had helped design and defend prior to his appointment to the Court.[120]

Like Scalia, Justice Rehnquist felt compelled to explain his decision in writing.[121] Writing a memorandum decision in *Laird v. Tatum*, and citing § 455, he asserted that he was never on record as counsel for the government in the case, was not a material witness in the case, did not have intimate knowledge of the evidence, and was totally disconnected from the issue while at the Department of Justice.[122] He spent the majority of his opinion arguing that he did not fit into any of the specific categories of § 455(b) and that he did not have any actual bias on the merits.[123]

Perry v. Schwarzenegger, brought by two same-sex couples who had been denied licenses to marry, challenged the constitutionality of California's Proposition 8, which amended the California Constitution

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114 Motion to Recuse at 1–2, *Cheney I*, 541 U.S. 913 (2004) (No. 03-475).

115 *Id.* at 3–4.

116 *Cheney I*, 541 U.S. 913.

117 Laird v. Tatum (*Laird I*), 408 U.S. 1 (1972).

118 Jeffrey W. Stempel, *Completing* Caperton *and Clarifying Common Sense Through Using the Right Standard for Constitutional Judicial Recusal*, 29 REV. LITIG. 249, 310 (2010).

119 *Laird II*, 409 U.S. 824, 824–25 (1972).

120 *Id.* at 839; *Laird I*, 408 U.S. at 1.

121 *Laird II*, 409 U.S. at 824.

122 *Id.* at 826–29.

123 *Id.* at 824.

to provide that "[o]nly marriage between a man and a woman is valid or recognized in California."[124] The ACLU, among others, moved to allow various gay rights organizations to become parties to the lawsuit. The district court denied its motion, and the ACLU did not appeal.

On August 4, 2010, after a highly publicized trial, District Court Judge Vaughn Walker ruled that Proposition 8 violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[125] The Ninth Circuit stayed judgment pending appeal.[126] Judges Stephen Reinhardt, Michael Daly Hawkins, and N. Randy Smith were assigned to hear the appeal on the merits.[127] The Ninth Circuit heard oral arguments on December 6, 2010.[128]

On January 4, 2011, the panel certified a question to the California Supreme Court.[129] Because California officials had declined to defend the law, the panel asked the state court to decide whether the proponents of a challenged initiative had a "particularized interest in the initiative's validity" that would permit them to defend the law when state officials refused to do so.[130] The panel stayed the federal appeal itself pending the California Supreme Court's response.[131] On February 16, 2011, the California Supreme Court agreed to hear the Ninth Circuit's question and heard oral arguments on September 6, 2011.[132] The district court's judgment remains stayed, and no decision about the appeal on the merits is expected until after the California Supreme Court rules on the Ninth Circuit's certified question.

Judge Reinhardt's wife, Ramona Ripston, was Executive Director of the American Civil Liberties Union (ACLU) of Southern California until February 2011, when she retired.[133] The ACLU advocates equal marriage rights for same-sex couples and, as noted,

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124 Perry v. Schwarzenegger (*Perry I*), 704 F. Supp. 2d 921, 927–28 (N.D. Cal. 2010).

125 *Id.* at 991–1003.

126 Order on Motion for Stay Pending Appeal at 1, Perry v. Schwarzenegger (*Perry III*), 630 F.3d 898 (9th Cir. 2011) (No. 10-16696), 2010 WL 3212786.

127 *Perry III*, 630 F.3d at 901.

128 *Id.* at 898.

129 Perry v. Schwarzenegger (*Perry II*), 628 F.3d 1191, 1193 (9th Cir. 2011).

130 *Id.*

131 *Id.* at 1200.

132 Perry v. Schwarzenegger, No. S189476 (Cal. Feb. 16, 2011); *Calendars—Supreme Court*, CALIFORNIA COURTS, *available at* http://www.courts.ca.gov/2116.htm (last visited Sept. 20, 2011).

133 *Perry IV*, 630 F.3d 909, 911 (9th Cir. 2011).

had unsuccessfully represented parties attempting to intervene in the *Perry* case.[134] Judge Reinhardt concluded that, in such circumstances, recusal was not necessary. Judge Reinhardt thus denied the defendant's Motion to Disqualify.[135]

In his memorandum, Judge Reinhardt conceded that § 455 would have required recusal where "a reasonable person with knowledge of all the facts would conclude that [my] impartiality might reasonably be questioned."[136] He represented that his wife's views had no impact on his own views and ability to remain impartial, and he concluded,

> A reasonable person familiar with my judicial record throughout my career . . . would not reasonably believe that either my wife's beliefs or her organization's filings in the court below would play any role whatsoever in my handling of the present case. I therefore decline to recuse myself under § 455(a).[137]

Is it possible that heuristics interfered in the ability of Justice Scalia, Justice Rehnquist, or Judge Reinhardt to make objective decisions regarding their own recusal? One of the most important recent studies of the effect of heuristics on judicial decision making was authored by Professor Chris Guthrie, Professor Jeffrey Rachlinski, and Judge Andrew Wistrich. In *Inside the Judicial Mind*, the authors identify five heuristics as the most common and measured their influence on 167 magistrate judges.[138] Of the five, three—anchoring, hindsight bias, and egocentric bias—were found to affect judges as much as other decision makers.[139] Those three are discussed in greater detail below. The other two, framing and the representativeness heuristic, had an impact on judicial decision making, but less so than for the population in general.[140] They are also less relevant to recusal issues.

A. Anchoring

Anchoring affects numerical estimates.[141] When a subject establishes an initial reference point (the "anchor"), regardless of how

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134 *Id.* at 913–14.

135 *Id.* at 916.

136 *Id.* at 911 (alteration in original).

137 *Id.* at 916.

138 Guthrie et al., *supra* note 93, at 787.

139 *Id.* at 816.

140 *Id.*

141 *Id.* at 787–88.

irrelevant it is to what he is attempting to estimate, he tends to rely on that anchor when making his estimate.[142] Once the anchor is set, there is inevitable bias. For example, the list value of a house can influence how the seller, buyers, and other participants in the sale process estimate the fair market value of the house. Reliance on an anchor may appear reasonable when anchors convey relevant information about the actual value of an item. Problems arise, however, when anchors do not provide any information about the actual value of a number. Even when they do convey relevant information, they can still bias judgment.[143]

In an early study of anchoring described by Guthrie et al., participants were asked to estimate the percentage of African countries in the United Nations.[144] Before asking for this estimate, the participants were informed that the number was either higher or lower than a numerical value identified by the arbitrary spin of a wheel. Unknown to the participants, the wheel had been set to stop on either ten or sixty-five.[145]

Even though the purportedly arbitrary initial values from the wheel were clearly irrelevant to the correct answer, the initial anchor values had a significant influence on the participants' responses. When the wheel landed on ten, the median estimate of the participants was twenty-five percent; when the wheel landed on sixty-five, the median estimate of the participants was forty-five percent.[146] In other words, the initial arbitrary value had a clear anchoring effect on participants' estimates, *notwithstanding the fact that participants knew it to be arbitrary*.

Other studies have shown this same anchoring effect—as, for example, when subjects receive an absurdly high anchor number and then must estimate the price of a book (after first being asked if it was higher or lower than $7128.53) or the average temperature in San Francisco (after first being asked if it was higher or lower than 558°F).[147] Even when an anchor is patently absurd and provides no useful information, mentally testing the validity of the anchor causes

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142 *See* Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420, 429 (2007).

143 *See* Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 96–97 (2000).

144 *See* Tversky & Kahneman, *supra* note 91, at 1128.

145 *See* Guthrie et al., *supra* note 93, at 788.

146 Rachlinski, *supra* note 143, at 97.

147 Guthrie et al., *supra* note 93, at 788–89.

people to adjust their estimates upward or downward toward that anchor.[148]

Litigation frequently produces anchors in settlement negotiations and damage awards.[149] In civil cases, judges who participate in settlement negotiations may use numbers floated in such negotiations as anchors regardless of their validity. This can result in biased damage awards.[150] In criminal cases, sentencing recommendations—however poorly grounded—are likely to serve as sentencing anchors.[151] Neither is necessarily illegitimate; law can make constructive affirmative use of anchors to influence judicial decisions. But, if law's goal is ultimately to measure *actual* damages, for example, anchors can unconsciously subvert that goal.

Numerical estimates are only relevant to a small subset of recusal decisions. But they were at least arguably relevant to Justice Scalia's decision in *Cheney*. Justice Scalia had accepted an item of value from one of the parties to an appeal pending before the Court—transportation by private jet from Washington, D.C., to Patterson, Louisiana, for himself, his son, and his son-in-law.[152] The value of that item was at least arguably relevant to the "appearance of partiality" standard of § 455(a). That such value was relevant to Scalia's decision not to recuse is evidenced by his concluding argument: "If it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined."[153] Clearly, Justice Scalia had some belief regarding the gift's value. What was his belief? And did anchoring bias possibly skew it?

Key to his assessment of the value of the gift he had received were three anchors: that "[o]ur flight down cost the Government nothing" (value = zero), and that no one in his party "saved a cent by flying on the Vice President's plane"[154] (value = zero) because they had purchased round-trip tickets on a commercial flight (value ≈ $1350).[155] The actual value of what he received, by contrast, was

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148 *Id.* at 788.

149 *Id.* at 789.

150 *Id.* at 793–94.

151 *See id.* at 794.

152 *Cheney I*, 541 U.S. 913, 914–15 (2004).

153 *Id.* at 929.

154 *Id.* at 921.

155 A search for flights from Washington, D.C., to New Orleans (the nearest major commercial airport to Patterson) suggests that the least expensive commercial round-trip

presumably not less than the cost of the flight properly allocated among the four passengers, three of whom were Justice Scalia and members of his family.

Flights in private jets of course have a higher value than flights on commercial airlines. As anyone who has ever flown on a commercial airline knows, modern commercial flights are at best a necessary evil. Those for whom money is no object hire private jets, which are far more comfortable, fly at the convenience of the passengers, and can land at small airports closer to the passengers' ultimate destination. Gulfstream jets, like the one Justice Scalia and his family used, currently rent for about $4900 per hour.[156] If one assumes six hours of rental,[157] the total value of the flight in question would have been just under $30,000. That value would then have to be allocated among the four passengers. One might allocate the value on a no-additional-cost basis, as Justice Scalia did.[158] This would imply that Justice Scalia received no value whatever from the private flight, a proposition which seems implausible. A more likely allocation would be pro rata, which would imply that Justice Scalia received a $22,000 gift from a party scheduled to appear before him.[159]

The point is not that Justice Scalia did anything wrong, or even that he received a larger gift than he acknowledged from a party scheduled to appear before him. The point is rather that the Justice's anchors might well have had an effect on his estimate of the gift's value. Had Justice Scalia not known the price of a commercial flight, had he known the cost of the flight to the government, or had he been given the prices that an average person would have bid for the privilege of

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flight is approximately $450. *See* KAYAK, http://www.sidestep.com /flights/DCA-MSY /2011-09-30/2011-10-4 (last visited Sept. 20, 2011).

156 *See, e.g.*, New York Aviation Corporation, http://www.privatejetcharters.com /Charterprices.htm (last visited Sept. 20, 2011).

157 The plane in question presumably flew from Washington to Patterson and back. The distance between Washington and Patterson is 1033 miles. The Gulfstream's rated cruising speed is 400 knots, *see, e.g.*, New York Aviation Corporation, http://www.privatejetcharters.com/Charterprices.htm (last visited Sept. 20, 2011), which equates to 460 miles per hour. The actual flight at that speed (ignoring slower speeds for landing and takeoff) would therefore have taken about 2-1/4 hours. Allowing for loading, takeoff, landing, and unloading, this suggests a one-way trip of about three hours.

158 *See* Internal Revenue Code, 26 U.S.C. § 132(a)(1) (2006).

159 *See, e.g.*, Honest Leadership and Open Government Act of 2007, 2 U.S.C.A. § 439a(c)(1)(B) (Supp. 2007–2008) (limiting the use of campaign funds for flight expenditures to the "pro rata share of the fair market value of such flight (as determined by dividing the fair market value of the normal and usual charter fare or rental charge for a comparable plane of comparable size by the number of candidates on the flight)").

flying on the Vice President's plane, he might have approached the problem of valuation quite differently. Indeed, had he assumed that the gift was worth over $20,000, he might have come to a different conclusion about the possibility of an appearance of partiality.

B. Hindsight Bias

Hindsight bias is the tendency of people to overestimate the predictability of past events.[160] In other words, it makes the past seem more predictable than it actually was. Hindsight bias occurs because learning an outcome causes people to update their beliefs about the world.[161] People then rely on these new beliefs to generate retroactive estimates of what was predictable.[162] In doing so, they ignore the fact that the outcome itself inspired the change in their beliefs.[163] Consequently, they conclude that the actual outcome was more predictable or foreseeable than it actually was.[164]

Hindsight bias is related to belief persistence, a phenomenon where people cannot ignore known information.[165] It is important not to confuse hindsight bias with the process of simply learning from experience, which is perfectly rational. Hindsight bias consists of using known outcomes to assess retroactively the predictability of something that has already happened.

Assessing the predictability of past outcomes is pervasive in the law;[166] it is therefore important to be aware of hindsight bias' effect on legal liability. For example, one study compared participants' foresight and hindsight evaluations of whether failure to take precautions against a flood was negligent.[167] Participants were instructed to find the defendant negligent if they believed a flood had a greater than ten percent chance of occurring in any given year.[168]

Although both sets of participants reviewed identical information about the likelihood of a flood, the participants reached different

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160 Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 571 (1998).

161 Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1269 (2005).

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.*

166 *See* Rachlinski, *supra* note 160, at 572.

167 *Id.* at 589.

168 *Id.* at 589–90.

conclusions when some were told that a flood had in fact occurred and caused damage.[169] Only twenty-four percent of foresight participants concluded that the likelihood of a flood justified liability for negligence, while fifty-seven percent of the hindsight participants concluded that the failure to take precautions was negligent.[170] In other words, the decision to refrain from taking the precaution seemed reasonable to a majority of foresight participants, but seemed unreasonable to a majority of hindsight participants.

In addition to negligence determinations, hindsight bias likely influences a decision not to suppress evidence for lack of probable cause (after the police actually find drugs during the search), claims of ineffective assistance of counsel (after the defendant has actually been convicted), the levying of sanctions under Rule 11 of the Federal Rules of Civil Procedure (after the court has actually rejected a motion with respect to which Rule 11 sanctions are sought), and assessments of the liability of corporate officers for false predictions about their company's performance (after the predictions actually fail to come true). Thus, hindsight bias can pose dangers in many areas of law.

Hindsight bias may have also affected Justice Scalia's decision not to recuse himself in *Cheney*. Under § 455(a), his recusal was required if his "impartiality might reasonably be questioned" by an objective person.[171] He asserted that he had not had any opportunity to be alone with Cheney during the duck hunt. Objective observers might or might not credit his assertion.

One of the questions before him was whether a reasonable observer might in fact be reluctant to rely on his assertion, given the objectively verifiable facts.[172] Knowing that the Justice had spent three hours on a plane with a party before him and two more days on a hunting trip, would a reasonable observer predict interactions between the two that might call the Justice's impartiality into question? Such interactions had not in fact occurred, the Justice

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169 *Id.* at 590.

170 *Id.*

171 *See* 28 U.S.C. § 455(a) (2006); *see also* Christopher Riffle, Note, *Ducking Recusal: Justice Scalia's Refusal to Recuse Himself from* Cheney v. United States District Court for the District of Columbia, 541 U.S. 913 (2004), *and the Need for a Unique Recusal Standard for Supreme Court Justices*, 84 NEB. L. REV. 650, 663–67 (2005) (noting that the recusal issue does not turn on whether a Justice can in fact decide a case impartially; rather, this statutory standard requires a Justice to recuse himself if his impartiality could "reasonably be questioned").

172 *Cheney I*, 541 U.S. 913, 924 (2004).

asserted.[173] Therefore, a reasonable, objective party would not predict them to occur.

Hindsight bias may similarly have influenced Justice Rehnquist's decision not to recuse himself in *Laird*. An appearance of partiality depends in significant part on what an objective observer would predict to have happened behind the scenes based on what is objectively verifiable. Justice Rehnquist asserted that he was not in fact of counsel or a material witness in the matter[174] and that he had very little intimate knowledge of the underlying evidence.[175] In effect, he asserted that he was *not in fact biased*.

Application of an appearance-based standard, however, does not turn on whether the judge is in fact biased. In applying such a standard, we do not want to have to credit or disbelieve a judge's unsworn and unverifiable assertions of fact. Predictions based on objectively verifiable evidence are essential to neutral application of such a standard. Knowing what had actually happened behind the scenes likely affected Justice Rehnquist's evaluation of what a reasonable observer would predict based on objectively verifiable evidence. In short, hindsight bias affected the Justice's evaluation.

The same phenomenon may have affected Judge Reinhardt's reasoning in *Perry v. Schwarzenegger*. Again, an objective observer knew only that Judge Reinhardt's wife's organization had attempted to intervene on one side of the case.[176] The "appearance of partiality" question was whether, based on the objectively verifiable facts, an objective observer might conclude that the judge's wife's views on the case before him might influence him.[177] Whether he was *in fact* influenced is a conceptually distinct question. Nevertheless, believing that he was not *in fact* influenced by his wife's views may have affected Judge Reinhardt's assessment of whether, based on the objectively verifiable facts, a reasonable observer might predict that he would be influenced.

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173 *Id.* at 915.

174 *Laird II*, 409 US 824, 828 (1972).

175 *Id.* at 826.

176 *See Perry IV*, 630 F.3d 909, 911, 913 (9th Cir. 2011).

177 *Id.*

C. Egocentric Bias

The unfortunately named "egocentric bias" is the final cognitive illusion identified and studied by Guthrie et al.[178] As they explain:

> People tend to make judgments about themselves and their abilities that are "egocentric" or "self-serving." People routinely estimate, for example, that they are above average on a variety of desirable characteristics, including health, driving, professional skills, and likelihood of having a successful marriage. Moreover, people overestimate their contribution to joint activities. . . . [For example], when married couples are asked to estimate the percentage of household tasks they perform, their estimates typically add up to more than 100%.[179]

The egocentric bias is famously exemplified by the closing phrase from the radio show, *A Prairie Home Companion, News from Lake Wobegon*: "Where all the women are strong, all the men are good-looking and all the children are above average."[180] Egocentric biases appear for many reasons. Again as explained by Guthrie et al.:

> First, of course, is self-presentation. People may not really believe that they are better than average, but they will nonetheless tell researchers that they are. Second, people engage in confirmatory mental searches for evidence that supports a theory they want to believe, such as that their marriage will succeed. They have no comparable data on the nature of strangers' marriages, so the only evidence they find suggests that theirs is more likely than others' to be successful. Third, memory is egocentric in that people remember their own actions better than others' actions. Thus, when asked to recall the percentage of housework they perform, people remember their own contribution more easily and, consequently tend to overestimate it. Finally, many of the constructs involved in egocentric biases are ambiguous, and thus, people can define success differently. For example, safe driving means different things to different people, and as a result, everyone really can drive safer than average, at least as measured by their own standards.[181]

Egocentric biases can have a negative influence on the litigation process. "[L]itigants and their lawyers might overestimate their own abilities, the quality of their advocacy, and the relative merits of their cases."[182] Consequently, they may be unrealistically unwilling to settle. As a result, egocentric biases can lead to bargaining impasse

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178 *See* Guthrie et al., *supra* note 93, at 811–12.

179 *Id.* (footnotes omitted).

180 Am. Pub. Media, A PRAIRIE HOME COMPANION WITH GARRISON KEILLOR, http://prairiehome.publicradio.org/ (last visited Sept. 20, 2011).

181 Guthrie et al., *supra* note 93, at 812 (footnotes omitted).

182 *Id.* at 812–13.

and wasteful litigation. Like litigants and lawyers, judges may also be inclined to interpret information in ways consistent with this bias.[183]

For example, judges in one study routinely and significantly underestimated the likelihood that they would be overturned on appeal.[184] The judges were asked to assess how likely they were to be reversed on appeal.[185] Even though their responses were anonymous, they still exhibited egocentric bias.[186] In fact, as reported by Guthrie et al., 56.1% of the judges put themselves in the lowest quarter of reversal rates.[187] Because the responses were anonymous, it seems that that the egocentric bias appeared more likely because of the second or third reasons: lack of comparative data or the egocentric memory.

Egocentric bias may lead judges to believe that they are better decision makers than is really the case; this may interfere with the performance of their jobs. "For example, a federal district judge can grant an interlocutory appeal only if she is willing to concede that she has issued a ruling on a matter of law 'as to which there is substantial ground for difference of opinion.'"[188] Thus, a litigant seeking to persuade a judge to grant an interlocutory appeal must convince her that another judge could easily disagree with her ruling.[189] Egocentric bias likely makes it difficult for litigants to convince federal judges that they might have been wrong. More generally, egocentric biases may make it hard for judges to recognize that they can and do make mistakes.[190]

At the same time, egocentric biases can be personally and socially beneficial. Psychologists argue that having a somewhat inflated belief in one's abilities helps maintain one's morale and ensures a healthy sense of well-being.[191] Society surely prefers its judges to be resolute and self-assured rather than timid and insecure.[192] Although egocentric beliefs may induce judges to see the world in a self-serving

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183 *Id.* at 813.
184 *Id.* at 813–14.
185 *Id.* at 813.
186 *Id.* at 814.
187 *Id.*
188 *Id.* (quoting 28 U.S.C. § 1292(b) (1994)).
189 *Id.*
190 *Id.*
191 *Id.*
192 *Id.*

fashion, the justice system as a whole may ultimately be better off as a result.[193]

Nevertheless, egocentric bias may make it difficult for judges to decide objectively whether they can act impartially in a particular case. Unfortunately, accusing a judge of "egocentric bias" seems particularly impolitic. And, unlike anchoring and hindsight bias, this bias likely affects every decision made by a judge about himself—in other words, it likely affects every federal recusal decision. For use in federal court, we may need a less pejorative term—perhaps "self-confidence bias."

In any event, such a bias may have played a part in leading Justice Scalia to conclude that he could remain impartial in a case involving a longtime friend. Perhaps in response to this concern, the Justice emphasized that Vice President Cheney, although a named party in the case, was named in his official capacity as a federal officer—Vice President of the United States and Chairman of the National Energy Policy Development Group—and that the defendant did not seek relief against his friend personally, but against the government.[194] He then went on to observe that if some other person were to become head of that committee or to obtain custody of the committee's documents, the plaintiffs would name that person, and his friend would be dismissed as a named party.[195]

In its Motion to Recuse, Sierra Club asserted that "because [Vice President Cheney's] own conduct is central to this case, the Vice President's reputation and his integrity are on the line."[196] At issue in the case was whether the committee had met *ex parte* with parties having an interest in energy policy. Such would be a violation of federal law and would at least arguably reflect on the Vice President's conduct.[197] Justice Scalia strongly disagreed; the case, he asserted, was "a run-of-the-mill legal dispute about an administrative decision" and "[n]othing this Court says on those subjects will have any bearing upon the reputation and integrity of Richard Cheney."[198]

Perhaps. At issue, however, was whether Justice Scalia would be able to disregard his friendship with Vice President Cheney and

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193 *Id.*

194 *Cheney I*, 541 U.S. 913, 918 (2004).

195 *Id.*

196 Motion to Recuse at 9, *Cheney I*, 541 U.S. 913 (2004) (internal quotation marks omitted).

197 *Cheney I*, 541 U.S. at 919 & n.1.

198 *Id.* at 918–19.

separate the man from the office. The media had prominently featured the *Cheney* case with many commentators criticizing the Vice President and the committee. Many viewed the case as reflecting on Mr. Cheney personally. At issue, moreover, was whether a reasonable person could reasonably question Justice Scalia's impartiality, not whether Justice Scalia could *actually* disregard that friendship. Cognitive illusions with regard to his own abilities—or egocentric bias—may well have affected his answer to both questions.

Please note that nothing in the foregoing paragraphs is intended to suggest that Justice Scalia is abnormal in any way. We *all* suffer from egocentric bias. It is psychologically healthy to do so. The point is rather that egocentric bias may make it impossible for judges to reliably resolve recusal motions with regard to themselves in a manner consistent with the standards of § 455, regardless of how intelligent, careful, and well intentioned they may be. Review by others is essential, and we should predict that cases involving grounds implicating possible egocentric bias should result in higher reversal rates than those that do not.

Judge Reinhardt, similarly, may have overestimated his ability to separate himself from his wife's views. This may have led him to an unrealistic assessment of whether his participation in *Perry* might create an appearance of impartiality. Given his wife's level of participation in California Proposition 8 issues, a reasonable person might well question Judge Reinhardt's impartiality. He stated, "The views are hers, not mine, and I do not in any way condition my opinion on the positions she takes regarding any issues."[199] Perhaps. It remains possible, however, that a psychologically healthy level of self-confidence caused him to underestimate his wife's influence on his views.

What happens when a judge's recusal decisions are reviewed by others? The hope is that review will be more objective, less affected by the heuristics described above.

IV

STUDY OF RECUSAL APPEALS FROM 1980 TO 2007

Researchers searched the relevant files on Lexis and Westlaw for U.S. court of appeals decisions between 1980 and 2007, inclusive, in

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[199] *Perry IV*, 630 F.3d 909, 916 (9th Cir. 2011).

which variants of the words or phrases "recusal," "disqualification," "28 U.S.C. § 144," and "28 U.S.C. § 455" were used. The researchers then read and coded the resulting cases by circuit, grounds asserted for recusal or disqualification, district court judge, outcome, whether the parties raised the recusal issue prior to judgment, and whether the case was civil or criminal. Cases cited within any such cases, if issued within the period studied, were also read and, if relevant, included in the study. All cases included in the study were read at least twice by different research assistants. I sampled their work for quality control purposes.

A. Basic Data

The study found 1080 appeals in which at least one ground asserted on appeal was the refusal by a district court judge to recuse himself. Reversals without remand for further proceedings on the recusal issue and remands for further proceedings on that issue were both relatively low. Total dispositions were as follows:

Affirmed	952	88.1%
Reversed	88	8.1%
Remanded	40	3.7%
Total	1080	

This total sample was divided almost evenly between civil and criminal cases: 505 civil and 575 criminal. Reversal rates on the recusal issue in criminal cases were somewhat higher. Dispositions of appeals from failure to recuse in civil cases were as follows:

Affirmed	434	85.9%
Reversed	52	10.3%
Remanded	19	3.8%
Total	505	

The corresponding figures for criminal cases were as follows:

Affirmed	518	90.1%
Reversed	36	6.3%
Remanded	21	3.7%
Total	575	

Motions to recuse were sought prior to judgment in 750 of the 1080 cases. The remaining 330 challenges were sought after judgment. The timing of the motion did not seem to affect disposition rates. Dispositions of the pre-judgment motions were as follows:

Affirmed	659	87.9%
Reversed	65	8.7%
Remanded	26	3.5%
Total	750	

The corresponding figures for post-judgment motions to recuse were as follows:

Affirmed	293	88.8%
Reversed	23	7.0%
Remanded	14	4.2%
Total	330	

Pre-judgment motions to recuse were more common in criminal cases:

	Civil	Criminal
Pre-judgment	63.0%	76.8%
Post-judgment	37.0%	23.2%

Between 1980 and 2000, the number of appeals heard per year from refusals to recuse stayed relatively constant. Beginning in 2001, the number of such appeals spiked and thereafter varied considerably from year to year. The cause of this change is unclear.

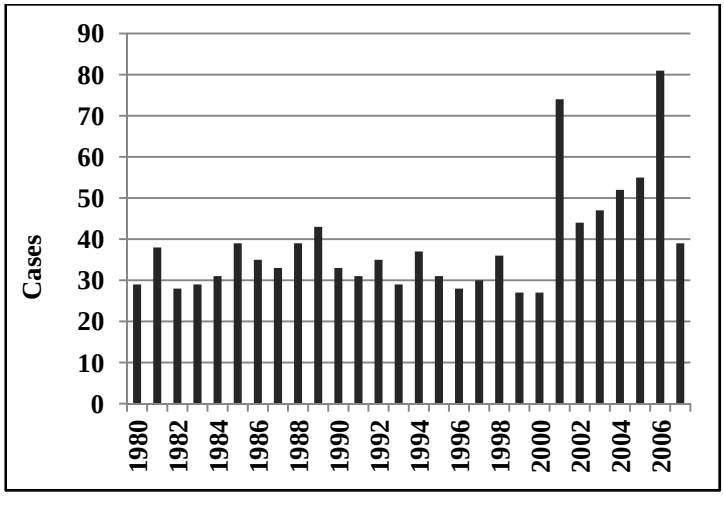

Fig. 1. Appeals from Refusals to Recuse.

Although the number of appeals changed significantly in 2001, the number of reversals and remands did not increase. In effect, the latter

part of the study period saw a spike only in the number of unsuccessful appeals. Again, the cause is unclear.

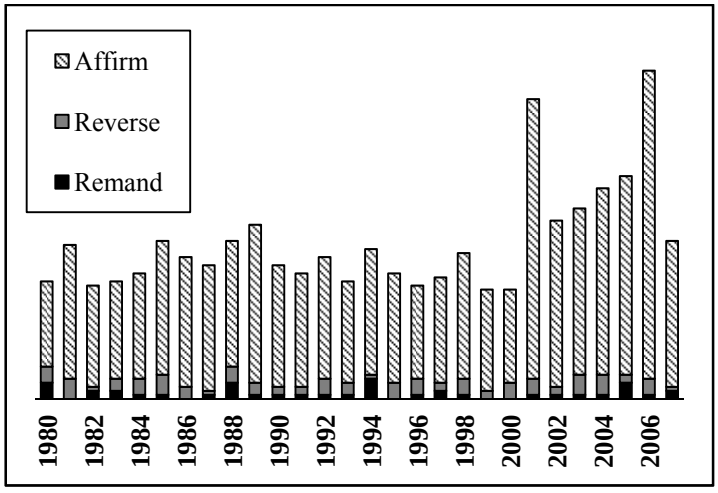

Fig. 2. Outcomes by Year.

Over the entire twenty-eight-year period, however, outcomes did vary markedly among circuits:

Circuit	Cases	Affirmed	Reversed	Remanded
1st	53	77.4%	17.0%	5.7%
2d	82	89.0%	6.1%	4.9%
3d	72	72.2%	20.8%	6.9%
4th	49	91.8%	4.1%	4.1%
5th	130	77.7%	20.0%	2.3%
6th	99	91.9%	3.0%	5.1%
7th	101	87.1%	9.9%	3.0%
8th	103	94.2%	4.9%	1.0%
9th	151	95.4%	2.0%	2.6%
10th	108	94.4%	1.9%	3.7%
11th	90	88.9%	6.7%	4.4%
D.C.	20	90.0%	10.0%	0.0%
Federal	22	90.9%	0.0%	9.1%

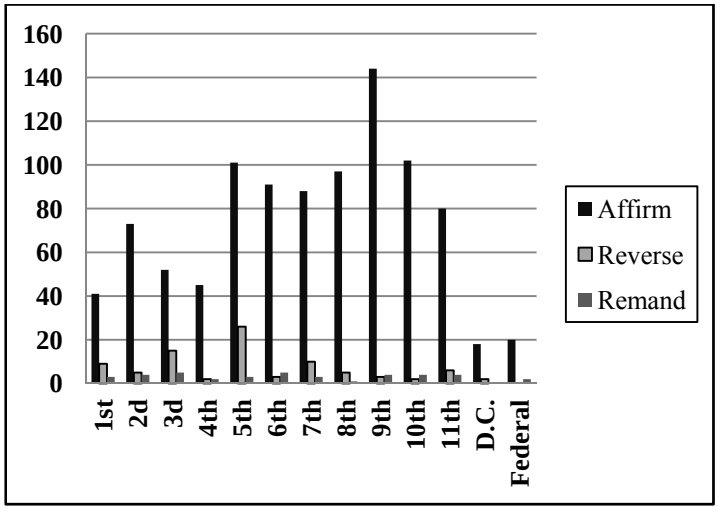

Fig. 3. Outcomes by Circuit.

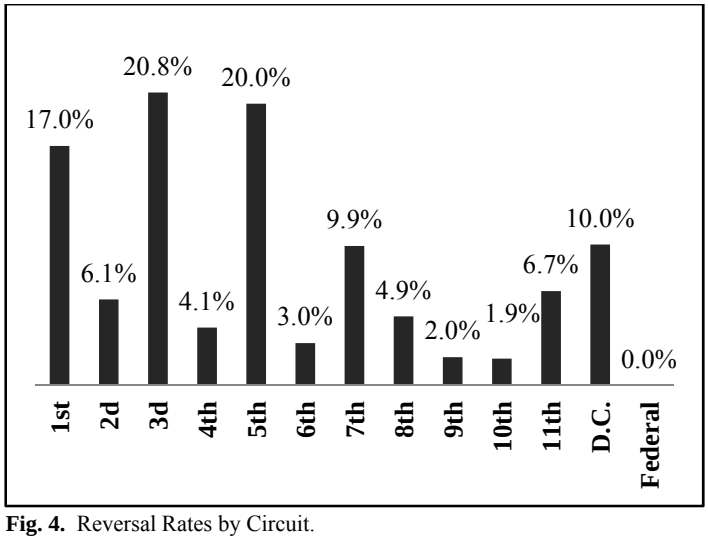

Fig. 4. Reversal Rates by Circuit.

In sum, there appear to have been substantial geographic disparities in reversal rates among the various circuits. No explanation based on the data collected in the study presents itself. One possibility is that different *circuits* applied different standards of review in recusal cases. The culture of deference to the target judge's evaluation of his own ability to remain impartial may have differed from circuit to

circuit. Another possible explanation is that the *district* courts in the different circuits used different standards when balancing recusal grounds against the duty to sit. Either explanation reinforces a concern that current law is too indeterminate and leaves too much to the discretion of the courts—to the district court judges making recusal decisions in the first instance, to the circuit court judges reviewing those decisions, or to both. Recusal standards should be effectively national in their application. The data suggest that this is not yet so.

B. Grounds Asserted

Coders initially identified eighteen categories of grounds asserted for recusal and one (necessity) for denying recusal. All studied cases were coded by ground. In many cases, the parties asserted more than one ground for recusal. Researchers coded each case for all asserted grounds. The grounds coded were as follows:

1. Financial Interest (General): Judge has a monetary interest in the outcome of the case.

2. Financial Interest (Stock): Judge or an immediate family member is a stockholder of corporation that is a party.

3. General Bias Against Counsel: Judge is or has been biased against counsel or in favor of the adverse counsel during current or past proceedings (including during prior employment).

4. General Bias Against a Party: Judge is or has been biased against a party or in favor of the adverse party during current or past proceedings (including during prior employment).

5. Racial Bias Against Counsel: Judge is or has been racially biased against counsel during current or past proceedings.

6. Racial Bias Against a Party: Judge is or has been racially biased against a party during current or past proceedings.

7. Prejudicial or Biased Statements: Judge made a statement that was prejudicial or biased during current or past proceedings.

8. Professional Relationship with Counsel: Judge has a current or past professional relationship with counsel, counsel's firm, or someone with an interest in the suit.

9. Professional Relationship with a Party: Judge has a current or past professional relationship with a party, a party's associate, or someone with an interest in the suit.

10. Personal Relationship with Counsel: Judge has a current or past personal relationship (biological or otherwise) with counsel or someone with an interest in the suit.

> 11. Personal Relationship with a Party: Judge has a current or past personal (biological or otherwise) relationship with a party or someone with an interest in the suit.
>
> 12. *Ex parte* Communications: Judge communicated with a party off the record and without notice to the other party.
>
> 13. Adverse Rulings: Judge has ruled against a party in current or past proceedings.
>
> 14. Personal Passion: Judge has strong ethical or social convictions about an issue in the case.
>
> 15. Rule of Necessity: Despite judge's interest, he must hear a case because no other forum is available to party.
>
> 16. Witness or Party in a Proceeding: Judge has been or could be a witness or party in a past or future related proceeding.
>
> 17. Knowledge of a Party or Disputed Evidence: Judge has extrajudicial knowledge of the party (e.g., from the media) or judge has or is presiding at a trial related to the same or similar matter.
>
> 18. Procedural Dismissal or Remand of a Party's Claim: The judge dismissed a party's claim on procedural grounds (e.g., untimely motion).
>
> 19. Legal Prohibition: The judge is legally prohibited from hearing the case.

One would expect at least three factors to contribute to the frequency of each of these grounds and its success rate. First, objectively, different grounds for recusal arise at different rates. On the one hand, it is probably relatively uncommon for judges to be potential witnesses in cases to which they have been assigned (Ground 6). On the other hand, it may be very common for judges to know counsel in the case (Grounds 3, 8, and 10). Second, trial judges probably recuse themselves at different rates based on different asserted grounds. One would expect the stock ownership rules to be largely self-enforcing (Ground 1). One might, by contrast, expect very few judges to recuse themselves on an explicit admission of racial bias (Grounds 5 and 6). Third, attorneys probably assert different grounds for appeal at different rates. The data set does not include data that would permit exploration of these issues. All the current data set tells us is how many cases asserting each ground have been decided and what their dispositions were.

A summary of the results follows:

		Cases	Reverse	Remand
1	Financial Interest (General)	35	5.7%	2.9%
2	Financial Interest (Stock)	26	11.5%	3.8%
3	General Bias Against Counsel	90	16.7%	2.2%
4	General Bias Against a Party	455	7.7%	3.3%
5	Racial Bias Against Counsel	4	0.0%	0.0%
6	Racial Bias Against a Party	25	4.0%	4.0%
7	Prejudicial or Biased Statements	314	9.6%	4.5%
8	Professional Relationship with Counsel	57	14.0%	1.8%
9	Professional Relationship with a Party	125	7.2%	3.2%
10	Personal Relationship with Counsel	37	16.2%	2.7%
11	Personal Relationship with a Party	53	9.4%	7.5%
12	*Ex parte* Communications	80	12.5%	5.0%
13	Adverse Rulings	286	3.1%	2.8%
14	Personal Passion	27	11.1%	7.4%
15	Rule of Necessity	10	10.0%	10.0%
16	Witness or Party in a Proceeding	30	6.7%	0.0%
17	Knowledge of a Party or Disputed Evidence	191	7.3%	3.7%
18	Procedural Dismissal or Remand	118	0.8%	5.1%
19	Legal Prohibition	26	19.2%	3.8%

For a better sense of when appellate courts are more or less willing to second-guess a trial judge's recusal decision, it may be useful to reorder the same data in order of reversal rates:

		Cases	Reverse	Remand
19	Legal Prohibition	26	19.2%	3.8%
3	General Bias Against Counsel	90	16.7%	2.2%
10	Personal Relationship with Counsel	37	16.2%	2.7%
8	Professional Relationship with Counsel	57	14.0%	1.8%

		Cases	Reverse	Remand
12	*Ex parte* Communications	80	12.5%	5.0%
2	Financial Interest (Stock)	26	11.5%	3.8%
14	Personal Passion	27	11.1%	7.4%
7	Prejudicial or Biased Statements	314	9.6%	4.5%
11	Personal Relationship with a Party	53	9.4%	7.5%
4	General Bias Against a Party	455	7.7%	3.3%
17	Knowledge of a Party or Disputed Evidence	191	7.3%	3.7%
9	Professional Relationship with a Party	125	7.2%	3.2%
16	Witness or Party in a Proceeding	30	6.7%	0.0%
1	Financial Interest (General)	35	5.7%	2.9%
6	Racial Bias Against a Party	25	4.0%	4.0%
13	Adverse Rulings	286	3.1%	2.8%
18	Procedural Dismissal or Remand	118	0.8%	5.1%
5	Racial Bias Against Counsel	4	0.0%	0.0%

It is not surprising that appellate courts appear to feel comfortable enforcing legal prohibitions against district court judges. What does seem a bit surprising is that district court judges do not enforce these same prohibitions against themselves without supervision.

The second set of grounds, ranked in order of reversal rates, all relate to the judge's relationship with counsel—friendly or unfriendly. If egocentric bias affects a judge's ability to assess objectively whether he can function impartially notwithstanding a particularly friendly or unfriendly relationship with counsel for one side or the other, we would expect the same high reversal rates for all three grounds. And, indeed, we find them.

Two further grounds—*ex parte* communications and stock interests—involve issues easily amenable to objective resolution. Here, appellate courts do not have to second-guess judgments made by judges about themselves. Both grounds involve allegations amenable to objective resolution. Again, it is not surprising that appellate courts are comfortable enforcing these grounds against

district judges. And again, it is surprising that district judges give them any opportunity to do so.

Four grounds relating to the judge's relationship with one party or another exhibit clustered reversal rates ranging from 7.2% to 9.4%. The fact that their reversal rates are clustered suggests that the four raise common issues—perhaps, again, a common concern that the district court judge has overestimated his ability to set aside personal relationships. Less clear is why a judge's relationship to one of the parties appears less likely to trigger appellate reversal than his relationship with counsel. Two explanations are apparent. First, appellate judges may be more insistent on maintaining an appearance of impartiality within the legal community. In other words, they may be more concerned about what their peers in practice think than about what the public in general thinks. Second, it may simply be that, objectively, the kinds of relationships that trigger counsel-based motions to recuse are on average closer than the kinds of relationship that trigger party-based motions to recuse. If so, applying the same standards to each might trigger higher reversal rates when counsel-based motions are denied.

Finally, the grounds least likely to trigger reversal are allegations of racial bias or complaints that the judge has previously ruled against the party. Neither finding is surprising. One would expect counsel to be hesitant to allege racial bias in a recusal motion. One would expect the judge in question to resist admitting such bias. And one would expect that appellate courts, even if inclined to reverse a refusal to recuse, would strain to rest that reversal on some other ground. Similarly, it is black letter law that prior adverse rulings by a judge do not, by themselves, warrant recusal.[200]

In sum, the data suggest that cognitive illusions do play a role in federal recusal decisions. Admitting to bias toward counsel or parties seems to be harder than admitting to more objective disqualifying factors. For a judge to admit that he or she cannot put aside personal feelings appears to be particularly difficult. To do so might require that he or she acknowledge inability to comply which the judicial oath in a particular case. We would expect the egocentric bias to make such an admission difficult. This does not reflect poorly on judges. It merely means that judges are human, too. The Supreme Court, in *Caperton*, reasoned that in structuring legal decision-making mechanisms and assessing their legitimacy, we must make "realistic

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[200] 46 Am. Jur. 2d Judges § 154 (2011).

appraisal of psychological tendencies and human weakness."[201] No judge should take such an appraisal personally.

C. Reversal Rates

The cases studied reflect a reversal rate of 8.1 %—6.3% in civil cases and 10.3% in criminal cases. It may be useful to place this rate in context. Recent studies have shown that reversal rates vary dramatically from one area of the law to another and vary further and equally dramatically depending on the identity of the party bringing the appeal. A study by Professors Clermont, Eisenberg, and Schwab regarding civil judgment reversal rates in U.S. courts of appeal between 1987 and 2000 found an average reversal rate of 32.79% where the defendant brought the appeal and an average reversal rate of 11.85% where the plaintiff brought the appeal.[202]

Breaking all such cases into subject-matter categories, the study found that defendants obtained reversal at rates as high as 50.33% in cases involving "other civil rights," 42.19% in employment cases, 42.05% in prisoner civil rights cases, 36.36% in securities and commodities cases, and at rates as low as 20.59% in FELA (railroad workman's compensation) cases.[203] Plaintiffs, by contrast, obtained reversal at rates as high as 37.50% in cases involving negotiable instruments and 26.67% in securities and commodities cases and at rates as low as 8.15% in motor vehicle cases, 6.87% in employment cases, 6.15% in habeas cases, and 5.75% in cases involving prisoners' civil rights.[204]

Unfortunately, cases in the present study were not coded to reflect whether the appeal was brought by plaintiff or defendant. Even if all civil recusal appeals were brought by plaintiffs, however, the reversal rate for recusal decisions in civil cases—6.3%—was well below the average reversal rate for all cases appealed by plaintiffs to U.S. courts of appeals. The question that most obviously begs for an answer is: Why?

At least three answers suggest themselves. First, judges may err in the direction of over-recusal. Failure to recuse is appealable and may result in the embarrassment of reversal. A decision to recuse is not

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201 Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2265 (2009).

202 Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals, 7* EMP. RTS. & EMP. POL'Y J. 547, 556–58 (2003).

203 *Id.*

204 *Id.*

appealable and therefore does not present the same risk. If trial judges tend to over-recuse, we would expect lower reversal rates on appeal. Second, parties may appeal recusal decisions with greater abandon and less attention to their likely success than other decisions. Recusal appeals are commonly added to appeals on other grounds. Adding appeal of a decision not to recuse may be relatively costless. A simple test of this hypothesis would be to compare appeal rates—the rates at which parties appeal recusal decisions—with the rates at which they appeal other decisions. Unfortunately, data are unavailable on the counts of unappealed district court recusal decisions.

Third, low reversal rates may simply reflect appellate deference to trial court recusal decisions. This third explanation is consistent with the finding that reversal rates vary dramatically from circuit to circuit. Different circuits may have different cultures of deference. If true, this would be disturbing for at least two reasons. First, federal law should be uniform. Second, because we have reason to believe that judges are less likely to be able to make recusal decisions objectively, deference seems less appropriate in the recusal context than it might in other contexts.

CONCLUSIONS

Although the empirical study reported in this article is preliminary, it does suggest possible improvements to federal recusal law are necessary.

First, the study suggests that it may be helpful for appellate courts to emphasize that § 455 is implicated even if no actual bias exists whenever, on the basis of the objectively verifiable facts, the judge's "impartiality might reasonably be questioned." Although § 455(a) explicitly adopts an appearance-based standard, judges may, because of ordinary human cognitive illusions, find it difficult to distinguish fact from appearance when assessing their own behavior. Indeed, they may find it difficult to admit even the possibility of an appearance of bias. A fully enforced appearance-based standard might mitigate these distortions. Preliminary as the present study may be, it does suggest that recusal grounds implicating egocentric bias raise particularly difficult problems for both trial judges and their appellate supervisors.

Second, it would be helpful for appellate courts to emphasize that, at least in U.S. district courts and courts of appeal, there is no "duty to sit." Like other highly motivated professionals, judges may feel

pressure to avoid recusal because they do not want to create the impression that they are unable or unwilling to do their jobs. A perceived pressure to perform should not get in the way of objective self-assessment.

Third, the U.S. Supreme Court, as a Court, should develop and adopt rules governing the application of § 455 to individual Justices. Ideally, a mechanism for review should exist. Supreme Court Justices are no more immune to cognitive illusions in assessing their own ability to rule impartially than judges on any other court. If the Supreme Court is unwilling or unable to develop such rules and procedures, Congress should do it for them. Perceived legitimacy of Supreme Court decisions is at least as important as perceived legitimacy of lower court decisions. It may be true that decisions by fewer than nine Justices are suboptimal. It may also be true that Supreme Court Justices cannot easily be replaced. But these factors are not nearly as important as ensuring the perceived legitimacy of the decisions the Court does make. If Justices of the Supreme Court are seen to be bending the recusal rules, lower court judges are likely to do so as well. "Do as I say, not as I do" does not work any better in the law than it does in familial or other contexts.[205]

Some argue that Supreme Court Justices should be subject to a more lenient recusal standard because of the nature of the cases they generally consider. Justice Scalia noted that if judges were required to recuse themselves from any case involving an issue with which they had a political connection, there would be few cases left in which they would not have a conflict.[206] This is not, however, a convincing reason to allow Justices to sit despite their outside activities and connections. It is rather a compelling reason to limit such activities and connections. What Justice Scalia never addressed was whether he should have gone on vacation with Vice President Cheney at all once it became clear that the Vice President was party to a case before him.

The Federal Code of Conduct for Judges currently requires judges "to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[207] It advises federal

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[205] Erwin Chemerinsky, *A Supreme Court Above Reproach*, DAILY J., Feb. 15, 2011, at 1.

[206] *See Cheney I*, 541 U.S. 913, 916–17 (2004).

[207] *Supreme Court Ethics Reform,* ALLIANCE FOR JUSTICE, http://www.afj.org/connect-with-the-issues/supreme-court-ethics-reform/ (last visited Sept. 20, 2011).

judges to avoid political conduct and expression.[208] Neither of these sections applies to Justices of the Supreme Court. If the Federal Code of Conduct for Judges were to apply in full to the Supreme Court, it might become less problematic to apply an appearance-of-bias standard to that Court as well. The perceived legitimacy of its decisions would likely improve. As Erwin Chemerinsky notes, "Codes of judicial ethics require that judges avoid even the appearance of impropriety. Nowhere is that more important than for the most visible court in the country—the U.S. Supreme Court."[209]

The current Court may be called upon to decide whether the recently passed health care law withstands constitutional scrutiny.[210] Justice Kagan and Justice Thomas have both been pressured to disqualify themselves from any healthcare litigation. Were they subject to the same appearance-of-impropriety standard applicable to lower court judges, it is possible that both Justices would be required to do so. Justice Kagan may have had involvement in the health care legislation while working in the Obama administration.[211] She has stated that "she attended at least one meeting where the existence of the litigation was briefly mentioned, but none where any substantive discussion of the litigation occurred."[212] The question should be, how would an objective observer assess her likely impartiality based on the objectively verifiable facts?

Justice Thomas's impartiality in the health care cases has similarly been called into question because his wife, Ginny Thomas, has served as a paid lobbyist against the legislation.[213] Moneys earned by his wife presumably accrue to his benefit as well. Again, the question should be, how would an objective observer assess his likely impartiality based on the objectively verifiable facts? If both Justices Thomas and Kagan were to recuse themselves, the Court would be down to seven Justices. This still constitutes a quorum. A decision

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208 *Code of Conduct for United States Judges,* U.S. COURTS, http://www.uscourts.gov/rulesandpolicies/codesofconduct/codeconductunitedstatesjudges.aspx (last visited Sept. 20, 2011).

209 Chemerinsky, *supra* note 205.

210 Nina Totenberg, *How Will Supreme Court Rule on Health Care Law?*, NPR, Feb. 2, 2011, http://www.npr.org/2011/02/02/133416600/how-will-supreme-court-rule-on-health-care-law.

211 Sherman, *supra* note 3.

212 *Id.*

213 Michael O'Brien, *Democrats: Justice Thomas Should Recuse Himself in Healthcare Reform Case,* THE HILL, Feb. 9, 2011, http://thehill.com/blogs/blog-briefing-room/news/142969-democrats-justice-thomas-should-recuse-himself-in-healthcare-reform-case.

by seven Justices would likely be viewed as at least as legitimate as a decision by nine, of whom two are under possible recusal clouds. Even if there should come a time when the Supreme Court could not hear a case because of a lack of quorum, or a time where it ends up with a tied decision, it would be preferable to allow the underlying circuit court opinions to stand than to release an opinion that creates the appearance of bias. The underlying court opinion would probably not stand forever, as Supreme Court Justices are not immortal and a new Court could hear a similar case in the future.

A worse scenario would be for one of the two potentially biased Justices to recuse himself or herself while the other heard the case, if the decision of the non-recused Justice made a difference in the substantive outcome. Equally bad would be the perception of logrolling within the Court: "I'll recuse myself if you do the same." What is needed, and soon, is further objective guidance—in the form either of Supreme Court rules or legislation. In the long run, realistic procedures for the federal appellate review of recusal decisions, including recusal decisions by Justices of the Supreme Court, would probably improve the legitimacy of appellate decisions. Whether such procedures can be adopted by rule or require further legislation is beyond the scope of this Article.

In the meantime, it would be helpful for judges to provide a written explanation of every recusal or refusal to recuse. In our system, precedent creates law, even when rulemakers are unable or unwilling to write rules. A body of written explanations would begin to constrain the discretion judges currently appear to have.

Our court system will maintain its power only so long as the people believe in the impartiality of its judges. The history of judicial recusal in this country is a history of ever more specific standard setting. The job is not yet done.