

RECUSAL AND *BUSH V. GORE*

In any case as controversial and complex as *Bush v. Gore*,¹ the personnel on the Court make all the difference to the outcome. Consequently, judges in such cases need to be impartial for the trial to be fair, and they also must appear impartial. If the citizens believe that their President got into office through a biased procedure, they will lose respect for the President, for the Supreme Court, and for the whole legal system. These dangers make it critical for judges to recuse themselves where their impartiality could reasonably be questioned.

But when is it reasonable to suspect a judge's impartiality? Before *Bush v. Gore* came to trial, it was widely reported that two of Justice Scalia's sons were lawyers in firms representing Bush and that Justice Thomas' wife was collecting applications from candidates who wanted to be recommended by the Heritage Foundation for positions in a Bush Administration. These connections with Bush led to several calls for recusal, the most prominent of which was by Judge Gilbert S. Merritt of the United States Court of Appeals for the Sixth Circuit. Republicans dismissed Merritt's call as partisan, since he was an old friend of the Gores and a contender for the Supreme Court. They also denied that such calls were reasonable. Justices Scalia and Thomas apparently agreed, because they did not recuse themselves or even disclose their conflicts of interest.

The public part of this debate lapsed into superficial rhetoric, but the issues are critical, so I want to determine the real force of these charges. To do so, we need to look at both the law of recusal and its purpose. In the end, I will argue that Justices Scalia and Thomas were and should have been required by federal law to recuse themselves in the case of *Bush v. Gore*.

¹ 531 U.S. 1048 (2000).



I. RULES OF RECUSAL

The governing law is Section 455 of Title 28 of the United States Code. Many grounds for disqualification are listed, but the crucial passages read,

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. (b) He shall also disqualify himself [when] . . . (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 . . . (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

The word “shall” makes this law mandatory. Recusal in the specified circumstances is not just nice. It is required.

There is no reference to either party in the case raising the issue of recusal, so no official challenge is needed. Even if neither party mentions recusal or any conflict of interest in court, and even if both parties openly waive any objections, the judge still has a duty to “disqualify himself” all by himself.²

The circumstances when recusal is required are quite broad. Subsection (b)(5)(iii) is more specific, but it covers a lot. This subsection refers to “an interest” without any limit on the kinds of interests that might require recusal, except that the interest must be substantial enough to be “substantially affected”. The “third degree of relationship” is defined to include great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece.³ Subsection (b)(5)(iii), thus, applies to interests of a judge’s spouse’s niece’s husband. This breadth must have been intentional, because it is explicit.

Subsection (a) is even more general. It was added in the 1974 revisions of the Code, presumably to cover further cases. Subsection (a) is not restricted to interests or to particular relationships. It applies to any grounds that might lead any reasonable person

² In addition, judges are required to disclose any facts that might be grounds for recusal, as Justice Scalia himself recognizes in *Liteky v. United States*, 510 U.S. 540, at 548 (1994). Justices Scalia and Thomas did not officially disclose their conflicts of interest in *Bush v. Gore*.

³ Jeffrey M. Shaman, Steven Lubet, and James J. Alfini, *Judicial Conduct and Ethics*, Third Edition (Charlottesville, Virginia; Lexis Law Publishing, 2000), p. 128.

to question the judge's impartiality. To question a judge's impartiality is not to believe that the judge is partial but is only to doubt or suspect the judge's impartiality. Moreover, because of the term "might", there is no need for anyone actually to question the judge's impartiality. There is also no need for all reasonable people to agree. What is required is only that someone could suspect the judge's impartiality without being unreasonable.

Subsection (b)(5)(iii) applies only when the circumstance "is known by the judge", but no such restriction appears in subsection (a). A judge is, therefore, required to recuse himself when his impartiality might reasonably be questioned even if he does not know that his impartiality might reasonably be questioned.⁴ If the judge had no way of knowing that his impartiality might reasonably be questioned, then he would presumably not be subject to personal sanctions; but the judge's decision could still be vacated as a violation of subsection (a).

Another striking feature of subsection (a) in contrast with (b) is, as Justice Scalia says, that "what matters is not the reality of bias or prejudice but its appearance."⁵ The relevant appearance is not subjective. It does not matter whether any observer, reasonable or not, actually doubts the judge's impartiality. It also does not matter whether the judge actually has any bias. As Justice Scalia says, "Since subsection (a) deals with the *objective appearance* of partiality . . . the judge does not have to be *subjectively* biased or prejudiced, so long as he *appears* to be so."⁶ Thus, nobody's actual subjective states matter.

Why don't all suspicions count? Because, if every suspicion mattered, then parties could disqualify any unwanted judge by spreading baseless rumors. This would be easier for those with connections to the media. To prevent such differential ability to shop for the most favorable judge, the law must count only reasonable doubts.

When is a suspicion "reasonable"? Here's one common test from a 1988 federal case: "In deciding the sensitive question of whether to recuse a judge, the test of impartiality is what a reasonable person,

⁴ *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

⁵ *Liteky v. United States*, 510 U.S. 540, at 548 (1994).

⁶ *Liteky v. United States*, 510 U.S. 540, at 553 note 2 (1994).

knowing and understanding all the facts and circumstances, would believe.”⁷ The point is that a doubt is unreasonable if it would disappear after the doubter became better informed.

But when would fully informed people have suspicions? Some examples are clear. It is not reasonable to question the impartiality of a judge for no reason at all. Since most judges usually are impartial in the required ways, an informed person needs at least some positive reason for suspicion. Moreover, the reason for suspicion must be strong enough. Everyone should admit that distant connections to minor interests are not enough to disqualify judges. At the other extreme, it seems clear that judges should be disqualified when their decisions could double their net worth or send their spouse or child to prison.

Such simple examples cannot answer the general question: When is a reason for suspicion strong enough? One answer is given by Justice Kennedy: “For present purposes, it should suffice to say that . . . , under §455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.”⁸ This standard would make recusal very rare, since a factor that inclines a judge towards one side in a case is almost never so strong that “a fair-minded person” literally “could not” set it aside. One might want recusal to be rare, but it should not be this rare. If the judge “could” set aside an aversion but is unlikely to do so, a trial under that judge would hardly be fair. Thus, Justice Kennedy’s standard is too permissive.

A better standard is hard to formulate. Any precise standard will be controversial, for the law on this issue is not clear or settled. Nonetheless, we can list some factors that are relevant. The reasonableness of a suspicion is bound to depend somehow on the likelihood that the suspicion is correct. This makes it reasonable to question a judge’s impartiality when circumstances create a significant risk that the judge will not set aside prejudices or disregard interests.

⁷ Judge Cardamone in *Drexel Burnham Lambert*, 861 F.2d 1307, at 1309 (1988).

⁸ *Liteky v. United States*, 510 U.S. 540, at 558 (1994). Justice Blackmun joined this dissenting opinion.

Some relations and interests create more risk than others. The closer the relationship, the more minor the interest that suffices to raise reasonable doubts. An interest of the wife of the nephew of a spouse might not be sufficient, whereas the same interest would be enough if it were the interest of a spouse or child. Why? Presumably because love of children and spouses is normally stronger than love of spouses' nephews' wives, so interests of closer relatives would be more likely to affect judges' decisions.

The kind of interest matters, too. Most recusal laws focus on finances, because the interest in money is widespread and strong. However, other interests can be just as strong, especially for some people. Professional interests are dear to the hearts of judges, who could often make more money in private practice. This suggests that financial and professional interests of spouses and children create more risk of bad decisions by judges than do other interests of other people. That explains why the most common recusals are when a case could affect the personal finances or professional career of the judge or a spouse or child.

The next question asks when such risks become significant enough to require recusal. The law is not clear here, but we can compare other areas where risks are assessed. In medicine, traffic control, and bungee jumping, which risks are significant depends on what is at stake. A very low probability of death can be a significant risk even when a much larger probability of a bruise is not. Similar considerations affect the need for recusal. Reasonable people will weigh what might be gained by recusal against what might be lost. Even a minor appearance of partiality could be grounds for recusal in important cases, such as felony trials, whereas the same factors might not be significant enough to warrant recusal in relatively trivial civil suits.

On the other hand, we might have to put up with more risk of unfairness when recusal would create practical problems, such as when no other judge is available to try the case. This sometimes happens in rural districts where alternative judges are hard to find and in cases involving utility rate hikes or tax increases that would affect every judge.⁹ However, this rule of necessity has no force when enough other judges are ready to try the case.

⁹ Shaman, Lubet, and Alfini, *Judicial Conduct and Ethics*, p. 112.

None of this provides a complete test of when recusal is required, but it should be enough for the case at hand. The reasons to question the impartiality of Justices Scalia and Thomas in *Bush v. Gore* are financial and professional interests of their sons and spouse. These relations are clearly covered under 28 U.S.C. §455 (b)(5). These kinds of interests are adequate for recusal in many other cases. Moreover, the implications of *Bush v. Gore* could not have been greater. Public scrutiny could not have been more intense. If the Justices failed to recuse themselves when necessary, there was much to lose, including the reputation of the Supreme Court, the sovereignty of Florida, and so on. These dangers make even the slightest risk of impropriety significant. In comparison, much less would be lost if Justices Scalia and Thomas had recused themselves when it was not absolutely necessary. The election would still have been resolved, state sovereignty and the appearance of impartiality in our highest court would have been saved, and so on. The Supreme Court had an opportunity to display their devotion to impartiality, principle, and federal law in a way that could have gained them tremendous respect. Given such potential gains and losses, even a minor ground for suspicion was enough to require recusal in *Bush v. Gore*.

II. RECUSAL IN THE SUPREME COURT

Since 28 U.S.C. §455 applies to “Any justice, judge, or magistrate of the United States”, Supreme Court Justices are also bound by these rules. They recognize this, as is shown by cases where they have recused themselves. Recently, Justice Thomas recused himself from hearing a 1996 appeal challenging the refusal of Virginia Military Institute to admit women, apparently because his son was a student there.¹⁰ Justice Thomas seems to have thought that his son had “an interest that could be substantially affected” by whether women went to Virginia Military Institute. It is not clear what that interest was supposed to be, but it cannot have been very great. Thus, Justice Thomas seems committed to the position that minor interests of one’s children are adequate to raise reasonable questions about

¹⁰ *U.S. v. Virginia*, 518 U.S. 515 (1996).

the partiality of a Supreme Court Justice even in cases much less important than *Bush v. Gore*.

The Supreme Court has not always held itself to such high standards, especially when relatives of Justices are partners of attorneys before the Court. This ground for recusal has received more written comment by the Supreme Court than any other. It is worth looking at what they say in order to determine whether there is any good reason to exempt Supreme Court Justices from the usual rules of recusal.

Justice Rehnquist's Statement

In 2000, the Supreme Court had to decide whether to accept an expedited review of a district judge's ruling against Microsoft. Chief Justice Rehnquist's son James is a Boston lawyer who was helping to defend Microsoft in a separate, private antitrust case. Nonetheless, Justice Rehnquist refused to recuse himself and took the unusual step of issuing a statement of his reasons for his refusal.¹¹ The fact that Justice Rehnquist felt the need to issue this statement is evidence that he knew that there was an appearance of impropriety. Otherwise, why say anything? But Justice Rehnquist argued that any suspicions were unreasonable: "there is no reasonable basis to conclude that the interests of my son or his law firm will be substantially affected by the proceedings currently before the Supreme Court." Why not? Justice Rehnquist gave three arguments.

First, "Microsoft has retained [his son's firm] on an hourly basis at the firm's usual rates." This argument is inadequate, since there are obviously other less direct ways for his son's firm to benefit financially. Moreover, financial interests are not the only ones that count under 28 U.S.C. §455.

Rehnquist seems to have been aware of these problems, since he went on to add a second argument that "it would be unreasonable and speculative to conclude that the outcome of any Microsoft proceeding in this Court would have an impact on those interests when neither he [James Rehnquist] nor his firm would have done any work on the matters here." This argument is no better than the

¹¹ *Microsoft Corporation v. U.S.*, 530 U.S. 1301, at 1301–1303 (2000). All quotations in this subsection are from this statement by Justice Rehnquist.

first. The absence of “any work on the matters here” hardly shows that the Supreme Court decision would not affect the case that James Rehnquist was working on and, thereby, affect James Rehnquist’s reputation and welfare.

Justice Rehnquist responds, “I do not believe that a well-informed individual would conclude that an appearance of impropriety exists simply because my son represents, in another case, a party that is also a party to litigation pending in this Court.” That’s not the point. Nobody claims that the problem is that simple. The bare fact that Microsoft is a client in both cases is not enough to create a reasonable appearance of impropriety. However, both cases here are antitrust cases. The problem is not just that the client is the same but also that the cases fall in the same area of law and raise similar issues. This complex of connections could make a well-informed and reasonable individual suspect that the Supreme Court decision in the government’s case might be used as a precedent in the private antitrust case argued by James Rehnquist.

Justice Rehnquist adds, “the impact of many of our decisions is often quite broad”, so the “fact that our disposition of the pending Microsoft litigation could potentially affect Microsoft’s exposure to antitrust liability in other litigation does not, to my mind, significantly distinguish the present situation from other cases that this Court decides.” However, the present situation involves more than speculation about a possible future case. James Rehnquist was currently working on an actual related case. That is what distinguishes this conflict from other cases whose impact is “quite broad” in the abstract.

Justice Rehnquist’s third argument concerns how often Supreme Court Justices would have to recuse themselves if 28 U.S.C. §455 were interpreted broadly enough to apply to him in this case. Justice Rehnquist refers to “the negative impact that the unnecessary disqualification of even one Justice may have upon our Court.” Recusal creates inconvenience even in lower courts, but the “negative impact” is said to be much greater in the Supreme Court. Why? “Here – unlike the situation in a District Court or Court of Appeals – there is no way to replace a recused Justice. Not only is the Court deprived of the participation of one of its nine members, but the even number of those remaining creates a risk of affirmance

of a lower court decision by an equally divided court.” However, if a Justice ought to recuse himself, then it is not clear why it is a “negative impact” for the Court to be “deprived of the participation of” that particular Justice. Maybe that Justice would have much to add to the Court’s deliberations or even has special expertise in that area of law, but that usefulness cannot prevent the appearance of partiality.

The argument then comes down to Justice Rehnquist’s claim that it is bad not to have all nine Justices. Why? Nine is not a magic number. Seven would be considered enough, if not for tradition.¹² Justice Rehnquist does insist that the Court should not have an even number of members. However, the number would not be even if two Justices stepped down, so this argument cannot justify Justices Scalia and Thomas’ decisions not to recuse themselves. More generally, it is not clear what would be so bad about an even number of Justices. This would make it less likely that lower courts, including state courts, would be overruled; but it is not clear why that would be bad. Anyway, this argument hardly seems available to Justices such as Rehnquist, Scalia, and Thomas, who usually speak strongly in favor of states’ rights.

Consequently, Justice Rehnquist does not present any good reason not to have recused himself in the Microsoft case. But that was only one case. The more general and important lesson is that he has given no good reason why Supreme Court Justices should not be subject to the same rules of recusal as other judges and justices.

The 1993 Policy

The kind of conflict that Justice Rehnquist faced in 2000 is not unusual these days, since several Justices now have spouses or children who practice law. This recurrent problem led seven of the Justices, including Justices Scalia and Thomas, to sign a general policy on November 1, 1993, regarding recusal when relatives are

¹² The number of Supreme Court Justices is set by Congress and has been as low as five (in 1801), although it has remained nine since 1869. The number has also been even: six in 1789–1801, six in 1802–1837, and ten in 1863–1866. The Court had seven Justices in 1866–1869.

partners of attorneys before the Court.¹³ This policy tries to carve out exceptions for the Justices that federal law doesn't allow.

In their 1993 policy, the Justices say, "We think that a relative's partnership in the firm appearing before us, or his or her previous work as a lawyer on a case that later comes before us, does not automatically trigger these provisions" of 28 U.S. §455. The Justices conclude, "Absent some special factor, therefore, we will not recuse ourselves by reasons of a relative's participation as a lawyer in earlier stages of the case." This strangely shifts the burden to anyone who would ask for recusal, whereas the burden lies elsewhere for other judges and justices.

What kinds of special factors would trigger recusal? "One such special factor, perhaps the most common, would be the relative's functioning as lead counsel below, so that the litigation is in effect 'his' or 'her' case and its outcome even at a later stage might reasonably be thought capable of substantially enhancing or damaging his or her professional reputation." This admits that professional reputation is a very significant interest. "Another special factor, of course, would be the fact that the amount of the relative's compensation could be substantially affected by the outcome here." The Justices agree that they must recuse themselves in these circumstances.

The Justices admitted that "in virtually every case before us" there is "a genuine possibility that the outcome will have a substantial effect upon each partner's compensation." However, they considered it an adequate safeguard that "we shall recuse ourselves from all cases in which appearances are made by firms in which our relatives are partners, unless we have received from the firm written assurance that income from Supreme Court litigation is, on a permanent basis, excluded from our relatives' partnership shares."

That is the policy, but it is also worth considering the procedure by which it was made. Courts set many of their own institutional rules, but it still seems strange for a court to make its own rules of judicial conduct, since the judges' own interests are clearly at stake.

¹³ "Statement of Recusal Policy", Supreme Court of the United States (November 1, 1993), signed by Justices Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Stevens, and Thomas. Justices Blackmun and Souter did not sign. All quotations in this subsection are from this statement unless otherwise noted.

By their own standards, the Supreme Court Justices should all have recused themselves from this decision about how to interpret 28 U.S. §455. A policy could still have been formulated, since they could have set up a Special Master or asked some other person or group to make a policy for them, possibly with input and subject to approval. Their actual procedure makes it hard to see how the Supreme Court statement could change the rules in force.

In addition to the procedure in making this policy, the content of the Supreme Court policy is also questionable. Their policy is, admittedly, in line with many precedents, although there are some precedents on the other side.¹⁴ Also, Judicial Conference advisory opinions and at least one *en banc* appeals court decision¹⁵ suggest that judges should recuse themselves even if a relative's involvement in a case is substantially less significant than the Court's policy covers. Under the Court's 1993 policy, for example, a justice's close relative could have been the second chair who argued the case below, and the Justice would still sit.

The Court might seem to anticipate that problem in requiring "written assurance that income from Supreme Court litigation is, on a permanent basis, excluded from our relatives' partnership shares." However, it is not that easy to sequester fees related to Supreme Court cases. If the firm gets a big fee from a Supreme Court case, that frees up funds in other parts of the firm's budget. Funds are fungible and movable here as in other budgets. Moreover, partners can be compensated in many ways. Relatives can benefit in indirect and intangible ways from the reflected glory of a Supreme Court win.

The Justices do offer some justifications for treating themselves differently in recusals: "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 . . . four votes out of eight instead of four out of nine." The first two arguments have already been criticized, except for the

¹⁴ See Shaman, Lubet, and Alfini, *Judicial Conduct and Ethics*, pp. 132–133, citing *Smith v. Beckman*, 683 P.2d 1214 (Colo. App. 1984).

¹⁵ *In Re: The Aetna Casualty and Surety Co.*, 919 F.2d 1136 (6th Cir. 1990).

suggestion that litigants are “entitled” to nine justices. That cannot be right, since it would rule out all recusals (and illnesses). The problems for the *certiorari* process are serious.¹⁶ However, this argument does not apply to the situation of Justices Scalia and Thomas in *Bush v. Gore*, so I will not discuss *certiorari* here.

The Justices also expressed concern about the possibility of parties “strategizing” recusals by picking particular law firms with an eye toward forcing the recusal of an unwanted justice. This is a problem, but again it does not apply to the situation of Justices Scalia and Thomas in *Bush v. Gore*. Bush clearly did not pick his lawyers in order to force Justices Scalia and Thomas to recuse themselves. Bush wanted those two on the Court.

The Justices conclude, “We do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage.” Of course, the Supreme Court need not use “excess” caution. However, as I argued in the previous section, much caution is required at least in prominent cases where judges have close relations to affected parties, the interests at stake concern money or reputation, the case has grave consequences, and it is subject to intense public scrutiny. These factors together make it reasonable to doubt the impartiality of Justices when “a relative is a partner in the firm before us.” A failure to recuse in such cases thus violates the mandate in 28 U.S.C. §455(a). In addition, interests of such relatives “could be substantially affected”, so failure to recuse would violate 28 U.S.C. §455(b)(5)(iii) regardless of appearances. The Supreme Court cannot change these rules by issuing any policy statement. To apply 28 U.S.C. §455 to such cases is not “to go beyond the requirements of the statute”. It is just to enforce existing law.

III. RATIONALES OF RECUSAL

To understand 28 U.S.C. §455 and its application to the Supreme Court, it is useful to consider the reasons for requiring recusal. There

¹⁶ See Steven Lubet, “Disqualification of Supreme Court Justices: The *Certiorari* Conundrum”, 80 *Minn. L. Rev.* 657 (1996).

are two main rationales: a consequentialist one and a deontological one.

The Appearance of Impartiality

The House Report on 28 U.S.C. §455(a) says that this statute was “designed to promote public confidence in the impartiality of the judicial process.”¹⁷ The Supreme Court ascribes a similar goal: “People who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of §455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.”¹⁸ On this understanding, the point of the statute is to have good consequences on public attitudes towards the courts.

This consequentialist rationale explains the focus on appearance.¹⁹ What affects people’s attitudes is what they believe about judicial impartiality, not whether judges really are impartial. The consequentialist rationale also suggests that recusal is more important in high-profile cases like *Bush v. Gore*. Such cases have greater consequences on public attitudes.

Why is public confidence so important? The answer is that the Supreme Court relies on public confidence for its authority. As Justices O’Connor, Kennedy, and Souter say in another context,

the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court’s power lies, rather, in its legitimacy, a product of substance and perception that shows itself in people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.²⁰

If the Supreme Court loses the confidence of the public, it will not be able to function effectively.

¹⁷ House Report at 6354–55.

¹⁸ *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, at 864–865 (1988) (note omitted). See also *Drexel Burnham Lambert*, 861 F.2d 1307, at 1312 (1988).

¹⁹ Appearances are also important to consequentialists in other contexts. For a wonderful discussion, see Julia Driver, “Caesar’s Wife: On the Moral Significance of Appearing Good,” *The Journal of Philosophy*, vol. 89 (July 1992), pp. 331–343.

²⁰ Joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, at 865 (1992).

Impartiality

Nonetheless, the appearance without the reality of impartiality would not be sufficient. One reason is that the rules of recusal also have another rationale, which raises deontological concerns about due process. Even if the system would not break down or suffer any bad effects from a judge failing to recuse, the process still seems unfair unless the judge is impartial. Legislators, in contrast, are not expected to be impartial. They are allowed to vote for a bill just because it favors their own district. Some citizens see their Congressional representatives as no more than advocates for their state or district. In contrast, it has long been held that judicial processes cannot be fair unless judges remain impartial between the parties in a case before them (and possibly also among others who are affected by the case).

Unfortunately, most people misunderstand impartiality. Impartiality among people does not require neutrality among values. To see this, compare basketball referees. Some referees restrict their calls to the most egregious fouls because the game is more exciting when the play continues without as many interruptions. Other referees put less emphasis on the value of excitement and more emphasis on the value of safety, so they call more fouls in order to prevent injury (and maybe also to teach respect for the rules). Most referees recognize the value of both excitement and safety, but they balance these values in different ways and sometimes adjust their weights to specific contexts, such as whether the game is between professionals or fifth graders. None of these methods of calling fouls reveals any partiality towards either of the teams playing in a particular game. Even if one team is more likely to win with a referee who calls fewer fouls, the referee can call the game that way for the sake of excitement without being partial to either team. This shows that one can reach decisions on the basis of values that favor one side over the other without failing to be impartial in any sense that is required of basketball referees.

Analogously, moral convictions do not make a judge partial in any sense that would disqualify him or her as a fair arbiter. A judge who is committed to freedom and equality is not partial. This point has often been recognized: "A judge's own moral convictions or atti-

tudes about societal matters are generally insufficient to disqualify a judge.”²¹ Similarly, a commitment to a certain method of interpreting the law, such as strict construction or original intent, does not make a judge partial in the way that requires recusal. If such methods are not unfair, then prior commitment to such a method cannot introduce unfairness into a procedure. Besides, if neutrality with regard to moral values or legal methods were required of judges, almost every judge would have to recuse himself or herself in almost every case. So the rules of recusal should not require that kind of neutrality.

The kind of impartiality that is and should be required is more practical because it is more limited. To understand the required kind of impartiality, it is useful to start with a general analysis of impartiality. The most illuminating analysis is presented by Bernard Gert, who says, “A is impartial in respect R with regard to group G if and only if A’s actions in respect R are not influenced by which member(s) of G benefit or are harmed by these actions.”²² On this analysis, all talk about impartiality is elliptical. There is no such thing as simply being impartial. Impartiality must be specified both with respect to the kind of action and with regard to the group toward whom one is impartial in this respect. For example, basketball referees are required to be neutral with respect to rule violations and with regard to the competing players. They can favor excitement for spectators over safety for players (on either side) without being partial in this respect. Again, legislators should be impartial among their various constituents, but they need not be impartial between their own district and other districts. They can argue strongly for public projects in their own districts, as long as they do not go too far. Senators may also favor United States interests over other nations when they consider treaties. They are not required to be impartial among various countries.

The same relativity applies to judges. Judges are allowed to favor the interests of their own country over other nations. They may favor the rights of parties in the case over the interests of spectators when

²¹ Shaman, Lubet, and Alfini, *Judicial Conduct and Ethics*, p. 113.

²² Bernard Gert, *Morality* (New York; Oxford University Press, 1998), p. 132. Much of what I say about impartiality in this section is indebted to Gert.

they exclude reporters and others from the courtroom. What are forbidden are only personal biases and prejudices with respect to the parties in the case.

Not all personal biases are forbidden. Some intra-courtroom biases are allowed, such as when a judge finds a party or lawyer in contempt.²³ Contempt can create animosity in the judge, but the judge may still carry on with the case. Otherwise lawyers could get rid of unwanted judges by showing contempt. Nothing like this is at issue in the case of *Bush v. Gore*, so I will usually ignore this qualification and say simply that judges must be impartial between the parties in the case.

A crucial term in Gert's analysis that needs to be clarified is "influenced". This term can be interpreted in two main ways. One could say that a factor influences a judge only when it makes a difference to what the judge decides. Alternatively, one could say that a judge is influenced by any factor that pushes the judge towards one side, even if that factor does not make a difference to what the judge decides in the particular case. The second interpretation makes influences like forces. If I push hard on my parked car, I do exert a force even though it makes no difference to the motion of the car. Similarly, an influence can incline a judge towards a certain decision without making any actual difference to what the judge decides in the particular case.

The same contrast comes out when a basketball referee's son is on one of the teams that are playing. When the referee calls a foul against the other team, the referee still might have called the same foul even if his son had not been on the team that benefited. The referee did have more motivation to call fouls against that opposing team, but that additional motivation might not have made any difference in the specific call. In describing situations like this, it is natural to say that the decision-maker (such as the referee) is not impartial even though the decision (such as the particular call) is impartial.

What we require from judges is not just that their decisions are impartial but also that they are impartial as decision-makers. One reason is that, if they are not impartial as decision-makers, there is a danger that their decisions will not be impartial. Risks must

²³ See Shaman, Lubet, and Alfini, *Judicial Conduct and Ethics*, pp. 115–116.

be distributed fairly. In addition, if the judge is not impartial as a decision-maker, then most people in the public will not be able to determine whether the judge's decision is impartial, that is, whether the judge's motivations really did make a difference to the decision. Since we want a procedure in which the public can have confidence, appearances are crucial. For such reasons, 28 U.S.C. §455 should be interpreted so that a prejudice in favor of one party over the other makes a judge partial even when that prejudice does not change the judge's decision in a particular case.

IV. APPLICATION TO JUSTICE SCALIA

These general standards apply to Justices Scalia and Thomas in the particular case of *Bush v. Gore*.²⁴ Let's start with Justice Scalia.

At the time when *Bush v. Gore* came before the Supreme Court, Justice Scalia's son Eugene, age 37, was a partner in the Washington office of Gibson, Dunn, and Crutcher. Another partner in the same firm was Theodore B. Olson, the attorney who twice had argued before the Supreme Court on behalf of Bush.

Another of Justice Scalia's sons, John, age 35, had accepted a job offer in the Washington office of Greenberg Traurig. A partner in that firm's Tallahassee office is Barry S. Richard, who represented Bush in Florida.

Neither son was directly involved in the case of *Bush v. Gore*. John Scalia was not going to join the involved firm until 2002. Eugene Scalia specialized in labor law in a firm with 242 partners, and his firm had submitted assurance that Eugene would not benefit financially from any case before the Supreme Court, as required by the Supreme Court's 1993 policy statement.

Nonetheless, Justice Scalia's sons could substantially benefit from a ruling for Bush in several indirect ways. First, any firm that wins such a prominent case is bound to build its reputation and thereby attract more and better clients who can be charged more. That is one reason why firms take on such cases, often for less than their usual fees. Thus, Eugene Scalia, as a partner in Olson's

²⁴ The following information about Justices Scalia and Thomas is drawn from a variety of media reports.

firm, is very likely to benefit from a victory by Olson on behalf of Bush. (Some recent evidence of non-financial benefit is that Bush appointed Theodore Olson to be solicitor general.) John Scalia would probably also benefit less directly, since anyone in a law firm knows that their welfare is tied to the welfare of the firm. When the firm does better, it has more funds available for raises and bonuses and better offices, as well as more slots for promotion. Admittedly, nobody could say that either of Justice Scalia's sons would get a raise as a direct result of the Supreme Court deciding for Bush. However, nothing like that is required for recusal. Any interests are covered by 28 U.S.C. §455, not just direct financial ones. There were many ways for Justice Scalia's sons to benefit from a decision in favor of Bush. Together these benefits could be substantial. Hence, subsection (b)(5)(iii) required recusal.

Subsection (a) focuses on reasonable appearance rather than actual benefits. Even if Eugene and John Scalia did not actually benefit from the Supreme Court's decision in *Bush v. Gore*, many observers did suspect that Eugene and John were likely to benefit somehow. The reasonableness of this suspicion is shown by the fact that so many smart people who knew the facts were suspicious. Unless all of those who doubted Justice Scalia's impartiality were being unreasonable, the appearance of impartiality was reasonable enough to violate the legal requirements of 28 U.S.C. §455(a).

The same arguments would apply in any important, high-profile case where a Justice's child or spouse is a lawyer in a firm that is representing either party before the Court. Recusal might be required in other cases as well, but it is at least required in such prominent cases.

V. APPLICATION TO JUSTICE THOMAS

Justice Thomas' conflict of interest was similar, but some differences matter. At the time of *Bush v. Gore*, the Justice's wife, Virginia (Ginni) Thomas, was employed by the Heritage Foundation. Her job was to collect applications from people seeking employment in a possible Bush Administration.

Unlike Justice Scalia, Justice Thomas would not be covered by the Supreme Court's 1993 policy statement. Moreover, Justice Thomas' wife was in daily contact with the Justice. Justice Thomas' own welfare was also more closely tied to that of his wife than Justice Scalia's welfare was tied to that of his sons. If Mrs. Thomas' recommendations for the new government were followed, not only would her organization be better off, but she would probably have a more prominent position in that organization, in addition to many friends inside the new government. The benefits to her and, hence, indirectly to Justice Thomas are not limited to finances, and they could be substantial.

In response to such charges, "Mrs. Thomas said . . . that her recruitment efforts were bipartisan and not on behalf of the Bush campaign." However, Mrs. Thomas herself acknowledged that "her search was likely to generate more interest among Republicans, because of the Foundation's conservative orientation."²⁵ So what makes it bipartisan?

A spokesperson for the Heritage Foundation, Kristine Bershers, pointed out that Virginia Thomas asked some Democrats to submit resumé.²⁶ That is irrelevant. Every informed person knows that the Heritage Foundation has strong ties to the Republican Party. Even if Mrs. Thomas and the Heritage Foundation did solicit resumé from a few Democrats, and even if Bush does include some token Democrats in his administration for public relations purposes, that does not change the fact that many more resumé were submitted by Republicans, many more Republicans were recommended, and many more of the Heritage Foundation's recommendations have been followed by Republican administrations than by Democratic administrations. After an administration takes over, those who were recommended and entered the government are then more likely to listen to the Heritage Foundation when they suggest policies. This was true in the past, and we and Justice Thomas had no reason to doubt that it would continue to be true in a Bush Administration.

²⁵ "Contesting the Vote: Challenging a Justice", by Christopher Marquis, *The New York Times*, December 12, 2000, Tuesday, Late Edition, Section A, p. 26, col. 5.

²⁶ <http://www.cnn.com/2000/LAW/12/12/supreme.court.conflict/#2>

Bershers also said, “Mrs. Thomas’ pay at the Heritage [Foundation] won’t be affected by whether Bush wins or loses his Supreme Court case.”²⁷ That’s not the point. Mrs. Thomas can have important interests in the outcome of the case even if her salary would not be directly affected.

Mrs. Thomas is reported to have responded, “There is no conflict here.” because she “rarely discussed court matters with her husband.”²⁸ However, “rarely” is not good enough, since *Bush v. Gore* is just the kind of case that most people discussed even if they never talked about any other legal case. Besides, it does not matter whether the Thomases ever discussed the particular case. They surely discussed the election at some time, so Justice Thomas knew very well which candidate was favored by his wife and by her employer. He also knew how her interests would be served by a Bush victory. She didn’t need to tell him.

Ari Fleischer, a spokesperson for the Bush transition team, responded to the charges by saying, “Like many professional women, Mrs. Thomas should not be judged by her spouse.”²⁹ Of course not, but that is not the issue. Nobody is judging Mrs. Thomas or saying that she did anything wrong. It is her husband who should have recused himself, and the reasons for recusal cannot be separated from his spouse’s professional interests, since this is just the kind of case that 28 U.S.C. §455 (b)(5)(iii) was meant to cover.

Instead of actual interests, 28 U.S.C. §455(a) focuses on the appearance of partiality. Even if Mrs. Thomas did not actually benefit from the Supreme Court’s decision in *Bush v. Gore*, many smart and informed members of the public did suspect that she was likely to benefit in some indirect way. This makes their suspicions seem at least reasonable. That requires recusal according to 28 U.S.C. §455(a).

²⁷ <http://www.cnn.com/2000/LAW/12/12/supreme.court.conflict/#2>

²⁸ “Contesting the Vote: Challenging a Justice”, by Christopher Marquis, *The New York Times*, December 12, 2000, Tuesday, Late Edition, Section A, p. 26, col. 5.

²⁹ “Contesting the Vote: Challenging a Justice”, by Christopher Marquis, *The New York Times*, December 12, 2000, Tuesday, Late Edition, Section A, p. 26, col. 5.

It is worth recalling that Justice Thomas did recuse himself in the Virginia Military Institute case, because his son was a student there. If that was enough to create a reasonable suspicion of partiality, then surely Virginia Thomas' ties to Bush through the Heritage Foundation must be more than enough to create reasonable doubts about his impartiality.

Consequently, to protect public confidence and to ensure a fair procedure, Justices Scalia and Thomas should have recused themselves in *Bush v. Gore*. Their failures to do so lend new force and meaning to the words in Justice Stevens' dissent: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."³⁰

VI. OBJECTIONS

Not everyone will agree. Even those who accept my interpretation of the rules of recusal, and their rationales might raise several questions about how those general standards apply to the particular case of *Bush v. Gore*.

No Effect

Some critics have responded that the interests of Justice Scalia's sons and of Justice Thomas' wife were not significant enough to affect how they decided a case as important as *Bush v. Gore*. Besides, they continue, Justices Scalia and Thomas were already disposed to favor Bush on ideological grounds, so the personal interests of their relatives made no difference to what they decided in that case.

I admit that Justices Scalia and Thomas probably would have decided for Bush even if their relatives were not associated with Bush. They had plenty of other incentives to want Bush to win.

³⁰ *Bush v. Gore*, 531 U.S. 1048, slip op. at 7 (2000). Justice Stevens was talking about a different issue regarding lower courts, but his fears also apply to recusal in the Supreme Court.

However, my claim is not that the Justices' conflicts of interest changed how they decided *Bush v. Gore*. Even if their decision was not affected, that would show at most that their decision was impartial. Federal law also requires the decision-maker to be impartial, for reasons discussed above. Twenty-eight U.S.C. §455 demands that Justices Scalia and Thomas recuse themselves if substantial interests of their close relatives inclined them towards one party or the other, even if their decisions were not affected by those motives. This stronger standard of impartiality is not met by Justices Scalia and Thomas, so they were required to recuse themselves.

Necessity

Partiality that would otherwise require recusal might be allowed if it is necessary for the legal system to work. If we need some judge to try a case, and a certain judge is no more partial than anyone else, then this judge will be allowed, despite partiality. Some defenders claim that such a rule of necessity applies to Justices Scalia and Thomas.

It does not. It would apply if my argument were that Justices Scalia and Thomas have moral, political, or legal views that affected their decision. If such views were grounds for disqualification, those grounds would rule out all judges in this case and in too many other cases. Similarly, the rule of necessity would undermine my argument if I claimed that Justices Scalia and Thomas had to recuse themselves just because they had a stake in the outcome of the election. Every Supreme Court Justice had a stake in the 2000 election. It is no secret that the President makes policies that affect Supreme Court Justices. Also, everyone wants colleagues with whom he or she can work easily. The Republican Justices would probably gain such colleagues if Bush won, and the Democratic Justices would probably gain such colleagues if Gore won. Thus, if we required recusal on those grounds, we would have no Justices left to try the case. Such grounds are too general.

My argument is different. We will have plenty of Justices left if judges are required to recuse themselves only when they have special connections through family members to parties in the case. Some other Justices might have had close relatives whose interests

were substantially affected. If so, those other Justices also should have recused themselves. However, no such connections have come to light, even when Republicans were trying to defend Justices Scalia and Thomas. Thus, there is no reason to believe that the normal rules of recusal would make the Supreme Court unable to try this case, so the rule of necessity cannot justify an exception to the normal rules of recusal in this case.

No Complaint

Another common response is that Gore's lawyers could have raised formal objections during the trial, but they did not, even though they probably knew of these connections through the media. This made it reasonable for Justices Scalia and Thomas to assume that Gore's lawyers did not want them to recuse themselves.

However, the lack of formal complaint could have been due to other factors. Gore's lawyers might have believed that it was too risky to raise the issue if the Justices were going to refuse anyway and then might hold their request against their client. Public opinion also might turn against them for citing such a technical legal ground in a national election.

In any case, even if the parties do explicitly or implicitly waive any objections, the judge still must recuse himself in many cases. The process will still be unfair if the judge is partial. The public will still lose confidence without recusal. That is why 28 U.S.C. §455 does not require any formal complaint in order for judges to be required to recuse themselves.

Et Tu

Popular discussions often include one more objection: The Florida Supreme Court abused its power, so it should have been overturned. Some critics add that Gore (and Clinton) created even more appearance of impropriety in many past acts, so they are in no position to raise such objections against Justices Scalia and Thomas.

All of this is irrelevant. I need not defend the Florida Supreme Court or the arguments by the dissenters in *Bush v. Gore*. The issue here is procedure. Regardless of how the case should have been decided, federal law requires that it be decided by Justices with

both impartiality and the appearance of impartiality. My point is that Justices Scalia and Thomas lacked those features, so they should not have tried the case, even if other impartial Justices would or should have overturned the Florida Supreme Court without their help.

The vices of Gore and Clinton are also irrelevant to this argument. Cases like *Bush v. Gore* are often hard to separate from political preferences. However, my argument does not depend on any political preferences. Whether they supported Gore or Bush, any Justices with family connections to either party should have recused themselves, no matter how that might have affected the outcome of the case. The issues here concern due process, so they cannot be settled by anyone's preference for a certain outcome or dislike for prior acts that were not before the Court.

Too Late

A final response is that my argument is too little too late. Who cares whether Bush gained power legally after he has been acting as President for so long? The answer is that many American citizens care about whether their President is legitimate and whether their Supreme Court Justices follow federal law. Legal scholars also care about whether Justices who espouse strict constructionism practice what they preach. There has been a grave cost to public confidence in the Supreme Court, as reflected in the above quotation from Justice Stevens. The point of recusal and fair procedures generally is to protect this public confidence, which is crucial to the Court's authority. Justices cannot violate these rules of recusal without doing damage to the Rule of Law.

VII. WHAT SHOULD BE DONE?

Suppose that you agree with me that Justices Scalia and Thomas were required by federal law to recuse themselves in *Bush v. Gore*. They did not do so. Thus, they violated federal law. What can we do about it? Twenty-eight U.S.C. §455 does not specify any particular penalty or remedy for violations, so several alternatives are available.

Impeach the Justices

The only remedies mentioned in the United States Constitution are impeachment and removal from office. However, the Constitution limits the grounds for impeachment of federal officers to “Treason, Bribery, or other high Crimes and Misdemeanors” (U.S. Const. Art. II, §4).

This phrase is unclear about whether it covers failures to recuse when required by federal law. Such failures are akin to bribery in their rationale, but they are still not bribery. Such failures can cause great harm, but they are not crimes or misdemeanors in the usual sense. Still, some commentators suggest that “high Crimes or Misdemeanors” are whatever Congress wants them to be. If so, this phrase might include failures to recuse when required by federal law, since such failures are serious misconduct.

Nonetheless, precedents suggest that such failures are not adequate grounds for impeachment and removal. No Supreme Court Justice has ever been removed from office through the process of impeachment. Federal judges have only been removed for serious misconduct, such as felonies.³¹ In addition, some opponents of impeachment argue that impeaching any Supreme Court Justice would make all Justices less likely to follow the law and protect unpopular rights against preferences of a majority that might impeach them.

These dangers are real, although they might be reduced in this case because an impeachment of Justices Scalia and Thomas would be for specific violations of federal law rather than for politically unpopular legal decisions. Still, impeachment could have dire consequences for the whole legal system. That is why I think that impeachment would be going too far, even if it is consistent with the law.

³¹ Edward J. Schoenbaum, “A Historical Look at Judicial Discipline”, 54 *Chi.-Kent L. Rev.* 1, 1–10 (1977). It is reported that one New Hampshire judge was removed for drunkenness, but such exceptions are very rare.

Find Misconduct

Lesser penalties still might be appropriate. As in some state cases,³² official findings of misconduct could be made publicly about Justices Scalia and Thomas. If such findings are not enough by themselves, they might be accompanied by some form of explicit criticism or censure.

Judges should be subject to such censure for failure to recuse only if the failure was willful. However, Justices Scalia and Thomas knew about their conflicts of interest and chose neither to recuse nor to disclose. So they cannot use this excuse.

Such public findings and censure would send the message that others will not stand by silently when Justices knowingly violate federal law. This might help to make judges act more responsibly and to restore some public confidence in the legal system.

Consequently, I believe that official, public findings and censure would be useful and appropriate. But who would do it? The other Justices on the Supreme Court? Congress? A special commission? In my view, any or all of these bodies could announce findings and censure Justices Scalia and Thomas. The point is to show that these Justices cannot get away with violating federal law. All of these official bodies are in a position to make that point.

Vacate the Decision

Instead of focusing on the Justices, some remedies focus on the case. Cases are often retried when a judge did not inform the parties about a conflict of interest and when the judge was required to recuse but failed to do so. This is and should be standard practice to ensure that a fair trial occurs at some time.

Unfortunately, there are serious practical problems with vacating the decision in *Bush v. Gore*. First, normally a failure to recuse is evaluated by an appellate court, but no court is higher than the Supreme Court. Future Supreme Courts could raise this issue. The four dissenters in *Bush v. Gore* are enough to put the case on the docket. Justices Scalia and Thomas would certainly have to recuse themselves from this new case. The four dissenters would then make

³² Shaman, Lubet, and Alfini, *Judicial Conduct and Ethics*, pp. 28–29.

up a majority that could reverse the previous decision and fashion a remedy. However, such moves could lead to a dangerous Constitutional crisis. Moreover, vacating the judgment in *Bush v. Gore* would leave it unclear who is President in 2000–2004. A new election could be held, but the risks would be immense. Besides, the losing party (Gore) has not asked for a retrial.

For these reasons, I do not favor vacating the judgment in *Bush v. Gore*. This remedy is consistent with the laws and precedents, but it would be too disruptive.

Recognize the Rules

Still, something must change, namely, the policy and practices of the Supreme Court. Why? To avoid repetition. Many people are calling for the government to clean up the ballots and the election system. There is more to clean up than that. The 1993 Supreme Court statement needs to be publicly revoked as a misinterpretation of the rules. It should be made clear that 28 U.S.C. §455 will henceforth be interpreted more strictly in accordance with its actual meaning. The Supreme Court needs to restore public confidence and set an example for other courts by announcing that Justices will recuse themselves when they face conflicts of interest like those of Justices Scalia and Thomas in *Bush v. Gore*. Federal rules require as much, and Supreme Court policy and practice must be brought back in line with those rules.

Nothing

Critics will likely respond that official findings of misconduct would tear our country apart. Policy changes could not be implemented without Supreme Court approval. So, they say, we should do nothing (other than maybe write academic articles).

This response is compatible with the illegitimacy of the Supreme Court decision and of Bush's presidency. Maybe it is too costly to do anything now, but that does not make it right in the first place. It is also dangerous to do nothing, because of the loss of confidence in the judicial system. Moreover, there is much to gain in the future from official findings now. Judges would abuse their power less often if they thought that they might be made to pay for abuses

by losing respect and legitimacy in the eyes of the public. Public opinion does have force with Justices, so it is worthwhile to inform the public about what these Justices did. Still, public opinion is not enough by itself. That is why I favor official findings of misconduct and revocation of the 1993 Supreme Court policy.

VIII. WHAT WILL BE DONE?

I am not so deluded as to believe that any steps like these will actually be taken. I would be as surprised as anyone if *Bush v. Gore* were retried or if Justices Scalia or Thomas were impeached or if any findings of misconduct were issued or if the Supreme Court renounced its 1993 policy. That is not how America works, unfortunately. My only claims are that official, public findings of misconduct are appropriate responses to this egregious violation of federal law and that the Supreme Court's 1993 policy needs to be revised. At the very least, these issues need to be considered seriously before anyone can know whether Bush gained power legally or whether the strict constructionists on our Supreme Court are hypocrites.³³

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