NOTES

DUCK HUNTING, DELIBERATING, AND DISQUALIFICATION: *CHENEY V. U.S. DISTRICT COURT* AND THE FLAWS OF 28 U.S.C. § 455(A)

I. INTRODUCTION

"Since I do not believe my impartiality can reasonably be questioned, I do not think it would be proper for me to recuse."[1] Justice Antonin Scalia set off a media firestorm with this one sentence.[2] In criticizing Justice Scalia's decision, the media questioned not only Justice Scalia's impartiality, but also the Supreme Court's ability to fairly decide cases.[3]

It was Justice Scalia's choice in *Cheney v. U.S. District Court* (*Cheney I*)[4] not to disqualify himself from *Cheney v. U.S. District Court* (*Cheney II*)[5] that led to the frenzied media reaction.[6] *Cheney II* came before the Supreme Court in early 2004, and respondent Sierra Club filed a motion for Justice Scalia to recuse himself.[7] Si-

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[1] Cheney v. U.S. District Court (*Cheney I*), 541 U.S. 913, 926 (2004) (Scalia, J.) (explaining why he should not recuse himself from Cheney v. U.S. District Court (*Cheney II*), 542 U.S. 367 (2004)).

[2] *See* Editorial, *Justice Scalia's Ethical Blindness*, HARTFORD COURANT, Mar. 24, 2004, at A12 (accusing Justice Scalia of "ethical obtuseness" and arguing that Justice Scalia's friendship and duck hunt trip have compromised his ability to be impartial); E.J. Dionne, Op-Ed, *Why Scalia Should Duck Out*, WASH. POST, Mar. 23, 2004, at A19 (calling Justice Scalia's memo "bizarre" and insinuating that Justice Scalia did not recuse himself for political and ideological reasons); Ernst-Ulrich Franzen, Op-Ed, *Scalia Should Duck this One*, MILWAUKEE J.-SENTINEL, Mar. 20, 2004, at 14A (noting that Justice Scalia has recused himself more than 190 different times while on the court, and claiming that his refusal to recuse himself would cause harm to the confidence of the general public in the judicial branch).

[3] *See generally Ethical Blindness*, *supra* note 2; Dionne, *supra* note 2, Franzen, *supra* note 2.

[4] *Cheney I*, 541 U.S. at 926.

[5] 542 U.S. 367.

[6] *See* Dionne, *supra* note 2; *see also Ethical Blindness*, *supra* note 2; *see also* Franzen, *supra* note 2.

[7] *See* Motion to Recuse at 1, *Cheney II*, 542 U.S. 367 (No. 03-475), *available at* http://news.findlaw.com/hdocs/ docs/scotus/chny22304scrbrf.pdf (reasoning that under § 455(a), Justice Scalia's impartiality could be objectively questioned, and therefore

erra Club based its reasoning on the fact that Justice Scalia went on the now-notorious hunting trip with Vice President Richard Cheney, the petitioner in the *Cheney II* case.[8] Justice Scalia rejected Sierra Club's motion on the grounds that Supreme Court Justices are held to a different standard of recusal.[9] Justice Scalia reasoned that under an objective standard, his impartiality could not be questioned.[10]

There is a certain amount of irony in Justice Scalia's decision. First, 28 U.S.C § 455(a) specifically singles out Justices, requiring recusal when their impartiality can be reasonably questioned.[11] Justice Scalia, a known judicial conservative who consistently endorses the use of the legislature rather than the judiciary to change law,[12] makes the argument that the legislature's specific wishes should be ignored because the Court has a better understanding of recusal.[13] Moreover, a catch-22 arises in a situation in which the very Justice asked to recuse himself from a case must apply a reasonableness standard to his own actions. By its very definition, a legal reasonableness standard such as the one found in § 455(a) requires a determination of what is normal under the circumstances. A justice analyzing the bias in

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federal law required him to disqualify himself from deciding the case).

[8] *Id.* at 2 ("[A]s described in literally hundreds of media reports, on January 5, 2004, Justice Scalia and one of his children accompanied Vice President Cheney on an Air Force Two flight from Washington, DC to Morgan City Louisiana.... on a duck hunting vacation.").

[9] *Cheney I*, 541 U.S. at 915 (reasoning that the Supreme Court had developed its own, more stringent recusal standard, which did not require a Justice to disqualify himself for bias alone, but was based on the rationale that a Supreme Court Justice was too valuable to step aside every time his impartiality could be questioned).

[10] *Id.* at 926.

[11] 28 U.S.C. § 455(a) (2000) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned").

[12] *See* Lawrence v. Texas, 539 U.S. 558, 586-605 (2003) (Scalia, J., dissenting). Scalia's dissent takes a hard line against the "homosexual agenda," arguing that a state should have the right to legislate that sodomy is a crime. *See also* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (Scalia, J., dissenting). Scalia's dissent scathingly denounces the majority's reaffirmation of the fundamental right to abortion. *Id.* at 970-71.

> The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.

Id. at 979. Scalia acknowledges that he has consistently held that the federal government should not impose its will on state law where the Constitution does not explicitly give the federal government the power to do so. *Id.* at 980-81.

[13] *Cheney I*, at 915-16. Scalia reasoned that regardless of the legislative intent of § 455(a), the implied Due Process requirement of having nine Justices hear the case overrides the legislature's explicit inclusion of the word "justice" in the statute. *Id.*

his own actions based on his own reasoning is using an inherently subjective standard.

The purpose of this Note is not to criticize the choice of Justice Scalia, but rather to critically examine the requirements of 28 U.S.C. § 455(a) in light of Justice Scalia's decision not to recuse himself. This Note focuses on subsection (a) of § 455 because Congress specifically intended § 455(a) to apply to Supreme Court Justices; by disregarding this legislative intent, Justice Scalia is effectively rewriting the act.[14] Subsection 455(a) is also the broadest of the judicial recusal statutes—it specifically singles out judges and justices for bias, while all other recusal statutes provide for specific situations in which judges and justices must recuse themselves.[15] The gray area of § 455(a) has had the effect of creating the very problems and conflicts of interest that the judicial disqualification statutes were written to prevent. This Note postulates that the unique position of the Supreme Court as the "court of last resort" means that the Supreme Court cannot expect its Justices to evaluate their own actions against a reasonableness standard. Furthermore, in asking Justices to assess their own actions objectively, § 455(a) creates possible conflicts within the Court and damages the perceived impartiality of the legal system.

This Note will explain the *Cheney I* outcome and will use this case to expose the limitations of 28 U.S.C. § 455(a). Part II of this Note discusses the history of Cheney I and II. Part III examines how the recusal process works, focusing on the history of § 455(a) and its design. Part IV looks at 28 U.S.C. § 455(a) in practice at the Supreme Court Level. This part explains why the statute cannot and does not work as applied to the Supreme Court, using *Cheney I* as the main example. Part V examines the effects that this deficiency has on the legal system and the public. Finally, Part VI proposes solutions that the Court or Congress could pursue in order to correct the problem.

II. HISTORY OF *CHENEY I* AND *CHENEY II*

Sierra Club, along with the non-partisan government watchdog Judicial Watch, brought a suit against Vice President Dick Cheney alleging violations of the Federal Advisory Committee Act (FACA).[16] The plaintiff advocacy groups contended that Vice President Cheney, in drawing up the energy policy for the new administration in 2001, committed unethical and possibly illegal actions.[17] These actions included meeting with the heads of major energy companies and known polluters, including the infamous Enron CEO Ken Lay, and then using the advice of these

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[14] *See* H.R. REP. NO. 93-1453, at 12 (1974).

[15] *See generally* 28 USC § 144 (2000); 28 USC § 455(b)-(d).

[16] Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group, 219 F. Supp. 2d 20 (D.C. Cir. 2002) (extensive subsequent history—including *Cheney II*—omitted). See Cheney v. U.S. District Court (*Cheney II*), 542 U.S. 367 (2004).

[17] David Von Drehle, *Scalia Rejects Pleas for Recusal in Cheney Case*, WASH. POST, Feb. 12, 2004, at A35 (explaining the layout of the case, who brought suit, and Justice Scalia's reason for not feeling the imperative to recuse himself).

men (if not the men themselves), to form the National Energy Policy Development Group (NEPDG).[18] The plaintiffs sought injunctive relief under FACA, hoping to force the NEPDG to release all of the records of their meetings for public scrutiny.[19] A court battle ensued which traveled all the way to the Supreme Court of the United States.

The recusal controversy began when the Supreme Court chose to grant certiorari to *Cheney II*. Petitioner Sierra Club discovered that Justice Scalia and Vice President Cheney were long-time friends. They further discovered that in the spring of 2003, Cheney and Scalia took a duck hunting trip together, which Justice Scalia readily acknowledged.[20] Justice Scalia also acknowledged that the trip involved twelve other hunters, that the hunters used Vice President Cheney's plane to travel to the hunt, and that Justice Scalia and the Vice President spent at least a little time alone together.[21]

Sierra Club filed a motion claiming that, under federal law, Justice Scalia's trip with Vice President Cheney, while Cheney's case made its way through federal court, created a question about the Justice's ability to decide the case impartially. Sierra Club viewed this uncertainty as mandating Justice Scalia's disqualification from deciding the case.[22] The group feared the possibility that either the Vice President asked Justice Scalia to find in his favor or, more innocently, that the two talked casually about the case, either of which could have led to possible bias.[23] Sierra Club based its argument on the objective standard of 28 U.S.C. § 455(a), positing that, regardless of what actually happened on the trip, Justice Scalia's actions had already contaminated public opinion and therefore required that he recuse himself.[24]

Justice Scalia wrote a scathing retort to Sierra Club's motion, vehemently denying any wrongdoing.[25] The Justice gave a laundry list of reasons why recusing

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[18] *Id.*

[19] *See Cheney II*, 542 U.S. at 374.

[20] Cheney v. U.S. District Court (*Cheney I*), 541 U.S. 913, 914 (2004) (Scalia, J.).

[21] *Id.*

[22] *See* 28 U.S.C. § 455(a) (2000) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned . . . ."). Sierra Club argued that Justice Scalia's close relationship with the Vice President, stemming from the time they spent alone together, may have led to an unfair influence on Justice Scalia. *See* Motion to Recuse, *supra* note 7, at 3.

[23] *See* Motion to Recuse, *supra* note 7, at 3 (citing media articles reflecting public opinion that Justice Scalia's impartiality had been compromised and it was only right for him to step aside).

[24] *Id.* at 1 ("Indeed, to our knowledge, there has not been a single editorial arguing against recusal. Sierra Club respectfully submits that, by the objective standard required by federal law, Justice Scalia's impartiality has reasonably been called into question, and he must be recused.").

[25] *Cheney I*, 541 U.S. at 928.

himself from the case would violate the reasonableness standard.[26] He pointed out that, regardless of the claims of the petitioner, the Supreme Court had already decided that Justices are too important to the administration of law and thus need only recuse themselves when they hold a monetary interest in the case.[27] Relying on this reasoning and focusing on his personal knowledge that he did nothing wrong, Justice Scalia concluded that the motion for recusal was unreasonable.[28] As a result, Justice Scalia denied the *Cheney I* motion and proceeded to participate in the *Cheney II* decision along with the full Court, which ultimately held 7-2 in favor of not releasing the documents.[29]

The late Justice Rehnquist later ordered an ethics inquiry to study recusal and to determine the propriety of the current standard, but this inquiry does not relate directly to the public debate on Justice Scalia's decision to hear the case involving the Vice President.[30] Regardless, while 28 U.S.C. § 455(a) remains in its current form, the problem highlighted by the duck hunting case will continue to recur. Subsection 455(a), which says a justice "shall" recuse himself, assumes that either another district judge can hear the case or that, if necessary, another court can hear the case. Because there is only one Supreme Court, a motion for a Supreme Court Justice to recuse himself under § 455(a) is, at best, a request. The language loses all its meaning when the very Justice that "shall disqualify" himself decides the propriety of recusal and no appellate process exists for the petitioner.[31] In essence, a

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[26] *Id.* at 915-916.

[27] *Id.* (internal citations omitted):

> Let me respond, at the outset, to Sierra Club's suggestion that I should "resolve any doubts in favor of recusal." That might be sound advice if I were sitting on a Court of Appeals. There, my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different: The Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case. Thus, as Justices [sic] stated in their 1993 Statement of Recusal Policy: "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. Even one unnecessary recusal impairs the functioning of the Court." Moreover, granting the motion is (insofar as the outcome of the particular case is concerned) effectively the same as casting a vote against the petitioner. The petitioner needs five votes to overturn the judgment below, and it makes no difference whether the needed fifth vote is missing because it has been cast for the other side, or because it has not been cast at all.

[28] *Cheney I*, 541 U.S. at 915 (quoting Justice Scalia: "I never hunted in the same blind with the Vice President. Nor was I alone with him at any time during the trip, except, perhaps, for instances so brief and unintentional that I would not recall them—walking to or from a boat, perhaps, or going to or from dinner.")

[29] Cheney v. U.S. District Court (*Cheney II*), 542 U.S. 367, 372 (2004).

[30] *Ethics inquiry ordered after Scalia flap*, NAT'L L. J., May 31, 2004, at 3.

[31] 28 U.S.C. § 455(a) (2000). *See also* 46 AM. JUR. 2D *Judges* § 220 (2005) ("The

Justice can (and in this case, did) reduce the reasonableness standard for recusal to a purely subjective decision.

III. HISTORY OF RECUSAL UNDER 28 U.S.C. § 455(A)

A. The Development of 28 U.S.C. § 455(a)

The concept of recusal for the purposes of impartiality has deep roots in the Due Process Clause of the Fifth Amendment.[32] Indeed, "throughout the history of our national government, Congress has sought to secure the impartiality of trial judges by requiring judges to disqualify themselves in various circumstances."[33] As far back as 1792, Congress legislated methods for recusal of federal judges, requiring federal district court judges to turn a case over to another federal court when a party complained about a judge's impartiality for listed reasons.[34]

In 1911, Congress enacted another law regarding judicial recusal:

> Whenever it appears that the judge of any district court is any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related or connected with either party as to render it improper, *in his opinion*, for him to sit at trial, it shall be his duty, on application by either party. . . shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had.[35]

The 1911 law differs substantially from the current version, 28 U.S.C. § 144, which Congress enacted in 1948.[36] Both the 1911 version and the current law, however, speak only of district court judges and subjective standards.[37]

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decision of a judge with regard to whether to disqualify himself will not be reversed absent an abuse of discretion or unless the record establishes bias or prejudice as a matter of law.").

[32] *See* Martin Redish et al., *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 457 (1986) (stating that Due Process requires independent, impartial judges).

[33] Susan Hoekema, *Questioning the Impartiality of Judges: Disqualifying Federal District Court Judges Under 28 U.S.C. § 455(a)*, 60 TEMPLE L.Q. 697, 697 (1987).

[34] *See* Act of May 8, 1792, ch. 231, 1 Stat. 275 (1792) (emphasis added):

> That in all suit and actions in any district court of the United States, in which it shall appear that the judge of such court is, any ways, concerned in interest, or has been of counsel for either party, it shall be the duty of such judge on application of either party, . . . to order an authenticated copy [of the minutes of the court] . . . to be forthwith certified to the next circuit court of the district, which circuit court shall, thereupon, take cognizance thereof, in the like manner, as if it had been originally commenced in that court, and shall proceed to hear and determine the same accordingly.

[35] Act of March 3, 1911, ch. 231, § 21, 36 Stat. 1087, 1090 (repealed 1948).

[36] *See* 28 U.S.C. § 144 (2000), which provides:

The 1974 amendment, 28 U.S.C. § 455, addressed both the subjectivity problem and the lack of a governing standard. Congress based the changes on the amendments to the ABA Code of Judicial Conduct.[38] The Congressional Report notes that, since Congress took up the issue, five states, the District of Columbia, and the Judicial Conference of the United States had adopted versions of the ABA Code.[39] Of particular interest is the amendment that would become 28 U.S.C. § 455(a), which subjected all federal judges and justices to judicial disqualification.[40] This is the first statute in American law that specifically mandated the recusal of any Supreme Court justice who had an improper interest in the case.

Subsection 455(a) requires that "any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[41] Both the ABA and Congress had numerous reasons for considering and eventually adopting § 455(a). Both the ABA and Congress wanted to dispel the old adage that judges had a "duty to sit."[42] Congress denied that any judge had a "duty to sit" and shifted the standard to focus on the concept of impartiality.[43] The enhancement of public perception of impartiality

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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 [session] 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.

[37] *Compare id. with* Act of March 3, 1911, ch. 231, § 21, 36 Stat. 1087, 1090 (repealed 1948). The original law of 1911 created a subjective evaluation as a means to disqualify a sitting judge. By contrast, the 1948 amendment to this law—the current 28 U.S.C. § 144—requires only an affidavit as a means to disqualify a judge.

[38] *See* H.R. REP. NO. 93-1453, at 5 (1974) (survey of over 14,000 lawyers, lawmakers, and judges demonstrated a preference that judges of all federal appellate levels be subject to a reasonableness standard when determining whether a case warrants recusal).

[39] *Id.* at 3.

[40] *Id.* at 6 ("[C]overage of the amended statute is made applicable to magistrates and referees in bankruptcy *as well as Supreme Court Justices* and all other federal judges" (emphasis added)).

[41] 28 U.S.C. § 455(a) (2000).

[42] *See* H.R. REP. NO. 93-1453, at 5. This report discusses the judicially created "duty to sit," a subjective balancing test placing more weight on the judge hearing the case than on recusal. *Id.* (citing *Edwards v. United States*, 334 F.2d 360 (5th Cir. 1964)).

[43] *See id.*

concerned the drafters of the amendment more than any single judge's subjective concerns.[44]

Congress also adopted § 455(a) to create a catch-all statute that would call for disqualification of judges in difficult situations in which the judge's interest is non-financial.[45] Until the ABA conference of 1969 proposed the amendment to the Code of Judicial Conduct, there were multiple statutory and ethical provisions with numerous interpretations as to when a judge could properly hear a case.[46] Indeed, the two main complaints about the law prior to 1974 were that § 455 lacked a distinct and concrete definition of what was improper, and that the statute lacked a central rationale for a judge to disqualify himself from a case.[47] While 28 U.S.C. § 144 and the other portions of § 455 named distinct pecuniary and conflict-of-interest situations that mandate judicial recusal and specified the process for such recusals,[48] the law still lacked an overarching rule that could effectively cover the gray areas. Congress included the wording "in which his impartiality might reasonably be questioned" in order to create a provision that allowed for the disqualification of judges who might have a conflict of interest that could not be pigeonholed into the category of pecuniary gain.

Furthermore, there is no question that the legislative intent of § 455(a) was to abolish the subjective standard that had governed the law before the statute's enactment. The Judiciary Committee went out of its way to stress that it was eliminating the subjective standard in favor of an objective standard.[49] Indeed, the record states, "[I]f there is a reasonable factual basis for doubting the judge's impartiality,

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[44] *Id.* at 5 ("Such a concept [of a 'duty to sit'] has been criticized by legal writers[,] and witnesses at the hearings were unanimously of the opinion that elimination of this 'duty to sit' would enhance public confidence in the impartiality of the judicial system.").

[45] *Id.* at 4-5.

[46] *See id.* at 2.

[47] Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 741-742 (1973). This Note endorses the "new" ABA standard on the following basis:

> [T]here are two major weaknesses inherent in [§ 455]. [I]t provides insufficiently detailed and concrete standards to guide judges in deciding whether to disqualify themselves . . . [and] fail[s] to provide a central, underlying rationale for disqualification [that] could help a judge decide whether to disqualify himself in instances not expressly covered by the mandatory provisions.

Id.

[48] *See* 28 U.S.C. § 144 (2000) (concerning the process of removing judges with personal bias or prejudice) and 28 U.S.C. § 455(b) (detailing when a judge's financial or other interests or conflicts could lead to disqualification). *See generally Disqualification*, *supra* note 47, at 738 nn.13-14 (regarding writs of mandamus and other forms of relief).

[49] H.R. REP. NO. 93-1453, at 5 ("[Subsection (a)] sets up an objective standard, rather than the subjective standard set forth in the existing statute . . . .").

he should disqualify himself . . . ."[50] Even those who opposed the statute endorsed the concept that an objective standard should be established for judicial recusal.[51]

B. Interpretation of 28 U.S.C. 455(a)'s Objective Standard

The Supreme Court ruled on the use of the objective standard in *Liljeberg v. Health Services Acquisition Corp.*[52] In this case the Court held that if an objective observer could reasonably question the impartiality of the judge in question, then the judge should disqualify himself.[53] The Court goes out of its way to stress that whether the judge "knew" of his conflict of interest is irrelevant.[54] Indeed, the Court points to 28 U.S.C. § 455(b)(4), which specifically includes a knowledge standard, and then compares § 455(b)(4) to § 455(a), finding that § 455(a) was meant as a specific, stand-alone catch-all that could be used regardless of what a judge did or did not know.[55] The Court reasons that it is not the knowledge of the judge that is important.[56] Rather, the paramount purpose of § 455(a) is preserving the public's confidence in an independent judiciary.[57]

Much of the Court's reasoning in its *Liljeberg* decision is based on previous rulings of the Fifth Circuit Court of Appeals.[58] Quoting directly from the lower court's line of reasoning, the Supreme Court states:

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[50] *Id.*

[51] *Id.* at 15. An opponent of the bill said on the record: "I have, of course, no objection to the principle . . . that a judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned . . . ." *Id.* The two opposing Committee members then went on to fight against the later, more specific and "inflexible," requirements of judicial disqualification. *Id.* The remainder of the Committee recommended the bill, endorsing the concept of an objective standard for impartiality purposes. *See Id.* at 14.

[52] 486 U.S. 847, 860-61 (1988).

[53] *Id.* (concluding that the legislative history indicates that Congress intended the standard of § 455(a) to be an objective standard).

[54] *Id.* at 859 ("The judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy, but it does not eliminate the risk that 'his impartiality might reasonably be questioned' by other persons.") (quoting 28 U.S.C. § 455(a) (2000)).

[55] *Id.* at 859.

[56] *Id.* at 860.

[57] *Id.* (explaining that the concern of the Court is that the public does not see the judge as partial and that the judge's partiality, or lack thereof, is not the deciding factor in the case).

[58] *Id.* (citing Hall v. Small Business Admin., 695 F.2d 175, 179 (5th Cir. 1983) (ruling that the enforcement of § 455(a) must be objectively concerned with preserving public confidence in an impartial judiciary)). *See also* Fredonia Broadcasting Corp., Inc. v. RCA Corp., 569 F.2d 251, 257 (5th Cir. 1978) (ruling that § 455(a) "is a general safeguard of the appearance of impartiality" to be used under a "reasonable man" objective standard (quoting Parrish v. Bd. of Comm'rs. of the Ala. State Bar, 524 F.2d 98, 103 (5th Cir. 1975) (one of the first cases to address the then-new § 455(a) standard, and deciding

> The statute requires the judge to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality. . . . The term cannot . . . extend to what happens in the judge's chambers or to his actual virtue because, were that so, *the test would not be the appearance of impartiality* but the absence of actual prejudice.[59]

In practice, the Supreme Court's established test inquires into whether a reasonable person would perceive bias. The deciding factor is not whether the judge in question was not impartial, but whether a reasonable person might view the judge as lacking impartiality. The Supreme Court has distinguished this test from those found in other U.S. statutes;[60] if a reasonable person may see a judge as partial to one side it is the duty of that judge to recuse himself to preserve the public perception of an independent judiciary.

The Court has since reaffirmed the objective standard for 28 U.S.C. § 455(a). Speaking for the majority in *Liteky v. United States*, Justice Scalia referred to the use of an objective standard in reviewing recusal as "universal[]."[61] Justice Scalia then explained that the governing factor in judicial disqualification under § 455(a) was the appearance of bias, regardless of its existence.[62] However, the opinion did go on to assert that § 455(a) is subject to the "extrajudicial source" doctrine,[63] which also limits 28 U.S.C. § 144, as well as the other subsections of 28 U.S.C. § 455.[64]

In sum, the case law of 28 U.S.C § 455(a) echoes the amendment's legislative history. Congress enacted § 455(a) as a method to rid the upper echelons of the federal judiciary of the subjective "duty to sit" rule and create an objective standard for recusal in ambiguous situations.[65] The Supreme Court has interpreted the term

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that its test was a "reasonable man" standard))).

[59] *Liljeberg*, 486 U.S. at 860-61 (quoting Health Services Acquisition Corp. v. Liljeberg, 796 F.2d 796, 802 (5th Cir. 1986) (citing *Hall*, 695 F.2d at 179)) (emphasis added).

[60] *See, e.g.*, H.R. REP. NO. 93-1453, at 2 (1974).

[61] Liteky v. U.S., 510 U.S. 540, 548 (1994). Justice Scalia wrote the majority opinion and took the position that *Liljeberg* was the governing authority, thus establishing that the objective standard was the only applicable standard for § 455(a). *Id.*

[62] *Id.*

[63] *Id.* at 545 n.1 ("The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.") (quoting U.S. v. Grinnell Corp., 384 U.S. 563, 583 (1966)). The "extrajudicial source" doctrine stems directly from the original statutes which required recusal when the judge had a "personal" bias, and has been interpreted to mean that impartiality must stem from comments or actions made outside the official role of the judge during the case. *Id.* at 548-49.

[64] *Id.* (explaining that while the extrajudicial source rule was originally developed for 28 U.S.C. § 144, it has since been extended; that "extrajudicial" means events that occurred before the trial itself, and that the recusal statute is not being used as a tool to simply avoid adverse rulings).

[65] H.R. REP. NO. 93-1453, at 5 (denying the "duty to sit" subjective standard and embracing an objective test in order to establish more confidence in the judiciary).

"reasonably" in subsection (a) to be a "universal" objective standard, separate from all other judicial disqualification tests.[66] This standard asks whether a reasonable man *might* conclude that a judge could act in a biased manner. Time and again, the Court has stressed that the appearance of impartiality and public confidence are the most important concerns of 28 U.S.C. § 455(a) and that the actual knowledge of the judge, or his intentions, should not be considered.[67]

C. 28 U.S.C. § 455(a) in Practice

When a party feels that a judge may be biased, or that the impartiality of the judge may be questioned, that party may move to disqualify the judge.[68] Once the motion is filed, the judge whose impartiality is being questioned makes the decision whether to recuse himself.[69] While 28 U.S.C. § 455(a) is considered the *standard* for recusal, the Fifth Circuit has interpreted 28 U.S.C. § 144 to govern the recusal *process*.[70] Under § 144, the sitting judge determines whether the affidavit calling for recusal is proper and oversees the process for filing such a motion.[71] The statute seems to call for only a procedural review.[72] However, the Supreme Court narrowed § 144 by interpreting it to mean that the judge must decide the legal sufficiency, but not the truth, of the affidavit.[73]

The additional step added by the *Berger* decision eliminated the chance that a motion to recuse under federal law would act as a preemptive challenge.[74] Further, though the courts have determined that § 455(a) is the standard for disqualification, the judge in question is governed by the requirements of § 144.[75] By having § 144 govern the actions of a judge subject to a § 455 petition for recusal, the same judge that is accused of bias legally reviews the "appearance of bias" standard.[76] There-

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[66] *See Liteky*, 510 U.S. at 548.

[67] *Id.* at 548; Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860 (1988).

[68] 28 U.S.C. § 144 (2000). *Cf.* Hoekema, *supra* note 33, at 726-27 (describing the process by which one obtains a recusal at the federal district court level).

[69] *Id.* at 728.

[70] Davis v. Bd. of Sch. Comm'rs. of Mobile County, 517 F.2d 1044, 1051 (5th Cir. 1975).

[71] 28 U.S.C. § 144.

[72] *Id.* (focusing on the language "timely and sufficient" which seems to imply that as long as the motion was properly filed as per court rules, the judge will recuse himself without reviewing the factual basis for the allegation).

[73] *See* Berger v. United States, 255 U.S. 22, 36 (1921).

[74] Hoekema, *supra* note 33, at 702-703 (discussing the legislative history of § 144 and finding that the original sponsors of the bill had expressed a belief that § 144 would require judges to recuse themselves if the motion were properly filed). The history does not indicate that the judge would be afforded any right to review the motion itself. *Id.*

[75] *Davis*, 517 F.2d at 1052 ("This means that we give §§ 144 and 455 the same meaning legally for these purposes, whether for purposes of bias and prejudice or when the impartiality of the judge might reasonably be questioned.").

[76] Hoekema *supra* note 33, at 712-713 ("Most courts agree that the judicial interpre-

fore, under § 455(a), a judge is expected to analyze subjectively whether he is impartial using an objective standard.

In essence, judicial narrowing and interpretation has limited the reach of § 455(a) by giving the judge additional discretion in evaluating his personal bias. Federal case law supports this interpretation.[77] However, the party's right to appeal an adverse ruling serves as a substantial safeguard.[78] If a judge at the district court or appellate court level decides under § 455(a) that he does not have to recuse himself, the affected party can appeal the decision of the judge based on abuse of discretion.[79]

An aggrieved party's ability to appeal a negative recusal decision is at the heart of the statute's effectiveness. Subsection 455(a) requires a judge or justice to recuse himself if there is an objective perception of bias.[80] If federal district or appellate court judges abuse their discretion, an aggrieved party, rather than having to face a judge it just tried to remove, can appeal the decision and have the motion reviewed on a truly objective basis. However, there is no appellate review at the Supreme Court level. This means that if a Supreme Court justice is asked to recuse himself, and abuses the discretion given to him in § 455(a), there is no one to objectively review the perceived abuse of discretion. Thus, Justice Scalia's position allows Supreme Court Justices unwarranted immunity from this protective device.

IV. 28 U.S.C. § 455(A) APPLIED TO SUPREME COURT CASES

A. Specific Examples of Recusal at the Supreme Court Level

In order to fully understand the impact of the lack of objective impartiality at the Supreme Court level, this Note will first look at two cases where Supreme Court Justices chose to recuse themselves under a § 455(a) standard.

Justice Clarence Thomas decided to recuse himself in the landmark case of *United States v. Virginia*.[81] The six-justice majority, with an opinion authored by

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tation of section 144 applies fully to section 455.").

[77] *See* Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 441 F.2d 631, 635 (5th Cir. 1971) ("Section 455 *vests in the justice or judge the obligation* to determine that a substantial interest or relationship to or connection with a party rendered it improper to sit in the seat of judgment." (emphasis added)); United States v. Seiffert, 501 F.2d 974, 977 (5th Cir. 1971) ("Congress made it expressly plain that it placed in the justice or judge the responsibility for making the determination 'in his opinion' that he should disqualify himself.").

[78] Vuono v. United States, 441 F.2d 271, 272 (4th Cir. 1971). An appeal from a decision against recusal cannot be interlocutory; the party must wait for a final decision before appealing. *E.g., id.*

[79] *Seiffert*, 501 F.2d at 977. Deciding that a § 455(a) mandamus is not legally sufficient is thus grounds for appeal as an abuse of discretion. *See id.*

[80] *See supra* Parts III.A.-B. for a discussion on the requirements of § 455(a) and its objectives.

[81] 518 U.S. 515, 519 (1996) (stating that Justice Thomas took no part in the decision of the case).

Justice Ruth Bader Ginsberg, found that the all-male Virginia Military Institute (VMI) had not provided an "exceedingly persuasive justification" for not allowing women to enroll and therefore had committed gender-based discrimination.[82]

Of particular interest is the single throwaway sentence stating that "Thomas, J., took no part in the consideration or decision of the case."[83]Justice Thomas' son, Jamal, was enrolled at VMI when the case came before the court.[84] Justice Thomas voluntarily recused himself before the oral arguments.[85] It is a fair assumption that the reason for the recusal is that Justice Thomas and his 'son had a direct interest in the ruling and may even have discussed the suit with each other. This scenario is more than sufficient to create an appearance of bias.[86]

Justice Thomas's decision falls squarely within the bounds of § 455(a).[87] While there was no mandamus asking him to step down, there was a conflict of interest that could very well have caused people to question the decision in the case. (Incidentally, Thomas, a known judicial conservative, almost definitely would have sided with the dissenters, in which case he would not have impacted the outcome of the case.[88]) Regardless, because Justice Thomas' impartiality could (and likely would) *objectively* be in question due to his connection with the school, recusing himself was the appropriate decision. This is a textbook example of how the recusal system should work under § 455(a).

Another example of § 455(a) performing as envisioned is Justice Scalia's decision to recuse himself from *Elk Grove Unified School District v. Newdow*.[89] The case came to the Court after the Ninth Circuit Court of Appeals upheld Mr. Newdow's claim that his daughter was being unconstitutionally coerced in religious matters due to the daily recitation of the pledge of allegiance, which contains the

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[82] *Id.* at 515-16 (explaining in the holding that an institution that receives federal and state funding must show an "exceedingly persuasive justification" for not admitting women). Due to the fact that VMI did not show any important government objectives and relied on "overbroad generalizations," the institution failed to meet the heightened scrutiny standard. *See id.*

[83] *Id.* at 518.

[84] *Thomas's Son Attends VMI*, WASH. POST, June 27, 1996, at A04.

[85] *Id.*

[86] Justice Thomas did not give an official reason for why he recused himself. *See Virginia*, 518 U.S. at 518. However, this note assumes that it was indeed Justice Thomas' relationship with his son, a VMI student, that was the basis for his recusal.

[87] *See* Motion to Recuse, *supra* note 7, at 3.

[88] *Contra* William Henry Hurd, *Gone with the Wind? VMI's Loss and the Future of Single Sex Education*, 4 DUKE J. GENDER L. & POL'Y 27, 53 (1997) (discussing the 6-2 majority and postulating what may have happened if Thomas had sat in on the decision, leaving open the possibility that the dissenters may have carried the majority, thus completely changing the outcome of the case).

[89] *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004). *See also* Charles Lane, *Justices Keep "Under God" in Pledge*, WASH. POST, June 15, 2004, at A1 ("Justice Antonin Scalia ... recused himself [from *Newdow*] after publicly indicating his likely support of 'under God'").

phrase "under God."[90] In a speech to the Knights of Columbus on January 12, 2003 in Fredericksburg, Maryland, Justice Scalia made direct references to the Ninth Circuit decision upholding Mr. Newdow's claims.[91] Justice Scalia's comments, delivered before the Court granted certiorari, make it clear he felt the Ninth Circuit wrongly decided the case.[92] The Associated Press (AP) carried an article covering the speech and focusing specifically on Justice Scalia's comments about the Pledge of Allegiance.[93] Mr. Newdow then filed a writ of mandamus asking Justice Scalia to recuse himself on the grounds that the Justice's public comments showed that he held a preformulated opinion on the case and also that that the AP article created a perception of partiality.[94] While some experts felt that the filing was possibly improper and at the very least a high-risk strategy,[95] Justice Scalia nevertheless agreed to recuse himself on October 14, 2003.[96]

Many experts view a request to the Supreme Court for a Justice to recuse himself on the grounds of 28 USC § 455(a) as a very dangerous and ill-advised strategy.[97] Indeed, there are even some who feel that § 455(a), when applied to a Supreme Court Justice for comments made in the course of his speeches, classes, or books, is more of a suggestion than a bright-line rule necessarily requiring recusal.[98] *Newdow* is a clear example of the application of § 455(a) as a suggestion. As Northwestern University School of Law professor Steven Lubet has said: "[General comments about the interpretation of areas of law are] qualitatively different from a comment about a specific case, which is what happened [in Scalia's speech]."[99] In *Newdow*, Justice Scalia made clear his views on a case that he would hear and de-

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[90] *See generally* Newdow v. United States Cong., 328 F.3d 466 (9th Cir. 2002) (finding that the school's use of "under God" in the pledge violated the First Amendment's Establishment Clause, making the Pledge of Allegiance unconstitutional as written).

[91] Tony Mauro, *A Tighter Gag on Judges?*, N.J. L.J., Oct. 20, 2003, at 154.

[92] *Id.* (quoting the mayor of Fredericksburg, Maryland: "From what [Justice Scalia] said, it was clear that he thought that anyone who did not want school children to say the Pledge of Allegiance with the words "under God" in it deserved a spanking.")

[93] *Id.*

[94] Todd Collins, *Lost in the Forest of the Establishment Clause:* Elk Grove v. Newdow, 27 CAMPBELL L. REV. 1, 24 (Fall 2004).

[95] Mauro, *supra* note 91 (quoting two law professors and an attorney who feel that a formal request to the Supreme Court that a Justice recuse himself is a high-risk strategy, and that Justices should feel free to comment on legal issues and even "criticiz[e] a legislative decision as a policy matter").

[96] *See id.*

[97] *See generally* Mauro, *supra* note 91 (quoting a "veteran practitioner who requested anonymity" and who felt that Newdow was being disrespectful to Justice Scalia by questioning his ability to be impartial).

[98] *See generally id.* (referring to § 455(a) motions for recusal as "asking" or "suggesting" that a justice step aside and quoting Professor Lubet: "Justices might well overlook some situations in which recusal is warranted—because no one raised it .... On the other hand, you can't really fault a judge for saying, 'Why should I step aside if no one has asked me to?'")

[99] *Id.*

cide. Mr. Newdow recognized that Justice Scalia's impartiality "might reasonably be questioned" because of the Justice's speech.[100] Mr. Newdow, therefore, acted in accord with the legislative intent of the law.[101] Justice Scalia had to recuse himself because his words were carried on a national news service and had created an appearance of partiality.

B. 28 U.S.C. § 455(a) as Applied to Cheney I

Subsection § 455(a) aims at curbing not only explicit bias or prejudice, but also the perception of impropriety and bias.[102] Justice Thomas's decision to recuse himself from the VMI case shows that personal relationships that create the perception of bias can be grounds for recusal from a decision.[103] Additionally, *Newdow* demonstrates that public activities that create the perception of partiality are grounds for recusal under § 455(a), even when judges have traditionally engaged in those activities and they are viewed by the legal community as harmless.[104]

Considering the circumstances under which *Cheney I* came to the Court and the media circus that accompanied it, Justice Scalia seemed to be a likely candidate for recusal, yet decided against it. Justice Scalia reasons that disqualifying himself is not proper because his absence would leave the court with only eight justices, *thus affecting the outcome of the case.*[105] Justice Scalia points directly to the fact that, as opposed to federal district courts (where venue can be changed) and federal appellate courts (where another appellate judge from the circuit can sit), the removal of a Supreme Court Justice functionally changes the decision-making capability of the body.[106] In Justice Scalia's opinion, to meet the requirements of § 455(a) a Supreme Court Justice need not recuse himself even when a relative is a partner in the firm at bar, or when the Justice once served as a lawyer for a firm arguing before the Court.[107]

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[100] 28 U.S.C. § 455(a) (2000).

[101] *See generally supra* Part III.A. (discussing the legislative history and congressional record regarding the intent of the law).

[102] Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860-61 (1988) (noting that the courts have interpreted the meaning of § 455(a) to be the reasonable perception of bias, regardless of the intentions of the judge).

[103] *See supra* notes 81-88 and accompanying text.

[104] *See supra* notes 89-101 and accompanying text.

[105] Cheney v. U.S. District Court (*Cheney I*), 541 U.S. 913, 915-16 (2004) (Scalia, J.) (reasoning that his absence, if unnecessary, acts as a functional vote against the petitioner, thus unfairly burdening him).

[106] *Id.*

[107] *Id.* (quoting SUPREME COURT OF THE UNITED STATES, STATEMENT OF RECUSAL POLICY 1 (Nov. 1, 1993) (on file with *Boston University Public Interest Law Journal*)):

> 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. Even one unnecessary recusal impairs the functioning of the Court.

Justice Scalia's reasoning is flawed for two reasons. First, 28 U.S.C. § 455(a) makes no distinction between federal judges and Supreme Court Justices.[108] The text refers to "[a]ny justice, judge, or magistrate" and in no way qualifies the application of the statute among the three.[109] Indeed, one of the reasons why Congress enacted § 455(a) was to create a governing standard for Supreme Court Justices.[110] Congress intended for the law to create a reasonableness standard for recusal and for Justices to abide by that standard.[111] Justice Scalia ignores the intent of the legislature that *all* judges, regardless of stature, be held to a standard that prevents the perception of bias and reasons that for policy reasons his vote is more important than the concern that the very same vote could damage the image of the Supreme Court.

Second, Justice Scalia's reasoning is flawed because he refuses to apply the objective standard of 28 U.S.C. § 455(a).[112] This is apparent from his reasoning that Vice President Cheney was sued in his official capacity[113] and that the petitioner cites to public opinion to demonstrate an objective perception of bias.[114] Standing by his original assertion that a justice must recuse himself only when "established principles and practices" require it,[115] Justice Scalia denounces the reasoning of the petitioner *in a subjective manner*.[116] It is possible that the very reason why Sierra Club wanted Justice Scalia removed was because he has shown he cannot impartially judge his own perception of bias.[117] Justice Scalia claims that his friendship

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[108] *See* 28 U.S.C. § 455(a) (2000) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.")

[109] *Id.*

[110] H.R. REP. 93-1453 at 6, 12 (1974).

[111] *Id.*

[112] Motion to Recuse, *supra* note 7, at 1 ("Sierra Club respectfully submits that, by the objective standard required by federal law, Justice Scalia's impartiality has reasonably been called into question, and he must be recused.").

[113] Cheney v. U.S. District Court (*Cheney I*), 541 U.S. 913, 916 (2004) (Scalia, J.)

> The only possibility is that [the duck hunting trip] would suggest I am a friend of [Vice President Cheney]. But while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer.

Id.

[114] *Id.* at 923 ("The implications of [Sierra Club's] argument are staggering. I must recuse because a significant portion of the press, which is deemed to be the American public, demands it.").

[115] *See id.* at 916.

[116] *See generally id.* Justice Scalia uses terms like "I see nothing wrong," "I think not," and "I do not believe," which demonstrate that Justice Scalia is reasoning from *his* point of view and not from that of a person on the outside looking in.

[117] *Id.* at 916-17.

would have no impact on the *Cheney II* decision because Mr. Cheney had no financial interests at stake.[118] He also avers that they barely talked on the hunting trip.[119] However, such circumstances are irrelevant under an objective standard. It does not matter that they are friends; what matters is that there is an obvious opportunity for coercion if the two spend *any* time alone.[120]

Thus, the argument against Scalia hearing the case is twofold. First, legislative requirements mandate the application of an objective standard when deciding if any federal judge must recuse himself from a case. Second, Justice Scalia's interpretation of § 455(a), that the Supreme Court plays by different rules than all other federal courts, is contrary to the stated objective of the statute. Justice Scalia has done away with the objective standard, and substituted a bright-line rule for a narrow category of cases, leaving an open, subjective interpretation for the rest.

V. THE CONSEQUENCES OF *CHENEY I*

The consequences of Justice Scalia's decision not to recuse himself from *Cheney II* and the basis of his reasoning have staggering implications. *Cheney I* contradicts thirty years of legal and legislative precedent, and implicitly elevates Supreme Court Justices to an above-the-law status by granting them the ability to judge themselves under a subjective standard. Furthermore, *Cheney I* seriously undermines the public confidence in an unbiased judiciary, which is a fundamental Fifth Amendment Due Process guarantee.[121]

A. Cheney I Exempts Supreme Court Justices from 28 U.S.C. § 455(a)

As indicated in the *Cheney I* opinion, Justice Scalia effectively exempts Supreme Court Justices from the requirements of 28 U.S.C. § 455(a).[122] Such an exemption directly contradicts the legislative intent of § 455(a).[123] Justice Scalia's reasoning is sound to an extent: the role of a Supreme Court Justice is very different from that of a district court or appellate court judge, and recusal policies should reflect such differences. When deciding whether to recuse themselves, lower federal court judges may rely on replacements who can sit in their stead and thus recusal need

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[118] *Id.*

[119] *Id.* at 915.

[120] *Cf.* Motion to Recuse, *supra* note 7, at 3-4 (implying that an objective standard would recognize that two men on a hunting trip together are likely to discuss business in some form, which adds to a perception of bias).

[121] Redish, *supra* note 32 ("[T]he participation of an independent adjudicator is at least a *necessary* condition, and may even constitute a *sufficient* condition, for satisfying the requirements of due process").

[122] *Cheney I*, 541 U.S. at 915-16 (reasoning that a Supreme Court Justice, under the Court's Statement of Recusal Policy, would be less likely to recuse himself).

[123] *See* discussion *supra* notes 36-44 and accompanying text (outlining the legislative intent that § 455(a) create an objective standard of impartiality applicable to Supreme Court Justices).

not unduly delay a case.[124] On the other hand, if a Supreme Court Justice recuses himself the Court is left with only eight Justices. This may shift the balance on the Court, creating the possibility of a 4-4 split and thus no majority holding. Justice Scalia notes that "even one unnecessary recusal impairs the functioning of the Court."[125] Regardless of the soundness of Justice Scalia's reasoning as a whole, a policy that encourages recusal undoubtedly frustrates the Court's ability to function.

The Supreme Court's unique place in the federal court system, however, does not sufficiently justify the decision in *Cheney I*. As discussed above, in enacting 28 U.S.C. § 455(a) Congress intended to fully subject Supreme Court Justices to a reasonableness standard.[126] Congress explicitly used the word "justice" in 28 U.S.C. § 455(a)[127] to ensure that a Supreme Court Justice would recuse himself from "any proceeding in which his impartiality could be reasonably questioned."[128] Justice Scalia blatantly rejects congressional intent by ignoring the clear language of § 455(a). Instead, he favors an interpretation that empowers the Court, in essence allowing the Court to ignore its obligation to combat perceptions of bias.

While one may argue about his motivations, this Note does not postulate that Scalia had sinister motives in *Cheney I*. This Note does not mean to suggest that Justice Scalia chose to hear and decide the case to do a favor for his friend, Vice President Cheney,[129] nor does it mean to suggest that the decision was part of a conspiracy to aid the corporations that benefited from the decisions of the energy task force.[130] This Note merely postulates that Justice Scalia's reasoning stemmed

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[124] *Cheney I*, 541 U.S. at 915 (Scalia, J.) (noting that the writ of mandamus in this case called for any doubts to be resolved in favor of recusal, which Justice Scalia would praise as sound advice *if he "were sitting on a Court of Appeals"* (emphasis added)).

[125] *Id.* at 916 (quoting SUPREME COURT OF THE UNITED STATES, STATEMENT OF RECUSAL POLICY 1 (Nov. 1, 1993) (on file with *Boston University Public Interest Law Journal*)).

[126] *See* discussion *supra* notes 106-108 and accompanying text (outlining the written language of the statute in question).

[127] H. R. REP. NO. 93-1453, at 12 (1974) (discussing the reasoning for the addition and amendment of 28 U.S.C. § 455(a) and its use and applicability to Supreme Court Justices).

[128] 28 U.S.C. § 455(a) (2000).

[129] *But see* Motion to Recuse, *supra* note 7, at 6 (quoting *The Tonight Show with Jay Leno*, NBC television broadcast, Feb. 11, 2004) ("Embarrassing moment today for Vice President Dick Cheney—as he went through the White House metal detector this morning, security made him empty his pockets and out fell Justice Antonin Scalia!")). The motion referenced the joke to note the public's concern that Justice Scalia refused to recuse himself in order to do Vice President Dick Cheney a favor. *See id.*

[130] *But see id.* The motion included another joke by Jay Leno (quoting *The Tonight Show*, *supra* note 129):

> You know this story—V.P. Dick Cheney went duck hunting with Supreme Court [Justice] Antonin Scalia while the Supreme Court was deciding a case involving Cheney's Energy Task Force. Cheney said there's no conflict of interest. And just to be sure, he said as soon as Halliburton finishes construction on Justice Scalia's

from the assumption that the Supreme Court is simply too important to risk recusal, even if there is a perception of bias.[131] Therefore, rather than applying the objective standard required by law, Justice Scalia endorsed a modern "duty to sit" rule that allowed him to subjectively decide that his actions were unbiased.

Justice Scalia's assumption contradicts the legislative intent of 28 U.S.C. § 455(a).[132] No matter how important the participation of each Justice of the Supreme Court is, the requirement to battle bias should come first. The mere perception of bias is more invidious to the legal system[133] than the purported risk to Due Process that Justice Scalia invokes.[134] Justice Scalia's reasoning creates a precedent that all but ignores the statutorily required recusal in favor of the presumption that Supreme Court Justices are above bias. The duck hunting decision lends credence to the argument that without a clear financial conflict, a Justice will never have to recuse himself because he is too important, no matter how biased he may be. This precedent invalidates the use of 28 U.S.C. § 455(a) for Supreme Court Justices, and runs the risk of doing irreparable harm to public perceptions of the judiciary.

Before leaving this topic, it is important to note the question of separation of powers, which underlies any discussion of Congressional regulation of the actions of Supreme Court Justices. The Constitution is seemingly silent on the issue of whether Congress has the power to regulate the Court.[135] While Congress has regulated the judicial system, including the Supreme Court, in the past,[136] such regulation is not necessarily indicative of Congress's *power* to regulate. However, whether Congress has the power to make rules for the Supreme Court is an entirely separate issue beyond the scope of this Note.[137] This Note assumes that Congress

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new house, he'll look into it.

The motion to recuse used the joke to illustrate the suspicion that there was a conspiracy afoot involving many of the large energy related corporations, some of whom the President and Vice President worked for prior to taking office. *See id.*

[131] Cheney v. U.S. District Court (*Cheney I*), 541 U.S. 913, 916 (2004) (quoting SUPREME COURT OF THE UNITED STATES, STATEMENT OF RECUSAL POLICY 1 (Nov. 1, 1993) (on file with *Boston University Public Interest Law Journal*)).

[132] 28 U.S.C. § 455(a) (2000). *See* discussion *supra* notes 106-108 and accompanying text.

[133] *See infra* notes 134-137 and accompanying text.

[134] *Cheney I*, 541 U.S. at 916.

[135] *See* U.S. CONST. art. III, § 1 (The Constitution itself establishes the Supreme Court and its jurisdiction, but does not speak as to who governs the rules of the Court. One could argue that all rules are "legislation," and since Congress is granted sole legislative power in Article I of the Constitution, Congress would have complete power to create the rules of the Court. Conversely, one could argue that the establishment of the Court by the Constitution, without mention of the Legislature, gives the rulemaking power to the Court).

[136] *See generally supra* Section III (discussing the legislative history of Congressional regulation of the issue of judicial recusal).

[137] For an excellent summary of the separation of power issues regarding recusal at the Supreme Court level, see Debra Lyn Bassett, *Recusal and the Supreme Court*, 56

did have the power to craft 28 U.S.C. § 455(a), and argues that in hearing *Cheney II*, Justice Scalia violated the spirit of the law.

B. The Loss of Credibility

The second consequence of Justice Scalia's decision is to cause the legal system as a whole to lose credibility. Justice Scalia argues that considerations of Due Process must take precedence over concern for the public perception of bias.[138] However, an independent judiciary is a necessary part of procedural Due Process.[139] As Professor Redish explains, "Regardless of what other procedural safeguards are employed, the values of due process cannot be realized absent this core element [of independence]. Thus, the participation of an independent adjudicator is at least a *necessary* condition, and may even constitute a *sufficient* condition, for satisfying the requirements of due process."[140] Justice Scalia overlooks the fact that, while the Court may have the advantage of a full, nine-Justice opinion when recusal does not occur, the appearance of bias damages public perception of the legitimacy of such a decision. The value of independent, unbiased judgment has long been recognized as the cornerstone of the federal judiciary, as witnessed by the fact that the Constitution of the United States grants all federal judges life tenure in order to alleviate possible pressures of making decisions for political reasons.[141] In drafting § 455(a), Congress explicitly endorsed the notion that the perception of an unbiased judiciary was more important to the country than a judge's "duty to sit."[142]

Sierra Club's argument stresses the point that Justice Scalia's actions risk the unbiased reputation of the court.[143] To illustrate, Sierra Club listed thirty-five separate U.S. newspaper editorials calling on Justice Scalia to recuse himself.[144] They also reproduced five political cartoons, published in over 500 newspapers, all of

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HASTINGS L.J. 657 (2005) (describing in detail the conflict between the Court and Legislature in regards to the attempt by Congress to regulate the rules of the Supreme Court).

[138] *Cheney I*, 541 U.S. at 916 (quoting SUPREME COURT OF THE UNITED STATES, STATEMENT OF RECUSAL POLICY 1 (Nov. 1, 1993) (on file with *Boston University Public Interest Law Journal*)).

[139] Redish, *supra* note 32, at 457.

[140] *Id.*

[141] U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour"). *See also* Christopher L. Eisgruber, *Politics and Personalities in the Federal Appointments Process*, 10 WM. & MARY BILL RTS. J. 177, 180 (2001-2002) (book review) ("[L]ife tenure . . . help[s] to reduce the likelihood that judges will regard themselves as the personal agents of the presidents who appointed them.").

[142] *See* H.R. REP. NO. 93-1453, at 5 (1974) (rejecting the "duty-to-sit" doctrine in favor of an unbiased judiciary).

[143] Motion to Recuse, *supra* note 7, at 4 ("[N]othing less than '[Justice] Scalia's reputation and the court's credibility are on the line'" (quoting Editorial, *Scalia Musn't Sit in Judgment of His Hunting Buddy*, NEWSDAY, Jan. 26, 2004, at A20)).

[144] *See id.* at ex. 3.

which were very critical of Justice Scalia's decision.[145] This media outcry serves as a measurement of public dissatisfaction with the Justice's decision. Yet Justice Scalia chose to hear the case anyway, claiming that his vote was more important than the risk of the perception of bias.[146]

The drafters of 28 U.S.C. § 455(a) included the language "perception of bias" in recognition of the fact that public confidence in the decisions of *all* federal courts is a necessary ingredient of a trusted judicial system.[147] Subsection 455(a) sets forth an objective standard for measuring bias that all federal judges are supposedly required to employ.[148] Regardless of his good intentions, in moving away from the objective standard, Justice Scalia risks the reputation of the Supreme Court as an independent body. In a post-*Bush v. Gore* world, where every decision of a Supreme Court Justice is viewed in a heavily partisan and political manner, Justices must adhere to an objective review of their ability to judge cases when there may be bias.[149]

VI. SOLUTIONS TO THE PROBLEM OF SUPREME COURT RECUSAL

The damage to the judiciary is already done. Justice Scalia heard *Cheney II*, and the court issued a decision.[150] Thus, the question now is what effect this will have on future recusal decisions. Justice Scalia's decision not to recuse himself based on subjective reasoning and a "duty-to-sit" justification arising from judicial self-importance creates a precedent for other Justices to shirk their duty to examine themselves objectively and critically when bias becomes an issue.

This Note calls on Congress to clarify the standard of 28 U.S.C. § 455(a). Specifically, Congress must affirm that the reasonableness standard applies to all members of the Judiciary. To solve the paradox that Supreme Court Justices must decide their own objectivity (thus relying on a subjective judgment), Congress must develop some form of separate judicial oversight to make sure that abuse of discretion does not occur. Just as under 28 U.S.C. § 144 all petitioners get some form of appellate review (be it by a jurisdictional switch or an *en banc* hearing), so must petitioners for disqualification at the Supreme Court level likewise have some judicial review. One solution could be simply allowing the other eight Justices to make the decision, with a tie cutting against disqualification. The solution could also take the form of a separate judicial body, comprised of other judges who must

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[145] *See id.* at 5-7, ex. 3.

[146] Cheney v. U.S. District Court (*Cheney I*), 541 U.S. 913, 916 (2004) (Scalia, J.) (quoting SUPREME COURT OF THE UNITED STATES, STATEMENT OF RECUSAL POLICY 1 (Nov. 1, 1993) (on file with *Boston University Public Interest Law Journal*)).

[147] *See* H.R. REP. NO. 93-1453, at 5 (discussing the duty to sit and Congress's explicit rejection of the duty in favor of an objective recusal standard on the grounds that an objective standard would enhance the credibility of the federal judicial system).

[148] *See supra* note 14 and accompanying test.

[149] *See supra* Part III.B.

[150] Cheney v. U.S. District Court (*Cheney II*), 542 U.S. 367, 392 (2004).

decide the issue. Regardless, some form of review is necessary in order to ensure that Justices properly disqualify themselves.

In conclusion, 28 U.S.C. § 455(a) in its current form simply does not work at the Supreme Court level. Justice Scalia, while agreeing that the reasonableness standard of § 455(a) is the proper standard for disqualification at all other levels, reintroduced a "duty-to-sit" standard for the Court. Justice Scalia rejected the federally mandated reasonableness standard and chose to judge himself on a subjective level. Congress must intervene so as to prevent another recusal decision in the vein of *Cheney I* from further damaging the credibility of the U.S. Supreme Court.

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