

Chief William's Ghost: The Problematic Persistence of the Duty to Sit

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Dear Bill—

I'm inclined to agree with [Justice] Byron [White] on this. Your issuance of such a memorandum [explaining your decision to participate in Laird v. Tatum despite criticism] would, I think, put no pressure on others, now or in the future, to give reasons for their disqualification Certainly, I will feel no such obligation. And I think publication of the memo would be basically healthy—it is informative, thoughtful, persuasive, and educational. On the other hand, I am sure you are not so sanguine as to think that the memo will satisfy the N.Y. Times, Washington Post, or other critics. It will probably just further irritate them, and they do have the last

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The article's title, of course, borrows from Adam Hochschild, *KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR AND HEROISM IN COLONIAL AFRICA* (1998) (describing Belgian monarch's decisions that continue to cause ill effect in Africa some hundred years later). Although even Justice Rehnquist's most vigorous critics, including me, of course do not literally equate his reign with King Leopold's, the Chief Justice's forays into judicial ethics have generally been negative and unfortunately remain a prominent part of his posthumous legacy. See *infra* pp. 27-34 and 65-66. Justice Rehnquist's memorandum defending his decision to participate in *Laird v. Tatum* (see *infra* Part II.C) had more far reaching consequences than Justice Stewart envisioned. Whether it was "basically healthy" to the law remains open to discussion. The "last word" on the issue also remains to be rendered (see *infra* Part III).

word. I suppose it comes down to your own instinctive feeling. If you would feel more comfortable publishing, I'd do so if I were you.

Hand-written note from Justice Potter Stewart to Justice William Rehnquist, August 14, 1972.

INTRODUCTION

The duty to sit concept or “doctrine”—or at least what I term the “pernicious” version of the concept¹—emphasizes a judge’s obligation to hear and decide cases unless there is a compelling ground for disqualification and creates a situation in which judges are erroneously pushed to resolve close disqualification issues against recusal² when the

1. See *infra* notes 20-29 and accompanying text. The duty to sit concept also exists in a “benign” form that simply emphasizes a judge’s responsibility not to recuse where the asserted basis for disqualification is weak, and cautions that the judge should not recuse simply to avoid difficult, politically charged, or inconvenient cases.

Perhaps the term “pernicious” is a little strong as the term is ordinarily defined as “highly injurious or destructive” and “implies irreparable harm done through evil or insidious corrupting or undermining.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 866 (10th ed. 1996). As is apparent in this article, I regard the version of the duty to sit concept that resists recusal in close cases as injurious to fairness, justice, and public confidence in the courts, although perhaps the harm is not “highly” injurious or “irreparable.” Certainly, the term “pernicious” has been used to describe situations that are not heinously awful. See Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI.-KENT L. REV. 859 (2004).

On the term “benign,” see MERRIAM WEBSTER’S COLLEGIATE DICTIONARY, *supra*, at 106 (defining benign as “favorable” or “wholesome” and of a “character that does not threaten health or life,” although also suggesting that benign things have “no significant effect”). On the contrary, I think the benign version of the duty to sit concept as reflected in Rule 2.7 of the 2007 ABA Model Code of Judicial Conduct (*see infra* text accompanying notes 58-64) does have a significant positive effect in encouraging judges not to avoid cases for reasons of personal convenience. Unfortunately, however, the ABA Code and the courts have not sufficiently distinguished between the benign and pernicious versions of the duty to sit and have been insufficiently ruthless in eradicating the pernicious version of the doctrine. See *infra* text accompanying notes 375-82 (recommending clarifying commentary to ABA Model Code).

2. This article treats the terms “disqualification” and “recusal” as synonyms. Some courts and commentators have traditionally attempted to distinguish the two, suggesting that disqualification is a judge’s mandatory obligation to avoid participation in a case while recusal is a more voluntary, discretionary act informed by the judge’s own preferences as well as the prevailing law. See, e.g., Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 460 (2004) (“Disqualification, based on relatively precise criteria, is

presumption should run in exactly the opposite direction.³ In close cases, judges should err on the side of recusal in order to enhance public confidence in the judiciary and to ensure that subtle, subconscious, or hard-to-prove bias, prejudice, or partiality does not influence decision-making.⁴ The pernicious version of the duty to sit concept pushes judges in exactly the wrong direction, suggesting that they should decline to preside only if the grounds for disqualification are undeniably clear.⁵ And, unfortunately, some judges appear capable of denying even a compelling case for disqualification.⁶ In some cases, the doctrine has been used to justify continued participation in cases where

nondiscretionary and, in general, cannot be waived by the parties. Recusal is a more generalized obligation or power of a judge to remove herself for a specified reason or even for no reason at all.” (footnote omitted). Most modern judicial and scholarly authority treat the terms as synonymous. A judge who is disqualified recuses him or herself just as a disqualified judge must recuse himself. See RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 20.8, at 604 (2d ed. 2007) (noting traditional connotative distinction but using terms interchangeably throughout treatise); Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213 (2002) (same); Randall J. Litteneker, Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 237 n.5 (1978) (same); see also JAMES J. ALFINI, STEVEN LUBET, JEFFREY SHAMAN & CHARLES GARDNER GEYH, JUDICIAL CONDUCT AND ETHICS § 4.04, at 4-11 (4th ed. 2007) (tending to use “disqualification” as preferred term but also using “recusal” as synonym).

3. See FLAMM, *supra* note 2, § 20.8, at 607-11; Bassett, *supra* note 2, at 1227 n.68 (noting that duty to sit doctrine “required judges to decide borderline questions of recusal in favor of presiding over the case”) (citing H.R. REP. NO. 93-1453, at 2 (1974), as reprinted in 1974 U.S.C.C.A.N. 6351, 6355); *infra* Part II.C. Whether the duty to sit qualifies as a formal “doctrine” is unclear, although it is a powerful concept that has been used for decades to resist disqualification motions. This article will use both the doctrine and concept nomenclature in describing invocation of duty to sit reasoning because the concept has been labeled a doctrine by many courts. See, e.g., Bassett, *supra* note 2, at 1227 n.68, 1243 n.146) (referring to duty to sit “doctrine”).

4. See *infra* Part II.C (criticizing duty to sit concept and application).

5. See FLAMM, *supra* note 2, § 20.8, at 604 (describing duty to sit as “generally construed in such a way as to oblige the assigned judge to hear a case unless and until an unambiguous demonstration of extrajudicial bias was made.”) (citing *United States v. Alabama*, 828 F.2d 1532, 1540 (11th Cir. 1987) (per curiam), *cert. denied sub nom.* *Board of Trustees v. Auburn Univ.*, 108 S. Ct. 2857 (1988); *United States v. Jaramillo*, 745 F.2d 1245, 1249 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2142; *Blizard v. Frechette*, 601 F.2d 1217, 1220 (1st Cir. 1979); *Parish v. Bd. of Commrs. of Ala. State Bar*, 524 F.2d 98, 103 (5th Cir. 1975), *cert. denied sub nom.* *Davis v. Bd. of Sch. Comm’rs*, 425 U.S. 944 (1976).

6. See *infra* text accompanying notes 288-374.

disqualification was required.⁷ In other cases, the doctrine has encouraged judges to continue to preside in cases where disqualification would have been the better course.⁸

More than three decades ago, both the American Bar Association (ABA) and the U.S. Congress acknowledged the error of elevating an overwrought sense of judicial obligation above a litigant's right to a judge whose impartiality was beyond reasonable question.⁹ But despite this, at least a half-dozen (and perhaps as many as twenty) state judiciaries continue to invoke the duty to sit concept, with occasional federal courts joining in despite the clear mandate of federal law.¹⁰ Although in many cases continued endorsement of the duty to sit may be primarily rhetorical, with perhaps only modest impact on the actual outcome of a recusal motion, the duty to sit concept appears to continue to exert hydraulic pressure against disqualification, creating a situation where too many cases are presided over or decided by judges whose detachment and neutrality is subject to question.¹¹

How could this happen when the pernicious version of the duty to sit has long been abolished in federal law and the ABA Model Code of Judicial Conduct and disapproved by the bulk of judicial ethics scholars? The continuing endurance of the duty to sit concept suggests that courts are more self-protective and resistant to change than commonly supposed.¹² In addition, it may reflect simple sloppy legal

7. See *infra* Part II.C (discussing cases of clear error in failure to recuse and in which the court invokes the duty to sit concept).

8. See *infra* text accompanying note 155 (discussing cases where duty to sit was invoked and judge ordered to preside when better exercise of discretion would have been to recuse).

9. See *infra* Part I.D (reviewing federal statutory elimination of duty to sit and its rejection in 1972 ABA Code of Judicial Conduct).

10. See *infra* text accompanying notes 191-221 (reviewing current status of duty to sit in the states).

11. See *infra* Part II.B (reviewing state court cases invoking duty to sit, finding much invocation to be dicta, but also finding that states continuing to adhere to duty to sit concept are more resistant to recusal motions).

12. See ALFINI, ET AL., *supra* note 2, § 4.01, at 4-3 ("Judges are also only human, and as such, some face difficulty with the issue of impartiality. It is only natural for judges to have confidence in their own impartiality and professionalism. . . . But partiality influences unconscious thought processes more than a judge may realize."); JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND

work in which judges and their law clerks are excessively drawn to outdated or erroneously reasoned judicial opinions rather than other sources of law and where too much credence is given to even highly problematic writings of a U.S. Supreme Court Justice.¹³ Whatever the explanation, it now seems beyond dispute that the duty to sit concept is at best unhelpful to courts deciding recusal motions and appears at the margin to result in more erroneous disqualification decisions undermining public confidence in the judiciary.¹⁴ The ABA's recently revised Code of Judicial Conduct is now before the various state courts and legislatures, providing an opportunity to clarify the precise contours and status of the duty to sit and to eradicate the pernicious version of the doctrine with certainty and finality.¹⁵

Part I of this Article describes the duty to sit concept-cum-doctrine, its history, and modern backlash against the doctrine resulting in its supposed abolition during the 1970s.¹⁶ An important catalyst in the process was then-Justice William Rehnquist's memorandum invoking the

ATTITUDES 1 (1995) (finding that although judges were quite willing to recognize even modest financial interest in case as ground for required recusal, they were resistant to disqualification where the asserted grounds were of non-monetary bias or prejudice or questions as to impartiality, with one-third exhibiting inclination not to disqualify); Jeffrey M. Shaman, *Introduction*, in LESLIE W. ABRAMSON, *JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT* xi (2d ed. 1992) ("Most judges genuinely believe that, despite their connections to a lawsuit, they can put aside their bias or interest, and decide the suit justly. What this ignores, unfortunately, is that partiality is more likely to affect the unconscious thought processes of a judge, with the result that he or she has little conscious knowledge of being swayed by improper influences. Furthermore, even if a judge were able to put aside bias and self-interest in a particular case, the appearance of impropriety remains, and is itself a serious problem that cases disrepute upon the judiciary."); Bassett, *supra* note 2, at 1242 ("[J]udges, like all human beings, are susceptible to the phenomenon of believing that they can be fair and unbiased."); accord John Leubsdorf, *Theories of Judging and Judicial Disqualification*, 62 N.Y.U. L. REV. 237, 245 (1987) ("[T]he most biased judges [may be] the least willing to withdraw."), Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61 (2000).

13. See *infra* Part II.A (discussing instances in which federal courts continue to refer to duty to sit approvingly even though it has not been the law of federal courts since 1974).

14. See *infra* Part II.C.

15. See *infra* Part III.

16. See *infra* Part I.

doctrine to resist recusal in a case in which he clearly should have stepped aside. In response to criticism, he wrote a memorandum explaining this refusal to recuse, seeking counsel from three other Justices before issuing the memorandum.¹⁷ Part II describes the continued endurance of the flawed concept in some federal courts and in many states notwithstanding the problematic nature of the Rehnquist memorandum, which continues to be cited favorably by some courts and also provides impetus for continued Supreme Court recalcitrance regarding recusal reform.¹⁸ Part III discusses the new ABA Model Code, which provides an opportunity to more clearly and expressly disavow the pernicious version of the doctrine.¹⁹

I. THE RISE AND INCOMPLETE FALL OF THE DUTY TO SIT CONCEPT

A. *Defining Terms: The Pernicious Duty to Sit Concept Distinguished From the Judge's Benign Responsibility to Hear and Decide Cases*

It has long been accepted that judges shoulder the heavy responsibility of deciding cases even under unpleasant circumstances. Some of the burdens of judging are simply elevated examples of annoying impositions faced by anyone in the workplace: Friday afternoon or holiday eve injunction requests, lengthy trials spilling into vacation periods, emergency arraignments conflicting with a child's graduation ceremony. For the most part, these sorts of annoyances do not spur voluntary disqualification by even the least industrious judges, although the prospect cannot be completely discounted.²⁰

17. See *infra* Part I.C. Justice Stewart's note to Justice Rehnquist, quoted at the outset of this article, was in response to this request for collegial advice.

18. See *infra* Part II.

19. See *infra* Part III.

20. See FLAMM, *supra* note 2, § 20.8, at 604 (discussing duty to sit generally, both as emblematic of general obligation to discharge assigned tasks and with more specialized meaning that assigned judge has obligation "to hear a case unless and until an unambiguous demonstration of extrajudicial bias [is] made"). Regarding occasional apparent slacking by some courts see, for example, *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) (discussing judge who remanded case to state court because of crowded docket); *LaBuy v. Howes Leather Corp.*, 352 U.S. 249 (1957) (discussing judge who

More threatening to judicial participation are the cases where the court is asked to adjudicate controversial matters that may lead to criticism in the press no matter what decision is made. Where judges are elected rather than appointed, controversial, high-profile cases can be particularly threatening in that a decision may become campaign fodder for a future opponent, may alienate current or potential donors, or may attract sustained criticism from local media outlets. Alone or in combination, these factors can be fatal to the judge's continued tenure on the bench.²¹ In addition, even in states with an appointed

appointed special master to determine issues of fact because of crowded docket). During the holiday season of 1981, an antitrust case seeking immediate preliminary injunctive relief was filed against a major gasoline retailer. The judge initially assigned the matter voluntarily recused himself because he regularly purchased that brand of gasoline, resulting in reassignment of the matter to the judge for whom I was clerking. This second judge literally rolled his eyes when the case came to him on this basis, conveying to me his impression that the first judge had been too quick to recuse and that this probably had to do with the prospect of hearing an involved case on short notice during the holiday season. My own view is that recusal based on a judge's retail habits may be overkill but can be justified in order to eliminate a potential ground for concern over the court's neutrality. I relate this story because it reflects the degree to which judicial culture frowns upon a judge turning away a case when the ground for recusal is weak or when recusal appears to further the judge's personal convenience. *See also infra* text accompanying note 225 (discussing judicial resistance to disqualification).

21. Former California Supreme Court Chief Justice Rose Bird and former Tennessee Supreme Court Justice Penny White lost re-election campaigns because some perceived them as insufficiently tough on crime because they disapproved of the application of the death penalty under the facts and circumstances of cases before them. *See, e.g.*, Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 329 n.161 (2008) (defeat of Rose Bird); Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 627 (defeat of Penny White); *see also* Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 52-55 (2003) (noting low voter participation in judicial elections and low voter knowledge about candidates make outcomes more vulnerable to special interest politics and media dollars spent on last-minute character assassination or name recognition); Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980 (1988) (discussing 1986 retention election that resulted in defeat of Chief Justice Bird, Justice Cruz Reynoso, and Justice Joseph Grodin and role of special interest politics in their defeats). *See generally* Penny J. White, *A Matter of Perspective*, 3 FIRST AMEND. L. REV. 5 (2004) (discussing, as a professor at the University of Tennessee College of Law, concept of judicial neutrality, free speech, and judicial elections in the aftermath of *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) (invalidating state rule prohibiting judge from announcing positions on particular issues that might come before court)).

judiciary, judges seldom enjoy the life tenure of the federal bench.²² A controversial decision may prompt political authorities not to re-appoint the offending judge or result in a judge losing a retention election, elections that should in theory be lost only if the judge is incompetent or corrupt.²³

Whatever the reason for recusal, it is thought to create significant capacity issues for the judicial system and to constitute a threat to the efficiency of the system. There are at any juncture only a finite number of available judges. The recusal of one judge puts greater pressure on judges that are not disqualified, particularly in smaller districts with fewer sitting judges. To a degree, the duty to sit, at least in its benign form, is in large part a duty not to

More recently, a controversial decision essentially requiring the legislature to raise taxes appears to have caused the re-election defeat of one Nevada Supreme Court Justice (Nancy Becker) and forced another (Deborah Agosti) into retirement. See Editorial, *Last Justice Standing*, LAS VEGAS REV.-J., Jan. 9, 2008, at 6B; Jane Ann Morrison, *Critic of Supreme Court Justice Sees Good Reason for Appointing Judges*, LAS VEGAS REV.-J., Dec. 10, 2007, at 7B; Editorial, *Nancy Becker Must Be Removed*, LAS VEGAS REV.-J., Nov. 5, 2006, at 2D. Both were in the majority, and Agosti had authored *Guinn v. Legislature*, 71 P.3d 1269 (Nev. 2003), which held that a state constitutional provision requiring adequate funding of education bound the legislature to provide funding in a case where the Governor had effectively maneuvered the legislature into passing the non-education budget and was then unwilling to appropriate additional funds for elementary and secondary education. The Court's decision in effect forced the legislature to raise taxes when it appeared that cuts to the educational budget would violate the state constitution.

Although the *Guinn* decision is more defensible than many of its critics will admit, see Jeffrey W. Stempel, *The Most Rational Branch*, 4 NEV. L.J. 518 (2004), critics were many and vociferous and their chorus of criticism is widely regarded as instrumental in Justice Becker's defeat and Justice Agosti's sudden decision to retire. Editorial, *Voters Can Finally Vent on Tax Ruling*, LAS VEGAS REV.-J., May 24, 2006, at 3D. In addition, Justices Miriam Shearing and Robert Rose, who were also in the majority, did not seek re-election at the end of their terms but their retirements were not as unexpected as that of Agosti. See Editorial, *supra*; see also Symposium, *Guinn v. Nevada*, 4 NEV. L.J. 1 (2004).

22. See James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 53, 68 (2007) (even appointed state judges lack life tenure and are consequently less independent than federal judges with life tenure); see also New York State Senate, About the Senate, Branches of Government in New York State, available at www.senate.state.ny.us/sws/aboutsenate/branches_gov.html (last visited Apr. 15, 2009) (New York Court of Appeals judges appointed for fourteen-year terms).

23. See Norman Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, 74 JUDICATURE 128 (1990).

unreasonably burden fellow judges by recusing in response to a weak argument for disqualification.²⁴

To combat a judge's potential urge to avoid demanding, time-consuming, or controversial cases, the legal profession has long taken the view that the nature of a judgeship implies that the judge has a responsibility to hear and decide cases, one that should not be shirked for political or personal reasons.²⁵ To the extent one views the duty to sit as a general and rebuttable obligation to preside over a case *unless disqualified*, it is unobjectionable.

However, the case for disqualification may not be clear, particularly when the ground asserted does not involve traceable financial interest but rather issues of bias, prejudice, or insufficient impartiality.²⁶ Reasonable

24. See *Judicial Disqualification: Hearing on S. 1064 Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary*, 93rd Cong. 19-21 (1974) [hereinafter 1974 Legislative Hearing] (testimony of California Chief Justice Roger Traynor and prominent Phoenix attorney John P. Frank) (observing tension between strong disqualification law protective of public confidence and efficiency of judicial system which, all things being equal, would prefer to have more judicial capacity rather than less); see also Jake Garn & Lincoln C. Oliphant, *Disqualification of Federal Judges Under 28 U.S.C. § 455(a): Some Observations on and Objections to an Attempt by the United States Department of Justice to Disqualify a Judge on the Basis of His Religion and Church Position*, 4 HARV. J.L. & PUB. POL'Y 1, 45 (1981) (stating that abolition of pernicious duty to sit is "not telling judges to go off and take vacations just because cases are uncomfortable").

25. See FLAMM, *supra* note 2, § 20.8, at 608-09.

[W]hile courts have sometimes acknowledged the pressures that may be brought to bear on a judge who has been confronted with a motion seeking his disqualification—and while some judges have indicated that they would not mind stepping away from a case in which their ability to be impartial has been questioned—it has generally been held that, in the absence of a compelling reason for disqualification, a challenged judge must retain a case without regard to any personal burdens that retaining the case may impose on him. Thus, a judge should ordinarily not recuse himself merely in order to avoid embarrassment or uneasiness; or because he would prefer to be trying some other type of case.

Id. (footnotes omitted).

26. See Christopher R. Carton, Comment, *Disqualifying Federal Judges for Bias: A Consideration of the Extrajudicial Bias Limitation for Disqualification Under 28 U.S.C. § 455(a)*, 24 SETON HALL L. REV. 2057 (1994) ("[M]ost commentators agree that while the standards for judicial disqualification have been textually broadened [over time], they are anything but 'clear' and that, consequently, public confidence in the impartiality of the judicial process is

opinions may differ on whether one would have reasonable doubts about a judge's impartiality. Is a judge "disqualified" when a substantial number of observers question the judge's neutrality? How substantial must the throng of concerned persons become? Is a majority required? Is unanimity or near-unanimity required? The locus of case law on disqualification adopts an objective reasonably informed lay observer test mandating disqualification when this mythical reasonable viewer would harbor serious doubts regarding a judge's impartiality.²⁷

Logically, the goal of public confidence in the judiciary mandates that something less than a majority of adequately informed and educated concerned observers is sufficient. The notion of public confidence in the courts implies that substantially more than fifty-one percent of the public is satisfied that a judge's handling of a matter was not tainted by partiality or its more invidious cousins bias and prejudice. Something like a supermajority of satisfaction is implicit in the notion of public confidence in the fairness of the courts. Conversely, this means that if a critical mass of lay observers could reasonably doubt a judge's impartiality, the case, although perhaps close, becomes one where the judge is logically disqualified or where, at the very least, doubts should be resolved in favor of disqualification. Although the size of the concerned critical mass may be open to debate (and probably requires something like twenty to thirty percent of the viewing public to harbor legitimate concerns over a judge's neutrality), the very notion of a justice system above reproach implies that a judge should not be presiding in situations where his or her participation engenders non-frivolous debate.²⁸

threatened." (citing Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 663 (1985)); see also Edward G. Burg, Comment, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CAL. L. REV. 1445, 1481-82 (1981); Mark T. Coberly, Note, *Caesar's Wife Revisited—Judicial Disqualification Under the 1974 Amendments*, 34 WASH. & LEE L. REV. 1201, 1201 (1977); Susan B. Hoekema, Comment, *Questioning the Impartiality of Judges: Disqualifying Federal District Court Judges Under 28 U.S.C. § 455(a)*, 60 TEMP. L.Q. 697, 697-98 (1987); Ellen M. Martin, Comment, *Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455*, 45 FORDHAM L. REV. 139, 139-40 (1976).

27. See FLAMM, *supra* note 2, § 5.6.3, at 129-48.

28. Of course, one can argue that the public, like a heavy duty piece of equipment, may be able to withstand substantial "punishment" in that it does

not rise up in arms when a controversial decision is rendered by judges whose neutrality is less than assured. For example, the Court in *Bush v. Gore*, 531 U.S. 98 (2000), by a 5-4 majority that divided uncomfortably along partisan as well as ideological lines, effectively placed George W. Bush in the presidency. The dissenters were the two Justices appointed by Democrats (Stephen Breyer and Ruth Bader Ginsburg, appointed by Bill Clinton) and a justice appointed by a Republican not named Bush (John Paul Stevens, appointed by Gerald Ford). Justice Souter, who provided the fourth dissenting vote, was the justice who most defied partisan typecasting in that he was appointed by President George H.W. Bush but nonetheless did not provide legal support to the candidacy of George W. Bush.

During the course of proceedings, Justice Scalia issued an opinion related to the Court's grant of certiorari that suggested he was quite interested in protecting the Bush candidacy. See *Bush v. Gore*, 531 U.S. 98, *cert. granted*, 531 U.S. 1046, 1046 (Scalia, J., concurring in petition for certiorari) ("The counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner Bush, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election."). In addition, the five-member Court majority elevated Bush to the White House through a theory of equal protection that the majority had never supported in prior cases and was not willing to incorporate into the general fabric of constitutional law. See 531 U.S. at 106-10. See also Louise Weinberg, *When Courts Decide Elections: The Constitutionality of Bush v. Gore*, 82 B.U. L. REV. 609, 610-12 (2002) (arguing that Court exceeded its constitutional power by using case to effectively decide election outcome).

In addition, the "popular press identified three Justices whom some believed had conflicts that should have resulted in their disqualification." See STEPHEN GILLERS, *REGULATION OF LAWYERS* 496-97 (7th ed. 2005) [hereinafter GILLERS, *REGULATION*] (noting questions raised about Justices Scalia, Thomas, and O'Connor and citing news articles); Sherrilyn A. Ifill, *Do Appearances Matter? Judicial Impartiality and the Supreme Court in Bush v. Gore*, 61 MD. L. REV. 606, 607-10 (2002). The Justices were not asked to step aside on these grounds by Gore's counsel and Gillers has concluded that the case for disqualification was weak. See STEPHEN GILLERS, *TEACHER'S MANUAL FOR REGULATION OF LAWYERS* 153-54 (2008) [hereinafter GILLERS, *MANUAL*] (reviewing issues presented in casebook and concluding disqualification not necessary). Other scholars, however, disagree or are less certain. See, e.g., Ifill, *supra* (concluding that "several Justices could and should have taken a variety of measures—including but not limited to recusal—that would have diminished the appearance of judicial bias in that case"); Caprice L. Roberts, *The Fox Guarding the Henhouse? Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 127-28 (2004) Regarding the view of laypersons, one need not look hard to find people who still regard the 2000 election as "stolen," a view essentially embraced in the HBO movie *Recount*, starring A-list actors like Kevin Spacey, Tom Wilkinson, and Dennis Leary, which aired repeatedly in 2008 to reasonably large viewing audiences.

One can regard *Bush v. Gore* as a controversial and important case that at least had a modest cloud over the impartiality of the bench—yet the world did not fall apart and there was not undue political turmoil in its aftermath. Does this mean my assertions about the importance of public confidence in the courts is mistaken? Perhaps. But I prefer to view *Bush v. Gore*, despite its problematic jurisprudence and result, as a sufficiently rare example that the public's overall

This view is perfectly consistent with the benign notion of a duty to sit as cautioning against recusal simply to avoid a difficult, time-consuming, or politically charged case. As discussed below, the legal profession has long embraced this benign notion of judicial responsibility even if its precise contours were not well articulated. Senator Birch Bayh, the primary author of the 1974 legislation strengthening federal disqualification standards, spoke of “relaxing” the duty to sit, by which he surely meant retaining the benign version of the doctrine even as his then-proposed legislation began to sound a death knell for the pernicious version of the concept, which was officially excised from federal disqualification law in the 1974 legislation.²⁹

goodwill toward courts could absorb. In addition, the case had a certain “rule of necessity” character because of the impending need to inaugurate one of the two litigants as president coupled with the perceived need for judicial resolution to avoid what may have been an unacceptable wait for a definitive ballot count. See *infra* note 75 and accompanying text (regarding the rule of necessity). For example, as this is written in May 2009, the November 2008 U.S. Senate election in Minnesota between incumbent Republican Sen. Norm Coleman and Democratic Challenger Al Franken (the comedian best known for his work on the original *Saturday Night Live*) remains incomplete six months after the election despite a recount, review, certification by the governor, and legal challenge, with some predicting that it may be summer 2009 or later before all legal challenges are exhausted. Franken has been certified as the winner but Coleman’s legal challenge remains pending. This delay is not considered unbearable by most observers but a similar delay in replacing outgoing President Bill Clinton was considered unacceptable or even illegal. In addition, losing litigant Al Gore quickly accepted the adverse decision in his case and did not question the neutrality of the Justices in the majority. In addition, the Court deciding *Bush v. Gore* had metaphorical nonpartisan wind at its back in that it had famously required President Richard Nixon to produce tape recordings on which he claimed executive privilege, *United States v. Nixon*, 418 U.S. 683 (1974), and required President Clinton to submit to civil discovery in sexual harassment case, *Jones v. Clinton*, 520 U.S. 681 (1997). All this combined to make *Bush v. Gore* palatable despite concerns that Justices owing their lofty position to a litigant’s father essentially made the litigant President. But would the public stomach a steady diet of such cases? I think not.

29. See Birch Bayh, *On Judicial Ethics*, 14 ST. LOUIS U. L.J. 667, 669 (1969).

The revision [proposed in amendments to 28 U.S.C. 455] also requires the judge to disqualify for appearance of impropriety, thereby codifying the requirement of [ABA] Canon 4. Finally, the bill relaxes the so-called “duty to sit” in cases where the judge is not disqualified by the provisions of the statute, and gives him fair latitude to disqualify himself in other instances where “in his opinion, it would be improper for him to sit.”

Id.

Unfortunately, however, the term “duty to sit” acquired not only the benign connotation of judicial courage and dedication but also the pernicious connotation of resisting recusal unless the facts of the case force the judge to step aside. This version of the duty to sit—which was never adopted in the ABA Codes or the federal statutes but arose through caselaw—came to embody the view that judges should not recuse in close cases and should resist disqualification unless the case for disqualification is strong. This more problematic and controversial version of judicial obligation is this Article’s focus and the Article’s suggestion that states seize upon the 2007 ABA Code, which is being reviewed for possible adoption, as an occasion for clarifying that the pernicious, recusal-resistant version of the duty to sit is dead.

The first official ABA pronouncement on judicial behavior was the 1924 Canons of Judicial Ethics.³⁰ “The

See also infra notes 30-49, discussing the legislative history of the 1974 changes to the federal disqualification statute, which adopted the approach of the 1972 ABA Model Code of Judicial Conduct and reflects the consensus that the benign version of the duty to sit was to be retained but that the pernicious strain of the concept was to be abolished. *See* H.R. REP. NO. 93-1453 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355-56 [hereinafter House Report]; S. REP. NO. 93-419, at 5 (1973) [hereinafter Senate Report]; 1974 Legislative Hearing, *supra* note 24, at 14-16.

The legislation revising federal disqualification law passed the Senate Oct. 4, 1973, the House on Nov. 18, 1974 with modest amendment, and passed the Senate again on Nov. 21, 1974, and was later signed by President Gerald R. Ford. *See* House Report, *supra*, at 6351.

30. Like many useful developments, the Canons were born of scandal. The original spur for judicial canons came from Judge Kennesaw Mountain Landis, a federal judge who was appointed as the first Commissioner of Baseball after the infamous “Black Sox” scandal of 1919. Despite demands that he resign his federal judgeship after he began serving as Commissioner, he refused to step down. The ABA promptly began drafting Canons of Judicial Ethics. With occasional amendments, the Canons of Judicial Ethics served the profession well for nearly fifty years and were adopted by most states. *See* STEPHEN GILLERS & ROY SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 687 (2008). The 1924 Canons contained a requirement that a judge not have other obligations that “will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official [judicial] functions” (Canon 24) as well as a requirement that judges not maintain a private law practice (Canon 31). As the Landis episode shows, judges can on occasion be exceedingly blind to ethical issues. *See* JOHN P. MACKENZIE, THE APPEARANCE OF JUSTICE 180-82 (1974) (summarizing scandal, noting that Landis came to attention of major league baseball because of “his friendly handling of one of the earliest attacks on the game as a violation of the federal antitrust laws” and was also known for anti-German xenophobia stemming from World

Canons remained essentially unchanged until 1972 when, after undergoing a comprehensive review, the ABA House of Delegates replaced them with the Code of Judicial Conduct. In 1990, that Code was again significantly revised and renamed the Model Code of Judicial Conduct.³¹ Like their counterparts aimed at practicing lawyers, the ABA Canons and Model Code are not binding unless adopted by the relevant state supreme court or legislature. In practice, however, the ABA model templates of legal and judicial ethics have become a de facto national set of standards for lawyer and judge behavior. Every state adopts the Model Rules and Model Code in large part,³² although some states (notably California and New York) utilize different formats and states may vary in their adoption of particular provisions.³³

The 1924 Canons did not specifically address the duty to sit concept as a weight against recusal but did stress the judge's responsibility to discharge his or her duties faithfully and diligently. As discussed below, the duty to sit doctrine stemmed not so much from a reading of the Canons as from common law with roots in Blackstonian England.

War I hostilities). While serving as both judge and commissioner, Landis drew salaries of \$7,500 and \$42,500 (totaling more than \$500,000 in 2007 dollars), respectively. Unsurprisingly, when forced to choose between the occupations, he chose the commissionership. *See also* Peter W. Bowie, *The Last 100 Years: An Era of Expanding Appearances*, 48 S. TEX. L. REV. 911, 915-17 (2007) (describing Landis episode and role in bringing about the Canons, noting that resolutions to impeach Landis were introduced in Congress and that "the ABA was angered by Judge Landis' conduct"). *But see* J.G. TAYLOR SPINK, JUDGE LANDIS AND 25 YEARS OF BASEBALL 74 (1947) ("[T]he entire country felt pleased and gratified with the selection of Landis as ruler of the game.").

31. *See* ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, ANNOTATED MODEL CODE OF JUD. CONDUCT 3 (2004) [hereinafter ABA ANNOTATED] (annotating 1990 Model Code); *see also* LISA L. MILFORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE (1992).

32. The Judicial Code has generally experienced less state variance than the attorney's Code or Model Rules. *See* GILLERS & SIMON, *supra* note 30, at 687 ("The 1972 ABA Model Code of Judicial Conduct proved widely influential. Nearly all states (plus the District of Columbia) eventually adopted codes of judicial conduct closely modeled on the 1972 ABA Code.").

33. For example, some states require an attorney to depart from the normal rule of protecting a client confidence if necessary to avoid death or serious bodily injury to a third person while the ABA Model Rules of Professional Conduct merely give the attorney the discretion to reveal ethically protected information in order to save live or limb. *See* GILLERS & SIMON, *supra* note 30 at 75-99 (providing commentary on state variance with ABA Model Rule 1.6).

The 1972 Code also contained no specific discussion of the duty to sit concept. The 1990 Judicial Code added Canon 3(B)(1), which provided that a “judge shall hear and decide matters assigned to the judge except those in which disqualification is required.” Like Rule 2.7 of the 2007 Code, Canon 3(B)(1) is properly seen as endorsement of the benign duty to sit and an admonition that judges not avoid difficult or controversial cases. Rule 2.7, the successor to Canon 3(B)(1), was not intended to require resistance to otherwise valid disqualification motions and did not establish a presumption against disqualification in close cases.³⁴ Nonetheless, as discussed below, the pernicious version of the duty to sit doctrine continued to enjoy substantial support by those interpreting the 1972 and 1990 Judicial Codes even though both versions of the Code, like federal law, required disqualification “in a proceeding in which the judge’s impartiality might reasonably be questioned.”

The benign notion of judicial responsibility but not judicial resistance to serious disqualification motions is reflected in the 1924 Canons, which required that judges be studious and diligent,³⁵ industrious,³⁶ prompt,³⁷ and “fearlessly observe and apply” the Constitution.³⁸ The judge also

34. The relatively little case law that exists construing Section 3B(1) suggests that it imposes an “affirmative duty not to avoid justiciable issues.” See ABA ANNOTATED, *supra* note 31, at 88 (quoting *In re Respondent U* (Cal. Bar Ct., Review Dep’t July 1995) and citing *Parker v. Priest*, 932 S.W.2d 320 (Ark. 1996) (holding judge must remain on case in absence of grounds for disqualification)); *Peterson v. Borst*, 784 N.E.2d 934, 936 (Ind. 2003) (explaining judge’s resignation from commission creating conflict rather than disqualifying self from case); *Hi-Country Estates Homeowner’s Ass’n v. Bagley & Co.*, 996 P.2d 534, 538 (Utah 2000) (“[U]nless a justification for reassignment exists, a judge has a duty to retain a case until it is completed”); N.Y. Advisory Comm. on Judicial Ethics, Op. 92-75 (1992) (advising a village justice not to disqualify himself from cases where the village attorney appears as private counsel unless there is some other basis for the disqualification because the “duty to sit where not disqualified . . . is as strong as the duty not to sit where disqualified”) (quoting Model Code of Judicial Conduct Canon 3B(1)).

35. See CANONS OF JUDICIAL ETHICS, Canon 4 (1924) (Avoidance of Impropriety).

36. See *id.* Canon 6 (Industry).

37. See *id.* Canon 7 (Promptness). In the same vein, the Canons also emphasized that a judge must be courteous and civil (Canon 10: Courtesy and Civility), considerate (Canon 9: Consideration of Jurors and Others); and “temperate, attentive, patient” (Canon 5: Essential Conduct).

38. See *id.* Canon 3 (Constitutional Obligations).

“should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety, nor be apprehensive of unjust criticism.”³⁹ These admonitions all counsel the judge to be diligent and unafraid in decisionmaking but in no way suggest that the judge should hear cases posing even a close question as to the judge’s impartiality. To the contrary, the Canons famously stated that a judge’s “official conduct should be free from impropriety or the appearance of impropriety”⁴⁰ and that the judge not only should avoid cases involving relatives but also “should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or person.”⁴¹ The Canons also barred improper *ex parte* communication,⁴² required the judge to act with “due regard to the integrity of the system of the law itself”⁴³ and to avoid partisan politics.⁴⁴

As discussed below, The 1972 ABA Code of Judicial Conduct, which replaced the Canons, struck an even

39. *Id.* Canon 14 (Independence).

40. *Id.* Canon 4 (Avoidance of Impropriety).

41. *Id.* Canon 13 (Kinship or Influence); *see also id.* Canon 32 (Gifts and Favors) (forbidding “presents or favors” from litigants or lawyers).

42. *See id.* Canon 16 (Ex Parte Applications); Canon 17 (Ex Parte Communications).

43. *Id.* Canon 20 (Influence of Decisions Upon the Development of the Law).

A judge should be mindful that his duty is the application of general law to particular instances, that ours is a government of law and not of men, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. Such action may become a precedent unsettling accepted principles and may have detrimental consequences beyond the immediate controversy. He should administer his office with a due regard to the integrity of the system of the law itself, remembering that he is not a depository of arbitrary power, but a judge under the sanction of law.

Id. Prior to a 1957 Amendment to the Canons, the words “a judge” had read “he” in many of the Canons. Despite this change, the pronoun “he” continued to be used in the body of the Canons. *See* MILFORD, *supra* note 31 at 133.

44. *See* CANONS OF JUDICIAL ETHICS, *supra* note 35, at Canon 28 (Partisan Politics), Canon 30: (Candidacy for Office).

stronger pose in favor of judicial impartiality but said relatively little regarding judicial obligation to hear cases. For example, Canon 1 of the 1972 Code emphasizes that a judge “should uphold the integrity and independence of the judiciary,”⁴⁵ while Canon 2 states that a judge “should avoid impropriety and the appearance of impropriety in all his activities.”⁴⁶ Canon 3, the primary disqualification provision of the Code, stresses the need for impartiality, setting forth in Canon 3C the situations requiring disqualification, criteria that effectively abolished the duty to sit as a counterweight to recusal, and that influenced congressional thinking to abolish the duty in the 1974 amendments to 28 U.S.C. § 455.⁴⁷ Reading Canon 3 as a whole, one cannot help but characterize it as emphasizing judicial neutrality and impartiality more than it stresses any perceived need to preside. However, in a nod at the benign form of duty to sit thinking, the 1972 Code required that the judge “perform the duties of his office . . . diligently” as well.⁴⁸ Like the 1924 Canons, Canon 3 of the 1972 Code requires that the judge “be unswayed by partisan interests, public clamor, or fear of criticism”⁴⁹ but stops well short of suggesting that a judge

45. See CODE OF JUDICIAL CONDUCT, Canon 1 (1972) (A Judge Should Uphold the Integrity and Independence of the Judiciary).

46. See *id.* Canon 2 (A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities).

47. *Id.* Canon 3(C) (A Judge Should Perform the Duties of His Office Impartially and Diligently). This part states that a judge should recuse “in a proceeding in which his impartiality might reasonably be questioned,” and lists circumstances that include “personal bias or prejudice concerning a party,” service “as a lawyer in the matter in controversy,” “financial interest in the subject matter in controversy,” or the participation or interest in the case of a close relation.

In addition, the judge is required to “inform himself about his personal and fiduciary and financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.” *Id.* Canon 3(C)(2). Canon 3(C)(3)(a) also provided that the degree of relationship was to be calculated “according to the civil system.” *Id.* In practical terms, this means any blood or in-law family relationship closer than first cousins invokes the disqualification requirements of Canon 3(C), an approach also adopted in Section 455 and continued in the 1990 and 2007 ABA Judicial Codes.

48. See *id.* Canon 3 (A Judge Should Perform the Duties of His Office Impartially and Diligently).

49. *Id.* Canon 3(A)(1).

should resist disqualification in any particular case because the general nature of the judicial task is to hear cases.

The 1990 ABA Judicial Code continued in the tradition of the 1972 Code regarding disqualification (renumbered as Canon 3(E) in the 1990 Code), reiterating the grounds for recusal set forth in the 1972 Code and Section 455 of the federal code⁵⁰ but also adding the language of Canon 3(B)(1) codifying the benign notion of the duty to sit by stating that “a judge shall hear and decide matters assigned to the judge except those in which disqualification is required.”⁵¹ Unfortunately, this language is susceptible to an interpretation echoing the more pernicious idea of a duty to sit as impeding recusal, in that one can argue that disqualification is not “required” within the meaning of the Code unless the case for recusal is sufficiently clear to overcome a presumption against recusal established by the general duty to sit. Regarding the new 1990 language, the ABA Reporter stated that Canon 3(B)(1) of the 1990 Code

adds a requirement to hear and decide matters assigned to a judge except those in which there is a bona fide disqualification of the judge. Although the “duty to sit” was implicit in the Canon’s general admonition to perform the duties of judicial office diligently, it ought to be stated affirmatively, the Committee believed, in order to minimize potential abuse of the disqualification alternative.⁵²

Properly read, the 1990 Code’s language that a judge has the responsibility to hear and decide cases should not be seen as reviving the pre-1970s notion of a duty to sit that required disqualification only in compelling cases. This is abundantly clear in the context of the 1990 Code’s adoption in that the 1990 Code and its background reflect no disapproval of the 1972 Code’s work regarding disqualification. The legislative history surrounding the 1972 Code emphasizes the ABA’s concern that judicial recusal practice was insufficiently rigorous. The scandal surrounding former Supreme Court Justice Abe Fortas was particularly salient to the ABA Committee,⁵³ as were other

50. See MODEL CODE OF JUDICIAL CONDUCT Canon 3(E) (1990) (Disqualification).

51. *Id.* Canon 3(B)(1) (Adjudicative Responsibilities).

52. See MILFORD, *supra* note 31, at 17.

53. George Edwards, *Commentary on Judicial Ethics*, 38 FORDHAM L. REV. 259, 259-60 (1969) (“No episode in history has done more damage to public

controversies involving disqualification or, more precisely, judges who did not disqualify themselves.⁵⁴ Against this backdrop, it was clear the 1972 Code was designed both to avoid financial ties that might compromise a judge and the appearance of impropriety.⁵⁵ Like the 1974 federal

confidence in the federal judiciary than the Fortas matter.”). As Edwards, a sitting Sixth Circuit judge at the time put it with pith,

Fortas was a Supreme Court Justice and within a hairsbreadth of being its Chief Justice. Then came the revelation that he had signed a contract for services (for his and his wife’s lifetimes) for \$20,000 a year with the Wolfson Family Foundation controlled and financed by a man who was (but obviously then hoped he wouldn’t be) on his way to the federal penitentiary. The stipulated quid for the \$20,000 per year quo was to be service to laudable public purposes.

Id. at 250. Although Fortas “voided the contract and returned the first \$20,000” when “indictment of Wolfson became certain,” the damage was more than done. *Id.* As bad as the Wolfson episode was for Fortas, arguably more disturbing was his inappropriately close relationship with then-President Lyndon Johnson, who appointed him to the Court and wanted to elevate him to the Chief Justice position. Fortas appears to have been a regular confidant and advisor to President Johnson while Fortas was on the Court notwithstanding that many Court cases have direct bearing on the Executive Branch. See Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 625-26 (1987). See generally LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 319-78 (1990) (describing episode and its importance); 1974 Legislative Hearing, *supra* note 24, at 14 (colloquy between Subcommittee Chair Rep. Robert Kastenmeier (D-Wis.) and attorney John Frank) (regarding 1922 ABA Model Code as having implicitly adopted the “reasonable question as to impartiality” standard that was expressly stated in the 1972 Code in the 1922 Code’s admonition that judge should avoid even the “appearance of impropriety”).

54. See Bowie, *supra* note 30, at 925-31; see also *id.* at 926 (noting, in addition to Fortas matter, the Tenth Circuit Judicial Council’s order “prohibiting District Judge Stephen Chandler from taking any action in any case pending in that district [and also] ordered that all cases then assigned be reassigned to other judges, and further ordered that no new cases were to be assigned”); *id.* at 930-31 (noting controversy over Fourth Circuit Judge Clement Haynsworth’s participation in case involving company in which he held stock, a debatable matter under the then-controlling law but a factor used to derail his nomination to the Supreme Court by President Richard Nixon).

55. See 1974 Legislative Hearing, *supra* note 24, at 9 (testimony of attorney John P. Frank) (“[There is also] the matter of the so-called appearance of impropriety [where] we have a conflict in the Federal system, at least since about 1920, the ABA standard has been that a judge should disqualify if it was going to look bad if he sat. Now I do not mean that as loose talk. Clearly you cannot womp up an imagined impropriety.”); *id.* at 14-15 (noting that appearance of impropriety/reasonable question as to judge’s impartiality is the implicit standard in the 1922 ABA Canons and is the approach followed in majority of states).

legislation, the 1972 ABA Code sought to abolish the pernicious version of the duty to sit.⁵⁶

However, the 1990 Code's new provision on judicial responsibility and use of the "duty to sit" terminology without differentiating between the benign general duty and the pernicious connotation of a duty to strenuously resist disqualification may have helped fuel the continuing inappropriate and even pernicious use of the concept despite its supposed abolition during the 1972-1974 time period. In any event, cases both before and after the 1990 Code continued to invoke the pernicious version of the duty to sit doctrine.

The 2007 ABA Model Code of Judicial Conduct expresses the benign concept in Model Rule 2.7 and, like its predecessor, can also be misread as supporting the pernicious version of the duty to sit concept.⁵⁷ Rule 2.7 states that "[a] judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law."⁵⁸ Rule 2.11, like the 1990 and 1972 Model Codes, sets forth stringent criteria for disqualification, requiring it in cases where the judge or a family member is financially tied to a party, where there is bias or prejudice, or where the judge's impartiality may be

Federal disqualification law prior to the 1974 Amendment required bias or prejudice and found appearance of impropriety or lack of neutrality insufficient as a basis for recusal. Frank and fellow witness California Chief Justice Roger Traynor were both arguing that the federal law should be changed to accord with the ABA Code, which they read as long requiring recusal if there was an appearance of impropriety, something made express in the 1972 Code, which stated that disqualification was required where a judge's impartiality could be reasonably questioned.

56. See 1974 Legislation Hearings, *supra* note 24, at 11-13 (testimony of attorney John P. Frank) (noting that 1972 ABA Code abolished duty to sit and recommending that federal law do the same, a position that prevailed in the enactment of the 1974 legislation).

57. One significant change in the 2007 ABA Code is stylistic. The format of having Canons is replaced by a format of having numbered rules with subparts in the manner found since 1983 in the ABA's Model Rules of Professional Conduct. Consequently, portions of the sometimes lengthy Canons are replaced by more specific rules such as Rule 2.7 regarding the judge's responsibilities and Rule 2.11 regarding disqualification.

58. See MODEL RULES OF JUDICIAL CONDUCT R. 2.7 (Responsibility to Decide) (2007).

reasonably questioned.⁵⁹ Expanding on the concept, the Comment to Model Rule 2.7 explains:

Judges must be available to decide the matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.⁶⁰

The Reporter's explanation of Comment 1 is that it essentially restates 1990 Code Canon 3(B)(1) but with a "slight modification to cross-reference the disqualification rule [Rule 2.11] explicitly and to acknowledge that in some instances disqualification may be required by other law."⁶¹ The Comment was

added to emphasize that although disqualification remains an important and at times essential option for a judge, it should not be misused as a tool to avoid deciding cases that the judge may regard as unpleasant or unpopular. The effective administration of justice depends on judges remaining available to hear the cases that parties file, and this Comment is intended to remind judges of that concern when they approach issues of disqualification.⁶²

As with earlier versions of the Code, there is obviously at least some tension between Rule 2.7's admonition that judges must not be too quick to recuse and the disqualification provisions of Model Rule 2.11.⁶³ Comment 1

59. *See id.* at R. 2.11 (Disqualification).

60. *See id.* at R. 2.7 cmt. 1 (Responsibility to Decide).

61. Charles Gardner Geyh, *Reporter's Notes Explanation of Changes*, in ABA ANNOTATED, *supra* note 31, at 87-88.

62. *Id.*

63. *Cf.* Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 541 (2005).

Theoretically, the "duty to sit" does not conflict with the statutory requirement that judges recuse themselves under certain specific circumstances. But the statutory standard for disqualification is vague, leading to ambiguous situations in which reasonable people can differ

to Rule 2.7 and the Reporter's Explanation make clear that, as has been the case for more than thirty years, the correct resolution of this tension was to require judges to recuse when presented with valid grounds (the command currently in Rule 2.11) but to caution against unwarranted recusal due to unsupported assertion, baseless suspicion, frivolous arguments, or manufactured grounds (the command currently in Rule 2.7).⁶⁴ To the extent that the concepts and rules collide on occasion, the duty of impartiality and mandatory disqualification trumps the more generalized "Responsibility to Decide" found in the Code.

In other words, the ABA has never suggested that judicial responsibility cautions against recusal in close cases. To the contrary, as discussed in Part D below, both the ABA and Congress desired that serious recusal questions be resolved in favor of enhancing public confidence through disqualification where the case for recusal was serious even if falling short of clear-cut. To this end, the pernicious duty to sit doctrine resistant to strong recusal claims was formally abolished but the benign concept of a duty to sit in the ordinary, non-problematic discharge of judicial duties was retained. Unfortunately, the Model Codes could have been clearer on this point. The door was thus left ajar to continuing invocation of the pernicious form of the duty to sit.

about whether the judge has a disqualifying interest. Because the legal obligation to recuse is not always clear, the "duty to sit" doctrine encouraged judges to remain on cases from which they arguably should have recused themselves.

Id. (footnote omitted). *See also* Idaho v. Freeman, 507 F. Supp. 706, 717 (D. Idaho 1981) (holding that duty to sit doctrine tended to push judges in direction of refusing to disqualify themselves in close cases); Litteneker, *supra* note 2, at 239 (same).

64. *See* House Report, *supra* note 29, at 6355 (regarding disqualification of judges; enacted Nov. 21, 1974 and now codified at 28 U.S.C. § 455).

Disqualification for lack of impartiality must have a reasonable basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

Id.

B. *The Development of the Duty to Sit as Resistance to Recusal*

The development of the more pernicious version of the duty to sit as embodying an unwarranted judicial resistance to recusal is both ancient and relatively recent in origin: ancient in that it stems in part from the historical but now largely abandoned notion of judges as immune to bias unless having a direct financial stake in a case⁶⁵ and recent in that the duty was not fully articulated and enshrined in its most problematic form until relatively shortly before it was abandoned by the ABA and Congress. The most prominent use of the by then-receding concept was Justice Rehnquist's memorandum inappropriately invoking it to explain his failure to recuse in *Laird v. Tatum*.⁶⁶ The

65. See Leubsdorf, *supra* note 12, at 237-38 (noting movement away from traditional view of judges as omniscient logic machines to modern view that judges, like other social actors, may be unable to be impartial under many circumstances that do not involve direct pecuniary interest). "Educated by the Legal Realists and their successors, lawyers fear that the values and experiences of judges ultimately shape their decisions." *Id.* at 245.

The list of disqualifying factors has expanded since the eighteenth century, when financial interest was the sole ground for recusal. Legislation played an important part of this evolution. Congress has supplemented its original disqualification statute of 1792 five times, in each instance expanding the scope of disqualification. The Supreme Court has read the Constitution to forbid decision makers to hear cases when they have a personal stake in the result, become personally embroiled with a party, or were involved in the litigated incidents. The organized bar has similarly expanded its standards.

Except for Chief Justice Rehnquist, every commentator who has critically analyzed disqualification in the federal courts has supported its expansion. . . .

The obvious explanation for these developments is a shift in society's view of judicial psychology, and psychology in general: from the eighteenth century's economic man, susceptible only to the tug of financial interest, to today's Freudian person, awash in a sea of conscious and unconscious motives. . . . Today, disqualification law is clearly directed at the likelihood of warped judgment, with a judge's financial or familial stake in the case as just one circumstance from which to infer such a likelihood.

Id. at 246-47 (citations omitted).

66. At least I (and most scholars and commentators) regard the Rehnquist Memorandum's use of the duty to sit concept as inappropriate in that case for disqualification was not a close one (although Justice Rehnquist privately acknowledged at least this much), but was clear and compelling in that he had a significant role in the development of the Nixon Administration's domestic

leading case regarding the doctrine in the United States, *Edwards v. United States*,⁶⁷ was decided in 1964 and the majority of federal appellate precedent endorsing the concept, including the cases cited in Justice Rehnquist's *Laird v. Tatum* memorandum, were issued after 1950.⁶⁸

surveillance program and because his own conduct was relevant to the dispute. See *infra* Part I.C.

67. 334 F.2d 360, 362 n.2 (5th Cir. 1964), *cert. denied*, 379 U.S. 1000 (1965). See Coberly, *supra* note 26, at 1205 n.25 ("The case most often cited as an example of the 'duty to sit' rule is *Edwards v. United States*."). The perhaps now-dated and mildly sexist expression invoking the nameless "Caesar's wife" stems from the notion that any significant doubts about the fidelity of the emperor's wife would bring political turmoil and that "[c]ourts, like Caesar's wife, must be not only virtuous but above suspicion." *U'Ren v. Bagley*, 245 P. 1074, 1075 (Or. 1926).

In *Edwards*, Judge Rives, a widely respected jurist whose participation in the case probably helped to account for its prominence, regarded the duty to sit as overcoming and forbidding the exercise of any "personal preference or individual view" that might auger in favor of recusal. 334 F.2d at 362. But in the actual *Edwards* case itself, Judge Rives invoked the concept of a legal compulsion to sit "[i]n the absence of a valid legal reason" and that without at least a valid legal reason, he had "no choice in this case" and "no right to disqualify" himself. 334 F.2d at 362-63 n.2 (5th Cir. 1964). In other words, although *Edwards* is cited as the poster child for both benign and pernicious duty to sit thinking, the *Edwards* Court was invoking only the benign version of the doctrine. Thus, the leading duty to sit case helps demonstrate that the pernicious version of the doctrine is unnecessary. If the claimed ground for recusal is weak, the disqualification motion can be easily denied without any need to invoke the concept of a duty to sit. In *Edwards*, the potential ground for recusal (raised by Judge Rives *sua sponte* and not by the parties), was the absence of the other two members of the original appellate panel from the en banc court rehearing the case, an odd and perhaps uncomfortable situation (since the other two panel judges would not be available to counter any influence Judge Rives as a member of the panel might have on the en banc court) that did not create a close question.

68. In addition to *Edwards v. United States*, 334 F.2d 360, 362 n.2 (5th Cir. 1964), the Rehnquist memorandum defending his decision to participate in *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (mem.) (Rehnquist, J.), cited the following as the universe of "[t]hose federal courts of appeals that have considered the matter [that] have unanimously concluded that a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified." Rehnquist goes on to list the cases: *Walker v. Bishop*, 408 F.2d 1378 (8th Cir. 1968); *Wolfson v. Palmieri*, 396 F.2d 121 (2d Cir. 1968); *Tynan v. United States*, 376 F.2d 121 (D.C. Cir. 1967); *United States v. Hoffa*, 382 F.2d 856 (6th Cir. 1967); *Simmons v. United States*, 302 F.2d 71 (3d Cir. 1962); *In re Union Leader Corp.*, 292 F.2d 381 (1st Cir. 1961); and *Tucker v. Kerner*, 186 F.2d 79 (7th Cir. 1950). Although these cases of course relied on earlier precedent, one can make a strong case that the pernicious form of the

But although perhaps only fully defined in the twentieth century, the duty to sit as commonly discussed and focused upon in this article has its roots in English common law from a time when notions of disqualification were far less stringent than today. The English approach was a bit of a step backward in the development of judicial impartiality.

Under medieval Jewish law, judges were barred from participating in any case in which a litigant was a friend, kinsman, or someone they disliked. The Roman Code of Justinian went further, permitting parties to remove judges for mere “suspicion” of bias. While the civil law ultimately incorporated the Justinian template into its system of “recusation” still operative in many countries today, the common law took a much more constricted approach.⁶⁹

In the Anglo-American system prior to the twentieth century and particularly prior to the nineteenth century, judges were allowed to preside in situations that today would almost universally be considered improper.⁷⁰ For example, Chief Justice John Marshall arguably violated even the most narrow disqualification norms of his time by acting as a judge in his own case, albeit one in which his involvement was personal and ideological, rather than financial. *Marbury v. Madison* arose out of the failure to deliver William Marbury’s commission to serve as a justice of the peace. Marshall was the acting Secretary of State who had refused to deliver the commission.⁷¹ As one

duty to sit, although perhaps logically related to older, now outdated attitudes toward judicial recusal, was not in full bloom until the mid-twentieth century.

There were, however, precursor traces of the duty to sit concept in some early twentieth century cases. See, e.g., *Ex parte N.K. Fairbank Co.*, 194 F. 978, 993 (D. Ala. 1912) (“I feel it my imperative duty to sit [in the absence of a showing of bias by the movant]. To do otherwise would set the evil precedent of weakly betraying a trust, because a litigant relied on information and belief anonymous slanders of a judge.”); see also *id.* at 994 (contending that judge must not accept as true, baseless allegations of bias, in an effort to disqualify judge via affidavit as then provided in 28 U.S.C. § 144). The phrase first cropped up in the nineteenth century but was not widely invoked. See *infra* note 97 and accompanying text.

69. Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 512 (2007).

70. See Leubsdorf, *supra* note 12, at 246-47.

71. See MACKENZIE, *supra* note 30, at 1. In similar fashion, Oliver Wendell Holmes sat with the Supreme Court in reviewing cases on which Holmes had

commentator said with understatement, “Early standards for recusal were far more lax than they are today.”⁷²

In thirteenth century England, notions of impartiality were even less vigorous. This extended to ideas regarding juror impartiality as well. For example, prior to the time of Edward Coke (1552-1634),⁷³ jurors were generally persons familiar with either the dispute at issue or the parties, something forbidden today under the modern view that jurors should generally have no prior knowledge of or involvement with litigation or litigants.⁷⁴ In similar fashion,

voted as a Justice of the Massachusetts high court, Justice Hugo Black participated in cases involving the constitutionality and interpretation of legislation he had drafted and reviewed as a U.S. Senator, and Abe Fortas voted on cases involving President Lyndon Johnson’s executive branch even though Fortas continued to act as an informal adviser to LBJ during Fortas’s time on the court. *See id.* at 2; Stempel, *supra* note 53, at 608-28 (detailing other examples of questionable or clearly improper failure to recuse by Justices). Defenders of such behavior may argue that the “shall not be a judge in his own case” criterion applied only to a judge’s financial interests and not political, ideological or professional interests. While this was perhaps correct as applied to Justices Marshall and Holmes, it seems insufficient justification for the more recent actions of Justices Black and Fortas.

72. *See* Frost, *supra* note 63, at 539 n.31.

73. Edward Coke was Solicitor General, Speaker of the House of Commons, Attorney General, Chief Justice of the Common Pleas Bench, and Chief Justice of the King’s Bench, to which he was appointed in 1613. E. ALLAN FARNSWORTH, *CONTRACTS* 832 (4th ed. 2004). Coke’s judicial writings generally stress impartiality and detachment of jurors, but, as noted in the following footnote, there are late seventeenth century cases permitting jurors to sit and utilize personal knowledge regarding a case. *Id.*

74. *See* STEVEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN & THOMAS O. MAIN, *CIVIL PROCEDURE: DOCTRINE, PRACTICE & CONTEXT* 389 (2d ed. 2004) (stating that early English juries were local committees established by Norman Conquerors to determine land ownership). From 1066 until roughly the sixteenth or seventeenth Century,

[j]urors were selected from the local community where the dispute arose and were required to have some familiarity with the facts of the case. In a sense, then, the earliest juries were groups of witnesses who discussed the case among themselves and arrived at a verdict In the centuries that followed, the distinction between juror and witness became more pronounced.

Id. *See also* FLEMING JAMES, GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, *CIVIL PROCEDURE* §3.2, at 182 (5th ed. 2001) (“Jurors originally were fact-reporters or witnesses, rather than neutral and previously uninformed adjudicators.”); John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 *AM. J. LEGAL HIST.* 201 (1988).

At the time of the founding of the American colonies, the transition was still in flux. “As late as 1670, in *Bushell’s Case*, an English judge declared that jurors

it was not generally considered improper for a presiding judge to be familiar with the disputants, the dispute, counsel or land in question, even if the familiarity was close, and even if the judge was friendly or antagonistic to counsel or the parties.

[A] judge was disqualified for direct pecuniary interest [in the outcome of a case] and for nothing else. Although Bracton tried unsuccessfully to incorporate into English law the view that mere “suspicion” by a party was a basis for disqualification, it was Coke who, with reference to cases in which the judge’s pocketbook was involved, set the standards for his time in his injunction that “no man shall be a judge in his own case.” Blackstone rejected absolutely the possibility that a judge might be disqualified for bias as distinguished from interest.⁷⁵

had the right to use their personal knowledge to decide the verdict.” SUBRIN, ET AL., *supra*, at 389.

75. John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609-10 (1947) (citing 4 BRACTON, DE LEGIBUS ET CONSUEUDINBUS ANGLIAE 281 (George E. Woodbine ed. 1942)); accord WILLIAM BLACKSTONE, 3 COMMENTARIES 361 (1769); FLAMM, *supra* note 2, § 1.2 (noting broader view of disqualifying circumstances applied to judges under Jewish and Roman law and Bracton’s unsuccessful advocacy of Roman view); Harrington Putnam, *Recusation*, 9 CORNELL L.Q. 1 (1924). See, e.g., Dr. Bonham’s Case, (1608) 77 Eng. Rep. 638 (K.B.) (disqualifying a judge from hearing a case in which he would receive a the amount of any fine he inflicted upon a party); Aon., per Holt, C.J., (1698) 1 Salk. 396, 91 Eng. Rep. 343 (K.B.) (Mayor of Hertford sanctioned for presiding in an ejectment case in which mayor was lessor of plaintiff and stood to profit from plaintiff’s financial success) Earl of Derby’s Case, 12 Co. 114, (1614) 77 Eng. Rep. 1390 (K.B.); Sir Nicholas Bacon’s Case, 2 Dyer 220b, (1563) 73 Eng. Rep. 487 (K.B.) (holding a judge may not preside in case determining judge’s own qualifications to be bondsman.) Note also that English law of the time seemed not to find any conflict in judge also working as bondsman, a type of moonlighting banned today.

Although English disqualification law did not extend beyond cases in which the judge had a personal financial stake in the case at bar, it occasionally took a very attenuated view of financial interest and causation of influence. See, e.g., Between the Parishes of Great Charte and Kennington, 2 Strange 1173, (1726) 93 Eng. Rep. 1107 (K.B.) (disqualifying judge in case where pauper was a party on ground that decision in favor of pauper could cause some increase in judge’s taxes); Case of Foxham Tithing, 2 Salk. 607, (1705) 91 Eng. Rep. 514 (K.B.) (same). Today, we regard this type of alleged financial interest as too attenuated to impair impartiality, and further deploy the “rule of necessity” which provides that a ground for disqualification applicable, if at all, to the entire bench, does not disqualify the particular judge to which the case is currently assigned because of the need to have the case adjudicated. See *Switzer v. Berry*, 198 F.3d 1255, 1257-58 (10th Cir. 2000) (stating judge able to preside even if otherwise subject to recusal where “case cannot be heard otherwise” by any judge not

Henry de Bracton argued that a judge should disqualify himself if related to a party, hostile toward a party, or previously involved in the case as counsel,⁷⁶ all are precursors to today's attitudes toward disqualification. During the thirteenth century, the Devonshire-born, Oxford-educated Bracton sat on King's Bench, an experience that made him, depending on one's perspective, realistic or cynical about the ability of judges to decide cases on the merits. He came to see his colleagues as easily swayed and lacking any special ability to rise above natural human favoritism, which prompted his view that judges should recuse themselves when subject to personal ties or emotions that might further cloud their judgment.⁷⁷

But Bracton's perspective, despite its prescient modernity, lost out to Blackstone's view, (now regarded almost as comical after the Legal Realism revolution of the twentieth century) that "the law will not suppose the possibility of bias or favour in a judge."⁷⁸ The prevailing

subject to similar ground for disqualification (citation omitted)); FLAMM, *supra* note 2, § 20.2; Frank, *supra*, at 611.

76. See FLAMM, *supra* note 2, § 1.2; BRACTON, *supra* note 75, at 281; Coberly, *supra* note 26, at 1202 n.8.

77. See Justice T.L. Yang, *Henry de Bracton: The Father of Case Law*, 1987 LAW LECTURES FOR PRAC. 211, 211-12.

78. BLACKSTONE, *supra*, note 75 at 361. See, e.g., *Brookes v. Rivers*, 1 Hardres 503, (1668) 115 Eng. Rep. 569 (Ex.) (holding judge not disqualified in case involving brother-in-law because "favour shall not be presumed in a judge"). But see *Becquet v. Lempriere*, 1 Knapp 376, (1830) 12 Eng. Rep. 362 (P.C.) (reaching opposite result on similar facts 150 years later, reflecting evolution of English attitudes). As Frank notes, even prior to Blackstone, English attitudes on the dangers of partiality were not always consistent. For example, an entire jury could be disqualified if the sheriff who called its members was related to a party. See *Vernon v. Manners*, 2 Plowden 425, (1572) 75 Eng. Rep. 639 (K.B.); Frank, *Disqualification*, *supra* note 75, at 611 n.22 ("[O]ddly enough, the English courts, over-influenced by Coke, early held that a judge was not disqualified by relationship, but that a jury was.").

Some American courts appear to have harbored a view similar to Blackstone's regarding the supposedly divine abilities of judges. See, e.g., *Benedict v. Seiberling*, 17 F.2d 831, 832 (N.D. Ohio 1926) (noting judge has duty to immediately decide whether to continue to sit when presented with affidavit of bias); *Montgomery County v. Cochran*, 116 F. 985 (M.D. Ala. 1902) ("[T]he judge of the city court of Montgomery is a man of highest character for integrity, a judge profoundly learned in the law, without prejudice against the defendants or either of them, and incapable of being influenced by any local sentiment, if such existed, which could tend to bias his judicial opinion.").

Blackstonian view also posited that “challenges to judicial impartiality would undermine public respect for the legal system” resulting in a “common law [that] made it very difficult to disqualify a judge.”⁷⁹ English law regarding disqualification was narrow and “simple in the extreme,”⁸⁰ which perhaps explains its emphasis on continued adjudication of a case without much reflection and few cases requiring recusal. In any event, disqualification of judges for bias was rare⁸¹ but there was at least support for Sir Edward Coke’s core principle that no man should be a judge in his own case.⁸² Coke, and the English bench generally, appear to be of the view that in all other cases there was a duty to sit,⁸³ although these precise words were not used and the concept was not well developed at English common law.

The English view, albeit one already in some evolution, was largely incorporated by the colonial and subsequent American legal system of the eighteenth century. By the nineteenth century, however, the grounds for recusal on the basis of monetary interest were expanding so that direct financial interest was not necessarily required. In addition, a judge’s bias toward or prejudice against a party was on occasion found so substantial and undeniable as to require recusal. And to be sure, the less class and status conscious United States was clearly less willing to put judges on a

The Legal Realism movement of the 1930s and beyond posited the notion of judges as immune to the human frailties of favoritism, ideology, social pressure, and the like was absurd. See Leubsdorf, *supra* note 12, at 245-46. Although some of the more iconoclastic views of hard-core legal realists were rejected by the legal establishment, the core insights of legal realism—that law is affected by history, sociology, philosophy, politics, and personality—is widely accepted, as is the notion that the legal profession is now in an extended “post-realist” era, albeit one in which formalist doctrine continues to be important in resolving disputes. See BAILEY KUKLIN & JEFFREY W. STEMPER, FOUNDATIONS OF THE LAW 183-85 (1994); Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 2, 49-50 (2007).

79. JAMES, HAZARD & LEUBSDORF, *supra* note 74, at 394.

80. See Frank, *supra* note 75, at 611-12 (“[B]ias, today the most controversial ground for disqualification, was rejected entirely.”).

81. See JAMES, HAZARD & LEUBSDORF, *supra* note 74, at 321.

82. See *Dr. Bonham’s Case*, (1610) 77 Eng. Rep. 646, 652 (K.B.).

83. See Goldberg, *supra* note 69, at 512-13. See generally FLAMM, *supra* note 2, at 613-21.

pedestal than was Blackstone.⁸⁴ But notwithstanding this, the American attitude toward recusal arguably became more protective of judges than even the narrow British approach, in that by the late nineteenth or early twentieth centuries the

common law [held that] the slightest pecuniary interest would disqualify a judge and with logical consistency the English courts hold that a judge is rendered incompetent upon a showing of a real possibility of bias. Accordingly, it has been held that a personal animosity between a judge and a party or membership of a judge in a class which will be interested in the outcome is sufficient for recusation. . . .

....

[But] in the United States, however, the courts have drawn an irrational distinction. While it is commonly held that interest is a sufficient ground for disqualification, prejudice is not. There are numerous decisions to the effect that a judge is competent although he has expressed a premature opinion of the merits of the case and is hostile to one party; and yet he is not competent if he is indirectly interested as a taxpayer or a city litigant. A situation is thereby created in which certain facts will disqualify merely because they raise a presumption of bias while an actual showing of bias will not.⁸⁵

Consequently, a good deal of U.S. case law on disqualification during the nineteenth and twentieth centuries was as protective of judges as the English law of the Blackstonian era even though England had moved toward taking a more aggressive view of judicial disqualification. But in both England and the U.S., the general tide, which accelerated during the twentieth century, was in favor of less confidence in judicial omniscience and more willingness to demand recusal.⁸⁶ The

84. See *Sanborn v. Fellows*, 22 N.H. 473, 481 (1851) (criticizing Blackstone's view that judges by nature of their office were incapable of being biased or prejudiced).

85. See Note, *Disqualification of a Judge on the Ground of Bias*, 41 HARV. L. REV. 78, 79-80 (1927) (citations omitted).

86. See Bowie, *supra* note 30, at 914-15 (attributing much of the momentum for greater attention to disqualification to public dissatisfaction with judges, courts, and legal system in general) (citing Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906), as indicative of public perception). Peter W. Bowie, Chief Bankruptcy Judge for Southern District of California, who was significantly involved in the

course of expanding notions of judicial disqualification began in the U.S. with the common law, followed by the first federal disqualification statute in 1792,⁸⁷ as amended in 1821, 1911, and 1948.⁸⁸ In addition to the basic grounds for federal judicial disqualification found in 28 U.S.C. § 455, Section 144 of the judicial code also provides for challenge to a federal district judge based on an affidavit of bias.⁸⁹

development of the 2007 ABA Model Code of Judicial Conduct, regarded this public dissatisfaction-cum-backlash as also based on disagreement with the substance of judicial decisions rather than concerns about judicial corruption, although both fueled the trend toward tougher disqualification laws. He noted:

The Supreme Court rendered its infamous decision in *Lochner v. New York* in 1905, invalidating a state law regulating the maximum workday and workweek of bakery and confectionery workers . . . in 1908, two years after Pound spoke, Oregon and California adopted provisions for the recall of their judges and the movement for recall measures then became nationwide. That gives us some flavor of the dissatisfaction that existed at the time.

See id. at 914 (internal citations omitted).

87. The Act of May 8, 1792 provided for disqualification where the judge had a monetary interest in a lawsuit before him or had served as counsel for either party in the case. *See Frost, supra* note 63, at 539 (citing to statute). *See also* Bowie, *supra* note 30, at 913 (quoting statute).

88. *See Frost, supra* note 63, at 540.

[T]he statue was altered in 1821 to mandate more generally that a judge recuse himself if he is “so related to, or connected with, either party, as to render it improper for him, in his opinion to sit on the trial of such suit or action.” Congress altered the statute again in 1911, adding that a judge should recuse himself if, “in his opinion,” his relationship with any attorney made it improper for the judge to sit on the case. In 1948, the provision was recodified at 28 U.S.C. § 455, where it remains today. The 1948 amendments eliminated the requirement that a party first seek a judge’s disqualification, transforming the statute from a challenge-for-cause provision to a self-enforcing disqualification provision that places the onus on the judge to determine whether he should recuse himself.

Id. at 540-41 (footnotes omitted); *accord*, Bowie, *supra* note 30, at 913. The statute was also amended in 1809 to provide a basis for removing a judge if the judge was disabled and could not continue to preside over a case. *See id.* at 913.

89. *See Frost, supra* note 63, at 541-43 (describing operation of 28 U.S.C. § 144). This provision of the statute might have operated as near-equivalent of right to peremptory challenge to initial trial judge but has been defanged by judicial interpretation to essentially provide for disqualification only when the party seeking recusal has the evidentiary foundation permitting it to give sworn

By the twentieth century, it was becoming common practice for judges to disqualify themselves if they held stock in a company involved in a case before them.⁹⁰ The Supreme Court struck a blow for greater impartiality in *Tumey v. Ohio*,⁹¹ which found a violation of due process when the mayor, who stood to gain from any fine imposed, presided over trial for unlawful possession of alcoholic beverages. *Tumey* observed a “general rule” that judicial officers were disqualified by such financial interest.⁹² But common practice was not universal practice. Some judges and reviewing courts found ownership of stock too attenuated to require recusal.⁹³ Further, all grounds for disqualification were generally regarded as waivable. Notoriously, judicial icon Learned Hand, in what came to be termed the “velvet blackjack,” routinely disclosed his investments in litigant companies and then asked the parties and counsel whether this posed a problem, effectively coercing their consent to his continued participation in the case.⁹⁴ In the main, however, disqualification based on pecuniary interest generally expanded and was widely accepted by the early or middle twentieth century. In addition to *Tumey*, the Supreme Court issued other decisions recognizing that a presiding judge’s pecuniary interest in a case could rise to the level of

testimony demonstrating clear actual bias. See *Berger v. United States*, 255 U.S. 22, 27 (1921); *Frost*, *supra* note 63, at 543-44.

90. See Frank, *supra* note 75, at 613. Prior to the twentieth century, there continued to be examples of judges continuing to sit on cases presenting rather blatant impartiality problems based on their financial interests. See, e.g., *In re Sime*, 22 F. Cas. 145, 146 (C.C.D. Cal. 1872) (No. 12,861) (noting that judge sits in bankruptcy cases in spite of being creditor of the debtor).

91. *Tumey v. Ohio*, 273 U.S. 510 (1927).

92. See *id.* at 522.

93. The black letter disqualification law at the time required disqualification only if a judge’s financial stake in a matter was significant. See 28 U.S.C. § 455 (1970); *U.S. v. Ravich*, 421 F.2d 1196, 1205 (2d Cir. 1970); *Canons of Judicial Ethics*, REPORT OF THE FORTY-EIGHTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 917 (1925). This was changed in ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3(C)(1)(c) (1972) and 88 Stat. 1609. See also John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43 (1970) (noting that Fourth Circuit Judge Clement Haynesworth did not disqualify in case of de minimus amount of stock held in litigant and that this was proper under law at the time which predated the 1970s changes, but his nonrecusal was nonetheless controversial and effectively used by political opponents).

94. See MACKENZIE, *supra* note 30, at 95-118.

violating a litigant's right to due process of law because due process presupposed a sufficiently neutral judge.⁹⁵

Disqualification on non-pecuniary grounds was another matter, however. Well into the twentieth century, judges were routinely sitting on cases involving legislation they had drafted, issues with which they had been involved prior to coming to the bench, and counsel or entities with close relations with the judge. Supreme Court Justices seemed often to present the most extreme cases, perhaps because each Justice made his own recusal decisions that were not subject to review. For example, Justice Holmes participated in the review of four cases on which he had sat while on the Supreme Judicial Court of Massachusetts. Justice Hugo Black sat on cases involving legislation he had drafted. Justice Felix Frankfurter participated in cases involving issues on which he had attempted to spur Court review for ideological reasons. Justice Frank Murphy participated in cases involving the Justice Department he headed as Attorney General before coming to the Court; Justice Robert Jackson acted as Nuremberg prosecutor while still on the Court. Chief Justice Earl Warren headed the Commission named after him examining the assassination of President John F. Kennedy.⁹⁶

95. See, e.g., *Aetna v. LaVoie*, 475 U.S. 813 (1986) (holding due process violated where state supreme court justice participates in cases that may have directly precedential benefit to his similar suit against insurance company); *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968) (continuing in this vein, holding that due process violated when arbitrator had close business relationship with disputant and failed to disclose this to other party, requiring arbitration award to be set aside; federal Arbitration Act requires same impartiality for arbitrators as is expected by judges); *In re Murchison*, 349 U.S. 133 (1955) (due process violated when judge took witness testimony as "one-man grand jury" and also convicted same witnesses of contempt for conduct in secret hearings); *Tumey v. Ohio*, 273 U.S. 510 (1927); cf. *Caperton v. A.T. Massey Coal Co.*, No. 33350, 2008 WL 918444, at *1 (W. Va. Apr. 3, 2008), cert. granted, 77 U.S.L.W. 3292 (U.S. Nov. 1, 2008) (No. 08-22) (agreeing to review on due process grounds case in which crucial state court justice received more than three million dollars in campaign contributions related to prevailing litigant); see also *Caperton v. A.T. Massey Coal Co., Inc.*, 2008 W. Va. LEXIS 123 (July 28, 2008) (Acting Chief Justice Benjamin, the target of criticism for his financial and political links to the defendant company's CEO, defends conduct now under review by the U.S. Supreme Court).

96. See Stempel, *supra* note 53, at 608-28. Although the extracurricular activities of Justices Jackson and Warren did not technically present acute and direct recusal problems, they were problematic in that there seems at least a non-trivial possibility that the Court may have been presented with cases

Aiding and abetting these arguable failings of judicial restraint was the evolving pernicious version of the duty to sit. The implicit premise of the Blackstonian view was that judicial bias for non-financial reasons was not a serious problem, that judges stepping aside for any other reason were shirking their duties or imposing impermissible collateral costs on the legal system, and that expansive notions of disqualification tended to undermine public confidence by conceding, at least indirectly, that judges were not the incorruptible, consistent, objective logic machines merely declaring the law (rather than determining it) posited by Blackstonian jurisprudence.

Although the roots of the doctrine can be traced to Blackstone and the pre-1800 English attitude that only direct financial stake in a case disqualified a judge, neither the 1924 Canons nor the 1972 Code embraced the duty to sit in their texts, although the 1990 Code, like the 2007 Code, notes that judges have an obligation to discharge their responsibilities as judges. The first reported American case to use the term appears in 1824, one of approximately twenty cases using the term in the nineteenth century, most after 1880.⁹⁷ The duty to sit as a basis for declining to recuse

calling into question the legality of the Nuremberg tribunals or the soundness of the Commission Report concerning the Kennedy assassination. In ironic addition, the Jackson and Warren actions were of course inconsistent with the benign duty to sit concept. By prosecuting war criminals and investigating a president's assassination, these Justices were providing valuable public service (although many question the quality of the Warren Commission investigation and findings) but were also spending considerably less time on their day jobs as part of an important court with limited membership and a heavy workload. Surely, distinguished attorneys from government or private practice could have been given leaves of absence to do this work, leaving Justices Jackson and Warren to spend more time toiling in the vineyards of the High Court's cases.

97. See *Waterhouse v. Martin*, 7 Tenn. 374, 385 (1824); see also *EWA Plantation Co. v. Holt*, 18 Haw. 509, 509 (1907); *Notely v. Brown*, 17 Haw. 393, 394 (1906); *Ex parte Ala. State Bar Ass'n*, 8 So. 768 (Ala. 1891) ([If judge is] "not disqualified under the constitution, it is his duty to sit, a duty which he cannot delegate or repudiate, and which no consent can devolve upon another."); *Lane v. Harris*, 16 Ga. 217, 250 (1854) (Benning, J., dissenting); *Graves v. Fisher*, 5 Me. 69, 72 (1827). (A Lexis search for "duty w/2 sit," prior to 1900, produced twenty-five cases, four or five of which appear to use the term to mean something other than either a judge's responsibility not to avoid difficult or inconvenient cases (the benign version of the duty to sit) or an obligation to decide close questions against recusal (the pernicious version of the duty to sit). In some states, the duty to sit terminology may have an additional meaning.

For example, in Alabama, the phrase duty to sit is also used to describe an appellate court's less deferential attitude toward reviewing a documentary

in non-compelling cases began appearing with more frequency in reported opinions during the 1950s and 1960s.⁹⁸ Perhaps the most prominent duty to sit case, *Edwards v. United States*⁹⁹ was decided in 1964, less than a decade before Justice Rehnquist's memorandum invoking the concept in defense of his failure to recuse in *Laird v. Tatum*.

Edwards involved prosecution of two defendants for failing to pay gambling taxes on the proceeds of their lottery operation. They were convicted at trial.¹⁰⁰ The case was

record below as opposed to a record based on oral testimony. *See infra* note 344. This article obviously focuses on the duty to sit as a bulwark discouraging disqualification.

98. *See, e.g.*, Walker v. Bishop, 408 F.2d 1378, 1382 (8th Cir. 1969); Wolfson v. Palmieri, 396 F.2d 121, 124 (2d Cir. 1968) (quoting Rosen v. Sugarman, 357 F.2d 794, 797-98 (2d Cir. 1966)); United States v. Hoffa, 382 F.2d 856, 859 (6th Cir. 1967); Tynan v. United States, 376 F.2d 761, 764 (D.C. Cir. 1967); Rosen v. Sugarman, 357 F.2d 794, 797-98 (2d Cir. 1966) (quoting *In re Union Leader Corp.*, 292 F.2d 381, 391 (1st Cir. 1961)); Simmons v. United States, 302 F.2d 71, 75 (3d Cir. 1962); *In re Union Leader Corp.*, 292 F.2d 381, 391 (1st Cir. 1961), *cert. denied*, 368 U.S. 927 (1961).

As this list of exemplary cases reflects, a large percentage of cases favorably invoking the duty to sit are criminal cases in which the courts' concern about effective and speedy justice may be at their apogee. Further, many disqualification motions brought by criminal defendants are, if this sample is indicative, particularly weak and fairly obviously designed to attempt to avoid a disliked judge or to lengthen the proceedings and stave off eventual incarceration. In nearly all of these cases, it appears that recusal was not warranted and that the arguments for disqualification were weak to the point of being frivolous. Consequently, in addition to creating the mischief discussed *infra* Part II.D.3, the duty to sit doctrine appears not to provide any useful assistance to judicial decisionmaking.

99. *Edwards v. United States*, 334 F.2d 360 (5th Cir. 1964).

100. *See Edwards*, 334 F.2d at 362-65. The merits of the criminal case turned on whether the defendants' admitted failure to pay had been "knowing" within the meaning of the statute. *Id.* at 363. The en banc Fifth Circuit, in a decision authored by Judge Rives, found sufficient circumstantial evidence of knowledge in view of defendants' prior record of violation and familiarity with the tax and criminal justice system. *Id.* at 364-66.

Three of the seven en banc judges dissented, but the dissent of Judges Jones and Bell was more like a concurrence in that it found the convictions "properly disposed of when they were before the panel of this Court," in a case where the en banc Court affirmed the panel's judgments of conviction. *Id.* at 368 (Jones & Bell, JJ., dissenting). Judge Brown's dissent was more substantive in that he not only rejected a presumption of knowledge of the law but also asserted that

initially heard by the standard three-judge appellate panel, which affirmed but in fractured form on the legal issue of whether knowledge of the law was presumed.¹⁰¹ The panel's composition later became problematic when the Fifth Circuit granted en banc review. One of the panel judges (Judge Paul Hays of the Sixth Circuit) had been from another circuit and was ineligible to participate in the en banc proceeding. Another judge (Judge Ben Cameron) on the panel died prior to the en banc argument, leaving Fifth Circuit Judge Joel Rives the sole member of the original panel able to participate in the en banc proceeding. While on the panel, Judge Rives had also been the lone dissenter to the panel ruling, differing from Judges Hays and Cameron over whether knowledge of the law could be presumed.¹⁰² This awkward position initially led him to the view that he should not participate in the en banc review, reasoning that it would appear unfair to the litigants to have him as the sole representative of the original panel. Consulting other members of the full Circuit Court, who

the government had failed to meet its burden of proving a "willful" failure to pay and disagreeing with the majority's broad use of a "pedagogical dispute over inference versus presumption" regarding treatment of the circumstantial evidence. *Id.* at 368 (Brown, J., dissenting).

Reading the Brown dissent forty-five years later is almost like reading the diary of a Puritan found in a time capsule. Modern judges simply lack the great solicitude for criminal defendants concerning regulatory crimes that is reflected in the Brown dissent. Modern lawyers (and most lawyers in the 1960s, judging by the majority in the case) would have little difficulty with the majority's presumption that people making money on a furtive enterprise for which they had been previously charged with non-payment of taxes probably knew that they owed taxes on the money they made. Judge Brown conceded that "Congress can, of course, prescribe that the failure to pay the tax is a crime and thus eliminate the element of a knowing duty to pay," but thought it unconstitutional for a court to convict based on "a so-called presumption, rebuttable or otherwise, that an accused knows the law and knowing the law knows he had a duty to pay." *See id.* at 368-69. Criminal defendants have not enjoyed such friendly judicial treatment since the heyday of the Warren Court.

101. *United States v. Edwards*, 321 F.2d 324, 325-27 (5th Cir. 1963). The panel majority proceeded from the position that the government had the burden of proving knowing failure to pay taxes without any presumption that the defendants knew of their duty to pay tax. *Id.* at 324. Dissenting, Judge Rives contended that such a presumption of knowledge of the law was correct even for regulatory crimes and even though the presumption is in some tension with the traditional "rule of lenity" in statutory interpretation which argues for strict construction of criminal laws against the government and in favor of defendants. *Id.* at 329 (Rives, J., dissenting).

102. *Id.* at 329-30.

were divided on the matter, Judge Rives ultimately resolved the issue in favor of his continued participation because of a judge's general duty to sit.¹⁰³

It is a judge's duty to refuse to sit when he is disqualified but it is equally his duty to sit when there is no valid reason for recusation.

....

Judges sit as a matter of course on rehearings of their own decisions. If either or both of the other judges who participated in the original decision could sit on the en banc rehearing there could be no question that I must also sit. While their absence makes me prefer not to sit, I have not found that it furnished me any legal excuse.

A court en banc consists of all active circuit judges of the circuit, 28 U.S.C. 46(c). In the absence of a valid legal reason, I have no right to disqualify myself and must sit.¹⁰⁴

Ironically, although *Edwards* is often cited in support of what this Article terms the pernicious version of the duty to sit (a doctrine disfavoring recusal in close cases and even resisting it in all but the clearest and most compelling of cases), Judge Rives in *Edwards* was employing only the benign version of the duty to sit. Not surprisingly, Judge Rives, although he preferred not to sit in the absence of his original fellow panel members who had differed with him over an important legal issue in the case, could not find "any legal excuse" to justify disqualification.¹⁰⁵ He was correct. Being the only eligible surviving panel member is not a ground for disqualification and the recusal issue was not close in any legal sense even if it made Judge Rives personally uncomfortable to be able to voice his opinion in the case a second time while the other panel judges could not. There were, after all, lawyers who would argue both sides of the issue before the full appellate court. Since Judge Rives was not disqualified, he of course had a duty to participate in his appellate court's en banc proceedings. He was using the benign duty to sit simply as a reminder to

103. *Edwards*, 334 F.2d at 362, n.2; see also Frank, *supra* note 93, at 59 (discussing *Edwards*).

104. *Edwards*, 334 F.2d at 362 n.2 (internal citations omitted).

105. *Id.* at 362 n.2. see also *Blizard v. Frechette*, 601 F.2d 1217, 1221 (1st Cir. 1979) (invoking benign version of duty to sit despite fact that pernicious version was abolished in 1974 legislation).

work through cases presenting awkward or difficult circumstances. He was not invoking the pernicious duty to sit concept as a substantive rule for refusing to recuse in a close or meritorious disqualification motion.

Edwards was therefore not a manifesto in favor of an aggressive, pernicious version of the duty to sit and probably became prominent simply because it was one of the few instances in which a judge so self-consciously wrestled with possible disqualification even in the absence of any real question as to the judge's impartiality. Not only was there no legal basis for recusal in *Edwards*, but neither was there any suggestion that Judge Rives was not neutral regarding the parties and the case. He may have had a legal opinion different than Judge Hays or Judge Cameron but not even the criminal defendants had suggested he was not able to be fair in forming his legal views in the matter. *Edwards* is also interesting in that Judge Rives, in invoking the duty to sit, referred to cases of recent vintage, underscoring the degree to which the doctrine, although perhaps based on ancient views of judging, had not been clearly articulated until the mid-twentieth century.¹⁰⁶

Many of the other cases invoking duty to sit rhetoric, including some of those cited in Justice Rehnquist's *Laird v. Tatum* manifesto against refusal (discussed below) also dealt more in dicta than in holding, involving cases where the case for recusal was so weak that the duty to sit tiebreaker was not realistically called into play.¹⁰⁷ In such cases, courts were, as in *Edwards*, really only applying the

106. *Edwards*, 334 F.2d at 362 n.2 (citing *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 860 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964) and *United States v. Valenti*, 120 F. Supp. 80, 92 (D.N.J. 1954)). *Sabbatino*, of course, was later reversed on the merits by the Supreme Court, which rendered an important opinion regarding international law comity. *See Sabbatino*, 376 U.S. 398.

107. *But see Rosen v. Sugarman*, 357 F.2d 794, 797-98, 800 (2d Cir. 1966) ("Application of [recusal] principles, not easy in any case, is peculiarly difficult when the bias and prejudice are alleged to have stemmed not from any history antecedent to the litigation or from the judge's contacts outside the courtroom, but from conflicts arising in the course of the very proceeding in which his impartial decision must be made.") (invoking duty to sit and ruling that disqualification unnecessary in case that appellate court acknowledged was difficult because record reflected incidents from which reasonable person might infer judge's hostility to counsel but where source of purported hostility was court proceedings rather than extrajudicial source).

benign version of the duty to sit rather than its more pernicious cousin.¹⁰⁸

C. Justice Rehnquist's Controversial Decision to Participate in Laird v. Tatum

William Rehnquist was nominated by President Richard Nixon in 1971 and joined the Court after Senate confirmation in early 1972.¹⁰⁹ Prior to his appointment, he had been a successful Phoenix, Arizona attorney active in the local bar and a politically active Republican, siding with Richard Nixon's candidacy in the battle against New York Governor Nelson Rockefeller for the party's nomination in 1968.¹¹⁰ After Nixon defeated Democrat Hubert Humphrey

108. Although *Edwards* also continued to be cited, it was usually in conjunction with discussion of the abolition of the pernicious version of the duty to sit by the 1974 federal legislation and in cases where the case for recusal was weak or on a collateral point. See, e.g., *Cheeves v. Southern Clays, Inc.*, 797 F. Supp. 1570, 1582-83 (court notes abolition of pernicious duty to sit but continued viability of benign duty to sit and rejects party's attempt to depose judge as part of effort to build case for recusal).

109. See White, *supra* note 21, at 14 n.30; see also Cornell Legal Information Institute, Supreme Court Collection: William Hubbs Rehnquist, <http://supct.law.cornell.edu/supct/justices/rehnquist.bio.html>; Christina E. Coleman, Note, *The Future of the Federalism Revolution: Gonzales v. Raich and the Legacy of the Rehnquist Court*, 37 LOY. U. CHI. L.J. 803, 803 n.1 (2006). In addition to serving as Associate Justice for 15 years, Rehnquist became Chief Justice in 1986 after nomination by President Ronald Reagan and served as Chief Justice until shortly before his death in 2005. See Linda Greenhouse, *Chief Justice Rehnquist Dies at 80: Forged Conservative Imprint—Leaves 2nd Vacancy*, N.Y. TIMES, Sept. 4, 2005, at 1. He was replaced as Chief Justice by John Roberts. See Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 877 (2008).

110. See COMM. ON THE JUDICIARY, NOMINATION OF WILLIAM H. REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES, S. REP. NO. 99-18, at 2 (1986) (reviewing career in private practice, including presidency of Maricopa County Bar Association and membership in National Conference of Commissioners of Uniform State Laws, and other activities prior to appointment as Assistant Attorney General, Office of Legal Counsel, Department of Justice, in 1969). Regarding Rehnquist's support of Nixon in pursuit of the Republican nomination in 1968, see STEPHEN C. SHADEGG, WINNING'S A LOT MORE FUN (1969) (describing Richard Nixon's comeback after losing 1960 presidential contest and 1962 California governor's race to obtain 1968 Republican nomination and presidency. Rehnquist and fellow Arizonan Richard Kleindienst, who later as Assistant Attorney General became embroiled in the Watergate matter, were important Arizona supporters of Nixon in his quest for the nomination). See also David Stout, *Richard G. Kleindienst, Figure in Watergate Era, Dies at 76*, N.Y. TIMES, Feb. 4, 2000, at A27 (Kleindienst sentenced to \$100 fine and thirty-day suspended sentence for minor offenses but

and third-party candidate George Wallace, Rehnquist was appointed head of the Justice Department's Office of Legal Counsel (OLC).¹¹¹ The OLC is charged, among other things, with advising the Administration regarding legal issues.

One issue during Rehnquist's OLC tenure was the constitutionality of a Department of Defense program of domestic surveillance, a program in which the Army compiled substantial data on citizens seen as dissidents critical of the Administration and, in particular, the nation's Vietnam War involvement.¹¹² Because the OLC did not interfere with the Army program, one presumes that Rehnquist, as OLC head, approved the initiative as constitutional. At least it seems more than plausible that OLC was aware of the program and had either approved it or declined to intervene.¹¹³ In addition, he publically spoke

acquitted of perjury charges, continuing to practice law in Arizona until his death). Irrespective of his political ties to the White House, Justice Rehnquist had an impressive educational and professional pedigree and his nomination for the Chief Justice position was supported by luminaries such as the late Griffin Bell, a former Fifth Circuit judge and Carter Administration Attorney General, former Harvard Law Dean Erwin Griswold, former Reagan Attorney General William French Smith, and then-University of Chicago, Law Dean (and later Stanford President) Gerhard Casper.

Rehnquist had a history of Republican political activism for some years prior to his support of Nixon, a matter that became a matter of some embarrassment during his confirmation hearings as Chief Justice. Rehnquist was accused, while acting as a GOP poll watcher, of having attempted to intimidate black voters, charges corroborated by prominent San Francisco attorney James Brosnahan, then an Assistant Attorney General in the Civil Rights Division of the Justice Department, in Senate testimony. In the aftermath of the testimony, which obviously did not derail Rehnquist's path to the Chief Justiceship, Rehnquist regularly disqualified himself from any case in which Brosnahan was an attorney of record. *See* Senate Report, *supra* note 29, at 31-32, 66, 83 (explaining that the Republican majority of the Judiciary Committee is relatively dismissive of the charges while Democratic Senators Kennedy and Metzenbaum clearly view the allegations as credible, providing more detailed information on the charges and the accusations of Brosnahan and other witnesses); Stempel, *supra* note 53, at 590 n.3.

111. *See* Senate Report, *supra* note 29; *see also* WILLIAM H. REHNQUIST, *THE SUPREME COURT* (2002) (providing some autobiographical history of his life and path to the Supreme Court).

112. *See* *Laird v. Tatum*, 408 U.S. 1, 3-7 (1972) (describing Army's domestic surveillance program).

113. The Office of Legal Counsel is an arm of the Justice Department responsible for assessing the legality of executive branch actions and advising the President. Although in a large country with a vast executive branch, it is of course possible that a given department will embark on a program without

in favor of such investigation and against the plaintiffs' objections to the program.¹¹⁴ When the legality of the program had been raised during his confirmation hearings, Rehnquist had expressed the view that the program was proper.

All of these aspects of Rehnquist's involvement with the subject matter of the Supreme Court case *Laird v. Tatum* would appear to have disqualified Rehnquist from participation in the case, in that he had a personal and professional stake in the legality and continued operation of the program, he formed views on this particular program's constitutionality prior to ascending to the bench, and he appeared to have partiality toward the government's view of both the procedural and substantive merits of any challenge to the surveillance program. This particular perspective about a specific government program involving then-attorney Rehnquist's employer (the executive branch) is something different than an attorney's generalized views concerning the Constitution.

A number of plaintiffs, led by Arlo Tatum, challenged the legality of the program, contending that the Justice Department intrusions violated the plaintiffs' First Amendment rights of association and expression as well as Fourth and Ninth Amendment rights to privacy. The government responded that the matter was not justiciable, successfully moving to dismiss before the trial court.¹¹⁵ A D.C. Circuit appellate panel reversed, finding the matter justiciable and that the plaintiffs had standing.¹¹⁶ The Supreme Court granted certiorari review.¹¹⁷

vetting its legality with the OLC. However, because of the novel and potentially cutting edge nature of the Department of Defense's domestic surveillance program, it is hard to imagine that the OLC was not asked for an opinion on the matter, or at least did not become aware of the program.

114. See William H. Rehnquist, *Privacy, Surveillance, and the Law*, Remarks Before the National Conference of Law Reviews in Williamsburg, Va. (Mar. 19, 1971), reprinted in *FEDERAL DATA BANKS, COMPUTERS AND THE BILL OF RIGHTS: HEARING BEFORE THE SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE COMM. ON THE JUDICIARY*, 92 Cong. 1590-96 ("I believe that no legitimate interest of any segment of our population would be served by permitting individuals or groups of individuals to prevent by judicial action the governments gathering [of] information . . .").

115. See *Tatum v. Laird*, No. 459-70 (D.D.C. Apr. 22, 1970).

116. See *Tatum v. Laird*, 444 F.2d 947 (D.C. Cir. 1971).

117. See 404 U.S. 955 (1971).

By the time the case reached the U.S. Supreme Court, Rehnquist had been appointed and confirmed as an Associate Justice. To the surprise and dismay of observers, he participated in the case¹¹⁸ and cast his deciding vote in a 5-4 decision in favor of the federal government's defense that the plaintiffs lacked standing to challenge the federal government's approval of the challenged surveillance program.¹¹⁹ The Court's finding of no standing and that the

118. According to folklore surrounding the case, counsel for the plaintiffs discussed making a formal disqualification motion regarding Rehnquist but elected against it, with those disfavoring the motion contending that it was not necessary because Rehnquist would act voluntarily and that it would look unduly aggressive to the other Justices if a formal motion was filed. See Stempel, *supra* note 53, at 592 ("The *Tatum* plaintiffs had assumed that the Justice would disqualify himself from any participation in the case because of his service as head of [OLC] during the time in which the Administration, presumably with the approval of that office, instituted the domestic surveillance program."); see also John P. MacKenzie, Editorial, *Mr. Rehnquist's Opinion*, N.Y. TIMES, Aug. 25, 1986, at A24 (saying *Tatum* plaintiffs "said they feared offending the Court needlessly when it seemed possible he would not participate without having to be asked [to step aside]").

[I]t was a shock to see [Justice Rehnquist] there when the *Branzburg* [v. Hayes, 408 U.S. 665 (1972)] and *Tatum* cases were called for oral argument . . . Rehnquist was considered disqualified because of his role as principal administration defender and witness at extensive hearings on military surveillance held before Ervin's Subcommittee on Constitutional Rights. There Rehnquist stated that the Pentagon program, however unwise or regrettable, did not violate anyone's constitutional rights. Specifically and crucially, he had testified that the *Tatum* lawsuit, which was pending in lower courts while the Ervin hearings were under way, was not "justiciable"; that is, it was the kind of lawsuit that courts should and would dismiss as judicially unmanageable. This was the very issue in the case when it reached the Supreme Court.

MACKENZIE, *supra* note 30, at 211-13; see also *id.* at 213-17 (detailing further information regarding Justice Rehnquist's Justice Department role touching on the surveillance program and his pre-decision on both procedural and substantive issues presented by the *Tatum* case).

119. See *Laird v. Tatum*, 408 U.S. 1, 13-16 (1972); see also *id.* at 16 (Douglas & Marshall, JJ., dissenting); 408 U.S. at 38 (Brennan, J., Stewart, J., and Marshall, J., dissenting). In this politically charged case, the *Laird v. Tatum* majority opinion rejecting plaintiffs' claim was authored by Chief Justice Warren Burger, a Nixon appointee, see 1 ENCYCLOPEDIA OF THE U.S. SUPREME COURT 117 (Thomas T. Lewis & Richard L. Wilson eds., 2001), and joined by Nixon appointees Harry Blackmun, *id.*, at 82, Lewis Powell, see 2 ENCYCLOPEDIA OF THE U.S. SUPREME COURT 730, William Rehnquist, *id.* at 777, and Kennedy appointee Byron White, see 3 ENCYCLOPEDIA OF THE U.S. SUPREME COURT 1020.

case was non-justiciable, ended inquiry into the program and avoided scrutiny of Justice Rehnquist's activities related to the issues presented in *Laird v. Tatum*.

After the decision, plaintiffs belatedly raised the issue, seeking rehearing of the case due to the alleged error of Rehnquist's participation.¹²⁰ The Court denied the petition for rehearing and Rehnquist wrote separately in defense of his decision to not be disqualified from the case¹²¹ even though his own performance as head of OLC would be under scrutiny if the Court were to find that the *Laird v. Tatum* plaintiffs had standing to challenge the Defense Department's domestic surveillance program.

Justice Rehnquist's opinion was distinguished by its feisty rhetoric and unbowed attitude.¹²² The Justice

Dissenters Thurgood Marshall, *see* 2 ENCYCLOPEDIA OF THE U.S. SUPREME COURT 593, and William O. Douglas, *see* 1 ENCYCLOPEDIA OF THE U.S. SUPREME COURT 289, had been appointed by Democratic Presidents Johnson and Roosevelt, respectively, while dissenters Brennan, *id.* at 97, and Stewart, *see* 3 ENCYCLOPEDIA OF THE U.S. SUPREME COURT 911, were appointed by Republican President Dwight Eisenhower.

120. *See* MACKENZIE, *supra* note 30, at 215-17.

121. *See* 408 U.S. 1 (1972). Justice Rehnquist's Memorandum announcing and explaining his decision to continue to sit is found at 409 U.S. 824 (1972).

122. For example, when discussing perhaps his strongest argument—that a judge's general judicial philosophy or political ideology should not be a basis for recusal—Rehnquist wrote:

Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

409 U.S. at 835 (italics in original). Unfortunately, this memorable turn of phrase misleads the reader. The *Tatum* plaintiffs were not challenging Justice Rehnquist based on his having an opinion but because he had expressed those opinions as the public face of an Executive whose conduct was at issue in the case at bar. Committing oneself to a position as part of the very activities under scrutiny in the lawsuit is quite different than developing even complex and long-standing views regarding the Constitution. Even in the absence of public comment suggesting prejudgment, Justice Rehnquist's connection to the program as head of OLC was alone ground for disqualification. *See* Stempel,

contended that there was no valid ground for his recusal although he conceded “that fair-minded judges might disagree about the matter,”¹²³ a concession that itself

supra note 53, at 596-607 (criticizing Rehnquist’s analysis on several grounds and noting in particular that plaintiff’s grounds for disqualification centered on Rehnquist’s personal participation in the underlying dispute rather than upon his generally conservative constitutional views regarding standing, justiciability, and national security).

Commenting on the problems of excessively common recusal of Justices, Rehnquist wrote: “[A]ffirmance of . . . conflicting results by an equally divided Court would lay down ‘one rule in Athens, and another rule in Rome’ with a vengeance.” 409 U.S. at 838. Here, Justice Rehnquist neglects to balance the difficulties presented by a Court lacking a Justice with the problems created when Justices subject to strong disqualification arguments refuse to step aside. *See* Stempel, *supra* note 53, at 651-53 (criticizing Rehnquist memorandum for inflating purported problems created by recusal and ignoring advantages of having case heard only by Justices with impartiality not subject to reasonable question).

123. *See* 409 U.S. at 836. Most commentators regard Justice Rehnquist’s analysis as flawed and his determination erroneous. *E.g.*, MACKENZIE, *supra* note 30, at 209 (“[Rehnquist sat] in judgment on matters deeply affecting his former client [President Nixon]. The sad conclusion—sad because it must be made of a jurist with brains, ability, and dedication to the Court—is that Rehnquist’s performance was one of the most serious ethical lapses in the Court’s history.” Rehnquist memorandum defending failure to recuse was “a monument both to Rehnquist’s technical ability and to his ethical shortsightedness.”); *See* Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 682-97 (2005) (criticizing Rehnquist’s approach in *Laird v. Tatum* and generally criticizing the Court for its lax attitude toward disqualification, suggesting procedural reform); *see also* Stempel, *supra* note 53, at 596-607 (finding that memorandum mis-stated the underlying facts, the asserted ground for recusal, the applicable disqualification law, and the evolving standards regarding recusal, and generally displayed insensitivity toward the issue and undue defensiveness regarding Justice Rehnquist’s own conduct in failing to recuse himself); Senate Report, *supra* note 29, at 13-25 (majority views), and *id.* at 69, 77-81 (minority view of Sen. Edward Kennedy (D-Mass.)). As might depressingly be expected in an era of relatively partisan politics, the majority section of the Senate Report, which consists largely of merely reproducing the Rehnquist memorandum, minimizes the flaws of Justice Rehnquist’s recusal analysis. *Compare id.* at 25 (“This was a forthright statement by Justice Rehnquist concerning his views on the controlling statute in effect at the time . . . [and] the issue raised was one of legal analysis upon which reasonable jurists could differ; however, in no way should Justice Rehnquist’s actions be construed as being improper.”), *with id.* at 81 (“[In *Laird v. Tatum*, Justice Rehnquist] was a committed advocate, not an impartial judge. He did not have an open mind, but a closed mind.”). With the perspective of thirty-five years’ hindsight, Sen. Kennedy and the others in the Judiciary Committee minority appear to have the better of the argument. For example,

implicitly demonstrates that the pernicious duty to sit made a tiebreaking difference in prompting him to continue on the case. In addition to disputing the magnitude of his alleged conflicts undermining his impartiality, Justice Rehnquist also specifically invoked the pernicious strain of the duty to sit doctrine, arguing that it required judges and justices to remain on a case unless the grounds for recusal were compellingly clear and essentially beyond dispute.¹²⁴

If all doubts were to be resolved in favor of disqualification, it may be that I should disqualify myself simply because I do regard the question as a fairly debatable one, even though upon analysis I would resolve it in favor of sitting.

Here again, one's course of action may well depend upon the view he takes of the process of disqualification. Those federal courts of appeals that have considered the matter have unanimously concluded that a federal judge has a duty to *sit* where *not disqualified* which is equally as strong as the duty to *not sit* where *disqualified*. . . These cases dealt with disqualification on the part of judges of the district courts and of the courts of appeals. I think that the policy in favor of the "equal duty" concept is even stronger

the majority is clearly wrong to characterize the Rehnquist memorandum as forthright when it in fact obfuscates his personal involvement in the case in an attempt to mischaracterize the recusal motion as a broad attack on his general constitutional views.

In particular, Justice Rehnquist erred in characterizing the disqualification as sufficiently close so as to implicate the pernicious version of the duty to sit doctrine counseling against recusal in close cases. Because of Justice Rehnquist's personal involvement in the case and his prior pronouncements on the merits of the case itself, he was clearly disqualified. Consequently, it was inappropriate for him to invoke the anti-recusal "tiebreaker" of the pernicious version of the duty to sit. Further, as the Judiciary Committee majority noted, "Justice Rehnquist acknowledged that subsequent amendments to the law could possibly require a different conclusion." *Id.* at 25; *accord* Letter from Geoffrey C. Hazard, Jr. to Sen. Charles Mathias, *reprinted in* ROBERT M. COVER, OWEN M. FISS & JUDITH RESNIK, *PROCEDURE* 1274 (1988) (submitting letter in connection with 1986 confirmation hearings regarding nomination to Chief Justiceship:

In a matter of such substance and complexity as the surveillance policy, it is implausible that the head of the government law office responsible for development of its legal aspects would not be personally involved in considerable detail concerning the facts and issues going into the policy and its formulation. On that basis, Mr. Rehnquist was the responsible counsel in the matter in question, as well as a potential witness concerning any factual issues regarding the policy. Each of these two relationships is independently a ground for disqualification.)

124. See 409 U.S. at 837-38.

in the case of a Justice of the Supreme Court of the United States. There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts. There is no higher court of appeal that may review an equally divided decision of this Court and thereby establish the law for our jurisdiction . . . [For these reasons, a Justice should not be] “bending over backwards” in order to deem oneself disqualified.¹²⁵

Having framed the issue this way, Rehnquist concluded that there was no such compellingly clear case for his disqualification and that any doubts should be resolved against recusal and in favor of his continued participation in the case.¹²⁶

125. See *id.* at 837-38 (citing *Edwards* and other cases, *supra* note 68 and accompanying text) (italics in original).

126. See *id.* at 837-38. Further evidence of the impact of the pernicious version of the duty to sit doctrine on Justice Rehnquist's decision is provided in his personal papers on file with the Hoover Institution on War, Revolution and Peace at Stanford University. In the aftermath of the Court's ruling on the substance of the justiciability issue on which he would cast a crucial vote, Justice Rehnquist faced plaintiffs' motion for rehearing and his disqualification from participating in reconsideration of the case. He drafted what would eventually become his now-famous explanatory memorandum on judicial disqualification, and then wondered whether to publish it or simply let the matter drop. He separately asked Chief Justice Burger and Justice White for “any comment you have with respect to either the substance of this draft or whether any opinion at all should issue in connection with the denial” of plaintiff's belated motion for recusal. See Letter from Justice William H. Rehnquist to Justice Byron R. White (July 28, 1972) (on file with author); Letter from Justice William H. Rehnquist to Chief Justice Warren E. Burger (July 28, 1972) (on file with author). He then sought Justice Stewart's opinion and received in reply the letter excerpted at the beginning of this article. See Letter from Justice William H. Rehnquist to Justice Potter Stewart (Aug. 8, 1972) (on file with author). Even though the inquiry ended with “no hurry,” Justice Stewart replied in less than a week despite being on vacation at the time. See Letter from “Potter” to “Bill” (Aug. 14, 1972) (copy on file with author) (suggesting additional examples of past situations in which Justices did not recuse despite having expressed opinions on general legal issues presented in pending case).

The first draft of the Rehnquist recusal memorandum received from the Supreme Court printer was, notwithstanding the July 28 letter to Justices Burger and White, dated August 1, 1972. See Memorandum from Mr. Justice Rehnquist in *Laird v. Tatum* (Aug. 1, 1972) (on file with author). It was not substantially changed prior to its publication. However, one change made in the second draft, while continuing to agree that fair-minded judges (“men” in the first draft) might disagree about recusal in the case, eliminated the words “the question is probably a fairly close one.” See Papers of William Rehnquist, Hoover Institution Archives, Box 29, folder 71-288 (on file with author). The change in tone makes it less obvious that the pernicious version of the duty to

sit doctrine played a role in Justice Rehnquist's fateful decision to remain on the case. But it seems clear that he indeed viewed the issue as more than colorable and sufficiently close that he might have recused, had he not subscribed to the pernicious version of the duty to sit doctrine. In late September, Justice Rehnquist circulated his final version of the memorandum to the full court, announcing his intention to publish it. *See* Memorandum of Justice William H. Rehnquist to Supreme Court Conference (Sept. 27, 1972) (copy on file with author). After the memorandum was filed, he sent a copy to Phoenix attorney John Frank "[s]ince I relied heavily on your acknowledged expertise in the field of disqualification to prepare the enclosed memorandum . . ." *See* Letter from Justice William H. Rehnquist to John P. Frank (Oct. 6, 1972) (on file with author).

The August 8, 1972, letter to Justice Stewart also reflects the degree to which Justice Rehnquist viewed the disqualification question as sufficiently close that the pernicious duty to sit likely placed a significant role in his ultimate decision.

As you may know from press accounts or from your own perusal of moving papers before the Court, the respondents in *Laird v. Tatum* addressed a motion to me individually to disqualify myself from consideration of that case. Senator Gravel's motion for rehearing in this case likewise requires the Court (not me individually) to disqualify me from participating in the case. The Gravel motion, I thought, was quite snide, and insofar as it might ultimately depend on my personal judgment, I would have no hesitation in denying it without opinion. The *Laird* motion, however, seemed to me to be a fairly serious, responsible presentation; because of this, and because the New York Times and Washington Post tend to feature the matter at every opportunity, I drafted a chambers opinion in connection with the *Laird* motion to accompany my denial of it. . . .

Because the Chief and Byron were the only two Justices here at the time I drafted it, I sent a copy of it to each of them, with a request for their comments. The Chief feels that I ought not to issue it, since the issue will inevitably become unnewsworthy if nothing is done, and because issuing it might create some sort of a precedent whereby in the future others to whom such motions were addressed would feel obligated to give a statement of their reasons for denial. Byron, on the other hand, felt that since these matters are individual ones, the practice of any one Justice would not place others under compulsion, and he thought it was a good idea to state reasons in a case such as this.

I definitely do not want to circulate the opinion to all members of the Court, because I think that ties each of them in too much with what is and must remain my own responsibility. On the other hand, having received conflicting advice, I would greatly value your opinion as to whether a memorandum of this nature should be issued by me to accompany the denial of the motion addressed to me as an individual Justice.

Reaction in political circles and the popular press to the Rehnquist memorandum and his refusal to step aside in *Laird v. Tatum* was largely negative,¹²⁷ providing impetus to

See Letter from Justice William H. Rehnquist to Justice Potter Stewart (Aug. 8, 1972) (on file with author).

After the memorandum was published, Justice Powell wrote to say that he thought “your splendid memorandum on ‘disqualification’ constitutes a conclusive answer to the motion.” See Letter from Justice Lewis F. Powell, Jr. to Justice William H. Rehnquist (Oct. 6, 1972) (on file with author). Ninth Circuit Judge Eugene Wright sent a longer, more effusive letter stating that Justice Rehnquist deserved “commendation for issuing a statement of explanation on the disqualification question. I believe you have set a good example for others to follow” and that “[t]his kind of well thought out statement delivered by a judge, in the interest of clarifying an issue, as you have done, would do much to restore the public’s confidence in the judicial system.” See Letter from Judge Eugene A. Wright to Justice William H. Rehnquist (Oct. 12, 1972) (on file with author). A New York attorney also wrote praising the opinion, while another lawyer wrote in criticism, as did a Catholic University law student. A Columbia Law student on Law Review had previously written attempting to obtain an interview to discuss the nature of Justice Rehnquist’s actions concerning the case while at OLC. The Justice responded by sending the student a copy of his memorandum. See generally Papers of William Rehnquist, Hoover Institution Archives, Box 29, folder 71-288 (on file with author).

127. See Adam Liptak & Jonathan D. Glater, *Papers Offer a Close-Up of Rehnquist and the Court*, N.Y. TIMES, Nov. 18, 2008, at A12 (“[Justice Rehnquist] faced stinging criticism for participating in a decision dismissing a challenge to Army surveillance of domestic political groups in the Vietnam War era.”). It appears from his recently released papers that Justice Rehnquist was painfully aware of the criticism and during the summer of 1972, in the aftermath of the Court’s *Laird v. Tatum* opinion, “struggled with whether he should publicly explain his decision to remain on the case.” *Id.* (characterizing Rehnquist materials on *Laird v. Tatum* as “filled with emotion, calculation and even anguish”). My own view of the materials is less dramatic, but there is no denying that Justice Rehnquist felt a desire to attempt to vindicate himself in the court of public opinion. However, he was also concerned about making the controversy larger and more enduring if he published his recusal memorandum.

Notwithstanding Justice Rehnquist’s reaction to the controversy created by his decision to participate in *Laird v. Tatum*, he continued to resist the modern trend toward expanded grounds for disqualification of judges. See Leubsdorf, *supra* note 12, at 246. Further, he continued to regard the Supreme Court as a particularly inappropriate tribunal for application of the new standards set forth in the 1974 amendments to 28 U.S.C. § 455. See *Microsoft Corp. v. United States*, 530 U.S. 1301, 1303 (2000) (mem.) (Rehnquist, J.) (it is “important to note the negative impact that the unnecessary disqualification of even one Justice may have upon our Court” and reiterating his argument made in the *Laird v. Tatum* memorandum). And, somewhat famously, Justice Rehnquist was still smarting enough from the *Tatum* episode to continue pressing the argument that he had done nothing wrong. See William H. Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 THE REC. OF THE ASS’N OF THE BAR OF THE CITY OF N.Y. 694 (Nov. 1973).

those wishing to revise the federal judicial code to expand disqualification in federal courts.¹²⁸ Although there was comparatively little commentary about the issue in legal periodicals, the weight of scholarly opinion came to be uniformly critical of Rehnquist's non-disqualification.¹²⁹ In

As reflected in his refusal to recuse in *Microsoft*, even the twenty-first century Rehnquist held Eighteenth Century views concerning disqualification. Microsoft was represented locally in antitrust matters by the Boston firm Goodwin, Proctor & Hoar, where James C. Rehnquist, son of the then-Chief Justice, was a partner working on matters for his (and the firm's) client Microsoft. Under the clear command of 28 U.S.C. § 455(b)(5)(ii) (judge's relation to counsel for a litigant), § 455(b)(5)(iii) (member of judge's immediate family with financial interest in case before judge) and § 455(a) (judge's impartiality subject to reasonable question), Justice Rehnquist was required to step aside in *Microsoft* but did just the opposite, invoking a duty to sit rationale. See *infra* note 132 and accompanying text, elaborating on the Rehnquist nonrecusal in *U.S. v. Microsoft*; see also *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 870 (1988) (Rehnquist, J., dissenting) (objecting to Court majority's decision in favor of retrial due to judge's failure to recuse under what most would regard as egregious circumstances).

128. See, e.g., Glen Elsasser, *Foes Won't Get Off Rehnquist Case*, CHI. TRIB., Sept. 7, 1986, at 4; John P. MacKenzie, *The Editorial Notebook; Mr. Rehnquist's Opinion*, N.Y. TIMES, Aug. 25, 1986, at A24; *Rehnquist Doesn't Recall Domestic-Spying Memo*, CHI. TRIB., Aug. 22, 1986, at 4; Larry Margasak, *Memo Indicates Rehnquist Helped Plan Surveillance*, LEXINGTON HERALD LEADER, Aug. 15, 1986, at A15.

129. See, e.g., Stempel, *supra* note 53, at 596 (Justice Rehnquist's failure to recuse is "perhaps the most glaring example in this [twentieth] century of the deleterious effects of permitting Supreme Court Justices to be recusal law unto themselves."). The main point of the article, however, was not that Justice Rehnquist erred but rather to suggest that the U.S. Supreme Court should end the practice of individual Justices making unreviewable disqualification decisions and should instead have disqualification motions decided by the entire Court. See generally Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need For a Per Se Rule on Friendship (Not Acquaintance)*, 33 PEPP. L. REV. 575 (2006); Bassett, *supra* note 2, at 1217 n.16. After reading the Rehnquist paper connect to *Laird v. Tatum*, I'm less sanguine that review by the full Court would be much of an improvement. Justices Burger, White, Stewart, and Powell all appear to have supported the Rehnquist decision not to recuse despite the clear substantive flaws in its rationale. Perhaps the clubby isolation of the Court too greatly interferes with the Justices' normal powers of perception and legal analysis.

See generally Frank, *supra* note 93 (criticizing duty to sit concept prior to its abolition in 1972 ABA Code of Judicial Conduct and 1974 amendments to 28 U.S.C. § 455). However, the force of the duty to sit doctrine, when it was in force in federal courts, was sufficiently strong that the only two law journal commentaries at the time of Justice Rehnquist's decision did not criticize his failure to recuse. See Note, *Disqualification of Judges and Justices in the*

1986, nearly fifteen years later, Rehnquist's elevation to Chief Justice brought renewed attention to the issue, resulting in further criticism from the scholarly community. Perhaps most prominently, Professors Geoffrey Hazard and Stephen Gillers both provided critical evaluations to Congress,¹³⁰ concluding that in addition to being a "judge in his own case" because of his Justice Department involvement in the surveillance program at issue in the case, Justice Rehnquist's participation raised a reasonable question as to his impartiality.

Notwithstanding the criticism, Justice Rehnquist remained largely unrepentant on the subject, both at the time of the original controversy, and during hearings concerning his nomination for the Chief Justices post. He continued to argue the matter in the public forum,¹³¹ and refused to admit error even when it was clear that the episode was becoming a major stumbling block on his path to Chief Justice. He was eventually confirmed as Chief Justice by one of the closest Senate votes in history, although this relatively narrow victory appeared not to have increased his sensitivity to disqualification issues.¹³²

Federal Courts, 86 HARV. L. REV. 736 (1973); Note, *Justice Rehnquist's Decision to Participate in Laird v. Tatum*, 73 COLUM. L. REV. 106 (1973).

Although the major blow to the duty to sit concept was the 1974 federal legislation, commentators continue to be critical of the doctrine. See, e.g., Bassett, *supra* note 2, at 1220 n.29; Bloom, *supra* note 26; Frost, *supra* note 63, at 545-46; Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107 (2004).

130. See 132 CONG. REC. 22,794, 22,829-30 (1986) (letters from Professor Geoffrey C. Hazard, Yale Law School and Professor Stephen Gillers, New York University School of Law); Stempel, *supra* note 53, at 596-608 (discussing written opinions of Professors Hazard and Gillers in response to congressional inquiry at the time of Justice Rehnquist's elevation to Chief Justice).

131. See generally Rehnquist, *supra* note 127. In the article, however, Justice Rehnquist is less specifically defensive about his participation in *Laird v. Tatum* and makes a broader criticism of the modern tide of public and judicial opinion encouraging increased disqualification of judges generally due to concerns about appearances of impropriety and reduced faith in the ability of judges to be fair.

132. Justice Rehnquist continued to hold this strong presumption against recusal throughout his time on the Court. See, e.g., *Microsoft Corp. v. United States*, 530 U.S. 1301, 1303 (2000) (refusing to disqualify himself due to family member involvement as counsel because of "negative impact that the unnecessary disqualification of even one Justice may have upon our Court"). In a higher profile refusal to recuse, Justice Scalia took a similar stance in refusing to step aside after his now-famous duck hunting trip with Vice-President

Part of the Justice's rationale for his certitude was his invocation of the "duty to sit" doctrine, which was in his view good, controlling law at the time of *Laird v. Tatum* notwithstanding the ABA Judicial Code's retreat from the doctrine in its 1972 Model Judicial Code. Justice Rehnquist took the position that the duty to sit concept strongly counseled that he stay on case despite concerns that he could not be impartial under the circumstances. As discussed below, the concept continues to exert a hold on the views of the Supreme Court regarding recusal and those of lower courts as well. In federal court, however, the duty to sit has not been the law for nearly thirty-five years.

D. Congress Abolishes the Duty to Sit in the 1974 Amendments to the Federal Judicial Code

Reaction to the Rehnquist refusal to recuse was sufficiently strong that it, along with other perceived judicial errors in failing to recuse, helped fuel revision of the federal disqualification law, particularly 28 U.S.C. §455.¹³³ In addition to generally strengthening the grounds for disqualification, the legislation specifically sought to abolish the duty to sit.¹³⁴ As one treatise author explains:

Cheney was advanced as a ground for recusal. *See* *Cheney v. U.S. Dist. Court*, 124 S. Ct. 1391 (2004) (Scalia, J. mem.).

133. *See* House Report, *supra* note 29, at 6353 (describing background leading to revision of federal law on disqualification); *id.* at 6356 (noting Justice Rehnquist's failure to recuse in *Laird v. Tatum* as problematic); FLAMM, *supra* note 2, § 1.5; *see generally* E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT (1973) (describing background leading to ABA decision to revise Code and strengthen disqualification provisions).

134. *See* H.R. REP. NO. 93-1453, at 2 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6351, 6352; *Duke v. Pfizer, Inc.*, 668 F. Supp. 1031, 1035 (E.D. Mich. 1987); *United States v. Conforte*, 457 F. Supp. 641, 651 (D. Nev. 1978); *Kansas v. Logan*, 678 P.2d 181, 184-85 (Kan. Ct. App. 1984); 13 CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 3541-3553 (1975); Bassett, *supra* note 123, at 673 (Congress "eliminated . . . the 'duty to sit' doctrine in 1974."); Note, *Disqualification of Federal Judges for Bias Under 28 U.S.C. Section 144 and Revised Section 455*, 45 FORDHAM L. REV. 139 (1976).

Senator Birch Bayh (not to be confused with his son, current Senator Evan Bayh (D-Ind.)) did not get everything he wanted concerning judicial recusal. Prior to enactment of the 1974 legislation, he "twice proposed amending [28 U.S.C.] section 144 to provide litigants a preemptory challenge directed to judicial disqualification. Congress, however, enacted only the revision of section 455 and left section 144 unaltered. Advocates of the preemptory challenge have criticized that congressional decision, and have emphasized problems under pre-

Prior to the 1974 amendments. . . .

. . . federal judges often expressly relied on the “duty to sit rule” to deny disqualification motions in all but the most blatant of circumstances.

. . . With the enactment of the 1974 amendments . . . the duty to sit rule was displaced by a “presumption of disqualification” such that, [after those amendments went into effect,] whenever a judge harbored any doubts as to whether his disqualification was warranted, he was to resolve those doubts in favor of disqualification.¹³⁵

Prior to this change, the doctrine was problematic to the degree that it implied that judges should tenaciously cling

amendment law or ill considered decisions under the amendments, as evidence of the present system’s failure to assure an impartial tribunal.” See *Caesar’s Wife Revisited*, *supra* note 26, at 1217. However, approximately half the states “have peremptory challenge statutes or the equivalent.” *Id.* at 1217 & n.109 (citing 19 states with peremptory challenge to initially assigned judge as of 1977) (Alaska, Arizona, California, Hawaii, Idaho, Illinois, Indiana, Maryland, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Washington, Wisconsin, and Wyoming). In the intervening 30 years, no additional states have added this feature. See FLAMM, *supra* note 2, at Ch. 3; *Report of the Judicial Disqualification Project* 30-31 (ABA Standing Committee on Judicial Independence, Working Paper, 2008), http://www.abanet.org/judind/pdf/JDP_DRAFT_FOR_DISCUSSION_PURPOSES.pdf. Under most such state systems, a party may disqualify the initially assigned judge for any reason. Thereafter, if the party is upset with a second judge (or third, etc.), the party bears the burden to demonstrate a need for disqualification under the relevant state’s version of the ABA Model Code. In addition, states may limit the peremptory challenge in some way (e.g., applicable to trial judges only, not available in criminal cases, drug courts or mental health cases; applicable only to visiting judges). See *id.* at 30; see also Deborah Goldberg, et al., *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 526-27 (2007) (recommending availability of peremptory disqualification to rectify perceived insufficient disqualification of judges surrounded by reasonable questions as to impartiality).

135. See FLAMM, *supra* note 2, § 20.8, at 604-05. *Accord* *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 484-85 (5th Cir. 2003); *Murray v. Scott*, 253 F.3d 1308,1313 (11th Cir. 2001); *United States v. Snyder*, 235 F.3d 42, 46 (1st Cir. 2000); *United States v. Sciarra*, 851 F. 2d 621, 634 n. 27 (3d Cir. 1988) (with 1974 amendments, Congress sought to eradicate duty to sit presumption against recusal); *United States v. Moskovits*, 866 F. Supp. 178, 182 n.4 (E.D. Pa. 1994) (statutory changes in Section 455 created a presumption in favor of disqualification in close cases as contrasted to the presumption against disqualification in close cases created by the duty to sit); see also Stempel, *supra* note 53, at 604; *In re Sch. Asbestos Litig.*, 977 F.2d 764, 784 (3d Cir. 1992) (judge has no duty to sit whatsoever).

to a case in spite of legitimate concerns about impartiality or application of a per se ground for disqualification such as financial interest in a litigant.¹³⁶ Recounting the history of the change, treatise author Richard Flamm noted that:

In 1973, the American Bar Association acted to resolve the conflict between the duty of sua sponte disqualification and the duty to sit by adopting former Canon 3C (now 3E) of the Code of Judicial Conduct. This provision was expressly designed to do away with the duty to sit concept as a restriction on a judge's proper exercise of discretion when confronted by a disqualification motion.¹³⁷

The legislative history of the 1974 amendments to the statute makes the legislative intent to abolish the duty to sit beyond question.¹³⁸ It also makes clear that the pernicious version of the duty to sit, if it was ever justified under the 1924 Canons, was eradicated by the 1972 Model Code of Judicial Conduct.¹³⁹ Attorney John Frank, a key figure in the creation of the 1972 ABA Model Code and the push for federal legislative reform, stressed the goal of harmonizing the ABA standards and federal law.¹⁴⁰ He also appeared to regard the pernicious version of the duty to sit as not only inconsistent with the 1972 ABA Model Code but

136. See Bassett, *supra* note 123, at 672-73 (“‘duty to sit’ doctrine required judges to decide borderline recusal questions in favor of participating in the case” and “oblige[d] the assigned judge to hear a case unless and until an unambiguous demonstration of extrajudicial bias was made.” (quoting RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES, § 20.10.1, at 613 (1996))).

137. See FLAMM, *supra* note 2, § 20.8, at 605.

138. See House Report, *supra* note 29, at 6355; Senate Report, *supra* note 29, at 5-6; 1974 Legislative Hearing, *supra* note 24, at 10-15 (Statement of attorney John P. Frank) (New Section 455(a) “eliminates the so-called ‘duty to sit’ rule of *Edwards v. United States*, 334 F.2d 360 (5th Cir. 1964) and numerous other cases . . . instead giving judges a reasonable latitude to disqualify where an appearance of unfairness may reasonably exist if they sit.”). *But see* 1974 Legislative Hearings, *supra* note 24, at 15 (repeating colloquy between Subcommittee Chair Robert Kastenmeier (D-Wis.) and attorney John Frank agreeing that proposed legislation would not eliminate benign version of duty to sit concept counseling judges not to recuse in the absence of a valid reason for disqualification; legislation is “not telling judges to go off and take vacations just because cases were uncomfortable”).

139. See House Report, *supra* note 29, at 6355; Senate Report, *supra* note 29, at 5-6; 1974 Legislative Hearings, *supra* note 24, at 11.

140. See Senate Report, *supra* note 29, at 10-15; 1974 Legislation Hearings, *supra* note 29, at 9-15.

also with its predecessor, the 1924 Canons, as well.¹⁴¹ Secondary authority unanimously underscores this intent.¹⁴²

Commentators have consistently noted the degree to which the duty to sit concept or doctrine restricts disqualification by pushing courts in the direction of refusing to recuse in close cases,¹⁴³ and that under modern 28 U.S.C. § 455, like the post-1972 ABA Judicial Code, close cases should now be resolved in favor of disqualification.¹⁴⁴

141. See Senate Report, *supra* note 29, at 9 (“[W]e have had a conflict in the Federal system, at least since about 1920. The ABA Standard has been that a judge should disqualify if it was going to look bad if he sat [which is inconsistent with the pernicious version of the duty to sit].”)

142. See, e.g., MACKENZIE, *supra* note 30, at 81-84, 197-205, 221-23, 228 (describing that reporter covering *Laird v. Tatum* case and other legal issues during the 1970s noted that Justice Rehnquist’s participation was catalyst in 1974 legislative change and that amendments to 28 U.S.C. § 455 were intended, like the 1972 ABA Model Code, to eliminate pernicious version of duty to sit doctrine, which had fallen into disfavor among significant portion of legal profession); Bowie, *supra* note 30, at 930-32 (describing changes in 1972 Model Code, adoption by Judicial Conference of the United States in Code of Conduct for United States Judges in 1973, and 1974 changes to Section 455); Jeremy S. Brumbelow, *Liteky v. United States: The Extrajudicial Source Doctrine and Its Implications for Judicial Disqualification*, 48 ARK. L. REV. 1059, 1075 (1995) (1974 amendments to federal law designed to harmonize ABA Model Code provisions and federal statute); Carton, *supra* note 26, at 2067-70 (“In response to growing criticism over § 455’s subjectiveness and the ‘duty to sit’ rule, Congress, following the lead of the Judicial Conference of the United States, adopted the American Bar Association’s Code of Judicial Conduct, Canon 3C” with minor changes. “Congress’s primary objectives in adopting Canon 3C were to: (1) make § 455 conform to the ABA Code; (2) increase public confidence in the impartiality of the judiciary by replacing the subjective standard of the old § 455 with an objective one; and (3) remove the ‘duty to sit’ rule established in *Edwards v. United States*, 334 F.2d 360 (5th Cir. 1964)); see also Christopher J. Moell, Casenote, *Liteky v. United States: Application of the Extrajudicial Source Rule to Judicial Disqualification Under 28 U.S.C. § 455(a)*, 21 OHIO N.U. L. REV. 595, 606-07 (1994) (“In fact, abolishment of ‘duty-to-sit’ was of such importance so as to warrant specific mention in the House Report.”); Bloom, *supra* note 26, at 673 (“The amended section 455 made another important change in the law by removing the ‘duty-to-sit’ rule. The prior rule was that a judge had a duty to hear a case if the alleged statutory grounds for disqualification, including bias, had not been proven. By providing that a judge would be automatically disqualified whenever his ‘impartiality might reasonably be questioned,’ the amendments effectively removed the duty-to-sit concept.”) (citation omitted).

143. See, e.g., Bassett, *supra* note 2, at 1220 n.29; Frank, *supra* note 93, at 59-60.

144. See, e.g., Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657, 660-61 (1996) (“[T]he once popular concept of a ‘duty to sit’ was repudiated long ago by the American Bar

Most federal courts have received this message as well,¹⁴⁵ although, as discussed below, a disturbingly high number

Association's [1972] *Model Code of Judicial Conduct*, since adopted by the United States Judicial Conference and embraced by Congress.") (footnotes omitted).

145. See, e.g., *Barksdale v. Emerick*, 853 F.2d 1359, 1360-61 (6th Cir. 1988) (prior to 1974 amendment to federal disqualification statute, doubts concerning recusal were required to be resolved in favor of continued participation because of duty to sit concept); *United States v. Alabama*, 828 F.2d 1532, 1540-41 (11th Cir. 1987) (describing prior to 1974 statutory change, courts "operated under the so-called 'duty to sit' doctrine which required a judge to hear a case unless a clear demonstration of extra-judicial bias or prejudice was made. . . . In passing the amended 28 U.S.C. § 455, Congress broadened the grounds and loosened the procedure for disqualification in the federal courts. . . . The statute also did away with the "duty to sit" so that the benefit of the doubt is now to be resolved in favor of recusal. . . . Congress expressly intended the amended § 455 to promote public confidence in the impartiality of the courts by eliminating even the appearance of impropriety. . . . [T]he general effect of this statute was to liberalize greatly the scope of disqualification in the federal courts.); *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1111-12 (5th Cir. 1980) ("The language of the new statute eliminates the so-called 'duty to sit.' The use of 'might reasonably be questioned' in section 455(a) . . . clearly mandates that it would be preferable for a judge to err on the side of caution and disqualify himself in a questionable case.") (emphasis in original); *United States v. Haldeman*, 559 F.2d 31, 139 n. 360 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977) (noting that the purpose of new Section 455 was in part to eliminate the duty to sit concept); *Idaho v. Freeman*, 507 F. Supp. 706, 721-23 (D. Idaho 1981) ("The legislative history of the new section [28 U.S.C. § 455(a)] made it clear that the 'duty to sit' rule had been done away with. By eliminating the 'duty to sit' rule Congress hoped to 'enhance public confidence in the impartiality of the judicial system.'") (quoting House Report, *supra* note 29). *Accord Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 871-74 (1988) (Rehnquist, J., dissenting joined by White and Scalia, JJ.) (conceding that 1974 legislation "had the effect of removing the so-called 'duty to sit,' which had become an accepted gloss on the existing statute," but opposing Court majority's decision to remand case for retrial due to judge's failure to recuse in the face of ties to interested party).

See also *Carton*, *supra* note 26, at 2070-71 ("Congress appears to have . . . achieved its objectives [in amending Section 455]: § 455 and the ABA Code of Judicial Conduct are virtually identical, most courts apply an objective test when deciding if disqualification is warranted, and the concept that judges have a duty to sit in close cases has been abandoned by most circuits.") Of course, the legislative command was to eliminate the duty to sit in all federal courts. However, "some courts have retained a limited version of the duty [to sit doctrine]. . . . by according the judge a presumption of impartiality and shifting the burden of proof to the movant to overcome that presumption." *Id.* at 2071, n.50 (citing *Bloom*, *supra* note 26, at 673 n.65 and *Litteneker*, *supra* note 2, at 241 n.26). On closer examination, these commentators are addressing the benign version of the duty to sit concept rather than its pernicious version. It appears that at the appellate level, the pernicious version of the duty to sit has mostly been buried, but it continues to crop up at the trial level. See Part II.A, *infra*.

appear to be either unaware of the 1974 amendments or confused about their impact. State courts, even in states that have adopted the ABA Model Code, also sometimes exhibit similar unawareness or confusion, although the majority of decisions appear to be in accord with current federal law that has extinguished the duty to sit concept.¹⁴⁶

II. ABOLISHED BUT NOT FORGOTTEN: THE TROUBLING ENDURANCE OF THE DUTY TO SIT AND JUSTICE REHNQUIST'S *LAIRD V. TATUM* MEMORANDUM

A. *Vestiges of the Past in Federal Court Decisions*

Despite the elimination of the duty to sit in the 1974 amendments to Section 455, a surprising number of federal

Appellate courts seldom apply the pernicious version but frequently apply the benign version, sometimes in apparent ignorance that the duty to sit nomenclature also was to have been eliminated along with the pernicious version of the doctrine via the 1974 federal legislation and the 1972 ABA Model Judicial Code. *See, e.g.*, *United States v. Angelus*, 258 Fed. Appx. 840, 842 (6th Cir. 2007) (“Although a judge is obliged to disqualify himself when there is a close question concerning his impartiality, he has an equally strong duty to sit where disqualification is not required”) (citing Rehnquist memorandum in *Laird v. Tatum*); *Clemens v. District Court*, 428 F.3d 1175, 1179 (9th Cir. 2005) (judge has duty to sit if no legitimate reason for recusal that is as strong as duty to recuse when facts and law require); *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995) (discussing “settled principle that a judge has as strong an obligation not to recuse when the situation does not require as he has to recuse when it is necessary” and commending trial judge for “his integrity in upholding what he sees as his clear judicial duty”). *But see* *United States v. Snyder*, 235 F.3d 42, 46 (1st Cir. 2000) (judge has duty to recuse where impartiality can be reasonably questioned “but otherwise, he has a duty to sit”) (“[The 1974 amendment to] Section 455(a) modified, but did not eliminate, the duty to sit doctrine. The duty to sit doctrine originally not only required a judge to sit in the absence of any reason to recuse, but also required a judge to resolve close cases in favor of sitting rather than recusing. Section 455(a) eliminated the latter element of the doctrine . . . but not the former”) (citations omitted).

146. *See, for example*, Charles Bliel & Carol King, *Focus on Judicial Recusal: A Clearing Picture*, 25 TEX. TECH. L. REV. 773, 802 (1994), describing trend in Texas and noting that the

long-standing acceptance of the principle of judicial impartiality, for many years it co-existed with a countervailing notion, which, though certainly not overriding the principle of impartiality, qualified it to some degree. This was the notion that judges had a duty to sit; that is, they had an obligation not to recuse themselves from a case whenever they could avoid doing so. In recent years, the belief that there is a duty to sit has been greatly diminished. Indeed, today there is little, if any, mention of the duty to sit.

courts continue to invoke it,¹⁴⁷ while a larger number cite Justice Rehnquist's *Laird v. Tatum* memorandum with favor, although almost always for its most defensible assertion that a judge is not disqualified merely because he has general jurisprudential views that might bear on a pending case.¹⁴⁸ Indeed, most federal courts addressing the duty to sit are critical of the concept and correctly point to its 1974 abolition.¹⁴⁹ Nonetheless, the duty to sit concept

147. See, e.g., *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976) (citing cases decided prior to 1974 legislation). In *Bray*, the court held that a tax protester's attempt to disqualify the judge pursuant to 28 U.S.C. § 144 fell short because "Bray's affidavit in support of his motion to disqualify the judge was insufficient. The mere fact that a judge has previously expressed himself on a particular point of law is not sufficient to show personal bias or prejudice." *Id.* However, in spite of invoking the duty to sit and finding the affidavit inconsistent, the court disqualified the judge pursuant to Section 455(a) due to a reasonable question as to the judge's impartiality. *Id.* at 860. The judge had "committed plain error in setting Bray's bail in the presence of the jury" and told federal marshals to "lock him up' if bail was not met," which "effectively vitiated the presumption of innocence." See *id.* at 859. In addition, the trial record revealed intemperate remarks by the judge that "clearly import his feelings of hostility toward the defendant." See *id.* at 859-61 (judge referred to Bray as "damned impertinent bird" and "whippersnapper" with whom judge would settle scores). *Bray* was wrong about the continued vitality of the duty to sit concept, but it reached the right result. The duty to sit concept, however, added nothing positive to the judicial inquiry.

Unfortunately, the Tenth Circuit appears to continue to treat the duty to sit as good law even though it is not relevant to the disposition of a recusal motion. See, e.g., *Switzer v. Berry*, 198 F.3d 1255, 1257-58 (10th Cir. 2000) (invoking duty to sit in case where motion to recuse was clearly subject to rejection under rule of necessity).

148. As of November 1, 2008, Justice Rehnquist's *Laird v. Tatum* memorandum has been cited in more than two-hundred subsequent opinions, usually without any indication of negative treatment, as well as in more than one-hundred law periodicals, often with negative comment. But a citation to the Rehnquist memorandum does not necessarily indicate that the citing court is unaware of the abolition of the duty to sit or otherwise incorrect in its overall approach to disqualification. See, e.g., *United States v. Alabama*, 828 F.2d 1532, 1545-46, (11th Cir. 1987) (citing Rehnquist memorandum but also showing substantial awareness and understanding of 1974 statutory change and correctly ordering recusal of trial judge; court noted that *Laird v. Tatum* decided prior to abolition of duty to sit doctrine and did not question Justice Rehnquist's assertion of no personal knowledge regarding underlying case).

149. See FLAMM, *supra* note 2, § 20.8. See also, e.g., *United States v. Amico*, 486 F.3d 764 (2d Cir. 2007); *United States v. DeTemple*, 162 F.3d 279 (4th Cir. 1998); *United States v. Cerceda*, 139 F.3d 847 (11th Cir. 1998), *vacated by*, 161 F.3d 652 (11th Cir. 1998); *United States v. Werner*, 916 F.2d 175 (4th Cir. 1990); *Barkesdale v. Emerick*, 853 F.2d 1359 (6th Cir. 1988); *Delesdernier v. Porterie*, 666 F.2d 116 (5th Cir. 1982); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101

continues to survive, at least in dicta, in some cases and probably continues to exert pressure against disqualification in close cases.¹⁵⁰

In spite of the *Laird v. Tatum* controversy surrounding Justice Rehnquist's non-recusal and statutory changes to 28 U.S.C. § 455, a surprising number of relatively recent federal cases have continued to treat the duty to sit as a continually viable concept. As one court noted, "[w]hile most courts acknowledge the clear legislative intent of abolishing the 'duty to sit' rule,¹⁵¹ other courts have either overlooked the legislators' intent or have sought to articulate some limited version of that duty.¹⁵²

Thus, while the legislative history of Section 455 indicates Congress' intention to do away with the "duty to sit" rule, and for judges not to consider that duty and disqualify themselves in "close" cases they also show their

(5th Cir. 1980); *Rice v. McKenzie*, 581 F.2d 1114 (4th Cir. 1978); *Fredonia Broadcasting Corp. v. RCA Corp.*, 569 F.2d 251 (5th Cir. 1978), *disregarded on other grounds*, *Riquelme Valdes v. Leisure Res. Group, Inc.*, 810 F.2d 1345 (5th Cir. 1987); *United States v. Pepper & Potter, Inc.*, 677 F. Supp. 123 (E.D.N.Y. 1988); *In re Wolfson*, 453 F. Supp. 1087 (S.D.N.Y. 1978); *Bradley v. Milliken*, 426 F. Supp. 929 (E.D. Mich. 1977).

150. See FLAMM, *supra* note 2, § 20.8; Bassett, *supra* note 2, at 1243 n.146 ("Although the 1974 amendments eliminated the 'duty to sit' doctrine . . . the cases suggest that some judges effectively have retained this doctrine in resolving recusal and disqualification matters involving suggestions of bias or prejudice."); *Obert v. Repub. W. Ins. Co.*, 398 F.3d 138, 144-45 (1st Cir. 2005) (noting varying attitudes of judges, with some still stressing duty to sit as ground for resisting recusal in close cases).

151. See *Idaho v. Freeman*, 507 F. Supp. 706, 722 (D. Idaho 1981), citing, *inter alia*, *United States v. Wolfson*, 558 F.2d 59, 63 (2d Cir. 1977); *United States v. Haldeman*, 559 F.2d 31, 139 n.360 (D.C. Cir. 1976) (en banc) (per curiam), *cert. denied*, 431 U.S. 933 (1977); *Smith v. Pepsico, Inc.*, 434 F. Supp. 524, 526 n. 2 (S.D. Fla. 1977); *Fong v. Am. Airlines, Inc.*, 431 F. Supp. 1334, 1337 (N.D. Cal. 1977); *Bradley v. Milliken*, 426 F. Supp. 929, 933 (E.D. Mich. 1977).

152. See *Idaho v. Freeman*, 507 F. Supp. at 722 (citing *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976)); *Smith v. Danyo*, 441 F. Supp. 171, 175 (M.D. Pa. 1977); *Honneus v. United States*, 425 F. Supp. 164, 166 (D. Mass. 1977); *United States v. Sinclair*, 424 F. Supp. 715, 710 (D. Del. 1977); *Andrews, Mosburg, Davis, Elam, Legg & Bixler, Inc. v. General Ins. Co.*, 418 F. Supp. 304, 307 (W.D. Okla. 1976); *Simonson v. General Motors Corp.*, 425 F. Supp. 574, 579 (E.D. Pa. 1976); *Duplan Corp. v. Deering Milliken, Inc.*, 400 F. Supp. 4997, 526-27 (D.S.C. 1956); *United States v. Pastor*, 419 F. Supp. 1318, 1332 (S.D.N.Y. 1975); *Virginia State Bar Assoc. v. Hirschkop*, 406 F. Supp. 721, 725 (E.D. Va. 1975); *Sperry Rand Corp. v. Pentronix, Inc.*, 403 F. Supp. 367, 373 (E.D. Pa. 1975); *Hall v. Burkett*, 391 F. Supp. 237, 240 (W.D. Okl. 1975).

concern that only in proper cases are judges disqualified and then only if the basis is reasonable.¹⁵³

If the case for disqualification is not close, the duty to sit concept endures in its more benign form in that a judge is of course required to do his or her duty and hear and decide cases unless there is at least a colorable ground for disqualification.¹⁵⁴ Although the duty to sit concept as a barrier to disqualification has been rejected by federal law since 1974 and the ABA since 1972, a few federal courts appear not to have realized the impact of the legislative changes and continue to endorse the problematic duty to sit counseling against recusal unless the case for disqualification is beyond serious question.¹⁵⁵ Another

153. See *Idaho v. Freeman*, 507 F. Supp. at 722; see also *id.* at 723-24 (positing that continued attraction to duty to sit concept may stem from judicial concern that 28 U.S.C. § 144 not become a vehicle for litigants' automatic and baseless peremptory challenge of judges).

154. See, e.g., *United States v. Snyder*, 235 F.3d 42, 46 n.1 (1st Cir. 2000). See *supra* Part I.A-B, discussing distinction between judge's responsibility to discharge duties and the duty to sit concept as resistance to recusal.

155. See, e.g., *United States v. Angelus*, 258 Fed. Appx. 840, 2007 WL 4561519 (6th Cir. 2007) (stating judge "has equally strong duty to sit where disqualification is not required" and citing *Laird v. Tatum*); *Clemens v. U.S. Dist. Court*, 482 F.3d 1175, 1179 (9th Cir. 2005) (finding judge has "as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require"); *Sensley v. Albritton*, 385 F.3d 591, 599 (5th Cir. 2004) (treating both duty to sit and Rehnquist memorandum as continuing good and instructive law); *Pharmacy Records v. Nassar*, 572 F. Supp. 2d 869, 876 (E.D. Mich. 2008); *Blackwell v. United States*, No. 2008 WL 1696947, at *1 (S.D. Ohio April 9, 2008); *Arnell v. McAdam*, No. 2007 WL 2021826, at *1 (S.D. Cal. July 10, 2007); *Beason v. Folino*, No. 2008 WL 471641, at *2 (W.D.Pa. Feb. 19, 2008) (treating both duty to sit and Rehnquist memorandum as continuing good law); *Petruska v. Gannon*, No. 2007 WL 3072237, at *4 (W.D.Pa. Oct. 19, 2007); *United States v. Washam*, No. 2007 WL 1166038 (W.D.Ky. April 17, 2007); *United States v. Blohm*, 579 F. Supp. 495, 505-06 (S.D.N.Y. 1983); *United States v. Ferguson*, 550 F. Supp. 1256, 1260 (S.D.N.Y. 1982) ("The Court concludes that under all the circumstances here presented it is required to disqualify itself on the ground that its impartiality might be reasonably questioned. It does so with reluctance since many long days and hours have been expended in studying the voluminous affidavits, exhibits and briefs submitted by the parties; in addition, this Court remains of the school that adheres to the 'duty to sit' concept, notwithstanding which the case must now be reassigned to one of my colleagues, all of whom are heavily burdened with other matters. But the Court's reluctance and its 'duty to sit' concept must yield to a higher authority—the majesty of the law. A cardinal principle of our system of justice is that not only must there be the reality of a fair trial and impartiality in accordance with due process, but also the appearance of a fair trial and impartiality."); *Sperry Rand Corp. v. Pentronix, Inc.*, 403 F. Supp. 367, 374

significant subgroup of federal cases cites problematic parts of Justice Rehnquist's *Laird v. Tatum* memorandum as good law instructive on questions of judicial disqualification.¹⁵⁶ Although many of these cases cite the memorandum for its less controversial view that a judge's philosophy is not ground for recusal,¹⁵⁷ all these cases seem oblivious to the

(E.D. Pa. 1975) (considering duty to sit as good law, citing Rehnquist memorandum favorably, but then noting 1974 legislation and finding case for recusal not close and denying disqualification); *In re Stoller*, 374 B.R. 618, 621-22 (Bkrptcy. N.D. Ill. 2007) (treating both duty to sit and Rehnquist memorandum as good law); *Cherokee Nation v. United States*, 26 Cl. Ct. 215, 218 (Ct. Cl. 1992) (same); *Choctaw Nation v. United States*, 26 Cl. Ct. 219, 221 (Ct. Cl. 1992) (same).

156. See, e.g., *Scott v. Metropolitan Health Corp.*, 234 Fed. Appx. 341, No. 2007 WL 1028853, at *10 (6th Cir. 2007) (observing that when the "objective appearance-or-partiality standard presents a close question"; judge "must" recuse himself (*quoting* *Union Planters Bank v. L & J Dev. Co., Inc.*, 115 F.3d 378, 383 (6th Cir. 1997)), but immediately adding, "Nonetheless, as the late Chief Justice Rehnquist noted, a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified."); *United States v. Alabama*, 828 F.2d 1532, 1540, 1543, 1546, (11th Cir. 1987) (applying correct law and reaching correct result but quoting Rehnquist memorandum at length); *Republic of Panama v. Am. Tobacco Co.*, 265 F.3d 299, 304 (5th Cir. 2001) (denying rehearing en banc). *Wessmann v. Boston Sch. Comm.*, 979 F. Supp. 915, 916-917 (D. Mass. 1997) (noting abolition of duty to sit but then stating that "Justice Rehnquist's memorandum in *Laird* has become a standard for recusal decisions of judges at all levels of the judicial system." (citing cases)). See also *United States v. IBM Corp.*, 475 F. Supp. 1372, 1388-89 (S.D.N.Y. 1979) (finding disqualification unwarranted under either pre-1974 or post-1974 version of Section 455).

157. Although the 1974 Amendments to federal disqualification law reflect congressional dissatisfaction with pre-existing disqualification law such as the pernicious version of the duty to sit and portions of the Rehnquist memorandum,

[t]estimony at the hearings established that such an expression of opinion should not disqualify the judge. However, where the judge had expressed an opinion about the merit or lack of merit of a specific case before such matter came before him in a particular proceeding, the witnesses were in agreement that under such circumstances the judge would be disqualified. [The proposed amendments seek] to make this distinction.

See Senate Report, *supra* note 29, at 2. Court decisions continue to find general judicial philosophy an insufficient ground for disqualification even if adverse to a litigant's theory of the case. See, e.g., *National Rifle Ass'n v. City of Evanston*, No. 2008 WL 3978293, at *2-*6 (N.D.Ill. 2008) (stating that prior jurisprudential views are ordinarily not ground for recusal but specific opinions as counsel in related matter are disqualifying; citing Rehnquist memorandum but appreciating that Justice Rehnquist was compromised not because of his general constitutional views but his specific involvement in Nixon

controversial history of the *Laird v. Tatum* case and the degree to which Justice Rehnquist's refusal to recuse was legislatively overruled in large part, consistently criticized by scholars and political commentators, and almost enough to stop his ascension to Chief Justice.

These comparatively clueless or incomplete federal court opinions are disturbing, even when citing the benign portions of the Rehnquist memorandum, in that they display an amazingly ahistorical perspective on the law. In effect, some federal courts are continuing to cite as authoritative an opinion that not only is no longer good law in substantial part but also has largely been discredited in that nearly all informed observers have concluded that Justice Rehnquist made the wrong decision in continuing to participate in *Laird v. Tatum* and incorrectly described the degree of his involvement with the case prior to coming to the Court. Use of the Rehnquist memorandum without at least some comment on its history is a bit like citing, without comment, *Lochner v. New York*¹⁵⁸ for the proposition that a contract creates rights and that contract rights are constitutionally protected.¹⁵⁹ Yet the Rehnquist

Administration's domestic surveillance program) (but also cleaving to traditional view that judge may hear cases involving legislation authored by judge when previously serving as legislator).

158. See *Lochner v. New York*, 198 U.S. 45, 53 (1905) (“[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Constitution”). It is equally true, of course, that the states have “power to prevent the individual from making certain kinds of contracts,” *id.* at 53, subject to certain federal constitutional constraints. *Lochner* is notorious for representing what many view as the high water mark of Supreme Court use of the Constitution to strike down state regulatory efforts that limit contractual freedom. See *id.* at 64 (“the freedom of master and employe[e] to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.”) But the high water mark was not reached without some resistance. See *id.* at 65 (Harlan, White, and Day, JJ., dissenting); *id.* at 74 (Holmes, J., dissenting). See also *Abbott v. Bragdon*, 912 F. Supp. 580, 594 (D. Me. 1995) (“The *Lochner* case and its progeny employed freedom of contract to strike down social legislation regulating aspects of the work place. . . . The Supreme Court, however, has dramatically curtailed the due process right to freedom of contract”) (rejecting *Lochner*-style freedom of contract argument that Americans With Disabilities Act is unconstitutional).

159. At least I hope readers will agree with me that *Lochner* is a controversial case in that it famously held that the Due Process Clause of the U.S. Constitution prevented a state from enacting labor laws protective of workers on the ground that this unduly infringed a substantive legal right of contract between employers and the workers themselves who were the objects of

memorandum is often cited as if it were an unobjectionable, “Brand X” recitation of an uncontroversial proposition of law.

How can this happen in a system supposedly built upon the careful weighing, selection, and application of precedent? Judicial use of the Rehnquist memorandum without at least some qualifying commentary is a less extreme version of citing *Plessy v. Ferguson*¹⁶⁰ as good law. *Plessy*, although its separate-but-equal view of the Fourteenth Amendment has been rejected for more than a half-century, does contain some statements of the law that

the legislation’s protective intent. This principle of “substantive” due process limited state regulatory efforts no matter how procedurally fair. *Lochner*’s reasoning was rejected a few years later in *Mueller v. Oregon*, 208 U.S. 412 (1908) and *Lochner* is now seen as an archaic, formalist anachronism that predates the modern regulatory state. See preceding note, *supra*; *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923), and by implication the *Lochner* line of cases); LAURENCE TRIBE, *THE INVISIBLE CONSTITUTION* 169 (2008) (“‘Lochnerizing’ now serves more as an epithet;” decision was “insufficiently sensitive to the dynamics of power that rendered ostensibly self-governing relationships of employer to employee or of producer to consumer hollow forms that concealed what were, at bottom, unilateral impositions of power.”); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* §§11.3, 11.4 (6th ed. 2000); G. STONE, ET AL., *CONSTITUTIONAL LAW* (2d ed. 1991). However, the concept of substantive due process arguably survives to a degree in decisions limiting the power of the state over citizens’ personal lives. See TRIBE, *supra*, at 168 (arguing that although *Lochner* erred in giving undue preference for “contract and property as especially important forms of social ordering,” decision employs a geometric construction of the Constitution that is defensible jurisprudential approach in that Constitution cannot be properly construed solely based on its text or drafting history); Cass Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873 (1987).

But whatever vestiges of *Lochner* remain and whatever one’s opinion on the merits of its holding and reasoning, only someone unfamiliar with American law would randomly pull the case from a digest or database and cite it without comment for any of the propositions within the case that are uncontroversial in isolation. Given its history, *Lochner* can never be a generic case just as the Rehnquist memorandum should never be treated as a generic source of disqualification law principles.

160. 163 U.S. 537 (1896). *Plessy*, of course, is the famous case in which the Supreme Court refused to apply the Equal Protection Clause of the Fourteenth Amendment to strike down a state law providing for segregation of white and black train passengers. It was formally and functionally overturned by *Brown v. Board of Education*, 347 U.S. 483, 492, 494-95 (1954) (“we cannot turn the clock back . . . to 1896 when *Plessy v. Ferguson* was written.”). See . NOWAK & ROTUNDA, *supra* note 159, §§ 14.8(c), 14.8(d); STONE, ET AL., *supra* note 159; TRIBE, *supra* note 159, at 117 (describing *Plessy* as “now infamous” after rejection in *Brown v. Board*).

are not erroneous standing alone.¹⁶¹ Nonetheless, most law school graduates would be a little shocked to see *Plessy* cited matter-of-factly and without elaboration in a judicial opinion. Yet federal courts sometimes use the discredited Rehnquist memorandum in similar fashion.

Fortunately, a few insufficiently researched or thoughtful judicial opinions are hardly a threat to the system. The number of errant federal cases, although disturbingly high, is dwarfed by the number of reported opinions correctly realizing that the duty to sit no longer exists as a counterweight against recusal.¹⁶² But to the

161. *See, e.g.*, 163 U.S. at 543 (Fourteenth Amendment forbids state from “making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States” or depriving persons of due process of law or equal protection of the laws).

162. *See, e.g.*, *King v. United States*, 576 F.2d 432, 437 (2d Cir. 1978) (discussing 1974 amendments to disqualification statute were “passed, among other reasons, to eliminate the ‘duty to sit’ concept, which had found expression in many judicial opinions” including Rehnquist memorandum); *Parrish v. Bd. of Comm’rs of Ala. State Bar*, 524 F.2d 98, 103 (5th Cir. 1975); *Davis v. Bd. of Sch. Comm’rs of Mobile County*, 517 F.2d 1044, 1052 (5th Cir. 1975); *United States v. Garrudo*, 869 F. Supp. 1574, 1577 (S.D. Fla. 1994) (“Congress amended Section 455 approximately fifteen years ago in order to eliminate the ‘duty to sit’ doctrine which had previously required a judge to hear a case absent a clear demonstration of bias or prejudice.”); *United States v. Moskovits*, 866 F. Supp. 178, 182 n.4 (E.D. Pa. 1994) (citing to Chief Justice Rehnquist’s dissenting opinion in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 871 (1988), to show that 1974 legislation removed duty to sit); *In re Fed. Skywalk Cases*, 93 F.R.D. 415, 426 (W.D. Mo. 1982) (noting that duty to sit concept survives in more benign form of cautioning judges not “to avoid sitting on difficult or controversial cases”); *Smith v. Pepsico, Inc.*, 434 F. Supp. 524, 526 n.2 (S.D. Fla. 1977); *Va. Elec. & Power Co. v. Sun Shipbldg. & Dry Dock Co.*, 407 F. Supp. 324, 331 (E.D. Va. 1976) (referring to legislative history of 1974 amendments); *Lazofsky v. Sommerset Bus Co.* 389 F. Supp. 1041, 1044-45 (E.D.N.Y. 1975); *United States v. Gorski*, 48 M.J. 317, 323 (C.A.A.F. 1997) (stating that the 1974 legislation eliminated duty to sit but cautioned that asserted basis for recusal must be reasonable and that statute should not lead to wholesale disqualification of judges). *Gorski* also noted that the 1974 legislation agreed with the aspect of the Rehnquist memorandum that took the view that a judge’s general jurisprudential views were not ordinarily ground for recusal but that recusal was apt where a judge “had expressed an opinion about the merit or lack of merit of a *specific case*.” *Id.* at 319. *See also* CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3544, 590 n.8 (2d ed. 1984). “Consistent with congressional intent concerning § 455, members of the judiciary generally have not disqualified themselves from cases involving issues of law on which they have expressed an opinion or participated in the formulation of public policy prior to appointment to the bench.” 48 M.J. at 319. *See also* *United States v. Kincheloe*, 14 M.J. 40, 53 n.3 (C.M.A. 1982).

extent that the continued afterlife of the Rehnquist memorandum impacts disqualification decisions, it degrades federal recusal law at the margin even though the official or true position of federal disqualification law holds no place for the pernicious version of the duty to sit and will not invoke it to resist recusal in cases of significant question regarding judicial impartiality.

Apart from deleterious impact on recusal law, the continued occasional unexamined citation of the Rehnquist memorandum reflects poorly on the craft of the judiciary. The vestige of the Rehnquist memorandum in federal caselaw at a minimum stands as an example of sloppy, uninformed opinion writing. This may suggest a broader problem of the manner in which courts work. Some federal judges are perhaps letting too much of their prose be drafted by law clerks who may easily find the Rehnquist memorandum in electronic databases but have no appreciation of its role in American judicial history.¹⁶³ The typical law clerk is between twenty-five and thirty years old. Not only was he or she not alive at the time of *Laird v. Tatum*, but he or she was almost certainly too young to have any recollection over the role Justice Rehnquist's actions played in almost denying him the position of Chief Justice.

The potential ignorance of youth (like its counterpart, the undue traditionalism of age) is understandable. More disturbing is that these law clerks as law students never learned (or at least did not remember) *le affaire de Rehnquist/Laird v. Tatum*. The episode is respectably chronicled in few of the leading professional responsibility

163. Ironically, Justice Rehnquist himself expressed concern that law clerks working for the Supreme Court would, through their ideological inclinations, have an impact on the Court's jurisprudence. See Adam Liptak, *Influence on the Supreme Court Bench Could Be an Inside Job*, N.Y. TIMES, Dec. 9, 2008, at A20. See also *infra* note 282 and accompanying text (noting current Supreme Court practice, with approval of Chief Justice Rehnquist during his time on the Court, of ceding law clerks substantial power over certiorari decisions due to the "cert pool" in which a single law clerk drafts memoranda on merits of cert petitions to be voted upon by the Justices). My concern is not that lower court law clerks have any particular ideological agenda regarding disqualification but rather are relatively ignorant about the evolution of modern recusal standards and the important role played by *Laird v. Tatum* and reaction to the Rehnquist memorandum.

casebooks¹⁶⁴ and, like the duty to sit generally, completely ignored in most.¹⁶⁵

Judicial ethics is generally a poor stepchild in most professional responsibility casebooks which are, to perhaps state the obvious and be fair to the authors, focused on lawyer conduct rather than judge conduct. Nonetheless, the treatment of judicial disqualification in the major casebooks is very light, often involving no presentation of an edited “main case” but proceeding only through relatively brief

164. See, e.g., GILLERS, REGULATION, *supra* note 28, at 517-18 (discussing duty to sit and Rehnquist role in *Laird v. Tatum* in particular). For further discussion of duty to sit and criticism of the Rehnquist role in *Laird v. Tatum*, see *id.* at 523 (citing FLAMM, *supra* note 2; Ifill, *supra* note 28, at 606; Leubsdorf, *supra* note 12; *Rehnquist*, *supra* note 53). See also JAMES R. DEVINE ET AL., PROFESSIONAL RESPONSIBILITY 399-400 (3d ed. 2004) (discussing Rehnquist memorandum and *Tatum* but treating error of failure to recuse as open question and failing to discuss duty to sit); WILLIAM H. FORTUNE ET AL., MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK 339 n.3 (2d ed. 2000) (referring briefly to *Laird v. Tatum*, but only for its interpretation that §§ 455(a) and (b) are not “materially different” with no mention of duty to sit or Rehnquist Memorandum); ANDREW L. KAUFMAN & DAVID B. WILKINS, PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION 742 (4th ed. 2002) (mentioning Rehnquist memorandum briefly and *Laird v. Tatum* but referring to Second Edition for more in-depth excerpts and criticism of memorandum).

165. See, e.g., ROBERT F. COCHRAN, JR. & TERESA COLLETT, CASES AND MATERIALS ON THE LEGAL PROFESSION 309-332 (2d ed. 2003) (failing to address judicial disqualification, judicial conduct, or duty to sit); NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 590-603 (4th ed. 2008) (making no mention of duty to sit, *Laird v. Tatum*, or Rehnquist memorandum); PAUL T. HAYDEN, ETHICAL LAWYERING: LEGAL AND PROFESSIONAL RESPONSIBILITIES IN THE PRACTICE OF LAW 532-54 (2003) (failing to mention duty to sit, *Laird v. Tatum*, or Rehnquist memorandum); GEOFFREY C. HAZARD JR. ET AL., THE LAW AND ETHICS OF LAWYERING (3d ed. 1999) (same); GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION (3d ed. 1994); LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 395-97 (2005) (same); THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY (9th ed. 2006) (same); JOHN T. NOONAN, JR. & RICHARD W. PAINTER, PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER 717-37 (2d ed. 2001) (same); MAYNARD E. PIRSIG & KENNETH F. KIRWIN, PROFESSIONAL RESPONSIBILITY: CASES AND MATERIALS (4th ed. 1984); DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS (5th ed. 2009) (same); DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS (2d ed. 1995) (same); MORTIMER D. SCHWARTZ ET AL., PROBLEMS IN LEGAL ETHICS (7th ed. 2005) (same); ROY D. SIMON ET AL., LAWYERS AND THE LEGAL PROFESSION (4th ed. 2009) (same); ROY D. SIMON, JR. & MURRAY L. SCHWARTZ, LAWYERS AND THE LEGAL PROFESSION (3d ed. 1994) (same); JOHN F. SUTTON, JR. & JOHN S. DZIENKOWSKI, CASES AND MATERIALS ON THE PROFESSIONAL RESPONSIBILITY OF LAWYERS 679-700 (2d ed. 2002) (same); RICHARD A. ZITRIN & CAROL M. LANGFORD, LEGAL ETHICS IN THE PRACTICE OF LAW (2d ed. 2001) (same).

summary text and problems that require students to apply statutory law and the ABA Model Code.¹⁶⁶ Almost all the major casebooks give little or no historical treatment to the development of disqualification norms and controversial cases such as Rehnquist's failure to recuse himself in *Laird v. Tatum*.¹⁶⁷ Although law clerks might have been expected to be ambitious enough to Shepardize the Rehnquist memorandum and see the many law review articles, most critical, commenting upon it, the clerks can perhaps be excused on the ground that their law school professors have not provided much help in this area of the law.¹⁶⁸

166. See generally, e.g., CRYSTAL, *supra* note 165; LERMAN & SCHRAG, *supra* note 165; MORGAN & ROTUNDA, *supra* note 165. The other casebooks cited in the previous footnote that treat judicial disqualification at all excerpt at least one main case. But the cases tend to focus on judicial misconduct and discipline of judges rather than disqualification. My experience and that of most law teachers is that students, following the lead of their professors, tend to pay most attention to the highlighted excerpted cases in a coursebook (and problems assigned for class discussion) while giving considerably less attention to the explanatory notes, which often contain most of the historical background contained in a coursebook.

167. In similar fashion, the typical casebook does not discuss, even in passing, controversies such as Justice Fortas's ties to the Wolfson Foundation or other past scandals of the bench. See *supra* note 165.

168. At least not if the content of the casebooks is any guide. Realistically, law professors in class are unlikely to say much about a topic that is not given significant attention in the casebook. For example, I use the Gillers casebook, GILLERS, REGULATION, *supra* note 28, which appears among all casebooks to have the most extensive treatment of the duty to sit and the Rehnquist memorandum but I seldom take more than a few moments of class time to discuss this portion of the assigned reading, an oversight that I now know needs correction.

Similarly, in civil procedure, the other law school course where students would likely get some exposure to the development and application of standards for judicial disqualification, the major casebooks give little or no treatment to the topic. See, e.g., JOHN T. CROSS ET AL., CIVIL PROCEDURE: CASES, PROBLEMS AND EXERCISES (2006) (referencing no discussion of judicial disqualification); DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE (4th ed. 2001) (same); RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS (5th ed. 2008) (same); JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASES AND MATERIALS (rev. 9th ed. 2008) (same); JOEL WM. FRIEDMAN ET AL., THE LAW OF CIVIL PROCEDURE (2d ed. 2006) (same); A. LEO LEVIN ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE (3d ed. 1992) (same); RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH (2d ed. 1995) (same); MAURICE ROSENBERG ET AL., ELEMENTS OF CIVIL PROCEDURE: CASES AND MATERIALS (5th ed. 1990) (same); THOMAS D. ROWE, JR., CIVIL PROCEDURE (2d ed. 2008) (same); A. BENJAMIN SPENCER, CIVIL PROCEDURE: A CONTEMPORARY APPROACH (2007) (same); STEPHEN N. SUBRIN ET AL., CIVIL PROCEDURE:

Even more disturbing is that the judges involved in the opinions continuing to treat the Rehnquist memorandum or the pernicious duty to sit as good law, who at least presumably read the drafts created on their behalf by law clerks, seem not to have much historical understanding of *le affaire de Rehnquist/Laird v. Tatum* or the evolution of judicial recusal standards. Some of this may again be age related as today a significant number of federal judges are in their forties or perhaps younger and may be only slightly more likely than their law clerks to have independent knowledge of the case or the controversy surrounding the Rehnquist appointment to the Chief Justice post in 1986. But it also suggests that judges were as disserved by their law school instruction in judicial recusal as were their clerks. Worse yet, the judges seem not to have learned on the job through press accounts of the Rehnquist/*Laird v. Tatum* matter such as the recent *New York Times* discussion of the release of Justice Rehnquist's personal papers focusing on *Laird v. Tatum*.¹⁶⁹

Potentially related to the specter of historical ignorance or sloppiness of judicial craft is the nature of many of the cases invoking the Rehnquist memorandum. A significant number of these are decisions withheld from official case reporters, meaning that the judge has elected (individually or as part of an internal policy of chambers) not to submit

DOCTRINE, PRACTICE AND CONTEXT (3d ed. 2008) (same); LARRY L. TEPLY & RALPH U. WHITTEN, CASES AND PROBLEMS ON CIVIL PROCEDURE: BASIC AND ADVANCED (1997) (same); (RICHARD H. FIELD ET AL., CIVIL PROCEDURE: MATERIALS FOR A BASIC COURSE 147 (8th ed. 2003) (alluding to federal disqualification statute in one paragraph). *But see* BARBARA ALLEN BABCOCK & TONI M. MASSARO, CIVIL PROCEDURE: CASES AND PROBLEMS 320-28 (1997) (addressing disqualification but without any discussion of duty to sit); ROBERT M. COVER ET AL., PROCEDURE 1239-67 (1988); *id.* at 1267-76 (excerpting Rehnquist memorandum in *Laird v. Tatum* and noting controversy it engendered, reprinting portions of Prof. Geoffrey Hazard's 1986 letter to the Senate Judiciary Committee that criticized the Rehnquist decision and analysis); ROGER S. HAYDOCK ET AL., FUNDAMENTALS OF PRETRIAL LITIGATION § 11.5.2 (7th ed. 2008) (addressing judicial disqualification but no discussion of duty to sit); GEOFFREY C. HAZARD, JR. ET AL., CASES AND MATERIALS ON PLEADING AND PROCEDURE: STATE AND FEDERAL 1152-67 (7th ed. 1994) (addressing disqualification but without any discussion of duty to sit); FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 7.4 (5th ed. 2001) (discussing "Recusal of Judge" but not duty to sit, citing articles that address duty to sit); STEPHEN C. YEAZELL, CIVIL PROCEDURE 582-90 (7th ed. 2008) (addressing judicial recusal, excerpting illustrative case, but not addressing *Laird v. Tatum* or duty to sit).

169. See Liptak & Glater, *supra* note 127.

the opinion to Thomson/West or to another official case reporter service for publication. In effect, judges self-edit by deciding whether an opinion is important enough to be published as an “official” court precedent. Historically, this means that judges do not treat as publishable opinions involving minor issues, clear cases, small stakes, or that do not reflect the court’s most serious legal scholarship. This may explain why naked invocation of the Rehnquist memorandum and the pernicious duty to sit seems to show up in unpublished opinions.¹⁷⁰

170. Regarding unpublished judicial opinions, see Amy E. Sloan, *If You Can't Beat 'Em, Join 'Em: A Pragmatic Approach to Nonprecedential Opinions in the Federal Appellate Courts*, 86 NEB. L. REV. 895, 898 (2008) (“Nonprecedential opinions have become the dominant mode of disposition for cases resolved on the merits in the federal appellate courts. The numbers vary somewhat by circuit, but overall 84% of opinions issued by the federal courts of appeals are nonprecedential.”) (tracing history of rule 32.1 in *Federal Rules of Appellate Procedure* historically limiting counsel’s ability to cite unpublished opinions but that was recently revised to permit citation of appellate opinions issued after January 1, 2007, regardless of their designation); David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1671 (2005); Richard B. Cappalli, *The Common Law’s Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 788-92 (2003) (questioning whether cases resolved through non-precedential opinions truly receive full judicial consideration and arguing that lack of public accountability likely results in less thorough consideration); Jeffrey O. Cooper, *Citability and the Nature of Precedent in the Courts of Appeals: A Response to Dean Robel*, 35 IND. L. REV. 423, 428 (2002) (arguing that manipulable publication decisions create at least appearance of arbitrary judging); Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711, 732 (2004); Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989) (examining deployment of published and unpublished opinion and concluding that it presents opportunity for unequal application of law); William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978) (criticizing the system of selective publication and restrictions on citation as creating opportunities for result-oriented decisions with thin analysis; also perhaps the most prominent scholarly article on this subject).

As reflected in the citations above, almost all scholarly attention on the subject has focused on appellate court use of unpublished non-precedential opinions. However, the same factors encouraging use of unpublished opinions by the court and making such use problematic exist at the trial court level.

In the modern cyber-world, one can argue that there is no longer such a thing as an unpublished opinion. See Sloan, *supra*, at 898 (“Although frequently referred to as unpublished opinions, nonprecedential opinions are, in fact, published in any meaningful sense of the word.”); *id.* at 898 n.13 (“[T]oday all

In similar fashion, a disproportionate number of the cases invoking the pernicious version of the duty to sit or citing the Rehnquist memorandum appear to involve criminal prosecutions in which a defendant is seeking to disqualify the assigned judge. The disqualification motions in this sub-genre of cases appear not to be well-taken. Where the criminal matter is not one of high-dollar, white-collar crime, the criminal defendant is more likely not to be represented by top flight counsel devoting great attention to the case, nor is the government likely to be devoting substantial resources to research of legal or historical questions. Further, the government is presumably resisting most criminal defendant motions for judicial recusal and has an incentive to refrain from correcting a court's misplaced reliance on either the Rehnquist memorandum or the pernicious duty to sit because consideration of either of these makes it less likely that the court will grant a defendant's recusal motion. It also simply appears that current legal opinion runs less favorably toward recusal efforts by criminal defendants, perhaps out of a view that most such motions are baseless or that wariness regarding recusal is required more in the criminal arena out of concerns for judicial efficiency and prompt disposition of criminal dockets.¹⁷¹

[opinions] are published, either in print in *West's Federal Appendix* . . . reporter or electronically on Westlaw, LexisNexis, or on the courts' own websites."'). Nearly all judicial decisions are capable of being retrieved from an electronic database. Lexis and Westlaw are available to practically every attorney whose office has electricity, as are court websites. Recognizing this, the federal courts have recently relaxed or eliminated traditional prohibitions on citation of "unpublished" opinions in briefs and memoranda. Notwithstanding these practical limitations on the published/unpublished distinction, courts and practitioners continue to note the difference between the thorough opinions often found on the pages of the Federal Reporter or Federal Supplement Reporter and the usually shorter, less elegant memoranda issued by courts hurriedly disposing of business. Perhaps disqualification opinions, especially those thought to lack merit, fall inordinately into this latter category, which may in turn provide a breeding ground where the Rehnquist memorandum and the duty to sit can continue to live in spite of the 1974 statutory changes to federal recusal law.

171. For example, Nevada permits peremptory challenges of trial judges in civil cases but not in criminal cases; see NEV. S.CT. R. 48.1(2) (2007). In addition, the federal system has the Speedy Trial Act, 18 U.S.C. § 3161, a version of which is found in most states, requiring that trial begin within a specified time after arrest or charge. If the deadlines are missed, the criminal defendant may be released and escape prosecution, creating both legal and political problems for the state and perhaps making the courts less willing to grant a

For whatever combination of reasons, there continue to appear references in federal court cases to a purported duty to sit or a fawning citation to the Rehnquist memorandum. These are an embarrassment to the federal judiciary, even where they do not actually result in misapplication of the law or erroneous recusal decisions. In at least a few of these cases, however, it appears that judges improperly enamored of the duty to sit or the Rehnquist memorandum have displayed insufficient sensitivity to disqualification issues.¹⁷² Worse yet, at the highest level of the federal system—the Supreme Court—duty to sit thinking continues to be advanced with perverse pride in cases where the Justices should realize that advancing the integrity of the Court's decisions is far more important than whether their children can practice law in their most preferred setting or whether a Justice can go duck hunting with a the Vice-President.¹⁷³

B. *Continuing Persistence of the Duty to Sit Concept in the States*

More important than the occasional embarrassments reflected in federal opinions, however (save for the occasionally significant failure of a U.S. Supreme Court Justice to recuse), is that a significant number of state court opinions have continued to refer to and embrace the duty to sit, notwithstanding its abolition by the federal courts and the ABA. Approximately a half-dozen states, most clearly Nevada, continue to profess allegiance to the pre-1972 pernicious version of the concept as one highly resistant to

disqualification motion that may delay proceedings. See Margaret M. Vierbuchen, *Speedy Trial*, 83 GEO. L.J. 981, 995 n.1309 (1995). However, the time spent deciding a defendant's recusal motion can be construed as defendant-induced delay that prevents dismissal for failure to meet Speedy Trial Act deadlines. See, e.g., *United States v. Muñoz-Franco*, 487 F.3d 25, 60-61 (1st Cir. 2008); *Martin v. Sec'y, Dept. of Corr.*, 262 F. App'x. 990, 995 (11th Cir. 2008). Nonetheless, the pressure to move swiftly in criminal matters and avoid release of a potentially dangerous defendant on technical grounds may make courts less receptive to disqualification in criminal cases.

172. See *supra* text accompanying notes 152-53 (discussing cases where duty to sit or Rehnquist memorandum have been invoked to deny meritorious disqualification motions).

173. See *infra* notes 229-42 and accompanying text (discussing U.S. Supreme Court's continued insensitivity regarding disqualification and in particular Justice Scalia's now-infamous hunting party with Vice-President Cheney).

judicial recusal.¹⁷⁴ State law regarding recusal is not, of course, controlled by the 1974 amendments to 28 U.S.C. § 455. But state law should be equivalent regarding recusal if the state has adopted the 1972 ABA Judicial Code (or a later version). Consequently, these states would appear to continue to be applying a variety of outmoded and discredited disqualification law and using it to the disadvantage of litigants.

As discussed below, an even larger number of states, perhaps as many as twenty, remain divided or unclear regarding the continuing existence of a duty to sit doctrine¹⁷⁵ even though the overwhelming adoption of 1972 ABA Code Canon 3C (which was part of the impetus for the 1974 federal legislation) or its successor 1990 Code Canon 3E by the states logically should mean that the duty to sit doctrine has been repealed or defanged in these states.¹⁷⁶

The ABA Code change alone, of course, could not erase the duty to sit unless individual states adopted it and interpreted it as eliminating the duty to sit doctrine. In some states as well as in the federal courts, statutory change was also required to the extent that duty to sit precedent had been based on an interpretation of a disqualification statute. But whatever the individual state technicalities of revising their respective state judicial codes, one would have expected eventual near-uniformity on the issue. Instead, as discussed below, the duty to sit doctrine, or at least a large part of the notion of a duty to sit, continues in many states and in some federal court

174. See *infra* notes 188-89 and accompanying text. See, e.g., *Ex parte Hill*, 508 So. 2d 269, 271-72 (Ala. 1987) (reversing trial judge's decision to recuse self due to friendship with litigants); *Las Vegas Downtown Redev. Agency v. Eighth Judicial Dist. Ct.*, 5 P.3d 1059, 1063 (Nev. 2000) (reversing trial court judge's decision to recuse on basis of receiving campaign contributions from litigants and ordering him to preside over case). Nevada is particularly unusual in that its commentary to Canon 3C regarding disqualification expressly endorses the duty to sit and cites *Ham v. District Court*, 566 P.2d 420, 424 (Nev. 1977), the state's initial lead case endorsing the concept after *Laird v. Tatum* and the 1974 amendment to federal law. See NEV. CODE JUD. CONDUCT Canon 3E (2006).

175. See *infra* notes 190-216 and accompanying text.

176. See FLAMM, *supra* note 2, § 20.8 (discussing the division of the states and making rough categorization of states' rules).

decisions that seem not to appreciate the historical significance of the 1974 legislation.¹⁷⁷

Even commentary affiliated with the ABA appears to understate the degree to which the organization's own Code had turned away from the duty to sit, a fact that should have been apparent after the 1974 amendments to the federal law of disqualification, which was intended to move in lockstep with the ABA standards and recusal practice in the states. For example, the annotations to the 1990 Judicial Code treat the duty to sit as continuing to prevail, giving the concept a bold-faced heading in the annotation and citing Justice Rehnquist's *Laird v. Tatum* opinion as if it were just another case.¹⁷⁸

To be fair to the annotators of the 1990 Judicial Code, the commentary read as a whole appears to recognize that when recusal is required, the duty to sit concept does not negate the duty to disqualify upon a proper showing of bias, reasonable question regarding impartiality, or prohibited financial or family ties to litigants or counsel. Similarly, the ABA commentary does not suggest that duty to sit notions be used to resolve close cases against recusal. One might therefore only criticize the ABA authors for merely being unclear about whether they were speaking of the benign version of the duty or its pernicious evil twin. Just the same, it is at least a little shocking to see the Rehnquist's memorandum quoted as unquestioned authority when Congress regarded it as so deficient as to require a change in federal disqualification law.

177. See FLAMM, *supra* note 2, § 20.8; Bassett, *supra* note 2, at 1243 n.146 ("Although the 1974 amendments eliminated the 'duty to sit' doctrine . . . the cases suggest that some judges effectively have retained this doctrine in resolving recusal and disqualification matters involving suggestions of bias or prejudice."); *Obert v. Republic W. Ins. Co.*, 398 F.3d 138, 144-45 (1st Cir. 2005) (noting varying attitudes of judges, with some still stressing duty to sit as ground for resisting recusal in close cases).

178. See ABA ANNOTATED, *supra* note 31, at 87 ("Though a judge has a duty to not sit where disqualified, a judge has an equally strong duty not to recuse himself when the circumstances do not require recusal.") (citing *Laird v. Tatum*, 409 U.S. 824 (1972)); *id.* ("Though a judge has a duty to recuse when required by Canon 3E, a judge has an equally strong duty not to recuse when the circumstances do not require recusal. See *Laird v. Tatum*, 409 U.S. 824 (1972) (a judge 'has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified.').") (citations omitted)).

In addition, the ABA annotators cite cases continuing to embrace the common law duty to sit as though this were uncontroversial while giving only attention rather than endorsement to the better modern view that close questions should be resolved in favor of disqualification, a fact that makes it impossible for any supposed duty to sit to carry weight equal to the duty of impartiality. For example, the ABA Commentary to Canon 3(E)(1) gives only passing treatment to Professor Leslie Abramson's sensible assessment:

See also, Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 GEO. J. LEGAL ETHICS 55, 62 fn. 37 (2000)(asserting that the Code of Judicial Conduct's rules for disqualification suggest that the appearance of partiality outweighs the duty of a judge to sit and decide a particular case). Some courts have held that on close questions, "the balance tips in favor of recusal." *See In re Boston's Children First*, 244 F.3d 164 (1st Cir. 2001); *Nichols v. Alley*, 71 F.3d 347 (10th Cir. 1995).¹⁷⁹

Professor Abramson's assessment is the majority view among scholars, federal courts, and most state courts, not merely a view of recusal offered as an alternative to an equally valid approach resistant to recusal. Yet as late as 2004, ABA publications could be read by those without background in the issue as continuing to treat the pernicious duty to sit concept as viable. It perhaps should then be no surprise that many states continue to cling to the doctrine, at least rhetorically. The Abramson assessment should be the centerpiece of the ABA's discussion of disqualification rather than a "*see also*" cite on the periphery of discussion. Yet the duty to sit and the Rehnquist memorandum continue to be cited as if they had not been the subjects of controversy thirty-five years ago. The episode calls to mind the famous aphorism that the English common law forms of action have been "buried" but "rule us from the grave."¹⁸⁰ In similar fashion, the pre-1970s

179. *See* ABA ANNOTATED, *supra* note 31, at 188 (italics in original).

180. *See generally* F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 2 (1965).

traditional attitude toward the duty to sit seems to continue rising from its presumptive coffin.¹⁸¹

Legal scholarship requires some humility. During the course of a five-hundred-page book, mistakes or poor choices of emphasis are often made, just as there are likely to be such errors in this 150-page Article. But the Annotated Judicial Code's preference for treating recusal in close cases as a minority view subordinate to the power of the duty to sit concept seems inexplicable. By 2004, the date of the ABA Annotated Code from which the above quotation is taken, the clearly established better view was that neither the 1972 nor 1990 ABA Codes retained the common law duty to sit concept as a brake against disqualification and it was clear beyond doubt that the duty to sit had been abolished under the federal judicial code. Similarly, it should also have been clear to the annotation authors that Justice Rehnquist's participation and memorandum in *Laird v. Tatum* had attracted substantial criticism and nearly derailed his quest for the Chief Justice position. As of 2004, the Annotation's deferential view of the duty to sit was at least inappropriate and in my view clearly wrong. Even defenders of the benign duty to sit as part of a general responsibility to hear and decide cases could not credibly maintain that this concept was of equal importance to the requirement that judges recuse themselves if an adequate showing of recusal had been made pursuant to Canon 3A.

Ironically, one state court decision mentioning the duty to sit with seeming approval is the now-notorious and perhaps soon infamous matter of *Caperton v. A.T. Massey Coal Company, Inc.*,¹⁸² a case related to *Caperton v. A.T.*

181. More benignly, one could see the continued persistence of duty to sit rhetoric and use of the Rehnquist memorandum as merely the carryover of linguistic bad habits similar to the continued use of the term "cause of action" when under federal pleading law one should be talking only of a "claim for relief." Similarly, one continued to hear of motions for "directed verdict" or "j.n.o.v." instead of the modern term "judgment as a matter of law." Just as some states have retained those civil procedure terms rather than adopting the federal nomenclature, states may willingly choose to continue to adhere to pre-1970s notions of the duty to sit. But where a state has adopted a recent version of the ABA Judicial Code, one would have expected that the state was also eliminating the pernicious version of the duty to sit and that the Rehnquist memorandum would not be cited in disqualification decisions.

182. No. 33350, 2008 WL 918444 (W. Va. Apr. 3, 2008).

Massey Coal Co.,¹⁸³ which the U.S. Supreme Court has agreed to review and where the ABA has submitted an amicus brief attacking the decision of a West Virginia Supreme Court Justice to sit on a case (and provide the deciding vote) in spite of having received three million dollars in campaign contributions (more than sixty percent of his electoral war chest) from the CEO of Massey or entities affiliated with him.¹⁸⁴ Among other things, the *Caperton v. Massey* litigation illustrates the degree to which the duty to sit doctrine and nomenclature makes disqualification jurisprudence unnecessarily more complicated and uncertain.

The ABA Model Code or commentary, of course, could neither erase nor enshrine the duty to sit unless individual states adopted it and interpreted it as eliminating the duty to sit doctrine. In some states and in the federal courts, statutory change was also required to the extent that duty to sit precedent had been based on an interpretation of a disqualification statute. Also, if the case for disqualification is not close, the duty to sit concept endures in a more benign form in that a judge is of course required to do his or her duty and hear and decide cases unless there is at least a colorable ground for disqualification.¹⁸⁵ Consequently, not every state court's dicta regarding a "duty to sit" indicates

183. No. 33350, 2007 WL 4150960 (W. Va. Nov. 21, 2007).

184. See 2008 WL 918444 at *38 ("West Virginia's judicial officers have a duty to hear such matters as are assigned to them, except those in which disqualification is required. This 'duty to sit' is not optional." (quoting *U.S. v. Mitchell*, 377 F. Supp 1312, 1325-26 (D.C. Cir. 1974), a case decided prior to the statutory abolition of the duty to sit in the federal judicial code and Canon 3B(1) of the West Virginia Code of Judicial Conduct, which reads exactly like the 1990 ABA Model Code, which does not embrace the duty to sit). See also *Caperton v. A.T. Massey Coal Co., Inc.*, 2008 WL 918444 (Benjamin, C.J., concurring) (attempting to defend participation in the case despite being target of complaints about his financial and political ties to defendant CEO); John Gibeaut, *Caperton's Coal: The Battle over an Appalachian Mine Exposes a Nasty Vein in Bench Politics*, A.B.A. J., Feb. 2009, at 52 (summarizing case background); *id.* at 53 ("[T]here are remnants of British legal thought [resistant to recusal] . . . For one, a duty to sit arose so cases in small jurisdictions won't go wanting for resolution in the absence of an unquestionably evenhanded jurist. The obligation to hear cases can become especially nettlesome for intermediate appeals courts and courts of last resort, where the pool of replacement judges is considerably smaller than at the trial level.").

185. See *United States v. Snyder*, 235 F.3d 42, 46 n.1 (1st Cir. 2000).

that the court continues to embrace the now-discredited version of the concept as unduly resisting recusal.

While the majority of federal courts reject the traditional pernicious duty to sit concept and note its 1974 abolition,¹⁸⁶ state courts have been less clear on the point, although it appears the majority of states have precedent consistent with federal law.¹⁸⁷ On the other end of the spectrum, the leading treatise on judicial disqualification identifies as many as eight states (Alaska, Arkansas, Georgia, Maryland, Mississippi, Missouri, Texas, and Wyoming) as continuing to be

firmly in accord with the rule that a judge has a duty to sit in cases in which mandatory grounds for disqualification have not been established. In these jurisdictions, a judge may only disqualify himself where there is a compelling reason for doing so. . . . In fact, it is sometimes considered improper for a judge to disqualify himself unless he knows the alleged cause of disqualification to exist, or it is shown to be true in fact—no matter how much he would personally like to remove himself from the case.¹⁸⁸

186. See FLAMM, *supra* note 2, § 20.8. See, also *e.g.*, *United States v. Amico*, 486 F.3d 764, 775 n.3 (2d Cir. 2007); *United States v. Cerceda*, 139 F.3d 847, 852 (11th Cir. 1998), *rev'd on other grounds*, 172 F.3d 806 (11th Cir. 1999) (*en banc*); *United States v. DeTemple*, 162 F.3d 279, 286-87 (4th Cir. 1998); *United States v. Werner*, 916 F.2d 175, 177 (4th Cir. 1990); *Barksdale v. Emerick*, 853 F.2d 1359, 1360 (6th Cir. 1988); *Delesdernier v. Porterie*, 666 F.2d 116, 119 (5th Cir. 1982); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1107 (5th Cir. 1980); *Fredonia Broad. Corp. v. RCA Corp.*, 569 F.2d 251, 256-57 (5th Cir. 1978); *Rice v. McKenzie*, 581 F.2d 1114, 1115-16 (4th Cir. 1978); *United States v. Pepper & Potter, Inc.*, 677 F. Supp. 123, 125 (E.D.N.Y. 1988); *In re Wolfson*, 453 F. Supp. 1087, 1092 (S.D.N.Y. 1978); *Bradley v. Milliken*, 426 F. Supp. 929, 933 (E.D. Mich. 1977).

187. See FLAMM, *supra* note 2, § 20.8, at 610-12 (discussing the division of the states and making rough categorization).

188. *Id.* at 610-11 (footnotes omitted). *City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial District Court*, 5 P.3d 1059 (Nev. 2000), is quite consistent with Flamm's description of the remaining hard-core duty to sit cases. In that case, the trial judge, although not being persuaded that he was actually prejudiced by campaign contributions, recused himself in order to avoid what he regarded as potential reasonable concern over his impartiality. *Id.* at 1061. The Supreme Court reversed and required his continued participation in the case absent a clearer, more compelling ground for disqualification. *Id.* at 1062-63.

One state, Nevada, has not only continued to endorse the duty to sit but also has specifically approved it in commentary to the Judicial Code.¹⁸⁹

According to Flamm's disqualification treatise, which lists considerable but not exhaustive state-specific information, the duty to sit, although alive and well in some states, is a minority rule. Additional state-by-state examination reflects the following divergence among the states regarding the duty to sit inhibition of recusal. As of the close of 2008:

- a) One state (Nevada) specifically speaks to the duty to sit and endorses the doctrine in state commentary to Canon 3E regarding disqualification;
- b) A half-dozen states (Alabama; Arkansas; Mississippi; Nevada; South Carolina) still seem to clearly embrace the duty to sit doctrine.¹⁹⁰
- c) Although nearly twenty states are unclear about the status of the duty to sit, at least twenty appear to have rejected it and another eight have probably buried the doctrine, at least implicitly or sub silentio.

A rough current scorecard of the status of the duty to sit in the states suggests the following characterization of status of the duty to sit.

189. See NEV. CODE OF JUD. CONDUCT Canon 3 cmt. 3E(1).

190. There is some divergence between my interpretation of the case law and Flamm's. For example, Flamm lists Alaska as a hard-core duty to sit state. However, the case cited by Flamm for this proposition, in addition to being an intermediate appellate case, simply states that a judge should sit on a case "when there is no valid ground for disqualification," an admonition that stops short of counseling judges to resolve doubts in favor of remaining on a case. See *Keller v. State*, 84 P.3d 1010, 1012 (Alaska Ct. App. 2004). In my view, Alaska's version of the duty to sit is simply the benign version of the concept that counsels judges not to avoid difficult or politically charged cases. See Marla N. Greenstein, *Judicial Disqualification in Alaska Courts*, 17 ALASKA L. REV. 53 (2000) (explaining Executive Director of Alaska Commission on Judicial Conduct's reasoning for the State's recusal policy, including availability of peremptory challenges, and suggests that the duty to sit concept in Alaska does not require case for disqualification based on cause to be beyond debate to require recusal); see also FLAMM, *supra* note 2, § 20.8, at 611-12 (noting that even in states where duty to sit is still good law, the concept is not applied where state permits peremptory challenge to initially assigned judge).

1) *No Duty to Sit or Abolition of the Duty to Sit*

District of Columbia;¹⁹¹ Georgia;¹⁹² Iowa; Kansas;¹⁹³ Maine; Massachusetts; Michigan;¹⁹⁴ Minnesota; Missouri;¹⁹⁵ Montana; Nebraska; New Jersey; North Carolina; Ohio; Oregon; Pennsylvania; Rhode Island; South Dakota; Tennessee; Virginia.

2) *Most Likely No Duty to Sit or Abolition of Duty to Sit*

Arizona;¹⁹⁶ Florida;¹⁹⁷ Hawaii;¹⁹⁸ Idaho; Illinois; New Hampshire;¹⁹⁹ New York; Washington; Wisconsin

191. In surveying the states, I have assumed (as, apparently, has FLAMM, *supra* note 2, § 20.8), that where a state has adopted the current version of the ABA *Judicial Code* and there is no recent case law discussing the duty to sit concept that the state adheres to the broad ABA and federal court position that the duty to sit has been eliminated, at least in its pernicious version counseling against recusal absent compelling circumstances. The District of Columbia is such a jurisdiction, as is Iowa, Maine, Massachusetts, Minnesota, Montana, Nebraska, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, and Virginia.

192. I am at some variance with Flamm regarding classification of Georgia. Flamm cites *Patterson v. Butler*, 371 S.E.2d 268, 269 (Ga. Ct. App. 1988), as authority for his view that Georgia is a duty to sit state. FLAMM, *supra* note 2, § 20.8, at 610 n.46. Upon reading, I did not view this case as endorsing the duty to sit and found no modern Georgia cases endorsing the duty to sit.

193. *See, e.g.*, *State v. Logan*, 678 P.2d 181, 185 (Kan. Ct. App. 1984) (Abbott, J., concurring) (noting with favor congressional abolition of duty to sit in 1974 legislation).

194. *See* *Grievance Adm'r v. Fieger*, 729 N.W.2d 451 (Mich. 2006) (“Neither the Michigan Constitution nor the Michigan Court Rules impose a ‘duty to sit.’”). *But see* *Adair v. State*, 709 N.W.2d 567, 579 (Mich. 2006) (“[W]here standards governing disqualification have not been met, disqualification is not optional; rather, it is prohibited (quoting *In re Aguinda*, 241 F.3d 194, 201 (2d Cir. 2001)).

195. Missouri is another state where my construction of the caselaw is at variance with Flamm’s. Flamm cites *In re B.R.M.*, 111 S.W.3d 460, 462 (Mo. App. 2003), as making it a duty to sit state, but the case merely states that a “trial judge has an affirmative duty not to disqualify himself from hearing a case unnecessarily.” *See* FLAMM, *supra* note 2, § 20.8, at 611 n.49. This language can be reasonably interpreted as simply stating the general rule and benign version of the duty to sit positing only that judges should do their jobs in the absence of a colorable recusal claim.

196. Arizona has old caselaw supporting the duty to sit, permitting a judge to preside in a case in which involving a bank to which he was indebted, a result clearly out of sync with modern attitudes about judicial propriety. *See* *Conkling v. Crosby*, 239 P. 506, 511-12 (Ariz. 1925). Because *Conkling v. Crosby* seems so

3) *Perhaps a Duty to Sit or Continued Vitality of Old Duty to Sit Cases*

Alaska,²⁰⁰ California;²⁰¹ Colorado;²⁰² Connecticut;²⁰³
 Delaware,²⁰⁴ Indiana;²⁰⁵ Kentucky,²⁰⁶ Louisiana;²⁰⁷

outdated and no recent duty to sit caselaw exists in Arizona, which has adopted the ABA Model Code, it is probably safe to say that Arizona would not apply the pernicious version of the duty to sit concept to resist recusal if the case for disqualification were at least a close one. However, *Conkling v. Crosby* has not been overruled.

197. *See, e.g.,* Dep't of Revenue v. Golder, 322 So. 2d 1, 1, 2, 6 (Fla. 1975) ("As between the two policies, I have little difficulty making the choice so long as the apparent predisposition is based solely on my prior analysis of the law for purposes unconnected with this particular lawsuit, the parties or their counsel.") (noting benign version of duty to sit but also notes requirement of impartial judiciary and importance of public confidence in courts). In essence, *Golder* appears to adopt the soundest portion of the Rehnquist memorandum, which espouses the view that a judge's general jurisprudential views are not cause for recusal, but rejects the Rehnquist memorandum's endorsement of a duty to sit as a counterweight to recusal. *Id.*

198. Hawaii cases mentioning the duty to sit are older and appear only to embrace the benign version of the duty counseling courts not to avoid difficult or controversial cases. *See, e.g.,* EWA Plantation Co. v. Holt, 18 Haw. 509, 510 (1907); *Notley v. Brown*, 17 Haw. 393, 394 (1906).

199. New Hampshire has no recent duty to sit precedent, but the rule of necessity is discussed in a manner suggesting that New Hampshire follows the Federal and ABA Model Code approach. *See, e.g.,* *Lorenz v. N.H. Admin. Office*, 858 A.2d 546 (N.H. 2004).

200. *See generally* Greenstein, *supra* note 190 (describing disqualification in Alaska courts).

201. California Civil Code 170 states that a "judge has a duty to decide any proceeding in which he or she is not disqualified." At first blush, this looks like a codification of the traditional pernicious duty to sit set forth in the Rehnquist memorandum. However, subsequent caselaw suggests that the statute is merely codifying the benign view that judges should not recuse themselves without at least a reasonable basis for disqualification. *See* *Morrow v. Superior Court*, No. A113535, 2007 WL 241778 (Cal. Ct. App. Jan. 30, 2007) (by longstanding precedent, judge's indirect financial links to subject matter of dispute do not present reasonable basis for disqualification); *United Farm Workers v. Superior Court*, 216 Cal. Rptr. 4, 8-9 (Cal. Ct. App. 1985) ("Section 170, which introduces the disqualification statutes, is a new section expressing the proposition . . . that '[a] judge has a duty to decide any proceeding in which he or she is not disqualified.' The legislative history shows this section was prompted by statements suggesting that certain judges did not believe they had such a duty.") (alteration in original); *see also infra* pp. 72-74 (discussing perceived tendency of Nevada trial judges to avoid politically sensitive cases as impetus for Nevada Supreme Court's embrace of duty to sit doctrine). *But see* *Olson v. Cory*, 184 Cal. Rptr. 325, 334 (1982) (Cal. Ct. App. 1982) (claiming federal courts to have unanimously embraced duty to sit and failing to note its abolition in

1972 ABA Code and 1974 federal legislation). But read as a whole, *Olson v. Cory* was a rule of necessity case rather than a specific disqualification case. Consequently, the duty to sit language really is mere dicta unnecessary to the decision.

202. Colorado's judicial code follows the 1990 ABA Model Code language but recent caselaw favorably mentions the duty to sit. *See, e.g., People v. Thoro Prods.*, 45 P.3d 737, 747 (Colo. Ct. App. 2001). In context, however, these cases appear to be embracing only the benign version of the duty to sit concept. For example, *People v. Thoro Products* involved a defendant who felt the presiding judge was biased due to the judge's earlier admonishment of defense counsel. This admonishment was related to defense counsel's prior representation of a former client of the judge's in a malpractice action against the judge. The *Thoro Products* defendant had been informed of this prior to retaining counsel in question.

203. Connecticut has adopted the 1990 ABA Model Code but recent caselaw endorses the duty to sit and cites the Rehnquist memorandum. *See, e.g., Jordaan v. Wayland*, No. CV065004384, 2008 WL 544619, at *2 (Conn. Super. Ct. Jan. 1, 2008) (quoting earlier state case favorably citing section of Rehnquist memorandum commenting favorably on pernicious version of duty to sit); *State v. Fuller*, No. CR1022619, 1996 WL 218207, at *4 (Conn. Super. Ct. Apr. 8, 1996) (citing Rehnquist memorandum favorably regarding duty to sit). However, the Flamm treatise, *supra* note 2, § 20.8, at 610-11 does not classify Connecticut as a duty to sit state and cites no Connecticut precedent on the issue.

204. The Flamm treatise does not characterize Delaware as a duty to sit state but it has recent precedent aggressively endorsing at least the benign version of the duty. *See, e.g., State v. Charbonneau*, No. 0207003810, 2006 WL 2588151, at *23 (Del. Super. Ct. Sept. 8, 2006) ("The Supreme Court also has noted that there is a compelling policy reason for a judge not to disqualify himself or herself unnecessarily, and in the absence of genuine bias, a litigant should not be permitted to 'judge shop.' In that regard it is also recognized that judges who too lightly recuse shirk their official responsibilities, imposing unreasonable demands on their colleagues to do their work and [making for] the untimely processing of cases.").

205. Indiana is not classed as a duty to sit state by the Flamm treatise and recent precedent appears to take the mainstream approach of combining a benign version of the duty to sit that does not unduly resist recusal. *See, e.g., Peterson v. Borst*, 784 N.E.2d 934, 935 (Ind. 2003) ("A judge has a 'duty to sit' under Canon 3(b) (1) and not to recuse 'unless disqualification is required.'"). Reasonable minds may differ as to whether "required" means that a clear and compelling case for disqualification must be made or whether "required" simply means that a reasonable and meritorious case for disqualification has been made. Hence, Indiana, like most states, is probably not a duty to sit jurisdiction as the term was used in the Rehnquist memorandum. But one cannot be sure that the pre-1970s version of the duty to sit will not in the future be used in Indiana or similar states to resist disqualification.

206. *See, e.g., Dean v. Bondurant*, 193 S.W.3d 744, 749 (Ky. 2006) (quoting *City of Las Vegas Downtown Redev. Agency v. Eighth Judicial Dist. Court*, 5 P.3d 1059, 1062 (Nev. 2000), a prominent duty to sit case from a strong duty to sit jurisdiction). The Flamm treatise, however, does not treat Kentucky as a duty to sit state. *See* FLAMM, *supra* note 2, § 20.8, at 610-11; *see also*

Maryland²⁰⁸; New Mexico;²⁰⁹ North Dakota;²¹⁰ Oklahoma;²¹¹
Texas²¹²; Utah;²¹³ Vermont;²¹⁴ West Virginia;²¹⁵ Wyoming²¹⁶

Commonwealth v. Smith, 875 S.W.2d 873, 879 (Ky. 1946) (setting forth benign version of duty to sit doctrine prior to abolition of pernicious version of doctrine at federal level).

207. See, e.g., State v. Connolly, 930 So. 2d 951 (La. 2006) (finding that a judge has discretion to recuse for any reason regarded as sufficient but reason must be reasonable). The Flamm treatise classifies Louisiana as a duty to sit state but this in my view reads too much into *State v. Connolly*. See also Bergeron v. Ill. Cent. Gulf R.R., 402 So. 2d 184, 186 (La. Ct. App. 1981) (denying recusal when asserted grounds did not fit any listed in Louisiana Code of Civil Procedure Article 151, which provides exclusive listing of grounds for disqualification); State v. Doucet, 5 So. 2d 894, 898 (La. 1914) (discussing traditional duty to sit as requirement not to avoid difficult cases)

208. Maryland is another state where Flamm and I diverge. See FLAMM, *supra* note, § 20.8, at 610-11 (citing *In re Turney*, 533 A.2d 916, 920 (Md. 1987)) for his view that Maryland is a strong duty to sit state. But *Turney* states only that the duty to sit where not disqualified is equal to the duty to recuse when required, which stops short of creating a presumption against disqualification and there placing Maryland in the category of states leaning toward a duty to sit but not overtly embracing it.

In *Turney*, a judge refused to disqualify himself in a case in which the defendant potentially would expose the judge's son as the purveyor of a fake driver's license involved in the case. The judge's refusal to recuse was reversed and the judge censured. See also Corapcioglu v. Roosevelt, 907 A.2d 885, 904 (Md. Ct. Spec. App. 2006) (endorsing duty to sit in what appears to be its benign form as admonition not to recuse unnecessarily); Jefferson-El v. State, 622 A.2d 737, 742-43 (Md. 1993) (same); Surratt v. Prince George's County, 578 A.2d 745, 758 (Md. 1990) (requiring recusal motion to be heard by different judge where motion involved sensitive personal allegations that judge allegedly made romantic overtures to counsel).

209. Flamm does not list New Mexico as a duty to sit state, but there are several recent cases that can be read as adopting the duty to sit concept as it existed prior to the 1972 ABA Code and changes to federal law. See State v. Hernandez, 846 P.2d 312, 326 (N.M. 1993) (stating that duty to sit is of equal strength to duty to step aside where disqualified); Gerety v. Demers, 589 P.2d 180, 184 (N.M. 1978) (same); State v. Salazar, 612 P.2d 1341, 1343 (N.M. Ct. App. 1980) (same).

210. Flamm does not list North Dakota as a duty to sit state and its most recent precedent, although approving the concept, appears to be speaking of the benign version of the duty as a guard against meritless, strategically driven recusal motions. See State v. Jacobson, 747 N.W.2d 481, 487 (N.D. 2008) ("Canon 3(B)(1) was added to the Code 'to emphasize the judicial duty to sit and to minimize potential abuse of the disqualification process.'").

211. Oklahoma's duty to sit precedents are older. See, e.g., *Ex rel. Murray v. Weems*, 29 P.2d 942, 942 (Okla. 1934); *Edwards v. Carter*, 29 P.2d 605, 607 (Okla. 1933). In addition, Oklahoma is not characterized as a duty to sit state by FLAMM, *supra* note 2, § 20.8, at 610-11.

4) *Duty to Sit Clearly Established*

Alabama;²¹⁷ Arkansas;²¹⁸ Mississippi;²¹⁹ Nevada;²²⁰ South Carolina²²¹

212. Texas is seen by FLAMM, *supra* note 2, § 20.8, at 610-11, as a clear duty to sit state on the strength of *In re K.E.M.*, 89 S.W.3d 814, 819 (Tex. App. 2002) and we agree it probably but not inevitably is a duty to sit state.

213. Utah, much like North Dakota, has recent caselaw supporting the duty to sit, but probably only in benign form. *See, e.g.*, *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 996 P.2d 534, 537 (Utah 2000). FLAMM, *supra* note 2, § 20.8, at 610-11, does not regard Utah as a duty to sit state.

214. *See, e.g.*, *State v. Hunt*, 527 A.2d 223, 224 (Vt. 1987) (deeming recusal apt but citing Rehnquist memorandum with approval).

215. Although FLAMM, *supra* note 2, § 20.8, at 610-11, does not treat West Virginia as a duty to sit state, it is the home of the now-infamous *Caperton* decision currently under U.S. Supreme Court review (*see supra* notes 184-84 and accompanying text) as well as other modern duty to sit precedent. *See, e.g.*, *Tennant v. Marion Health Care Found.*, 459 S.E.2d 374, 385 (W. Va. 1995) (endorsing duty to sit as set forth in Rehnquist memorandum, which is cited).

216. Wyoming is characterized in FLAMM, *supra* note 2, § 20.8, as a strong duty to sit state on the strength of *Brown v. State*, 816 P.2d 818, 824 (Wyo. 1991). *Farman v. State*, 841 P.2d 99, 101 (Wyo. 1992), makes the point even more strongly.

217. *See, e.g., Ex parte Hill*, 508 So. 2d 269, 271-72 (Ala. 1987).

218. *See, e.g., Long v. Wal-Mart Stores*, 250 S.W.3d 263, 274 (Ark. Ct. App. 2007) (holding judge must sit unless “there is a valid reason to disqualify” and judge’s decision to step aside “will not be disturbed absent an abuse of discretion”); *Bogachoff v. Arkansas Dep’t of Human Servs.*, No. CA 04-1183, 2006 WL 1344072 (Ark. Ct. App. May 17, 2006) (same); *Turner v. N.W. Ark. Neurosurgery Clinic*, 210 S.W.3d 126, 134 (2005). However, it can be argued that Arkansas is not a true duty to sit state as the term is used in this Article and that the *Long* and *Turner* language merely endorses the benign version of the doctrine in that a “valid” reason for recusal need not be a compelling reason but only a colorable case for disqualification. Erring on the side of caution, however, I am treating Arkansas as a duty to sit state.

219. *See, e.g., Hathcock v. S. Farm Bureau Cas. Ins.*, 912 So. 2d 844, 852 (Miss. 2005) (“In the absence of a judge expressing a bias or prejudice toward a party or proof in the record of such bias or prejudice, a judge should not recuse himself.”) (finding no basis for disqualification where judge represented defendant for twenty years when in private practice and where judge’s son worked for defendant as claims adjuster; Plaintiff in case was claims adjuster claiming wrongful discharge; although case seems egregiously wrongly decided, duty to sit is not mentioned). *But see Washington Mut. v. Blackmon*, 925 So. 2d 780, 785 (Miss. 2004) (“[T]here must be an equilibrium between [the] need for impartiality and the need to prevent the frivolous and unnecessary disqualification of those elected to perform judicial duties. . . . Where required by fairness and compliance with the standards of the Code of Judicial Conduct,

C. *The Error of Duty to Sit Thinking and Its Continuing Impact*

The presumption against disqualification created by the duty to sit doctrine is detrimental to the judicial system in that it reverses what should be the logical presumption in favor of disqualification in close cases. Where the decision of whether to recuse is uncertain or difficult, a ruling in favor of recusal logically enhances public confidence in the judiciary. The court is being careful—perhaps more careful than absolutely necessary—to ensure that no reasonable person (or critical mass of people claiming to be reasonably concerned) can assert that the resulting rulings in the case or the case outcome are the product of bias, prejudice, partiality, or impropriety. In contrast, to the degree that the duty to sit prompts a judge to remain presiding when there are good arguments for disqualification, the lay and legal communities have valid reason to wonder whether the outcome of the case turned in any significant part on favoritism by the judge.

Even where a judge is personally confident that he can be impartial, substantial social science research confirms the common sense insight that people regularly overestimate their ability to be fair and to resist the influence of extraneous factors.²²² Although judges may be

the duty to recuse prevails; but otherwise, the judges have a duty to serve unless they cannot adjudicate the litigants' claims fairly.”)

220. See *Millen v. Dist. Court*, 148 P.3d 694, 700 (Nev. 2006); *Las Vegas Downtown Redev. Agency v. Dist. Court*, 5 P.3d 1059, 1061 (Nev. 2000); see also discussion of *Las Vegas Downtown Redev.* case, 940 P.2d 127, *infra* note 227 and accompanying text.

221. See *Simpson v. Simpson*, 660 S.E.2d 274, 278 (S.C. Ct. App. 2008) (finding that Canon 3(B)(1) imposes a “duty to sit” and citing *Millen v. Dist. Court*, 148 P.3d 694 (Nev. 2006), a strong duty to sit precedent from perhaps the leading duty to sit state). However, FLAMM, *supra* note 2, § 20.8, does not list South Carolina as a duty to sit state.

222. See Note, *Disqualification of a Judge on the Ground of Bias*, 41 HARV. L. REV. 78, 81 (1927) (“The reasons advanced by the courts [resisting recusal], namely, that he is vindicating the court and not himself and that there is a sufficient check on his emotions through an appeal or impeachment, seem entirely inadequate. A biased mind rarely realizes its own imperfection and would normally prevent that perfect equipoise so desirable in our system of trial. And even if the trial is conducted with perfect justice the public would still be apt to grasp at the thought that vindication actuated by a feeling of revenge has been achieved.”). Notwithstanding the excessively flowery prose and now sexist-sounding vision of the judge as inevitably male, the Harvard Law student

more inoculated against these subconscious influences or biases than laypersons, it appears that they, too, are susceptible.²²³ This is hardly surprising. Judges are human beings and humans, even if well-trained to resist, have shown themselves vulnerable to a number of cognitive errors and heuristic biases.²²⁴ Judges appear resistant, at times almost defensively so, to the idea that they could be anything other than perfectly fair and immune to influences outside the record.²²⁵

who penned this note some eighty years ago correctly anticipated the social science research of the late twentieth and early twenty-first centuries and reflects the widespread belief that a person accused of insufficient neutrality is probably the worst person in the world to assess the charge.

223. See, e.g., Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (reporting on study showing judges susceptible to cognitive illusions and biases); Arthur J. Lurigio et al., *Understanding Judges' Sentencing Decisions: Attributions of Responsibility and Story Construction*, in APPLICATIONS OF HEURISTICS AND BIASES TO SOCIAL ISSUES 91 (Linda Heat et al. eds., 1994); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 595-602 (1998) (discussing hindsight bias and its impact on judiciary); Rachlinski, *supra* note 12, at 102 (same).

224. See CASS SUNSTEIN ET AL., BEHAVIORAL LAW AND ECONOMICS (2000); Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17 (1931).

225. See, e.g., Cheney v. United States Dist. Court, 541 U.S. 913, (2004) (Scalia, J., mem.); Rehnquist, *supra* note 127; Roger J. Miner, *Judicial Ethics in the Twenty-First Century: Tracing the Trends*, 32 HOFSTRA L. REV. 1107, 1117 (2004) (commenting that author, a Second Circuit Judge, “think[s] that the suspicion of the laity [regarding questions as to a judge’s impartiality] is not as great as the rulemakers think it is.”); Amy J. Shimek, *Professional Responsibility Survey: Recusal*, 73 DENV. U. L. REV. 903 (1996) (arguing judges are relatively quick to perceive need to disqualify in cases of financial conflict of interest but resist recusal for reasons of personal relationships, past practice, outside activity, group affiliation, and other non-financial grounds for recusal); see also Shimek, *supra* note 225 (noting that panel of judges commenting on Lubet & Shaman and Goldschmidt articles appear to find modern disqualification law insufficiently deferential to judge’s own good sense); Panel Discussion, *Disqualification of Judges (The Sarokin Matter): Is It a Threat to Judicial Independence?*, 58 BROOK. L. REV. 1063 (1993) (judges tend to view both public and reviewing courts as overly suspicious of trial judges and in particular are, as the title suggests, concerned that disqualification may happen too easily simply because a judge forms an opinion during the course of a case and uses perhaps intemperate language in assessing a situation).

The “Sarokin Matter” involved the disqualification of then federal trial judge H. Lee Sarokin from continuing to sit in *Haines v. Liggett Group, Inc.*, 975 F.2d 81 (3d Cir. 1992), a case involving a claim that the cigarette industry has consciously marketed a dangerous product and deceived consumers. After years of litigation, Judge Sarokin in an opinion characterized the tobacco industry as

Although no system can be made perfectly immune to such influences, erring on the side of disqualification rather than on the side of continuing to sit provides a greater margin of safety and, just as important, upholds the appearance of impartiality and fair justice to the public and policymakers.²²⁶ In return for this benefit, abolition of the

the “kings of concealment.” See *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681, 683 (D. N.J. 1992). Although the language was headline-grabbing and (along with other factors) ultimately disqualifying, Judge Sarokin’s supporters have a reasonable argument that his opinion of the tobacco defendants was not from an extrajudicial source and hence should not have prompted disqualification.

226. This was a prime reason Congress in amending 28 U.S.C. § 455 chose to eliminate the traditional duty to sit concept. See House Report, *supra* note 29, at 6355 (discussing duty to sit concept, as resistance to recusal, “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.”).

The 1972 ABA Model Code, by adding the provision that a judge should step aside where his or her impartiality could be reasonably questioned, was implicitly rejecting the duty to sit but unfortunately did not make this explicit in the Code, Commentary, or Reporter’s Notes. However, the discussion in the Reporter’s Notes is completely consistent with this Article’s criticisms of the duty to sit doctrine and illustrates the evils of the doctrine.

The disqualification section [Canon 3C] begins with a general standard that sets the policy for disqualification—that is, “A judge should disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” The general standard is followed by a series of four specific disqualification standards that the Committee determined to be of sufficient importance to be set forth in detail. Although the specific standards cover most of the situations in which the disqualification issue will arise, the general standard should not be overlooked. Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge’s “impartiality might reasonably be questioned” is a basis for the judge’s disqualification. Thus, an impropriety or the appearance of impropriety in violation of Canon 2 that would reasonably lead one to question the judge’s impartiality in a given proceeding clearly falls within the scope of the general standard, as does participation by the judge in the proceeding if he thereby creates the appearance of a lack of impartiality.

See THODE, *supra* note 133, at 60-61; accord FLAMM, *supra* note 2, § 20.8; see also ABRAMSON, *supra* note 12, at 16-19; ALFINI, ET AL., *supra* note 2, § 14.05D; Bassett, *supra* note 2, at 1227.

Logically, the 1972 Code’s new requirement of recusal where judicial impartiality is subject to reasonable question is inconsistent with the traditional duty to sit and effectively eliminates the duty to sit as discussed in the Rehnquist memorandum. A reasonably informed lay observer could harbor doubts about a judge’s impartiality even if the case for recusal is not clear,

duty to sit carries few costs. Although disqualification motions may be made for strategic rather than legitimate reasons, this occurs even where a duty to sit holds sway. The primary protection against pretextual disqualification motions is sound application of the law. Although judges should not be spooked or railroaded into stepping aside, a policy of disqualification in close cases does not open the floodgates to meritless motions and undue delay.

The duty to sit had more logic a century ago when the population of both citizens and judges was smaller and when communication and travel was more difficult. To recuse in a close case in 1900 may have imposed significant burdens on the system. To recuse in 2008, particularly in an urban area, is merely to allow a judge whose impartiality is beyond question to hear the case. Even in rural areas, substitution of judges is not a great burden. Judges from another region can be assigned to replace a disqualified judge. Travel and electronic communication can be used to facilitate judicial substitution as a consequence of recusal. Although a duty to sit notion retains some allure for specialized courts or a state supreme court, even these situations do not support use of a duty to sit doctrine to permit a judge to continue when there are doubts about impartiality or to require a judge willing to recuse in such cases to remain on the case.²²⁷

compelling, or absolute. Under the 1972 Code (and its successors), the judge in such a situation should step aside. But under the duty to sit doctrine, this same judge would be required to ignore the Code and remain on the case unless the argument for disqualification went beyond creating a reasonable question and rose to the level of near-absolute assurance that the judge could not be impartial. Thus, the duty to sit doctrine, if it remained in force, would negate a substantial measure of the changes in the Model Judicial Code adopted by the ABA and subsequently the U.S. Congress some thirty-five years ago. In addition, of course, the duty to sit doctrine would undermine public confidence in the courts if it resulted in judges staying on a case where reasonable laypersons were concerned about the judge's ability to be fair.

227. For example, the Nevada Supreme Court noted that the Nevada legal community was sufficiently small that relations between parties, counsel, and judges were bound to occur and that requiring recusal in every instance of negative contact outside the courtroom would be inefficient for the system. See *City of Las Vegas Downtown Redev. Agency v. Hecht*, 940 P.2d 127, 129 (Nev. 1997) (citing *In re Dunleavy*, 769 P.2D 1271, 1275 (Nev. 1988)). See ALFINI ET AL., *supra* note 2, § 4.05D (discussing *Hecht* and disqualification generally). Even if this view were correct in 1997, it has begun to look increasingly outdated in light of the growth in Nevada population and the size of the bench (particularly in Las Vegas) during the ensuing years. Even in 1997, of course,

The very language of the duty to sit concept is problematic. By speaking of a “duty” to preside, it is implied that judges who err on the side of disqualification have in some sense gone AWOL or shirked their duties to the office or the system. A better view might be that these judges are in fact acting on a higher plane to ensure that there is no doubt about their impartiality. To be sure, no one wants judges avoiding hard or controversial cases or using recusal as an illegitimate means of reducing caseload. But this goal is adequately accomplished through the ABA Model Code language speaking of a “responsibility” to decide cases. One can even argue that ABA Rule 2.7 is unnecessary in that judges generally reach the bench as a result of a strong work ethic and desire to be noticed. Logically, most will relish the chance to hear and decide cases and have a natural reluctance to do anything other than work hard at the judicial task.²²⁸ Judges who fail to fit this profile present an issue for court administrators and judicial discipline commissions. The pernicious duty to sit, however, will not improve their performance.

D. *Difficulties of the Duty to Sit Doctrine in Application*

1. *The U.S. Supreme Court: Still Insensitive After All These Years.* Perhaps the least enlightened bench regarding judicial disqualification is the U.S. Supreme Court. The Court was almost born with indefensible attitudes toward and examples of recusal. The great Chief Justice John Marshall was a “judge in his own case” when penning the seminal *Marbury v. Madison* opinion in that he had been personally involved in the underlying dispute.²²⁹ Equally iconic Oliver Wendell Holmes committed a similar error

the *Hecht* view was outmoded in that even Western states like Nevada that are sparsely populated outside their urban centers have modern roads, modes of transit, and electronic communications. While one might expect outsiders to treat Nevada as though parts of the state were still served by stagecoach (recall the famous *New Yorker* cartoon with a detailed map of the city that quickly slips into a vast and open brown patch west of the Hudson River), it is a little surprising to see a state’s own high court promoting such a provincial view of the state.

228. I have heard local lawyers bemoan the resistance of some judges to court-ordered or encouraged mediation or other alternative dispute resolution efforts because (from the lawyers’ perspective) of the judges’ felt need to retain control of cases. If these perceptions are correct, trial judges in Nevada hardly need to be reminded of their work responsibilities.

229. 5 U.S. (Cranch 1) 137 (1803); *see supra* note 71 and accompanying text.

when he participated as a Justice in reviewing his work on the Massachusetts Supreme Judicial Court.²³⁰ Hugo Black, hero to many devotees of the First Amendment and the Seventh Amendment, sat on cases involving the constitutionality of legislation he authored.²³¹ Abe Fortas continued to advise President Johnson while sitting in judgment on challenges to the activities of the Johnson Administration.²³² Then-Justice Rehnquist committed his infamous faux pas in *Laird v. Tatum* and in the course of defending it also defended these and other questionable instances of Supreme Court Justices refusing to recuse.²³³

More recently, Justice Antonin Scalia went on his now equally infamous duck hunting trip with Vice-President Dick Cheney and was even more combative about defending his purported honor than was Justice Rehnquist in *Laird v. Tatum*.²³⁴ The case in question involved a challenge by the Sierra Club and others to the alleged participation of unidentified oil industry representatives in the Vice-President's National Energy Policy Development Group [hereinafter the Group]. The Group, chaired by Cheney, was established by President Bush with the charge of establishing a national energy policy. Plaintiffs were concerned that an energy policy designed for oilmen by oilmen²³⁵ might give short shrift to environmental concerns

230. See *supra* note 71 and accompanying text.

231. See *id.* Justice Black was particularly known as a First Amendment absolutist who took literally the Amendment's command that Congress should make *no law* restricting press freedom and generally resisted all censorship efforts. He was also a strong proponent of the civil jury, where he was successful in protecting jury trial against encroachment by the equitable powers exercisable by the bench (See, e.g., *Beacon Theatres, Inc., v. Westover*, 359 U.S. 500 (1959)) and fought less successfully against expanded use of directed verdict and judgment as a matter of law.

232. See *supra* note 53 and accompanying text.

233. See *Laird v. Tatum*, 409 U.S. 824 (1972) (Rehnquist, J., mem.) (denying motion to recuse); *supra* Part I.C.

234. See *Cheney v. U.S. Dist. Court*, 541 U.S. 913 (2004) (Scalia, J., mem.) (denying motion to recuse). See also *infra* note 240 and accompanying text.

235. Like his father, President George H.W. Bush, President George W. Bush had been involved in the oil industry, as had Vice President Cheney as head of Haliburton Corp. See Benjamin W. Cramer, *The Power of Secrecy and the Secrecy of Power: FACA and the National Energy Policy Development Group*, 13 COMM. L. & POL'Y 183, 187-88 nn.16-17; Christopher Scott Maravilla, *That Dog Don't Hunt: The Twelfth Amendment After Jones v. Bush*, 23 PACE L. REV. 213, 223-24 (2002).

and green technologies. They wanted to know the Group's sources of information and opinion. Plaintiffs took the position that the Group was a sufficiently official policy-making arm of government to require transparency and public records regarding the Group's activities by making them subject to the Federal Advisory Committee Act (FACA). Vice-President Cheney and the Bush Administration resisted the lawsuit as an undue infringement upon Executive Branch prerogatives. The trial court agreed with plaintiffs and ordered disclosure, which was affirmed by the federal appellate court.²³⁶ The Administration successfully obtained Court review reversing the decision, with the participation of Justice Scalia, in what was in essence a 5-4 majority ruling.²³⁷

236. See *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004). See also *In re Cheney*, 334 F.3d 1096 (D.C. Cir. 2003), *vacated*, 542 U.S. 367 (2004); *In re Cheney*, No. 02-5354, 2004 U.S. App. LEXIS 19407 (D.C. Cir. Sept. 15, 2004) (proceeding before D.C. Circuit en banc after Supreme Court remand) (per curiam).

The division of votes in *Cheney* was a bit complicated and did not strictly or predictably align according to the political party responsible for a Justice's appointment to the Court, a factor arguably reducing the problematic nature of Republican-appointed Justice Scalia's participation in a case involving Republican Vice-President Cheney.

Justice Kennedy (Republican) wrote the primary opinion of the Court, which was joined by Chief Justice Rehnquist (Republican) and Justices Stevens (Republican but considered an ideological and jurisprudential moderate/liberal); O'Connor (Republican); and Breyer (Democrat), with Justices Scalia (Republican) and Thomas (Republican) joining as to crucial Parts I-IV of the decision. 542 U.S. at 372 (listing majority, concurring and dissenting opinions). Justice Stevens concurred. *Id.* at 392. However, Justices Thomas and Scalia dissented in part, arguing for outright reversal of the appeals court opinion rather than vacation and remand. *Id.* at 393-95. Justices Ginsburg (Democrat) and Souter (Republican but considered moderate) dissented. *Id.* at 396-405.

Without Justice Scalia's participation, the Court would have deadlocked on the major issue of the case, a fact that provides some support to the argument in the *Laird v. Tatum* Rehnquist memorandum that a single Justice's recusal can have undue impact since it would in *Cheney* have resulted in affirmance of the trial court decision by an equally divided Supreme Court. It would hardly be bad jurisprudence to require greater transparency than found with the Cheney energy group. Further, the Court or Congress could provide for substitution of a missing Justice or could instead allow such cases to be decided by the relevant court of appeals sitting en banc.

237. See *Cheney*, 542 U.S. 367. The government's petition for certiorari accepted by the Court framed the issues as:

The case, like many cases with political overtones, was controversial in its own right but became moreso when plaintiff Sierra Club sought Justice Scalia's recusal on the basis of the Justice's duck-hunting trip with the Vice-President while the case was pending.²³⁸ Justice Scalia denied the motion in a memorandum.²³⁹ He argued that while his friendship with Vice-President Cheney would be grounds for recusal if Cheney had been sued in his personal capacity, their social connection was of no moment when the suit involved a suit against Cheney in his official capacity.²⁴⁰

(1) Whether [FACA] . . . can be construed . . . to authorize broad discovery of the process by which the Vice President and other senior advisors gathered information to advise the President on important national policy matters, based solely on an unsupported allegation in a complaint that the advisory group was not constituted as the President expressly directed and the advisory group itself reported.

(2) Whether the court of appeals had mandamus or appellate jurisdiction to review the district court's unprecedented discovery orders in this litigation.

Petition for Writ of Certiorari, *Cheney*, 542 U.S. 367 (No. 03-475). The tone of the questions, slanted with loaded words even as compared to other examples of certiorari advocacy, suggests that the four or more Justices voting to grant review were quite receptive to vacating the trial court order. *Id.* Regarding FACA and constitutional questions it presents, see Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51 (1994).

238. As Justice Scalia was quick to point out, plaintiff Judicial Watch, Inc. did not join the Sierra Club motion and issued a statement that it did not believe recusal was required. 541 U.S. at 913-14.

239. *Id.* at 929.

240. *Id.* at 926 ("If friendship is basis for recusal (as it assuredly is when friends are sued personally) then activity which suggests close friendship must be avoided. But if friendship is *no* basis for recusal (as it is not in official-capacity suits) social contacts that do no more than evidence that friendship suggest no impropriety whatever.") (emphasis in original); *id.* at 920 ("In sum, I see nothing about this case which takes it out of the category of normal official-action litigation, where my friendship, or the appearance of my friendship, with one of the named officers does not require recusal."); *id.* at 918-19 (rejecting plaintiff argument that Cheney's reputation is "on the line" in the case).

Justice Scalia's strident statement is at least empirically and psychologically misleading and in my view wrong. The differences between personal capacity suits against a party and official capacity suits against a party are differences of degree and not the type of night-and-day distinctions that would justify a rule that always requires recusal in one type of case (personal capacity suits) but never in the other type of case (official capacity suits). If one is socially and emotionally friendly with a litigant, one wishes for the friend to prevail in

Depending on one's perspective, Justice Scalia either took strong issue with the facts asserted by the Sierra Club or quibbled over them and their likelihood of reflecting an excessively cozy relationship with a litigant.²⁴¹ More bluntly than most, the Scalia memorandum noted that the Justices act as if they are the law unto themselves regarding matters of recusal. "Since I do not believe my impartiality can reasonably be questioned, I do not think it would be proper for me to recuse. That alone is conclusive."²⁴² The sentiment is not much different than Richard Nixon's famous statement that "[i]f the President does it, it can't be against the law,"²⁴³ words that continue to retain their shock value thirty years later²⁴⁴ while the legal profession still too

litigation regardless of whether an adverse outcome affects the friend/litigant's reputation, pocketbook, personal freedom, or political agenda. Although it may be even harder to be impartial if the friend is a criminal defendant facing a potential prison term, this hardly means there is no partiality when the litigant is a government official whose conduct and reputation will be affected by the case result.

241. *Id.* at 914-15 (detailing facts, characterizing connection to Cheney as remote and trip as modest; "In other words, none of us [Justice Scalia, his son, and his son-in-law] saved a cent by flying on the Vice President's plane."); *id.* at 923 (contending that both movant and newspapers critical of trip "do not even have the facts right"). Of course, Justice Scalia glosses over a significant problem in that because there is no formal discovery concerning the facts of the trip and its secluded nature makes investigation difficult, observers are highly dependent on the Justice's own version of the facts, which may be colored by self-interest.

See also id. at 921 ("I daresay that, at a hypothetical charity auction, much more would be bid for dinner for two at the White House than for a one-way flight to Louisiana on the Vice President's jet. Justices accept the former with regularity. While this matter was pending, Justices and their spouses were invited (*all* of them, I believe) to a December 11, 2003, Christmas reception at the residence of the Vice President—which included an opportunity for a photograph with the Vice President and Mrs. Cheney. Several of the Justices attended, and in doing so they were fully in accord with the proprieties.") (emphasis in original). One might at least question whether the customary Washington galas mingling the pinnacle of the executive, legislative, and judicial branches of government deserve to be considered immune from disqualification consideration.

242. *Id.* at 926-27 (2004). For authority, Justice Scalia cites Chief Justice Rehnquist's nonrecusal memorandum in *United States v. Microsoft*, 530 U.S. 1301 (2000), discussed *infra* notes 283-87 and accompanying text.

243. Archibald Cox, Op-Ed, *Watergate: A Dike That Can Leak*, N.Y. TIMES, June 17, 1982, at A27.

244. The statement is perhaps the centerpiece of the play and movie *Frost/Nixon* and advertisements for the film frequently highlighted the

meekly accepts the Justices' decision to be judges of their own case regarding recusal.

A leading legal ethics authority described the Scalia memorandum as "both disappointing and disingenuous," and an opinion that engaged in "fallacious arguments and misstates and misapplies the Federal Disqualification Statute."²⁴⁵ As this commentator observed:

The close and long-standing friendship between Scalia and Cheney might cause a reasonable person to question Scalia's impartiality in a case of such importance to Cheney, especially in a presidential election year in which energy and environmental issues are being debated.²⁴⁶

In addition, a situation that is universally recognized as relevant to a judge's impartiality is the acceptance of something of value from a litigant. . . .²⁴⁷

Another situation that is universally recognized as relating to a judge's impartiality is ex parte communications. . . .²⁴⁸

[These bases for recusal] are all implicated in Scalia's duck-hunting trip with Cheney.²⁴⁹

Other commentators reached similar assessments of the Scalia memorandum.²⁵⁰

The Scalia memorandum, like its ideological predecessor, the Rehnquist memorandum in *Laird v. Tatum*, is also notable for its defiant attitude. Like the

statement being made by actor Frank Langella in his portrayal of Nixon (in the slightly revised form of "If the President does it, it's not illegal").

245. Monroe H. Freedman, *Duck-Blind Justice: Justice Scalia's Memorandum in the Cheney Case*, 18 GEO. J. LEGAL ETHICS 229, 229, 235 (2004).

246. *Id.* at 230.

247. *Id.*

248. *Id.*

249. *Id.*

250. See David Feldman, Note, *Duck Hunting, Deliberating, and Disqualification: Cheney v. U.S. District Court and the Flaws of 28 U.S.C. §455(A)*, 15 B.U. PUB. INT. L.J. 319 (2006); Timothy J. Goodson, Note, *Duck, Duck, Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of Cheney v. United States District Court*, 84 N.C. L. REV. 181 (2005); Christopher Riffle, Note, *Ducking Recusal: Justice Scalia's Refusal to Recuse Himself from Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913 (2004), and *the Need for a Unique Recusal Standard for Supreme Court Justices*, 84 NEB. L. REV. 650, 651 (2005).

Rehnquist memorandum, the Scalia memorandum is heavy on historical examples of Justices being excessively cozy with litigants or interested parties such as Presidents,²⁵¹ a history that (notwithstanding Justice Scalia's contentions to the contrary) no longer reflects modern norms of impartiality or the law.²⁵² Despite considerable empirical evidence showing that many observers had difficulty with the duck hunting, Justice Scalia dismissed their concern, although observing that "8 of the 10 newspapers with the largest circulation in the United States" and "20 of the 30 largest" had called on him to recuse without "a single newspaper" favoring his continued participation.²⁵³ As Professor Freedman put it, "Unless we are to believe that all these editorialists are unreasonable people, the conclusion is inescapable that a reasonable person *might question* Scalia's impartiality in the case."²⁵⁴

Extended examination of the Scalia memorandum is beyond the scope of this Article. What is important and within the scope of this Article is Justice Scalia's use of the pernicious version of the duty to sit doctrine to justify his non-recusal.

Let me respond, at the outset, to Sierra Club's suggestions 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 stated in their 1993 Statement of Recusal

251. See *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 541 U.S. 913, 916, 924-26 (2004) (Scalia, J., mem.) ("Many Justices have reached this Court precisely because they were friends of the incumbent President or other senior officials—and from the earliest days down to modern times Justices have had close personal relationships with the President and other officers of the Executive.").

252. Freedman, *supra* note 245, at 234 (noting that "the law relating to disqualification has undergone what Scalia himself has called 'massive changes.'" (quoting *Liteky v. United States*, 510 U.S. 540, 546 (1994)) (emphasis omitted).

253. *Cheney*, 541 U.S. at 923 (quoting *Sierra Club*, Motion to Recuse at 3-4).

254. Freedman, *supra* note 245, at 234.

Policy: . . . “Even one unnecessary recusal impairs the functioning of the Court.”²⁵⁵

A rule that required Members of this Court to remove themselves from cases in which the official actions of friends were at issue would be utterly disabling.²⁵⁶

If I could have done so in good conscience, I would have been pleased to demonstrate my integrity, and immediately silence the criticism, by getting off the cases. Since I believe there is no basis for recusal, I cannot.²⁵⁷

One can of course read the Scalia memorandum as endorsing only the benign version of the duty to sit since he found “no basis” for disqualification. But even if Justice Scalia believes as stridently as he purports to in the personal capacity/official capacity distinction and the long-standing coziness of the Washington governmental power elite, he realistically is invoking the pernicious duty to sit to a degree in that he takes the position that he should not recuse himself unless compelled under the law because of the particular status and scarcity of U.S. Supreme Court Justices.

Despite his protestations about the weakness of the case for recusal, the fact remains that press and public opinion was highly critical of the Scalia-Cheney bonding in ways that did not hinge on whether the two were ever in the same duck blind or the relative benefits of flying Air Force Two as compared to coach. Any reasonable person would have to acknowledge that the situation at least should give a jurist pause before declining to recuse, as Justice Scalia implicitly does by devoting a fifteen-page memorandum to the topic.

In effect, the pernicious version of the duty to sit permits Justice Scalia to have it both ways. He can with one breath, in the best admit-no-weakness-or-nuance style of Justice Black, claim to see no basis for recusal, while in a back-stopping second breath invoke the notion that if close

255. *Cheney*, 541 U.S. at 915-16, 929 (citations omitted). *See also id.* at 915-16 and *Aguinda v. Texaco, Inc. (In re Aguinda)*, 241 F.3d 194, 201 (2d Cir. 2000), for the implicit proposition that resolving doubts in favor of recusal in lower courts may also be bad policy.

256. *Cheney*, 541 U.S. at 916.

257. *Id.* at 929.

cases are not resolved against recusal, the institutional implications are ominous. Like Justice Rehnquist in *Laird v. Tatum* and *U.S. v. Microsoft*, and like seven of the nine justices in the 1993 Statement of Recusal Policy,²⁵⁸ Justice Scalia in *Cheney* deploys a doctrine that was supposed to have been abolished to resist recusal and buttress a nonrecusal decision that is at least questionable if not clearly erroneous.

More recently, Justice Scalia went hunting with prominent plaintiffs' lawyer W. Mark Lanier, who authored an amicus brief in the *Wyeth v. Levine* case²⁵⁹ pending before the Court. The case involves the issue of whether FDA approval of a drug label preempts state law-based failure to warn suits against pharmaceutical manufacturers.²⁶⁰ The outing was an outgrowth of Scalia's appearance as a guest speaker in a lecture series at Texas Tech University, Lanier's law school alma mater.²⁶¹ Unlike the prior case, the hunting host is not a party to the case. Lanier is not even counsel to the litigants; but stands in the more attenuated position of a plaintiffs' lawyer interested in the ramifications of the result but who is not tied to the result. In addition, Justice Scalia's relatively pro-defendant tort law opinions are sufficiently well known²⁶² that it is hard to

258. See *supra* note 127 and accompanying text regarding the Rehnquist nonrecusals in *Laird v. Tatum* and *U.S. v. Microsoft*; see *infra* note 258 and accompanying text regarding the 1993 Justices' Statement.

259. See *Wyeth v. Levine*, 128 S.Ct. 1118 (2008) (granting writ of certiorari to Vermont Supreme Court regarding decision in *Levine v. Wyeth*, 944 A.2d 179 (Vt. 2006)).

260. See *Levine v. Wyeth*, 944 A.2d 179 (Vt. 2006) (upholding trial judgment for plaintiff against drug manufacturer in tort action sounding in failure to warn by four to one; defendant unsuccessfully contended that plaintiff's action was contradicted by and precluded by FDA regulation of prescription drug labels). A divided Supreme Court affirmed, with Justice Scalia dissenting and favoring the drug company position. See *Wyeth v. Levine*, 129 S.Ct. 1187 (2009).

261. See Debra Cassens Weiss, *Justice Scalia Goes on Hunting Trip with Plaintiffs Lawyer*, A.B.A. J., Nov. 21, 2008, http://www.abajournal.com/weekly/justice_scalia_goes_on_hunting_trip_with_plaintiffs_laywer (last visited Mar. 5, 2009).

262. See Larry Catá Backer, *A Cobbler's Court, A Practitioner's Court: The Rehnquist Court Finds Its "Groove,"* 34 TULSA L.J. 347, 350 (1999) (stating Justice Scalia supports restrictions on applicability to other jurisdictions of state court rulings that would, as practical matter, help tort plaintiffs present expert testimony); Center for Democratic Culture at UNLV, *The Law and Politics of*

imagine a reasonable observer thinking that his views on preemption will be shaped by a particularly good junket with a plaintiffs' lawyer (Justice Scalia is known for his deference to state law in tort issues).²⁶³ By contrast, Justice Scalia's views on Executive Branch prerogatives²⁶⁴ seem sufficiently close to those of the Vice-President that one might reasonably worry that the bonding of a little duck hunting would cement the Justice's likely favorable attitude toward vice-presidential prerogatives.

One can make a good case that Justice Scalia's hunting jaunt with Lanier, like his trip with Cheney, raises concerns about impartiality in that it is a gift of value (at least if you like hunting) and an opportunity for *ex parte* interaction with someone who has something riding on the outcome of a pending Supreme Court decision. However, there is also a distinction between the two trips in terms of the appearance of social outings with a litigant as compared to a merely interested party. Further, Cheney is a friend of the Justice rather than a mere acquaintance; and the Lanier outing is less likely to bother lay observers than the Cheney junket.

Just the same, I would have preferred Justice Scalia not take either hunting trip, just as I would prefer that Justices not attend events where they may have occasion to have informal, private encounters with persons or entities interested in specific pending litigation before the Court. It is one thing for a justice to visit an academic setting that creates exposure to a general legal issue, particularly where the event is witnessed by many and chronicled in the press. It is another matter to participate in a social event with someone with a significant stake in a pending matter, regardless of the specific amount of time available for private *ex parte* contact or intimate bonding.

Tort Reform, 4 NEV. L.J. 377, 430-34 (2003) (stating Justice Scalia is not considered a supporter of tort plaintiffs).

263. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (Scalia, J., dissenting) (arguing that state punitive damages law is not subject to judicial supervision via the Due Process clause); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 599-603 (1996) (Scalia, J., dissenting) (same).

264. See Michael Avery, *The Rise of the Conservative Legal Movement*, 42 SUFFOLK U. L. REV. 89, 95 n.36 (2008) (noting correlation between judges' Federalist Society ties and judicial conservatism); Trevor W. Morrison, *Hamdi's Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411, 435 n.139 (2006) (noting Scalia's opposition to giving Guantanamo Bay detainees the right to sue captors).

The response of some (perhaps many, but pretty clearly not most) newspaper editorial pages is that it is unreasonable to ask Justices to cease social outings with old friends simply because they may have an interest in Court litigation. But there are outings and there are outings. And timing counts for something. Surely it would not have killed Justice Scalia to forgo social outings with a sitting Vice-President until the conclusion of the case and perhaps throughout his term of office. Similarly, it is not unreasonable to ask Justices to refrain from accepting expensive hospitality from eager new friends with pending interests coming before the Court. Although Mark Lanier may not have been a formal party to the *Wyeth* litigation, he stood to win or lose substantial counsel fees in the future depending on the Court's decision in the litigation. Justice Scalia would have better exercised his discretion to restrict his time in Lubbock to the lecture and skip the hunting trip.

Perhaps even more revealing about the Court's insufficiently self-reflective attitude toward recusal is something less headline-grabbing and more institutional than the Rehnquist and Cheney episodes. In 1993, the Court issued a Statement on Recusal Policy signed by then Chief Justice Rehnquist and Justices Stevens, Scalia, Thomas, O'Connor, Kennedy, and Ginsburg (Justices Blackmun and Souter did not sign). The Statement addressed recusal concerns posed because the Justices "have spouses, children or other relatives within the degree of relationship covered by 28 U.S.C. § 455 [first cousins or closer] who are or may become practicing attorneys."²⁶⁵

In particular, the Court was addressing the issue of whether a relative's partnership in a law firm representing a Supreme Court litigant or appearance on behalf of a litigant required recusal pursuant to § 455(b)'s limitations on judicial participation where a relative was acting as counsel or had a substantial financial interest in the outcome of a case.²⁶⁶ Sensibly, the Statement concluded that a Justice should recuse where the relative was lead counsel or actively involved in the case because the case outcome

265. See 1993 Statement of Recusal Policy, reprinted in GILLERS & SIMON, *supra* note 30, at 742-43.

266. See *id.* at 742 (noting Court Statement focuses on 28 U.S.C. § 455(b) (5)(ii) but also considers whether such financial ties create a reasonable question as to impartiality under § 455(a)).

“might reasonably be thought capable of substantially enhancing or damaging his or her professional reputation” or would have significant financial benefit to the attorney-relative.²⁶⁷

However, where the attorney-relative was merely a partner in the Court litigant’s law firm, this alone would not require recusal, as the Court viewed the attorney-relative’s economic or professional stake in the case as too small and attenuated from the case result. However, where the “amount of a relative’s compensation could be substantially affected by the outcome” this “would require our recusal even if the relative had not worked on the case, but was merely a partner in the firm that shared the profits.”²⁶⁸ For example, a lawyer-relative may be a partner in a small or medium sized firm with a contingency fee agreement defending a large judgment below. In such cases, even if the lawyer-relative is not the lead attorney, he or she stands to profit handsomely if the judgment is not disturbed by the Court.

From this sensible assessment, the Court proceeds to recognize economic reality, stating,

It seems to us that in virtually every case before us with retained counsel there exists a genuine possibility that success or failure will affect the amount of the fee, and hence a genuine possibility that the outcome will have a substantial effect upon each partner’s compensation. Since it is impractical to assure ourselves of the absence of such consequences in each individual case, we shall recuse ourselves from all cases in which appearances on behalf of parties are made by firms in which our relatives are partners²⁶⁹

But then the Court takes away with one hand what it gave with the other, declaring that there need be no recusal in such cases if “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.”²⁷⁰

267. *See id.* at 743.

268. *See id.* at 742.

269. *See id.* at 743.

270. *See id.*

Although the Court's escape hatch from what first seemed to be a recusal policy protective of public confidence may at first seem reasonable, it falters under closer examination. Money is fungible. In any given wallet, a dollar stolen from the church collection plate looks like a dollar earned from honest labor—and both dollars have the same purchasing power. Although a law firm may technically bar a hypothetical attorney and Justice-relative from sharing in the profits from representing Court litigants, law firm partner compensation involves a mix of often subjective factors such as “value to the firm.” No one can assure that the attorney-relative's substantial compensation based on value to the firm is not indirectly or at least subconsciously the result of the business brought to the firm because of his or her famous name and link to a powerful parent.²⁷¹

Defenders of the distinction proffered by the Court can point to lower court decisions on variants of the Rules of Professional Conduct, which permit a law firm to avoid imputed disqualification by screening an incoming disqualified attorney, including a prohibition on giving the screened attorney any funds generated by the case on which the screened attorney is disqualified.²⁷² Of course, this

271. If nothing else, the attorney-relative benefits from the fees on a matter for which he or she is disqualified if the firm decides to use some of those fees for expenditures that benefit the firm as a whole: better furniture; company cars; adjacent parking; the firm retreat; CLE programs in resort locations; new computers or other technology; better law library resources; additional associate or paralegal support. Although these may or may not be trivial depending on the amount and attorney-relative's preferences, they are at least evidence that the attorney-relative benefits from firm cases before the Court, even if he or she does not formally receive a portion of the fee.

272. See, e.g., NEV. R. PROF. CONDUCT 1.10(c) (permitting screening of lawyer subject to conflict so that entire firm can avoid imputed conflict, requiring as one condition that disqualified lawyer not share in fees from the matter); *Cromley v. Bd. of Educ.*, 17 F.3d. 1059 (7th Cir. 1993), cert. denied, 513 U.S. 816 (1994) (permitting screening via common law decision, requiring as condition of effective screen that disqualified lawyer not share in firm's fee for the matter). However, cases like *Cromley* also serve to make my skeptical point in that the migrating, disqualified lawyer in *Cromley* moved from being plaintiff's counsel to joining defendant's firm as a partner while the litigation was pending. One might reasonably ask whether the lawyer's negotiation of a partnership in a new firm adversely affected his loyalty to the plaintiff as well as whether the migrating lawyer really enjoyed no benefits from fees generated in the matter even where not directly compensated. See GILLERS, REGULATION, *supra* note 28, at 296-97 (raising this and other questions in commenting on *Cromley*). But see ABA Standing Committee on Ethics and Professional Responsibility,

theory of the screening rule is subject to the same critique of economic reality that can be leveled at the Court's Recusal Policy. If the critique is rejected for migrating lawyers, one might ask, why should it not also be rejected regarding judicial recusal?

One reasonably good short answer is that judges are not lawyers and that attitudes toward and concerns about judicial fairness are generally stronger than even the system's concerns for attorney loyalty and the possibility that a conflicted lawyer may use sensitive proprietary information against a former adversary. For example, as discussed above, the judicial recusal standard requiring disqualification if a judge's impartiality may be reasonably questioned is to a large degree an appearance of impropriety standard.²⁷³ But lawyers have not been subject to this standard since the 1983 ABA Model Code removed what had been Canon 9 to the formerly controlling 1970 Code of Professional Responsibility.²⁷⁴ Although the concept lingers in the field of attorney disqualification,²⁷⁵ it has always had significantly more impact regarding judicial disqualification as well as having held official status for twenty-five years after the concept was at least formally removed from the rules of attorney disqualification. Simply put, the legal system is more inclined to disqualify a judge than an attorney when the situation looks bad to a reasonable lay observer.

In addition, one may make a strong case that the concerns over apparent impropriety or questionable

Recommendation to the House of Delegates, Feb. 2009, at 9 (recommending amendment of ABA Model Rule 1.10 to permit screening as means of avoiding imputed disqualification where disqualified attorney joins new firm, noting that 23 states permit such screening; proposed rule, like that in states permitting screening, would require that disqualified lawyer be "apportioned no part of the fee" new firm earns in connection with matter in which new lawyer is disqualified).

273. See *supra* text accompanying note 55.

274. See GILLERS, REGULATION, *supra* note 28, at 313-14 (noting that 1983 Model Code removed "appearance of impropriety" standard that formerly governed attorney conduct); HAZARD, *supra* note 165, at § 65.7; CHARLES WOLFRAM, MODERN LEGAL ETHICS (1986).

275. See *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1269 (7th Cir. 1983) (Posner, J.) ("While 'appearance of impropriety' as a principle of professional ethics invites and maybe has undergone uncritical expansion because of its vague and open-ended character, in this case [where a law firm switched sides in related matters] it has meaning and weight.").

impartiality should be at their zenith concerning the U.S. Supreme Court, which plays such an important role in American public policy, even as compared to other federal and state courts. Unfortunately, the Statement of Recusal Policy turns this concept on its head and instead argues that the unique status and awesome power of the Court and its comparative small and fixed number of jurists favors resistance toward recusal.

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. Given the size and number of today's national law firms, and the frequent appearance before us of many of them in a single case, recusal might become a common occurrence, and opportunities would be multiplied for "strategizing" recusals, that is, selecting law firms with an eye to producing the recusal of particular Justices. In this Court, where the absence of one Justice cannot be made up by another, needless recusal deprives litigants of the nine Justices to which they are entitled, produces the possibility of an even division on the merits of the case, and has a distorting effect upon the certiorari process, requiring the petitioner to obtain (under our current practice) four votes out of eight instead of four out of nine.

The Statement's rhetoric on this point is eerily reminiscent of the Rehnquist memorandum in *Laird v. Tatum*, using almost the same prose and substantive argument.²⁷⁶ In effect, the Statement of Recusal Policy is continuing to defend the duty to sit, in both its benign and pernicious form. The Statement's version of the duty to sit is benign in that it is of course true that U.S. Supreme Court Justices should not recuse without a valid reason, a truism reinforced by the comparative scarcity of Justices (nine) as opposed to the hundreds of federal trial judges. But the Statement's endorsement of the duty to sit is also pernicious in that it perpetuates the dangerous conceit of duty to sit thinking by suggesting that but for participation by all nine Justices, the world may end. Although the problems of affirmance by an equally divided court, lack of a quorum, or

276. See 409 U.S. 824, 837-39 (1972); *supra* notes 122-26 and accompanying text.

unrepresentative voting are non-trivial, they are not the apocalyptic risks painted by the Recusal Statement.

In addition, the Statement's version of the duty to sit is pernicious in that, when coupled with the exception to recusal where fees from Court litigation are sequestered from the attorney-relative, the Statement as a whole implicitly takes the position that it is more important for the Justices to participate than to provide a Court with impartiality not subject to reasonable question, even under circumstances raising close questions of judicial fairness. For example, under the Statement's policy, there could exist a two-person Washington, D.C., boutique law firm with Attorney Justice-Child and Attorney Unrelated. If they agree that Justice-Child will not share in Unrelated's Supreme Court billings, the related Justice may sit on cases argued by Attorney Unrelated. Even to non-skittish laypersons, this looks awful as the firm of Justice-Child & Unrelated appears before the Court, including the affected Justice. Further, even if attorney Justice-Child does not directly take a cut of attorney Unrelated's billings on Court matters, there is an obvious symbiosis here that suggests that Attorney Justice-Child is indeed profiting in at least some not very attenuated manner from the fusion of his or her filial connection to a Justice and Attorney Unrelated's skills as an advocate. Where the law firm in question is large and multinational, the risk of reasonable question is reduced, but not categorically eliminated.

To be fair to the signing Justices, the Statement does not eliminate the possibility that an individual Justice will find a situation to require disqualification under 28 U.S.C. § 455(a) even though the affected law firm has a policy of segregating Court-related compensation from the attorney related to a Justice. The Statement is directed primarily at disqualification for a relative's financial interest pursuant to 28 U.S.C. § 455(b). But the tone of the Statement overstates the dangers of recusal and also is unwilling to grapple with the argument that the awesome power of a Justice may of necessity put limits on the Justice's actions or the career choices of an attorney relative. Although the child of a Justice may desperately desire a partnership in a noted Supreme Court litigation law firm such as Hogan & Hartson or Smith & Taranto or a large multi-national firm like Mayer Brown, the better part of valor for the attorney-child may be to elect a modestly less satisfying and remunerative practice in a firm with few stops at the

Supreme Court. Well short of hanging a shingle in rural Wyoming, the attorney-child of a Justice logically has many career opportunities that will seldom pose recusal problems for the Justice-parent.²⁷⁷ Alternatively, if the attorney-child is bound and determined to have a practice that presents more such problems, this should logically place some limits on the Justice-parent's participation.²⁷⁸ Then there is the question of a litigant strategically seeking recusals by retaining a law firm with a Justice's relative. But where is it written that a law firm employing a Justice's relative is required to take a case? The relatives of Justices and their firms could perhaps be expected to show some dignity and dedication to the system in spurning business thought to come from clients seeking a strategic recusal.

At a specific level, the Statement of Recusal Policy plays fast-and-loose with problems of the Court's own making. The Statement notes that recusals may have a "distorting effect" on grants of certiorari because with a recusal, the party seeking Supreme Court review must obtain fifty percent of the available votes (eight) rather than the customary forty-four percent (four of nine votes).²⁷⁹ The idea that the Court should perhaps permit a Justice to sit under troubling circumstances simply to avoid this slight increase in a party's chance of obtaining certiorari review is a bit troubling. It is also unrealistic in that certiorari is only

277. The case of the attorney-spouse is perhaps more sympathetic in that the attorney-spouse of a Justice has normally invested considerable time and resources in establishing a legal career niche prior a Justice's appointment. For example, Chief Justice Roberts' wife was already a partner at Hogan & Hartson when he became Chief Justice and Justice Sandra Day O'Connor's husband was already an experienced lawyer with an established practice when she was appointed to the Court. But as discussed *infra* text accompanying note 288, confidence in the neutrality of the Court is a strong enough value to sometimes require more sacrifice of attorney-relatives.

278. I believe this logic justifies subjecting the attorney-spouse to the same standards that govern the attorney-child. Although the spouse may be faced with a situation of retooling a career in mid-life while a child often merely must use some judgment when embarking on a legal career (e.g., Chief Justice's Roberts' children were all well short of college, let alone law school and their first full-time jobs when he was appointed), family member career aspirations need in some cases to be subordinate to a strong recusal policy promoting public confidence in the Court.

279. See Recusal Statement at 743, discussed *supra* note 258 and accompanying text.

granted three percent of the time,²⁸⁰ making the chances that a recused Justice thwarted an important cert grant rather remote. If the issue is that important or involves that much conflict in the circuits, the odds are pretty good that it will be presented in another cert petition that enjoys full participation by all Justices.²⁸¹

But the Recusal Statement's example of the supposed ravages of recusal become laughable when one considers the Court's own decision to have petitions evaluated by a "cert pool" in which a single law clerk drafts an evaluative memo relied upon by all Justices participating in the pool, which means the entire Court, except for Justice Stevens, who continues to be the lone hold-out in refusing to participate in this communal delegation of the decision-making process.²⁸² If the genuine participation of each Justice were so vitally important to questions of granting cert, the Court would require each chambers to conduct its own independent evaluation of the merits of the cert petition. But instead, the Court compromises this value of each Justice's participation that is supposedly so important by homogenizing the process. Once the evaluative function has

280. See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1528-29 (2008); Peter J. Messitte, *The Writ of Certiorari: Deciding Which Cases to Review*, EJOURNAL USA, Apr. 2005, at 18 (reporting that only four percent of certiorari petitions filed by counsel are successful; when pro se petitions are included, the figure drops to close to one percent).

281. Further, it appears that litigants, especially large, frequently litigious "repeat player" litigants, have opportunities to select optimal cases for seeking certiorari review. See Lazarus, *supra* note 280, at 1528-29. Regarding the relative advantages of repeat players, see Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974) (coining term and modeling advantages possessed by repeat players). Most likely, the group of litigants that may be most impacted by a stronger Court recusal policy on lawyer-relatives is also the group represented by large law firms or firms with expertise in Supreme Court litigation, which is also inordinately comprised of repeat players. In other words, even if more aggressive disqualification prevents a repeat player litigant from gaining review in Case A because Attorney Justice-Child is a partner in its law firm, Case B will probably present another chance for review in the near future.

282. See TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006); ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006); Lazarus, *supra* note 280, at 1509 n.100 (2008). David R. Straus, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947 (2007).

been so greatly centralized at a cost of more searching consideration by the individual Justice's chambers, it becomes much harder to make the case that the recusal of a Justice or two has much impact.

Over the proverbial long haul, the Recusal Statement of the Court concerning attorney-relatives is unlikely to create scandal or deep mistrust of the Court. But the Statement continues the Court's long history of being less sensitive to recusal than much of the legal community. More to the point for purposes of this Article, the Court continues to at least implicitly endorse the duty to sit and reflect at least potentially pernicious duty to sit thinking notwithstanding abolition of the concept. The example of Justice Rehnquist's participation in *U.S. v. Microsoft* provides an example of mischief in this attitude.²⁸³ His son was not only a partner in a law firm representing Microsoft as local counsel but was an antitrust specialist acting on behalf of Microsoft in the very same type of matter at issue in the federal government's case against Microsoft. The Microsoft company represented by Boston attorney James Rehnquist²⁸⁴ would surely benefit if there were a U.S. Supreme Court ruling favoring that same Microsoft company in the government's lawsuit.

However, the Chief Justice, although recognizing this, concluded that a reasonable objective observer would not regard him as less than impartial and sat on the *U.S. v. Microsoft* case. Justice Rehnquist reasoned that his son's potential benefit from a decision against Microsoft before the Court was too attenuatedly de minimis to raise a reasonable question as to the Chief Justice's impartiality.²⁸⁵

283. *Microsoft Corp. v. United States*, 530 U.S. 1301 (2000).

284. *See id.* at 1301 ("Microsoft Corporation has retained the law firm of Goodwin, Procter & Hoar in Boston as local counsel in private antitrust litigation. My son James C. Rehnquist is a partner in that firm, and is one of the attorneys working on those cases.").

285. *See id.* at 1302 ("[T]here 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. . . . [I]t 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 nor his firm would have done any work on the matters here."). Perhaps. But should a Justice not also ask whether his or her neutrality in the matter will be compromised by knowing that a child is a member of one litigant's legal team? More precisely, would this not cause concern to a reasonable law observer?

He made this decision despite acknowledging that “[i]t is true that both my son’s representation and the matters before this Court relate to Microsoft’s potential antitrust liability” and that “[a] decision by this Court as to Microsoft’s antitrust liability could have a significant effect on Microsoft’s exposure to antitrust suits in other courts.”²⁸⁶

In declining to recuse, Justice Rehnquist once again invoked the “scarcity of Justices” argument used in the Recusal Policy Statement and his *Laird v. Tatum* memorandum, evoking the specter of a Court stymied in its tasks because of undue ethical sensitivity.²⁸⁷ Although Chief Justice Rehnquist’s assessment of the risk in *Microsoft* is far more defensible than his analysis in *Laird v. Tatum*, both decisions reveal a Justice overly resistant to recusal in part because of his continued invocation of the pernicious version of the duty to sit. Similarly, the Court’s general attitude toward recusal is steeped in duty to sit thinking coupled with a perhaps excessive sense of each individual Justice’s importance to the fate of American law.

2. *Nevada: Codifying the Duty to Sit and Applying the Concept in Problematic Fashion.* Nevada appears to be the only state that not only continues to endorse the traditional duty to sit doctrine but also expressly adopts it in its Commentary to the state Code of Judicial Conduct, which is otherwise modeled on the 1990 ABA Code. Commentary to Canon 3(e)(1) of the Nevada Judicial Code states that

A judge has a duty to sit. *Ham v. District Court*, 93 Nev. 409, 415, 566 P.2d 420, 424 (1977). Whether a judge’s impartiality might reasonably be questioned, and the opinion of the judge as to his or her ability to be impartial is determined pursuant to *Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 644, 940 P.2d 134 (1997).²⁸⁸

286. *See id.* at 1302.

287. *See id.* at 1302 (“[B]y virtue of this Court’s position atop the federal judiciary, the impact of many of our decisions is often quite broad. . . . [I]t is important to note the negative impact that the unnecessary disqualification of even one Justice may have upon our Court. Here—unlike the situation in a District Court or a Court of Appeals—there is no way to replace a recused Justice. Not only is the Court deprived of the participation of one of its nine members, but the even number of those remaining creates the risk of affirmance of a lower court decision by an equally divided court.”).

288. *See* NEV. CODE JUD. CONDUCT Canon 3E(1) cmt. The Comment immediately adds, “The mere receipt of a campaign contribution from a witness,

The *Ham* case cited in the Commentary post-dates *Laird v. Tatum*, the Rehnquist memorandum, and the 1970s changes to ABA and federal recusal norms. Despite its strength and status, Nevada's seeming affection for the duty to sit doctrine is of relatively recent origin. Although the concept was alluded to in older Nevada opinions,²⁸⁹ it

litigant or lawyer involved with a proceeding is not grounds for disqualification." This provision was added Jan. 31, 2000 and is consistent with *Las Vegas Redev. Agency v. Dist. Court*, 5 P.3d 1059 (Nev. 2000), which required a judge who had recused on the basis of campaign contributions from the litigants to remain on the case. See *infra* p. 81. Judicial elections for Nevada state court are often hotly contested, expensive, and involve contributions by important interests such as the gaming industry, mining, the plaintiff's trial bar, and other business concerns. The Nevada-specific commentary reflects the state's concern that if campaign contributions alone are disqualifying, there would be a significant increase in disqualification with attendant logistical problems. See generally Richard M. Cardillo, *I Am Publius and I Approve This Message: The Baffling and Conflicted State of Anonymous Pamphleteering Post-McConnel*, 80 NOTRE DAME L. REV. 1929, 1944 (2005); Alan B. Rabkin, *Judicial Elections and Nonpartisan Candidates: Staying on the Right Side of Canon 5*, 9 NEV. LAW. 20 (2001); Jeffrey W. Stempel, *Malignant Democracy: Core Fallacies Underlying Election of the Judiciary*, 4 NEV. L.J. 35 (2003) (noting intense political campaign activity surrounding state bench and calling for move to selection of judges by appointment).

289. Historically, Nevada's early case law, like the majority of courts in the early- to mid-twentieth century, took a resistant stance toward recusal. See, e.g., *State v. Dist. Court*, 5 P.2d 535, 537 (1931) (noting "popular criticism" of disqualification statute "in that it destroys the elevated rank of district judges in the estimation of the people"). In addition, the Court was concerned that the recusal statute could be "abus[ed] by unscrupulous attorneys and their clients" and place "another clog in the regular and orderly administration of justice." In spite of this, however, the Court enforced the statute to require that a case be reassigned from a voluntarily-recusing judge to a judge stipulated as fair by the parties, something the Chief Judge of the District Court had been unwilling to do. As to criticisms of the statute, the Court stated that "[t]hese considerations are matters which are more properly addressed to the legislature." See *id.* at 537.

Nevada was, like most states, resistant to requiring disqualification simply because of concern that a judge's participation might appear improper to the lay public. For recusal, it was generally required that there be a showing of "actual bias or prejudice or that for some persuasive reason a speedy or impartial trial before the judge in question might not be had." See, e.g., *State ex rel. Backer v. Dist. Court*, 274 P.2d 571, 573 (Nev. 1954). Subsequent changes to statutes and the judicial code in most states have now established that a reasonable concern about impartiality or even the avoidance of the appearance of impropriety will support recusal, particularly when the judge has chosen to recuse rather than continue on the case. See, e.g., *State ex rel. Mosshammer v. Allen Super. Court*, 206 N.E.2d 139, 142 (Ind. 1965) ("A judge should have such discretion to disqualify himself under the circumstances. A court, in the administration of justice, should strive not only to give a fair trial, but to have a party feel he is

took strong rhetorical form only after the doctrine had been abolished at the federal level and had become largely discredited by commentators. This appears to have been the result of adverse judicial reaction to what were perceived as meritless or tactical recusal motions.²⁹⁰ Then came concern that some judges were too quick to recuse in cases that involved electorally powerful litigants who might, if displeased, extract vengeance at the next judicial election and unseat an offending judge.²⁹¹ Later came concern that

getting a fair trial.”). In *Mosshammer*, the Indiana Supreme Court further noted: “A judge has a discretion to disqualify himself as a judge in a case if he feels he cannot properly hear the case because his integrity has been impugned or false charges have been made against him, and he has a mandatory duty to disqualify himself if he is prejudiced, interested, or related to any of the parties in the litigation.” *Id.* at 142. Ironically, this Indiana case was approvingly cited by the Nevada Supreme Court in *Ham v. District Court*, 566 P.2d 410, 423 (Nev. 1977), and in the more recent *Mosley v. Nevada Commission on Judicial Discipline*, 102 P.3d 555, 564 (Nev. 2004).

290. *See, e.g., Ham*, 566 P.2d at 420 (noting that the grounds for disqualification were weak or it could reasonably be inferred that the motion was made for tactical reasons rather than out of serious concern over judicial favoritism); *see also infra* notes 293-94 and accompanying text (discussing *Ham* further).

291. Such extraction of vengeance appears to have occurred at the Nevada Supreme Court level where Justices supporting the Court’s decision in *Guinn v. Legislature of Nevada*, 76 P.3d 22 (Nev. 2003) (requiring, in essence, the legislature to raise taxes to fund public education budget), were relentlessly criticized in the press, particularly by the *Las Vegas Review-Journal*, the state’s largest circulation newspaper, *see, e.g.,* Ed Vogel, *Legislature: Most Oppose Tax Ruling*, LAS VEGAS REV.-J., Nov. 1, 2003, at A1. In relatively short order, these Justices either left the bench voluntarily prior to facing the electorate—for example, Justices Deborah Agosti, A. William Maupin, Robert Rose, Miriam Shearing, and Clifford Young and another Justice in the majority, Myron Leavitt, died prior to leaving the bench, or were defeated—for example, Justice Nancy Becker, whose opponent noted prominently Justice Becker’s support for the *Guinn* decision. This also appears to have clearly occurred at the State Senate level in 2004 when incumbent Republican Ann O’Connell angered the gaming industry by opposing its efforts to institute a general business receipts tax that would in turn reduce public pressure for an increase in the state gaming receipts tax. *See* Kirsten Searer, *Four Longtime Senators Not Returning to Capital*, LAS VEGAS SUN, Feb. 7, 2005, at B1. The gaming industry backed newcomer Joe Heck, a physician, in the Republican primary, where he wrested the party’s nomination and ultimately the state senate seat from O’Connell. Heck was subsequently defeated in 2008 due to the strength of Democratic registration efforts and the Obama presidential campaign. *See* Ed Vogel, *Democrats Seize Control of State Senate*, LAS VEGAS REV.-J., Nov. 5, 2008, at B1.

At the trial court level—there is no intermediate appellate court in Nevada—it is less clear whether powerful interest groups have successfully targeted incumbents for defeat. It is clear, however, that these electoral actors are active

although receipt of campaign contributions would appear to be the type of thing that would raise questions about impartiality, treating contributions as a ground for recusal would create substantial disruption in judicial assignments and come close to violating the rule of necessity in a state where there is much judicial electoral activity through a broad array of interests that contribute to many or even most judicial campaigns.²⁹²

Although the commentary to Nevada's current Judicial Code cites *Ham*²⁹³ as the key case in establishing the duty to sit, *Ham* did not embrace the pernicious version of the doctrine with much fervor—or even use the words duty to sit²⁹⁴—although it did speak of a “duty to preside to the

and it is conventional wisdom that a judicial candidate, especially when running for the first time, needs the support of at least a critical mass of the following constituencies to win election: law enforcement organizations, firefighters, other government workers, gaming, the Chamber of Commerce, the plaintiff's bar, major ethnic or racial groups, the physicians' lobby (which tends to care primarily about caps on non-economic damages in medical malpractice cases), the culinary workers local (which, unlike many cities, is very powerful because it dominates work in the hotel and entertainment industry that is the core of the Las Vegas economy), and educators. A judge angering even one of these key interest groups during the course of a case could very well imperil his or her re-election chances. See *High Court Seat Goes to Pickering*, LAS VEGAS REV.-J., Nov. 5, 2008, at 1B (noting that, in 2008 race for open Nevada State Supreme Court seat, better-financed attorney Kristina Pickering narrowly defeated trial judge Deborah Shumacher); see also *High Court Hopefuls Use Their Money*, LAS VEGAS REV.-J., Aug. 7, 2008, at 3B.

In any event, at least one former Justice has stated in my presence that concern over trial judges running from politically sensitive cases was a substantial factor in encouraging the growth of the duty to sit doctrine during the 1990s and early twenty-first century in Nevada. Conversation with anonymous former Justice (Oct. 3, 2008).

292. See, e.g., *City of Las Vegas Downtown Redev. Agency v. Dist. Court*, 5 P.3d 1059, 1062 (Nev. 2000).

293. 566 P.2d at 420.

294. The precise question framed by the court in *Ham* was “[w]hether a district court judge can voluntarily disqualify himself from participation in or consideration of proceedings pending before him, absent a judicially-warranted reason or justification for such a recusal.” 566 P.2d at 421. Not surprisingly, the court answered this question “in the negative,” *id.*, but did not elaborate at length as to what circumstances—for example, campaign contributions, friendly or hostile relations with parties or counsel, or public perceptions of the judge's ties to litigants—would constitute a “judicially-warranted reason” for disqualification. In the *Ham* case itself, the basis for seeking recusal was counsel's bare contention that “his client believed Judge [Llewellyn] Young to be biased and prejudiced against her.” *Id.* at 421. There was no articulation of the reason for the client's belief much less any offer of proof on the point. *Id.* at 423.

conclusion of [the case], in the absence of some statute, rule of court, ethical standard, or other compelling reason to the contrary.”²⁹⁵ The *Ham* Court quoted *Corpus Juris Secundum* for the proposition that “[i]t is the duty of a judge, however, to exercise the judicial functions only conferred on him by law, and he has no right to disqualify himself in the absence of a valid reason.”²⁹⁶ In other words, *Ham* technically

Nonetheless, even though Judge Young stated that he thought he had no bias or prejudice, he “agreed to disqualify himself and allow the parties fifteen days within which to agree upon a judge to whom the case would be reassigned.” *Id.* at 421. The Nevada Supreme Court found the judge’s accommodation unwarranted under these circumstances and that there was “some limit” on judicial discretion to recuse. *Id.* at 423. The court stated:

Here, no explanation of the nature of the claimed bias or prejudice was given and, as such, stands unsubstantiated. Indeed, the trial judge expressly denied that he entertained any bias or prejudice when he offered to voluntarily disqualify himself. There seems to be no other explanation for the judge’s voluntary disqualification other than that such a course was suggested to him attendant to a claim of bias. While we are entirely mindful that the direction of [Nevada Revised Statutes] 1.230(3) is not mandatory in setting forth “actual or implied bias” as a ground for a volunteered recusal, we cannot expand this permissiveness to allow disqualification on any grounds whatsoever.

Id.

According to the *Ham* decision, decided in 1977, the Nevada Revised Statutes Section 1.230 and the Code of Judicial Conduct in effect at that time each provided independent, but overlapping, bases for disqualification. *See id.* at 422-24. The primary distinction was that the Code stated that a judge shall recuse where the judge’s impartiality is subject to reasonable question while the statute requires “actual or implied bias,” a standard more resistant to recusal. *See id.* Although *Ham* noted Nevada Supreme Court Rule 209 and the Judicial Code’s admonition that a judge should avoid the “appearance of impropriety,” *id.* at 423 n.5, the opinion does not address the “impartiality might reasonably be questioned” standard of the current Nevada Judicial Code and ABA Model Code. ABA MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007); NEV. CODE OF JUDICIAL CONDUCT CANNON 3E(1) (1991);

295. *Ham*, 566 P.2d at 424.

296. *Id.* at 423 (quoting 48 C.J.S. *Judges* § 93 (1947)); *see also* Conkling v. Crosby, 239 P. 506, 511-12 (Ariz. 1925) (quoting *Corpus Juris Secundum* as well). In addition to predating the 1970s revolution that abolished the duty to sit, *Conkling* is not persuasive support of the duty to sit. First, like *Ham*, *Conkling* does not articulate the doctrine clearly or use specific duty to sit language. Worse, *Conkling* rejected a motion for disqualification under circumstances that most modern observers would find reflect outdated notions of judicial inoculation from partiality and obliviousness to public perceptions. *See id.* at 514. In *Conkling*, the judge had taken out a loan of \$5,000 to \$6,000—

adopted only the benign form of the doctrine but did so in broad enough language to permit it to be applied by those supporting a pernicious version of the doctrine.²⁹⁷

Further, the *Ham* Court stated that “were there any suggestion of impropriety or action giving the appearance of impropriety in any given case . . . then in effect, it seems clear that recusal would be a necessary step to alleviate or obviate such an appearance.” Although there was “some reasonable limitation on the disqualification of judges,” the *Ham* Court chose to adopt a “practical construction” of the disqualification statutes, “one which allows the voluntary disqualification of a judge not for any reason, but only for those reasons which reasonably appear to be judicially warranted.”²⁹⁸ On the facts, the *Ham* Court found no colorable basis for recusal, stating: “We observe nothing in the record that would show a manifestation of prejudice or bias To allow a voluntary disqualification under the

more than \$60,000 in today’s dollars—from a bank that was a party to the case. *Id.* at 508. In other words, the judge owed a debt to one of the litigants appearing before him. *Id.*

The Arizona Supreme Court could not “say as matter of law that [the judge] was disqualified in the case in question because of his indebtedness” and the movant had failed to file an affidavit of prejudice on these grounds, which the court hinted might perhaps have been sufficient to accomplish recusal. *See id.* at 511. Nonetheless, the *Conkling* Court found that only a direct pecuniary interest of a judge was automatically disqualifying. *See id.* Indebtedness that was not itself the subject of the action before the judge was insufficient. The court would not say as a matter of law that indebtedness to a litigant “constitutes bias and prejudice *per se.*” *Id.* Reviewing the case law of the era, *Conkling* found considerable support for its conclusion, a result that would probably not obtain in most courts today. *Id.*

Some of the era’s defensiveness toward disqualification is also captured in *Conkling*. For example, the court placed great stock in the trial judge’s personal view that he would not be biased for or against the bank because of his indebtedness, reasoning that to disagree with the trial judge would be “to find that he had deliberately perjured himself.” *Id.* at 514. This view, of course, is overstated and melodramatic. The trial judge could be wrong about his lack of bias, not because he is dishonest, but because people are often unable to see prejudice or favoritism in their own thoughts and actions. Considerable psychological research conducted during the intervening eighty-three years has confirmed this all-too-human trait.

297. *See Ham*, 566 P.2d at 424.

298. *Id.* at 423-24. The *Ham* opinion also cited a 1954 Arizona case as standing for the proposition that judges have substantial discretion to recuse, even if the grounds for recusal are not compellingly proven. *See id.* at 423 (citing *Zuniga v. Super. Court*, 269 P.2d 720 (Ariz. 1954)).

instant circumstances would introduce into the judicial procedures in Nevada an approach wholly un contemplated by our Legislature and this Court.”²⁹⁹

Despite its innocuous beginning, *Ham* and its progeny embraced the duty to sit doctrine after the doctrine was supposed to have died. Read carefully and as a whole, *Ham* is not a judicial salvo in favor of the duty to sit—yet it came to stand for that proposition and was even enshrined in the commentary to the state Judicial Code. While it is fair to say that the Nevada Supreme Court had historically been resistant to arguably over-cautious disqualification based on appearance of impropriety or reasonable question as to impartiality grounds, the 1970s Nevada cases were not really using the pernicious duty to sit as a tiebreaker against recusal in close cases because the court did not see that decade’s recusal questions as close.³⁰⁰ Prior to the

299. *Ham*, 566 P.2d at 424. In addition, the motion for disqualification came after years of litigation and was directed at a judge who was now quite familiar with a complex case, a familiarity that would be lost if he was disqualified and the case transferred. The court reasoned:

To permit disqualification on these facts would result in a substantial inconvenience to the court and all parties and persons directly or indirectly concerned, cause unnecessary delay and expense, and could result in a trial judge acting without or in excess of his jurisdiction, contrary to legislative intent, which intent is to expedite proceedings and to require that a judge preside on a case until he is prevented from doing so for proper reason. Should a reason appear, he should then step down and, at that time, explicate his reasons for the withdrawal.

Id.

In addition, there was a short dissent in *Ham*, differing with the court’s holding because it appeared to require a judge to confess actual bias in order to recuse, a position the dissent found insufficiently protective of the public faith in the courts. *See id.* at 415 (Mowbray, J., dissenting) (“There may be cases where a judge himself feels he is not biased, yet in the interest of presenting a high standard of impartiality concludes that a requested transfer should be granted.”).

300. *See, e.g., Hayes v. Forman*, 568 P.2d 579, 580 (Nev. 1977) (requiring Judge [Keith C.] Hayes to “be restored as trial judge” in the Howard Hughes “Mormon Will” case where he voluntarily withdrew because of unfounded allegations that he would uphold the will because it provided a substantial gift to the Mormon Church of which Judge Hayes was a member). In *Hayes*, the court’s own description of *Ham* is that it “recognized that there may be circumstances where the appearance of impropriety may require disqualification if the judge created that appearance.” *Id.* However, there should not be disqualification out of an abundance of caution “where the judge’s conduct is

1990s, *Ham* appeared to have a low profile.³⁰¹ But during the 1990s, *Ham* evolved into a purported edict on the duty to sit³⁰² and paved the way for occasionally pernicious application of the doctrine.

beyond reproach and recusal is sought for admittedly false statements of counsel.” *Id.*

301. For example, in *Jeaness v. Dist. Court*, 626 P.2d 272, 274 (Nev. 1981), the court noted that *Ham* was the exception to the general rule in favor of voluntary recusal so long as there was not an absence of justification for withdrawal. The *Jeaness* Court also noted that *Ham* had emphasized the fact-specific nature of its holding resisting disqualification in a case that had gone on for some time. *Id.* In *Goldman v. Bryan*, 764 P.2d 1296 (Nev. 1988), and *In re Dunleavy*, 769 P.2d 1271 (Nev. 1988), the court rejected disqualification motions in cases where it seems fairly clear that the case for recusal was weak. In *Goldman*, one challenged judge had merely recited the facts of the case in a letter but voiced no opinion on the matter. 764 P.2d at 1299-3003. In *Dunleavy*, counsel for one of the parties had contributed to the judge’s campaign some years in the past. 769 P.2d at 1275. In *Ainsworth v. Combined Ins. Co.*, 774 P.2d 1003, 1018 (Nev. 1989), the court found Chief Justice E.M. Gunderson not to be disqualified because his admittedly negative attitude toward counsel was based upon the proceedings before the court and did not constitute extra-judicial bias. *See also* *Laxalt v. McClatchy*, 602 F. Supp. 214, 218 (D. Nev. 1985) (“[R]ecusal or disqualification should not be based on speculation. This is true even though a judge should resolve any close issue in favor of disqualification if a reasonable person might question his impartiality. . . . There are policy reasons why a judge does have an obligation not to recuse himself when no probative evidence reasonably gives rise to doubt as to his impartiality.” (citations omitted)).

302. *See, e.g.*, *City of Las Vegas Downtown Redev. Agency v. Hecht*, 940 P.2d 134, 138 (Nev. 1997) (rejecting disqualification motion based on justice’s alleged antipathy toward counsel); *Sonner v. State*, 930 P.2d 707, 712 (Nev. 1996) (finding judge’s representation in unrelated matter by prosecuting attorney now appearing before the judge does not require recusal by the judge); *Kirksey v. State*, 923 P.2d 1102, 1118 (Nev. 1996) (rejecting disqualification motion based on inappropriate ex parte communication, proper judicial calling of witnesses, and judge’s judicially acquired knowledge and emphasizing judge’s “obligation not to recuse himself” without reason and “substantial weight” to be given to judge’s decision rejecting recusal); *Snyder v. Viani*, 916 P.2d 170, 174-75 (Nev. 1996) (concluding that Justice Robert Rose’s past ownership of a bar sold subject to promissory note was not a “direct, ongoing pecuniary interest that would disqualify him from participation” in a case involving an attempted common law dram-shop cause of action against an unrelated bar); *Valladares v. Dist. Court*, 910 P.2d 256, 257-58, 260 (Nev. 1996) (holding judge not disqualified even though he had previously, during the course of a judicial campaign, questioned the honesty and competency of counsel for one of the parties). *But see In re Varain*, 969 P.2d 305 (Nev. 1998) (rejecting judicial discipline for judge’s reassignment of case after recusal; no invocation of duty to sit doctrine); *In re Oren*, 939 P.2d 1039, 1040 (Nev. 1997) (holding disqualification was required where judge had, as a deputy district attorney, been involved in criminal child neglect case against the same father involved in termination of parental rights hearing before the judge), *partially overruled by* *Towbin Dodge LLC v. Dist.*

Although reasonable observers may disagree over whether the 1990s Nevada recusal decisions are correct, several seem very problematic. *Valladares v. District Court*,³⁰³ *Sonner v. State*³⁰⁴, *Redevelopment Authority v. Hecht*,³⁰⁵ and perhaps *Snyder v. Vianni*³⁰⁶ and *Kirksey v. State*³⁰⁷ appear wrongly decided in that recusal should have been required or would have been the better, more confidence-building course of action. Thus, it appears that the state's endorsement of the duty to sit, initially only in its benign form, evolved into a more pernicious duty to sit

Court, 112 P.3d 1063 (2005) (permitting affidavit of prejudice to be filed within reasonable time after counsel becomes aware of grounds for affidavit; interestingly, this ruling was based in part on the court's interest in following federal judicial disqualification procedure); *Whitehead v. Nevada Comm'n on Judicial Discipline*, 908 P.2d 219, 219 (Nev. 1995) (overruling appointment of special master deemed void because of participation of justices subject to recusal); *PETA v. Bobby Berolini, Ltd.*, 894 P.2d 337, 341 (Nev. 1995) (holding judge's membership on advisory board of foundation interested in case creates appearance of impropriety supporting disqualification), *partially overruled by Hecht*, 940 P.2d at 138). If federal recusal procedure is considered reasonable by the court, one might question why the court continues to invoke a duty to sit doctrine that was abolished under federal law nearly thirty-five years ago.

The decision in *Snyder*, 716 P.2d at 170, was 3-2, with Chief Justice Robert Steffen and Justice Charles Springer in dissent. There was at the time well-known tension between the Justices of the court with respect to the *Whitehead* litigation, which involved allegations of improper conduct against former trial judge Jerry Carr Whitehead. See Stephen Magagnini, *Nevada's Top Court Hogtied by Feud: Justices Tangle Over Probe of Reno Judge*, SACRAMENTO BEE, March 17, 1996, at A1. Consequently, it might be well for both Nevadans and nonresidents to regard recusal debate among the Justices of that composition of the court as forming a separate category that should not greatly impact the Commission's recommendation regarding continued endorsement in the Code of a duty to sit.

Hecht involved alleged animosity between former Justice Robert Rose and prominent Las Vegas attorney Laura FitzSimmons. See also *O'Brien v. State Bar*, 952 P.2d 952, 956-58 (Nev. 1998) (Rose, J., dissenting) (discussing majority's rejection of challenge to FitzSimmons' election to State Bar of Nevada Board of Governors). *Hecht* can also be described as a case where the Court rejected recusal because of the perceived necessities of administering the judicial system in a state with an elected judiciary and often contentious judicial elections that may lead to tensions between judges and attorneys who supported their opponents.

303. 910 P.2d at 256.

304. 930 P.2d at 707.

305. 940 P.2d at 134.

306. 916 P.2d at 170.

307. 923 P.2d at 1102.

concept that pushed its Supreme Court to resist recusal in cases where disqualification would have been the better choice.

For example, In *Valladares v. District Court*,³⁰⁸ the challenged judge was not disqualified even though he had previously, during the course of a judicial campaign, questioned the honesty and competency of counsel for one of the parties. Surely that must have raised reasonable concern about the judge's ability to be impartial in adjudicating the matter. In *Sonner v. State*,³⁰⁹ the judge's representation in an unrelated matter by a prosecuting attorney now appearing before the judge did not require recusal of the judge. In *Kirksey v. State*, the Court rejected a disqualification motion based on inappropriate ex parte communication, improper judicial calling of witnesses, and the judge's judicially acquired knowledge leading to antipathy toward a party and counsel.³¹⁰ *Kirksey* emphasized the judge's "obligation not to recuse himself" without reason and the "substantial weight" to be given to a judge's decision rejecting recusal. In these situations, it is hard not to see some reasonable ground for concern over the judge's ability to be impartial.

In *Snyder v. Viani*, the Court concluded that Justice Robert Rose's financial interest related to a bar was not a "direct, ongoing pecuniary interest such that would disqualify him from participation" in a case involving a request that the Court create a dram-shop cause of action by common law.³¹¹ Unlike most states, Nevada has no dram shop liability statute, a reflection of the political power of the hospitality industry. Justice Rose had sold his interest in the bar—which was not the defendant in the case—prior to the case but still held a promissory note for payment promised by the new owners, creating the argument that payment on the note would be at risk if establishments serving alcohol were subjected to increased potential liability.

308. 910 P.2d at 257.

309. 930 P.2d at 712.

310. 923 P.2d at 118-19.

311. 916 P.2d at 171-72.

Hecht involved alleged animosity between Justice Rose and prominent Las Vegas attorney Laura FitzSimmons.³¹² FitzSimmons alleged that Justice Rose held animosity toward her growing out of what Nevadans commonly refer to as the *Whitehead* matter, a nexus of investigations, litigation, and conflict arising out of allegations of improper conduct against former trial Judge Jerry Carr Whitehead.³¹³ Judge Whitehead agreed to leave the bench as part of a negotiated arrangement with the prosecution in which charges were dropped.³¹⁴ Satellite litigation revolved around the question of the confidentiality of investigation records and whether some members of the Supreme Court improperly had made selective leaks to the press.³¹⁵

Battle lines became drawn at the court regarding the *Whitehead* matter, with Justices E. M. "Al" Gunderson, Charles Springer, and Thomas Steffen tending to align with Whitehead, while Justices Rose, Miriam Shearing, and Clifford Young were viewed as the anti-Whitehead camp.³¹⁶ FitzSimmons had been law clerk to Gunderson and remained a friend. Attorneys tended to ally with various Justices in their views of the *Whitehead* matter. FitzSimmons was one of the prominently identified attorneys in the fight, and she and Justice Rose came to have well-known tension with one another that became

312. 940 P.2d 134, 136 (Nev. 1997) (rejecting disqualification motion based on justice's alleged antipathy toward counsel).

313. See, e.g., *Whitehead v. Nevada Comm'n on Judicial Discipline*, 920 P.2d 491 (Nev. 1996), *stricken as void by Del Papa v. Steffen*, 920 P.2d 489, 491 (Nev. 1996); *Whitehead v. Nevada Comm'n on Judicial Discipline*, 908 P.2d 219, 219 (Nev. 1995); *Whitehead v. Nevada Comm'n on Judicial Discipline*, 893 P.2d 866, 872 (Nev. 1995). See also Stephen Magagnini, *Nevada's Top Court Hogtied by Feud: Justices Tangle Over Probe of Reno Judge*, SACRAMENTO BEE, Mar. 17, 1996, at A1; Ed Vogel, *High Court Rejects Attorney's Request*, LAS VEGAS REV.-J., Oct. 2, 1992, at 3B; Todd Woody, *Nevada's No-Holds-Barred Politics and Casino Culture Has Made Serving on the State's Supreme Court a Dicey Proposition*, RECORDER (SAN FRANCISCO), Oct. 6, 1997, at 1.

314. Subsequent to leaving the bench, Judge Whitehead became a prominent mediator who commands a significant hourly rate for his alternative dispute resolution efforts. David Berns, *Group to Honor Former Judge*, Las Vegas Rev.-J. June 19, 2003, at 38 (reporting that Whitehead received lifetime achievement award from Nevada Trial Lawyer Association and was praised as mediator).

315. See *Whitehead*, 893 P.2d at 879.

316. See *supra* note 313 and accompanying text.

widely known in the legal community.³¹⁷ When Justice Rose stood for re-election in 1994,

FitzSimmons supported his opponent and worked in the opponent's campaign office. She also arranged a press conference where statements were made by former U.S. Attorney Bill Maddox that were detrimental to Justice Rose's campaign. During these political campaign exchanges, Justice Rose cited FitzSimmons' activity as evidence that she opposed his reelection . . .

After Justice Rose won the 1994 election, FitzSimmons filed a lawsuit to make public any telephone conversations between Justice Rose and third parties that had previously been sealed by the district court. FitzSimmons stated that the purpose of the request was so that she could use the statements in a legal action against Justice Rose; however, FitzSimmons gave neither Justice Rose nor the other third parties to the conversations notice of the petition or hearing. When Justice Rose and the third parties became aware of the action through sources other than FitzSimmons, they opposed it; and FitzSimmons did not pursue it further.³¹⁸

The court went on to state:

In a document filed [in the case] Justice Rose accuses [FitzSimmons] of being part of an ongoing conspiracy against him, a conspiracy which he calls the "Gunderson/Whitehead/Springer/Steffen coalition." The Rose document is comprised of a long bill of complaints against Ms. FitzSimmons and against the mentioned conspiratorial coalition, including charges that Ms. FitzSimmons was part of a plan to make public sealed criminal charges that had been filed by a Metropolitan police officer against Justice Rose, and that, had it not been for Ms. FitzSimmons and her co-conspirators, these charges would have been kept from the public eye and remained "sealed" by order of District Judge [later Supreme Court Justice] Nancy Becker.³¹⁹

317. See also *O'Brien v. State Bar*, 952 P.2d 952, 956-58 (Nev. 1998) (Rose, J., dissenting) (disagreeing with majority's rejection of challenge to FitzSimmons's election to State Bar of Nevada Board of Governors).

318. See *City of Las Vegas Downtown Redev. Agency v. Hecht*, 940 P.2d 134, 136 (Nev. 1997).

319. *Id.* at 142 n.3 (Springer, J., dissenting) ("Ms. FitzSimmons vehemently denies that she is part of any such conspiracy; but it is obvious from [the document] that he earnestly believes that Ms. FitzSimmons is conspiring to

In addition, although the Court majority does not give details, it notes that “[a]dmittedly, a few of Justice Rose’s comments [about FitzSimmons] may have been better not made”³²⁰ But the Court nonetheless found recusal inappropriate because of the “political realities” of a “difficult campaign for re-election” in which FitzSimmons was “actively opposing” Justice Rose.³²¹ Relying in part on the tainted *Valladares* precedent, which held that a judge may preside even when an attorney in the case is his former opponent who he labeled unfit for the bench,³²² the *Hecht* majority stressed that it generally takes more concern about impartiality to disqualify a judge due to attitudes toward an attorney than where the judge’s negative attitudes concern a party to the litigation.³²³ The *Hecht* Court, “[i]n reviewing the statements made by Justice Rose about FitzSimmons’ activities,” found that the statements had “none of the vindictiveness found in the statements made in *Valladares* where the attorney’s ethics, honesty, and competency were challenged.”³²⁴ And, as noted above, not even these vindictive statements in *Valladares* were sufficient to warrant disqualification. In essence, the *Hecht* majority was able to take the erroneous *Valladares* decision, spawned in part from the state’s duty to sit, anti-recusal culture, and use it to reach another arguably erroneous decision.³²⁵

destroy him.”). Because the description of the document referenced is provided by Justice Springer, an open opponent of Justice Rose, some caution is required in accepting Justice Springer’s characterization of the document. Unlike Justice Young and the court majority, Justice Springer supported disqualification of Justice Rose. *See id.* (“In my judgment, [Justice Rose’s] beliefs and the other charges . . . create a strong appearance of *extreme* bias on the part of Justice Rose and lead to the almost inescapable inference that it is impossible for Justice Rose to sit in impartial judgment in this case while Ms. FitzSimmons is acting as counsel.”). Nonetheless, the contents of the document, if even roughly accurately described by Justice Springer, are quite damning and reflect a situation where hostility between a judge and an attorney is so great as to raise reasonable questions as to impartiality.

320. *See id.* at 137 (majority opinion).

321. *See id.*

322. *See Valladares v. Dist. Court*, 910 P.2d 256 (Nev. 1996); *see also supra* text accompanying note 308.

323. *See Hecht*, 940 P.2d at 137 (citing *Valladares*, 910 P.2d at 256).

324. *See id.* at 138.

325. I say arguably out of a belief that reasonable persons may be able to form a conclusion that Justice Rose should not have been disqualified in *Hecht*, although my own opinion is to the contrary, on the ground that the often rough-

The theory of the distinction between prejudice against counsel and prejudice against a party, of course, is that it is the party that stands to win or lose from litigation, while the attorney has no personal stake in the outcome and merely moves on to the next case. But this theory is less than satisfying if the attorney is working on a contingent fee basis, which in part explains why counsel for personal injury plaintiffs—for example, Mark Lanier, who recently

and-tumble nature of Nevada judicial elections, which heavily involve the bar, leads to difficult exercises of line-drawing as to when lawyer-judge conflict is sufficient to require a judge to be removed from the lawyer's cases. In addition, there are concerns over strategic and selective use of recusal motions. One of Justice Rose's strongest arguments against recusal was that FitzSimmons had appeared as counsel before the Court in eighteen cases "since the *Whitehead* case (the time which FitzSimmons claims Justice Rose's bias against her began)" but that she "filed a formal demand [for recusal] in only half of them." *Id.* at 137.

Further, Justice Rose also had available to him something of a "no harm, no foul" defense in that "Justice Rose apparently voted in favor of FitzSimmons' clients five out of eight times, with one case still pending" and that "Justice Rose cites the record of rulings in her cases as clear evidence that he is fair and impartial in cases where FitzSimmons is an attorney for a party." *Id.* Although seemingly persuasive, the "no harm, no foul" defense should not defeat an otherwise valid recusal motion. A judge may have intense personal antipathy for an attorney that calls into question the judge's neutrality and yet be unable to consistently rule against the attorney because of other factors such as an overwhelmingly strong case on the merits, the presence of other lawyers or parties to whom the judge owes allegiance or has greater antipathy. A biased judge may also have tactical reasons for voting a certain way in order to build coalitions on the court or establish precedent for future deployment on an issue. The judge may consider this more important than his individual enmity for a single lawyer.

Although this may make jurists seem excessively Machiavellian, my point is simply that a lawyer's track record before a judge is often of minimal evidentiary value. Although it would clearly strengthen the case for recusal if the judge always ruled against the parties the attorney represented, it does not conversely follow that a mixed record refutes the charge of lack of neutrality. A partial judge may even realize his attitudes toward an attorney tend to warp his judicial judgment and fight against this tendency with erratic success, making a mixed record on counsel's cases the product of simple human frailty rather than anything more calculating. Regardless of the reasons for a judge's mixed voting record on an attorney's cases, the core relevant question is whether a reasonable person knowing of the judge's strong enmity toward an attorney would have reasonable questions about the judge's ability to be impartial when hearing cases in which that attorney is involved. In my view, that standard was clearly met in *Hecht* because of the peculiar but well-known circumstances of legal, political, and personal conflict growing out of the *Whitehead* matter.

hunted with Justice Scalia³²⁶—are often heavy contributors to judicial campaigns. As Justice Rose, and most everyone in the Nevada bar, surely knew, FitzSimmons, a lawyer for landowners seeking compensation for actual or constructive taking of their property by government entities, was almost certainly representing Hecht under some form of a contingency or bonus fee arrangement rather than billing by the hour. Quite literally, her financial rewards in the case, as well as any reputational awards, would rise or fall with the Court's decision for or against her client just as if she were a party to the case. Under these charged circumstances, many questioned the correctness of the decision to let Justice Rose remain sitting in judgment in a case that could so greatly reward or punish an attorney regarded as his enemy. The hostility between Justice Rose and FitzSimmons was widely known in the legal community and, like the *Whitehead* matter, was reported in the press, adding to concern that his failure to recuse himself could undermine public confidence in the courts.

Eventually, Justice Rose did elect to recuse himself from cases involving FitzSimmons,³²⁷ suggesting some tacit admission of error in the *Hecht* decision. Regardless of whether the duty to sit led to bad decisions in these cases, its existence in Nevada did not do anything to make the recusal questions involved any easier. For example, in *Hecht*, the majority defended its opposition to recusal by arguing that “[i]n a state with a relatively small number of attorneys disqualifying judges because an attorney before them had participated in the process or had opposed a judge or justice would subject many judges and justices to disqualification.”³²⁸ The court then quoted a prior case to buttress this argument: “In a small state such as Nevada, with a concomitantly limited bar membership, it is inevitable that frequent interactions will occur between the members of the bar and the judiciary.”³²⁹

326. See *supra* notes 259-63 and accompanying text (describing Justice Scalia's hunting trip with prominent personal injury attorney Mark Lanier).

327. See *Whitehead v. Nevada Comm'n on Judicial Discipline*, 920 P.2d 491 (Nev. 1996), *stricken as void by*, *Del Papa v. Steffen*, 920 P.2d 489, 491 (Nev. 1996).

328. See 940 P.2d at 137.

329. *Id.* (quoting *In re* *Petition to Recall Dunleavy*, 769 P.2d 1271, 1275 (Nev. 1988)).

But this “small state” exception, a variant of the argument against recusal in the U.S. Supreme Court by Justices Rehnquist, Scalia, and the others who issued the Court’s 1993 Statement on Recusal Policy,³³⁰ is not well taken. Today, Nevada has roughly 2.5 million residents and more than 6,000 active members of the State Bar as well as nearly fifty trial judges of general jurisdiction and an equal number of family court and municipal judges who could be called for service in cases where recusal left a court short-staffed. The seven-member state Supreme Court permits the appointment of a retired justice or designated trial judge to fill vacancies in a case created by recusal. Although obviously smaller than neighboring states like California, Nevada is not so small as to create an exception to the usual ground rules regarding recusal. Further, the state’s main population centers, the Reno-Sparks and Las Vegas metropolitan areas, are 400 miles apart. Consequently, even if the entire bench in one metro area is disqualified, the case could be transferred to a widely separated metro area where at least some members of the bench are likely to be eligible to preside.

Notwithstanding Nevada’s adequate size and status as the fastest-growing state for much of the 1995-2005 time period, the Nevada Supreme Court’s Twenty-First Century cases endorsed the duty to sit doctrine with considerably more force than did *Ham* and under circumstances where the recusal question was close.³³¹ Most prominently, *City of Las Vegas Downtown Redevelopment Agency v. District Court* required the trial judge to retain a case on which he had previously determined to step aside in order to avoid any semblance of a question as to his impartiality due to the receipt of campaign contributions for parties to the litigation.³³² *Las Vegas Downtown Redevelopment Agency* serves as a good example of the manner in which invocation of a duty to sit doctrine results in resolving a close case—for example, whether to recuse because of campaign contributions—against disqualification rather than in favor of disqualification as would most federal courts. More

330. See *supra* notes 265-70 and accompanying text.

331. See *Millen v. Dist. Court.*, 148 P.3d 694, 699-700 (Nev. 2006); *City of Las Vegas Downtown Redev. Agency v. Dist. Court*, 5 P.3d 1059, 1061-63 (Nev. 2000).

332. 5 P.3d at 1062-63.

importantly, the duty to sit concept was used to require a trial judge to hear a matter in spite of the fact that the trial judge, for non-frivolous reasons that did not implicate his dedication to his work,³³³ felt more comfortable allowing the matter to be presided over by another judge without an arguable shadow on his impartiality.³³⁴

333. One could, I suppose, argue that the 2000 *Las Vegas Downtown Redevelopment Agency* case, since it involved a major downtown redevelopment project popularly known as the “Fremont Street Experience” and vigorously contested litigation, was the type of controversial, unpopular, or difficult case from which a judge may be tempted to absent himself. But it was not the functional equivalent of a case involving espionage and capital punishment (e.g., the Rosenbergs), deciding an election (Bush v. Gore, 531 U.S. 98 (2000)), charging a once popular public figure with immorality (e.g., Michael Jackson), or one with media circus potential (e.g., the O.J. Simpson criminal prosecutions). In these latter types of cases, one can understand the rationale for duty to sit sentiment since a judge might want to avoid the political and logistical headaches of such a case. But *Las Vegas Downtown Redevelopment Agency* does not seem to fit this category.

334. The Court noted that trial Judge Mark Denton’s recusal on grounds of receipt of campaign contributions had initiated a “chain” of recusals in that two other judges had subsequently recused themselves. See *Las Vegas Downtown Redevelopment Agency*, 5 P.3d at 1060. My definition of a chain involves somewhat more than three links. If recusal on grounds of campaign contributions would disqualify the entire Eighth District bench, the recusal issue would be more problematic. But because there were an additional fifteen local judges who might have been available to hear the case as well as judges from outside the Las Vegas area, one can question whether Judge Denton’s voluntary disqualification created sufficient administrative difficulties to force him to stay on the case.

Unfortunately, reported cases like *Las Vegas Downtown Redevelopment Agency* may underreport the degree to which the Nevada Supreme Court has been unduly resistant to recusal due to the pernicious version of the duty to sit. For example, in an unreported prior decision, the Court reversed a trial judge’s recusal resulting from the judge’s receipt of a certified letter from a litigant reminding the judge that the litigant had contributed five-hundred dollars to his campaign. Shocked, the judge assembled counsel in chambers and stated that although he thought he would not favor the campaign contributor, the letter created doubt that required his disqualification, both to assuage concerns that the judge could be bought for five-hundred dollars and concern that he would be so insulted by the letter that he would retaliate against this amazingly ham-handed and unethical litigant. On review, the Supreme Court ordered the trial judge to continue to preside—the liability phase of the case had been determined prior to the certified letter crowing about the campaign contribution—stating that the duty to sit compelled participation absent a reason to recuse. Because the trial judge had stated he was not biased, the Supreme Court found that there was consequently no reason to recuse. See *Conversation with judges, including affected judge*, Feb. 7, 2009. I only wish I could say I was making this up.

In *Millen v. District Court*, the Court provided an extensive discussion of recusal lists—lists of persons or entities given to the clerk of court to prevent the clerk from assigning cases involving these parties to judge.³³⁵ *Millen* also sensibly concluded that the duty to sit did not require a judge to continue to hear a case in which the litigant's choice of attorney created grounds for disqualification, unless "the lawyer was retained for the purpose of disqualifying the judge and obstructing management of the court's calendar."³³⁶ During the course of the opinion, the Court reiterated its support for the duty to sit doctrine.³³⁷ However, as with many of the 1990s Nevada recusal cases, one can make a strong argument that consideration of the duty to sit was not necessary to resolving the disqualification issue in *Millen*.

The *Millen* Court devoted an entire page of the relatively brief opinion balancing the duty to sit against a party's right to counsel and right to a judge whose impartiality could not be reasonably questioned.³³⁸ At the conclusion of this needless hand-wringing, the Court reached the correct result and did not insist that the originally assigned judge with ties to counsel, a former judge, remain on the case. Continued recognition of a duty to sit unnecessarily required the Court to hesitate in requiring judicial disqualification in cases where the presence of a particular counsel created legitimate grounds for recusal due to bias, prejudice, or the appearance of impropriety. The Court could have reached the same sensible decision—that lawyer-based grounds for recusal are ineffective where the lawyer was selected merely to attempt to disqualify a judge—even if the duty to sit doctrine had never existed.

335. 148 P.3d at 699-701.

336. *Id.* at 696-97:

We also consider whether a judge's duty to sit and hear a case supersedes a client's right to select an attorney of his or her choice when that attorney appears on the assigned judge's recusal list. We conclude that, when a judge's duty to sit conflicts with a client's right to choose counsel, the client's right generally prevails, except when the lawyer was retained for the purpose of disqualifying the judge and obstructing management of the court's calendar.

337. *See id.* at 699-700.

338. *See id.*

Implicitly, *Millen* adopted the benign version of the duty to sit doctrine rather than its pernicious cousin. But the case could more easily have been decided if the Court was not burdened by the duty to sit concept at all. At the very least, the *Millen* Court would have benefitted if the Judicial Code made clear that a judge's responsibilities to hear and decide cases embraces only the benign duty to sit and rejects the pernicious duty to sit. Whatever merits *Millen* has standing alone, the fact remains that recent Nevada precedent reflects as many as a half-dozen cases where recusal was not required under circumstances that should give most observers substantial doubt about judicial impartiality. Erroneous decisions spurred by the pernicious version of the duty to sit remain good law in Nevada even if the state courts meant only to adopt the benign version of the doctrine.

Despite this, Nevada law does not appear to take the duty to sit concepts to the extremes reflected in *Laird v. Tatum* or other, older cases that viewed the concept as requiring that judges be removed from a case only under the most extreme circumstances. Rather, Nevada caselaw, if read closely, seems to suggest that the duty to sit should not override application of the basic principles of impartiality regarding disqualification decisions.³³⁹ However, the rhetorical impact of the duty to sit nomenclature appears at the margin to make Nevada judges too resistant to recusal. Certainly, the term and its caselaw appear as a matter of course in the briefs of every litigant resisting a disqualification motion in Nevada. In 2007, Nevada's state courts were the subject of a multi-installment *Los Angeles Times* series tellingly titled *Juice vs. Justice?* ("juice" a colloquial term for influence).³⁴⁰ Although there are

339. Depending on one's viewpoint, the "recusal and judicial campaigns" decisions might be criticized as too resistant to disqualification. But these cases could be decided the same way if the Court found the issue not to be a close question or wished to invoke a version of the rule of necessity in resisting disqualification for de minimus campaign support in view of the elected Nevada judiciary.

340. See Michael J. Goodman, *A Judge Who Isn't Playing by Fast and Loose Rules*, L.A. TIMES, June 8, 2006, at A20; Michael J. Goodman, & William C. Rempel, *In Las Vegas, They're Playing With a Stacked Judicial Deck*, L.A. TIMES June 8, 2006, at A20; Michael J. Goodman & William C. Rempel, *Juice vs. Justice: For This Judge and His Friends, One Good Turn Led to Another*, L.A. TIMES, June 9, 2006, at A1; Michael J. Goodman & William C. Rempel, *Juice vs.*

reasonable rebuttals to the article,³⁴¹ which depended heavily on the profiling of a few judges and the general problem of judicial fundraising and elections, the fact remains that, in part because of its embrace of the duty to sit and resistance to recusal, Nevada courts have an image problem that predates the *L.A. Times* series and continues.³⁴²

3. *Mischief in Other States.* Although Nevada may be the most prominent example of a state that formally embraces the duty to sit long after it was supposed to have disappeared, a few other states provide similar examples of problems where the continued reign of the duty to sit may make courts too resistant to judicial disqualification. As one scholar observed, “[p]rior to 1975 Alabama courts found

Justice: Special Treatment Keeps Them Under the Radar, L.A. TIMES, June 10, 2006, at A1.

341. See, e.g., Sean Whaley, *Rose Responds to Criticism*, LAS VEGAS REV.-J., Sept. 20, 2006, at 5B (stating that the Nevada judiciary was taking steps to improve disclosure of conflicts of interest affecting state judges).

342. See *supra* notes 303-07 (discussing cases where Nevada permitted judges to preside in questionable circumstances); *supra* notes 312-25 (regarding the *Whitehead* controversy and acrimony on the 1990s Nevada Supreme Court); see also David Kihara, *County is Called Court ‘Hellhole,’* LAS VEGAS REV.-J., Dec. 18, 2007, at 6B (noting Clark County/Las Vegas, Nevada courts named on American Tort Reform Association’s annual list of “Judicial Hellholes” associated with judicial favoritism, erratic decisionmaking and abnormally high verdicts for plaintiffs); Glen Puit, *Lawsuit Critical of High Court*, LAS VEGAS REV.-J., Nov. 13, 2003, at 3B.

Of course, making the ATRA Judicial Hellhole list could be viewed, at least in part, as an honor in that ATRA’s evaluation of courts is largely geared to whether the local courts are pro-plaintiff (bad in ATRA’s view) or pro-defendant (good in ATRA’s view). My own opinion is that ATRA, having previously named low-hanging fruit such as the St. Clair County, Illinois, courts (where the plaintiff’s bar appears to have developed a compliant bench) to its list, is now straining a bit to find alleged hellholes. The Clark County courts are in my experience more plaintiff friendly than many courts, including their federal counterparts in Nevada, but not unduly so. Although a few of the state trial judges are weak intellectually or occasionally intemperate, the bench as a whole compares favorably with other courts. Furthermore, finding for a plaintiff hardly is conclusive of judicial error. Some defendants are guilty as charged and deserve an adverse verdict and a substantial judgment against them. See, e.g., *Merrick v. Paul Revere Life Ins. Co.*, 594 F. Supp. 2d 1168 (D. Nev. 2008) (deciding, in a well-crafted opinion by U.S. District Judge James C. Mahan, who was a target of the *L.A. Times* Juice vs. Justice series for alleged favoritism, that on the basis of strong evidentiary record, large insurer acted in bad faith and with malice, and awarding substantial compensatory and punitive damages).

sufficient reason to disqualify judges only in egregious circumstances” and despite the state’s subsequent adoption of the 1972 ABA Model Code, “some Alabama courts persisted in requiring parties who sought to disqualify a judge to show that the judge was biased in fact.”³⁴³ Although the state’s continued embrace of the duty to sit³⁴⁴ is not directly textually linked in the state’s recusal-resistant decisions, the state remains recusal resistant in doctrine³⁴⁵ and occasionally fails to disqualify in some seemingly egregious cases.³⁴⁶

Arkansas embraces the duty to sit in a seemingly benign form but in a manner that creates a confusing standard and seems to have narrowed the reach of the ABA Model Code. When addressing recusal motions, Arkansas courts typically state that “a judge has a duty to sit on a case unless there is a valid reason to disqualify.”³⁴⁷ Also frequently noted is that

343. See FLAMM, *supra* note 2, § 28.2 at 825. See, e.g., *Ex parte* Hunt, 642 So. 2d 1060, 1069 (Ala. 1994) (requiring showing of prejudice rather than merely reasonable question as to impartiality). *But see In re* Sheffield, 465 So. 2d 350, 355 (Ala. 1985) (applying correct standard and requiring recusal).

344. See, e.g., *Ex parte* Hill, 508 So. 2d 269, 271 (Ala. Civ. App. 1987) (stating that although federal law has eliminated duty to sit, “we are not prepared to go that far . . .”).

Alabama also uses the term “duty to sit” when referring to evidence that was not heard in open court below. In Alabama, as in most states, a trial court’s findings of fact are reviewed under a “clearly erroneous” standard. However, this deference is not accorded to trial court findings of fact that are not based on evidence based on oral testimony, and it then becomes the appellate court’s “duty to sit in judgment on the evidence.” See *McLean v. Brasfield*, 460 So. 2d 153, 155 (Ala. 1984); *accord* *McCulloch v. Roberts*, 296 So. 2d 163, 164 (Ala. 1974).

345. See, e.g., *Ex parte* Hill, 508 So. 2d 269, 271-72 (Ala. 1987) (affirming judge’s decision to disqualify self from divorce case due to personal friendship with parties and personal knowledge regarding some facts at issue but setting forth standard of actual prejudice rather than reasonable-question-as-to-impartiality standard).

346. See, e.g., *Hunt v. State*, 642 So. 2d 999, 1053-54 (Ala. Crim. App. 1993) (holding that recusal not required even though judge’s *ex parte* communications created appearance of impropriety); *Baker v. State*, 296 So. 2d 794 (Ala. Crim. App. 1974) (finding recusal not required where judge presided over trial of defendant who was indicted in another case known to the judge).

347. *Irvin v. State*, 345 Ark. 541, 49 S.W.3d 635, 641 (Ark. 2001). See also, e.g., *U.S. Term Limits, Inc. v. Hill*, 870 S.W.2d 383, 384-85 (Ark. 1994) (noting abolition of pernicious duty to sit in federal law, construing this to leave benign duty in place under Arkansas version of ABA Model Code and finding, “Under

The rule is long established that there is a presumption of impartiality on the part of judges and a judge's decision to recuse is within his or her discretion and will not be reversed absent abuse. The party seeking recusal must demonstrate any alleged bias. Unless there is an objective showing of bias, there must be a communication of bias in order to require recusal for implied bias.³⁴⁸

The Arkansas courts thus seem—notwithstanding the state's adoption of the “reasonable question as to impartiality” standard of the ABA Model Rule—to require much more than merely a reasonable question about the judge's neutrality but instead have raised the bar for recusal to require a rather clear showing of actual bias or prejudice.³⁴⁹ There is also often language in Arkansas cases stressing that the “question of bias is usually confined to the conscience of the judge.”³⁵⁰ The net impact appears to be a state resistant to recusal in that it requires proof of actual bias and finds it insufficient that reasonable lay observers could be concerned or that a judge's participation appears inappropriate. Although the bulk of Arkansas cases involving denial of recusal appear to reflect only weak grounds,³⁵¹ the state's overall attitude seems resistant to

the current code, a judge has a strong duty not to sit in cases where he or she is disqualified, but there is an equally strong duty to sit in cases when he or she is not disqualified.”). *But see* Walls v. State, 20 S.W.3d 322, 324-25 (Ark. 2000) (employing duty to sit to reject recusal notwithstanding “apparent ethical lapses” of trial judge in talking to press and meeting ex parte with victims and families in a case involving rape of boy scouts by leader).

348. *See, e.g.*, Malory v. Harsfield, Almand & Grisham, LLP, 86 S.W.3d 863, 866 (Ark. 2002).

349. *See infra* note 290 and accompanying text.

350. Bland v. Baxter Reg'l Med. Ctr., No. CA 05-1229, 2006 WL 2556394 (Ark. App. Sept. 6, 2006).

351. *See, e.g.*, Porter v. Arkansas Dept. of Health & Human Servs., No. 08-359, 2008 WL 4173644 (Ark. Sept. 11, 2008) (finding judge's characterization of litigant's statement as “bad answer” insufficient ground for recusal, but citing duty to sit); Johnson v. State, No. CR 03-1023, 2005 WL 3320855, at *2 (Ark. Dec. 8, 2005) (finding defendant's claim of judge's friendship with crime victim unsupported by evidence, but citing duty to sit); U.S. Term Limits, Inc. v. Hill, 870 S.W.2d 383, 384 (Ark. 1994) (rejecting argument that judge's prior opinion differing with current legal position of movant constituted ground for recusal, but noting duty to sit); Long v. Wal-Mart Stores, Inc., 250 S.W.3d 264, 274 (Ark. App. 2007) (discussing lack of objective evidence of asserted judicial vendetta against movant, but noting duty to sit); Bland v. Baxter Regional Med. Center, No. CA 05-1229, 2006 WL 2556394, at *6 (Ark. App. Sept. 6, 2006) (“Although Bland presented the theory of a personal vendetta against her attorney, she

disqualification unless the case is compelling,³⁵² a legacy of the state's continued embrace of duty to sit rhetoric.

provided no objective evidence of bias, nor did she show that there was an actual communication of bias . . . ,” but noting duty to sit); *Bogachoff v. Arkansas Dep't of Human Svcs.*, No. CA 04-1183, 2006 WL 1344072 *7-*8 (Ark. App. May 17, 2006) (judge's decision not to order home study by Dept. of Human Services is not sufficient ground for recusal, but citing duty to sit); *Dodson v. State*, No. CR 02-1221, 2005 WL 775859, at *1-*2 (Ark. Apr. 7, 2005) (holding that judge's prior finding of contempt against counsel not ground for recusal, but duty to sit cited); *Turner v. Northwest Arkansas Neurosurgery Clinic, P.A.*, 210 S.W.3d 126, 134 (Ark. App. 2005) (finding judge's clearly erroneous evidentiary and procedural rulings reversed on appeal were not ground for recusal, but citing duty to sit). In addition, of course, *Turner* is supported by the rule that a judge should ordinarily only be recused for bias or prejudice stemming from an extrajudicial source. However, the nature of the *Turner* judge's rulings (e.g., excluding all evidence of mental illness of physician accused of malpractice) is so extreme that one might be justified in inferring that such wildly pro-defendant rulings reflect bias in favor of defendant, prejudice against plaintiff, prejudice against medical malpractice suits, or raise reasonable questions as to judge's impartiality.

352. See, e.g., *Perroni v. State*, 186 S.W.3d 206, 210 (Ark. 2004) (noting duty to sit):

Upon our review of the record, we hold that Perroni has failed to demonstrate the required bias on Judge Fox's part. While Perroni alleges Fox erred by serving as prosecutor and as a witness, in prejudging Perroni's case, in incarcerating Ross, and in conducting an ex parte investigation when preparing for a show-cause hearing, the primary issue is whether he disobeyed Judge Fox's scheduling order.

See also *Malory*, 86 S.W.3d at 867 (finding violation of Canon 3B(7)(a)(ii) prohibiting ex parte communications but finding that judge “cured this violation by calling the parties and allowing an opportunity to respond. Further, appellant has failed to show or demonstrate any bias of the trial court as a result of the ex parte communication.”); *Irvin v. State*, 49 S.W.3d 635, 642-43 (Ark. 2001) (rejecting defendant's argument “that the judge should have recused because the judge had formerly prosecuted Irvin while serving as the elected prosecuting attorney”; Irvin offered no evidence that the trial judge was biased or prejudiced against him merely because he had acted as prosecutor in Irvin's prior prosecutions. This bare fact proves nothing and, absent any actual showing of bias or prejudice, cannot suffice to require the trial judge to recuse,” citing duty to sit); *Walls v. State*, 20 S.W.3d 322, 324-25 (Ark. 2000) (employing duty to sit to reject recusal notwithstanding “apparent ethical lapses” of trial judge in talking to press and meeting ex parte with victims and families involving rape of boy scouts by leader, but citing duty to sit); *Beshears v. State*, 947 S.W.2d 789 (1997) (rejecting recusal where trial judge had prosecuted defendant in connection with unrelated matter ten years earlier and citing duty to sit). Accord *Parker v. Priest*, 932 S.W.2d 320 (Ark. 1996) (Hochstetter, S.J., mem.) (rejecting recusal due to allegedly close relationship with law firm involved; judge both denied as factual matter and cited duty to hear and decide cases); *Barritt v. State*, No. CA CR 06-1261, 2007 WL 2713593 (Ark. App. Sept.

As recently as 2008, a South Carolina appellate court rejected recusal despite the trial judge's ties to a party through counsel, her husband's law partner. The court noted that the duty to sit had long been recognized in federal court but failed to note its abolition at the federal level.³⁵³ Further, the court required an actual showing of prejudice rather than merely a reasonable question as to impartiality.³⁵⁴ The court found "Canon 3B(1) to be controlling, which imposes a 'duty to sit.'"³⁵⁵ However, as previously discussed, Canon 3B of the 1990 Code was intended only to adopt the benign version of the duty to sit, not its pernicious namesake.³⁵⁶ Fortunately, other South Carolina cases properly result in recusal and do not invoke the duty to sit,³⁵⁷ but the pernicious aspects of the concept appear to produce error occasionally.

Despite its continued adherence to the duty to sit, Mississippi courts will disqualify or sanction judges where the situation is clear.³⁵⁸ However, the state's recusal record

19, 2007) (rejecting recusal despite judge's ex-parte communication with juror who expressed reservations about guilty verdict).

353. See *Simpson v. Simpson*, 660 S.E.2d 274, 277-78 (S.C. Ct. App. 2008) (citing cases from Arkansas, Maryland, Michigan, Nevada, and West Virginia). As previously discussed, see *supra* notes 194 and 208 and accompanying text, Maryland and Michigan upon closer examination appear to be states with only a benign version of the duty to sit. The *Simpson* approach to the doctrine can be faulted for having managed to focus inordinately on a minority of states retaining the pernicious version of the duty.

354. See *Simpson*, 660 S.E.2d at 278. *Simpson* speaks inconsistently of the doctrine having been "recognized and imposed in both state and federal courts," *id.* at 278, but then cites as its federal authority *McBeth v. Nissan Motor Corp. U.S.A.*, 921 F. Supp. 1473, 1477 (D.S.C. 1996), which states that "[n]o judge, of course, has a duty to sit where his impartiality might be reasonably questioned," demonstrating that the *McBeth* Court was referring only to the benign duty to sit and not attempting to resurrect the pernicious version twenty years after it had been abolished in federal law.

355. *Simpson*, 660 S.E.2d at 278.

356. See *supra* text accompanying note 288 (discussing the 1990 Code).

357. See, e.g., *In re Dillon County Magistrate Davis*, 630 S.E.2d 281, 282-83 (S.C. 2006) (finding that a judge engaged in misconduct by holding a special hearing for his uncle, with no mention of duty to sit); *In re Stocker*, 608 S.E.2d 865, 870 (S.C. 2005) (finding that a judge improperly engaged in ex parte communications, with no mention of duty to sit); *Burgess v. Stern*, 428 S.E.2d 880 (S.C. 1993) (same).

358. See, e.g., *Miss. Comm'n on Judicial Performance v. Justice Court Judge S.S.*, 2002-JP-01126-SCT, ¶¶ 11, 19, 834 So. 2d 31, 34, 36 (Miss. 2003) (holding that a private reprimand was appropriate where a judge "participated in

has significant blemishes.³⁵⁹ The common thread among the small cluster of strong duty to sit cases is one in which courts in these states appear at times highly resistant to recusal, and on the whole appear to be more reluctant to recuse than in most state and federal courts. Although comprehensive data on public confidence in the judiciary in these states is not available, all of the “hard core” duty to sit states have been the subject of unflattering press reports concerning problems of partisanship and favoritism in their courts.

Alabama was widely perceived as a nirvana for personal injury plaintiffs until the business community struck back, currently making the state favorable to corporate defendants and insurers.³⁶⁰ Political affiliation and

drafting a petition against a law officer while serving as a judicial officer and continuing to preside on cases involving the Deputy without disqualifying himself”); Miss. Comm’n on Judicial Performance v. Vess, 692 So. 2d 80, 84-85 (Miss. 1997) (adopting the Commission on Judicial Performance’s recommendation that a judge “be subjected to public reprimand” for improper ex parte communications); Miss. Comm’n on Judicial Performance v. Milling, 651 So. 2d 531, 539-540 (Miss. 1995) (holding that a judge be removed from office for becoming socially involved and openly living with a criminal defendant); Miss. Comm’n on Judicial Performance v. Peyton, 645 So. 2d 954, 956-57 (Miss. 1994) (finding that a judge’s improper ex parte communications warranted the imposition of a fine of \$1,000 and a fifteen day suspension).

359. See, e.g., *Johnson v. Mississippi*, 403 U.S. 212, 215 (1971) (finding that a state court judge should have recused himself due to prior civil rights cases in which the petitioner had obtained a verdict against the judge); *In re Blake*, 912 So. 2d 907, 917-18 (Miss. 2005) (holding that a trial court judge was so obviously biased against an attorney that she must disqualify herself from all seven cases on her docket involving the attorney).

360. See e.g., *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991) (rejecting a constitutional challenge to an Alabama jury verdict of \$840,000 in punitive damages in an insurance bad faith case with \$200,000 in damages, a result called into question by subsequent Court decisions regarding constitutional limits on punitive damages); *Exxon Corp. v. Dep’t of Conservation & Natural Res.*, 859 So. 2d 1096 (Ala. 2002) (affirming a jury award of \$3.42 billion in punitive damages on breach-of-contract and fraud claims); *BMW of N. Am., Inc. v. Gore*, 701 So. 2d 507, 515 (Ala. 1997) (reducing a punitive damages award for a distributor’s failure to disclose that a car had been repainted after being damaged prior to delivery to \$50,000 after remand from U.S. Supreme Court); David Firestone, *Alabama Acts to Limit Huge Awards by Juries*, N.Y. TIMES, June 2, 1999, at A16 (reporting the state legislature’s passage of law limiting punitive awards in response to the state’s notoriety for huge tort awards). Most of Alabama’s bad press has concerned very large tort judgments under circumstances that suggest some jury irrationality. For example, in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), a jury awarded \$4 million in punitive damages because the buyer of a BMW automobile was not told that the

ideological bent appear correlated with judicial outcomes.³⁶¹ Famously, one Alabama Supreme Court justice inappropriately sat and cast the deciding vote in a case with precedential value for his own pending lawsuit under circumstances so egregious that the U.S. Supreme Court (including Justice Rehnquist) found it a violation of due process.³⁶²

Mississippi has long been pilloried as a “judicial hellhole” by the American Tort Reform Association (ATRA), a pro-defendant group.³⁶³ Although the ATRA agenda may be a bit too callous for some tastes (my own included),³⁶⁴ the organization has a point about state judges with excessively

paint job on the car had been retouched due to acid rain damage. Although the trial court reduced the award, the judge-entered award was two million dollars, an astonishing amount for such a relatively trivial, even if “fraudulent,” wrong perpetrated by the carmaker. *Id.* This sort of judicially adjusted award raises concerns about the competence and fairness of the courts.

361. See Stephen J. Ware, *Money, Politics, and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645 (1999).

362. See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824-25 (1986).

363. See AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2008/2009 3-19 (2008), available at <http://www.atra.org/reports/hellholes/report.pdf>. The worst courts in America according to the ATRA list are, in descending order of hellishness: West Virginia; South Florida (Miami); Cook County, Illinois (Chicago); Atlantic County, New Jersey; Montgomery County, Alabama; Macon County, Alabama; Los Angeles County, California (so much for the L.A. Times throwing stones at Las Vegas); and Clark County, Nevada (Las Vegas). *Id.*

364. For example, the ATRA advocates strict (and in my view arbitrary) caps on noneconomic damages and punitive damages that are hard to square with fundamental precepts of the American judicial system. The ATRA also opposes the contingency fee, which in essence permits injured persons to obtain legal representation that they could otherwise not afford and advocates the “English Rule” that losing parties should pay the winner’s counsel fees—a rule that would disproportionately favor those with wealth and the ability to spread the risk of litigation outcomes, i.e., commercial defendants, at the expense of individual plaintiffs. See generally The Legal Underground, ATRA’s “Judicial Hellholes 2004”: Don’t Be A Mindless Dupe, http://www.legalunderground.com/2004/12/atras_judicial_.html (last visited Dec. 30, 2008) (reporting distortions in ATRA claims); Joan Claybrook, *Why the “Tort Reform and Accidental Deaths” Report is Fundamentally Flawed*, PUBLIC CITIZEN 8, <http://www.citizen.org/documents/ACF2FB.pdf> (last visited Dec. 30, 2008) (finding statistics in an ATRA report untrustworthy and finding the ATRA to be more of a lobbying group for businesses facing litigation than a neutral investigator). The ATRA would probably make the same criticism of Public Citizen, a generally liberal group founded by noted activist Ralph Nader. See generally Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 W. VA. L. REV. 1097 (2008).

cozy relationships to campaign-contributing plaintiff counsel.³⁶⁵ Further, Mississippi's real life seemed to have imitated John Grisham's art³⁶⁶ when prominent plaintiffs' lawyer Richard Scruggs was convicted of attempting to bribe a judge.³⁶⁷ Less notoriously, Arkansas and South Carolina have also been dogged by a perception that being part of the relevant good-old-boy network and having close ties to judges is good for litigation results.³⁶⁸ In particular, the rural areas of these southern states are considered areas in which favored lawyers friendly with the local bench do particularly well.

4. *Mischief in States Where The Status of the Duty to Sit is Unclear.* Even in states not within the hard core of remaining duty to sit jurisdictions have produced some startlingly inappropriate participation by jurists whose impartiality was at least subject to question. Most famous, perhaps is West Virginia's *Caperton v. Massey*, upon which the U.S. Supreme Court has granted review in response to the losing side's claim of lack of due process when the pivotal vote in the case was cast by a Justice who had received more than \$3 million from the prevailing litigant and another supportive Justice had been hosted on an expensive vacation with the winning party.³⁶⁹

In addition, one can find in other states with post-1974 duty to sit precedent no shortage of cases in which judges continue to preside in cases that raise serious questions as

365. A famous example from a state with mixed signals on the duty to sit is *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768 (Tex. App. 1987), in which Pennzoil prevailed with counsel Joseph Jamail, who had contributed more than \$10,000 to the campaigns of the trial judge presiding over the case, which involved a \$4 billion award. *Id.* at 784, 842, 866; see also Stuart Taylor, Jr., *Texaco Set Back by Supreme Court in Pennzoil Case*, N.Y. TIMES, April 7, 1987, at A1 (reporting that the initial jury verdict was near \$10 billion).

366. Grisham's novels frequently involve at least the aroma of corruption or favoritism in a southern state such as Mississippi, Louisiana, Alabama, or the Florida panhandle. See, e.g., JOHN GRISHAM, *THE APPEAL* (2008); JOHN GRISHAM, *THE PARTNER* (1997); JOHN GRISHAM, *THE RUNAWAY JURY* (1996).

367. See Bloomberg News, *Scruggs's Son Sentenced in Bribery Case*, N.Y. TIMES, July 3, 2008, at C10.

368. See James H. Ritchie, Jr., *The Judicial Merit Selection Commission*, 18 S.C. LAW. 27, 27 (2006).

369. See *supra* text accompanying notes 182-84 (discussing *Caperton v. Massey*).

to their impartiality³⁷⁰ or state disqualification doctrine that appears to misread the ABA standards supposedly adopted by the states.³⁷¹ Despite this, it generally seems that in states that have clearly followed the ABA and federal model abolishing the pernicious version of the duty to sit, recusal practice appears to require disqualification more frequently in cases that present doubts about the judge's impartiality even if the case is not a compelling one of bias.³⁷² The same

370. On Alaska, see, for example, *Pride v. Harris*, 882 P.2d 381, 382-83, 385 (Alaska 1994) (finding no "appearance of partiality" where the judge presided over auto accident case involving a party that had been the losing litigant before the judge in contested child custody battle, during which the judge arguably had made adverse assessments of the litigant's character and credibility); *Blake v. Gilbert*, 702 P.2d 631, 633, 640-41 (Alaska 1985) (holding that a judge was not required to recuse himself in case where the judge's nephew was a business partner of a civil defendant accused of breach of fiduciary duty and tortious interference).

On Connecticut, see, for example, *State v. Webb*, 680 A.2d 147, 185-86 (Conn. 1996) (finding that recusal was not required where the judge presided over a prior criminal trial involving the same defendant); *State v. Bunker*, 874 A.2d 301, 313 (Conn. App. Ct. 2005) (holding that disqualification was not required where the judge had personally prosecuted the defendant's unrelated probation violation ten years earlier and had been a supervisor in prosecution office at time of the defendant's other prior convictions).

371. See, e.g., *Rodvik v. Rodvik*, 151 P.3d 338, 352 (Alaska 2006) (holding that refusal to recuse is an "abuse of discretion only when it is 'plain that a fair-minded person could not rationally come to [the same] conclusion [as the judge] on the basis of the known facts'"; one litigant had been a prominent public critic of the judge prior to the case); *Jourdan v. Nationsbank Mortgage Corp.*, 42 P.3d 1072, 1081-83 (Alaska 2002) (finding that a judge's appointment by governor who was a friend of a litigant was insufficient to require recusal because there was no showing of "bias;" whether there was a reasonable question as to impartiality was not addressed); *Feichtinger v. State*, 779 P.2d 344, 348 (Alaska Ct. App. 1989) (holding that a sitting judge assigned to a case must continue to preside over the matter unless there is "good cause" for disqualification—terminology suggesting a case must raise more than a reasonable question as to impartiality).

372. States that have abolished the duty to sit clearly:

District of Columbia. See, e.g., *Gillum v. United States*, 613 A.2d 366, 369-70 (D.C. 1992) (per curiam) (requiring recusal of judge after a "heated" exchange between the judge and counsel during the trial); *Turman v. United States*, 555 A.2d 1037, 1038 (D.C. 1989) (per curiam) (requiring recusal when the judge stated that because a witness was credible in prior trial he believed her to be credible in the instant case).

Georgia. See, e.g., *In re Inquiry Concerning a Judge No. 97-61*, 499 S.E.2d 319, 319-20 (Ga. 1998) (per curiam) (holding that a municipal court judge, who was the son of the mayor, be removed from the bench because of the appearance of impropriety, despite no instances of improper behavior by the judge); *Strayhorn v. Staley*, 339 S.E.2d 740 (Ga. Ct. App. 1986) (finding that a judge

should have recused herself in a contempt proceeding regarding remarks of counsel which may have been directed at her). However, a number of Georgia cases appear to be resistant to recusal despite not invoking the duty to sit. *See, e.g.*, *Robertson v. State*, 484 S.E.2d 18, 20 (Ga. Ct. App. 1997) (holding that where a trial judge was unaware that her husband was representing the victim of a criminal defendant in related potential civil action, the judge was not required to recuse herself from trial).

Iowa. See, e.g., *Bride v. Heckart*, 556 N.W.2d 449, 455 (Iowa 1996) (finding that a district court judge's failure to disclose that he had recently been represented by the defense counsel's law firm deprived the plaintiff of the opportunity to make a timely request for disqualification); *Blum v. State*, 510 N.W. 2d 175, 179-80 (Iowa Ct. App. 1993) (holding that the judge's remarks "create[d] a palpable atmosphere of hostility during the hearing" on the plaintiff's motions to withdraw his guilty plea, and that the judge should have recused himself "because of the allegation of judicial intimidation and his personal knowledge regarding [the plaintiff's] claims of juror and judicial misconduct").

Kansas. But see State v. Logan, 678 P.2d 181, 183 (Kan. Ct. App. 1984) (holding that the defendant's right to fair trial was not denied due to the fact that the judge had a son who was an assistant district attorney at the time of the prosecution, but stating that it would be "appropriate" for the judge to recuse himself from future cases "which the district attorney's office is prosecuting while his son is employed on its staff"; but note that this is refusal to disturb a sentence and not a disqualification decision at the outset of trial and may have been the result of the court affirming on the implicit ground that any error was harmless).

Maine. See, e.g., *Gavin v. Kennedy*, No. Civ. A. CV-04-018, 2004 WL 1434496, at *1-*2 (Me. Super. Ct. 2004) (no damages awarded to party alleging judicial bias in case where judge in fact recused on the basis of weak argument for disqualification).

Massachusetts. See, e.g., *Furtado v. Furtado*, 402 N.E. 2d 1024, 1036 (Mass. 1980) (noting that "contempt charges should be heard by a judge other than the trial judge 'whenever the nature of the alleged contemptuous conduct is . . . likely to affect the trial judge's impartiality'").

Michigan. See, e.g., *Citizens Protecting Michigan's Constitution v. Secretary of State*, 755 N.W. 2d 147 (Mich. 2008) (Cavanagh, J., mem.) (stating that although he has "more than a de minimis interest" in the outcome of the case, he will participate because of the "rule of necessity," and that "this Court's traditional disqualification procedure leaves such a determination solely to the challenged justice"); *Grievance Admin. v. Fieger*, 729 N.W. 2d 451 (Mich. 2006) (contentious cases in which Court divides sharply over alleged judicial bias toward flamboyant, controversial attorney Geoffrey Fieger); *Ypsilanti Charter Twp. v. Kircher*, 281 Mich. App. 251, 264 n.3 (Mich. Ct. App. 2008) (noting that the circuit court judge recused himself from a case despite no showing of bias or prejudice "in order to avoid the appearance of bias or impropriety"); *Peterson v. Orban*, No. 286081 2008 WL 5158890, at *1 (Mich. Ct. App. 2008) (per curiam) (noting that the judge recused himself due to his wife's acquaintance with the defendant's wife).

Minnesota. See, e.g., *In re Estate of Goyette*, 376 N.W. 2d 438, 442 (Minn. Ct. App. 1985) (stating that the former trial judge's removal of himself from the

probate proceedings was not an abuse of discretion). *But see* *Oslin v. State*, 543 N.W. 2d 408, 417 (Minn. Ct. App. 1996) (finding that a judge who initially recused himself from a matter could later decide to sit where he never explained basis for original disqualification and record did not reflect any personal interest in case).

Missouri. See, e.g., Moore v. Moore, 134 S.W.3d 110, 114-15 (Mo. Ct. App. 2004) (holding that the family court commissioner abused his discretion in failing to sustain a motion to recuse himself from future proceedings in the case because of improper ex parte contact) (noting that “litigants . . . are entitled to a trial which is not only fair and impartial, but which also ‘appears’ fair and impartial”) (; *State ex. rel. Thexton v. Killebrew*, 25 S.W.3d 167, 171 (Mo. Ct. App. 2000) (stating that “[t]he crucial need for public confidence in the judicial system requires [courts] to liberally apply the law in favor of disqualification” of a trial judge); *State v. Hornbuckle*, 746 S.W.2d 580, 585 (Mo. Ct. App. 1988) (noting that “[w]hen the offense charged is committed against the person or property of the judge, or some person ‘near of kin’ to [the judge] by blood or marriage” disqualification is required).

Montana. See, e.g., Shultz v. Hooks, 867 P.2d 1110, 1112 (Mont. 1994) (holding that a judge was disqualified from presiding over a malpractice action where he had represented plaintiff in an underlying matter because although the underlying suit was technically a separate action from the malpractice suit, the legal representation in the underlying suit gave rise to the malpractice claim); *Schellin v. N. Chinook Irrigation Ass’n*, 848 P.2d 1043, 1045 (Mont. 1993) (holding that where a trial judge is a participant in settlement negotiations that fail to resolve a case, the judge must sustain motions to disqualify himself from presiding over the ensuing trial).

Nebraska. See, e.g., Metcalf v. Metcalf, 757 N.W.2d 124, 126 (Neb. Ct. App. 2008) (stating that the trial judge recused himself from an alimony modification case because he had heard the plaintiff’s previous modification complaint).

New Jersey. See, e.g., State v. Taimanglo, 957 A.2d 699, 702, 706 (N.J. Super. Ct. App. Div. 2008) (noting that after the defendant stated that he had rented a hotdog cart to the judge ten years earlier, but had not been paid, the judge, although he had not recognized the defendant, “decided to recuse himself, and he had the right to do so whether required or not”); *Rivers v. Cox-Rivers*, 788 A.2d 320, 322 (N.J. Super. App. Div. 2002) (requiring recusal where a judge represented a party fourteen years earlier even though the judge had no recollection of the representation) (“Except when required by the rule of necessity, where a judge has previously represented one of the parties in a matter before him against the other, any judicial action taken is a nullity, whether the conflict comes to light during the proceedings before an order enters or reasonably soon following the conclusion of the matter after an order has been entered.”) (footnote omitted).

North Carolina. See, e.g., Jones v. Dalton, 667 S.E.2d 720 N.C. 2008) (mem.) (stating that a Supreme Court Justice voluntarily recused himself because his brother is an associate in a large law firm that was representing litigant, despite the fact that the judge’s brother was not involved in the case and that both the Chair and the Executive Director of Judicial Standards Commission advised the judge that disqualification was unnecessary in the absence of a personal appearance in the case by the judge’s brother); *In re Badgett*, 666 S.E.2d 743, 747, 749 (N.C. 2008) (holding that a trial judge be removed from the

bench for life due to his misconduct in a single case, which violated the professional rules requiring judges to “ensure the integrity and independence of the judiciary,” “act in a manner that promotes public confidence in the integrity and impartiality of the judiciary,” and demonstrate patience with and extend courtesy to everyone with whom the judge deals with in his professional capacity) (quoting the N.C. Code Jud. Conduct Canons 1, 2(A), & 3(A) (3)).; *In re Braswell*, 600 S.E.2d 849, 850 (N.C. 2004) (ordering the censure of a trial judge for failure to recuse in case where the plaintiff was an adverse party to the judge in a separate lawsuit); *In re Bissell*, 429 S.E.2d 731, 731-32, 735 (N.C. 1993) (per curiam) (censuring a trial judge for barring an attorney from sessions of court because he had initiated a preliminary investigation against her instead of recusing herself from the cases in which the attorney served as counsel).

Ohio. See, e.g., *Disciplinary Counsel v. Squire*, 876 N.E.2d 933, 952 (Ohio 2007) (suspending a judge for two years for repeated violations of the Code of Judicial Conduct and the Code of Professional Responsibility, including engaging one attorney in a conversation about case without presence of other attorney in violation of judicial code); *Disciplinary Counsel v. Medley*, 819 N.E.2d 273, 281 (Ohio 2004) (suspending a judge for eighteen months for ex parte communications, prejudging issues, and misrepresenting facts in a journal entry of case); *Office of Disciplinary Counsel v. Karto*, 760 N.E.2d 412, 419 (Ohio 2002) (finding that a judge who ultimately recused himself from a juvenile delinquency case should have recused himself earlier based on evidence of bias, including the judge’s instruction to the prosecutor to bring felony charges against the juveniles); *In re Disqualification of O’Neill*, 688 N.E.2d 516, 517 (Ohio 1997) (finding all judges of Franklin County were disqualified from hearing a case because the former assistant prosecutor, who then became a judge, was likely to be called as witness); *Taylor v. Carr*, 572 N.E.2d 805, 805 (Ohio Ct. App. 1989) (holding that a judge retains discretion to recuse when judge’s bailiff is related to a litigant, though there is no technically mandated disqualification).

Pennsylvania. See, e.g., *Commonwealth v. Stevenson*, 393 A.2d 386, 394 (Pa. 1978) (finding that where record reveals ongoing bitter controversy between judge and defendant, recusal required in summary contempt proceeding); *Commonwealth v. Druce*, 796 A.2d 321, 327 (Pa. Super 2002) (stating that disqualification is required whenever “significant minority” of laypersons could reasonably question court’s impartiality). *But see* *Commonwealth v. Perry*, 364 A.2d 312, 317-18 (Pa. 1976) (finding that judge’s acquaintance with murder victim and mourner at funeral was an insufficient basis for recusal); *Commonwealth v. Druce*, 848 A.2d 104, 111 (Pa. Sup. Ct. 2004) (finding that judge violated canon of judicial conduct barring pretrial statement but was nonetheless not required to recuse himself).

Rhode Island. See, e.g., *Cardinale v. Cardinale*, 889 A.2d 210, 215 (R.I. 2006) (noting that the judge initially did not recuse due to comments made during early stages of trial but recused after obtaining advice from chief judge).

South Dakota. See, e.g., *State v. McCrary*, 676 N.W.2d 116, 125 (S.D. 2004) (sentencing judge’s ex parte contact with defendant’s therapist constituted reversible error when judge inquired about therapist’s opinion regarding molestation by defendant and imposed sentence). *But see* *State v. Robideau*, 262 N.W.2d 52, 54 (S.D. 1978) (finding that the trial judge not required to recuse where wife was the first cousin of prosecutor).

appears to hold true in states where the status of the duty to sit is less clear, including both the states that most likely do not follow the duty to sit³⁷³ and those that still may follow the duty to sit.³⁷⁴

Tennessee. See, e.g., *State v. West*, No. M2007-02732-CCA-R3-CD, 2008 WL 4467154, at *5 (Tenn. Crim. App. July 22, 2008) (discussing judge's recusal due to professional relationship with court clerk); *Leeper v. Leeper*, No. E2007-02229-COA-R3-CV, 2008 WL 3820768, at *2 (Tenn. Ct. App. July 22, 2008) (discussing judge's recusal due to manifested feelings of frustration with litigant).

Virginia. See, e.g., *In re Moseley*, 643 S.E.2d 190, 192 (Va. 2007) (noting that judge recused self in response to disqualification motion); *Alexander v. Flowers*, 658 S.E.2d 355, 360 (Va. Ct. App. 2008) (ordering a judge to recuse for relying on "relapse rates" of cocaine addicts). *But see* *Commonwealth v. Jackson*, 590 S.E.2d 518, 519-20 (Va. 2004) (finding that a judge was not required to recuse due to prior service as attorney for commonwealth in trial where probation imposed that was now subject of subsequent trial).

373. States that most likely have no duty to sit:

Arizona. See, e.g., *In re Anderson*, 814 P.2d 773, 776 (Ariz. 1992) (finding that judge should not preside over cases involving a hospital because judge sat on hospital's board) *State v. Superior Court*, 748 P.2d 1184, 1186 (Ariz. 1987) (discussing question as to judge's impartiality due to ties to prosecution of case prior to appointment to bench); *State v. Quick*, 868 P.2d 327, 328 (Ariz. App. 1993) (stating that judge must recuse self where he was a member of prosecutor's staff while case was pending). See also *Op. Ariz. Att'y Gen. 180-139* (1980) (conflict of interest requiring disqualification exists where town magistrate married to town chief of police).

Florida. See, e.g., *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996) (reversing decision of judge who supervised the assistant state attorneys who prosecuted defendant); *State v. Calloway*, 937 So. 2d 139, 143 (Fla. App. 2006) (disqualifying a judge for improper ex parte communication with defense counsel); *Pearson v. Pearson*, 870 So. 2d 248, 249-50 (Fla. Dist. Ct. App. 2004) (finding that a judge's ex parte contacts with husband during hearing on contempt motion created reasonable question as to impartiality requiring recusal); *Goines v. State*, 708 So. 2d 656, 658-59 (Fla. Dist. Ct. App. 1998) (finding that the trial judge is required to recuse if he had any prior involvement with pending criminal matter); *Duest v. Goldstein*, 654 So. 2d 1004, 1004-05 (Fla. Dist. Ct. App. 1995) (holding disqualification of original sentencing judge was required after reversal and remand due to judge's connections to prosecution team); see also *Stevens v. Americana Healthcare Corp. of Naples*, 919 So. 2d 713, 715 (Fla. Dist. Ct. App. 2006) (finding that judge has duty to disclose information that litigants or counsel might consider relevant to issue of disqualification); *Perlow v. Berg-Perlow*, 875 So. 2d 383, 389-90 (Fla. 2004), *review denied*, 969 So. 2d 1014 (Fla. 2004) (finding judge's verbatim adoption of one party's twenty-five-page proposed final divorce judgment created appearance of partiality requiring reversal); *Wilson v. Armstrong*, 686 So. 2d 647, 648-49 (Fla. Dist. Ct. App. 1996) (noting that a rule against ex parte contacts applies to discussions about cases with other judges except as expressly authorized by law).

Hawaii. See, e.g., *State v. Kakugawa*, No. 26503, 2006 WL 1737932, at *4 (Haw. June 26, 2006) (finding no error where judge did not recuse over comments made during pretrial conference where there was no finding of bias or prejudice against defendant); *State v. Stanley*, 129 P.3d 1144, 1153 (Haw. Ct. App. 2005) (explaining that judge was required to recuse after party offered gift, despite refusing gift and consent of both parties to judge's continued participation in case). This contrasts with the more restrictive attitude toward recusal that prevailed in the days when the pernicious version of the duty to sit held sway. See, e.g., *Notley v. Brown*, 17 Haw. 393, 393 (Haw. 1906) (finding that a supreme court justice was not disqualified even though he had been counsel to party in case and actively involved in case).

Idaho. See, e.g., *State v. Suiter*, 67 P.3d 1274, 1276-77 (Idaho Ct. App. 2003) (noting that the trial judge recused after party accused judge of making obscene gesture toward party).

Illinois. See, e.g., *Barth v. State Farm Fire & Cas. Co.*, 886 N.E.2d 976, 983 (Ill. 2008) (finding trial judge not required to recuse from case where the judge was insured by the party in the case because the economic interest was too attenuated; test is whether reasonable person might question judge's ability to be impartial); *In re Moses W.*, 842 N.E.2d 783, 789 (Ill. App. Ct. 2006) (finding that recusal was required where judge had private communication with juvenile regarding compliance with placement rules at issue in proceeding before the judge); *People v. Vasquez*, 718 N.E.2d 356, 359 (Ill. App. Ct. 1999) (remanding because judge should have recused in post-conviction matter where he had participated in original proceeding leading to conviction). See also *People v. Buck*, 838 N.E.2d 187, 194 (Ill. App. Ct. 2007) (requiring recusal if situation creates appearance of impropriety).

New Hampshire. See, e.g., *Blaisdell v. City of Rochester*, 609 A.2d 388, 388 (N.H. 1992) (holding that judge's failure to make adequate disclosure to parties about basis for possible disqualification results in disqualification). *But see* *Lorenz v. New Hampshire Admin. Office of Courts*, 858 A.2d 546, 549 (N.H. 2004) (invoking "rule of necessity" to reject recusal motion brought by court reporters against the Administrative Office of the Courts).

New York. See, e.g., *In re Murphy*, 626 N.E.2d 48, (N.Y. 1993) (finding an appearance of impropriety by not recusing from matter involving party from whom judge had previously borrowed money and failing to disclose relevant information results in removal of judge); *Murray v. Murray*, 424 N.Y.S.2d 50, 51 (N.Y. App. Div. 1980) (requiring recusal where appearance of improper judicial interest emerges, integrity of court system requires judge's recusal). *But see* *Spremo v. Babchik*, 589 N.Y.S.2d 1019, 1022 (N.Y. Sup. Ct. 1992) (finding judge has "obligation" not to recuse unless personally satisfied that judge cannot be impartial), *aff'd as modified* 628 N.Y.S.2d 167 (N.Y. App. Div. 1995), *appeal denied*, 658 N.E.2d 221 (N.Y. 1995).

Washington. See, e.g., *State v. Graham*, 960 P.2d 457, 461 (Wash. 1998) (requiring recusal by part-time judge when defendant was accused against property of one of judge's clients); *Sherman v. State*, 905 P.2d 355 (Wash. 1995) (requiring recusal when judge directed extern to make improper ex parte contact with doctors charged with monitoring defendant's chemical dependency); *Kauzlarich v. Yarbrough*, 20 P.3d 946, 957-58 (Wash. Ct. App. 2001) (finding that judge originally assigned to defamation case did not abuse discretion in recusing sua sponte because of concern that court personnel could be witnesses

in case), *rev. denied*, 29 P.3d 718, *cert. denied*, 534 U.S. 1090 (2001) (concluding that trial judge did not recuse too readily or violate judicial responsibilities). *But see* *Smith v. Behr Process Corp.*, 54 P.3d 665 (Wash. Ct. App. 2002) (holding that judge was not required to recuse in consumer class action against wood stain manufacturer where he had eaten dinner at home of class member prior to lawsuit).

Wisconsin. *See, e.g.,* *Racine County v. Int'l Ass'n of Machinists and Aerospace Workers Dist. 10*, 2008 WI 70, 310 Wis.2d 508, 751 N.W.2d 312 (finding appointment powers proper grounds for recusal because party was involved in post over which judges exercised appointment influence).

374. States that may still have duty to sit:

Alaska. As reflected in note 190 *supra*, Alaska, like any state, has cases rejecting disqualification in cases that would make some reasonable observers uncomfortable. But the state also has more than its share of examples of effective or even aggressive disqualification. *See, e.g.,* *Keller v. State*, 84 P.3d 1010 (Alaska Ct. App. 2004) (finding recusal by three judges in trial where father of defendant was court bailiff constituted good cause); *Ivan v. State*, Nos. A-6548, 4055, 1999 WL 331668, at *2 (Alaska Ct. App. May 26, 1999) (referring decision to another judge for review to avoid appearance of impropriety).

California. *See, e.g.,* *Christie v. City of El Centro*, 37 Cal. Rptr. 3d 718, (Cal. Ct. App. 2006) (disqualifying judge for ex parte communications with initial judge in case); *Betsworth v. Workers' Comp. Appeals Bd.*, 31 Cal. Rptr. 2d 664, 665 (Cal. App. 1994) (holding that judge should not preside if "so personally embroiled" in matter that impartiality is affected). California precedent reflects sensitivity to impartiality issues even well before the 1970s changes in the ABA Code and the federal disqualification statute. *See, e.g.,* *Austin v. Lambert*, 77 P.2d 849, 851 (Cal. 1938) (commenting that disinterest and impartiality of judges are indispensable to proper administration of justice); *Wickoff v. James*, 324 P.2d 661, 665 (Cal. App. 1958) (commenting that judge should not preside unless "wholly free, disinterested, impartial and independent").

Colorado. *See, e.g.,* *In re Estate of Elliott*, 993 P.2d 474, 481 (Colo. 2000) (finding that when there is an appearance of partiality, it is incumbent on judge to recuse); *People v. Dist. Court*, 560 P.2d 828, 831 (Colo. 1977) (holding that "[c]ourts must meticulously avoid any appearance of partiality" to gain confidence of litigants and public).

Connecticut. As reflected in note 203, *supra*, Connecticut has rejected disqualification in cases that would make some reasonable observers uncomfortable. But the state also has more than its share of examples of effective or even aggressive disqualification. *See, e.g.,* *Statewide Grievance Comm. v. Burton*, No. DBDCV0303351055S, 2008 WL 2895951, at *12 n.26 (Conn. Super. Ct., July 2, 2008) (discussing judge's recusal to avoid any allegations of bias after yelling at party, despite overwhelming evidence that judge was not in fact biased or prejudiced in decisionmaking).

Delaware. *See, e.g.,* *Nellius v. Stifftel*, 402 A.2d 359, 361-62 (Del. 1978) (holding that in cases in which litigant's right to fair trial conflicts with decisions of interested judges, litigant right prevails).

Indiana. *See, e.g.,* *In re Edwards*, 694 N.E.2d 701, 712 (Ind. 1998) (disqualifying judge in child support proceeding where he had current and ongoing sexual relationship with mother and was financially supporting her);

State v. Morgan County Court, 451 N.E.2d 316, 317 (Ind. 1983) (finding that judge may not preside in case where he had role as counsel prior to becoming judge); Calvert v. State, 498 N.E.2d 105 (Ind. Ct. App. 1986) (requiring judge to recuse because he had been involved in prior prosecution of defendant). *But see* Harden v. State, 538 N.E.2d 244 (Ind. Ct. App. 1989) (holding judge's prior representation of defendant in unrelated criminal matter did not require recusal).

Kentucky. See, e.g., Dean v. Bondurant, 193 S.W.3d 744 (Ky. 2006) (holding Chief Justice of Supreme Court disqualified in case where "many" of the attorneys involved in the case had provided "numerous" campaign contributions, but campaign contributions alone are not per se ground for recusal).

Louisiana. See, e.g. In re Alford, 977 So.2d 811 (La. 2008) (judge's improper ex parte contacts required recusal); In re Fuselier, 837 So.2d 1257 (La. 2003) (judge engaged in improper ex parte communications related to fixing traffic tickets and similar favors). Even during the heyday of the duty to sit, Louisiana had some strong precedent favoring recusal. *See, e.g.,* State v. Doucet, 5 So. 2d 894 (La. 1942) (judge recused in case involving alleged embezzlement of public funds because of judge's political connections to those accusing the defendant). *But see* In re Cooks, 694 So.2d 892 (La. 1997) (finding judge's conversations with attorney friend regarding newspaper accounts of case was insufficient ex parte contact to require recusal); Bergeron v. Illinois Central Gulf R. Co., 402 So.2d 184, 190 (La. App. 1981) (Lear, J., concurring) (noting duty to sit in Louisiana that has never been officially disavowed).

Maryland. See, e.g., In re Turney, 533 A.2d 916, 916, 920 (Md. Ct. App. 1987) (censuring judge for failing to recuse in case involving fake drivers license procured by stepson for friend; judge's failure in a particular case to avoid the appearance of impropriety warrants censure; "Courts, be they high or low, should and must like Caesar's wife, be above suspicion. Any other standard is one which undermines the trust and confidence of the average citizen in his government."). *See also* MD. CODE ANN. [Code of Judicial Conduct] R. 16-813, Canon 3(D)(1) (cmt) (West 2008) ("By decisional law, the rule of necessity may override the rule of recusal. For example, a judge might be required to participate in judicial review of a judicial salary statute or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. When the rule of necessity does override the rule of recusal, the judge must disclose on the record the basis for possible recusal and, if practicable, use reasonable efforts to transfer the matter promptly to another judge.").

New Mexico. See, e.g., Martinez v. Carmona, 624 P.2d 54, 55 (N.M. Ct. App. 1980) (finding after recusal, judge disqualified from subsequent proceedings); In re Klecan, 603 P.2d 1094 (N.M. 1979) (holding that because judge declared mistrial and held attorney in contempt, he had become so personally embroiled in case as to warrant recusal); Doe v. State, 570 P.2d 589, 591 (N.M. 1977) (judges "should avoid any hint of impropriety" in making recusal decisions).

North Dakota. See, e.g., In re Application of Graves for Admission to Bar, 677 N.W.2d 215, 216 (N.D. 2004) (involving state board; board members held to impartiality standard of judges; chair required to recuse in matter where husband had conducted business dealings with stepfather of person under board investigation); Grey Bear v. North Dakota Dept. of Human Servs., 651 N.W.2d

The duty to sit is not the root of all non-disqualification evil. But it clearly fosters the wrong incentives, making courts unduly resistant to recusal. At the margin, it

611, 614 (N.D. 2002) (discussing trial judge's recusal after becoming irritated with legal tactics of litigant).

Oklahoma. See, e.g., Miller Dollarhide, P.C. v. Tal, 2007 OK 58, ¶ 17, 163 P.3d 548, 554 (judge recused because of constant tension with defendant, specifically stating that "error, if any, should be made in favor of disqualification."); Okla. Jud. Ethics Op. No. 2000-1, 2000 OK. JUD. ETH. 1, 10 P.3d 893 (judge has duty to make full disclosure of facts that might support motion for recusal); State v. Childers, 105 P.2d 762, 764 (Okla. 1940) (judge should recuse where "any substantial ground" for disqualification). *But see* Sandefur v. Vanderslice, 151 P.2d 430 (Okla. 1944) (judge initially correctly recused in quiet title action because of interest in real estate involved but then permitted to hear remainder of case after resolution of title question).

Texas. See, e.g., In re Chacon, 138 S.W.3d 86 (Tex. 2004) (finding that justice of peace removed from bench willfully and persistently allowed improper relationship to influence discharge of duties, including reduction in bail for county commissioner's relative); *In re Thoma*, 873 S.W.2d 477 (Tex. 1994) (holding that judge's two ex parte contacts were improper and resulting waiver of penalties was a willful violation of judicial code); *In re K.E.M.*, 89 S.W.3d 814 (Tex. App. 2002) (holding judge disqualified in juvenile's habeas corpus petition because of having been county attorney when case was investigated and prosecuted); *Monroe v. Blackmon*, 946 S.W.2d 533, 534 (Tex. App. 1997) (recusal required where judge represented by a party's counsel in another pending matter). *But see* Kirby v. Chapman, 917 S.W.2d 902, 908 (Tex. App. 1996) (judge not disqualified in child custody case involving ex-husband brother of state senator who supported judge's appointment to the bench; citing duty to sit).

Utah. See, e.g., Reg'l Sales Agency, Inc. v. Reichert, 830 P.2d 252, 254 (Utah 1992) (holding that judge was disqualified where party represented by law firm in which brother-in-law and father-in-law were partners; announcing broad rule of disqualification based on financial interest in such situations but relaxed rule where financial benefit is indirect and based only on increase in law firm's reputation). *But see* *In re Inquiry Concerning Judge*, 2003 UT 35, ¶ 15, 81 P.3d 758, 761 (holding recusal of justice not required where son-in-law attorney in law firm retained by judge under investigation in pending proceeding); *In re Affidavit of Bias*, 947 P.2d 1152, 1155 (Utah 1997) (finding no reasonable inference of bias created where judge hears case in which former law firm represents party); *Am. Rural Cellular, Inc. v. Sys. Comm'n Corp.*, 939 P.2d 185 (Utah 1997) (same).

Vermont. See, e.g., State v. Hunt, 527 A.2d 223, 223-24 (Vt. 1987) (recusing from case in which defendant's attorney would be witness in proceedings involving them, but citing duty to sit in what appears to be benign form and citing Rehnquist memorandum in *Laird v. Tatum*).

West Virginia. See supra notes 182-84 and accompanying text regarding *Caperton v. Massey* and West Virginia approach to disqualification.

Wyoming. See, e.g., Farman v. Wyo. Workers' Comp. Div., 841 P.2d 99, 100 (Wyo. 1992) (finding affidavit of bias insufficient and citing duty to sit, but apparently in benign form).

probably has a hand in erroneous recusal decisions even when not expressed in the errant opinion. In states like Alabama and Nevada, where the duty is sit is repeatedly endorsed and purportedly revered, there seem an inordinate number of incorrect or problematic instances of failure to recuse.

III. THE NEW OPPORTUNITY PRESENTED BY THE NEW ABA CODE OF JUDICIAL CONDUCT

In 2007, the ABA completed its fourth major effort codifying judicial ethics. Following the 1922 Canons, the 1972 Model Code and the 1990 Model Code, it approved the 2007 Model Code. Substantively, the 2007 Code continues the bulk of the 1990 Code but helpfully reorganizes the material in a format similar to the Model Rules of Professional Conduct. In addition, the 2007 Code revises certain language in the 1990 Code both for clarity and with some modest change in emphasis or application.³⁷⁵ The 2007 Code stakes some significant new substantive ground in that it expands the prior prohibition against judicial manifestation of bias to add “gender, ethnicity, marital status, and political affiliation” to the list and formally bars “harassment” by judges.³⁷⁶ New Rule 2.9(B) requires the judge to notify the parties if a judge inadvertently receives an unauthorized *ex parte* communication bearing upon the substance of a matter.³⁷⁷ New commentary to Rule 2.9

375. For example, Rule 1.3 of the 2007 Code forbids judges to “abuse the prestige of the judicial office to advance the personal or economic interests of the judge or others,” while Canon 2B of the 1990 Code stated that a judge “shall not lend the prestige of office” to these types of interests. New commentary to Rule 2.6(B) of the 2007 Code (formerly Canon 3B(8) of the 1990 Code) continues to permit judges to encourage settlement but warns that the judge should “not act in a manner that coerces any party into settlement” and commentary lists six factors the judge may consider in shaping his or her approach to settlement. Rule 2.9(A) (2) of the 2007 Code continues, as did Canon 3B(7) of the 1990 Code to permit court-appointed experts but now also requires “advance notice to the parties” as well as “reasonable opportunity to object and respond to the notice and to the advice received. See STEPHEN GILLERS AND ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 690-91 (2008).

376. This is in Rule 2.3(B) of the 2007 Code, formerly Canon 3(B)(5) of the 1990 Code. See GILLERS & SIMON, *supra* note 30, at 690.

377. The Rule is aimed at things like a fax or email accidentally sent to the judge. In addition, Comment 4 to Rule 2.9 relaxes the rule against *ex parte* contact for specialized courts such as drug or mental health courts where the

permits a judge to “consult ethics advisory committees, outside counsel, or legal experts concerning the judge’s compliance” with the Code and new Rule 2.10(E) permits a judge to respond to media reports alleging improper conduct.³⁷⁸ Regarding disqualification, Rule 2.11 differs from its predecessor Canon 3E of the 1990 Code in that it extends the disqualification rules applicable to family members to include a “domestic partner.”³⁷⁹ Judges also under the 2007 Code are required to “resign immediately from discriminatory organizations while the 1990 Code permitted them to remain members for up to a year during which they could work to change the rules of the organization.”³⁸⁰

Among the organizational or cosmetic changes is new Rule 2.7, which restates the 1990 Code’s provision concerning judicial “Responsibility to Decide.” New Rule 2.11 restates the Code’s grounds for disqualification. As discussed above, the 2007 Code, like its 1972 and 1990 predecessors, provides a sound set of criteria for disqualification and eliminates the pernicious version of the duty to sit. Unfortunately, however, it fails to do so in a

purpose is often therapy as much or more than disputes resolution, adjudication, or punishment. *See* GILLERS & SIMON, *supra* note 30, at 691.

378. But the newly codified right of a judge to respond to charges remains subject to Rule 2.10(A), Canon 3B(9) of the 1990 Code, which states that a judge’s public comments may not be of a type that could “reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court . . .” *See* GILLERS & SIMON, *supra* note 30, at 691.

379. *See* GILLERS & SIMON, *supra* note 30, at 691. The Terminology section of the 2007 Code defines a domestic partner as “a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married.” In addition, a new Comment 2 to Rule 2.11 makes the judge’s “obligation not to hear or decide matters in which disqualification is required” applicable “regardless of whether a motion to disqualify is filed.” *See* GILLERS & SIMON, *supra* note 30, at 691.

380. *See* Model Rule 3.6. In addition, Comments to Rule 3.6 create exceptions for religious organizations and for “national or state military service.” In other words, the ABA was willing to bend its forceful policy of nondiscrimination as a concession to the power and popularity of the military and various religions that discriminate on grounds of sexual preference. *See also* GILLERS & SIMON, *supra* note 30, at 689-92 summarizing changes in the 2007 Code. Perhaps the most important development not touched on in text is Rule 4.1 and commentary, which attempts to provide a roadmap for what judges campaigning for the office can or cannot say in the aftermath of *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), which invalidated state law prohibiting a judge from “announcing” his position on a contested legal issue pending before the courts.

manner clear enough to extinguish the continued use of the pernicious version of the duty to sit concept while retaining the benign notion that judges should of course not shirk from cases that are difficult, time-consuming, or uncomfortable.³⁸¹

As per past practice, after the ABA has promulgated a new or revised model set of rules for judicial or legal ethics, the various states review the ABA product to determine whether the new ABA model will be adopted in the respective states. Typically this is done through a commission appointed by the state supreme courts. The state commissions review the ABA model and approve, reject or modify as desired, making recommendations to the state supreme court, which adopts as seen fit. In general, states are receptive to codifying as law the ABA models, which normally become law in the states in substantially the form promulgated by the ABA. Usually this is done within a few years after issuance of the model by the ABA. Regarding the 1983 introduction of the ABA Model Rules of Professional Conduct, the process took somewhat longer because the 1983 Model Rules were a significant departure from the 1970 Code of Professional Responsibility. However, eventually the Model Rules became the norm in nearly all states.

Currently, this typical traditional process is underway regarding the 2007 Model Judicial Code. As of April 15, 2009, six states have adopted the 2007 Code with few revisions. Approximately 20 additional states have judicial code revision commissions in fairly advanced states of completion. The remainder of the states appear to be in the early process of constituting commissions and beginning to review the ABA model. Once a commission or other advisory body is formed, the process moves fairly swiftly and is likely to result in the state's essential adoption of the ABA model within a year. Consequently, the bulk of states will soon be reviewing and probably adopt the 2007 Judicial Code, including Rules 2.7 and 2.11 and commentary by 2010.

This presents the legal profession with a prime opportunity to clarify the duty to sit, clearly extinguishing the pernicious version resistant to recusal while preserving

381. See *supra* Part I.A., discussing tension between concept of judicial responsibility and disqualification norms.

the benign concept that judges not avoid hard or risky cases. For example, as discussed below, the Judicial Code Revision Commission in Nevada, perhaps the most hard core of duty to sit states, has added commentary clarifying the relationship between Rule 2.7 and Rule 2.11. If the state's Supreme Court concurs, Nevada will have made a major pivot from being the state most overtly wedded to the pernicious version of the duty to sit to being the first state with a Judicial Code clarifying that the concept of judicial responsibility does not counsel against recusal in close cases and that there should in fact be a preference for disqualification in such instances. Other states, even those with minimal duty to sit precedent, should follow suit so that the pernicious version of the concept is permanently excised from the judicial lexicon. The ABA should consider similar clarification. It disapproved the pernicious version of the duty to sit more than thirty-five years ago, but the Code continues not to sufficiently separate the benign and pernicious versions of the concept.

When enacting their respective version of the 2007 ABA Code, states should specifically disavow the traditional pernicious version of the duty to sit in the Commentary to the new Code. The current language in ABA Model Rule 2.7 about "responsibility" to perform judicial duties is strong enough as a means of encouraging judges not to duck tough cases but avoids the potentially misleading rhetoric of a duty to sit. The Commentary could also specifically state that in close cases, the ordinarily preferable practice is to resolve the matter in favor of disqualification unless there are strong extenuating circumstances such as disrupting resolution of a matter needing immediate decision, a shortage of judges or the like. Following is some suggested language:

Some prior cases³⁸² have recognized or referred to a "duty to sit." Properly understood, the term "duty to sit" means only that judges should not disqualify themselves without a valid reason that is at least colorably correct as a matter of fact and law. Recognition of a "duty to sit" should not be construed to suggest that judges should refuse to disqualify themselves in apt circumstances or that close cases should routinely be resolved against disqualification. On the contrary, close questions should ordinarily be resolved in favor of

382. And in the case of Nevada, commentary to the 1990 Code as well.

disqualification in order to preserve public confidence in the judicial system.

Although there is some relationship between the duty to sit and the rule of necessity, the concepts are quite distinct. The rule of necessity makes sense in that it posits that judges must be able to hear the case even if it tangentially affects the bench because the system demands that courts be available to make decisions. For example, judges are not disqualified from hearing matters that generally affect taxes, ballot issues, and the like simply because they are taxpayers or voters. The alleged self-interest is too attenuated and the consequences of disqualification too severe in that if one judge is disqualified, all are disqualified and the case cannot be adjudicated.

CONCLUSION

The duty to sit is an outdated, problematic doctrine unhelpful to twenty-first century questions of disqualification. Although supposedly buried more than three decades ago, the pernicious version of the doctrine continues to exert undue negative influence from beyond the grave. The ABA should clarify that Rule 2.7 of the 2007 Model Code regarding a judge's responsibilities embraces only a benign version of the duty to sit concept while states should seize upon the opportunity presented by their consideration of the 2007 ABA Judicial Code to firmly reject the pernicious duty to sit concept as a restriction on disqualification procedure. The ABA, the states, the judiciary and the legal profession should affirmatively declare that close questions be decided in favor of recusal. The parties' and society's right to a judiciary above suspicion outweighs any misplaced notion that there somehow is shame or sloth in stepping aside from cases in which the judge's impartiality may be suspect.