

TESTIMONY OF CHARLES G. GEYH

“THE FEDERAL JUDICIARY IN THE 21ST CENTURY: IDEAS FOR PROMOTING
ETHICS, ACCOUNTABILITY, AND TRANSPARENCY”:

HEARING BEFORE THE HOUSE OF REPRESENTATIVES COMMITTEE ON THE
JUDICIARY SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND
THE INTERNET

JUNE 21, 2019

TESTIMONY OF CHARLES G. GEYH

“THE FEDERAL JUDICIARY IN THE 21ST CENTURY: IDEAS FOR PROMOTING ETHICS, ACCOUNTABILITY, AND TRANSPARENCY”:

HEARING BEFORE THE HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

JUNE 21, 2019

My name is Charles G. Geyh (pronounced “Jay”). I am the John F. Kimberling Professor of Law at the Indiana University Maurer School of Law at Bloomington. My writings on judicial conduct, ethics, selection, independence, accountability, and administration include more than eighty books, book chapters, articles, reports, and other publications. I am a coauthor of the treatise *Judicial Conduct and Ethics* (Lexis Law Publishing, 5th ed. 2013), and author of *Courting Peril: The Political Transformation of the American Judiciary* (Oxford University Press 2016); *Judicial Disqualification: An Analysis of Federal Law* (Federal Judicial Center 2010); and *When Courts & Congress Collide: The Struggle for Control of America’s Judicial System* (University of Michigan Press 2006). In addition, I have served as co-Reporter to the ABA Joint Commission to Revise the Model Code of Judicial Conduct. Prior to entering academia in 1991, I was counsel to the House Judiciary Committee’s Subcommittee on Courts, Intellectual Property and the Administration of Justice, under Chairman Robert W. Kastenmeier.

INTRODUCTION

In anticipation of my testimony today, I have been asked for my views on three issues relevant to judicial ethics, accountability and transparency: 1) The constitutionality and wisdom of legislation directing the Judicial Conference of the United States to issue a Code of Conduct applicable to all justices and judges of the United States; 2) The need to amend the Ethics in Government Act to require that financial disclosure reports completed by judges pursuant to the Act be accessible to the public online; and 3) The desirability of amending the federal judicial disqualification statute to provide that justices, judges, and magistrate judges offer explanations for their recusal decisions that the clerk of the relevant court shall post to the applicable court’s website. As to the first

issue, in my view, it would be constitutional and wise for Congress to direct the Supreme Court to promulgate its own code of conduct, if the Court declines to take the initiative to promulgate such a Code on its own. I do not think it is wise for Congress to direct the Judicial Conference to issue a Code applicable to the Supreme Court, and I do not think it necessary for Congress to direct the Judicial Conference to issue a Code of Conduct applicable to the inferior courts. As to the second issue, I support legislation that would require judges' financial disclosure statements to be posted online. And as to the third issue, I support legislation requiring judges to explain their disqualification rulings, however briefly. With respect to this third issue, concerning disqualification procedure, I have an additional recommendation: that the disqualification statute be amended to require that disqualification determinations be made by a different judge than the judge whose disqualification is sought.

I. CODES OF JUDICIAL CONDUCT AND THE FEDERAL JUDICIARY

In 1922 the American Bar Association (ABA) established a Committee, then chaired by Chief Justice William Howard Taft, which promulgated Canons of Judicial Ethics that the ABA adopted in 1924¹—a series of thirty-four hortatory pronouncements “intended to be nothing more than the American Bar Association’s suggestions for guidance of individual judges.”² In 1972, the ABA approved a “Model Code of Judicial Conduct,” comprised of seven broadly worded canons and a series of more specific provisions underlying each canon, specifying a judge’s ethical obligations in greater detail. The ABA substantially revised the Model Code in 1990 and again in 2007. Today, all fifty state judicial systems have promulgated codes of conduct applicable to their judges, based on one of the three ABA models.

For its part, the Judicial Conference of the United States adopted its Code of Conduct for U.S. Judges in 1973, based on the 1972 Model Code, and has modified its code several times in the years since. In addition, the Judicial Conference has authorized its Committee on Codes of Conduct to issue Ethics Advisory Opinions, 116 of which are available online.³ The Committee on Codes of Conduct, also known as the “Dear Abby Committee,” offers confidential advice, upon request, to judges who have ethical questions or concerns.

The convention across the federal and state systems has been for high courts to regulate their own ethics by adopting codes of conduct on their own initiative. That convention is in keeping with a custom of respect for the autonomy and independence of the judiciary as a separate branch of government. With respect to the lower federal courts, I would urge the Judicial Conference to follow the lead of the vast majority of state court systems and update its code of conduct in light of the 2007 ABA Model. But on the whole, the Judicial Conference has done an effective job of promulgating, maintaining

¹ JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* 181–83 (1974).

² Robert Martineau, *Enforcement of the Code of Judicial Conduct*, 1972 UTAH L. REV. 410, 411.

³ *Guide to Judiciary Policy*, Vol. 2B, Ch. 2: *Published Advisory Opinions* (2019), <http://www.uscourts.gov/sites/default/files/vol02b-ch02.pdf>.

and explaining its Code, for which reason I regard legislation directing the Judicial Conference to issue a Code it has already issued as unnecessary and ill-advised.

Although the Judicial Conference is led by the Chief Justice of the United States, its jurisdiction is limited to the lower federal courts. Thus, the Code of Conduct for U.S. Judges applies to all federal judges except the justices on the Supreme Court of the United States.⁴ And therein lies the problem. Given the Supreme Court’s longstanding disinclination to adopt a code for itself, I would encourage this subcommittee to support legislation that calls upon the Supreme Court to promulgate its own Code of Conduct.

In the spirit of interbranch comity and in light of the judiciary’s superior expertise in such matters, however, I do not recommend that Congress impose an ethics code of its own making on the Court. Nor do I recommend that the Judicial Conference of the United States be directed to issue a Code of Conduct for the Supreme Court. Associate justices of the Supreme Court have never been a part of, or regulated by, the Judicial Conference. Rather, the Judicial Conference is comprised of lower court judges (led by the Chief Justice). This counsels against directing the Judicial Conference to promulgate a code of conduct for the Supreme Court for two reasons. First, the Supreme Court of the United States is *sui generis*. Crafting a code of conduct requires an appreciation for the unique context in which the Court and its justices operate—an appreciation that the justices themselves are better positioned than judges of the Judicial Conference to understand and act upon⁵. Second, the associate justices of the Supreme Court supervise the judges of the lower courts who comprise the Judicial Conference, in two capacities: as justices exercising appellate review and as administrators assigned to oversee their designated circuits. Asking the supervised to regulate the ethics of their supervisors invites tension and mischief that can easily be avoided if the Supreme Court is directed to adopt a Code for itself—a measure that I regard as constitutional and wise.

A. The Constitutionality of Legislation Regulating Supreme Court Ethics

In his 2011 year-end report on the federal judiciary, Chief Justice Roberts opined that constitutional limits on congressional power to regulate the Supreme Court are largely untested.⁶ That is absolutely true, but it is true in no small part because the Supreme Court has acquiesced to such power for generations and in some cases centuries, thereby establishing a longstanding convention in support of such regulation, which the Court has respected.

Article III, Section 1 of the U.S. Constitution declares that, “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” In Article III, section 2, the

⁴ For an analysis and discussion of the issue of applying the Code of Conduct for U.S. Judges to the Supreme Court, see James J. Alfani, *Supreme Court Ethics: The Need for Greater Transparency and Accountability*, 21 PROF. LAW. 10 (2012).

⁵ The Supreme Court would, of course, be free to capitalize on the expertise of the Judicial Conference by enlisting its guidance or adopting a Code modeled after the Code of Conduct for U.S. Judges.

⁶ C.J. Roberts, *2011 Year-End Report on the Federal Judiciary*, SUPREME COURT 7 (Dec. 31, 2011, 6:00 PM), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

Constitution delegates to Congress the power to regulate the Supreme Court’s appellate jurisdiction, and in Article I, Section 8, Clause 18 it authorizes Congress to make laws necessary and proper for “carrying into execution” all powers vested by the Constitution in the government of the United States.

A plain reading of these provisions authorizes Congress to take steps it deems necessary and proper to establish a Supreme Court that is fit for duty. The founding generation interpreted congressional power to organize and establish the Supreme Court quite broadly. Matters that the first Congress regulated in the Judiciary Act of 1789, included: the Supreme Court’s size; where, when, and how often the Supreme Court was to meet; how many justices constituted a quorum; the duties of the justices themselves—including a duty to “ride circuit” and hear cases as roving trial judges; and the terms of a separate oath of office that judges and justices must take.

A closer look at the judicial oath of office underscores how legislation directing the Court to issue its own code of ethics falls squarely within the power of Congress to enact laws necessary and proper to establish the Supreme Court. The defining duties of a good judge—dating back to Socrates—have been “to hear courteously, to answer wisely, to consider soberly, and to decide impartially.”⁷ That the Supreme Court, which Congress was tasked to establish, should be comprised of judges who abide by the enduring principles that define a good judge is incontestable. Article VI of the U.S. Constitution declares that all public officials in the federal and state systems, including judges, “shall be bound by oath or affirmation, to support this Constitution,” but that oath does not address the unique duties of judges on the Supreme and lower courts that the first Congress established. Accordingly, in the Judiciary Act of 1789, Congress imposed an additional oath on judicial officers, including the justices of the Supreme Court, which required them to swear as follows:

“I, _____, do solemnly swear or affirm that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God.”

This oath, a substantially similar version of which remains in place today,⁸ is a brief code of ethics, that binds judges to administer justice impartially, independently, and with integrity, dipping into the well of principles dating back to the origins of western democracy. Insofar as the necessary and proper clause authorized Congress to require that judges swear to abide by these core ethical precepts—authority that has never been questioned in over two centuries and counting—there would be nothing to bar Congress from amending the judicial oath of office (which it did as recently as 1990) to elaborate on the ethical principles that the justices must swear to follow. And if it is necessary and proper for Congress to regulate Supreme Court ethics in the oath

⁷ FRANKLIN PIERCE ADAMS, FPA BOOK OF QUOTATIONS 466 (1952).

⁸ 28 USC 453.

requirement, as ancillary to its power to establish the Supreme Court, it should be permissible for Congress to do so in freestanding legislation. One can view the federal disqualification statute, 28 U.S.C. 455, in just such a way: As an enactment, the terms of which Congress lifted from the ABA's Model Code of Judicial Conduct, and applied to the U.S. Supreme Court over half a century ago, to the end of "carrying into execution" a more impartial and forthright Supreme Court. Insofar as Congress has the authority to subject the Court to a code of Congress's making, I see no constitutional impediment to Congress, in the spirit of interbranch comity, deferring to the Court's expertise and directing it to promulgate a code for itself.

B. The Wisdom of Legislation Regulating Supreme Court Ethics

There are 25,000 judicial officers in the United States, all but nine of whom—the most visible and influential nine in the nation—are subject to a code of judicial conduct. No ethics rule prevents a Supreme Court justice from engaging in political activity, participating in *ex parte* communications, or joining a club that discriminates based on race, sex, religion, or national origin. Yet ethics rules for all other federal judges forbid these activities.

Judicial codes of conduct fortify the administration of justice. They tell judges their ethical responsibilities and articulate high standards of conduct to which they should aspire. They assure litigants that the judges before whom they appear are committed to fairness and impartiality. They require judges to conduct their personal and professional lives in a manner that will foster respect for the courts.

In his 2011 year-end report, the Chief Justice said that the Supreme Court did not need to adopt a code of conduct because the justices already "consult" the Code of Conduct for United States Judges, which governs other federal judges.⁹ I have two concerns. First, it is unrealistic to think that judges will in fact consult a code they have not approved and agreed to follow, as reliably as one they have. In 2016, Justice Ruth Bader Ginsburg publicly criticized then presidential candidate Donald Trump, only to express regret for those remarks shortly thereafter, explaining that, "[j]udges should avoid commenting on a candidate for public office." Canon 5(A)(2) of the Code of Conduct provides that a judge should not "publicly endorse or oppose a candidate for public office." Had Justice Ginsburg consulted the Code before, rather than after this episode, perhaps the problem could have been avoided.

Second, there is an obvious difference between consulting a code that a justice remains free to disregard, and binding oneself to a code that a justice is committed to follow. Justices Thomas and Scalia were widely criticized for serving as featured speakers at Federalist Society events, given commentary accompanying Canon 4(C) of the Code of Conduct for U.S. Judges, which states that "[a] judge may attend fund-raising events of law-related and other organizations although the judge may not be a speaker, a guest of honor, or featured on the program of such an event." Insofar as the Code was

⁹ C.J. Roberts, *2011 Year-End Report on the Federal Judiciary*, SUPREME COURT 5 (Dec. 31, 2011), <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

called to the attention of the justices involved, it was apparently disregarded—which the justices were free to do. There is an argument to make that Supreme Court justices should be permitted to speak at such events: the public’s interest in what they have to say may offset the concern that they are lending the prestige of their offices to advance the interests of the organization that sells more tickets by hosting them. Indeed, the latest version of the ABA Model Code of Judicial Conduct allows judges to speak in such circumstances.¹⁰ If the Supreme Court shares the ABA’s view and had simply adopted a Code that followed the ABA Model on this point, it could have avoided the perception that its justices were behaving unethically.

Skeptics have argued that it would be an empty gesture for the Supreme Court to adopt a Code because there is no workable way to enforce compliance. But the pledge itself has value. Just as the public rightly expects judges to follow their oaths of office, it will also assume that a justice who vows to abide by ethics rules that the Court itself adopted will do so. Moreover, the Supreme Court depends on diffuse public support for its continued legitimacy. The notion that the justices would jeopardize the Court’s legitimacy by acting unethically in defiance of their own code strikes me as unlikely in the extreme.

This is not a partisan issue. Judges appointed by presidents of both parties confront ethical dilemmas. Codes of judicial conduct proliferated in the Watergate era amid pervasive suspicion of government that has not dissipated in the ensuing forty years. It would be unfortunate if the only judges in the United States who see no need for a code of ethics were those on the nation’s most powerful tribunal.

It would be optimal for the Supreme Court to “take the hint”—to recognize that public confidence in the Court would be enhanced if it bound itself to a Code of its own making, and to obviate the need for legislation by promulgating such a code as literally every other court system in the United States has done on its own initiative. In light of continued foot-dragging by the Supreme Court, however, legislation is both necessary and proper.

II. FINANCIAL DISCLOSURE

The Ethics in Government Act includes judicial officers among those who must submit periodic financial disclosure reports, and defines “judicial officers” comprehensively to include justices and judges of the Supreme and lower courts.¹¹ The Act further provides that the “supervising ethics office in the...judicial branch...shall, within thirty days after any report is received under this title...furnish a copy of such

¹⁰ ABA Model Code of Judicial Conduct, Rule 3.7(A)(4).

¹¹ 5 U.S.C. §101(a), (d). Judicial officers subject to disclosure requirements include: “the Chief Justice of the United States, the Associate Justices of the Supreme Court, and the judges of the United States courts of appeals, United States district courts, including the district courts in Guam, the Northern Mariana Islands, and the Virgin Islands, Court of Appeals for the Federal Circuit, Court of International Trade, Tax Court, Court of Federal Claims, Court of Appeals for Veterans Claims, United States Court of Appeals for the Armed Forces, and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior.” 5 U.S.C. §109(10).

report to any person requesting such inspection or copy.”¹² The Administrative Office of U.S. Courts enables members of the public to request financial disclosure reports by submitting a form that is available online.¹³

Financial disclosure statements are essential to preserving public confidence in the courts by reassuring the public that their judges are unencumbered by financial conflicts of interest that would call their integrity, impartiality, or independence into question. And they are essential to litigants and their lawyers, whose right to due process of law includes the right to an impartial judge whose judgment is not clouded by conflicts of interest. My concern is that we still do not have a system in place that grants the public ready, open, and free online access to those disclosure statements. For lawyers and litigants, the delays associated with requesting and then waiting on a response to requests for the financial disclosure statement of a given judge, can frustrate their ability to obtain timely information on potential conflicts in their cases. For the general public, having to go to the trouble and technical difficulty of filing specific on-line or hard-copy requests for financial disclosure statements on a judge-by-judge basis undermines transparency in an information age when ready access to such data should be a given.

The American Bar Association’s Model Code of Judicial Conduct addresses this problem by imposing annual reporting obligations on judges, and then requiring that: “Reports made in compliance with this Rule shall be filed as public documents in the office of the clerk of the court on which the judge serves... and, when technically feasible, posted by the court or office personnel on the court’s website.”¹⁴ With respect to the federal courts, there can be no doubt that the Administrative Office of U.S. Courts has the capability to post financial disclosure statements online, and should do so on its own initiative, or failing that, via congressional directive.

I am mindful of the concern that some have expressed over the years, about the threat that open disclosure can pose to judges and their families from disgruntled litigants who can access identifying information on disclosure reports. That problem, however, is best resolved by redaction rules that enable judges to excise private information, and not by complicating access to information that the public is legitimately entitled to receive.

III. DISQUALIFICATION PROCEDURE

For centuries, impartiality has been a defining feature of the Anglo-American judge’s role in the administration of justice. The reason is clear: in a constitutional order grounded in the rule of law, it is imperative that judges make decisions according to law, unclouded by personal bias or conflicts of interest. When the impartiality of a judge is in doubt, the appropriate remedy is to disqualify that judge from hearing further proceedings in the matter.

¹² 5 U.S.C. §105(b)(1).

¹³ *Request for Examination of Report Filed by A Judicial Officer or Judicial Employee*, (Mar. 2017), <https://www.uscourts.gov/sites/default/files/ao010a.pdf>.

¹⁴ ABA Model Code of Judicial Conduct, Rule 3.15(d).

A. *Providing Explanations for Disqualification Rulings*

Under federal (and state) law, when the requirements for disqualification are satisfied, judges must withdraw from the case on their own initiative or at the request of a party. In federal litigation, the norm in motions practice is for judges to explain their decisions, however briefly, but when it comes to disqualification decisions that is often not the case.¹⁵ The draft Judicial Accountability, Transparency, and Accountability Act limits proposed reporting obligations to decision to disqualify (the draft Act employs the term “recusal,” which appears neither in the federal disqualification statute nor the Code of Conduct for U.S. judges), but I would urge such obligations to include explanations for rulings that deny requests to disqualify. An excellent report written by Russell Wheeler and Malia Reddick on behalf of the Institute for the Advancement of the Legal System concludes that it is important for judges to explain their disqualification rulings, for reasons worth quoting at length:

Judges should explain denied recusal motions in writing or orally on the record, even when the denial is because the motion is untimely or clearly frivolous or insufficient. Written explanations can be as brief as a few sentences—whatever is necessary to state the applicable standard and explain why the motion does not meet it—or in appropriate cases, why the standard requires a sua sponte recusal. Even a granted motion might include a one- or two-sentence clarification of the reason for the grant. While the explanation can be brief, it is not enough simply to invoke a technical legal term that a layperson would likely not understand.

Some jurisdictions have prepared forms or checklists with common reasons for the action taken on a recusal motion, which the judge can complete, annotate as necessary, and file as an explanation They can help ensure individual judges’ accountability to their oath of impartiality. Requiring a judge to write an opinion explaining a recusal denial may cause her to reconsider the denial if the opinion turns out to be what judges call “an opinion that won’t write”; what a judge may regard initially as an obvious conclusion may become less obvious when the judge cannot explain it in a reasoned opinion. In the same vein, formal explanations promote due process by demonstrating that judicial decisions are well reasoned rather than arbitrary. They promote transparency in the recusal process as a whole, and they provide guidance to other judges by establishing common law interpretations of vague or ambiguous recusal requirements. Such provisions might call for a written explanation even of a sua sponte recusal, although convening participants worried that requiring such explanations might discourage judges from recusing on their own initiative if the reason for the recusal could be embarrassing. If

¹⁵ Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. Kan. L. Rev. 531, 589 (2005).

such information is in a motion, however, it is already in the open. The best way for judges to avoid having potentially dirty laundry exposed to public review is to recuse sua sponte; putting reasons on the record is valuable if only to refute the often factually strained allegations in the motion.

Explaining recusal rulings in writing facilitates appellate review of denied recusal motions. Written explanations also facilitate aggregate data collection on recusal activity. Finally, if a party (or anyone) files a disciplinary complaint regarding a failure to recuse (alleging, for example, that the denial stemmed from an improper motive), the subject judge's explanation for the denial as offered at the time can facilitate resolution of the complaint.

The ABA Judicial Disqualification Project's draft report notes the concern that such a requirement could cause judges to recuse unnecessarily out of an abundance of caution, leading to recusals based on the "lowest common denominator" and "setting 'precedent' that other judges will be pressured to follow." The report called the concerns "understandable" but "overstated" and argued they "do not counsel against encouraging" judges to explain their rulings. States may thus prefer to encourage—rather than require—such explanations. If so, the encouragement should be strong and forceful.¹⁶

A report of the Brennan Center for Justice reaches a similar conclusion.¹⁷ In addition to these litigation-specific justifications, is a systemic one: Offering written explanations for decisions to disqualify (or not)—however brief—facilitates record keeping and enables systemic evaluation of when, how, and why disqualification rules are being applied, to the end of facilitating better informed oversight, and, when needed, reform.

To ease administrative burdens associated with explaining decisions to disqualify (or not) in routine cases, some jurisdictions provide their judges with disqualification templates to complete.¹⁸ I do not regard such templates as a proxy for reasoned explanations in difficult matters, but in easy cases, where the reasons for disqualification or non-disqualification are obvious, it is a labor-saving option worthy of consideration.

B. Ending Judicial Self-Evaluation in Disqualification Proceedings

¹⁶ RUSSELL WHEELER & MALIA REDDICK, *Judicial Disqualification Procedures: A Report on the IAALS Convening* 10 (June 2017), https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf.

¹⁷ Matthew Menendez and Dorothy Samuels, *Judicial Recusal Reform: Toward Independent Consideration of Disqualification* 11 (2016), https://www.brennancenter.org/sites/default/files/publications/Judicial_Recusal_Reform.pdf.

¹⁸ WHEELER & REDDICK, *supra* note 16, Appendix D. As written, this template offers one check box explaining decisions to disqualify: Because the judge's impartiality might reasonably be questioned. That might be satisfactory in state systems, where all more specific grounds for disqualification are subsumed within the "impartiality might reasonably be questioned" catch-all. *See, e.g.* ABA Model Code of Judicial Conduct, Rule 2.11. But in the federal system, where the catch-all in §455(a) is separated from the more specific grounds for disqualification in §455(b), additional check boxes would be necessary.

In the federal system, the norm is that disqualification motions are decided by the judge whose disqualification is sought.¹⁹ While it may be a bit awkward to initiate the disqualification process by calling upon the party who seeks a judge's disqualification to raise the matter with that judge, it is a defensible approach. The target judge will be the most familiar with the facts giving rise to the motion, and can step aside without delay when circumstances warrant.

When, however, the judge is disinclined to step aside, asking that judge to resolve a contested disqualification motion becomes much more problematic. In effect, such an approach calls upon the judge to “grade his own paper”—to ask the judge who is accused of being too biased to decide the case, to decide whether he is too biased to decide the case. Unsurprisingly, two recent commentators observe that “the fact that judges in many jurisdictions decide on their own disqualification and recusal challenges . . . is one of the most heavily criticized features of U.S. disqualification law, and for good reason.”²⁰ Another commentator adds:

The appearance of partiality and the perils of self-serving statutory interpretation suggest that, to the extent logistically feasible, another judge should preside over [disqualification] motions. To permit the judge whose conduct or relationships prompted the motion to decide the motion erodes the necessary public confidence in the integrity of a judicial system, which should rely on the presence of a neutral and detached judge to preside over all court proceedings.²¹

And yet another commentator echoes that “[t]he Catch-22 of the law of disqualification is that the very judge being challenged for bias or interest is almost always the one who, at least in the first instance, decides whether she is too conflicted to sit on the case.”²²

Over eighty percent of the public thinks that disqualification motions should be decided by a different judge.²³ The assumption underlying the public's view—that a judge is ill-positioned to assess the extent of her own bias (real or perceived)—is corroborated by empirical research. Recent empirical studies in cognitive psychology have demonstrated that judges, like lay people, are susceptible to cognitive biases in their decision-making.²⁴ Considerable research has been conducted in the field of

¹⁹ *Schurz Communications, Inc. v. FCC*, 982 F.2d 1057, 1059 (7th Cir. 1992); *In re United States*, 158 F.3d 26, 34 (1st Cir. 1998) (citations omitted). *Accord United States v. Heldt*, 668 F.2d 1238, 1271 (D.C. Cir. 1981).

²⁰ James Sample & David Pozen, *Making Judicial Recusal More Rigorous*, 46 JUDGES' J. 17, 21 (2007).

²¹ Leslie W. Abrahamson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 561 (1994).

²² Amanda Frost, *Keeping Up Appearances: A Process Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 571 (2005).

²³ Press Release, Justice at Stake Campaign, Poll: Huge Majority Wants Firewall Between Judges, Election Backers (Feb. 22, 2009) (on file with author). Is this on file with you?

²⁴ Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in *Heuristics and Biases: The Psychology of Intuitive Judgment* 49, 49-50 (Thomas Gilovich et al., eds., 2002); Guthrie et al., *Inside the Judicial Mind*, 86 Cornell L. Rev. 777 (2001).

“heuristics”—rules of thumb or mental shortcuts people use to aid their decision-making that may enable efficient judgments in some settings, but in other settings may serve as forms of bias that result in systematic, erroneous judgments.²⁵ This research suggests that when an individual employs “heuristics” in his decision-making, he is unaware of those underlying biases.²⁶

More generally, people typically rely on introspection to assess their own biases;²⁷ however, “because many biases work below the surface and leave no trace of their operation, an introspective search for evidence of bias often turns up empty.”²⁸ The individual thus takes his unfruitful search as proof that bias is not present and fails to correct for those biases.²⁹

The peril of asking a person to assess the extent of her own bias is further exacerbated for judges by the judicial disqualification paradox, because the judge is being asked to assess whether she harbors a real or perceived bias that she has sworn to avoid. In short, the tradition of calling upon judges to be the final arbiters of challenges to their own impartiality should be abandoned.

A simple solution to the problem of calling upon a judge to evaluate her own qualification to sit is to assign the matter to a different judge. Such a procedure could be limited to courts of original jurisdiction (district judges, magistrates, bankruptcy judges), or extended to appellate courts. Illinois employs such a procedure with language that could be borrowed, with appropriate modifications to accommodate the vocabulary of section 455: “Upon the filing of a petition for substitution of judge for cause, a hearing to determine whether the cause exists shall be conducted as soon as possible by a judge other than the judge named in the petition.”³⁰ The Illinois statute adds that the judge whose disqualification is sought “need not testify but may submit an affidavit if the judge wishes” to assist the judge evaluating the disqualification petition.³¹

One possible objection to this proposal is a somewhat cynical one: That reassigning disqualification to a different judge is pointless, because judges will not second-guess the impartiality of their colleagues. This concern is overblown. The Judicial Conduct and Disability Act, which has been in place since 1980, calls upon judges within

²⁵ Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 49, 49-50 (Thomas Gilovich et al., eds., 2002).

²⁶ Joyce Ehrlinger et al., *Peering Into the Bias Blind Spot: People’s Assessments of Bias in Themselves and Others*, 31 *PERSONALITY & SOC. PSYCHOL. BULL.* 1 (2005); Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 *PSYCHOL. REV.* 781 (2004); Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 *PERSONALITY & SOC. PSYCHOL. BULL.* 369 (2002); Richard E. Nisbett et al., *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 *PSYCHOL. REV.* 231 (1977).

²⁷ Emily Pronin et al., *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 *J. OF EXPERIMENTAL SOC. PSYCHOL.* 565, 565-67 (2007).

²⁸ Ehrlinger, *supra* note 8, at 10.

²⁹ Pronin, *supra* note 9, at 565–67.

³⁰ 735 Ill. Comp. Stat. 5/2-1001 (a)(3).

³¹ *Id.*

a given circuit to discipline their own. If judges can be trusted to evaluate the misconduct of a colleague, then surely they can be trusted to assess whether, under the circumstances of a given case, a reasonable person might question the subject judge's impartiality to preside.