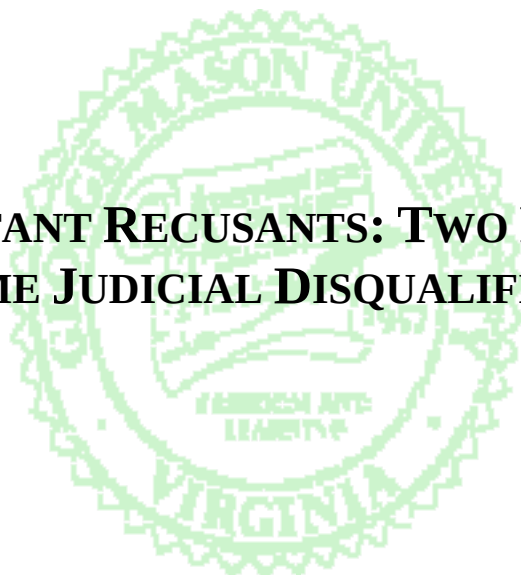


GEORGE MASON UNIVERSITY SCHOOL OF LAW

THE RELUCTANT RECUSANTS: TWO PARABLES OF SUPREME JUDICIAL DISQUALIFICATION



Ross E. Davies

06-51

***Green Bag 2d*, Vol. 10, No. 1, Autumn 2006, pp. 79-107**

**GEORGE MASON UNIVERSITY LAW AND
ECONOMICS RESEARCH PAPER SERIES**

This paper can be downloaded without charge from the Social Science
Research Network at http://ssrn.com/abstract_id=945552



THE RELUCTANT RECUSANTS

TWO PARABLES OF SUPREME JUDICIAL DISQUALIFICATION

Ross E. Davies

IT IS A RECURRING IRONY OF JUDICIAL RECUSAL — a mechanism meant to reduce real and apparent bias in adjudication — that it inspires strikingly partial arguments by both its proponents and its opponents in particular cases or controversies. This partiality is driven only partly by the differences that underlie all legal disputes, differences of interpretation, opinion, expertise, and knowledge of the facts. It is also driven by direct competition for the levers of judicial power. Recusal is, after all, the only lawful way to remove an important vote from an important case — other than an impossibly speedy impeachment in the House and conviction in the Senate. This is an appealing or frightening prospect (depending on one's position) in a close case, and thus worth fighting for or against (again, depending on one's position). But voting — credibly impartial voting — is the only power a judge has, making it well worth defending. So, the stakes are high and the associated incentives are straightforward and potent.¹ Two examples involving Supreme Court Justices and their critics illustrate the phenomenon.

Ross Davies is a law professor at George Mason University and an editor of the Green Bag.

¹ Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 S. CT. REV. 203; RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS § 10.3-28 (2006).

THE RECUSALS THAT WEREN'T

In January 2004, while *Cheney v. United States District Court*² was before the Supreme Court, Justice Antonin Scalia went duck-hunting with his old friend and named party in the case, Vice President Richard Cheney. The Sierra Club, one of the other parties in *Cheney*, then filed a motion seeking Scalia's recusal. The gist of the motion was that Scalia's "impartiality might reasonably be questioned"³ because important interests of his good friend hinged on the outcome of the case, and socializing with that friend while the case was pending created too many doubts about his ability to set aside that friendship while deciding the case. Scalia denied the motion.⁴

Commentators of every stripe launched attacks on or defenses of Scalia and his decision. All of the defenses and all but one of the attacks are beyond the scope of this little essay. That one is simple: several of Scalia's critics argued that the error of his ways was obvious from a comparison of his approach with Justice Thurgood Marshall's. Specifically, there was on the one hand Scalia's insensitive and improper disinclination to recuse in *Cheney*, and, on the other hand, Marshall's commonsensical and prudent inclination to recuse in all cases involving two organizations with which he had long been associated – the National Association for the Advancement of Colored People and the NAACP Legal Defense (later "and Education") Fund.⁵ For example, during an interview on National Public Radio about Scalia's refusal to recuse in *Cheney*, Professor Frank Wu questioned Scalia's judgment and explained that when it comes to recusal practices,

the best example, I think, is the late Justice Thurgood Marshall. You know, for his entire career [1967-1991], he

² 542 U.S. 367 (2004).

³ 28 U.S.C. § 455(a).

⁴ 541 U.S. 913 (2004) (Scalia, J., in chambers).

⁵ The two organizations have been separate for a long time, but for present purposes it should be sufficient to refer to either and both as "NAACP," because Marshall and his colleagues lumped the two together in this context.

recused himself from cases involving the NAACP or the NAACP Legal Defense Fund, even 25 years after he was no longer associated with them.⁶

Alas, Wu's description of Marshall is wrong.

The true story begins (subject to a flashback or two) on October 4, 1984, when Marshall sent a memorandum to the other Justices describing a new policy on recusals he proposed to adopt in cases involving the NAACP.⁷ His past practice had been, he said, to "routinely disqualif[y] myself from all cases in which the NAACP has participated as a party or as an intervenor."⁸ Enough time had passed, however, since he had left the NAACP, "that continued adherence to this self-imposed blanket disqualification rule is no longer necessary." And so he planned "in the future not to recuse myself in cases in which the NAACP is a party or an intervenor, unless the circumstances of an individual case persuade me, as with all cases, to do otherwise." In a cover note accompanying the memo, Marshall "earnestly [sought their] advice as to the propriety of this proposed action." All eight responded the next day with crisp blessings.⁹ Justice John Paul Stevens was especially emphatic:

⁶ *Request for Justice Antonin Scalia to recuse himself from a case involving his friend Vice President Dick Cheney*, TAVIS SMILEY SHOW, NPR, Apr. 13, 2004; see also, e.g., Sherrilyn A. Ifill, *Can He Be Recused?*, LEGAL TIMES, Apr. 26, 2004, at 60; Timothy J. Goodson, *Duck, Duck, Goose*, 84 N.C. L. REV. 181, 205 & n.147 (2005).

⁷ Justice Thurgood Marshall, Memorandum to the Conference, Oct. 4, 1984, and replies from Chief Justice Warren Burger and Justices William Brennan, Byron White, Harry Blackmun, Lewis Powell, William Rehnquist, John Paul Stevens, and Sandra Day O'Connor, all Oct. 5, 1984, in Papers of Harry A. Blackmun, Library of Congress, Manuscript Division, box 1405, folder 14, *reprinted at* pages 93-107, *infra*.

⁸ Marshall had always felt freer to participate in cases in which the NAACP participated in a lesser capacity – for example as counsel (see, e.g., *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); JACK GREENBERG, *CRUSADERS IN THE COURTS* 425-26 (BasicBooks 1994)), or as a friend of the Court (see, e.g., *McGautha v. California*, 402 U.S. 183 (1971); *Aikens v. California*, 402 U.S. 812 (1971) & 406 U.S. 813 (1972)). But not entirely free. See, e.g., *McGautha v. California*, 400 U.S. 814 (1970); *University of Tennessee v. Geier*, 444 U.S. 886 (1979).

⁹ Pages 100-107, *infra*.

Dear Thurgood: Not only do I agree with the analysis in your memorandum, but I also agree that it was proper for Bill Rehnquist to participate in *Laird v. Tatum*. I think he received some undeserved flack for taking part in that case and I suppose the same may happen to you, but I am delighted that you have made the decision that you have because I think it is entirely appropriate for you to participate in NAACP cases.

Stevens's endorsement of not only Marshall's memo but also Rehnquist's refusal to recuse himself in *Laird v. Tatum* would have resonated with the Justices. Twelve years earlier, in 1972, just as Rehnquist was beginning his service on the Court, he was confronted by several cases — *Laird* was one of them — in which a party or the press demanded his recusal or criticized his participation. The grounds for recusal were said to relate to his service in the Justice Department just before his elevation to the Court.¹⁰ His refusal to recuse in *Laird* and other cases in 1972 was as controversial in its day as Scalia's participation in *Cheney* would later be.¹¹ Rehnquist's role in *Laird* was even a factor in congressional deliberations leading to the enactment in 1974 of the amended disqualification statute that Scalia would apply in *Cheney*.¹² Thus, Stevens's reply to Marshall was a statement of solidarity with Rehnquist (who had been hammered for resisting pressure to recuse in cases tied to the Nixon Administration of which he had been a part) as well as Marshall (who was risking similar treatment for ceasing to recuse in cases tied to the

¹⁰ *Laird v. Tatum*, 409 U.S. 824 (1972) (Rehnquist, J., in chambers); see also *Gravel v. United States*, 409 U.S. 902 (1972) & 409 U.S. at 839; Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736 (1973).

¹¹ Compare, e.g., *Burger and Rehnquist*, NEW REPUBLIC, Nov. 4, 1982, at 8, with *Rehnquist Memorandum*, N.Y. TIMES, Oct. 12, 1972, at 46 (editorial); Fred P. Graham, *Determined Not to 'Bend Over Backward'*, N.Y. TIMES, Oct. 15, 1972, at E8.

¹² H.R. Rep. No. 1453, 93rd Cong., 2d Sess. (Oct. 9, 1974); *Hearing Before the Subcommittee on Improvements in Judicial Machinery ... on S. 1064 to Broaden and Clarify the Grounds for Judicial Disqualification*, 93d Cong., 1st Sess. 88-89, 114-19, 170-85 (1973); 541 U.S. at 914; see also RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION § 28.3 (Aspen 1996).

NAACP of which he had been a part) on the question of categorical recusals. Marshall was not alone on the Court, nor was his position unprecedented there.

Marshall's memo and his colleagues' replies remained confidential until shortly after his death in 1993, when the Library of Congress opened his papers to the public. But the secret memo was not the only – or even the most obvious and convincing – evidence that Marshall would no longer “routinely disqualif[y]” himself in NAACP cases. The cases were. In February 1985 he joined the majority in *NAACP v. Hampton County Election Commission*,¹³ and in June 1986 he did the same in *Davis v. Bandemer*.¹⁴ He continued to participate in NAACP cases until he retired from the Court in 1991.¹⁵ He also continued to recuse himself in some such cases when he felt circumstances called for it, as he had promised in his 1984 memo.¹⁶

Nevertheless, the myth of Marshall's categorical self-restraint in NAACP cases persisted. For example, Professor Jeffrey Stempel relied on it in a 1987 critique of Rehnquist's refusal to recuse himself in *Laird* – much as Wu would use it in his 2004 critique of Scalia's refusal to recuse himself in *Cheney*.¹⁷ After a thorough indictment of Rehnquist's approach to recusal in *Laird*, Stempel declared that “the trend toward greater caution by the Justices de-

¹³ 470 U.S. 166 (1985).

¹⁴ 478 U.S. 109 (1986); see also Brief of Appellees Indiana NAACP State Conference of Branches, *Davis v. Bandemer* (July 17, 1985).

¹⁵ See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987); *Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988); *Spallone v. United States*, 493 U.S. 265 (1990); see also, e.g., *Duncan v. Carrollton, Georgia, Branch of the NAACP*, 485 U.S. 936 (1988); *Spallone v. United States*, 487 U.S. 1251 (1988); *Tallahassee Branch of the NAACP v. Leon County*, 488 U.S. 960 (1988); *Martin v. Wilks*, 490 U.S. 755 (1989); *Virginia State Conference NAACP v. Upchurch*, 493 U.S. 1069 (1990); *NAACP, Detroit Branch v. Detroit Police Ass'n*, 498 U.S. 983 (1990); Andrew Blum, *Yonkers Deseg Case Continues*, NAT'L L.J., Apr. 8, 1991, at 36.

¹⁶ Pages 94, 99, *infra*; see, e.g., *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788 (1985); *Missouri v. Jenkins*, 491 U.S. 274 (1989).

¹⁷ Compare Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOKLYN L. REV. 589 (1987), with *Request for Justice Antonin Scalia to recuse himself . . .*, TAVIS SMILEY SHOW, note 6, *supra*.

serves praise,” and then offered an example of that praiseworthy trend:

Justice Thurgood Marshall, on the Court since 1967, has continued to recuse himself in cases involving the NAACP or the NAACP Legal Defense Fund, as he was NAACP general counsel from 1943 to 1960.¹⁸

Similar reports appeared in the mass media, especially around the time of Clarence Thomas’s nomination to the Court,¹⁹ although not everyone was taken in.²⁰

By the mid-1990s, with the opening of the Marshall Papers at the Library of Congress, it was even more difficult to miss Marshall’s 1984 change of position on the NAACP. In 1995, Professor Mark Tushnet, probably the leading authority on Marshall, cited the 1984 memo in a study of the Court’s treatment of race discrimination during Marshall’s tenure, and did so again a couple of years later in the second volume of his biography of Marshall.²¹ But in the decade since Tushnet’s work appeared scholars have continued to invoke Marshall’s supposed commitment to recusal in NAACP cases.²²

There is, however, an even stranger aspect of Marshall’s reputation for recusal in NAACP cases: Marshall himself got it wrong. When he wrote in his 1984 memo of “my blanket disqualification rule” in NAACP cases, he was describing a rule that either did not exist or was not followed.

¹⁸ Stempel, 53 BROOKLYN L. REV. at 624 & n.138.

¹⁹ See, e.g., Saul Friedman, *Lasting Doubts? Charges Cast Cloud Over Future Decisions*, NEWSDAY, Oct. 16, 1991, at 5; Mark Tushnet, *Marshall Had Policy of Recusing Himself in NAACP’s Cases*, LEGAL TIMES, Sept. 9, 1991, at 30.

²⁰ Ronald D. Rotunda, *Thomas’ Ethics and the Court*, LEGAL TIMES, Aug. 26, 1991, at 20.

²¹ Mark V. Tushnet, *The Supreme Court and Race Discrimination, 1967-1991: The View from the Marshall Papers*, 36 WM. & MARY L. REV. 473, 509 n.206 (1995); MARK V. TUSHNET, MAKING CONSTITUTIONAL LAW 84 n.* (Oxford 1997).

²² See, e.g., Ryan Black & Lee Epstein, *Recusal on Appeal*, 7 J. APP. PRAC. & PROCESS 75, 77 & n.15 (2005); Sherrilyn A. Ifill, *Do Appearances Matter?*, 61 MD. L. REV. 606, 620-21 (2002); see also note 6, *supra*.

In fact, Marshall first participated in an NAACP case in 1974, when he dissented in *Milliken v. Bradley*.²³ *Milliken* was a school desegregation case “commenced in August 1970 by the respondents, the Detroit Branch of the National Association for the Advancement of Colored People and individual parents and students, on behalf of a class later defined by order of the United States District Court for the Eastern District of Michigan.”²⁴ Nor was Marshall’s participation in *Milliken* difficult to detect. He was active at oral argument, and even read aloud an abbreviated version of his opinion when the Court handed down its decision.²⁵ And the next year, in *Meek v. Pittenger* — an establishment clause case in which “[t]he organization plaintiffs” included “the National Association for the Advancement of Colored People” — Marshall joined most of Justice Potter Stewart’s opinion for the Court, and an opinion by Justice William Brennan concurring in part and dissenting in part.²⁶ He probably recused

²³ 418 U.S. 717, 781 (1974) (Marshall, J., dissenting); *see also id.* at 762 (White, J., dissenting); Order denying motion of respondents to require each party to bear its own costs, *Milliken v. Bradley* (Oct. 15, 1974) (Marshall, J., dissenting), National Archives and Records Administration, Record Group 267, Appellate Case Files (“NARA RG267”), box 57; Ronald Bradley and ... National Association for the Advancement of Colored People, Detroit Branch ... , Brief in Opposition to Petitions for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit, *Milliken v. Bradley* (filed Oct. 6, 1973).

²⁴ 418 U.S. at 722 (footnote omitted).

²⁵ Transcript of Oral Argument at 74, *Milliken v. Bradley* (Feb. 27, 1974), NARA RG267, box 57; *Milliken v. Bradley*, “Read in Court by Justice Marshall,” July 25, 1974, in Marshall Papers, box 131, folder 4; *see also* JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 357 (Times Books 1998). There is no reason to think that Marshall’s participation was an oversight on his part. (Such things do happen from time to time, and understandably. JOHN C. JEFFRIES, JR., LEWIS F. POWELL, JR. 275 (Scribners 1994).) The NAACP is identified as a party in the majority opinion. 418 U.S. at 722. Moreover, in the Marshall Papers, on the first page of the first circulated draft of Burger’s opinion for the majority in *Milliken*, the words “The action was commenced in August 1970 by the respondents, the Detroit Branch of the National Association for the Advancement of Colored People” are underlined in red ink. Marshall Papers, box 131, folder 5.

²⁶ 421 U.S. 349 (1975); Silvia Meek, ... National Association for the Advancement of Colored People ... , Brief for Appellants, *Meek v. Pittenger* (filed Nov. 22,

himself more often than he participated in NAACP cases from the late 1960s to the early 1980s,²⁷ but he certainly did not recuse as a matter of routine.²⁸ And after 1984, of course, he abandoned any pretense of routine recusal.

In the end, then, a comparison of Scalia's approach to recusal in *Cheney* (or Rehnquist's in *Laird*) with Marshall's approach in NAACP cases does not have the implication that commentators have long sought to present as obvious. Because Marshall, like Scalia and Rehnquist, did not tilt invariably toward recusal in close cases, including those in which a lobe of the public mind might well perceive an uncomfortably close connection between a Justice and a party. This does not mean that Marshall would have done what Scalia did in *Cheney*, but it does mean that he would not have considered the case an obvious one for recusal simply because there was a close and well-publicized connection between Scalia and Cheney. Whether recusal was appropriate under the circumstances, Marshall might have said, would invariably require attention to the circumstances.

THE LESSER DOES NOT PRECLUDE THE GREATER

During the Scalia-*Cheney* brouhaha, Senators Patrick Leahy and Joseph Lieberman sent a letter to Chief Justice Rehnquist in which they expressed particular concerns about Scalia and the *Cheney* case, and general concerns about judicial stewardship of impartiality and the appearance of impartiality in the courts. They also asked "whether mechanisms exist for the Supreme Court to disqual-

1974). Marshall's participation in the case was in doubt even after oral argument on February 19, 1975. Justice William J. Brennan to the Chief Justice, Feb. 24, 1975, in Marshall Papers, box 148, folder 7 ("however Thurgood votes (if he does participate) there remains a majority against my view"). See also *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 71 n.24 (1975).

²⁷ See, e.g., *NAACP v. New York*, 413 U.S. 345 (1973); *NAACP v. Federal Power Commission*, 425 U.S. 662 (1976); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

²⁸ And yet, again, commentators persisted in reporting that he did. See, e.g., *Justices Decide for N.A.A.C.P. in Boycott Case*, N.Y. TIMES, July 3, 1982, at 11; Nick King, *Supreme Court Sidesteps Boston Jobs Case*, BOSTON GLOBE, May 17, 1983.

ify a Justice from participating in a matter or for review of a Justice's unilateral decision to decline to recuse himself."²⁹

Rehnquist's reply seemed categorically and comprehensively negative:

Each of us strives to abide by the provisions of 28 U.S.C. §455, the law enacted by Congress dealing with the subject. ... While a member of the Court will often consult with colleagues as to whether to recuse in a case, there is no formal procedure for Court review of the decision of a Justice in an individual case. This is because it has long been settled that each Justice must decide such a question for himself.³⁰

And just in case this description of Court recusal practice left any doubt as to the propriety of anyone, anywhere taking a hand in a Justice's independent decision about his or her recusal, the Chief Justice concluded with a firm snub:

Insofar as your letter suggests reasons why Justice Scalia should have disqualified himself in the pending case of *Cheney v. U.S. District Court*, it has, so far as I know, no precedent. A Justice must examine the question of recusal on his own even without a motion, and any party may file a motion to recuse. And anyone at all is free to criticize the action of a Justice – as to recusal or as to the merits – after the case has been decided. But I think that any suggestion by you or Senator Lieberman as to why a Justice should recuse himself in a pending case is ill considered.

Nothing in the official records of the Supreme Court contradicts Rehnquist's characterization of individual Justices' freedom to determine independently whether they will sit or not sit in any case. It

²⁹ Letter from Senators Patrick Leahy & Joseph I. Lieberman to Chief Justice William H. Rehnquist, Jan. 22, 2004, reprinted in *Irrecusable & Unconfirmable*, 7 GREEN BAG 2D 277, 278-79 (2004).

³⁰ Letter from Chief Justice William H. Rehnquist to Senator Patrick Leahy, Jan. 26, 2004, reprinted in *id.* at 280.

is the nearest thing to a perfectly independent, unreviewable, unchallengeable judicial decision that any Article III judge can make.³¹

But that is not the end of the matter. Read Rehnquist's words. He said "there is no *formal procedure* for Court review of the decision of a Justice in an individual case." But how about an *informal means* of performing the functions about which Leahy and Lieberman were inquiring – namely, "to disqualify a Justice ... or for review of a Justice's unilateral decision" on recusal? In fact, there is, or at least was, just such a creature.

On Friday, October 17, 1975, eight of the Court's nine members – Chief Justice Warren Burger and Justices William Brennan, Potter Stewart, Byron White, Thurgood Marshall, Harry Blackmun, Lewis Powell, and William Rehnquist – met without telling the ninth member of the Court, William O. Douglas, what they were doing. In a post-meeting letter distributed only to the participants, White identified two decisions made by seven members of the group of eight (implying but not stating that he had dissented). First, the "Court [would] not assign the writing of any opinions to Mr. Justice Douglas." Second, "they would not hand down any judgment arrived at by a 5-4 vote where Mr. Justice Douglas is in the majority."³² They were motivated by concerns about Douglas's competence to serve. He had suffered a serious stroke the previous New Year's Eve, and his recovery was not going well. His disturbingly uneven behavior inside the Court and in public showed that he was not well enough to serve as a judge.³³ For reasons about which we can only speculate, the group dealt with the problem in secret. The only direct evidence of this entire exercise is White's letter.

According to White, the decisions of the seven-Justice majority in the group of eight amounted to arrogation by the Court of the

³¹ See, e.g., *Hanrahan v. Hampton*, 446 U.S. 1301 (1980) (Rehnquist, J., in chambers); cf. *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970); Goodson, note 6, *supra*, at 215 & n.179.

³² Letter of October 20, 1975, reprinted in DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE* 463-65 (Free Press 1998).

³³ David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court*, 67 U. CHI. L. REV. 995, 1052-56 (2000); BRUCE ALLEN MURPHY, *WILD BILL* ch. 38 (2003).

congressional power to impeach and remove judges. White was, as Professor Dennis Hutchinson describes him, “overwrought” by his own “constitutional fastidiousness.”³⁴ After all, they had not removed Douglas from office. Instead, as Powell biographer John Jeffries explains, “They took away his vote.”³⁵ In other words, when Douglas failed to recuse himself until he was capable of functioning effectively, the rest of the Court took over and made the decision for him. The constitutionality of what amounts to collusive compulsory informal secret recusal is an open question,³⁶ but the raw fact that the Court has engaged in this form of self-management is not.³⁷

³⁴ HUTCHINSON, note 32, *supra*, at 434, 463. White’s reaction may have also reflected a constitutional hypocrisy to match his constitutional fastidiousness. According to White, “the action voted by the Court [meaning the seven-member majority of the group of eight] exceeds its powers and perverts the constitutional design” because the Constitution “allows the impeachment of judges by Congress; but it nowhere provides that a Justice’s colleagues may deprive him of his office by refusing to permit him to function as a Justice.” And so, White admonished his colleagues, “[i]f the Court is convinced that Justice Douglas should not continue to function as a Justice, the Court should say so publicly and invite Congress to take appropriate action.” *Id.* at 463, 465. White showed no signs of taking his own medicine, however. Confronted with what he had just described as a perversion of the constitutional design, White limited his response to a sanctimonious letter to the perpetrators and then sat on his hands. If he truly believed that seven of his colleagues had pulled off what amounted to a silent judicial coup at the expense of Congress, then he was bound by his oaths of office to put a stop to it, and perhaps by federal criminal law to not take part in Court business conducted under the arrangements he was objecting to. After all, Richard Nixon had only recently become an ex-President in part because of his role in obstructions of justice. On the other hand, perhaps White was just overwrought and appropriately ignored by his fellow Justices. Or on yet another hand, perhaps the letter was written with an eye to the need for a fig leaf in the event the whole business blew up in the Court’s face. In which case it also would have been ignored by the Justices who thought they were doing the right thing.

³⁵ JEFFRIES, note 25, *supra*, at 417.

³⁶ Compare, e.g., HUTCHINSON, note 32, *supra*, at 435, with *McBryde v. Committee to Review Circuit Council Conduct*, 264 F.3d 52, 67 & n.5 (D.C. Cir. 2001).

³⁷ There have been other instances of this sort of behavior, although none with a climax so dramatic. See, for example, Garrow, note 33, *supra*, at 1015-16, on the Court’s dealings with Justice Joseph McKenna in 1924-25.

So, Rehnquist's letter to Leahy and Lieberman was accurate, as far as it went, but not one millimeter further:

- “[T]here is no formal procedure for Court review of the decision of a Justice in an individual case” – but there is an informal means of achieving the same end, though it has only been used for a blanket disqualification.
- “[I]t has long been settled that each Justice must decide such a question for himself” – but on at least one occasion the Court has determined that it has the power to review that decision, as it has the power to review decisions that Justices must make for themselves in chambers and lower-court judges must make for themselves in the run of cases.
- “[A]ny suggestion by you or Senator Lieberman as to why a Justice should recuse himself in a pending case is ill considered” – but such a suggestion by a majority of Justices meeting in secret has been considered on at least one occasion to be well-considered, by a majority of Justices meeting in secret.³⁸

Which is not to say that the Douglas incident (in 1975) is indicative of the way recusals are handled at the Court today (in 2006). Rather, it is only to say that if the Senators were asking “whether mechanisms exist for the Supreme Court to disqualify a Justice from participating in a matter or for review of a Justice’s unilateral decision to decline to recuse” in order to learn whether the Court had any means to deprive a Justice of his or her vote, then Rehnquist was answering a narrower question.

³⁸ Despite Rehnquist’s follow-up rebuke – that, “so far as I know, [there is] no precedent” for members of Congress to “suggest[] reasons why Justice Scalia should have disqualified himself in [*Cheney*]” – there was some precedent for such suggestions. See, e.g., *Final Report by the Special Subcommittee on H. Res. 920*, 91st Cong., 2d Sess., 1970 at 61-65 (Representative F. Edward Hebert’s letters to Chief Justice Warren Burger and Solicitor General Erwin Griswold asking that Douglas be disqualified in cases relating to the Vietnam War, and Burger and Griswold’s replies).

It may well be that while striving to (a) keep Leahy and Lieberman and the rest of Congress at arm's length³⁹ and (b) honor the general (though imperfect) confidentiality of the Court's deliberations,⁴⁰ Rehnquist chose not engage in a distracting discussion of either the past or the present state of informal recusal management at the Court. With regard to the past, he did not mention the Douglas incident. With regard to the present, he did not, for example, direct his correspondents' attention to recent statements by Justices John Paul Stevens and Ruth Bader Ginsburg. In 2003, Stevens told a bar association audience that he had considered recusing himself in *Grutter v. Bollinger*⁴¹ – the University of Michigan law school affirmative action case – because one of his former clerks was dean of the law school. Citing what he described as the usual practice on the Court, Stevens recalled presenting the question of his recusal to his colleagues. They “unanimously and very firmly” told him he should stay on the case. And so he did.⁴² More recently, Ginsburg explained that under current practice, “[i]n the end it is a decision the individual Justice makes, but *always* with consultation among the rest of us.”⁴³ Nor did Rehnquist note the more structured but still informal step seven of the Justices took in 1993 when they signed a joint “Statement of Recusal Policy” spelling out the circumstances under which they would and would not recuse themselves in the event a firm of which a close relative was a member or employee appeared before the Court.⁴⁴ Chief Justice John Roberts and Justice Samuel Alito have announced their adoption of the 1993 Statement

³⁹ Leahy and Lieberman were not the only legislators quizzing Rehnquist about recusal. See, e.g., Letter from Representatives Henry A. Waxman & John Conyers, Jr. to Chief Justice William H. Rehnquist, Jan. 30, 2004.

⁴⁰ *Leaky Ethics*, 8 GREEN BAG 2D 123 (2005).

⁴¹ 539 U.S. 306 (2003).

⁴² Charles Lane, *Stevens Gives Rare Glimpse Of High Court's 'Conference'*, WASH. POST, Oct. 19, 2003 at A3.

⁴³ Ruth Bader Ginsburg & Paul Berman, *An Open Discussion with Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1039 (2004) (emphasis added).

⁴⁴ Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Thomas, and Ginsburg, *Statement of Recusal Policy*, Nov. 1, 1993.

as well, and Scalia cited it in his *Cheney* recusal opinion.⁴⁵ Rehnquist also failed to mention his 2000 opinion in chambers explaining his refusal to recuse in the *Microsoft* case, which he opened with an invocation of the Court, as well as the law: “I have reviewed the relevant legal authorities and consulted with my colleagues.”⁴⁶

Taken together, these opinions and informal but not casual comments and statements suggest that the Justices recognize the value of running disqualification issues past their colleagues, and even of bowing to the collegial consensus as a reasonable proxy for the objective standard for recusal in 28 U.S.C. § 455. Without relinquishing individual independence, and perhaps, one might hope, without disregarding what happens when someone (like Douglas) exceeds institutional tolerance for harmful idiosyncrasy.

Whether all of this is enough to satisfy Leahy and Lieberman is another matter. In early 2004 Rehnquist formed a committee headed by Justice Stephen Breyer to examine the implementation of the Judicial Conduct and Disability Act of 1980. Leahy – following up on his correspondence with Rehnquist regarding the *Cheney* case and Supreme Court recusals in general – wrote to Breyer, directing the committee’s attention to, among other things, “whether Justices of the Supreme Court should be subject to similar procedures as provided in the Judicial Conduct and Disability Act.”⁴⁷ The committee’s report appeared in September 2006, and made no mention of coverage for Supreme Court Justices.⁴⁸



⁴⁵ Supreme Court Press Release, Sept. 30, 2005 (announcing Roberts’s adoption of the 1993 recusal policy); Tony Mauro, *Justice Alito’s Green Day*, LEGAL TIMES, Feb. 6, 2006, at 1 (same for Alito); *Cheney*, 541 U.S. at 915-16.

⁴⁶ *Microsoft Corp. v. United States*, 530 U.S. 1301 (2000).

⁴⁷ Letter from Senator Patrick Leahy to Justice Stephen G. Breyer, May 28, 2004.

⁴⁸ *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice* (Sept. 2006), www.supremecourtus.gov/publicinfo/breyercommittee-report.pdf.



NAACP RECUSALS

Thurgood Marshall et al.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 4, 1984

MEMORANDUM TO THE CONFERENCE

Attached is a memorandum concerning my proposed action in cases involving the NAACP and the NAACP Legal Defense Fund. I earnestly seek your advice as to the propriety of this proposed action.

Thanks.

T.M.
T.M.

This correspondence among the Justices is from box 1405, folder 14 of the Papers of Harry A. Blackmun, which are held in the Manuscript Division of the Library of Congress.

10 GREEN BAG 2D 93

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 4, 1984

MEMORANDUM

Since my appointment to the federal bench in 1961, I have routinely disqualified myself from all cases in which the NAACP has participated as a party or as an intervenor. Now, 40-odd years after I severed my ties with that organization, I believe that continued adherence to this self-imposed blanket rule is no longer necessary.¹ Accordingly, for the reasons set out below, I plan in the future not to recuse myself in cases in which the NAACP is a party or an intervenor, unless the circumstances of an individual case persuade me, as with all cases, to do otherwise.

My initial decision to disqualify myself in NAACP cases was a result of the personal and professional affiliation with the organization that I had developed before coming on to the federal bench. For at least a time after leaving the organization, I deemed it proper not to participate in any NAACP matters before the Court, both to quell any appearance of impropriety and to assure, prophylactically, that I did not decide cases involving issues that were in the office while I was there. The distancing effect of time convinces me that that rationale no longer is applicable, and that the basis for my blanket disqualification rule has therefore evaporated.

¹From the mid-1940s, the NAACP had to operate separately from the NAACP Legal Defense Fund because of rulings by the Internal Revenue Service.

NAACP Recusals

- 2 -

For more than 20 years, I have been wholly removed from the NAACP, the NAACP Legal Defense Fund and all other like organizations. In that time, I have become uninvolved in the internal workings of the organizations. I have not kept track of their priorities, their hiring practices, their personnel, their case load, their policy choices, or their trial strategies. I have, of course, not retained my membership or received any form of remuneration. Time therefore has erased the ties to the organizations that initially led me to adopt a broad disqualification policy. It is clear to me now that my participation henceforth would be proper as a general matter, under any ethical standard, and would be in keeping with the statutory rules and ethical canons on judicial disqualification.

I begin by considering issues raised by the special nature of the NAACP, which at once plays the role both of public policy advocate and counsel. In almost every instance in which NAACP cases now arrive in this Court, the association participates in order to further a certain conception of public policy in which its members, along with many others, have an interest.

There is of course nothing improper about participating in a case because of a sympathy with the public policy goals that one side advocates. The congruity between my views and those of the NAACP on matters of law and policy has never been the cause of my disqualification in NAACP matters, nor should it have been. Nor would it have been improper to participate because I held and announced particular views when I was affiliated with the NAACP. I agree with the analysis of this question offered by JUSTICE

- 3 -

REHNQUIST in Laird v. Tatum, 409 U.S. 824 (1972), and accepted by many commentators, that the mere fact that sitting judges made known, prior to their appointments, their views on what the law is or ought to be, does not and should not preclude them from deciding cases that raise those issues. That a litigant is aware that a judge has expressed a view contrary to that which the litigant would like the court to accept does not warrant disqualification, and never has.

Nor should my former affiliation with the organization preclude all participation today. When the organization's role is that of advocate, my relationship to the organization is analogous to a judge's relationship to the judge's prior law firm. There is no dispute that a judge generally may participate in a case in which counsel is a law firm with which the judge was affiliated, as long as the matter at hand was not in the office while the judge was at the firm. See Code of Judicial Conduct for United States Judges, Canon 3C(1)(b); Frank, Disqualification of Judges, 56 Yale L.J. 605, 630-631 (1947). This is of course especially true after a substantial passage of time. Indeed many of my predecessors have participated in such cases much sooner than will result from my decision to begin sitting in cases involving the NAACP. It is not precedent alone that supports this view; the rule also makes sense. If a judge has neither acted as a lawyer in a given controversy, nor practiced with a lawyer who served, during their association, as counsel in that controversy, there has been no opportunity to prejudge the facts of the case at hand. I have no doubt that I am capable of

judging each case in which the NAACP participates on the basis of its own facts.

Nor, surely, should the mere fact of a past affiliation forever bar a judge from hearing a case. Perhaps the leading commentator in this area, John P. Frank, has pointed out the absence of a convincing reason for a judge to follow a blanket rule of disqualification when former law partners argue before the judge. He argues that the basis for such disqualification can only be a belief "that the previous association creates an intimacy which causes the arguments of counsel to have excessive weight with the judge." Frank, *Disqualification of Judges*, 56 *Yale L. J.* 605, 631 (1947). Yet, he points out, it is almost impossible to draw any rational distinction between the relationship of a judge with a former partner and with a former faculty colleague, government associate, law clerk or old friend, *ibid.*, and none of these prior relationships is, or necessarily should be, perceived either as reasonably creating an appearance of impropriety or requiring routine disqualification. Since there is no reasonable appearance of impropriety when such former associates appear before a court, there should not be one when former colleagues in law practice appear before it. Given the role the NAACP plays in the cases I have described, I find no logical distinction between former law partners and my former organizational affiliation. And after 40 years, I am fully satisfied that the intimacy of which Professor Frank speaks is no longer present.

Additionally, both the Code of Judicial Conduct and advisory

- 5 -

opinions to the Code make clear that judges and justices are free to hear argument, where former law firms are counsel, as long as the matter was not in the office when the judge was there, and as long as the judge no longer receives remuneration from the law firm he has left. Otherwise, the opinions speak in terms of a matter of months before it would be proper to hear the cases. My separation easily suffices to meet that standard. See Code of Judicial Conduct for United States Judges, Canon 3C(1); Advisory Committee on Judicial Activities, Advisory Opinion Nos. 56 and 62.

Finally, since my appointment, federal law has placed Supreme Court Justices within the scope of 28 U.S.C. § 455. The statute, enacted in 1974, contains a general, objective prohibition on participation in cases where impartiality might reasonably be questioned. 28 U.S.C. § 455(a). It then enumerates several specific grounds for disqualification, one of which, subsection (b)(1) of § 455, requires a judge to disqualify himself when "he has a personal bias or prejudice concerning a party." This latter provision bars personal bias or prejudice. As the foregoing makes clear, my participation in cases in which the NAACP is an intervenor or a party is not in all cases contrary to these principles. Under these rules it is well-accepted that neither personal bias nor prejudice is necessarily implicated when a judge or justice hears argument by a former law partner, or about a legal issue on which he has declared beliefs. Most significantly, the more than 40 years that have passed since I was associated with the NAACP should remove any perceived or

NAACP Recusals

- 6 -

actual impropriety that might have attended my participation in cases involving the NAACP immediately after my appointment. And of course, in those instances where I believe my prior affiliation might create a reasonable appearance of impropriety, or otherwise warrant disqualification, I will not participate.

Thurgood Marshall et al.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

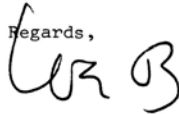
October 5, 1984

Dear Thurgood:

I agree with your analysis on the NAACP
matter.

I do not view this the same with a
Justice's former partners, which may or may not
call for recusal after 30 or more years.

Regards,

A handwritten signature in black ink, appearing to be "L B" or "Lewis B.", written in a cursive style.

NAACP Recusals

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

October 5, 1984

Dear Thurgood,

I fully agree with your proposed
policy respecting participation in cases
in which the NAACP and NAACP Legal
Defense Fund are involved.

Sincerely,

Bill

Thurgood Marshall et al.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

October 5, 1984

Dear Thurgood,

I have no doubt about the soundness of
your judgment about not disqualifying
yourself in NAACP cases.

Sincerely yours,



NAACP Recusals

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 5, 1984

Dear Thurgood:

I certainly feel that your analysis of action with respect to the NAACP and the NAACP Legal Defense Fund is an appropriate one.

Sincerely,



Thurgood Marshall et al.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

October 5, 1984

Dear Thurgood:

I approve of your proposal with respect to participation in cases in which the NAACP and the NAACP Legal Defense Fund are involved.

Sincerely,

Lewis

NAACP Recusals

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 9, 1984

Dear Thurgood,

I certainly agree with your decision respecting participation in cases in which the NAACP and NAACP Legal Defense Fund are involved.

Sincerely,



Thurgood Marshall et al.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 5, 1984

Dear Thurgood:

Not only do I agree with the analysis in your memorandum, but I also agree that it was proper for Bill Rehnquist to participate in Laird v. Tatum. I think he received some undeserved flack for taking part in that case and I suppose the same may happen to you, but I am delighted that you have made the decision that you have because I think it is entirely appropriate for you to participate in NAACP cases.

Respectfully,



NAACP Recusals

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

October 4, 1984

Dear Thurgood,

I agree completely with your proposed policy concerning your future participation in cases in which the NAACP and the NAACP Legal Defense Fund are involved. The time has long since passed which would suggest a blanket policy of disqualification.

Sincerely,

