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Mr. Chairman and Members of the Committee, I feel honored to have the opportunity to testify at these important proceedings.

My comments today are about reforms that are needed in the procedures and practices that govern recusal of federal judges. I am one of many scholars of the judicial system who believes that the laws governing recusals are failing at their primary objectives: protecting the reputation of the judiciary and fostering public confidence in the work of the judiciary.[1] Your consideration of the nomination of Judge Alito will turn, in part, on your views about whether he should have recused himself from certain cases while sitting on the United States Court of Appeals for the Third Circuit. That is why I want to discuss with you today the problematic recusal practices that have too often led judges and justices into situations in which their recusal decisions undermine public faith in the judiciary.

I. FLAWS IN THE RECUSAL PROCESS

Preserving the reputation of the judiciary is essential to maintaining its legitimacy. Federal judges are appointed to life tenured positions rather than elected through the democratic process, and yet they issue thousands of decisions a year affecting the daily lives of Americans. The public's willingness to abide by these judicial decisions is based in significant part on the public's conviction that they are issued by fair and impartial decisionmakers. When judges fail to recuse themselves in cases in which they have some personal bias or interest, they not only deprive the parties of their

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[1] *See, e.g.*, Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L. J. 657 (2005); John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43 (1970); Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusals*, 53 KANSAS L. REV. 531 (2005); John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 236 (1987); Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusals and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107 (2004).

right to an impartial decisionmaker, they also undermine the integrity of the judiciary. Furthermore, when judges sit on cases in which a reasonable observer would question their partiality – even if the judges are themselves certain of their ability to be unbiased – they can do just as much damage to the public's faith in the judicial branch.

Because the reputation of the judiciary is undermined by the *appearance*, as much as the reality, of bias, Congress enacted a statute, 28 U.S.C. 455, that provides: "Any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." By using this language, Congress sought to ensure that even if a judge is certain of his or her ability to be impartial, that judge must step aside if a member of the public *might reasonably* disagree. In essence, the law requires judges to recuse even in borderline cases in which the possibility of bias, or the appearance of bias, is slight.

A key problem with the statute, however, is that it provides no procedural mechanisms to govern recusal. It does not say how parties are to seek recusals, it does not say how evidence regarding a judge's potential conflicts of interest are to be shared with the parties, and it does not clarify who should make the decision about recusal and whether that person should articulate any grounds for that decision. This procedural vacuum has, I believe, been the cause for recurring controversies over judges' failure to recuse – controversies that undermine the very goal of section 455 to protect the integrity of the judicial branch.

Normally, when there is a dispute about facts and law that needs to be resolved, that issue will be presented to the judge by the parties, who will each vociferously argue their view about the facts and the law. If the parties do not have enough information at the outset of a proceeding, they will first engage in discovery so that they do have the facts before they make their arguments.

Finally, an impartial decisionmaker will issue a decision and give a reasoned explanation for that decision. The decision then becomes part of the body of law that future judges use to guide their own decisions.

Unfortunately, judicial recusals operate entirely outside of these normal adjudicatory processes, particularly at the Supreme Court level. When making decisions about recusals, justices have eschewed the adjudicatory processes that usually govern legal disputes and instead make decisions in an untransparent and ad hoc manner. In most cases, a party will never be given the information needed to determine whether a justice might not be impartial due to his or her financial connections, relationships to a party or the attorney for that party, or prior work or personal experiences. Sometimes parties do obtain information that leads them to question a justice's partiality. Parties can use that information to file a motion to recuse – although they may well be deterred from doing so because such motions are so rare as to create the perception that filing one, at least in the Supreme Court, is an insult to the Court.[2] Moreover, that motion will be decided by the very justice whose partiality is being questioned[3] – without any input from the other eight justices[4] – and that justice need never explain his or her decision on the matter.[5] Of course, justices

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[2] *See, e.g.*, ALAN J. CHUSET, DISQUALIFICATION OF FEDERAL JUDGES BY PEREMPTORY CHALLENGES 58 (1981) (noting that "[j]udges, like other persons, are likely to resent charges of bias"); Randall J. Litteneker, Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 260 (1978) ("Counsel who would face a particular judge many times in his career would be hesitant to charge the judge with bias or to refuse a judge's request that he waive his right to disqualify."); Frost, *supra* note 1, at 568-569.

[3] *Cheney v. United States Dist. Ct.*, 124 S. Ct. 1532 (2004) ("In accordance with its historic practice, the Court refers the motion to recuse in this case to [the individual justice being asked to recuse himself] Justice Scalia.").

[4] Letter from Chief Justice William Rehnquist to Senator Patrick Leahy (Jan. 26, 2004) ("[T]here is no formal procedure for Court review of the [recusal] decision of a Justice in an

can and often do voluntarily recuse themselves, but they almost never explain *why* they are doing so, leaving the parties and the public in the dark as to the nature of the conflict of interest.[6] Worse, the lack of explanation means that judges and justices do not get the benefit of their colleagues' wisdom when determining whether they should recuse themselves.

The ad hoc, opaque, and unchecked quality of judicial recusal decisions undermines the public's faith in the judiciary, and thus subverts the very goal of the recusal legislation. Over the last 40 years, a number of different judges and justices have faced significant public criticism due to their failure to recuse themselves in cases in which there is at least a debatable appearance of bias. To give just a few of the most prominent examples:

- In 1969, Supreme Court-nominee Clement Haynsworth was not confirmed for the position, in part due to the revelation that while a member of the Fourth Circuit he had sat on a number of cases in which he had a small financial interest.[7]
- Justice Abe Fortas failed to be elevated to the position of Chief Justice, in part over concern that he had served as counselor to President Johnson while sitting as a Justice on the Supreme Court.[8]

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individual case.").

[5] Leubsdorf, *supra* note 1, at 244-45 ("[A] judge who withdraws usually writes no opinion.").

[6] *Id. See also* Tony Mauro, *Decoding High Court Recusals*, LEGAL TIMES (Mar. 1, 2004). A 2004 study conducted by the Legal Times revealed that the Justices recuse themselves regularly, with Justice Stephen Breyer averaging the most number of recusals each year (42) and Chief Justice William Rehnquist averaging the least (7). *Id.*

[7] JOHN P. MACKENZIE, THE APPEARANCE OF JUSTICE (1974), at 81-88.

[8] *Id.* at 24.

- In 1972, then-Justice William Rehnquist faced criticism for his refusal to recuse himself from a case on which he had publicly commented while serving in the Department of Justice.[9] That controversy resulted in an amendment to 28 U.S.C. 455 to prohibit judges and justices from sitting on cases if they had expressed a view about the case while serving as a government lawyer.[10]
- In 2004, Justice Scalia made a controversial decision not to recuse himself from a case in which Vice President Cheney was a party despite having gone on a vacation with the Vice President shortly after the Supreme Court agreed to hear the case.[11]
- Most recently, in the months preceding these confirmation hearings, Judge Samuel Alito has been questioned about his failure to recuse himself from a case in which Vanguard was a party because he owns mutual funds with Vanguard, and because he stated in his 1990 Judiciary Committee questionnaire that he would recuse himself from such cases.[12]

Whatever one's views are about whether these individual judges should have recused themselves, I think most would agree that the process by which the recusal decisions were made did not work to foster public confidence in the judiciary in these cases.

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[9] *Laird v. Tatum*, 409 U.S. 824 (1972).

[10] Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609, at 1609 (now codified as 28 U.S.C. 455(b)(3)).

[11] *Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913 (2004). I note that I was an attorney at Public Citizen Litigation Group at the time that Alan Morrison, another Litigation Group attorney, served as counsel of record for Sierra Club in the *Cheney* case. I did not participate in the litigation, however, and this testimony reflects no one's views but my own.

[12] *Monga v. Ottenberg*, 43 Fed. Appx. 523 (3d Cir. 2002); *see also* Letter from Judge Samuel A. Alito, Jr. to Senator Arlen Specter (undated).

The problems I have just described concerning judges' failure to follow the normal adjudicatory procedures when deciding whether to recuse themselves are particularly disturbing in regard to recusal decisions by Supreme Court justices. The Supreme Court provides the very last forum for judicial review in any case. If a district court or circuit court judge chooses not to recuse him or herself, that failure to recuse can at least theoretically be appealed to a higher court, which will review the decision and may reverse it. But when a single Supreme Court justice refuses to recuse, there is no review of that decision by anyone.

Furthermore, the stakes are simply that much higher in the Supreme Court. The cases that the Supreme Court reviews often present highly divisive issues that have split the lower appellate courts and will divide the Supreme Court. The opinion announced by the Court will then govern the entire nation, likely for decades to come. If a justice who arguably should have recused him or herself is part of a slim majority, that decision may be viewed as suspect by those who must abide by it.

Finally, the Supreme Court justices are the public face of the judiciary, and thus their recusal practices are subject to the greatest scrutiny and are the decisions that inevitably come to the attention of the general public. For example, anyone reading the newspaper in the Spring of 2004 became aware of the controversy over Justice Scalia's refusal to recuse himself in the *Cheney* litigation.

For all these reasons, the absence of transparency and consistency in the recusal process, particularly at the Supreme Court level, is undermining the reputation of the judiciary.

II. PROPOSED SOLUTION

The solution I suggest is to import into recusal law the normal adjudicatory processes by which parties get notice, have a chance to be heard, and are given a reasoned explanation for the decision reached. These procedural reforms could be made either by the justices themselves issuing a rule regarding recusal policy, or by Congress through amendments to the statute governing recusal.

First, revised procedures should make it clear that the parties are entitled to file motions for recusal when they believe that a judge or justice should step aside. Because section 455 is silent on that issue, and because Supreme Court practice in particular discourages such motions, very few are filed even when they would be justified.

Second, the laws should require greater transparency on issues relating to recusal. Judges and justices should be required to inform the parties and the public of any information that they believe might be considered relevant to the question of recusal, even if they do not think recusal is warranted. Indeed, Canon 3E of the American Bar Association's Model Code of Conduct for Judges already suggests that judges disclose "on the record information that the judge believes the parties or their lawyers might consider relevant" to their potential disqualification. This Canon should be codified into law or adopted as a part of judicial practice.

Third, when judges and justices do decide to recuse themselves – either in response to motions or on their own volition – they should issue at least a brief explanation for their decision. By doing so, they will create a body of precedent that will provide a guide for litigants and judges facing thorny recusal questions, and will enable Congress to monitor recusals to determine whether any changes in the law are required.

Fourth, when a judge or justice does not feel certain that he has an obligation to step aside, he should not make that decision entirely on his own, but rather should either refer the question to

his colleagues or, at the very least, should make that decision together with his colleagues. If a judge's interest in a case is being questioned, the appearance of justice is compromised unless a neutral third-party concludes that the judge has no reason to step aside.

Had these proposals already been in place, I believe that many of the recusal controversies of the past would have been avoided. For example, the recent controversy involving Justice Scalia's refusal to recuse himself from the *Cheney* litigation was almost entirely due to the lack of transparency and procedural structure in the recusal process. The controversy began when the L.A. Times reported that, shortly after the Supreme Court had agreed to hear the *Cheney* case, Justice Scalia had gone on a duck-hunting trip with the Vice President and had accepted a ride on Air Force Two with him.[13] As details emerged, more and more newspapers covered the story on their front pages, and ran editorials criticizing the Justice and calling for his recusal.[14] The situation quickly became fodder for political cartoons and even jokes on late-night television. One of the parties moved to recuse Justice Scalia, and the public attention inspired Justice Scalia to write an extraordinary 21-page memorandum decision in which he vociferously defended his right to sit on the case and provided many new facts about the trip that had been previously unknown.[15] In his memorandum decision, Justice Scalia for the first time informed the parties (and the public) that he

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[13] David G. Savage, *Trip With Cheney Puts Ethics Spotlight on Scalia*, L.A. TIMES, Jan. 17, 2004, at A1.

[14] *See* Frost, *supra* note 1, at 573.

[15] *Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913 (2004).

had never been alone with the Vice President during the trip, had never discussed the case, and did not save any money by traveling with the Vice President on Air Force Two.[16]

Now, imagine for a moment that Justice Scalia had made a short public statement about the details of his trip with Vice President Cheney immediately as it happened, and before newspapers had a chance to report it as a "breaking" story. I believe that this voluntary disclosure of all the facts at the very beginning of the case would have prevented a controversy that tarnished – albeit in a small way – the reputation of the judiciary.

I will give one more example directly relevant to these hearings today. Judge Alito has been criticized for failing to recuse himself in a case in which Vanguard was a party after he had promised in his 1990 confirmation hearings to recuse himself in all such cases. In a letter to Senator Specter, Judge Alito wrote that after he had served on the bench for a period of time he came to view this pledge as "unduly restrictive" and no longer wished to abide by it.[17] If Judge Alito had fully disclosed his change in views to the parties in any case involving Vanguard, he could have avoided the appearance of impropriety that followed from his hearing a case that he had previously stated he would recuse himself from.

In conclusion, the recusal process is failing to protect the reputation of the judiciary because recusal decisions are made in secret, are made without explanation, and are made without the benefit of the adversarial process. Reforms to recusal laws should require that the question whether a judge or justice recuse him or herself be made in accordance with the procedures that apply to all other

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[16] *Id.* at 912-15.

[17] Letter from Samuel A. Alito, Jr., to Senator Arlen Specter (undated).

legal disputes. With these reforms in place, I think we would better protect both the reputation of the judiciary and the judges who serve the public.

Thank you for inviting me to share my views with you today.