Nos. 11-393, 11-398, & 11-400

In the Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, ET AL., PETITIONERS
v.
KATHLEEN SEBELIUS, ET AL., RESPONDENTS

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS
v.
STATE OF FLORIDA, ET AL., RESPONDENTS

STATE OF FLORIDA, ET AL., PETITIONERS
v.
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION OF DAVID BOYLE FOR RECUSAL OF JUSTICE KAGAN AND JUSTICE THOMAS AND MEMORANDA THERETO

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Quis judicabit ipsos judices?[1]

Dear Justice Kagan or Justice Thomas:

How are you? One hopes you and yours are well. —This Motion and letter[2] is a polite request for your recusal from hearing the upcoming "health care cases" in the Supreme Court of the United States, 11-393, -398, and -400. This request is not out of any rancor or objection to your being on the Court, or sitting to judge cases, in general. Indeed, one is sending an identical letter to, respectively, your Brother Justice, Clarence Thomas, or your Sister Justice, Elena Kagan, requesting his or her recusal as well from the cases.[3] One looks forward to a civil and substantial dialogue with you and the public about this issue; and courts, optimally, value such dialogue. Thank you for reading, and for writing an apposite memorandum.

SUMMARY OF ARGUMENT

Movant, while submitting, in accompanying documents, request for leave to intervene in 11-398, and an amicus brief in 11-393 and 11-400 (all those cases regarding the Patient Protection and Affordable Care Act of 2010 (hereinafter, "Act") or its "individual mandate" ("Mandate")), is also requesting the recusal of

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[1] I.e., "Who will judge the judges?" Said in paraphrase of Juvenal's famous quote "*Quis custodiet ipsos custodes?*" ("Who will guard the guardians?"), from his *Satires* (*Satire VI*, ll. 347–48), c. late 1st or early 2nd century A.D.

[2] The format of this Motion may resemble other requesters' apparently-allowed formats, *see, e.g.*, *infra* at 5 & n.5, and 6 & n.6, Purpura Recusal Mots., and also Freedom Watch Mot. for Recons. of Req. to Participate at Oral Argument on Issue of Recusal or Disqualification of J. Elena Kagan, Jan. 30, 2012, *mot. denied* Feb. 27, 2012, *available at* http://www.freedomwatchusa.org/pdf/120129-Motion%20for%20Reconsideration.pdf. Movant is also presently sending the Clerk's office a note re format issues.

[3] To save paper, and also to prevent confusion for those being sent a "courtesy copy" of this Motion, one identical letter is being sent to both Justices, rather than two separate letters which would be 99.9% alike except for the named recipient. Each Justice will receive one hand-signed copy, though.

Justices Kagan and Thomas from the cases, just as many other people have requested recusal of at least one Justice. Justice Kagan's activities as Solicitor General, and Justice Thomas' wife's activities and finances and the reporting or nonreporting of those, give a *prima facie* case for recusal. The history and theory of judicial recusal; public concern and suspicion about the fallibility of judges; and the need for Court accountability—especially given the Court's continuing refusal to adopt the Code of Conduct for United States Judges ("Code of Conduct") (1973; amended 2009; revised 2011)—, all weigh in favor of recusal of the Justices, and their each writing a memorandum just as Justice Antonin Scalia did when he was asked to recuse from a case. Movant eschews insulting tactics, and is trying to be pacific and gracious in this present request to two fine and honorable Justices.

ARGUMENT

I. SOME BACKGROUND ON JUDICIAL CORRUPTION AND RECUSAL

People have pondered the issue of judicial corruption, or other judicial inadequacy, for some while. *See, e.g.*, *Amos* 5:10-12 (New International Version): "There are those who hate the one who upholds justice in court and detest the one who tells the truth. . . . There are those who oppress the innocent and take bribes and deprive the poor of justice in the courts." *Id.* In somewhat more recent times, and in this land, there was controversy in the case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), when Chief Justice John Marshall did not recuse himself even though the case, *see id.*, concerned things done during his tenure as Secretary of

State, and his brother James was charged with delivering some of the judicial commissions the case concerned. And in the past century, *see Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161 (1945), Justice Hugo Black's personal lawyer, the memorably-named Crampton P. Harris, was also a former law partner of Black's, and had represented the winning side, so that the other side petitioned for rehearing on grounds of unfairness. However, Black did not recuse himself, and even tried to persuade the Court to grant the rehearing *per curiam*. Justice Robert Jackson was apparently not impressed by Black's effort, and produced a concurrence, 325 U.S. 897 (1945), joined by Justice Felix Frankfurter, in which Jackson, by implication, *see id.*, criticizes Black's failure to recuse himself from the case. The rancor between Black and Jackson may have even hastened the death of Chief Justice Harlan F. Stone, tragically enough.[4] But that tragedy may have been an avertable tragedy, since if Black had recused, much of the rancor might not have existed, and a worthy life might have been saved. Perhaps *Amos* 5:10-12, *supra*, has some echo in the present day.

II. A RECENT REPORT ON RECUSAL-RELATED MATTERS; AND, THE SUPREME COURT AS FRATERNITY

Perhaps anticipating that recusal of Justices Kagan and Thomas was on people's minds, the present Chief Justice of the United States, John G. Roberts, Jr., said in

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[4] *See* the article on Justice Jackson at http://en.wikipedia.org/ wiki/Robert_H._Jackson, and the article on *Jewell Ridge Coal Corp.*, *supra*, at http://en.wikipedia.org/wiki/Jewell_Ridge_Coal_Corp._v._Mine_Workers, in the Wikipedia "online" encyclopedia (both articles *citing* Dennis J. Hutchison, *The Black-Jackson Feud*, 1988 Sup. Ct. Rev. 203 (1988)).

his 2011 Year-End Report on the Federal Judiciary (*available at* http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf),

> I have complete confidence in the capability of my colleagues to determine when recusal is warranted. They are jurists of exceptional integrity and experience whose character and fitness have been examined through a rigorous appointment and confirmation process. I know that they each give careful consideration to any recusal questions that arise in the course of their judicial duties. We are all deeply committed to the common interest in preserving the Court's vital role as an impartial tribunal governed by the rule of law.

2011 Y.-End Rep., *supra*, at 10 (Roberts, C.J.). Movant believes the Chief Justice did an excellent thing in sticking up for his Sibling Justices on the Court in his year-end report, *see id.* The idea of brotherhood or siblinghood, and accompanying loyalty, seems quite important to Chief Justice Roberts, *see, e.g.*, *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. ____, 131 S. Ct. 1632, 1649 (2011),

> [T]here is indeed a real difference between a suit against the State brought by a private party and one brought by a state agency. It is the difference between eating and cannibalism; between murder and patricide. While the ultimate results may be the same—a full stomach and a dead body—it is the means of getting there that attracts notice. I would think it more an affront to someone's dignity to be sued by a brother than to be sued by a stranger.

131 S. Ct. at 1649 (Roberts, C.J.). The Chief Justice's taste for meaty metaphors (similes) aside, *see id.*, siblinghood or fraternity (sorority) is indeed a good thing, within limits. However, when in-group loyalty, or undue presumption that nothing could go wrong in the group, takes over, one may miss things that go wrong. And they do go wrong, *see, e.g.*, the problems caused by Justice Black's refusal of recusal in *Jewell Ridge Coal Corp.*, *supra* at 3.

The Chief Justice is presumably right that all Justices currently seated are of sterling character, *see* 2011 Y.-End Rep. at 10. However, Justices of sterling character would presumably want to explain themselves to the public with, say, a memorandum as to why they are recusing, or not recusing, themselves in a certain case where it is apparent to many people that there are serious grounds for recusal.

III. SOME PREVIOUS ATTEMPTS AT RECUSAL IN THE HEALTHCARE CASES, AND SOME NOTIONS ADVANCED BY THOSE ATTEMPTS

Movant suspects the first attempt at recusing a Justice, or Justices, from the current healthcare cases is that of Messrs. Nicholas E. Purpura and Donald R. Laster Jr. in *Purpura v. Sebelius*,[5] Motion for Recusal (undated),[6] *available at* http://www.scribd.com/doc/73464619/20111121-Recusal-Kagan-Sotomayor. The motion attempts to remove Justices Elena Kagan and Sonia Sotomayor from the case, on the grounds that "It is without argument Justice Kagan and Justice

[5] No. 11-2303 (3d Cir. Sept. 29, 2011), *petition for cert. denied* (U.S. Jan. 9, 2012), *reh'g denied* Feb. 21, 2012 (11-7275).

[6] Though the docket page, http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-7275.htm, says, *id.*, "Nov 25 2011 Request for recusal received . . . .").

Sotomayor have a financial interest in the outcome of these proceedings which precludes their participation." *Id.* at 3. However, Movant would argue with the movants about that, since they give no real evidence that those two Justices "have a financial interest in the outcome of these proceedings", *id.* Movants also claim,

> As this Honorable Court is aware . . . . defendants failed to answer Count 6 of the Petition that concerns whether Mr. Barack Hussein Obama II is . . . ."a natural born Citizen" and was authorized to sign "H.R. 3590" "*Patients Protection Affordable Care Act*" [sic] into law . . . .
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> . . . .
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> . . . [, so that] it stands to reason Mr. Obama is unauthorized to appoint Judge [sic] Sotomayor and Judge [sic] Kagan to the Supreme Court.

Purpura Recusal Motion, *supra*, at 3-4. (Thus, the movants may be implying that since "Judges" Kagan and Sotomayor are ostensibly "fake", the Justices' "financial interests" derive from keeping their jobs instead of being given the hook and shown out the door by those *illuminati* who figured out that Obama is an "illegitimate president". Movant had no idea that the President was illegitimate, but one learns new things every day.) It seems that the recusal motion was denied, along with the certiorari petition.[7] But Movant does thank Purpura and Laster, who, if nothing else, were the first litigants to "get the ball rolling" and advocate Kagan's recusal.

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[7] The Purpura (Laster seems to be missing) Motion for Expedite Reargument [sic] Pursuant to Rule 21 to Recall and Vacate and Allow Participation on March 26-28, 2012 -" *Patient Protection and Affordable Care Act* " "H.R.3590" (Jan. 27, 2012), *reh'g denied* Feb. 21, 2012, *available at* http://www.scribd.com/doc/79712515/Purpura-v-Sebelius-Motion-to-Recall-and-Vacate, says, *id.* at 17, "Special Note: Again, Petitioner respectfully reminds this Honorable Court that by law, see Title 28 USC Section 455 requires [sic] the Honorable Justices Sotomayor and Kagan to recuse themselves and are not allowed take part [sic] in any proceedings related to Purpura v. Sebelius. [sic—underlining plus italics] There [sic] previous participation is/was another valid reason to 'recall and vacate'." This version at least says "Justices" instead of "Judges", *id.*

However, there was a later attempt at recusal, the Brief of Amicus Curiae Freedom Watch in Support of Neither Party and on Issue of Recusal or Disqualification of Justice Elena Kagan, Jan. 6, 2012, *mot. denied* Jan. 23, 2012, *reh'g denied* Feb. 27, 2012, in 11-393 and -400 (but not in 11-398; so Freedom Watch would not object to Kagan hearing the "individual mandate" case?), *available at* http://www.freedomwatchusa.org/pdf/120105-%2011-393,%2011-400%20ac%20Freedom%20Watch.pdf. This document states many interesting things. One is that

> Regrettably, and outrageously, before even considering these recusal and disqualification issues, Chief Justice Roberts prejudged these serious issues and stated in his annual report that Supreme Court justices need not follow the recusal and disqualification ethics rules that pertain to other federal judges . . . .
> . . . [T]he comments of Chief Justice Roberts are an affront to the high ethical standards of our Founding Fathers and amount to a subversion of our laws. They are disgraceful at best and at worst amount to obstruction of justice. They are the result of someone who became Chief Justice by first ingratiating himself to the "Washington establishment," and now seeks to act as the Chief Justice not just of the Court, but of this same establishment – which for decades has pushed the nation to the brink of revolution by representing mostly its own interests . . . ."

Freedom Watch Br., *supra*, at 3-4. However, among other possibly regrettable (or even outrageous) actions or omissions, the brief's author Larry Klayman does not give any evidence that, or how, Roberts ostensibly "ingratiat[ed] himself to the 'Washington establishment,' and now seeks to act as the Chief Justice not just of the Court, but of this same establishment", *id.* at 4. *See* S. Ct. Rule 24, "Briefs on the Merits: In General": "A brief shall be . . . free of . . . scandalous matter." *Id.* § 6.

So when Klayman essentially makes out Roberts to be a black-robed devil, Movant cannot agree, sans much stronger evidence (or *any* evidence) in favor of devilhood.

One will advert briefly to similar material, not submitted to Court, which offers rich context to the brief just mentioned: *see* Larry Klayman, *Supremes flip We the People 'the bird'—Exclusive: Larry Klayman rips Chief Justice Roberts over Obamacare-recusal issue*, WND.com, "The Law of the Land" section, Jan. 6, 2012, 6:24 p.m., at http://www.wnd.com/2012/01/supremes-flip-we-the-people-the-bird/,

> In his annual report, Chief Justice Roberts, obviously speaking for his colleagues, flips the American people "the bird" and declares war on the noble vision of our Founding Fathers. Roberts' arrogant and lawless statements are in effect an attack against ordinary citizens . . . .
>
> The sad reality is that to become a Supreme Court justice a lawyer must "kiss derriere" for most of his career . . . . In effect, what we get . . . . are politicians in black robes.
>
> Chief Justice Roberts is a textbook example of this. He spent his entire career slithering around Washington, D.C., ingratiating himself with the powers that be, and was, thanks to establishment Republican grease, eventually nominated . . . . to the Supreme Court. . . . Indeed, the Washington, D.C., mega-law firm from which he hails, Hogan and Hartson, is chock full of Republican and Democratic lobbyist greasers of great "esteem" and influence. . . .
>
> . . . .
>
> This is a formula for revolution, and in my amicus brief I laid it on the line with the justices. Either they shape up by representing us, or ship out!

Supremes flip We the People 'the bird', *supra*. There are some issues here. First, Movant is not sure what mighty mechanism Klayman has to make the Justices "ship out", *id.* Second, Movant is not sure what "grease", *id.*, Klayman is referring

to—perhaps one of the Justices was in an amateur production of the well-known musical *Grease* (Jim Jacobs & Warren Casey (1971))? Or is Klayman referring to the Mediterranean country (albeit with incorrect spelling)? Finally, Klayman not only attributes an obscene digital gesture (??) to Mr. Roberts, s*ee id.*, but calls it "the bird", *id.* Klayman also says Roberts "slither[ed]",[8] *id.* So is Roberts a snake, or a bird? *per* Klayman. One cannot tell.[9] …Klayman, by attributing serpent-ness to the Chief Justice, may even literally be calling Roberts "the judge from Hell", *see* Dante Alighieri, *Inferno* (Henry Wadsworth Longfellow trans., 1909) (early 1300's), Canto V, *available at* http://www.online-literature.com/dante/inferno/5/:

> There standeth Minos horribly, and snarls;
> Examines the transgressions at the entrance;
> Judges, and sends according as he girds him.
> . . . .
> And this discriminator of transgressions
> Seeth what place in Hell is meet for [an evil spirit confessing its sins];
> Girds himself with his tail as many times
> As grades he wishes it should be thrust down.
> Always before him many of them stand;
> . . . .
> They speak, and hear, and then are downward hurled.

Inferno, *supra*, Canto V, ll. 4-6, 9-13, 15. (After calling the Justices "politicians in black robes", *Supremes flip*, *supra*, why not just make any accusation at all, without proof? Why not claim, say, that the Justices are all hiding red lightsabers under their robes *à la* villains from *Star Wars*? Or that the Justices are the sort of

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[8] As well, does Klayman have photographic evidence of the "slithering"? Would not Roberts' robe get dirty if this had actually happened? Movant frankly has trouble seeing a man like Roberts "slithering" anywhere, though in his high school athletic career the Chief Justice may have pulled a few "snakily" agile moves here and there on the football field.

[9] Or Roberts (according to Klayman) could, conceivably, be a "combination" bird-snake, e.g., the "feathered serpent" deity Quetzalcoatl of Aztec legend. However, Klayman has submitted no affidavit to that effect . . . . . though the Court could always ask him for one.

dangerous gang one sees swarming up from a sewer through a manhole in Michael Jackson's *Beat It* video?[10] Etc. Once Pandora's box is open…)

The material of the last few pages *supra* is quoted, and analyzed, at some length, to make the point that civility, including civility to judges, is important, whether in submissions to the Court or in other media. Civility and goodwill are a sort of "glue" that helps bind our society, and the legal profession, together. *See, e.g.*, the ABA's Model Rules of Prof'l Conduct, "Maintaining The Integrity Of The Profession", R. 8.2, "Judicial And Legal Officials" (2010): "(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . .", *id.*, and *id.* cmt. [3], "To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized", *id.* There is no need to demonize judges or Justices, who are human beings[11] and not demons, poltergeists, or any other supernatural nuisance requiring exorcism. (*Cf.* the treatment of law student Sandra Fluke by radio talk-show host Rush Limbaugh.) On that note: Movant seeks herein to do justice, but to do so in a civil, decent and humane manner that respects the Court.

By the way, Klayman also requested oral argument, *see* Freedom Watch Br. at 18; Movant is not doing this. Having actual *oral argument in front of the whole*

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[10] Michael Jackson, *Beat It*, *on* the album *Thriller* (Epic Records 1982, Quincy Jones producer); single released 1983; video released 1983 (Antony Payne/Mary M. Ensign producers, Bob Giraldi director),
[11] Movant has heard of the recent robbery of Justice Breyer at machete-point while on vacation; and a little while back, Justice Ginsburg having to use a ramp to slide off an airplane; and was very sorry to hear about these incidents. Those Justices, and all the others, have Movant's best wishes.

Court about whether one of them should recuse, sounds like torture for everybody concerned. (Also: "As in the case of the lower courts, the Supreme Court does not sit in judgment of one of its own Members' decision whether to recuse[.]" 2011 Y.-End Rep. at 9 (Roberts, C.J.).) Movant believes that each Justice can decide for herself or himself about recusal, without the public spectacle or "crucible" of oral argument. (*But see* Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*[12], the concluding sentence: "To permit the judge whose conduct or relationships prompted the [recusal] 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." *Id.* at 561.)

IV. GROUNDS FOR RECUSAL OF JUSTICE KAGAN

Besides the personal attacks on various people, though, Klayman's brief actually makes serious points about why Justice Kagan should be recused. Klayman—a talented lawyer and frequent tilter at ostensibly corrupt judicial windmills—also helpfully appends to his brief various e-mails Freedom Watch obtained from the Government concerning Justice Kagan's activities as Solicitor General for the Obama Administration, and Movant thanks Klayman for providing those resources, and his *legitimate* arguments, to the public. Movant will even repeat verbatim some of those arguments, since they are similar to those Movant would have made anyway, and there is no need to "reinvent the wheel":

[12] 28 Val. U. L. Rev. 543 (1994), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999427 (courtesy of Social Science Research Network).

Justice Kagan served in her former role as Solicitor General of the United States, whereby she participated in crafting a defense for the constitutionality of the [] Act. She therefore acted as counsel to the drafters in developing a strategy to defend the law. This role should disqualify Justice Kagan under 28 U.S.C. §455(a) because her "impartiality might reasonably be questioned." . . . . Her past involvement is personal and direct. . . .

Furthermore, statements made by Justice Kagan in a series of released emails clearly demonstrate Justice Kagan's encouragement and delight at the passage of the Act. These statements, at the very least, demonstrate Justice Kagan's personal bias in favor of the Act. Personal bias is grounds for disqualification under 28 U.S.C. §455(b)(1). In addition, her involvement in crafting a defense disqualifies her since she served as "counsel, advisor, or material witness concerning the proceeding" under 28 U.S.C. §455(b)(3). Finally, the Due Process Clause of the Fifth Amendment also mandates that in cases with extreme fact patterns such as this one the probability of actual bias rises to an unconstitutional level, requiring Justice Kagan's recusal and/or disqualification.

. . . .

§455(a) of Title 28 United States Code mandates that "any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceedings in which his impartiality might reasonably be questioned." The significant aspect of §455(a) is not the reality of bias or prejudice but its appearance. *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000), citing *Liteky v. United States*, 510 U.S. 540, 548 (1994). The recusal or disqualification inquiry must be made from the perspective of a reasonable observer who is informed of all surrounding facts and circumstances. *Cheney v. United States Dist. Court*, 541 U.S. 913, 924, citing *Microsoft Corp.*, 530 U.S. at 1302. . . .

Justice Kagan's employment as the Solicitor General, the person appointed specifically to represent the government in the Supreme Court, is an objective indicator of a conflict of interest within the current lawsuit. Thus, a reasonable person could reasonably question Justice Kagan's impartiality.

Additionally, §455(b) requires recusal whenever a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." This Court has further elaborated that §455(b)(1) requires recusal where the official has "a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved or because it rests upon knowledge that the subject ought not to possess . . . or because it is excessive in degree." *Liteky*, 510 U.S. at 550. Before being appointed to the Supreme Court, Justice Kagan served as the U.S. Solicitor General. While it has long been insinuated that Justice Kagan participated in discussions regarding President Obama's health care legislation, documents have recently come to light unequivocally evidencing Justice Kagan's strong support of the Act. These incriminating documents, in pertinent part, are listed below:

- On October 13, 2009, there was an exchange between Justice Kagan and former Deputy Solicitor General Neal Katyal. Katyal informs Justice Kagan, "We just got Snowe on health care." (referring to Senator Olympia Snowe).
- On March 21, 2010, there was an email from Justice Kagan to then senior counselor for Access to Justice Laurence Tribe: "I hear they have votes Larry!! Simply amazing . . . " Tribe then responded with, "So healthcare is basically done! Remarkable."
- On March 16, 2010, there was an email from Justice Kagan to David Barron, asking if he had seen an article by Michael McConnell published in the Wall Street Journal that discussed a strategy by Democrats to "Deem ObamaCare into law without voting." Justice Kagan writes in the subject line "Health care q." Barron responded with, "YES, HE IS GETTING THIS GOING."

. . . . In objectively examining these statements and the circumstances surrounding this case, there is no doubt that a reasonable person would question the blatant partiality of Justice Kagan.

. . . .

Section 455(b)(3) of Title 28 requires recusal or disqualification when a judge, justice, or magistrate

previously employed as government employee served as "counsel, advisor, or material witness concerning the proceeding." Justice Kagan's position as Solicitor General clearly serves as governmental employment. In this capacity, Justice Kagan served as "counsel, advisor, or material witness" when she received privileged information and even aided in the crafting of a legal defense to the constitutionality of the Act.

. . . .

. . . Justice Kagan's recusal is also mandated by the Due Process Clause of the Fifth Amendment because of the unconstitutional probability of bias that exists because of her involvement as Solicitor General of the United States.

Due Process disqualification is reserved for "extraordinary situation[s] when the Constitution requires recusal." *Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). This Court further elaborated in *Caperton* that "[j]ust as no man is allowed to be a judge in his own cause, similar fears of bias can arise when – without the other parties' consent – a man chooses the judge in his own cause." *Id.* at 2256. The Patient Protection and Affordable Care Act of 2010 was President Obama's signature legislation. He championed for the Act and signed it with great fanfare. Yet many opposed this Act and President Obama's initiatives surely suspected it may head to this Court. Thus, by nominating a justice who had been a fellow proponent of the legislation, President Obama was choosing "the judge in his own cause." This creates, at the very least, an appearance of a quid pro quo, with the public having a reasonable belief that President Obama selected Justice Kagan in exchange for her ruling on the constitutionality of the Act.

As the court noted in *Caperton*, when extreme fact situations arise the Due Process Clause of the Fourteenth Amendment acts to disqualify a biased decisionmaker. . . . Thus, in the case at hand, the Fifth Amendment's Due Process Clause should serve to disqualify Justice Kagan in much the same way that the Fourteenth Amendment did in *Caperton*. The standards for judicial fairness should be the same regardless of which court is hearing the case.

Freedom Watch Br., *supra*, at 2-3. Some may debate features of the brief above, e.g., just how, and how much, Kagan participated in crafting a defense for the Act. But, in any case, the excerpts *supra* make at least a strong *prima facie* case for recusal.

However, Klayman for some reason does not refer, at least directly, to two other document caches—from which the general public could learn much—, distributed by Judicial Watch (*available at* http://www.judicialwatch.org/files/documents/2011/mrc-kagan-docs.pdf ("Cache 1") and http://www.judicialwatch.org/files/documents/2011/mrc-kagan-vaughn-declaration-docs.pdf ("Cache 2")), which also bring up questions about Kagan's involvement. Ben Johnson's *Documents Show Elena Kagan's Conflict of Interest on ObamaCare*, Floyd Reports, May 18, 2011, at http://floydreports.com/documents-show-elena-kagans-conflict-of-interest-on-obamacare/, provides a vigorous summary of the Caches, *supra*, here in pertinent (though incomplete) part:

> On January 8, 2010, Brian Hauck, Senior Counsel to Associate Attorney General Thomas Perrelli, wrote to Kagan's deputy, Neal Katyal, asking for the office's assistance in "how to defend against the inevitable challenges to the health care proposals that are pending." Three minutes later, Katyal replied, "Absolutely right on. Let's crush them. I'll speak with Elena and designate someone." After Katyal volunteered, Kagan responded, "You should do it."
>
> A few hours later, Katyal updated Hauck, writing, "Brian, Elena would definitely like OSG [the Office of Solicitor General] to be involved in this set of issues." Katyal added, "I will handle this myself, along with an Assistant from my office, (*Name Redacted* – **BJ**), and **we will bring Elena in as needed**."(Emphasis added.)
>
> The Justice Department continues to withhold a series of e-mails that would disclose Kagan's exact role in the negotiations. However, it has turned over the Vaughn index, which describes the items being stonewalled in general terms. These include seven e-mails written from

March 17-21, 2010. Kagan was copied on three e-mails that discuss "what categories of legal arguments may arise and should be prepared in the anticipated lawsuit." Another four dealt with "expected litigation" against the health care law; Elena Kagan wrote one of the four being withheld.

In the same week, Perrelli announced a White House meeting "to help us prepare for litigation." Katyal wrote Kagan, "I think you should go, no?" Kagan ended the paper trail cold, responding, "What's your phone number?"

. . . .

One year ago yesterday, Justice Department spokeswoman Tracy Schmaler wrote an e-mail acknowledging Katyal was "point" (of reference) on defending ObamaCare, but asking him, "Has Elena been involved in any of that to the extent SG office was consulted?" Katyal responded, "No, she has never been involved in any of it. I've run it for the Office, and have never discussed the issue with her one bit." (Does anyone innocent speak that way?) Katyal later insisted Kagan had been "walled off from Day One."

After Katyal alerted Elena to the inquiry, a jittery Kagan jumped in, instructing Schmaler, "This needs to be coordinated. Tracy, you should not say anything about this before talking to me."

. . . .

Federal statute 28 U.S.C. 455 demands that a judge must step aside "in any proceeding in which his impartiality might reasonably be questioned" or in which he (or *she*) "participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy."

By telling Katyal he "should do it," Kagan appointed the point person who defended ObamaCare. Further e-mails from March 24 reveal Kagan was copied on the administration's plan to coordinate with U.S. attorneys in fighting state lawsuits against ObamaCare. And she may have attended the administration's meeting mentioned in the e-mail.

Frankly, it strains credulity to believe the president's most important legal adviser provided no legal advice on this issue.

> . . . .
>
> At a minimum, Kagan's actions constitute "the appearance of impropriety." Elena Kagan must recuse herself when the state challenges reach the High Court.
>
> If she violates this federal statute, she should be impeached and removed from her seat.

Documents Show Elena Kagan's Conflict of Interest on ObamaCare, *supra* (citation omitted). Movant does not endorse impeaching Kagan or removing her from the bench, *see id.*, but does endorse recusal of Kagan on basis of, among other things, the information Judicial Watch and Ben Johnson report. (As does, e.g., (Republican) U.S. Senator Jeff Sessions, *see Kagan Must Recuse Herself from Obamacare Case*, Nat'l Rev. Online, Feb. 23, 2012, 3:09 p.m., at http://www.nationalreview.com/bench-memos/291832/kagan-must-recuse-herself-obamacare-case-sen-jeff-sessions (citing some of the material cited by Johnson *supra*, in support of Kagan recusal).)

Also, *see* Hans von Spakovsky, *Obamacare Litigation: More "Golden" Reasons Why Justice Kagan May Need to Recuse Herself*, The Foundry blog of the Heritage Foundation, Jan. 13, 2012, 5:28 p.m., at http://blog.heritage.org/2012/01/13/obamacare-litigation-more-%E2%80%9Cgolden%E2%80%9D-reasons-why-justice-kagan-may-need-to-recuse-herself/,

> An internal memorandum from the Office of the Solicitor General (OSG) reveals that Justice Elena Kagan "substantially participated" in a health care case in San Francisco in which the Justice Department argued over the effect of the Patient Protection and Affordable Care Act (PPACA). This raises grave new doubts about the appropriateness of Kagan's participation as a justice in the Obamacare lawsuit scheduled to be heard by the Supreme Court in March.
>
> . . . .

. . . Kagan's involvement in another case, *Golden Gate Restaurant Association v. San Francisco*, reveals still more about the extent to which Kagan formulated the government's legal opinion regarding the PPACA and why she should seriously consider disqualifying herself from the pending Supreme Court case.
. . . In May of 2010, the OSG filed an amicus brief telling the Supreme Court that it should not take the case.

The amicus brief contains an extensive discussion of the Obamacare legislation. In fact, the OSG's arguments on the PPACA take up at least six pages—almost half of the 13 pages of "Discussion" in the brief. The OSG informs the court that the Department of Labor decided not to "proceed with a proposed regulation" related to the issues in the *Golden Gate* case "because of the passage" of the PPACA. This means that there had to have been detailed discussions between the OSG's Office and the Labor Department over the legislation and its effect on this case. That is confirmed by an email dated March 22, 2010, from Edwin Kneedler, the Deputy SG, to Kagan in which he states that the Labor Department had been requested to produce an insert for the brief "identifying the provisions of the health care bill (as it will be reconciled) that are relevant to the preemption issue in this case."

. . . .

Elena Kagan's name is not on the amicus brief; it is signed by Neal Katyal as the Acting SG. However, Katyal wrote a "Memorandum for the Solicitor General" dated May 13, 2010, on the subject of "CURRENT CASES THAT YOU HAVE WORKED ON." This memo was sent to Kagan "to guide your decisions about which cases to participate in pending your nomination." It contains a list of cases "in which we feel that you have *substantially participated*" (emphasis added). The second case listed is "Golden Gate." Internal emails reveal that the case was "discussed with Elena several times" and that she exchanged multiple private emails with the counsel drafting the brief.

. . . .

The fact that Kagan "substantially participated" in a case in which her office filed an amicus brief that discussed the PPACA in detail and provided an opinion on its effect on the issues in that case raises new and serious questions about her impartiality—particularly when

> viewed together with the evidence of her internal communication regarding the legal challenges to Obamacare. The OSG itself said in an email on May 11, 2010, from Kneedler to Katyal that the "Golden Gate case presents special considerations because of the possible nexus to the Health Care bill." So even internally, the Justice Department recognized the "nexus" between the *Golden Gate* case and the PPACA.

Obamacare Litigation: More "Golden" Reasons, *supra*. (The amicus brief in question, *see id.*, is *available at* https://www.dol.gov/sol/media/briefs/goldengate(A)-05-2010.htm, courtesy of the Department of Labor.) Movant will add that Kagan replied at 8:14 p.m. on March 22, 2010 to that day's e-mail from Kneedler, saying, "Thanks, Ed. And is [redacted] on Golden Gate?" Cache 2, *supra*, at 74. Thus, it seems that Kagan was no passive observer, *see id.*, but an active participant in the case.

But while von Spakovsky may not be a supporter of the Act or Kagan in general, law professor Eric J. Segall is a self-confessed "leftist" and supporter of the Act, *see* his article *An ominous silence on the Supreme Court: Justice Elena Kagan should explain why she's not heeding the calls to recuse herself from the soon-to-be-heard Obama healthcare case.*, L.A. Times, Feb. 12, 2012, at http://www.latimes.com/news/opinion/commentary/la-oe-segall-kagan-recusal-20120212,0,4442652.story, discussing not only Kagan but also the Chief Justice's 2011 year-end report:

> The litigation is likely to be the highest-profile Supreme Court case since Bush vs. Gore. The court has set the argument for 5½ [now 6] hours over three days, which is almost unheard of in modern times, and the decision may factor into the presidential election. Yet Roberts tells us just to trust Supreme Court justices to do the right thing, and Kagan doesn't even offer an explanation for her decision to stay on the case despite a substantial formal

> motion that she recuse herself. This request for blind allegiance and judicial silence smacks of hubris.
>
> . . . .
>
> One does not have to pick sides in that contentious debate to believe that a justice who seriously values the rule of law would put on the record the reasons she continues to sit on what may be a landmark case in the face of substantial arguments for recusal. Moreover, a chief justice looking out for the historical legacy of the court should encourage that associate justice to be publicly transparent about such an important ethical question. He should not defend her silence, even by implication.
>
> . . . Maybe there are good legal arguments why Kagan need not recuse herself, but there is no good reason that she shouldn't at least come forward and publicly explain her decision. Not doing so suggests that there is something deeply political (and maybe, like Bush vs. Gore, even something partisan) going on, and that possibility could negatively infect what many of us on the left hope to be Supreme Court affirmation of the constitutional validity of the Affordable Care Act.

An ominous silence, *supra*. This article is telling in various ways, including the fact that Segall is confessedly*, see id.*, a supporter of the Act, so that he is likely not trying to "knock her out of the litigation" for invidious purposes, but rather, for the sake of integrity and the appearance of integrity, as our system of justice demands. *See also* Jonathan Turley, *Should Kagan Recuse Herself From The Health Care Case?* Nov. 15, 2011, at http://jonathanturley.org/2011/11/15/should-kagan-recuse-herself-from-the-health-care-case/, quoted extensively below,

> Of . . . concern . . . . is a[n] email exchange on March 21, 2010 (the day PPACA was passing the House) with her top deputy Neal Katyal. Associate Attorney General Tom Perrelli had send [sic] a message to a group of DOJ lawyers, including Katyal, notifying them that there was going to be a meeting the next day to plan for the litigation expected to challenge PPACA. Kagan was included in the mailing, which would seem to confirm her

office[']s involvement in the litigation planning. As head of that office, it raises a serious appearance problem and may reflect additional conversations that could have occurred between her and Katyal or other lawyers in effort. This was already one of the top priorities of the Administration and one would expect a comprehensive team at Justice Department that would include the Solicitor General's office.

However, the Administration appears to have anticipated the issue and, according to Attorney General Eric Holder, carefully separated Kagan from any discussions of the health care law:

"I can tell you that certainly, one of things that we did while she was solicitor general was physically-physically–literally move her out of the room whenever a conversation came up about the health care reform legislation . . . I can remember specific instances in my conference room when we were going to discuss that topic. We asked Justice Kagan to leave and she did."

That effort may be successful, though it also increases the appearance of selecting someone in part to help guarantee a vote on the critical legislative measure for the Administration. Few would doubt that Kagan would vote for the legislation and the effort leaves the appearance of a pocket vote for the President. For full disclosure, I questioned Kagan's selection given the many more distinguished judges and academics. Kagan had little writing and little litigation distinguishing her. What she did have was strong connections in the Administration and a reliable vote potential.

Kagan has previously recused herself from cases, but nothing as important and with such a potentially determinative impact as the health care litigation. In October 2010, Kagan recused herself from half of the cases pending before the Court. Given the obvious effort by everyone to separate Kagan from these discussions, she may have avoided a conflict, but the involvement of her office still presents a serious appearance question. The emails with Tribe also suggest that she may have been a bit lax at times in dealing with the legislation.

Once again, this controversy highlights the need for enforceable ethical standards for the Court and greater clarity on conditions for mandatory recusal.

Should Kagan Recuse Herself, *supra*. Turley gives Kagan some benefit of the doubt, *see id.*, but also is properly critical of her possible laxness and of the appearance issues raised by the scenario, *see id.*

There is almost "endless" commentary on the topic of Kagan and recusal, though one last item for now is the mystery-novelesque-sounding report *Elena Kagan: The Justice Who Knew Too Much*, by Carrie Severino, Judicial Crisis Network (undated), at http://judicialnetwork.com/files/Recusal4.pdf. (One notable tidbit is, *id.* at 10, "[Kagan] recused herself in [a certain case] even though internal documents JCN has obtained reveal that 'Elena has not worked on this case.'" The fact that the Administration believes the stakes are higher in the Obamacare context is hardly reason to relax recusal standards.") So, while one appreciates Kagan's fine service to the Nation in academia, the Executive Branch, and on the Court, one also notes that many people seek her recusal. —We now return to theory for a short while:

V. THE COURT IS NOT FOR UNACCOUNTABLE PHILOSOPHER-KINGS

"For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." This famous quote from Judge Learned Hand, *The Bill of Rights* 73 (1958) (cited by the Learned Hand "Wikiquote" page at http://en.wikiquote.org/wiki/Learned_Hand), expresses, among other things, Hand's pessimism at having the Court occupied by nine "gods" above democratic accountability. The learned judge is correct that the

Court should not place itself above the People in some "godlike" way. Thus, an explanation from a Justice, like Kagan, to the People about recusal would be meet.

VI. GROUNDS FOR RECUSAL OF JUSTICE THOMAS

Some wonder, however, if Justice Clarence Thomas should also recuse. *See, e.g.*, Felicia Sonmez, *House Democrats say Justice Thomas should recuse himself in health-care case*, Wash. Post, "44: The Obama Presidency" section, Feb. 9, 2011, 12:21 p.m., at http://voices.washingtonpost.com/44/2011/02/house-democrats-say-justice-th.html, including, *see id.*, a letter by 74 (Democratic) U.S. Representatives asking for Thomas' recusal,

> The appearance of a conflict of interest merits recusal under federal law. From what we have already seen, the line between your impartiality and you and your wife's financial stake in the overturn of healthcare reform is blurred. Your spouse is advertising herself as a lobbyist who has "experience and connections" and appeals to clients who want a particular decision - they want to overturn health care reform. Moreover, your failure to disclose Ginny Thomas's receipt of $686,589 from the Heritage Foundation, a prominent opponent of healthcare reform, between 2003 and 2007 has raised great concern.

House Democrats say Justice Thomas should recuse himself, *supra*. One notes that the fact that this letter is signed by presently recused (or rather, resigned[13]) Congressman Anthony Weiner, *see id.*, does not help inspire confidence in the letter. Still, on the "broken clock is right twice a day" theory, the assertions in the letter seem troubling.[14] (While Mrs. Thomas, *see id.*, received the mentioned $686,589 a

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[13] Due to being exposed by, among others, commentator Andrew Breitbart (1969-2012).

[14] *See also* this recent news item, Paul Bedard, *31 Democrats accuse court Republicans of ethics violations*, Wash. Examiner, Washington Secrets section, Mar. 6, 2012, 4:42 p.m., http://

number of years before the Act was passed in Congress, that money still represents a substantial tie to the Heritage Foundation.) For documentation, *see, e.g.*, Common Cause, *Supreme Court Justice Clarence Thomas' failure to disclose income of spouse*, at http://www.commoncause.org/atf/cf/%7bfb3c17e2-cdd1-4df6-92be-bd4429893665%7d/JUSTICE%20THOMAS%27%20FAILURE%20TO%20DISCLOSE%20INCOME%20OF%20SPOUSE.PDF. (The links under the heading "According to Justice Thomas 'Disclosure*", *see id.*, are nonfunctional; but seemingly the same material can be accessed at http://www.judicialwatch.org/judge/thomas-clarence/.)

Other articles are illuminating as well. Jeffrey Toobin's article with perhaps an unnecessarily leading title,[15] *Partners: Will Clarence and Virginia Thomas succeed in killing Obama's health-care plan?* ("*Partners*"), The New Yorker, "Annals of Law" section, Aug. 29, 2011, at http://www.newyorker.com/reporting/2011/08/29/110829fa_fact_toobin?currentPage=all, notes of Virginia Thomas, and her husband,

> (Her work for Heritage was well known, which renders Justice Thomas's decision to omit it especially peculiar. In January, he issued a statement saying that information was "inadvertently omitted due to a misunderstanding of the filing instructions," even though the document clearly called for the Justice to provide "Spouse's Non-Investment Income.")
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> . . . .
>
> Michael Gerhardt, a professor at the University of North Carolina School of Law, [said, regarding whether Thomas should recuse himself regarding the health care Act,] "I

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washingtonexaminer.com/politics/washington-secrets/2012/03/31-democrats-accuse-court-republicans-ethics-violations/344526, "Liberal criticism of conservative Supreme Court members escalated Tuesday when 31 Democrats accused three justice of ethics breaches and demanded that Chief Justice John Roberts adopt ethics rules covering all other federal judges." *Id.* But why are those Democrats not making inquiries about Justice Kagan re recusal in the health care cases?

[15] By the way, Toobin's words, "For this Justice, the Constitution mandates the law of the jungle", *Partners*, *supra*, may have been insensitive, seeing Thomas' African-American background.

> think it is possible she"—Ginni Thomas—"might have significant interests in the dispute before the Court . . . . [a]nd these interests are not restricted only to financial ones. The code, after all, forbids judges from engaging in conduct that undermines their impartiality or the appearance of impartiality. In Thomas's case, the evidence so far seems compelling enough to put the burden on the Justice to explain why he does not believe he has to recuse himself."

Partners, *supra*. (*But see* the words following the quote above:

> Patrick Longan, who holds a chair in ethics and professionalism at the law school of Mercer University, in Macon, Georgia, disagrees. "The standard is whether there is something materially to be gained by the judge or his spouse from the outcome of the litigation," he said. "It's hard for me to see how his vote in the case would help her materially, one way or the other."

Partners, *supra*.) And re Thomas' "inadvertent omission of financial information",

see id.: *see Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988),

> The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.
>
> First, it is remarkable that the judge [in question], who had regularly attended the meetings of the Board of Trustees since 1977, completely forgot about the University's interest in having a hospital constructed on its property in Kenner.
>
> . . . .
>
> In fact, his failure to stay informed of this fiduciary interest may well constitute a separate violation of § 455. *See* § 455(c).

Liljeberg, *supra*, at 865, 868 (Stevens, J.).

In addition, *see* Kathleen Hennessey, *Virginia Thomas' group backs off on calling healthcare law unconstitutional*, L.A. Times, Oct. 22, 2010, at http://articles.latimes.com/2010/oct/22/nation/la-na-virginia-thomas-20101022,

> A conservative group [Liberty Central] founded by Virginia Thomas, the wife of Supreme Court Justice Clarence Thomas, removed references to the "unconstitutional" healthcare law from its website Thursday and blamed staff errors for statements indicating she and her group believed the law should be struck down.
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> . . . .
>
> [A group officer] said Thomas did not intend to sign a memorandum that called for the repeal of the "unconstitutional law." . . .
>
> . . . .
>
> In addition to the memorandum . . . , Liberty Central's website . . . urged supporters to attend an event hosted by Virginia Atty. Gen. Ken Cuccinelli, who has filed one of several court challenges to the law. It included a position paper signed by Liberty Central's managing editor, Brian Faughnan, that said the law contained provisions that the "Constitution does not permit."
>
> The site also encouraged visitors to sign a petition on the healthcare law circulated by Revere America[.]
>
> "This law includes an unprecedented overreach of the federal government into the lives of individuals and tramples on the Constitution," the petition said.
>
> On Thursday, Liberty Central posted an update to the site describing the position paper signed by Faughnan as "misattributed," and saying that it was actually written by Betsy McCaughey, an opponent of the healthcare law who is not on Liberty Central's staff.
>
> Later in the day, the post was removed.

Virginia Thomas' group backs off, *supra*. The various mistakes made, *see id.*, seem to mirror the mistakes made by Justice Thomas in neglecting to report his wife's income. While the Thomases had the purest intentions, no doubt, the various events are still interesting. *See* 28 U.S.C. § 455, "Disqualification of justice, judge, or magistrate judge" (80 Pub. L. 773, 62 Stat. 869 (1948); amended 1990), at (c), "A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial

interests of his spouse and minor children residing in his household", *id.*, and *cf.* Code of Conduct, Canon 3C(2) (worded almost identically to 28 U.S.C. § 455(c), though with more gender-neutral language). Also, *see* 28 U.S.C. § 455(b)(4), concerning a judge's recusal if "[h]e knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome[,]"[16], *id.*, and *id.* § (b)(5), "He or his spouse, or a person within the third degree of relationship . . . . (iii) [i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding[.]" *Id.* And finally, *see*, "Most importantly, § 455(b)(4) requires disqualification no matter how insubstantial the financial interest and regardless of whether or not the interest actually creates an appearance of impropriety." *Liljeberg* at 859 n.8 (Stevens, J.).

As for Mrs. Thomas' "post-Liberty Central" activities, *see* Kenneth P. Vogel, Marin Cogan, & John Bresnahan, *Justice Thomas's wife Virginia Thomas now a*

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[16] "(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

. . . .

(3) 'fiduciary' includes such relationships as executor, administrator, trustee, and guardian;

(4) 'financial interest' means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a 'financial interest' in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a 'financial interest' in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a 'financial interest' in the issuer only if the outcome of the proceeding could substantially affect the value of the securities."

28 U.S.C. § 455(d).

lobbyist, Politico, updated Feb. 5, 2011, 7:33 a.m., at http://www.politico.com/news/stories/0211/48812.html,

> Now, Virginia "Ginni" Thomas, wife of Justice Clarence Thomas, has recast herself yet again, this time as the head of a firm, Liberty Consulting, which boasts on its website using her "experience and connections" to help clients "with "governmental affairs efforts" and political donation strategies.
>
> . . . .
>
> Thomas's role as a de facto tea party lobbyist and — until recently — as head of a tea party group [Liberty Central] that worked to defeat Democrats last November "show[s] a new level of arrogance of just not caring that the court is being politicized and how that undermines the historic image of the Supreme Court as being above the political fray," said Arn Pearson, a lawyer for Common Cause, the left-leaning government watchdog group.
>
> "It raises additional questions about whether Justice Thomas can be unbiased and appear to be unbiased in cases dealing with the repeal of the health care reform law or corporate political spending when his wife is working to elect members of the tea party and also advocating for their policies."

Justice Thomas's wife, *supra*. "Left-leaning-identified" Arn Pearson may have his own opinion, *see id.*, but even those not on the "Left" may partially agree with him. (Movant is against the Mandate, so he may not be on the "Left"; but he agrees with Pearson, not about anyone's supposed "arrogance", *id.*, but at least that the appearance of Justice Thomas' neutrality re the Act may be in question.)

Even those who admire Justice Thomas[17] enough to urge that he run for President, *see* Adam Winkler, *Clarence Thomas Is a Long Shot for President, But*

[17] Movant has admired portions of Thomas' judicial opinions. Movant also admires Thomas' service as a positive role model for diversity, since he sometimes selects clerks not from the usual "Yalevard"-type pool, but from "not so famous" law schools, *see Partners*, *supra* at 24 (listing schools

His Candidacy Makes a Lot of Sense,[18] note, "Not only has [Thomas] been a consistent voice to curtail the power of the federal government but his wife Ginni, a Tea Party activist herself, has been a leader in the fight to repeal Obama's healthcare reform law." *Clarence Thomas Is a Long Shot*, *supra*. (Incidentally, constitutional-law professor Winkler also notes, "If drafted at the [Republican] convention at the end of August, Thomas would still have to resign." *Id.* However, at least according to the "Ineligibility Clause" (U.S. Const. art. I, § 6, cl. 2), Thomas could shoulder the responsibilities of both an Associate Justice and a President at the same time; which would be quite a milestone in American leadership.)

Finally: some have criticized Thomas and another Justice for appearing at a dinner or two sponsored by certain parties. This Motion shall not take time to do that, although those who find the meals troublesome probably think so in good faith.[19] The vision of judges or Justices without dinners, black robes whipping around lean, hungry bodies in the wind, like Lear on the blasted heath, is not pleasant to contemplate. (Judges too deserve a "full stomach", 131 S. Ct. at 1649 (Roberts, C.J.).) (Also, *see* Code of Conduct, Canon 4C, "A judge may attend fund-raising events of law-related and other organizations although the judge may not be

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providing clerks for Thomas). After all, Abraham Lincoln himself never went to any formal law school at all. (By the way, Virginia Thomas, like her husband, has done some fine work benefiting the public, e.g., in spreading awareness about dangerous cults.) However, as admirable as Justice Thomas may be, that does not *ipso facto* make him free from public inquiry about recusal.

[18] The Daily Beast, "Campaign 2012—Election Beast" section, Feb. 26, 2012, 4:45 a.m., at http://www.thedailybeast.com/articles/2012/02/26/clarence-thomas-is-a-long-shot-for-president-but-his-candidacy-makes-a-lot-of-sense.html.

[19] *But see* the Justice Jackson article at http://en.wikipedia.org/wiki/Robert_H._Jackson, relating, *see id.*, that Justice Jackson did not like Justice Black attending a certain dinner and receiving an award: a dinner where Crampton P. Harris, counsel in then-pending *Jewell Ridge* and another case, was one of the sponsors. Jackson himself avoided that dinner, due to perceived conflict of interest.

a speaker, a guest of honor, or featured on the program[.]" *Id.*) Still, it is best to avoid the appearance of partisanship, *see* the example set by Justice Jackson *supra* in the dinner anecdote. And *see Liteky v. United States*, 510 U.S. at 550 (1994),

> When the prevailing standard of conduct imposed by the law for many of society's enterprises is reasonableness, it seems most inappropriate to say that a judge is subject to disqualification only if concerns about his or her predisposed state of mind, or other improper connections to the case, make a fair hearing impossible. That is too lenient a test when the integrity of the judicial system is at stake. Disputes arousing deep passions often come to the courtroom, and justice may appear imperfect to parties and their supporters disappointed by the outcome. This we cannot change. We can, however, enforce society's legitimate expectation that judges maintain, in fact and appearance, the conviction and discipline to resolve those disputes with detachment and impartiality.

510 U.S. at 564 (Kennedy, J., concurring in the judgment).

To end this section, which started with some words by Weiner, we shall transition to some other, more inspiring words, by Frankfurter.

VII. SUPREME COURT AS "MONASTERY", OR, THE NEED FOR HIGH MORAL STANDARDS AND APPEARANCES ON THE COURT, AS DESIRED BY THE PEOPLE AND SHOWN IN POPULAR CULTURE

As Justice Frankfurter noted in his diary:[20] "When a priest enters a monastery, he must leave - or ought to leave - all sorts of worldly desires behind him. And this Court has no excuse for being unless it's a monastery." *Id.* (citation omitted) He had

[20] *Quoted in The birth of the modern Constitution: the United States Supreme Court, 1941-1953*, p. 92, *available at* http://books.google.com/books?id=eaAivaq6zVAC&printsec=frontcover#v=onepage&q&f=false.

a point, in that Justices are supposed to be of unimpeachable character (lest they be impeached). After all, the judiciary is perhaps the most "aristocratic" branch of government (especially in the federal judiciary, with its lifetime—though at least not hereditary—tenure, and no need to run for office), with archaic garb like the robe, and the very name "court", sounding like a relic of medieval times and a royal court. In "return" for all that grandeur and style, much is expected by the People.[21]

And the people, at least "judging" by popular culture, have a fascination with the "bad judge" or "judge gone wild". *See, e.g.*, the evangelical Christian comic-book tract by Jack Chick, *Here Comes the Judge* (2012), *available at* http://chick.com/reading/tracts/1066/1066_01.asp (corrupt, murderous Judge Barnstead goes to Hell for eternity after facing "awesome Judge" in afterlife); the 1992 John Grisham novel (later a 1993 Warner Bros./Alan J. Pakula film) *The Pelican Brief*, featuring, *see id.*, a Supreme Court Justice who sneaks off to pornographic movie theaters; the Walt Disney Studios/Rob Marshall film *Pirates of the Caribbean: On Stranger Tides* (2011), in which Captain Jack Sparrow (played by Johnny Depp) impersonates a Justice Smith of England's "Old Bailey" and dispenses comically summary (in)justice from the bench, *see id.*; and a 1995 Sylvester Stallone film (Cinergi Pictures/Hollywood Pictures/Danny Cannon), *Judge Dredd*.

Judge Dredd deserves its own special mention, and not just because it has "Judge" in the title. While a notoriously bad movie, it does at least showcase the

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[21] *Cf.* "Judge not, lest ye be judged." (*Matthew* 7:1)

lauded British comic book series of the same name, featuring a dystopian future in which "Judges" who act as judge, jury, and executioner maintain a brutal peace in "Mega-City One" (covering the present eastern U.S., after a nuclear holocaust) of 2139 A.D. Maybe the most famous line of Dredd (Stallone) in the film, as seen in the trailer,[22] is, "I AM THE LAW!" (bellowed during his trial after he is falsely accused of murder). *Id.* The audience is cued that Dredd's bellowing is a little much for decent people to tolerate, since later in the trailer, Dredd's sidekick Herman "Fergee" Ferguson (Rob Schneider) growls, *id.*, "I AM THE LAW!" while sitting next to Dredd and gesticulating in a comical manner. The point is that while Americans are not happy with corrupt, pornographic, or fake/crazy/piratical judges, *see* the respective tract, book/film, and film cited *supra*, they do not even want arrogant or hubristic judges. Dredd (while a hero) is not the law, and no judge or Justice (outside of Heaven) is the law, either. In a democracy, we should dread to have a judiciary run by Dredds, *see, e.g.*, Philip Johnston, *'Judge Dredd' powers for police urged*, The Telegraph (London), Sept. 22, 2005, 12:01 a.m., at http://www.telegraph.co.uk/news/uknews/1498906/Judge-Dredd-powers-for-police-urged.html (featuring photo of Stallone as Dredd, saying "I am the law", and featuring *Judge Dredd*-citing critics of the controversial expansion of powers of British police).[23]

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[22] *Judge Dredd Trailer 1995 - {Sylvester Stallone}*, YouTube, uploaded by stallonefans1 on Nov. 14, 2008, at http://www.youtube.com/watch?v=6X9FTY3bv6k. Speaking of "Platonic Guardians": the trailer features, of all things, a Plato quote [from which work?], intoned by James Earl Jones: "When there is crime in society, there is no justice." *Id.* One wonders what Learned Hand would think.

[23] And on the truth-is-stranger-than-fiction note, *see* the recent real-life examples of embarrassing judicial behavior, Bill Rankin, *N. Georgia judge investigated for brandishing gun in court*, Atlanta J.-Const., Feb. 25, 2012, 2:50 p.m., at http://www.ajc.com/news/atlanta/n-georgia-judge-investigated-1362511.html (jurist, though not named "Dredd", pulls out pistol in court), and John S. Adams, *Chief*

One last reference to popular culture re judges is more recent, and optimistic, than *Judge Dredd*: *see Sesame Street: Sonia Sotomayor: "The Justice Hears a Case."* YouTube, uploaded by SesameStreet on Feb. 3, 2012, at http://www.youtube.com/watch?v=FizspmIJbAw. In her appearance, *see id.*, on the children's show *Sesame Street*, Justice Sotomayor generously gives of her time to hear the case of *Baby Bear v. Goldilocks* (and prehear the case of *Three Little Pigs v. Big Bad Wolf*). Sotomayor was a "good sport" and good role model;[24] just as another Justice was a "good sport", so to speak, when called to recuse himself from a case. We explore this below.

VIII. MEMORANDUM OF JUSTICE SCALIA: ONE USEFUL ROLE MODEL

In the matter of *Cheney v. United States Dist. Court*, 541 U.S. 913 (2004), your Brother Justice Antonin Scalia refused to recuse himself when asked. However, he at least had the thoughtfulness toward the American public, and toward the dignity of his position as a Justice, to write a 21-page memorandum *explaining* his non-recusal, *see* Mem. of Scalia, J., 541 U. S. 913 (2004) ("Scalia Memorandum").[25] In his memorandum, the Justice mentions how numerous factual inaccuracies had been spread about his time on a duck-hunting trip with Vice President Richard "Dick" Cheney, *see id.* at 13-14 (e.g., a newspaper had said Scalia and Cheney were in the

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U.S. District Judge sends racially charged email about president, Great Falls Trib., Feb. 29, 2012, 3:20 p.m., at http://www.greatfallstribune.com/article/20120229/NEWS01/120229014/Chief-U-S-District-Judge-sends-racially-charged-email-about-president, "Chief U.S. District Judge Richard Cebull on Wednesday admitted to sending a racially charged email about President Barack Obama from his courthouse chambers." *Id.* In light of these incidents, it may be wise for real-life Supreme Court Justices to set as high a moral bar as reasonably possible for themselves.)

[24] Sotomayor did not respond, apparently, to the Purpura requests for her (and Kagan's) recusal; but since those requests did not state much (any?) grounds for believing that Obama is a Communist spy from Kenya, or similar grounds for Presidential illegitimacy, one may understand her silence.

[25] *Available at*, e.g., http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/scotus/chny31804jsmem.pdf (courtesy of Findlaw), albeit without the starting-page cite of "913".

same duck blind; but Scalia says this is untrue).[26] The documentation in these cases seems to present *prima facie* cases for recusal, in a way that the seeming misreporting of who was in whose duck-blind in the Cheney case did not support a *prima facie* case for Scalia's recusal. (Not even mentioning that a fowl-hunting holiday is a far smaller matter than (a) being a Solicitor General with possible serious contact with certain legislation (the Act), or (b) having a spouse with years of income (and undisclosed for years, at that) from, and contact with, groups lobbying or advocating against the Act at some point.)

Scalia opines, "The decision whether a judge's impartiality can "'reasonably be questioned"' is to be made in light of the facts as they existed, and not as they were surmised or reported." Scalia Mem., *supra*, at 1 (Scalia, J.) (citation omitted). So, if Justices Kagan and Thomas would tell the public what "the facts as they existed", *id.*, then the public would get to know the Justices' side of the story.

Additionally, Scalia declares, "The people must have confidence in the integrity of the Justices[.]" *Id.* at 19 (Scalia, J.). Yes, ideally they should; but that is up to the People, if they feel like having confidence. They are not *obligated* to the Justices—the servants of the People, after all—to show confidence.[27] On that note: the corollary of Scalia's declaration immediately *supra* is that the Justices must give

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[26] But what inaccuracies are there, if any, in the present cases? E.g., are the various e-mails to or from Kagan, or the disclosure forms of Thomas omitting mention of his wife's income, real, or not?

[27] Bertolt Brecht once wrote, in the poem *Die Lösung* ("The Solution") (c. 1953), something to the effect of, "If the government doesn't trust the people…why don't they just dissolve the people?" *Id.* Expecting an automatic entitlement to the people's respect just because you are a government official, comes uncomfortably close to that sort of attitude, *see id.*

the People *reasons* for such "confidence in the integrity of the Justices" (Scalia, J.). Such reasons may be found, one hopes, in the two presently-requested memoranda.

IX. IMPARTIALITY FROM JUSTICES, MOVANTS, AND PARTIES

By the way, Movant has found disquieting the "partisan camp", or even "gang", aspect of various attempts to recuse Kagan and Thomas. Many of those in a certain political party have attempted to recuse Kagan, but pooh-pooh any attempt to recuse Thomas. The "opposite" political party does the opposite, severely criticizing Thomas, while making light of attempts to recuse Kagan. (*See* once more *The Pelican Brief*, in which a deranged oil mogul eliminates ("with extreme prejudice") two environmentalist-leaning Supreme Court Justices just because they might vote against his oil-drilling project on marshland with pelicans on it, *see id.*) This is unseemly and unbalanced. It seems that those wanting one Justice recused, should also want the other recused, for similar reasons. Movant may be showing himself "nonpartisan", so to speak, in asking for two recusals.[28]

Movant shall note that he was alarmed during Kagan's Supreme Court confirmation hearings, when she did not give the seemingly obvious answer, "No", when asked if government could mandate eating Americans to eat three fruits and three vegetables a day. But even though Movant suspects Kagan may rule in favor of the Mandate, that is not why he is asking for recusal. Nor is Movant seeking

[28] By the way, it is possible that for some "procedural" reason (e.g., if Movant is not allowed to intervene in 11-398 or elsewhere, therefore maybe depriving him of some "standing" to request recusal), this Motion may not be "procedurally viable". However, the substance, and moral force, of the Motion would still exist. And physically, the Motion may still exist, e.g., on the Internet, so that the public would be aware of the recusal idea, and might be curious why Justices did not recuse.

recusal just because he filed a lawsuit against the Mandate (though not the Act, which is fully severable), *Boyle v. Sebelius* (CV-11-07868-GW(AJWx))[29], and is currently attempting to intervene in 11-398 to overturn the Mandate. Rather, this Motion has cited ample reasons and evidence, *passim*, for Kagan's recusal.

And, as well, Movant is seeking recusal of Thomas, who seems likely to *favor* Movant's position in 11-398 and overturn the Mandate. But just because Thomas may do this, Movant cannot turn a blind eye to the reasons for recusal, and fail to submit a request for Thomas' recusal. (In a sense, Movant is trying to mirror what he is asking of the Justices. He is looking for "impartiality" from them, and he himself is, in turn, exhibiting impartiality by requesting recusal for not one, but two, Justices. *Cf.* the old legal maxim, "He who seeks equity must do equity.")

X. HOW LACK OF DISCLOSURE AND "PROPRIETY" FROM JUSTICES MAY HAMPER THE INDEPENDENCE, POWER, AND DIGNITY OF THE COURT

One current U.S. presidential candidate (unnamed) is particularly unhappy with the Court, and courts in general, proposing to ignore Supreme Court decisions, and having federal marshals "pay a little visit" to supposedly recalcitrant jurists. (And in the past, there have been, by others, proposals of, or attempts at, "court-packing" or "jurisdiction-stripping".) It would give such people, those who want to "rough up the courts a little bit", ammunition if Justices were seen as unaccountable to the

[29] Currently *dismissed for lack of jurisdiction without ruling on the merits* (Feb. 3, 2012); Movant respectfully disagrees with the District Court and plans to appeal the ruling in some manner.

people and unwilling to put themselves under the law, instead of above the law.[30] (Since Justice Jackson, whose punctilio about recusal matters has been noted *supra*, had as clerk Chief Justice Rehnquist, and Rehnquist in turn had as clerk Chief Justice Roberts, it would be especially sad, seeing that chain of discipleship, if standards were seen by the public to have decayed since Jackson's time.)

Speaking of possible perceived unaccountability: the Court has resisted adopting the Code of Conduct, *see, e.g.*, "The Justices, like other federal judges, may consult a wide variety of other authorities to resolve specific ethical issues. . . . For that reason, the Court has had no reason to adopt the Code of Conduct as its definitive source of ethical guidance." 2011 Y.-End Rep. at 5 (Roberts, C.J.). (But Movant does not understand completely the logic here: lower federal judges could also "consult . . . authorities", *id.*, and therefore not have to adopt a Code of Conduct, by such logic.) And, *see* the Chief Justice's recent letter (Feb. 17, 2012) to Senator Patrick Leahy (Chairman of the Senate Committee on the Judiciary), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2012/02/CJ-letter-on-ethics-to-Sen.-Leahy-2-17-121.pdf (mentioning Court's continuing refusal to adopt Code of Conduct, despite request of five members of Committee to do so) (courtesy of SCOTUSblog).

In the absence of the Code, one would expect, at the very least, a heightened sensitivity by the Court to appearances, related to recusal or otherwise. On that

[30] Without overly generalizing, it is safe to say that reciprocity is almost an "unwritten law" in human life. So: those who wish to be respected, may want to show respect to others. The requested memoranda would show such respect, and refusal to release those memoranda could be interpreted as not showing respect to the People who employ the Justices and indeed all government officials.

note: commentators have noted that failure to recuse, or at least to give an explanation for non-recusal, may embarrass the Court. *See* once more Eric J. Segall, *An ominous silence on the Supreme Court*, *supra* at 19; and *see* James Oliphant, *Kagan, Thomas pressed to stay out of healthcare fight*, L.A. Times, Politics Now section, Dec. 1, 2011, 9:28 a.m., at http://www.latimes.com/news/politics/la-pn-kagan-thomas-20111201,0,7773539.story,

> [Jonathan] Turley, the law professor, said both Kagan and Thomas should stand down, because any ruling involving either of them would taint the outcome.
>
> "The appearance problems for both justices undermines [sic] the integrity of the court and the legitimacy of any final ruling in this historic case," he said. "They are responsible for those appearance problems and, in the interest of the court as an institution, should recuse themselves in my view."

Kagan, Thomas pressed to stay out, *supra*; Tim Louis Macaluso, *Supreme Court hearing on health-reform raises concerns*, Rochester City Newspaper, News Blog, Nov. 15, 2011, 5:34 p.m., at http://www.rochestercitynewspaper.com/news/blog/2011/11/Supreme-Court-hearing-on-health-reform-raises-concerns/,

> [P]eople are asking whether two of the justices can make impartial judgments in the [health care] case.
>
> [I]t's important that the public doesn't sense even a hint of impropriety in the Supreme Court's decision, which is expected sometime in the summer. A lot is at stake.
>
> The Bush v. Gore case left many Americans questioning the Supreme Court's impartiality. A similar outcome with the Obama health-care law would deal another blow to the court's image.

Supreme Court hearing on health-reform raises concerns, *supra*; and Editorial, *The Court's Recusal Problem*, N.Y. Times, Mar. 15, 2011, at http://www.nytimes.com/2011/03/16/opinion/16wed3.html: "If the justices don't act [to reform the recusal

process], Congress may have to require them to adopt a more transparent recusal process. That's not our first choice. But the questions about the court's impartiality are too serious to ignore." *Id.* Movant concurs, and looks forward to the two detailed memoranda re recusal from the healthcare cases.[31]

XI. MOVANT MAY BE PERSUADED NOT TO SUPPORT RECUSAL

Movant writes this Motion without invective or rancor, as a polite, even gracious, request for the Justice to spend some of his or her valuable time to write a memorandum. Movant is even trying to show some courtliness,[32] as befits a Court.

In fact, Movant is willing to change his mind about recusal if given reason.[33] Perhaps, say, there are factors of which he or others have not been apprised yet.[34]

CONCLUSION

It may even improve the public image of the Court if the People get to hear the voices of Justices in recusal issues, or other matters where Justices may seem more

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[31] Re the words, "[A]t the end of the day, no compilation of ethical rules can guarantee integrity. Judges must exercise both constant vigilance and good judgment to fulfill the obligations they have all taken since the beginning of the Republic," 2011 Y.-End Rep. at 11 (Roberts, C.J.): the logic of that quote, *see id.*, does not *preclude* the Supreme Court adopting the Code of Conduct—which could be helpful even if not *per se* "guarantee[ing] integrity", *id.*—; and "constant vigilance and good judgment", *id.*, would seem to commend writing memoranda. How is the public easily to know that the Justices have thoroughly thought about the issues relating to recusal, without seeing memoranda showing that thought?

[32] *Cf., e.g.*, the "verray, parfit, gentil knight" in Geoffrey Chaucer's *Canterbury Tales* (late 14th Century), *General Prologue*, *Knight's Portrait*, l. 72, *id.* As opposed to comparing any Justice to a reptile, raven, or rodent, *see Supremes flip We the People 'the bird'*, *supra* at 8.

[33] Re "congruence and proportionality": e.g., if one Justice were to write a 21-page memorandum, and the other were to write a 21-word (or 21-letter, or 21-line) memorandum, this might not redound to the credit of the Court. Two completely identical memoranda might not be optimal either, of course. But one humbly looks forward to a substantial and substantive memorandum from each Justice.

[34] Movant is sending the accompanying Motion for Leave to Intervene, etc., largely because he thinks the Court has not considered, or not been told, certain factors about the cases; on that note, he is open to learn more and enter a civil dialogue about factors he may be unaware of, re recusal.

human and less "Olympian". Movant recalls that some Justices (including Justice Samuel Anthony Alito, Jr.) may have felt unfairly silenced during President Obama's attack on the *Citizens United*[35] decision during his January 27, 2010 State of the Union speech, *see id.* But Justices have a chance to say their piece, and Movant looks forward to reading their piece(s) re recusal. "To bring coherence to the process, and to seek respect for the resulting judgment, judges often explain the reasons for their conclusions and rulings." *Caperton v. A. T. Massey Coal Co.*, 556 U. S. ____, 129 S. Ct. 2252, 2263 (2009) (Kennedy, J.). Even Justice Benjamin, focus of *Caperton*, at least responded to a recusal motion and gave some explanation, *see id.* at 2257-58. "Who will judge the judges?" may mean, then, that when judges judge themselves, they should do so in a credible, substantial, and documented manner.[36] Movant humbly thanks the Justices for their time and consideration.

Dated: March 16, 2012 Respectfully submitted,

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[35] *Citizens United v. Fed. Election Comm'n*, 558 U.S. ____ (2010).

[36] "The attitude of the judge and the atmosphere of the courtroom should . . . be such that . . . a litigant . . . can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice." (citation omitted) Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality 'Might Reasonably Be Questioned'*, 14 Geo. J. of Legal Ethics 55, 67 n.61 (2000), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=996485 (courtesy of Social Science Research Network).