Exhibit C

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Sexual Orientation Singled Out for Scrutiny

By Margaret Russell

It is both newsworthy and valuable to have openly gay and lesbian judges but not because their presence will dictate any specific legal outcomes. Sexual orientation, like race, gender, and other categories of identity, is simply one facet of the human complexity of all individuals on the bench. The Hon. Deborah A. Batts, the first and only open lesbian on the federal bench, said of her historic appointment by President Bill Clinton in 1994: "I'm a mother, I'm an African-American, I'm a lesbian, I'm a former professor. If people assume any one of these aspects is going to predominate, it would create a problem."

Why, then, is it important to have openly gay and lesbian judges? This question re-emerged last month with the publication of two unrelated high-profile news stories in the same week. The first reported on what the story described as the "non-issue," "open secret" of the Proposition 8 (same-sex marriage) case in San Francisco federal district court: that its presiding judge, the veteran jurist Hon. Vaughn Walker, is openly gay. The second story reported on Senator Charles Schumer's recommendation of Daniel Alter to a New York federal district court judgeship; if confirmed, Alter will be the first openly gay male appointed to the federal bench. An increased number of openly gay and lesbian judges is likely to benefit the legitimacy of our justice system in several ways, including fostering the public's acceptance of diversity, and recognizing excellence in the legal profession regardless of sexual orientation. Unfortunately, these developments have led some to question the ability of gay and lesbian judges to be fair, particularly in cases involving issues of the law regarding sexual orientation (e.g., the Proposition 8 trial).

It would be troubling and unjust if anyone assumed that gay and lesbian judges' competence would somehow be compromised by their sexual orientation. Presumably, *every* judge has a sexual orientation, as surely as he or she has a race, gender, and ethnicity. To single out only those of minority sexual orientation for scrutiny fosters an unspoken assumption that heterosexual judges are by definition more "neutral" and

"impartial" on issues of sexual orientation and the law.

This invisible privilege of "neutrality" accorded to dominant groups was brilliantly challenged a generation ago, when pioneering African-American judges on the federal bench faced disqualification (recusal) motions filed by defense lawyers in civil rights cases. In these cases, lawyers had filed motions under 28 U.S.C. Sections 144 and 455, alleging that the judges manifested "personal bias or prejudice" or that their "impartiality might reasonably be questioned." In *Pennsylvania v. Local Union 542, International Union of Operating Engineers* (1974), the Hon. A. Leon Higginbotham, the first black appointed to the federal bench in Philadelphia, faced a motion to recuse based on his identity as a black judge and his civil rights background. His opinion denying the motion was lengthy and trenchant: "Perhaps, among some whites, there is an inherent disquietude when they see that occasionally blacks are adjudicating matters pertaining to race relations, and perhaps that anxiety can be eliminated only by having no black judges sit on such matters or, if one cannot escape a black judge, then by having the latter bend over backwards to the detriment of black litigants and black citizens and thus assure that brand of 'impartiality' which some whites think they deserve.... Since 1844...black lawyers have litigated in the federal courts almost exclusively before white judges, yet they have not urged that white judges should be disqualified on matters of race relations.... If blacks could accept the fact of their manifest absence from the federal judicial process for almost two centuries, the plain truth is that white litigants are now going to have to accept the new day where the judiciary will not be entirely white and where some black judges will adjudicate cases involving race relations." Judge Higginbotham, later appointed to the 3rd Circuit U.S. Court of Appeals, served on the federal bench for nearly three decades .

Similarly, the Hon. Constance Baker Motley, the first African-American female federal judge, confronted a recusal motion in *Blank v. Sullivan and Cromwell* (1975), a case against law firms for sex discrimination. The motion argued that her background as a female lawyer rendered her less likely to be impartial in evaluating claims of sex discrimination against female lawyers. She rejected the motion, asserting: "[I]f background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys of a sex...." Judge Motley served on the federal bench for nearly four decades.

Some asserted that Judges Higginbotham and Motley, as pioneering civil rights advocates in their pre-bench legal careers, lacked the "appearance of impartiality" required of a judge presiding over a civil rights case. Yet what would the requirement of the *absence* of pre-bench civil rights work mean to our understanding of who is fit to serve as a judge? Daniel Alter, the aforementioned first openly gay male nominee, is now the National Director of the Civil Rights Division of the Anti-Defamation League. It would be disturbing to think that his work on behalf of civil rights would be seen as a disqualifier.

So, in the end, what will it mean to have diversity of sexual orientation on the bench? In a specific sense, it is impossible to know because the judiciary is still so non-diverse. However, the observations of pathbreaking African-American judges such as

Higginbotham and Motley are instructive; as they saw it, no one should have to repudiate his or her identity or heritage in order to be seen as impartial. In fact, "impartiality" itself does not mean being shorn of identity and experience; judging is an inherently human act. As noted U.S. Supreme Court Justice Benjamin Cardozo wrote: "We may try to see things as objectively as we please. Nevertheless, we can never see them with any eyes except our own."

Professor Margaret M. Russell teaches civil procedure and constitutional law at Santa Clara University School of Law. Her book, Freedom of Assembly and Petition: The First Amendment, Its Constitutional History, and the Current Debate will be published by Prometheus Books in spring 2010.