

**SHOULD I STAY OR SHOULD I GO NOW: FOREIGN LAW  
IMPLICATIONS FOR THE SUPREME COURT'S RECUSAL  
PROBLEM**

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INTRODUCTION

I . . . do solemnly swear . . . that I will administer justice without respect to persons, . . . and that I will faithfully and *impartially* discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States.<sup>1</sup>

Every Supreme Court Justice must take this oath “before they may execute the duties of their appointed office.”<sup>2</sup> But how is this impartiality guaranteed? The recusal process—where a litigant seeks the withdrawal of a Justice who may be perceived as biased or where a Justice removes him or herself from a case due to subjectivity—is one way the Court guarantees impartiality. However, the United States recusal system is deeply flawed.<sup>3</sup>

For example, many critics argued that Justice Antonin Scalia should not have participated in *Cheney v. United States District Court* because of his relationship to Vice President Dick Cheney—who was sued in his official capacity.<sup>4</sup> The public scoffed when Justice Scalia went on a duck-hunting trip with Vice President Cheney just three weeks after the Court granted certiorari.<sup>5</sup> More recently, Justice

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1 SUPREME COURT OF THE U. S., TEXT OF THE OATHS OF OFFICE FOR SUPREME COURT JUSTICES (2009), *available at* <http://www.supremecourt.gov/about/oath/textoftheoathsofoffice2009.aspx> (emphasis added).

2 *Id.*

3 *See infra* Part I.

4 *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 374 (2004); *see infra* notes 94–99.

5 *See* Motion to Recuse at 4, *Cheney*, 542 U.S. 367 (No. 03-475), 2004 WL 3741418, at \*4 [hereinafter Motion to Recuse] (“[T]he nation’s editorial writers have called upon Justice Scalia to step aside in the interests of promoting the public confidence in the integrity of the judicial process . . . .”) (citation omitted).

Elana Kagan chose to remain on *National Federation of Independent Business v. Sebelius*,<sup>6</sup> even though she was the Solicitor General of the United States when Congress debated the Affordable Care Act (“ACA”) and when the office developed a litigation strategy for the Act’s constitutionality.<sup>7</sup> On the same case, Justice Clarence Thomas did not recuse himself even though his wife is a verbal activist against the ACA and is a founder and lobbyist of the Tea Party group Liberty Central.<sup>8</sup>

What is the effect of a Justice’s refusal to recuse, whether or not a litigant requested the Justice’s withdrawal? Critics cite the Supreme Court recusal problem as a potential cause for the recent drop in the Court’s public opinion.<sup>9</sup> As Or Bassok recently argued, the increased value of public confidence polls demonstrates that public opinion is the source of the current Court’s legitimacy.<sup>10</sup> Public confidence is also necessary to the proper functioning of our legal system, and the Court’s ratings are at an all-time low.<sup>11</sup> The lack of public confidence in the Court leads to the public giving less weight and credibility to

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6 Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

7 Sherrilyn A. Ifill, *Justice and Appearance of Justice in Sherrilyn A. Ifill & Eric J. Segall, Judicial Recusal at the Court*, 160 U. PA. L. REV. PENNUMBRA 331, 335 (2012) (“Concerns about Justice Kagan’s impartiality arise largely from whether, as Solicitor General in the Obama Administration, she may have been involved in providing advice to members of the Administration on the soundness or constitutionality of the health care law.”)

8 Mike Sacks, *Clarence Thomas Petitioned By 100,000 Progressives To Recuse Himself From Health Care Cases*, HUFFINGTON POST (Feb. 17, 2012), [http://www.huffingtonpost.com/2012/02/17/clarence-thomas-petition-recuse-health-care\\_n\\_1284610.html](http://www.huffingtonpost.com/2012/02/17/clarence-thomas-petition-recuse-health-care_n_1284610.html); see Ifill, *supra* note 7, at 335.

9 See Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in New Poll*, N.Y. TIMES (June 7, 2012), <http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html?pagewanted=all> (explaining that the approval rating for the Justices is only forty-four percent, down from sixty-six percent in the 1980s and fifty percent in 2000, and that many Americans do not believe the Supreme Court judgments to be “impersonal”); *The Supreme Court’s historically low approval ratings: 4 theories*, THE WEEK (May 3, 2012), <http://theweek.com/article/index/227529/the-supreme-courts-historically-low-approval-ratings-4-theories> (“The downward approval trend reflects the perception that the court is not longer a disinterested, apolitical protector of the Constitution . . .”).

10 See generally Or Bassok, *The Supreme Court’s New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153 (arguing that the Supreme Court’s basis for legitimacy has moved from knowledge to public opinion).

11 See Liptak & Kopicki, *supra* note 9 (explaining that the approval rating for the Justices is only forty-four percent, down from sixty-six percent in the 1980’s and fifty percent in 2000); Luke McFarland, *Is Anyone Listening? The Duty to Sit Still Matters Because the Justices Say it Does*, 24 GEO. J. LEGAL ETHICS 677, 684 (2011) (“[P]ublic confidence in the judiciary is necessary to our judicial system. Public trust in the Court, however, has declined to near all-time lows in recent decades.”); *The Supreme Court’s historically low approval ratings: 4 theories*, *supra* note 9 (“The Supreme Court’s favorability rating is at a 25-year low . . .”).

the decisions.<sup>12</sup> Moreover, having a functioning system of recusal is necessary for maintaining the actual and perceived fairness of our legal system.<sup>13</sup>

Scholars have proposed a number of solutions to remedy the situation,<sup>14</sup> and this Comment explores another remedy through a comparison of the U.S. system to that of foreign law systems of recusal. Foreign law is becoming increasingly important in U.S. law and can provide new perspectives and ideas on dealing with problems that exist across different countries' judicial organizations.<sup>15</sup>

By looking at the recusal systems of five foreign constitutional courts, this Comment evaluates the differences in the standards and procedures of each court and concludes that the U.S. Supreme Court should adopt one of two possible procedural changes: (1) review the initial recusal motion as a court, without the Justice whose recusal is requested or (2) allow for an appeal to the Court sitting without the Justice whose recusal is requested.

Part I describes the problems of the American legal system of recusal, including a description of constitutional and statutory requirements and the applicable procedure and standards. Part II includes an overview of proposed solutions to the United States recusal problem. Part III discusses the recusal systems for two common law countries' constitutional courts, including the Supreme Court for the United Kingdom and the High Court of Australia. Part IV discusses the recusal systems of three civil law countries, including France, Germany, and Japan. Part V analyzes the wisdom that we can derive

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12 See R. Matthew Pearson, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV. 1799, 1805 (2005) ("Because the judiciary derives authority from the public's belief in the reasoned foundation of its decisions, and because decisions stained with apparent bias undermine that belief, justice must not only be done but manifestly must be seen to be done." (citation omitted)).

13 *Id.* at 1805 ("Mandatory and discretionary recusal of judges enhances the image of judicial fairness and promotes public confidence in the judicial process.").

14 See *infra* Part II.

15 See, e.g., *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) ("[W]e are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem . . ." (citation omitted)); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) (considering decisions of the European Court of Human Rights and the Canadian Supreme Court); *Raines v. Byrd*, 521 U.S. 811, 828 (1997) (discussing the constitutional practices of several European courts, including those in France and West Germany); *Holder v. Hall*, 512 U.S. 874, 906 n.14 (1994) (Thomas, J., concurring) (citing numerous foreign voting systems); *United States v. Stanley*, 483 U.S. 669, 710 (1987) (O'Connor, J., concurring in part and dissenting in part) (citing the Nuremberg Military Tribunals for support).

from these five foreign courts. Part VI describes this Paper's proposed solution and evaluates any potential limitations for applying the solution to the United States Supreme Court.

## I. RECUSAL IN THE SUPREME COURT OF THE UNITED STATES

This Part provides an overview of the Supreme Court's recusal system, beginning with the historical approach to the withdrawal of Justices. A description of the recusal procedure is offered next. Then, this Part explains the legal restrictions placed on a Justice when s/he decides a recusal motion, followed by an overview of the standard developed through case law. Subsequently, this Part describes the Justices' "duty to sit," which comes from outside of traditional legal explanations for recusal motion denials.

### A. *A Brief History of the Recusal Problem*

From the very beginning of the Court, Justices have pushed the limits of what impartiality requires. For instance, Chief Justice John Marshall wrote the opinion in *Marbury v. Madison*,<sup>16</sup> one of the Court's most famous decisions, which established the Court's judicial review power. But was he impartial? The cause of action arose when then-Secretary of State James Madison refused to deliver William Marbury's commission as Justice of the Peace of the District of Columbia.<sup>17</sup> However, Chief Justice Marshall preceded Madison as Secretary of State and it was Justice Marshall, in his role as Secretary of State, who failed to deliver Marbury's commission in a timely manner.<sup>18</sup> Further, the Court decided the case in the midst of a political war between the Federalists and the Republicans, a war to which Chief Justice Marshall was a party.<sup>19</sup> Chief Justice Marshall was deeply imbedded in *Marbury's* cause of action and with the political battle raging in the United States.<sup>20</sup> Should he have recused himself? Did

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<sup>16</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>17</sup> *Id.* at 137–38.

<sup>18</sup> Sanford Levinson & Jack M. Balkin, *What Are the Facts of Marbury v. Madison*, 20 CONST. COMMENT. 255, 260 (2003) ("Marshall was the Secretary of State whose failure to deliver Marbury's commission in a timely fashion in the first place gave rise to the litigation in *Marbury*.").

<sup>19</sup> *Id.* at 257–58. Marshall was appointed as Chief Justice for the same reason the Midnight Judges Act was passed—in order to fill the Judiciary with Federalist judges. *Id.* at 258. The controversy surrounding the case showed that Marshall was inextricably a part of it, and it is curious that Marshall did not recuse himself from a case in which he was clearly involved.

<sup>20</sup> *Id.* at 257–58.

he consider recusing himself? Unfortunately, we do not know because he offered no explanation.

This early example of unexplained non-recusal set the stage for the subsequent denials of recusal by other Supreme Court Justices. But there are also examples where a Justice disqualified himself or herself for reasons that seem less problematic than Chief Justice Marshall's involvement in *Marbury*. Even Chief Justice Marshall recused himself from *Stuart v. Laird*<sup>21</sup> because he sat as the circuit judge and delivered the lower court opinion in the case.<sup>22</sup> However, at this time in history, a Justice often reviewed the decision that s/he made while riding circuit.<sup>23</sup> Marshall, again, provided explanation neither for deciding to recuse himself in *Stuart* nor refusing to disqualify himself in *Marbury*, and we are left asking what actually drove these choices. This kind of unexplained and inconsistent decision-making is common with recusal jurisprudence.

In rare cases, a Justice has provided an explanation for his or her disqualification or decision not to recuse. For example, in *Public Utilities Commission of D.C. v. Pollack*,<sup>24</sup> Justice Felix Frankfurter recused himself because he believed that he would be unable to decide the case fairly, based on his strong beliefs about the cause of action.<sup>25</sup> The case dealt with public buses playing the radio, and Frankfurter stated that as a "victim of the practice in controversy," he could not participate in the case.<sup>26</sup>

Compared to Chief Justice Marshall's role in *Marbury*, Justice Frankfurter's position as a member of the public who was forced to listen to the radio on public buses is far less connected to the case and controversy. Yet, we have one Justice who recused himself because he personally experienced radio playing on a bus and another who did not recuse himself, even though he actually signed the commission that was at the center of the controversy. The dichotomy of these decisions provides an example of the problem of Supreme Court recusal. A Justice makes his or her decisions, generally without disclosing why or how, and the parties must accept it.<sup>27</sup> From the

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21 *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803).

22 *Id.* at 308 (reporter's note); Levinson & Balkin, *supra* note 18, at 260.

23 Levinson & Balkin, *supra* note 18, at 260.

24 *Pub. Utils. Comm'n of D.C. v. Pollak*, 343 U.S. 451 (1952).

25 *Id.* at 467 (statement of Frankfurter, J.) ("My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it.").

26 *Id.*

27 *See infra* Part I.B; *see generally* Suzanne Levy, *Why Congress Can and Should Require Justices to Publish Reasons for their Recusal Decisions*, 16 U. PA. J. CONST. L. (forthcoming March 2014)

point of view of an outsider observer, the decisions of particular Justices deciding whether to recuse themselves may seem inconsistent. Justices have refused to recuse themselves in cases that would seem to strongly limit their ability to be impartial<sup>28</sup> and Justices have recused themselves in cases where their ability to be impartial does not seem to be significantly affected<sup>29</sup>

Currently, the debate continues over when a Justice should recuse. Justices continue to decide whether to recuse in inconsistent circumstances, coming to decisions that make the American public scratch their head. Moreover, critics cite the Supreme Court's recusal problem as a possible reason for the recent drop in the public opinion of the Court.<sup>30</sup> And, the press ferociously covers<sup>31</sup> recusal refusals in controversial cases, creating debates and casting doubt on the Court's impartiality and, potentially, the Court's legitimacy.<sup>32</sup>

### B. *The Recusal Procedural Process*

One of the primary concerns about motions for recusal is that the Justice in question decides whether to recuse, providing no appeal from this decision. Supreme Court Rule Twenty-One governs the recusal procedure of the Court.<sup>33</sup> An application is filed with the Clerk of the Court, who transmits the motion to the particular Justice.<sup>34</sup> The Justice decides the motion and files a response.<sup>35</sup> There is

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(arguing that Justices should be required to release their reasons for denying recusal motions).

<sup>28</sup> See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>29</sup> *Pollak*, 343 U.S. at 466 (discussing Justice Frankfurter's recusal).

<sup>30</sup> Cf. *The Supreme Court's historically low approval ratings*, *supra* note 9 (discussing that the court has been seen as "increasingly politicized"); Liptak & Kopicki, *supra* note 9 (describing how few Americans believe Supreme Court judgments to be "impersonal").

<sup>31</sup> See Dan Collins, *Scalia-Cheney Trip Raises Eyebrows*, CBS NEWS (Dec. 15, 2003, 10:19 AM), <http://www.cbsnews.com/news/scalia-cheney-trip-raises-eyebrows/> ("[S]everal experts in legal ethics questioned the timing of their trip and said it raised doubts about Scalia's ability to judge the case impartially . . ."); Stephen Dinan, *Health case raises recusal questions for Kagan, Thomas*, WASH. TIMES (Nov. 14, 2011), <http://www.washingtontimes.com/news/2011/nov/14/court-announcement-raises-recusal-questions-kagan-/?page=all> ("Before the Supreme Court case is heard, we need to know if Justice Elena Kagan helped the Obama administration prepare its defense for Obamacare when she was solicitor general."); Press Release, Judicial Watch (Mar. 22, 2012), in *Judicial Watch Asks Supreme Court Justice Elena Kagan to Directly Address Obamacare Recusal Controversy*, REUTERS (Mar. 22, 2012, 5:24 PM), <http://www.reuters.com/article/2012/03/22/idUS227341+22-Mar-2012+MW20120322> (describing how a national government watchdog group asked Justice Kagan to articulate her reasoning behind any decision regarding recusal in *Sebelius*).

<sup>32</sup> See generally Bassok, *supra* note 10 (discussing the court's decreasing distance from public opinion and the questions of legitimacy that are starting to result).

<sup>33</sup> SUP. CT. R. 21.

<sup>34</sup> *Id.*

no requirement for an opinion to accompany the response to a motion for recusal.<sup>36</sup> Most responses are less than a sentence, simply stating “[m]otion to recuse, presented to [the] Justice . . . , is by him [or her] denied.”<sup>37</sup>

In almost every other area of the law, decisions are made by an entity with little or no self-interest in the outcome.<sup>38</sup> However, a Justice has the sole authority to decide whether s/he will recuse. A Justice must take a hard look at his or her own circumstances and the public perception of these circumstances, and ask whether a reasonable person would think the Justice in question is biased. It is difficult to look at one’s own possible conflicts of interest from an outsider’s point of view, and even harder to believe that anyone could perceive bias based on that.<sup>39</sup> Further, it is almost insulting to be accused of potential partiality, particularly where it would be a contested issue. Thus, because of the “appearance of partiality and the perils of self-serving statutory interpretation . . . another [Justice] should preside over such motions.”<sup>40</sup>

This is particularly poignant because in the Supreme Court, there is no appellate review of recusal denials. There is no check on a Justice’s decision that a reasonable person could not apprehend that the Justice is biased, particularly because that decision is based on the Justice’s interpretation of his or her own partiality.

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35 *Id.*

36 *Id.*

37 *See, e.g.*, Ernest v. U.S. Attorney, 474 U.S. 1016, 1016 (1985) (“Motion to recuse Justice Powell denied.”); Kerpelman v. Attorney Grievance Comm’n of Md., 450 U.S. 970, 970 (1981) (“Motion to recuse The Chief Justice denied.”); Gravel v. United States, 409 U.S. 902, 902 (1972) (“Motion to recuse, presented to Mr. Justice Rehnquist, by him denied.”); Guy v. United States, 409 U.S. 896, 896 (1972) (“Motion to recuse presented to Mr. Justice Blackmun and Mr. Justice Rehnquist by them severally denied.”); Serzysko v. Chase Manhattan Bank, 409 U.S. 1029, 1029 (1972) (“Motion to recuse Mr. Justice Powell and Mr. Justice Rehnquist denied.”).

38 *See* Jeffrey M. Hayes, *To Recuse or to Refuse: Self-Judging and the Reasonable Person Problem*, 33 J. LEGAL PROF. 85, 96–97 (2008) (“A number of other commentators have noted the impropriety of allowing judges to consider motions to recuse directed at their own partiality.”); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 667 (1987) (“In virtually every area of the law, decisions are made ultimately by an entity with little or no self-interest in the outcome of the decision.”).

39 *See generally* Joyce Ehrlinger et al., *Peering into the Bias Blind Spot: People’s Assessments of Bias in Themselves and Others*, 31 PERSONALITY SOC. PSYCHOL. BULL. 680 (2005) (explaining that people tend to believe that their own judgments are less prone to bias than those of others); Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXP. SOC. PSYCHOL. 565 (2007) (describing the existence of a “bias blind spot” in people when they assess bias in themselves).

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

The procedural problem of the Court's recusal system is not the end of the issue either. If the recusal standard, provided by statutes, was clear and easily applied, then the weakness in the procedure may be overlooked. However, as this Comment shows, the recusal standard, as it has developed from recusal statutes, is just as problematic as the procedure.

### C. *The Statutory Landscape Underlying American Recusal*

#### 1. *Judicial Disqualification Statute: 28 U.S.C. § 455*

In the time of *Marbury*, no clear statutory rule existed to guide a Justice in his or her recusal decision. Now, a statute directly applies to a Justice's decision on recusal.<sup>41</sup> Congress intended the law to provide a statutory ground to disqualify a judge or Justice based on the canons of the Judicial Code of Conduct.<sup>42</sup> The first section states that a Justice must "disqualify himself [or herself] in any proceeding in which his [or her] impartiality might reasonably be questioned."<sup>43</sup> The second section, § 455(b), provides specific circumstances where a Justice must disqualify him or herself.<sup>44</sup> These include

(1) Where he [or she] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; (2) Where in private practice he [or she] served as lawyer in the matter in controversy, or a lawyer with whom he [or she] previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it; (3) Where he [or she] has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy; (4) He [or she] knows that he [or she] . . . or his [or her] spouse or minor child residing in his [or her] household, has a financial interest in the subject matter in controversy . . . ;[and] (5) He [or she] or his [or her] spouse, or a person within the third degree of relationship . . . : (i) Is a party to the proceeding . . . ; (ii) Is acting as a lawyer in the proceeding; (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; [or] (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.<sup>45</sup>

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41 H.R. REP. NO. 93-1453, at 1-2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6351-52.

42 *Id.*

43 28 U.S.C. § 455(a) (2006).

44 28 U.S.C. § 455(b) (2006).

45 *Id.*

From the plain language and structure of 28 U.S.C. § 455, it is apparent that the first section applies to a more general apprehension of bias for any particular reason, whereas the second section requires disqualification of a Justice in situations where Congress has decided a Justice's partiality is per se in question. While it appears that § 455 provides for protection against favoritism by demanding recusal when a Justice's "impartiality might reasonably be questioned,"<sup>46</sup> this Comment illustrates that the interpretation and application of this statute tends to move closer to requiring a showing of actual bias.<sup>47</sup>

Moreover, the presence of 28 U.S.C. § 455 has not remedied the problem. For example, in *Microsoft Corporation v. United States*,<sup>48</sup> Chief Justice William Rehnquist decided to remain on the case even though his son was a partner for the law firm representing Microsoft and was one of the lawyers representing Microsoft in related matters.<sup>49</sup>

Chief Justice Rehnquist stated that § 455(b)(5)(iii) would not disqualify him because his son's interests "[would not] be substantially affected by the proceedings currently before the Supreme Court."<sup>50</sup> He based this conclusion on the fact that Microsoft would be paying his son's firm on an hourly basis and that the outcome of the case would not affect that payment.<sup>51</sup>

Next, he argued that § 455(a) did not require his recusal because his "son's personal and financial concerns [would] not be affected" by the case and, therefore, no "appearance of impropriety exist[ed]."<sup>52</sup> However, Chief Justice Rehnquist accepted that the disposition of the case could have had "a significant effect on Microsoft's exposure to . . . suits in other courts,"<sup>53</sup> which could have affected his son's representation of Microsoft. But he stated this was a weak basis for recusal because it would have made the standard over-inclusive. Chief Justice Rehnquist argued that this could not be a sufficient basis for recusal because "[e]ven [the Court's] most unremarkable decision . . . might have a significant impact on the clients of [the Justices'] children who practice law."<sup>54</sup>

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46 28 U.S.C. § 455(a) (2006).

47 *See infra* Part II.

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

49 *Id.* at 1301 (statement of Rehnquist, C.J.).

50 *Id.* at 1302.

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.* at 1303.

## 2. *Ethics in Government Act*

The Ethics in Government Act<sup>55</sup> requires high-salaried government employees to file annual financial reports.<sup>56</sup> It also gives the Attorney General the power to investigate and bring a civil action against individuals who the Attorney General has reasonable cause to believe have willfully failed to file required information.<sup>57</sup> This statute makes material available that displays the potential financial conflicts of a Justice. And the threat of investigation and civil action appears to weigh against the hiding of judicial conflicts of interest.

After watchdog groups brought to light Justice Clarence Thomas's failure to disclose information that could have been evidence of bias in *Sebelius*, Justice Thomas acknowledged that he erred in not disclosing certain financial facts, including his wife's past employment. However, there was no civil action commenced by the Attorney General.<sup>58</sup> The statute has teeth, in theory, but in practice, the Attorney General may be unwilling to bring a civil action against a Justice. While pressure from the media led to Justice Thomas amending his financial disclosure to include his wife's income from her conservative political work, there was no enforcement action from the Executive branch.<sup>59</sup>

Professor Deborah L. Rhode stated that this harmed Justice Thomas's reputation.<sup>60</sup> But what about the effect it had on the Court's reputation? Common Cause, a liberal advocacy group, wrote a letter to James C. Duff, Secretary to the Judicial Conference of the United States, stating,

Common Cause respectfully requests that the Judicial Conference make such a determination in the case of Justice Thomas . . . Without disclosure, the public and litigants appearing before the Court do not have adequate information to assess potential conflicts of interest, and disclosure is needed to promote the public's interest in open, honest and accountable government.<sup>61</sup>

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55 Ethics in Government Act of 1978, 5 U.S.C. App. 4 § 101 (2006).

56 *Id.*

57 *See id.* at § 104 ("The Attorney General may bring a civil action . . . against any individual who knowingly and willfully falsifies or who knowingly and willfully fails to file or report any information that such individual is required to report . . .").

58 *See* Eric Lichtblau, *Thomas Cites Failure to Disclose Wife's Job*, N.Y. TIMES (Jan. 24, 2011), [http://www.nytimes.com/2011/01/25/us/politics/25thomas.html?\\_r=1&](http://www.nytimes.com/2011/01/25/us/politics/25thomas.html?_r=1&).

59 *See id.* (discussing how Justice Thomas's failure to disclose his wife's past employment was a conflict for which there is no formal mechanism for review, even from the executive branch).

60 *Id.*

61 Letter from Bob Edgar, President and CEO and Arn H. Pearson, Vice President for Programs, Common Cause, to James C. Duff, Sec'y to the Judicial Conference of the U.S.

Justice Thomas stated that he “inadvertently omitted” this information due to a “misunderstanding.”<sup>62</sup> Representative of New York Louise Slaughter argued for further investigation because “[t]o accept Justice Thomas’s explanation without doing the required due diligence would be irresponsible.”<sup>63</sup> In the wake of this controversy, legislators questioned “whether Justice Clarence Thomas can impartially rule on the pending challenges to the federal health-care [sic] overhaul”<sup>64</sup> and asked him to recuse himself.<sup>65</sup> This type of controversy over propriety and impartiality affects the perception of the Court as an impartial body.

### 3. *Guidance from Other Sources*

There are also non-binding guidelines that a Justice uses to decide whether to recuse. One of the most prominent sources of judicial ethics is the Judicial Code of Conduct.<sup>66</sup> The Judicial Conference of the United States, which includes the Chief Justice of the Supreme Court, produces the Judicial Code of Conduct.<sup>67</sup> This Code is binding for all federal judges, but not for Supreme Court Justices.<sup>68</sup>

The Code of Conduct focuses on five canons:

(1) A Judge Should Uphold the Integrity and Independence of the Judiciary; (2) A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities; (3) A Judge Should Perform the Duties of the Office *Fairly, Impartially, and Diligently*; (4) A Judge May Engage in Extra-

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(Jan. 21, 2011), available at <http://www.commoncause.org/site/apps/nlnet/content2.aspx?c=dkLNK1MQIwG&b=4773617&ct=11515523>.

<sup>62</sup> Lichtblau, *supra* note 58 (internal quotation marks omitted).

<sup>63</sup> Jennifer Bendery, *Clarence Thomas Should Be Investigated For Nondisclosure, Democratic Lawmakers Say*, HUFFINGTON POST (Sept. 29, 2011, 7:12 PM), [http://www.huffingtonpost.com/2011/09/29/democratic-lawmakers-call-for-investigation-into-clarence-thomas-finances\\_n\\_987934.html](http://www.huffingtonpost.com/2011/09/29/democratic-lawmakers-call-for-investigation-into-clarence-thomas-finances_n_987934.html).

<sup>64</sup> Nathan Koppel, *Democratic Legislators Call for Investigation of Justice Thomas*, WALL ST. J. L. BLOG (Sept. 30, 2011 5:00 PM), <http://blogs.wsj.com/law/2011/09/30/democratic-legislators-call-for-investigation-of-justice-thomas>.

<sup>65</sup> *Id.*; Letter from Anthony D. Weiner, House Representative, U.S. Cong., to Justice Thomas, in *Conflicted Clarence Thomas*, HUFFINGTON POST (Feb. 10, 2011 01:08 PM), [http://www.huffingtonpost.com/rep-anthony-weiner/conflicted-clarence-thoma\\_b\\_821444.html](http://www.huffingtonpost.com/rep-anthony-weiner/conflicted-clarence-thoma_b_821444.html).

<sup>66</sup> JUDICIAL CONFERENCE OF THE U.S., CODE OF CONDUCT FOR UNITED STATES JUDGES, available at <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct.aspx> (last visited Jan. 3, 2013) [hereinafter CODE OF CONDUCT].

<sup>67</sup> *See Rules and Policies*, UNITED STATES COURTS, <http://www.uscourts.gov/RulesAndPolicies.aspx> (last visited Jan. 3, 2013).

<sup>68</sup> *See* CODE OF CONDUCT, *supra* note 66 (“This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges.”).

judicial Activities That Are Consistent with the Obligations of Judicial Office[; and] (5) A Judge Should Refrain from Political Activity.<sup>69</sup>

Under canon three, we find language very similar to 28 U.S.C. § 455(a), stating that a judge should disqualify him or herself where his/her impartiality “might reasonably be questioned.”<sup>70</sup>

In his 2011 Year End Report, Chief Justice John Roberts stated that while the Code of Conduct applies only to lower federal court judges, the Supreme Court is not exempt from observing the same ethical principles.<sup>71</sup> Moreover, Justice Roberts declared that many Justices look to the Code of Conduct for advice when making recusal decisions because the Code plays the same role as guidance for both Justices and other judges.<sup>72</sup>

While Chief Justice Roberts and Professor Russell Wheeler argue that the Code of Conduct does not create palpable penalties for lower court judges, Professor Amanda Frost contends that there are tangible results for the misconduct of judges.<sup>73</sup> Frost maintains that the Code of Conduct is more than guidance for other federal judges because their actions in contravention of the Code can provide a basis for a misconduct ruling.<sup>74</sup> Basically, because a misconduct proceeding *can* follow a violation of the Code, the Code provides more than an informational role.<sup>75</sup>

In addition to the Code of Conduct, a Justice relies on the advice of his or her fellow Justices and various experts in ethics to guide a

<sup>69</sup> *Id.* (emphasis added).

<sup>70</sup> *Id.* at Canon 3(C)(1).

<sup>71</sup> John Roberts, *2011 Year-End Report on the Federal Judiciary* 3–4, SUPREME COURT OF THE U.S. 3-4 (2011), available at <http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx> (noting that the Code of Conduct plays the same role for Justices as it does for other federal judges because, according to the commentary accompanying Canon 1, it is “designed to provide guidance to judges”).

<sup>72</sup> *Id.* at 7–9; see also Russell Wheeler, *What’s So Hard About Regulating Supreme Court Justices’ Ethics?—A Lot*, BROOKINGS INST. (Nov. 28, 2011), <http://www.brookings.edu/research/papers/2011/11/28-courts-wheeler> (referring to Justice Kennedy’s statement during a House appropriations subcommittee hearing that the Code of Conduct applies to the Justices in the sense that they have agreed to be bound by them by resolution).

<sup>73</sup> See Roberts, *supra* note 71, at 5 (“[T]he Court has had no reason to adopt the Code of Conduct as its definitive source of ethical guidance.”); Wheeler, *supra* note 72 (citing the Conference’s Codes of Conduct Committee chair that the Code is “advisory and aspirational”); Amanda Frost, *Regulating the Supreme Court Justices’ Ethics: a Response to Russell Wheeler*, AM. CONSTITUTION SOC. BLOG (Mar. 25, 2011), <http://www.acslaw.org/acsblog/regulating-the-supreme-court-justices-ethics-a-response-to-russell-wheeler> (stating that a violation of the Code of Conduct can form a basis for a finding of statutory misconduct).

<sup>74</sup> Frost, *supra* note 73 (arguing that lower court judges are obliged to follow the Code of Conduct or risk “investigation and sanctions”).

<sup>75</sup> *Id.*

recusal decision.<sup>76</sup> This, like the Code of Conduct, is not a concrete rule. A Justice is able to ask advice of his or her fellow Justices, but is not required to. Chief Justice Roberts wrote that the Justices often turn to “judicial opinions, treatises, scholarly articles, . . . disciplinary decisions[,] . . . [and] advice from the Court’s Legal Office, from the Judicial Conference’s Committee on Codes of Conduct, and from their colleagues.”<sup>77</sup> But, this happens behind closed doors, and the public is unaware when a Justice uses these sources to make his or her decision.

Additional bases for recusal standards are statements from the Court itself. For example, the Court released a statement in 1993 describing its standard for recusal in situations where a family member—the Justice’s spouse or a person within the third degree of relationship to either the Justice or the Justice’s spouse<sup>78</sup>—participated in a case.<sup>79</sup> The Justices wrote that they would not recuse if a family member participated in a case, unless the relative was the lead counsel, absent a special factor that the relative would be affected by the proceeding.<sup>80</sup>

Therefore, while not binding or required, there are a number of other sources of ethical guidelines for Justices. Unfortunately, the additional guidelines only serve to muddy the already unclear guidelines for the Court. What is required is a clearly defined and uniformly applied standard.

#### D. *The Recusal Standard: Reasonable Apprehension of Bias*

Because 28 U.S.C. §455 requires a Justice to recuse where there is a *reasonable* apprehension of bias, the Court applies an objective standard.<sup>81</sup> The standard is that a Justice should be disqualified “if an objective observer would entertain reasonable questions about the [Justice]’s impartiality.”<sup>82</sup> The standard asks what a reasonable per-

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<sup>76</sup> Roberts, *supra* note 71, at 5 (explaining that the Justices may seek advice from their colleagues).

<sup>77</sup> *Id.*

<sup>78</sup> 28 U.S.C. §455 (b)(5) (2006).

<sup>79</sup> SUPREME COURT OF THE U.S., STATEMENT OF RECUSAL POLICY (1993), [http://www.eppc.org/docLib/20110106\\_RecusalPolicy23.pdf](http://www.eppc.org/docLib/20110106_RecusalPolicy23.pdf) [hereinafter STATEMENT OF RECUSAL POLICY].

<sup>80</sup> *Id.*; McFarland, *supra* note 11, at 683–84.

<sup>81</sup> 28 U.S.C. §455(a) (2006) (“Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”).

<sup>82</sup> *Liteky v. United States*, 510 U.S. 540, 564 (1994) (Kennedy, J., concurring).

son would think, not a reasonable Justice.<sup>83</sup> In tort law, a reasonable person is one who “exercise[s] those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others.”<sup>84</sup> The standard should not take into account the special circumstances of an individual—for example, the judicial characteristics of a Justice.<sup>85</sup> Adopting the viewpoint of such an ideal person may lead to the imputation of specific qualities that are above-and-beyond those of a reasonable person.<sup>86</sup>

At the circuit court level, there are different interpretations of how this standard should be applied. In the Fourth Circuit, a judge’s perspective should not be used because of his or her awareness of the obligation of a judge to be impartial.<sup>87</sup> The reasonable observer is “not the judge himself [or herself] or a judicial colleague but a person outside the judicial system.”<sup>88</sup> In addition, in the First Circuit, the reasonable person is one who has the mind of an objective knowledgeable member of the public.<sup>89</sup>

In the Fifth and Seventh Circuits, the reasonable person must be from outside of the legal profession because an outsider is less likely to give credit to a judge’s impartiality and mental discipline.<sup>90</sup> However, Professor Pearson argues that in these circuits, applying an outsider perspective does not necessarily remove deference to a judge because a “reasonable person is not ‘hypersensitive or unduly suspicious.’”<sup>91</sup>

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83 *Id.*

84 RESTATEMENT (SECOND) OF TORTS §283 cmt. b (1965).

85 *Id.* at cmt. c (“The standard which the community demands must be an objective and external one, rather than that of the individual judgment, good or bad, of the particular individual.”); Hayes, *supra* note 38, at 97–98 (explaining the use of a “reasonable person standard”).

86 See Hayes, *supra* note 38, at 99–100 (noting that if subjective views are used to determine what is reasonable, the supposed objectivity of the reasonable person collapses into subjectivity).

87 Pearson, *supra* note 12, at 1812 (citing to the Fourth Circuit’s consideration of the reasonable observer in *United States v. DeTemple*, 162 F.3d 279, 287 (4th Cir. 1998)).

*DeTemple*, 162 F.3d at 287.

89 *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981); Pearson, *supra* note 12, at 1813.

90 See *United States v. Jordan*, 49 F.3d 152, 156–57 (5th Cir. 1995) (“Judges must ascertain how a reasonable person would react to the facts. Problematic is the fact that judges do not stand outside of the judicial system . . . .”); see also *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990) (stating, also, that “the judge does not stand outside the system”); Pearson, *supra* note 12, at 1813 (explaining how, in the Fifth Circuit, the “reasonable person standard” has been likened to “the viewpoint of an average person on the street”) (citing *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980)).

91 Pearson, *supra* note 12, at 1812 (citing *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990)).

For the Supreme Court, there is limited precedent providing an understanding of how a Justice applies the standard to him or herself because most Justices do not write statements explaining their recusal decisions. In the statements that exist, a Justice seeks to apply the reasonable person standard from the point of view of the informed observer.<sup>92</sup> But in practice, the standard collapses into that of the Justice's point of view.<sup>93</sup>

For example, in *Cheney v. United States District Court*, Justice Scalia's memorandum explains why he refused to recuse himself from the case.<sup>94</sup> After the Court granted the writ of certiorari, Justice Scalia went on a duck hunting vacation, where he flew on Air Force Two with Vice President Cheney.<sup>95</sup> The public outcry<sup>96</sup> at Justice Scalia's apparent partiality led the Sierra Club to file a motion requesting that the Justice recuse himself. The Sierra Club argued that the "unanimous conclusion" of the American public that there was an appearance of favoritism demonstrated that an objective observer would

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<sup>92</sup> See *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 924 (2004) (Scalia, J. mem.) (noting that a reasonableness standard applies to the decision of a judge's impartiality).

<sup>93</sup> See Hayes, *supra* note 38, at 101 ("The combination of self-judging and the reasonable person standard, however, proves unworkable in practice by failing to adequately constrain judicial discretion.").

<sup>94</sup> *Cheney*, 541 U.S. at 914–29.

<sup>95</sup> See *id.* at 915 (detailing the Justice's trip with Vice President Cheney); Hayes, *supra* note 38, at 101 (using Justice Scalia's recusal memorandum in *Cheney* as a case study); Motion to Recuse, *supra* note 5, at 2 (noting that Justice Scalia's trip had been described in numerous media reports).

<sup>96</sup> See, e.g., *Justice Scalia and Mr. Cheney*, N.Y. TIMES (Feb. 28, 2004), <http://www.nytimes.com/2004/02/28/opinion/justice-scalia-and-mr-cheney.html> (calling for Justice Scalia to recuse himself from the case); Dahlia Lithwick, *Sitting Ducks: Ruffled feathers over the Supreme Court's recusal rules*, SLATE (Feb. 3, 2004, 6:52 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2004/02/sitting\\_ducks.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2004/02/sitting_ducks.html) (noting the pressure by watchdog groups on Justice Scalia to recuse himself); Bill Mears, *Watchdog groups question Cheney, Scalia hunting trip*, CNN (Jan. 19, 2004, 6:04 PM), [http://cnm.com/2004/ALLPOLITICS/01/19/scotus.cheney\\_scalia/index.html](http://cnm.com/2004/ALLPOLITICS/01/19/scotus.cheney_scalia/index.html) (noting that it may be up to the other Justices to put enough pressure on Justice Scalia to recuse himself); Warren Richey, *Was the duck hunt a conflict of interest?*, CHRISTIAN SCI. MONITOR (Feb. 13, 2004), <http://www.csmonitor.com/2004/0213/p02s01-usju.html> (noting that several academics were concerned over Justice Scalia's trip with Vice President Cheney); David G. Savage & Richard A. Serrano, *Scalia Was Cheney Hunt Trip Guest; Ethics Concern Grows*, L.A. TIMES (Feb. 5, 2004), <http://articles.latimes.com/2004/feb/05/nation/na-ducks5> (detailing the duck hunting trip and noting the ethical gap in the Supreme Court's review of recusal decisions); *Scalia and Cheney's outing: No ordinary duck hunt*, ASSOCIATED PRESS, in USA TODAY (Feb. 6, 2004), [http://usatoday30.usatoday.com/news/washington/2004-02-06-cheney-scalia\\_x.htm](http://usatoday30.usatoday.com/news/washington/2004-02-06-cheney-scalia_x.htm) (noting that because Vice President Cheney had a significant personal and political interest in the litigation, Justice Scalia should recuse himself).

conclude that Justice Scalia was partial towards Vice President Cheney.<sup>97</sup>

Justice Scalia concluded that the standard requires the objective observer to have knowledge of the *actual* facts and circumstances.<sup>98</sup> Therefore, he claimed that because the editorials were inaccurate and uninformed, the American public could not represent the objective observer.<sup>99</sup> Moreover, he stated that he does not believe that his “impartiality *can* reasonably be questioned.”<sup>100</sup> However, the sole individual who has knowledge of all of the surrounding facts and circumstances is the Justice who is deciding the motion.<sup>101</sup> Justice Scalia may have been moving the objective observer point of view closer to that of the individual Justice—in this case, himself.

In *Microsoft Corporation v. United States*, Chief Justice Rehnquist similarly denied a motion to recuse himself from a case where his son was a partner in a firm representing Microsoft in a related matter.<sup>102</sup> He also argued that a potential impact on the Microsoft litigation was not enough to show a reasonable apprehension of bias because of the broad impact that any Court decision may have on a Justice’s relatives.<sup>103</sup> Chief Justice Rehnquist imputed knowledge of this fact to the reasonable person,<sup>104</sup> which, again, seems to move the standard closer to the point of view of the Justice. The Justices, in applying the objective observer standard, have a strong tendency to migrate the point of reference from that of a reasonable, outside viewer to that of a Supreme Court Justice.<sup>105</sup> This both undermines the statutory requirements—a reasonable basis, not actual bias—and upsets the public—

97 See Motion to Recuse, *supra* note 5, at 3–4 (noting that newspaper editorials indicate a unanimous public conclusion of favoritism).

98 See *Cheney*, 541 U.S. at 924 (“It is well established that the recusal inquiry must be ‘made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.’” (internal citation omitted)).

99 See *id.* at 923–24 (addressing the inaccuracies in the editorials attached to the Sierra Club’s motion).

100 *Id.* at 926 (emphasis added).

101 See *Hayes*, *supra* note 38, at 101 (noting that judges get to use their unique knowledge of the facts to apply the reasonable person standard to themselves).

102 *Microsoft Corp. v. United States*, 530 U.S. 1301, 1301 (2000) (statement of Rehnquist, C.J.) (noting that his son worked for the firm Microsoft had hired on retainer for a different matter).

103 See *id.* at 1303 (“Even our most unremarkable decision interpreting an obscure federal regulation might have a significant impact on the client of our children who practice law.”).

104 See *id.* (noting that an observer informed of the broad effect Supreme Court decisions have would not conclude partiality toward Microsoft).

105 See *Hayes*, *supra* note 38, at 101 (noting that judicial discretion on the issue of recusal is unconstrained when it involves self-judging).

who may be confused about why a Justice who appears biased can say that there is no reasonable apprehension of bias.

*E. The “Duty to Sit”*

Another wrinkle present in the Justice’s mind when dealing with the decision to recuse is the “duty to sit.” Scholars have described the “duty to sit” as a presumption against recusal, particularly where the reasons for not recusing are as strong as the reasons for recusing.<sup>106</sup> The concept developed from English common law and is not codified in statute or displayed in rules of ethics.<sup>107</sup>

It appears that Congress attempted to replace the “duty to sit” with a presumption for disqualification when it passed 28 U.S.C. § 455.<sup>108</sup> In the statute, Congress created an objective standard with a requirement for a Justice to disqualify himself or herself not only if there is actual bias present, but also when a Justice’s impartiality *might reasonably* be questioned.<sup>109</sup>

However, a Justice is inclined to use the “duty to sit” concept because if s/he recuses, then there is no one to replace him or her.<sup>110</sup> The concept provides a basis for Chief Justice Rehnquist’s statement that depriving the Court of a Justice “creates a risk of affirmance of a lower court decision by an equally divided court.”<sup>111</sup> Further, Justice Scalia revived the concept when he refused to withdraw from *Cheney* by stating that “granting [a recusal] motion is . . . effectively the same as casting a vote against the petitioner.”<sup>112</sup> Therefore, the “duty to sit” is still present in the minds of Justices when they make recusal decisions, even if it is not part of any statutory, ethical, or Constitutional standard.

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106 See Stempel, *supra* note 38, at 595; McFarland, *supra* note 11, at 681.

107 See McFarland, *supra* note 11, at 680–81 (relaying the history behind judicial recusals).

108 See H.R. REP. NO. 93-1453, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6354–55 (noting that the language of the statute would have the “effect of removing the . . . duty to sit”).

109 See *id.* (“Disqualification for lack of impartiality must have a *reasonable* basis.”).

110 See Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, Discussion at the University of Connecticut School of Law (Mar. 12, 2004), *in An Open Discussion with Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1039 (2004) (noting the risk that a case will be left undecided if a Justice is forced to recuse himself or herself from the bench).

111 *Microsoft Corp. v. United States*, 530 U.S. 1301, 1303 (2000).

112 *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 916 (2004) (Scalia, J. mem.).

## II. PROPOSED SOLUTIONS

In light of these issues, many scholars and politicians have suggested ways to improve the recusal system as it applies to the Supreme Court. This Part discusses the proposals and demonstrates their individual flaws. First, this Part analyzes the proposal to allow sitting or retired judges and Justices to hear recusal appeals. Next, this Part breaks down the suggestion addressing the “duty to sit” which would permit retired Justices to replace recused Justices. Finally, this Part considers the proposition that the Court adopt formal standards governing recusal. As this Comment suggests, all three of these proposals are deeply flawed.

### A. *Meaningful Review*

Representative Chris Murphy of Connecticut introduced a bill that would have created a court of sitting or retired judges or Justices to decide how recusal motion denials should be reviewed and to hear appeals from unsuccessful recusal motions.<sup>113</sup>

The Justices argued that this would violate the “one Supreme Court” mandate of Article III § 1 of the Constitution, which states, “[J]udicial power . . . shall be vested in *one* supreme Court.”<sup>114</sup> The Justices stated that establishing an appeals panel to review Court decisions would create, in essence, a court above the Supreme Court.<sup>115</sup> They distilled this principle from Justice Charles Hughes’s advisory opinion on the Court-packing plans of President Franklin Roosevelt.<sup>116</sup> In the letter, Justice Hughes suggested that the President’s plan to divide and enlarge the Court ran counter to Article III §1.<sup>117</sup>

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113 See H.R. 862, 112th Cong. (2011); see also Wheeler, *supra* note 72 (critiquing the bill as unconstitutional, in violation of the “one Supreme Court” mandate).

114 U.S. CONST. art. III, § 1 (emphasis added); see also Wheeler, *supra* note 72 (noting that a court of lower court judges would most likely violate the Constitution).

115 See Wheeler, *supra* note 72 (noting that the appeals process in place for lower judges seeking recusal does not apply to the Supreme Court because there is no higher court).

116 See Paul A. Freund, *Charles Evan Hughes as Chief Justice*, 81 HARV. L. REV. 4, 28 (1967) (noting that Justice Hughes’ letter argued against President Roosevelt’s assurance that additional appointments would prove more efficient); Alpheus Thomas Mason, *Charles Evans Hughes: An Appeal to the Bar of History*, 6 VAND. L. REV. 1, 11 (1952) (“[Chief Justice Hughes’] letter suggests that the President’s idea of an enlarged Court and the hearing of cases in divisions might run counter to the Constitutional provision for ‘one Supreme Court.’”); Wheeler, *supra* note 72 (discussing Chief Justice Hughes’s challenge to President Roosevelt’s 1937 proposal).

117 See Freund, *supra* note 116, at 28 (“The Chief Justice observed that to sit in divisions would not only be inadvisable but would seem to contravene the provision in Article III that there shall be ‘one Supreme Court.’”); Mason, *supra* note 116, at 11 (noting that the President’s idea of enlarging the court was contrary to the Constitution).

However, Professor Amanda Frost argues that there is no need to entertain the “one Supreme Court” argument.<sup>118</sup> Frost maintains that the proposed statute would allow a committee of judges and retired Justices to decide that the entire Court must review a Justice’s decision not to recuse.<sup>119</sup> In this situation, there is no need for the committee to become a separate “court” above the Supreme Court.<sup>120</sup> Instead, the committee would make it possible for the Court, as a whole, to review the recusal decision of a single Justice.

Some scholars have argued that there is no constitutional bar to the full Court hearing appeals from denied recusal motions.<sup>121</sup> They contend that nothing in the text of the Constitution, in Article III or elsewhere, limits Congress’s power to require the Court to review a Justice’s ability to decide on a case.<sup>122</sup> These scholars also state that this is a mild infringement on the Court’s power, as “compared to other Congressional attempts to influence the Court.”<sup>123</sup>

Therefore, the constitutionality of this bill is still unclear. Either way, the issue is moot because the bill was not passed.

#### B. Remedying the “Duty to Sit”

Senator Patrick Leahy proposed a bill to allow retired Justices to sit on the Court by designation when a Justice recuses himself or herself.<sup>124</sup>

There are practical issues in applying this solution. First, there is the possibility of Justice shopping. Litigants could survey the characteristics of the retired Justices who agree to participate in this program and determine that it would be beneficial to their case if a re-

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118 Frost, *supra* note 73 (arguing that the problem with the recusal process is that a Justice acts alone, rather than consulting the entire Court).

119 *Id.* (“The bill gives the Judicial Conference discretion to decide which judges or justices (including retired Justices) could review a single justice’s refusal to recuse him or herself.”).

120 *See id.* (noting that, by requiring only current Supreme Court Justices to review recusal decisions, the bill would not be creating a court higher than the Supreme Court).

121 McFarland, *supra* note 11, at 688 (discussing academics who argue that review of recusal decisions can be done constitutionally).

122 *Id.* (“Furthermore, nothing in the text of Article III or any other provision of the Constitution prohibits Congress from requiring the Court to review the qualifications of Justices to participate in individual cases.”) (citing Stempel, *supra*, note 38, at 656–57).

123 McFarland, *supra* note 11, at 688.

124 S. 3871, 111th Cong. (2010); *see also* Press Release, Senator Patrick Leahy, United States Senator for Vt., Leahy Proposes Bill to Allow Retired Justices to Sit on Court by Designation (Sept. 29, 2010), available at <http://www.leahy.senate.gov/press/leahy-proposes-bill-to-allow-retired-justices-to-sit-on-court-by-designation> (addressing Senator Leahy’s reasons for proposing the legislation).

tired Justice sat on the case. Then, the party could file a recusal motion, if a reasonable apprehension of bias exists against a Justice who is likely to decide against them. This would result in litigants affecting both the composition of the Court and the outcome of a case.

While choosing the retired Justices at random could remedy Justice shopping, it would most likely not fix this problem. For example, let us assume that the litigant would prefer a more liberal Justice. If all participating retired Justices are more liberal than the disqualified conservative Justice, then it would not matter which randomly selected retired Justice sits on the case. In this instance, the litigant engages in Justice shopping by disqualifying a sitting Justice based on his or her ideology in order to replace him or her with any of the preferred retired Justices.

### C. Formalized Standards

The Justices could also accept a formal standard for deciding recusal motions in a number of ways. First, they may accept the Code of Conduct as binding.<sup>125</sup> Because the Justices already say they follow the Code and the rules are not overly burdensome, this seems a simple solution meant to quell public upset.<sup>126</sup> Further, the formal disqualification rules already apply to Justices via 28 U.S.C. § 455(a).<sup>127</sup>

Second, the Justices could create their own formal rules and follow them. They already created a standard with their 1993 Statement on family members involved in litigation.<sup>128</sup> This option would increase transparency and provide the public with the comfort that the Court is following formal ethical guidelines, of which the public would be aware. If the Court itself adopted and enforced these ethical guidelines, then there appears to be no constitutional issue. Nothing in Article III limits the Court's power to adopt its own pro-

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125 See generally *Supreme Court Justices and the Code of Conduct*, AM. JUDICATURE SOC. (Aug. 22, 2011), [www.ajs.org/judicature-journal/editorial/supreme-court-justices-and-the-code-of-conduct/](http://www.ajs.org/judicature-journal/editorial/supreme-court-justices-and-the-code-of-conduct/) (discussing the possibility of explicitly adopting the Code that the Supreme Court Justices already implicitly follow).

126 See *id.* ("By explicitly adopting the Code of Conduct for U.S. Judges they already implicitly follow, U.S. Supreme Court justices will demonstrate that they understand the connection between their conduct and public confidence and distance themselves from the contentions that they take their ethical responsibilities lightly.").

127 28 U.S.C. § 455(a) (2006) (stating that the disqualification rules apply to any justice, judge, or magistrate judge in the United States); *Supreme Court Justices and the Code of Conduct*, *supra* note 1 (noting that the same statutory disqualification rules that apply to federal judges also apply to the Supreme Court).

128 STATEMENT OF RECUSAL POLICY, *supra* note 79 (addressing situations where members of the Court have relatives at law firms arguing the case in front of the Court); Wheeler, *supra* note 72 (noting the Court's history of releasing recusal statements).

cedures, and the Court has already exercised this power when publishing its own guidelines in the past.<sup>129</sup> However, if Congress forces a code of ethics on the Court and enforces it, then we may run into a separation of powers issue.<sup>130</sup>

### III. RECUSAL IN TWO COMMON LAW COUNTRIES' CONSTITUTIONAL COURTS

#### A. *Recusal in the Supreme Court of Britain*

Because English common law serves as the ancestral backdrop for American law, one of the first countries to compare with the United States is the United Kingdom. The recently formed Supreme Court of the United Kingdom heads the judicial branch.<sup>131</sup> The Supreme Court of the United Kingdom was created to end the judicial role of the House of Lords and to enhance judicial independence from the legislature.<sup>132</sup>

The recusal procedure applied in the Supreme Court of the United Kingdom is a creature of tradition.<sup>133</sup> Like the United States, a party requests a justice to disqualify him or herself and then the justice decides the motion. However, a principle of English common law is that “nobody may be judge in his own cause.”<sup>134</sup> Allowing a justice to decide whether s/he should recuse undermines this key principle. Moreover, with the adoption of the Human Rights Convention in England, some scholars suggest that the court is required to create a concrete procedure for recusal.<sup>135</sup>

The current standard for recusal is very similar to that of the United States Supreme Court. A justice asks whether a fair-minded

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<sup>129</sup> See, e.g., STATEMENT OF RECUSAL POLICY, *supra* note 79.

<sup>130</sup> See *supra* Part VI (discussing the separation of powers issues inherent in such a proposal).

<sup>131</sup> See generally James Hyre, Comment, *The United Kingdom's Declaration of Judicial Independence: Creating a Supreme Court to Secure Individual Rights Under the Human Rights Act of 1998*, 73 FORDHAM L. REV. 423, 426 (2004) (examining the Labour government's proposal to establish a Supreme Court of the United Kingdom).

<sup>132</sup> See *id.* at 428–30 (noting how the House of Lords would have a greater legislative, rather than judicial, role with the creation of a Supreme Court).

<sup>133</sup> See Pearson, *supra* note 12, at 1814–15 (noting the importance of foreign law and precedent on the American courts).

<sup>134</sup> *R v. Gough*, [1993] A.C. 646 (H.L.) [661] (appeal taken from Eng.).

<sup>135</sup> See Universal Declaration of Human Rights art. 10, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”); Pearson, *supra* note 12, at 1822 (noting that concrete procedure for recusal applications were necessary in the English legal system).

and informed observer would conclude, having considered the facts, that there was a real possibility that the tribunal was biased.<sup>136</sup> The reasonable observer is an individual who adopts a balanced approach to the issue of bias.<sup>137</sup> To decide the recusal motion from this viewpoint, the justice looks at all the circumstances that have bearing on the situation and then asks if a fair-minded and informed observer would see a real possibility of bias.<sup>138</sup>

The key difference between the United States and the British Supreme Court recusal system is that the English system may provide for an appeal. The example is actually a case before the House of Lords, because the case arose before the United Kingdom created their new Supreme Court.<sup>139</sup> This court demonstrated its willingness to analyze the bias of one of its own members during *Regina v. Bow St. Metro. Stipendiary Magistrate (Ex parte Pinochet Ugarte) (No. 2)*.<sup>140</sup> The former head of Chile, General Augusto Pinochet, brought suit to set aside the November 25, 1998 House of Lords ruling that Pinochet was not entitled to immunity from arrest and extradition.<sup>141</sup> Pinochet based his suit on the appearance of possible bias resulting from Lord Leonard Hoffmann's relationship with Amnesty International ("AI"), which intervened in the original case.<sup>142</sup> Lord Hoffmann's wife worked for AI since 1977, and Lord Hoffmann was a Director and Chairperson of Amnesty International Charity Limited ("AICL").<sup>143</sup>

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136 See *Porter v. Magill*, [2001] UKHL 67, [2002] 2 A.C. 357 (H.L.) [493] (appeal taken from Eng.) (changing the *Gough* real danger test to the current test for a reasonable possibility of bias); see also Pearson, *supra* note 12, at 1820 (noting the decision to modify the *Gough* test).

137 See *Lawal v. N. Spirit Ltd.*, [2003] UKHL 35, [2004] 1 All E.R. 187 (H.L.) [192–93] (appeal taken from Eng.) (suggesting that a reasonable apprehension of bias is the proper standard).

138 See *id.* at 193 (“[The court] must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility . . . that the tribunal was biased.”).

139 Hyre, *supra* note 131, at 423–24 (discussing the Labour government's 2003 proposal to establish the British Supreme Court).

140 *R v. Bow St. Metro. Stipendiary Magistrate (Ex parte Pinochet Ugarte) (No. 2)*, [2000] 1 A.C. 119 (H.L.) [125–28] (appeal taken from Eng.) (outlining the allegations that one of the members of the Appellate Committee was biased against a party in a proceeding); Pearson, *supra* note 12, at 1820–21 n.145 (discussing how the House of Lords grappled with the question of setting aside one of its own appellate decisions because of a bias claim).

141 *Ex parte Pinochet Ugarte*, 1 A.C. at 125–26; Kate Malleson, *Judicial Bias and Disqualification after Pinochet* (No.2), 63 MOD. L. REV. 119, 119 (2000).

142 *Ex parte Pinochet Ugarte*, 1 A.C. at 125–26; Malleson, *supra* note 141, at 119.

143 *Ex parte Pinochet Ugarte*, 1 A.C. at 128–29.

As a Director of AICL, Lord Hoffmann neither received payment nor participated in the policymaking activities of AI.<sup>144</sup>

The issue in the case was whether the House of Lords could set aside its prior decision. Pinochet argued that the House of Lords “must have jurisdiction to set aside its own orders where they have been improperly made, since there is no other court which could correct such impropriety.”<sup>145</sup> Lord Nicolas Browne-Wilkinson stated that as the ultimate court of appeal, the court has the power to correct the injustice of an earlier order.<sup>146</sup> However, he constrained the holding by saying the “House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure.”<sup>147</sup> All five Lords<sup>148</sup> agreed with Lord Browne-Wilkinson and granted Pinochet’s petition.<sup>149</sup>

The result of *Ex parte Pinochet Ugarte* theoretically provides a party the right to appeal the judgment of the court if, after the judgment, the party discovers facts creating a real potential of bias. However, *Ex parte Pinochet Ugarte* is unique because Lord Hoffmann’s relationship with AI was not part of the public record and was not discovered by the party until the trial ended. Moreover, the case did not review Lord Hoffmann’s decision to deny a recusal motion, though it does review Lord Hoffmann’s decision not to voluntarily recuse himself. However, it is possible that the Supreme Court of the United Kingdom would extend this remedy to allow appeals from denials of recusal motions based on the same principles of fairness and impartiality discussed in *Ex Parte Pinochet Ugarte*.

Therefore, while the court did not explicitly provide a remedy for a denied recusal motion, the logic provided in *Ex Parte Pinochet Ugarte* would support review of a recusal denial as well.

#### *B. Recusal in the High Court of Australia*

As another common law country whose roots grow from English common law, Australia is another good comparator for the United States. Australia’s constitutional review power is vested in the High Court of Australia.<sup>150</sup>

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144 *Id.* at 131.

145 *Id.*

146 *Id.* at 132.

147 *Id.*

148 Interestingly, Lord Hoffmann did not participate in this appeal.

149 *Ex parte Pinochet Ugarte*, 1 A.C. at 146.

150 AUSTRALIAN CONSTITUTION § 71.

Like the highest courts in the United States and Britain, the Australian High Court has no concrete rule dealing with the procedure of recusal motions.<sup>151</sup> A party may raise the matter prior to arguments through a letter or motion or may raise it by motion or objection during arguments.<sup>152</sup> The judge whose impartiality is questioned decides the motion and responds to the moving party.<sup>153</sup>

The Australian court system places independence and impartiality as one of its core principles, and its recusal standard flows from this ideal.<sup>154</sup> Similar to the United States, the Australian standard for recusal is whether a fair-minded observer would entertain a reasonable apprehension of bias.<sup>155</sup> In the High Court's view, the reasonable person is not a lawyer, but is not ignorant of the legal system, is not overly-sensitive, and has the characteristics of the majority of the Australian public.<sup>156</sup> The Australian High Court explicitly rejected a "real danger of bias test," seeking to avoid requiring litigants to allege actual bias.<sup>157</sup> Alleging actual bias is frowned upon in its legal system because it implicitly includes the character of a judge in the recusal equation, thereby decreasing public confidence in the Court.<sup>158</sup>

As with Britain, the key distinction between Australia and the United States is the possibility of an appeal. In *Kartinyeri v. Commonwealth*, Justice Ian Callinan suggested that the denial of a motion for a judge to recuse could be appealable.<sup>159</sup> The plaintiffs argued Justice Callinan should not participate in the case, but did not file a formal motion.<sup>160</sup> They based their belief on the Justice's joint opinion regarding the Hindmarsh Island Bridge Bill,<sup>161</sup> the subject of the case.<sup>162</sup> The plaintiffs argued that a reasonable apprehension of bias existed because the Justice's paper expressed an opinion on the issues before

151 Pearson, *supra* note 12, at 1823.

152 *Id.*

153 *Id.* at 1824.

154 *Webb v The Queen* [1994] 181 CLR 41, 74 (Austl.) ("[T]he general rationale underlying the doctrine is reinforced by the principle expressed in the maxim that nobody may be judge in his own cause."); Andrew Field, *Confirming the Parting of Ways: The Law of Bias and the Automatic Disqualification Rule in England and Australia*, 2001 SING. J. LEGAL STUDIES 388, 388–89 (2001) ("Fundamental to the common law system of adversarial trial is that it is conducted by an independent and impartial tribunal.") (citation omitted).

155 *Webb*, 181 CLR at 73–74; Field, *supra* note 154, at 389; Pearson, *supra* note 12, at 1823.

156 Pearson, *supra* note 12, at 1823.

157 *Webb*, 181 CLR at 74; Pearson, *supra* note 12, at 1822–23.

158 Field, *supra* note 154, at 393–94.

159 *Id.* at 409 n.94; *Kartinyeri v Commonwealth (no. 2)* [1998] 195 ALJR 1334, 1334–38 (Austl.) (statement of Callinan, J.).

160 *Kartinyeri*, 72 ALJR at 1334–38.

161 *Hindmarsh Island Bridge Act 1997* (Cth) (Austl.)

162 *Kartinyeri*, 72 ALJR at 1334–38.

the High Court and a Minister of the Commonwealth, a party to the case, requested the paper.<sup>163</sup> Justice Callinan refused to recuse, but the High Court listed for argument an appeal from this decision.<sup>164</sup> Before the High Court, sitting as a whole, decided the motion, Justice Callinan unilaterally withdrew from the case.<sup>165</sup>

Therefore, *Kartinyeri* suggests that it is possible for the full High Court to review a single justice's decision not to recuse. Moreover, Professor Margaret Allars argues that there is "no doubt that the full High Court may hear an appeal from a ruling made by a single High Court [justice]."<sup>166</sup> Additionally, she cites *Autodesk Inc. v. Dyason*<sup>167</sup> and *De L v. Director-General, NSW Department of Community Services (No. 2)*<sup>168</sup> for the proposition that the court has "an inherent power to reopen its decision" if procedural fairness requires it.<sup>169</sup>

As with the Supreme Court of the United Kingdom, the High Court in Australia may eventually provide for review of a denied recusal motion. The court may have already done so, but was unable to complete the process due to Justice Callinan's eventual recusal.

#### IV. RECUSAL IN THREE CIVIL LAW COURTS OF LAST RESORT

As a means for comparison, it is worthwhile to look at the recusal systems of countries that have different legal systems from the United States. This is particularly relevant in the area of recusal because many common law countries have recusal procedures and standards very similar to that of the United States.<sup>170</sup> Therefore, to add a new dimension to this Comment's foreign law analysis, this Part analyzes

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<sup>163</sup> *Id.*

<sup>164</sup> Pearson, *supra* note 12, at 1824–25.

<sup>165</sup> *Id.* at 1824.

<sup>166</sup> Margaret Allars, Professor, Faculty of Law, The Univ. of Sydney, Perfected judgments and inherently angelical administrative decisions: The powers of courts and administrators to reopen or reconsider their decisions, Delivered at the New South Wales Chapter of the Australian Institute of Administrative Law and The Administrative Law Section of the New South Wales Bar Association Seminar: The Power of Tribunals to Reconsider Their Own Decisions (May 16, 2001), <http://netk.net.au/CrimJustice/Allars.pdf>.

<sup>167</sup> *Autodesk Inc. v Dyason*, [1993] 176 CLR 300 (Austl.)

<sup>168</sup> *De L v Dir.-Gen., N.S.W. Dep't of Cmty. Servs. (No. 2)*, [1997] 190 CLR 207 (Austl.).

<sup>169</sup> Allars, *supra* note 166.

<sup>170</sup> *See, e.g.*, Comm. for Justice & Liberty v. Nat'l Energy Bd. (1976), [1978] 1 S.C.R. 369, 394 (Can.) (reviewing the standard for recusal in the Supreme Court of Canada); Pearson, *supra* note 12, at 1816–17 (describing the recusal system in Canada). The procedure for recusal in the Supreme Court of Canada is the same as the procedure in the United States Supreme Court in that a justice decides motions regarding his or her own recusal. *Id.* Moreover, the recusal standard asks whether a reasonable observer, who is an informed and right-minded member of the community, would have a reasonable apprehension of bias. *Id.*

the recusal process and standards for the court of last resort in three civil law countries.

#### A. *Recusal in the French Court of Cassation*

The French judicial system is divided into two tracks: (1) “ordinary courts,” or civil and criminal courts and (2) administrative courts.<sup>171</sup> The Court of Cassation is the court of last resort for the first track.<sup>172</sup> The recusal system in this court is found in the statutory law of France.<sup>173</sup>

The procedure for recusal in the Court of Cassation is very different from that of the common law countries’ recusal systems. A judge may informally and voluntarily withdraw from a case when s/he feels s/he would have difficulty taking part in the decision.<sup>174</sup> The judge must explain his or her reasons to the court, which then decides whether the judge can recuse.<sup>175</sup> If the court agrees with the judge, then a new judge is substituted.<sup>176</sup>

In addition, a litigant may request that a judge be disqualified for enumerated reasons.<sup>177</sup> The Court decides whether a judge recuses, and the judge whose impartiality is questioned cannot participate in the decision.<sup>178</sup> Further, the judge must respond to the court for any points raised against him or her.<sup>179</sup> If the motion is granted, then another judge replaces the one recused.<sup>180</sup> If the motion is denied, then the party who wrongly raised the issue is fined.<sup>181</sup> Moreover, the party has a right to appeal the decision of the court, except in specific situations.<sup>182</sup>

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171 *Judicial systems in Member States – France*, EUROPEAN JUSTICE, [https://e-justice.europa.eu/content\\_judicial\\_systems\\_in\\_member\\_states-16-fr-en.do?member=1](https://e-justice.europa.eu/content_judicial_systems_in_member_states-16-fr-en.do?member=1) (last updated Dec. 9, 2013).

172 *Id.*

173 See *infra* notes 174–89 and accompanying text.

174 CODE DE PROCÉDURE CIVILE [C.P.C.] art. 339 (Fr.), translated in THE FRENCH CODE OF CIVIL PROCEDURE IN ENGLISH 66 (Nicolas Brooke trans., Oxford University Press 2009); Jean Pierre Plantard, *Judicial Conflicts of Interest in France*, 18 AM. J. COMP. L. 710, 713 (1970) (explaining that a judge may recuse him or herself if certain conflicts of interest or other circumstances are present).

175 Plantard, *supra* note 174, at 713.

176 C.P.C. art. 339 (Fr.); Plantard, *supra* note 174, at 713.

177 C.P.C. art. 341 (Fr.); Plantard, *supra* note 174, at 714.

178 C.P.C. arts. 346, 349, 1027 (Fr.); Plantard, *supra* note 174, at 714.

179 C.P.C. arts. 347, 349 (Fr.); Plantard, *supra* note 174, at 714.

180 C.P.C. arts. 348, 352 (Fr.); Plantard, *supra* note 174, at 714.

181 C.P.C. art. 353 (Fr.); Plantard, *supra* note 174, at 714.

182 C.P.C. art. 349 (Fr.) (explaining that the recusal application will be ruled upon by the president of the court in question, whose ruling cannot be appealed, if the challenge is “directed against a member of a court composed of professional and lay judges” rather

Under French law, a judge may recuse him or herself only for causes provided for by the law.<sup>183</sup> The recusal of a judge may be requested

(1) Where [s/he] or his [or her] spouse has a personal interest in the dispute; (2) Where [s/he] or his [or her] spouse is the creditor, debtor, presumed heir or beneficiary of a donation of one of the parties; (3) Where [s/he] or his [or her] spouse is related by blood or marriage to one of the parties, or to his [or her] spouse up to the fourth degree of kinship; (4) Where there have been legal proceedings between himself [or herself] or his [or her] spouse and one of the parties or his [or her] spouse; (5) Where [s/he] has previously had knowledge of the matter as judge or arbitrator or where [s/he] has advised one of the parties; (6) Where the judge or his [or her] spouse is entrusted with the administration of the property of one of the parties; (7) Where there exists a link of subordination between the judge or his [or her] spouse and one of the parties or his [or her] spouse; [and] (8) Where there has been a well-known friendship or enmity between the judge and one of the parties. . . .<sup>184</sup>

Another ground for removal of judges is *renvoi*.<sup>185</sup> The procedure and grounds described above apply to *renvoi*, but *suspicion légitime* is an additional ground for removal.<sup>186</sup> *Suspicion légitime* exists where there are “serious reasons to suspect that all the judges of a Court have a common interest in the issue or have some common feeling in favor or against one of the parties.”<sup>187</sup> However, cases of *suspicion légitime* are extremely rare.<sup>188</sup> In fact, there are few cases where conflicts of interest are raised.<sup>189</sup>

#### B. Recusal in the German Federal Constitutional Court

The German court system is divided into five independent and specialized jurisdictions: (1) ordinary; (2) labor; (3) general administrative; (4) fiscal; and (5) social.<sup>190</sup> In addition to these, there is the

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than against a typical judge); Plantard, *supra* note 174, at 714 (discussing the usual appeal right).

183 C.P.C. art. 341 (Fr.); Plantard, *supra* note 174, at 713 (“The grounds on which a party can ask for the recusal of a judge are various but are restricted by the text of the law.”).

184 C.P.C. art. 341 (Fr.); Plantard, *supra* note 174, at 713.

185 Plantard, *supra* note 174, at 714.

186 *Id.*

187 *Id.*

188 *Id.*

189 *Id.* at 715.

190 *Judicial systems in Member States – Germany*, EUROPEAN JUSTICE, [https://e-justice.europa.eu/content\\_judicial\\_systems\\_in\\_member\\_states-16-de-en.do?member=1](https://e-justice.europa.eu/content_judicial_systems_in_member_states-16-de-en.do?member=1) (last updated February 20, 2013).

constitutional jurisdiction of the Federal Constitutional Court.<sup>191</sup> This court ensures that the government obeys the German Constitution and secures the respect and effectiveness of its democracy.<sup>192</sup> The court consists of sixteen justices, divided into two Senates (or panels), which each contain three Chambers.<sup>193</sup>

The procedure for recusal allows a litigant to challenge the judge's partiality.<sup>194</sup> The panel of the judge in question decides the motion without the judge's participation.<sup>195</sup> The challenged judge must make a statement on the issue of his or her impartiality.<sup>196</sup>

A judge may also self-disqualify by declaring his or her own partiality.<sup>197</sup> If s/he does so, the recusing judge's panel reviews whether the statement of self-rejection is reasonable.<sup>198</sup> When the court agrees that the judge should be removed, a judge from the second panel is selected as a substitute.<sup>199</sup>

German statutory law provides that a judge from the Federal Constitutional Court must recuse if s/he

[1] is a party to the case or is or was married to a party, is related by blood or marriage in the direct line, related by blood up to the third degree or by marriage up to the second degree in the collateral line[;] or [2] has already been involved in the same case by reason of his [or her] office or profession.<sup>200</sup>

A judge is not a "party" simply because s/he has an interest in the outcome based on his or her profession, personal status, political party, descent, or a general consideration.<sup>201</sup> Moreover, a judge is not

191 *Id.*

192 *The Task*, FED. CONSTITUTIONAL COURT, <http://www.bundesverfassungsgericht.de/en/organization/task.html> (last visited Mar. 16, 2013).

193 *Organization*, FED. CONSTITUTIONAL COURT, <http://www.bundesverfassungsgericht.de/en/organization/organization.html> (last visited Mar. 16, 2013).

194 Gesetz über das Bundesverfassungsgericht [BVerfGG] [Law on the Federal Constitutional Court], Mar. 12, 1951, BUNDESGESETZBLATT, TEIL I [BGBl I] as amended art. 19 (Ger.), translated in Federal Constitutional Act (Bundesverfassungsgerichts-Gesetz, BVerfGG) (Lawrence Schäfer & Gerhard Dannemann, eds., INTER NATIONES, trans., 2001), <http://www.iuscomp.org/gla/statutes/BVerfGG.htm>; Hans G. Rupp, *Judicial Conflicts of Interest in the Federal Republic of Germany*, 18 AM. J. COMP. L. 716, 722 (1970) ("A judge of the Constitutional Court may be rejected by a party who can prove that he has reason to suspect bias.").

195 BVerfGG, BGBl I, art. 19 (Ger.); Rupp, *supra* note 194, at 722 (explaining that the judge with the potential bias is absent when the question of disqualification is decided).

196 BVerfGG, BGBl I, art. 19 (Ger.).

197 BVerfGG, BGBl I, art. 19 (Ger.); Rupp, *supra* note 194, at 722.

198 BVerfGG, BGBl I, art. 19 (Ger.).

199 *Id.*

200 *Id.* at art. 18; Rupp, *supra* note 194, at 722.

201 BVerfGG, BGBl I, art. 18 (Ger.); Rupp, *supra* note 194, at 722.

“involved” in a case because s/he participated in legislative procedures or expressed an expert opinion on a relevant question of law.<sup>202</sup>

In a case where the federal government provided funds to political parties already represented in the *Bundestag*, the court sustained the recusal of a judge based on his public utterances.<sup>203</sup> The judge was a professor of constitutional law and, while the case was pending, read a paper at an academic convention expressing his view that financing political parties with government funds was constitutional.<sup>204</sup> Further, he said that it was an “unholy alliance” of liberals who are against the government financing of political parties.<sup>205</sup> The court decided that recusal was appropriate because there were grounds to doubt the judge’s impartiality and objectivity.<sup>206</sup> The court did not require a showing of actual bias.<sup>207</sup>

### C. *Recusal in the Supreme Court of Japan*

The court system in Japan is similar to the United States with trial courts, appellate courts, and a Supreme Court of last resort.<sup>208</sup> The Japanese Supreme Court is the highest court in the state, exercising appellate jurisdiction of final appeal and original jurisdiction in proceedings against certain government commissioners.<sup>209</sup> The court consists of a chief justice and fourteen other justices.<sup>210</sup> In Japan, there are three systems providing for the recusal of justices: (1) exclusion (*Joseki*); (2) challenge (*Kihi*); and (3) withdrawal (*Kaihi*).<sup>211</sup>

The first system of recusal is exclusion, which operates automatically under law.<sup>212</sup> A judge is disqualified from performing his/her duties

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202 BVerfGG, BGBL I, art. 18 (Ger.); Rupp, *supra* note 194, at 722.

203 Rupp, *supra* note 194, at 723–24.

204 *Id.* at 723.

205 *Id.* at 723–24.

206 *Id.* at 724.

207 *Id.* (“[T]he Court emphasized that the question to be decided was not whether the judge himself felt biased or whether he actually was biased, but whether a party to the case, when reasonably evaluating all relevant facts had grounds to doubt his impartiality and objectively.”).

208 *Overview of the Judicial System in Japan*, SUPREME COURT OF JAPAN, [http://www.courts.go.jp/english/judicial\\_sys/overview\\_of/overview/index.html](http://www.courts.go.jp/english/judicial_sys/overview_of/overview/index.html) (last visited Mar. 17, 2013).

209 *Id.*

210 *Id.*

211 Chuichi Suzuki, *Problems of Disqualification of Judges in Japan*, 18 AM. J. COMP. L. 727, 728 (1970).

212 MINJI SOSHŌHŌ [MINSHŌHŌ] [C. CIV. PRO.] 2011, art. 23 (Japan), *translated in* 2 EHS LAW BULL. SER. no. 2300 (2011); Suzuki, *supra* note 211, at 728.

- (1) If a judge, [his/her] spouse, or [his/her] former spouse is a party to the case, or [s/he] is related to a party in the case . . . ;
- (2) If a judge is or was a blood relation within the fourth degree of relationship, a relative by affinity within the third degree of relationship of a party, or a relative of a party with whom [s/he] resides;
- (3) If a judge is the guardian, supervisor of guardian, curator, supervisor of curator, assistant, or supervisor of assistant of a party;
- (4) If a judge has acted as a witness or expert in the case;
- (5) If a judge is or was the representative or assistant to party in the case;
- (6) If a judge has participated in an arbitration award in the case or participated in a decision of the previous instance against which an appeal has been filed.<sup>213</sup>

Once the ground for removal is discovered, either the judge may exclude him or herself, or the party may file a motion for exclusion.<sup>214</sup> The court makes a disqualification decision if any of the enumerated grounds exist.<sup>215</sup> If the judge is removed, then the trial starts from the beginning, unless a final decision has been made.<sup>216</sup>

The second system of recusal is a challenge. A challenge is authorized “[i]f there are such circumstances as may prejudice the impartiality of decision on the part of a judge.”<sup>217</sup>

There are some overlaps in the procedure for disqualifications and challenges.<sup>218</sup> For both, a party may file a motion to the court that the judge belongs.<sup>219</sup> The challenged judge may express his or her opinion on the judgment, but may not participate in the decision.<sup>220</sup> Only an order finding that the disqualification or challenge is groundless may be appealed.<sup>221</sup> However, in challenges where the party took part in preliminary proceedings or oral arguments, the party loses the right to challenge, unless the grounds for the challenge later occurred or were unknown at the time.<sup>222</sup>

213 MINSOHŌ [C. CIV. PRO.] art. 23; *see also* Suzuki, *supra* note 211, at 729 (quoting Article 23 of The Code of Civil Procedure of Japan).

214 MINSOHŌ [C. CIV. PRO.] art. 23; Suzuki, *supra* note 211, at 730.

215 MINSOHŌ [C. CIV. PRO.] art. 23; Suzuki, *supra* note 211, at 730.

216 Suzuki, *supra* note 211, at 730.

217 MINSOHŌ [C. CIV. PRO.] art. 24, para. 1; *see also* Suzuki, *supra* note 211, at 730 (“The Code of Civil Procedure authorizes a challenge ‘if there exist such circumstances concerning a judge as are calculated to prejudice the impartiality of decision.’” (citation omitted)).

218 *See, e.g.*, MINSOHŌ [C. CIV. PRO.] art. 25, para. 1 (outlining the decision process regarding review of either an exclusion or a challenge).

219 Suzuki, *supra* note 211, at 733 (“[I]t is clear that the essential functions of exclusion and of challenge are identical, since the Code of Civil Procedure prescribes common procedures for both, and the Code of Criminal Procedure provides for a motion for exclusion in the same terms as for the motion for challenge.”).

220 MINSOHŌ [C. CIV. PRO.] art. 25, para. 3; Suzuki, *supra* note 211, at 735.

221 MINSOHŌ [C. CIV. PRO.] art. 25, paras. 4–5.

222 *Id.* art. 24, para. 2; Suzuki, *supra* note 211, at 732.

The final system for recusal is where a judge voluntarily recuses him or herself in recognition of a basis for exclusion or challenge.<sup>223</sup> If a judge knew that there were grounds for his or her exclusion or challenge, then taking the case would be a waste of judicial economy and would jeopardize confidence in the judiciary.<sup>224</sup> The judge must ask permission from the Court to withdraw.<sup>225</sup>

#### V. WHAT ARE THE LESSONS FROM THE FOREIGN COURTS?

The striking differences between the approach to recusal in civil and common law countries are very interesting. From the common law countries, there are similarities in the procedure and standard applied. However, at least in England and Australia, there appears to be a method to appeal the denial of a recusal motion. While neither have actually granted or ruled directly on an appeal from a recusal motion, it would not be surprising if the potential availability of the appeal influences public confidence.

Moreover, the civil law countries provide a very different approach to recusal. In all three, the motion for recusal is decided by the court, excluding the questioned judge. Further, the grounds for recusal are clearly enumerated. While their systems are based on civil law, there is much to learn from the method of recusal in these countries.

#### VI. SUGGEST PROCEDURAL CHANGES TO IMPROVE SUPREME COURT RECUSAL

How can we apply these lessons to the recusal system of the United States? This Comment suggests incorporating both the approach for review provided by the common law countries and the initial decision procedure of the civil law countries. The Court should decide to either (1) provide meaningful review for the denial of a recusal motion, while sitting without the questioned Justice; or (2) make the initial decision as a Court, without the questioned Justice. Either solution will increase the perception of impartiality and reinforce the public's perception of the Court.

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223 Suzuki, *supra* note 211, at 736.

224 *Id.* at 737.

225 *Id.*

A. *Decision by Full Court Without the Recused Justice*

While generally not addressed, there seems to be a contradiction between the principle that a person shall not judge his or her own case and the procedure that allows Justices to decide their own recusal. In the civil law countries discussed, no judge decides his or her own recusal motion.<sup>226</sup> Even if they voluntarily withdraw, their decision is reviewed by the court excluding their participation.<sup>227</sup> These countries conclude that separating the questioned judge from the recusal decision is an obvious choice.<sup>228</sup>

However, in the United States, a Justice is asked if his or her situation, as a reasonable observer would see it, could lead to an apprehension of bias. Justice Scalia argued that knowing the facts, that he knew, a reasonable observer would not apprehend a bias towards Vice President Cheney.<sup>229</sup> On the other hand, the facts, as the public knows them, led to public outcry and requests for Justice Scalia to recuse himself.<sup>230</sup> The perception of a Justice, of his or her own behavior and relationships, may differ from that of a reasonable observer. Moreover, an impartial tribunal (the Court sitting without the questioned Justice) would be able to determine recusal motions without facing this issue.

Therefore, this Comment suggests that the Court, sitting without the Justice in question, decide motions for recusal. This would prevent the Justice from deciding his or her own perceived bias. Moreover, it creates a check on an individual Justice's power to refuse recusal motion when there is no chance for review.

Nevertheless, there are practical concerns when the full Court is made available to hear these appeals. First, it seems unlikely that the Court sitting as a whole will decide to overrule a fellow Justice's decision that there is no reasonable perception of partiality, unless there is an obvious case of bias. Second, if the Court decides and writes an opinion in these cases, there is a concern of creating at least persuasive precedent, if not binding rules. Third, there is a question of whether the appeal will be available as of right or whether the Court will allow them on a discretionary basis. Finally, this process will

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226 See *supra* Part V.

227 *Id.*

228 See, e.g., Plantard, *supra* note 174, at 714 (“[The judge] cannot, *of course*, participate in the decision . . . .”) (emphasis added).

229 *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 923–29 (2004) (Scalia, J., mem.).

230 See *supra* note 96.

lengthen an already long and expensive process for litigants who have gone through the entire appellate system.

### *B. Meaningful Review*

Another complaint made by critics of the recusal system in the Supreme Court is the complete lack of review.<sup>231</sup> Once a Justice makes a decision on a recusal motion, there is no court, judge, or Justice who can review the decision. Aside from an example of bad behavior sufficient to support impeachment, there is no barrier for arbitrary decisions.<sup>232</sup>

The most unique difference between the Supreme Court and the courts of last resort in Australia and England is the potential availability of review of recusal denials.<sup>233</sup> While none of the jurisdictions have actually reviewed the recusal denial of a fellow justice before a case is decided, at least in England and Australia, there is the possibility that review is available.<sup>234</sup> Our own Congress attempted to make review available through legislation, but failed.<sup>235</sup>

Therefore, this Comment suggests that the Court, sitting without the Justice in question, be able to review the denials of recusal motions, particularly when made by the Justice in question. By providing meaningful review of recusal motions, the Supreme Court will boost the public's confidence in its integrity.

The practical concerns of Justice shopping will still apply in this situation. However, there is an added problem where the Court, in deciding whether their fellow Justice is biased, may choose not to question that Justice's reasoning, deferring to his or her decision. Therefore, the availability of a meaningful review may not make any difference in the outcome of recusal motions.

In addition, there is the possibility that the Court will split on these decisions based on ideological lines. For example, if the decision is highly controversial and there is a split in the Court based on liberal and conservative viewpoints, then the liberal Justices will be less inclined to recuse another liberal Justice and the conservative Justices will be more willing to do so, and vice versa. This would lead to in-

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<sup>231</sup> See *supra* Part I.

<sup>232</sup> See U.S. CONST. art. III, § 1.

<sup>233</sup> See *supra* Parts III & IV.

<sup>234</sup> *Id.*

<sup>235</sup> H.R. 862, 112th Cong. § 3(b) (2011).

creased politicization of the Court and a decrease in the public's respect of the Court's impartiality.<sup>236</sup>

### C. Possible Constitutional Issues

There are also potential constitutional issues with these proposals. The Court, deciding to implement these solutions on its own, would not violate the Constitution. However, if Congress steps in and legislates to apply these solutions to the Court, then there may be a separation of powers issue.

To provide for a meaningful review of recusal denials or a process whereby the Court sitting without the questioned Justice makes the recusal decision, the Court could create its own procedure for appeal. Reviewing a Justice's decision does not violate the Constitution, as the highest judicial power sits in the Court as a whole.<sup>237</sup> An individual Justice does not represent the entire Court when s/he makes a decision. Therefore, the Court would still sit above individual Justices.

Additionally, the Court would still be acting as "one Court" and would still maintain its status as the court of last resort, even if it sits without one Justice. Unlike other proposals recommending a panel of retired judges and Justices to review recusal denials, using the Supreme Court as the reviewing entity avoids violating Article III § 1 of the Constitution.

But, there is a question of whether Congress would violate the Constitution by forcing the Court to use either of these procedures. The basis for the constitutional violation would be the Separation of Powers Doctrine. By creating three separate branches of government in Articles I, II, and III of the Constitution, the Framers created a system that "by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."<sup>238</sup> Alexander Hamilton wrote that impeachment was the only check on the Judicial Branch because of the "necessary independence of the judicial character."<sup>239</sup> Forcing the Court to adopt these proposed solutions violates the separation of powers if it impermissibly undermines the role of the judicial branch.

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236 See Eric Hamilton, *Politicizing the Supreme Court*, 65 STAN. L. REV. ONLINE 35, 36 (2012) ("Politicization of the Supreme Court causes the American public to lose faith in the Court . . .").

237 See U.S. CONST. art. III, § 1 ("The judicial Power of the United States shall be vested in one supreme Court . . .").

238 *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

239 THE FEDERALIST NO. 79, at 472-73 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

To determine if the proposed solutions undermine the Court's role, one must ask (1) what is the Court's constitutional role; and (2) when is this role impermissibly undermined?

There is general agreement that the Court's constitutional role is as a decision-maker dealing with cases and controversies, as described in Article III of the Constitution.<sup>240</sup> However, this decision-maker role is also accompanied by the Court's ability to maintain the necessary powers to decide cases and controversies.<sup>241</sup> So, the question is whether these proposed solutions infringe on this decision-making power.

The level of infringement must be more than *de minimis* because, as Justice Rehnquist said, Congress's decision to make only nine Justices "sets limits on [the Court's] procedure."<sup>242</sup> In his recent paper, Professor Brandon Smith analyzed exactly what level of infringement is permitted. He argued that there are certain attributes that are essential to Article III Justices.<sup>243</sup> These include the ability to exercise the ordinary powers of district courts, such as "subject matter jurisdiction, the ability to decide points of law . . . , and the power to issue immediately enforceable judgments."<sup>244</sup>

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<sup>240</sup> U.S. CONST. art. III, § 2, cl. 1; *see, e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995) (discussing the Framers' intent that the federal courts have power to definitively decide cases); William Baude, *The Judgment Power*, 96 GEO L.J. 1807, 1809 (2008) (stating that the power to make binding judgments is part of the judicial role); John Harrison, *Addition by Subtraction*, 92 VA. L. REV. 1853, 1855 (2006) (arguing that deciding cases and controversies is the heart of judicial power); Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833, 842 (2007) (arguing that the power "to say what the law is" as provided by *Marbury* is the role of the judiciary) (citation omitted); Brandon Smith, *The Least Televised Branch: A Separation of Powers Analysis of Legislation to Televis the Supreme Court*, 97 GEO L.J. 1409, 1421 (2009) ("[T]here is widespread acknowledgement that the Article III 'judicial power' is primarily a power of decisionmaking to be exercised in the context of cases and controversies.").

<sup>241</sup> *See Access to the Court: Televising the Supreme Court: Hearing Before the Subcomm. on Admin. Oversight & the Courts of the Comm. on the Judiciary*, 112th Cong. 13–14 (2011) (statement of Maureen Mahoney, Of Counsel, Latham & Watkins LLP, Wash. D.C.) ("[T]he Supreme Court has made clear that the judicial power does include the authority to adopt rules necessary to conduct its proceedings and to protect the integrity of its decisionmaking processes.").

<sup>242</sup> William H. Rehnquist, *The Supreme Court: How It Was, How It Is* (1987), *reprinted in* SUSAN LOW BLOCH & THOMAS G. KRATTENMAKER, *SUPREME COURT POLITICS: THE INSTITUTION AND ITS PROCEDURES* 383, 387 (1994); *see also* Smith, *supra* note 240, at 1423 (discussing Chief Justice Rehnquist's statement and the "parameters . . . affecting judicial decisionmaking . . .").

<sup>243</sup> *See* Smith, *supra* note 240, at 1423–27 (discussing the attributes that are essential to the judicial power).

<sup>244</sup> *Id.* at 1424 (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84–86 (1982)).

Now, applying this analysis to legislation forcing the recusal of Supreme Court Justices either to be decided by the Court sitting without the questioned Justice or to be reviewable by the Court sitting without the questioned Justice, there is a de minimus separation of powers violation. As mentioned above, the results of a successful recusal motion could certainly affect the outcome of a decision because the chance of a plurality decision increases. Further, as Louis J. Virelli argues, recusal decisions may be constitutionally reserved to the Court and may not be altered by Congress because of policy concerns.<sup>245</sup> Virelli contends that Congress would violate the separation of powers doctrine by mandating certain recusal standards and procedures because a recusal decision is an “exercise[ ] of the judicial power under Article III that the Justices make individually, independently, and without any prospect of review.”<sup>246</sup> In a recent *SCOTUSblog* article, Virelli claims, “the Impeachment Clauses of Article I and the Exceptions Clause of Article III, as well as the academic literature on the inherent power of the federal courts, strongly suggest that Congress is constitutionally precluded from interfering (at least substantively) in [recusal] decisions.”<sup>247</sup>

On the other hand, this infringement on the Supreme Court’s power is clearly offset by its provision of constitutional due process rights, namely an impartial Justice, to litigants.<sup>248</sup> As the Supreme Court has stated, the Due Process Clause provides litigants a “right . . . to ‘an impartial and disinterested tribunal.’”<sup>249</sup> However, a litigant would be denied an impartial tribunal if one of the Justices could be reasonably seen as biased. Moreover, under the current system, the Justice deciding a litigant’s recusal motion is clearly interested in the outcome because the motion directly relates to the Justice’s ability to decide a case. Therefore, the protection of rights guaran-

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245 Louis J. Virelli III, *The (Un)constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181, 1230–31 (2011).

246 *Id.* at 1231.

247 Lou Virelli, *Scholarship highlight: Supreme Court recusal and the separation of powers*, SCOTUSBLOG (Feb. 8, 2013, 12:36 PM), <http://www.scotusblog.com/2013/02/scholarship-highlight-supreme-court-recusal-and-the-separation-of-powers/>.

248 U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1. For a good review of this argument, see N.Y.C. BAR ASS’N COMM. ON GOV’T ETHICS, SUPREME COURT ETHICS: THE NEED FOR GREATER TRANSPARENCY IN A JUSTICE’S DECISION TO HEAR A CASE 34–35 (2012), <http://www2.nycbar.org/pdf/report/uploads/20072211-SupremeCourtEthics-TheNeedforGreaterTransparencyinaRecusal.pdf> (“[W]hile the law adds to the ‘only check’ on the Court, it protects in part a right guaranteed by the Fifth and Fourteenth Amendments.”).

249 Republican Party of Minn. v. White, 536 U.S. 765, 813 (2002) (Ginsburg, J., dissenting) (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980)).

teed by the Fifth and Fourteenth Amendments may justify the potential infringement on the Court's power.

Additionally, history shows that Congress has a recognized power to decide when a Justice should withdraw, as shown through the multiple statutes dealing with a Justice's recusal and required disclosures.<sup>250</sup> Congress has also passed legislation regarding the number of Justices,<sup>251</sup> the composition of a quorum,<sup>252</sup> the date for the start of each term,<sup>253</sup> and the limitations on the Court's subject-matter jurisdiction.<sup>254</sup> These examples are particularly fruitful because they are procedural mandates like the ones proposed in this Comment.

In addition to these statutes governing Supreme Court procedure, Congress has also created substantive standards to be applied in recusal motions through 28 U.S.C. § 455. Clearly, if such a substantive standard can be forced upon the Supreme Court's recusal decisions, then creating a procedure for the Justices' recusal decisions is not above-and-beyond prior congressionally defined procedures.<sup>255</sup>

Therefore, while it is very likely constitutional for Congress to force the Court to undertake these new procedures for recusal, the Court should implement these solutions on its own. The self-infliction of such a procedural amendment would not only avoid such constitutional issues, but would also work in favor of legitimizing the Court. By taking it upon itself to correct the procedural injustices of Supreme Court recusal, the Court would acknowledge its concerns with the previous system and show the public that the Court is working to remedy these wrongs.

#### CONCLUSION

From the review of both common law and civil law countries, this Comment shows that what our automatic understanding of how

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<sup>250</sup> See *supra* Part I.C.2.

<sup>251</sup> 28 U.S.C. § 1 (2006).

<sup>252</sup> *Id.*

<sup>253</sup> 28 U.S.C. § 2 (2006).

<sup>254</sup> See, e.g., 28 U.S.C. §§ 1257–59 (2006) (providing that the Supreme Court has jurisdiction to review certain cases from the highest state courts, the highest court of Puerto Rico, and the United States Court of Appeals for the Armed Forces); 28 U.S.C. § 1292 (2006) (providing over which cases federal courts of appeals have jurisdiction); 28 U.S.C. § 1332 (2006) (providing which courts have jurisdiction based upon the amount in controversy and the citizenship of the parties).

<sup>255</sup> However, Virelli argues that even these prior statutes may be unconstitutional. See generally Virelli, *supra* note 247, at 1185 (“This Article . . . argues that any legislative interference with Supreme Court recusal decisions is an unconstitutional intrusion into the judicial power vested in the Court by Article III of the Constitution.”).

recusal should proceed is not necessarily the only one, nor the correct one. By looking to foreign courts and thinking about how their processes could improve our court system, we are able to learn both what our weaknesses are and where our strengths lie. Clearly, our Court is having problems with the recusal system in place. Without reform, the public's opinion of the Court may continue to decline, continuing to diminish the Court's legitimacy. Therefore, the need to learn from both similar and divergent systems is vital.

And what do we see? In the common law countries, there is an explicit preeminence of justice and fairness, and the courts of last resort work to ensure that these principles are truly applied. Where the courts see potential partiality, or unfair procedures, they step in to correct them.

Moreover, in the civil law countries, there is a near universal application of a very different procedure. In all three civil law countries, the judge whose impartiality is questioned does not decide the motion for recusal. The principle that a person should not judge his or her own case is embodied in the recusal procedures in these countries. Also, the recusal decisions of impartial tribunals are appealable, providing even more protection from potentially biased decision-making.

It seems surprising that these civil law countries would provide more protection than the United States, given our renowned constitutional right to an impartial tribunal. However, as compared to the United States, the other countries examined by this Comment provide more procedural protections for litigants who fear the decider of their case is partial to the other side. We as a nation should be shocked by this and take a hard look at reform.

This Comment suggests starting with a more protective procedure, rather than focusing on the standard for recusal. While the standard is not set in stone, it is similar to the ones applied in the countries this Comment examined. Therefore, it may be more important to start with the more troubling procedural issues first, and then see if a change in the standard is necessary.

All in all, what is clear from this analysis is that our recusal system needs work, and we can learn how to repair it through the examination of foreign courts. Justice and fairness demand it.



