

COMMENTS

YOUR HONOR, PLEASE EXPLAIN: WHY CONGRESS CAN, AND SHOULD, REQUIRE JUSTICES TO PUBLISH REASONS FOR THEIR RECUSAL DECISIONS

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On November 14, 2011, the United States Supreme Court granted certiorari on the long-debated constitutionality of the Patient Protection and Affordable Care Act (PPACA) of 2010.¹ The hubbub surrounding the case was soon interjected with calls for Justices Clarence Thomas and Elena Kagan to recuse themselves from the decision due to alleged conflicts of interest.² A large government watchdog group stressed that, whatever she chose to do, Justice Kagan must “provide an articulation of [her] reasoning behind any decision regarding recusal.”³ That all nine Justices nevertheless sat on the case, with no

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1 Florida *ex rel.* Att’y Gen. v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235, 1241 (11th Cir. 2011), *cert. granted sub nom.* Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 603 (2011), *cert. granted*, 132 S. Ct. 604 (2011), and *cert. granted in part*, 132 S. Ct. 604 (2011).

2 See Brief for Freedom Watch as Amicus Curiae Supporting Neither Party and on the Issue of Recusal or Disqualification of Justice Elena Kagan, Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (Nos. 11-393, 11-400), 2012 WL 72452, (arguing that Kagan’s direct prior involvement, as United States Solicitor General, in designing a defense of the Affordable Care Act’s constitutionality disqualified her from ruling on the case); Joanne Kenen, *Recusal Fight Could Bedevil Supreme Court Health Care Ruling*, POLITICO PRO, (Nov. 30, 2011, 11:44 PM), <http://www.politico.com/news/stories/1111/69486.html> (noting that Justice Thomas was asked to recuse himself because of his wife’s involvement in combating the law).

3 Letter from Judicial Watch to Elena Kagan, US. Supreme Court Justice (Mar. 22, 2012) available at <http://www.judicialwatch.org/press-room/press-releases/judicial-watch-asks-supreme-court-justice-elena-kagan-to-directly-address-obamacare-recusal-controversy> (urging that if Kagan did not dispel controversy by explaining her action on recusal, “[i]t would leave a cloud hanging over the Court’s decision and could undermine public confidence in the impartiality and integrity of the Court as an institution”).

formal explanations from Kagan or Thomas of their reasons for doing so, raised concerns that the ultimate decision was not legitimate.⁴

The United States Supreme Court is the country's final arbiter of justice, the tribunal of last resort for challenging a law or regulation.⁵ It generally hears cases only when lower courts cannot or do not sufficiently resolve the conflict at issue.⁶ Ensuring that the Court maintains its legitimacy is therefore of the utmost importance. For its rulings to garner widespread respect, the public must believe in the Court's integrity.⁷ Recently, though, that integrity has come under fire, with claims that justices are presiding over cases in which they should not be involved.⁸ In July 2012, shortly after the final PPACA decision, a Gallup poll found that only forty-six percent of those questioned approved of how the Court was performing its duties, with forty-five percent disapproving.⁹

The United States' system of government has two principal mechanisms for ensuring legitimate decision-making by the judiciary. The first is impeachment. The Constitution declares that all federal judg-

4 Motion for Reconsideration of Request to Participate at Oral Argument on Issue of Recusal or Disqualification of Justice Elena Kagan, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (Nos. 11-393, 11-400), 2012 WL 72452 (arguing that if Kagan sat on the case, the "ultimate decision [t]herein w[ould] be forever held illegitimate and tainted by judicial misconduct" and that it would "have a lasting effect on the integrity of the Supreme Court and how Americans view their court").

5 See U.S. CONST. art. III, § 1 ("The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may . . . establish."); 28 U.S.C. §§ 1253-54, 1257-60 (2006) (delineating how cases reach the U.S. Supreme Court after being heard in a federal district or appellate court or when a party appeals a decision by the highest court of a state or territory that has bearing on federal law or constitutional rights).

6 28 U.S.C. §§ 1253-54, 1257-60.

7 Cf. Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 532 (2005) ("Appearances matter because the judiciary's reputation is essential to its institutional legitimacy—that is, to the public's respect for and willingness to abide by judicial decisionmaking.").

8 See, e.g., David Edwards, *Rep. Slaughter calls for 'retroactive recusal' to overturn Citizens United*, THE RAW STORY (Oct. 5, 2011, 10:25 EST), <http://www.rawstory.com/rs/2011/10/05/rep-slaughter-calls-for-retroactive-recusal-to-overturn-citizens-united> (advocating for a retroactive recusal of Justice Thomas in a case where his wife received a financial benefit from the Court's ruling); Jackie Calmes, *Activism of Thomas's Wife Could Raise Judicial Issues*, N.Y. TIMES, Oct. 9, 2010, at A1, A14 (discussing the suggestion that Justice Thomas should recuse himself from certain cases due to his wife's alleged financial interest); Senator Jeff Sessions, *Kagan Must Recuse Herself From Obamacare Case*, NAT'L REVIEW ONLINE, Feb. 23, 2012, <http://www.nationalreview.com/bench-memos/291832/kagan-must-recuse-herself-obamacare-case-sen-jeff-sessions#> (arguing that Justice Kagan must recuse herself from the PPACA case per 28 U.S.C. § 455(b)(3)).

9 The approval rating rose slightly, to forty-nine percent, in September 2012, but remains lower than it has been over most of the past twelve years. GALLUP, *Supreme Court*, <http://www.gallup.com/poll/4732/supreme-court.aspx>.

es “shall hold their Offices during good Behaviour.”¹⁰ Congress may remove a life-tenured federal judge from office for “Treason, Bribery, or other high Crimes and Misdemeanors.”¹¹ The second mechanism is recusal and disqualification.¹² Recusal of U.S. Supreme Court Justices is currently governed by 28 U.S.C. § 455.¹³ Under this statute, a Justice must not only respond to motions seeking his or her recusal, but must also independently evaluate his or her suitability for each case and dismiss himself or herself when circumstances make recusal proper.¹⁴ Unlike impeachment, recusal is a temporary remedy: it removes a justice only from the case at hand, and not from any future cases that come before the Court.¹⁵

This Comment aims to clarify the extent to which Congress can constitutionally regulate Supreme Court recusals. Part I lays the groundwork for the discussion, looking at the development and interpretation of 28 U.S.C. § 455 as well as weaknesses in the Court’s present handling of recusal. Then, Part II expounds on why having justices explain their recusal decisions would be beneficial. Notwithstanding the qualitative merits of such a proposal, Congress can implement it only if doing so would be constitutional. To help answer that question, Part III analyzes the doctrine of inherent judicial powers, distinguishing between substantive congressional acts that intrude on the Court’s core functions and procedural acts that do not. While the separation of powers may bar Congress from imposing *substantive* rules on the justices’ recusal decisions, there are fewer Constitution-based arguments against its imposing *purely procedural* requirements in this area.¹⁶ This caveat presents a noteworthy possibility for balancing Congress’s involvement in Court affairs with

¹⁰ U.S. CONST. art. III, § 1.

¹¹ U.S. CONST. art. II, § 4.

¹² Recusal may refer to a judge or Justice independently deciding to remove himself or herself from a case, whereas disqualification refers to such a decision when preceded by a party’s request or required by statute; both terms are often used interchangeably, and they are discussed as such herein. See BLACK’S LAW DICTIONARY (9th ed. 2009).

¹³ See generally *infra* Part I.A.

¹⁴ POLICIES & PROCEDURES MEMORANDUM 05-02: PROCEDURES FOR ISSUING RECUSAL ORDERS IN IMMIGRATION PROCEEDINGS 1–2 (U.S. Dep’t of Justice, Exec. Office for Immigration Review 2005) (citing *Liteky v. United States*, 510 U.S. 540, 548 (1994)) (identifying that § 455 places the burden of recognizing when recusal is warranted on each judge, rather than relying on parties to bring such grounds to their attention).

¹⁵ Louis J. Virelli III, *The (Un)constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181, 1211–12 (2011).

¹⁶ See, e.g., Frost, *supra* note 7, at 535 (proposing that recusal procedures, rather than the substantive recusal standard, should be modified in order to enhance the Court’s legitimacy).

the Court's constitutional right to self-autonomy in its decision-making.

Finally, Part IV shows how a Congressional requirement for implicated justices to explain their recusal decisions would be procedural, and thus constitutional. This reform would also bolster public understanding of, and respect for, the Court's decisions. It would thereby have meaningful effect, even if accompanying substantive modifications to existing standards were needed to guarantee the Court's legitimacy in this area.¹⁷ Moreover, it may motivate the Court to independently adopt stricter recusal rules that would not challenge constitutional requirements.¹⁸

I. THE RECUSAL STANDARD AND ITS APPLICATION BY THE SUPREME COURT

A. *Legislative Evolution*

Judicial recusal has roots in the Constitution's Due Process Clause, which grants all litigants the right to have their cases heard by an impartial tribunal.¹⁹ The Court has recognized that objective rules are

¹⁷ Virelli, *supra* note 15, at 1223–25 (“If the Court is unrestrained by Congress in deciding when a Justice will be recused from a case, it is unlikely the procedural framework in which that decision was made will do much to alter it.”).

¹⁸ *See id.* at 1229–30 (arguing that even if separation of powers precludes Congress from modifying Court recusals, the Court can amend its practices internally without violating the Constitution, and further, that the Court might be more prone to taking this approach if congressional pressure in this area were removed); Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1603–04 (2012) (advocating that the removal of congressional attempts at regulating recusal reform may encourage the Court to address the recusal issue directly). Moreover, even an open-ended reasons requirement would make at least minimum self-regulation unavoidable.

¹⁹ *See, e.g.*, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872, 883–84 (2009) (holding that a judge's refusal to recuse himself from the trial of a litigant who had contributed significantly to his election campaign violated the other party's due process rights by posing a significant risk of bias or prejudgment); *Tumey v. Ohio*, 273 U.S. 510, 523, 532–33 (1927) (“[I]t . . . deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case”); *In re Murchison*, 349 U.S. 133, 133–39 (1955) (holding that the due process requirement of an impartial tribunal is not satisfied if the judge presiding at a contempt hearing also served as the “one-man grand jury” from which the charges arose); *Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002) (“[I]mpartiality’ in the judicial context—and of course its root meaning—is the lack of bias for and against either *party* to the proceeding . . . an impartial judge is essential to due process.”); Sherrilyn A. Ifill, *Justice and Appearance of Justice: Opening Statement at University of Pennsylvania Law Review Debate* (2012), in *Judicial Recusal at the Court*, 160 U. PA. L. REV. PENNUMBRA 331, 333 (2012) (“The requirement of judicial recusal is based on the constitutional due process right of litigants to have their cases heard by an impartial tribunal.”); Marie McManus Degan, *No Actual*

needed in this area because of “the difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one.”²⁰ Ultimately, the current statutory obligations are more restrictive than due process mandates, requiring justices to lack not only actual bias, but also any appearance of bias.²¹

Under the common law, a federal judge could be disqualified from a case only if he had a direct financial interest in the cause at issue.²² Congress codified this rule in the first judicial disqualification statute in 1792, adding the requirement that a judge recuse himself if he had previously been counsel for one of the parties.²³ Over the next 120 years, the legal standard for recusal was progressively broadened to cover additional situations where a judge might have a conflict of interest.²⁴ Yet statutory requirements for the recusal of Justices remained conspicuously absent.

In 1948, Congress amended § 455 to include “[a]ny justice . . . of the United States,” newly applying the law to Supreme Court justices as well as lower federal judges; every amendment since has maintained this inclusion.²⁵ Still, the statutory recusal standard was subjective, specifically setting the implicated judge’s view as the relevant benchmark for determining whether recusal was proper in any situa-

Bias Needed: The Intersection of Due Process and Statutory Recusal, 83 TEMP. L. REV. 225, 230–36 (2010) (describing cases where the Court has held recusal necessary as a matter of due process).

²⁰ *Caperton*, 556 U.S. at 883.

²¹ 28 U.S.C. § 455 (2006); Sarah M.R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 14 n.64 (2007) (citing RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 2.3.3 (1996)). The Court itself identified three types of impartiality in *Republican Party of Minnesota*: “lack of bias [with respect to] either party . . .,” “lack of preconception [regarding] a particular legal view,” and “openmindedness.” 536 U.S. at 775–78 (2002) (emphasis in original).

²² Richard E. Flamm, *History of and Problems with the Federal Judicial Disqualification Framework*, 58 DRAKE L. REV. 751, 753 (2010).

²³ Virelli, *supra* note 15, at 1200–01. Under then-governing law, a judge was not required to disqualify himself for an interest not specifically covered by the statute. Frost, *supra* note 7, at 539. These rules made it legitimate, in 1803, for then-Chief Justice John Marshall to participate in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), thereby deciding on the legality of a commission that he, in his former governmental role, had authorized and then neglected to deliver. *Id.* at 539 n.31.

²⁴ See Flamm, *supra* note 22, at 753–54 (describing the roots and nature of early judicial disqualification law); Charles Gardner Geyh, *Judicial Disqualification: An Analysis of Federal Law*, FED. JUDICIAL CTR., 5-7 (2d ed. 2010), [http://www.fjc.gov/public/pdf.nsf/lookup/judicialdq.pdf/\\$file/judicialdq.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/judicialdq.pdf/$file/judicialdq.pdf) (last visited Feb. 2, 2014) (outlining the progression of federal judicial disqualification law from the year 1792).

²⁵ Virelli, *supra* note 15, at 1201. The 1948 amendment also extended the disqualification requirement to judges who were related to a party’s lawyer.

tion.²⁶ The predominant approach to recusal at the time was reflected in the “duty to sit,” according to which a judge must preside over an assigned case unless there is an indisputable ground for his disqualification.²⁷

In 1974, Congress reconciled federal law with professional codes that the American Bar Association (“ABA”) and the Judicial Conference of the United States had adopted in an effort to set forth a more objective recusal norm.²⁸ In the amended § 455(a), a “reasonable person” standard replaced the challenged judge’s or Justice’s opinion as the decider on recusal.²⁹ The statute now encompasses a general standard for recusal in § 455(a) and a requirement of recusal in certain enumerated circumstances in § 455(b), stating in relevant part,

26 Prior to the 1974 amendment, § 455 read, “[a]ny justice . . . shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so . . . connected with any party or his attorney as to render it improper, *in his opinion*, for him to sit on the . . . proceeding therein.” Bassett, *infra* note 32, at 672 n.81 (emphasis added).

27 This “pernicious” doctrine may wrongly push the resolution of close issues against recusal, when the presumption should be the opposite. Jeffrey W. Stempel, *Chief William’s Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 814–15, 824, 871 (2009). While judges should not recuse themselves merely to avoid having to decide a time-consuming or challenging case (abdication of the judicial duty requires “at least a colorable ground for disqualification”), they should do so if there is a meaningful doubt of propriety. *Id.* at 824, 871. *But see* Cravens, *supra* note 21, at 40–41 (advocating for a public reason-giving requirement along with fewer allowances for recusal to correct “[t]he current regime, [which] while nominally setting out a duty to sit on cases whenever the rules permit, in fact undermines the meaningful fulfillment of that duty to sit by excusing judges under an appearance standard”). The “duty to sit” is notably distinct from the “rule of necessity.” *See* Stempel, *supra*, at 958 (clarifying the difference between the two).

28 The ABA’s adoption of its Model Code of Judicial Conduct, in 1972, marked the first major clash with the “duty to sit” mindset. *See* Flamm, *supra* note 22, at 757–58 (outlining the status of judicial disqualification law with the inception of the ABA Code of Judicial Conduct in 1972). This code stated that a federal judge should disqualify himself or herself whenever his or her impartiality could “reasonably be questioned.” *Id.* at 757; *See* ABA MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2011), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html (delineating the most current version of the Code). In 1973, the Judicial Conference of the United States adopted a similar code as a set of ethical expectations for the conduct of federal judges. CODE OF CONDUCT FOR UNITED STATES JUDGES (2009), available at <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx> (delineating the most current version of this code). While these codes provide valuable guidelines, they do not govern Supreme Court justices.

29 Flamm, *supra* note 22, at 758–59 (“Amended § 455 was expressly intended to substitute a ‘reasonable person’ standard for the ‘duty to sit’ criterion that had previously been used in determining whether a judge should recuse in a particular factual situation.”); Stempel, *supra* note 27, at 863, 895.

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party . . . ;

(2) Where in private practice he served as lawyer in the matter in controversy . . . or . . . has been a material witness concerning it;

(3) Where [while a government employee he] 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 knows that he . . . or his spouse or minor child . . . has [an] interest . . . that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse . . . [is] a party to the proceeding . . . ; [i]s acting as a lawyer in [it]; . . . [has a related] interest; [or i]s . . . likely to be a material witness in [it].³⁰

The goal behind this change was to rid the law of any semblance of unfairness, so as to enhance the public's confidence in the judiciary.³¹ However, 28 U.S.C. § 455 remains fairly unenforceable against Supreme Court Justices; they are largely free to make their own recusal decisions as they see fit.³² One must therefore ask how effective the amended law has been at ensuring that Justices indeed recuse themselves where, for the sake of legitimacy, they should.

B. *A Need for Reform*

While Supreme Court recusals are not *frequent*, neither are they altogether rare in occurrence. Between the 1946 and 2003 terms, the Supreme Court decided 6815 cases after hearing oral arguments.³³ About twelve percent of these, 817 cases, had recusals that were not due to illness and were not appointment-related (where oral argu-

³⁰ 28 U.S.C. § 455 (1974). The same grounds for recusal appear in Canon 3C of the Judicial Conference's Code of Conduct. *See supra* note 28.

³¹ Flamm, *supra* note 22, at 759. However, even post-1974, federal courts—including the Supreme Court—have effectively invoked the “duty to sit” to justify decisions to stay on close cases, suggesting that it continues to influence recusal decisions despite the change in the statutory language. Stempel, *supra* note 27, at 869–71, 905–07; *see also infra* Part II.B (discussing Justice Scalia's explanation of his participation in *Cheney*).

³² 28 U.S.C. § 455, the only statute governing the recusal of justices, has never been enforced against a Supreme Court Justice. Luke McFarland, *Is Anyone Listening? The Duty to Sit Still Matters Because the Justices Say It Does*, 24 GEO. J. LEGAL ETHICS 677, 682–83 (2011). It can be enforced at the Supreme Court level only by impeaching the erring Justice. Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 692, 698 (2005).

³³ Ryan Black & Lee Epstein, *Recusals and the “Problem” of an Equally Divided Supreme Court*, 7 J. APP. PRAC. & PROCESS 75, 85 (2005).

ments in the case occurred before the Justice was appointed).³⁴ Of those 817 cases, 120 had two recusals and nine had three recusals, resulting in a total of 943 “discretionary” Justice withdrawals over this period.³⁵ Given that recusals occur in a significant proportion of Supreme Court cases, this is an issue that is followed by at least some part of the American population. The Court must therefore avoid the suggestion of anything less than complete integrity on this front.

Though the federal standard for judicial recusal has formally changed from a subjective to an objective one, the process for making a recusal determination in the Supreme Court has changed little. Each Justice assesses his or her own suitability to preside over cases, and a Justice implicated in a motion for disqualification makes the final determination on the matter.³⁶ The other Justices do not formally review that conclusion. Moreover, because the Supreme Court is the highest court in the United States, a Justice’s decision on recusal is not appealable.³⁷

The Court seems to deviate from the objective standard it espouses for lower federal judges³⁸ when applying § 455 to itself, touting

³⁴ *Id.* at 90 n.59.

³⁵ *Id.*; *Supreme Court Ethics: The Need for Greater Transparency in a Justice’s Decision to Hear a Case*, N.Y.C. BAR ASS’N COMM. ON GOV’T ETHICS 37 n.135 (2012), available at <http://www2.nycbar.org/pdf/report/uploads/20072211-SupremeCourtEthics-TheNeedforGreaterTransparencyinaRecusal.pdf>.

³⁶ See Virelli, *supra* note 15, at 1201–06 (suggesting that Congress’s lack of effort to change the recusal process underlines the Justices’ authority to handle recusal independently, and highlighting examples of recusal practice to show that the Justices considered such decisions to be individual both before and after § 455’s modification).

³⁷ See Ross E. Davies, *The Reluctant Recusants: Two Parables of Supreme Judicial Disqualification*, 10 GREEN BAG 2D 79, 87–88 (2006) (highlighting that a Supreme Court Justice’s decision to sit on a case or recuse himself or herself from that case is not subject to review); David Feldman, Note, *Duck Hunting, Deliberating, and Disqualification: Cheney v. U.S. District Court and the Flaws of 28 U.S.C. § 455(a)*, 15 B.U. PUB. INT. L. J. 319, 321, 329–330, 335–37 (2006) (emphasizing that the lack of an appeal remedy for a Supreme Court decision on recusal vitiates the ability of § 455(a) to ensure that an objective standard is applied, and further detailing flaws in the application of this statutory provision to the Court); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 642–43 (1987) (“A comprehensive statute applies to Justices, but [it] may only be applied if the allegedly biased Justice voluntarily chooses to follow the law faithfully. . . . Section 455, as applied to the Supreme Court, borders on a caricature, its only legitimacy deriving from the generally high ethical conduct of the Justices.”).

³⁸ See *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 850, 859–60 (1988) (holding that a judge’s ignorance of a disqualifying circumstance does not preclude reasonable questioning of his impartiality, as “advancement of the purpose of [§ 455(a)]—to promote public confidence in the integrity of the judicial process, . . .—does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew” (citing S. REP. NO. 93-419, at 5 (1973); H. R. REP. NO. 93-1453, at 5 (1974))); *Sao Paulo State of the Federative Republic of Braz. v. Am. Tobacco Co., Inc.*, 535 U.S. 229, 230–33 (2002) (holding that a

each Justice's ability to determine his or her own impartiality and favoring a Justice's remaining on a case rather than resolving any doubts in favor of recusal.³⁹ The Court's freewheeling view of recusal is arguably exemplified by the 1993 Statement of Recusal Policy signed by seven of the nine then-Justices, addressing what they would do when one of their relatives was involved in a case that came before the Court.⁴⁰ The Statement requires recusal only in a fairly narrow sliver of such circumstances, suggesting that policy—rather than the statute itself—provides the justification for the Court's activities in this area.⁴¹

A further problem is that the public is left largely uninformed about the extent to which § 455 and other considerations actually motivate the Justices' decisions in the recusal realm.⁴² In the Court's

judge whose name was *erroneously* tied to a prior case involving some of the same defendants did not have to recuse himself, as § 455(a) requires recusal only "if a reasonable person, *knowing all the circumstances*, would expect that the judge would have" bias or interest in the case). *See also* United States v. Will, 449 U.S. 200, 211–14, 217 (1980) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)) (clarifying that § 455 was not intended to prevent the judiciary from exercising its duty "to say what the law is"; thus, where *all* federal judges have an interest in the outcome of a case, so that § 455 seems to make it impossible to assign any alternate judge to it, the common law's Rule of Necessity supersedes: an implicated judge may then sit on a case notwithstanding a related interest). Justices contend that achieving the clear congressional purpose of § 455(a)—"guarantee[ing] litigants a fair forum in which they can pursue their claims"—and ensuring that important questions are resolved for the public requires the application of the common law's Rule of Necessity. *Id.* at 216–17. For further discussion of these cases, *see* Bassett, *supra* note 32, at 676–78 (outlining the holdings of the seminal cases interpreting section 455).

39 Bassett, *supra* note 32, at 676, 682; *see* N.Y.C. BAR ASS'N COMM. ON GOV'T ETHICS, *supra* note 35, at 21–22 (noting that the Supreme Court's Statement of Recusal Policy "shifts the burden back to the moving party seeking recusal of a Justice under Section 455(b)(5)(ii) to point to a special factor, whereas recusal would be automatic under similar circumstances for other judges"); Frost, *supra* note 7, at 548, 554 (noting that Justices interpret the recusal laws narrowly in applying them to themselves); *infra* Part II.B (discussing Justice Scalia's *Cheney* statement).

40 SUPREME COURT OF THE UNITED STATES, STATEMENT OF RECUSAL POLICY (1993), *available at* http://www.eppc.org/docLib/20110106_RecusalPolicy23.pdf.

41 *See id.*; Virelli, *supra* note 15, at 1188, 1206. As Professor Bassett notes, "[r]ather than applying an objective reasonable person standard on a case-by-case basis, as § 455(a) requires, the Recusal Policy simply reflects the Justices' own sense of what to them would constitute a reasonable basis upon which to question a judge's impartiality and applies that standard across the board." *Id.* at 1206 (quoting Debra Lyn Basset, *supra* note 32, at 681 (quoting Sherrilyn A. Ifill, *Do Appearances Matter? Judicial Impartiality and the Supreme Court in Bush v. Gore*, 61 MD. L. REV. 606, 625–26 (2002))).

42 *See* Frost, *supra* note 7, at 570 n.190, 580 (explaining that Justices recused themselves in 500 cases over about five years, most of which were not explained publicly; as of 2005, Justice Ginsburg recused herself an average of seven times per year) (citing Tony Mauro, *Furor Over Scalia-Cheney Trip Casts Light on Murky World of Recusals*, 175 N.J. L.J. 732 (2004)).

October 2011 term, for instance, there were seven individual recusals in a total of seventy-six final decisions.⁴³ None of these were followed by any published explanation of the implicated Justice's rationale.⁴⁴

Federal law contains no requirement for Justices to publish any sort of opinion or explanation regarding their decisions on recusal. Accordingly, the Court tends not to share its reasoning; "[t]he public is routinely informed only that Justice X took no part in the consideration or decision regarding a case," with citizens left to wonder how, and if, that decision was tied to the impartiality requirement.⁴⁵ A Justice may even choose to preside over a case notwithstanding a motion for his or her disqualification, without giving any rational explanation for deciding to ignore the motion's plea. This silence hardly inspires much confidence in the Justices' sincerity—deserved or not. Even without limiting a Justice's authority to decide on his or her own recusal (which could fuel constitutional concerns, as discussed below),⁴⁶ ensuring some explanation of *why* a given decision was made would itself help restore some confidence in the Court.

II. THE VALUE IN EXPLAINING RECUSAL DECISIONS

The lack of reasoned explanations for Supreme Court Justices' recusal decisions, combined with each decision's being made by the very Justice whose participation in the case is at issue,⁴⁷ dispenses with

See also Grant Hammond, JUDICIAL RECUSAL: PRINCIPLES, PROCESS, AND PROBLEMS 64–65 (2009).

43 *Stat Pack for Oct. Term 2011*, SCOTUSBLOG (Sept. 25, 2012) 1, 47-55, http://sblog.s3.amazonaws.com/wp-content/uploads/2013/03/SCOTUSblog_Stat_Pack_OT11_Updated.pdf

44 This fact was determined via a search of each of the cases on WestLaw Next. Supreme Court Recusal, WESTLAW NEXT, <http://lawschool.westlaw.com> (follow "Westlaw Next" hyperlink; then search "supreme court recusal").

45 Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification—and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoilation, and Perceptual Realities*, 30 REV. LITIG. 733, 799–800 (2011). *See, e.g.*, *Otey v. Stenberg*, 512 U.S. 1279, 1279 (1994) ("Justice Breyer took no part in the consideration or decision of this application and this petition."); *Craven v. Cobell*, 133 S. Ct. 543, 544 (2012) ("The Chief Justice and Justice Kagan took no part in the consideration or decision of this petition.").

46 *See also* Bassett, *supra* note 32, at 688.

47 *See Examining the State of Judicial Recusals After Caperton v. A.T. Massey: Hearing Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 22, 29 (2009) (testimony of Charles G. Geyh, Assoc. Dean & Prof. of Law, Ind. Univ.) ("[W]hen a party is concerned that a judge appears to be too biased to be fair . . . it is odd in the extreme to have that issue resolved by the very judge who is allegedly too biased to be fair."). Self-assessment is particularly hard for judges, who are thus asked to evaluate whether they have a bias that every judge swears to avoid. *See* Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 561 (1994) ("To permit

key procedural elements that are widely believed to maintain the legitimacy of adjudicatory processes.⁴⁸ Judges' common failure to explain their decisions on recusal has also been said to "offend[] . . . a basic tenet of liberal democracy—that officials must give public reasons for their actions in order for those actions to be legitimate."⁴⁹ Requiring that Justices explain their independent decisions on recusal would be a relatively non-intrusive but valuable way to improve the present situation.

A. *Benefits of Reason-Giving Exceed Any Potential Drawbacks*

Giving reasons—"the explicit act of offering a justification or explanation for the result reached"⁵⁰—has numerous benefits in the context of Supreme Court recusal. First, it shows that the Justice has heard the litigants' arguments and that the decision was not arbitrary or based on illegitimate preferences.⁵¹ For example, as two scholars have written,

[T]he Justices would further the rule of law by explaining their decisions to stay on the case. Their failure to do so further removes the Court from the American people and will make it much easier for the losing side to argue that the eventual decision resulted more from political and partisan concerns than from good-faith legal analysis.⁵²

The statutory standard for recusal, after all, is "appearance" of partiality; determining such appearance arguably requires looking to people

the judge whose conduct or relationships prompted the motion to decide the motion erodes the necessary public confidence in the integrity of a judicial system which should rely on the presence of a neutral and detached judge to preside over all court proceedings.").

48 Frost, *supra* note 7, at 536, 555–56 (listing procedural aspects needed for a judicial decision to be considered legitimate: "(1) litigants, not courts, initiate disputes; (2) the disputes are presented through an adversarial system . . . ; (3) a rationale must be given for decisions; (4) the decision must refer to, and be restricted by, an identifiable body of law; and (5) the decisionmaker must be impartial"). Recusal, unlike most adjudicatory processes, does not follow these procedures. *Id.* at 557. See also Stempel, *supra* note 45, at 737 ("A strengthened proceduralist approach to judicial disqualification is an important and practically necessary means of helping to enhance judicial impartiality and public confidence in the courts.").

49 James Sample & David E. Pozen, *Making Judicial Recusal More Rigorous*, 46 JUDGES' J. 17, 22 (2007).

50 Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 636 (2005).

51 Frost, *supra* note 7, at 560–62. See also Paul D. Carrington & Roger C. Cramton, *Original Sin and Judicial Independence: Providing Accountability for Justices*, 50 WM. & MARY L. REV. 1105, 1106 (2009) (noting that "published decisions and opinions explicating judges' rulings [serve primarily] to manifest their disinterest" to the parties being judged and their lawyers).

52 Ifill, *supra* note 19, at 341.

besides the challenged Justice.⁵³ Justices' provision of reasons would facilitate such evaluation and thus also the proper application of § 455(a).⁵⁴

Second, Justices' explanations of their decisions on recusal would ensure greater public understanding of why those decisions were made. By shining some light into the "black box" of Justices' deliberations on this important issue, the provision of reasons would ease discomfort and make people more willing to accept the result, whatever it was.⁵⁵

Third, requiring Justices to provide such explanations would ensure that they are not guided by gut reactions or unconscious biases but rather take the time for rational deliberation.⁵⁶ Also, the publication of reasons would enhance transparency, illuminating any potential indications that a Justice should not be involved in deciding a case.⁵⁷ "In the rare instances where a Justice is inclined to participate in a case where ethical constraints argue against doing so, the requirement of a writing would create valuable counterpressure."⁵⁸

Finally, routinely published reasons would commit the Court to general principles governing categories of recusal issues, establishing precedents to guide future decisions that would promote fairness and predictability by placing each decision within some recognizable context.⁵⁹ At present, not only are there few explanations of recusal deci-

53 Letter from Mark N. Aaronson, Professor of Law, Univ. of Cal. Hastings, et. al to Chairmen and Ranking Minority Members of the H. Judiciary and S. Judiciary Comm., Changing Ethical and Recusal Rules for Supreme Court Justices (Mar. 17, 2011), available at http://www.afj.org/judicial_ethics_sign_on_letter.pdf.

54 The Court has been accused of repeatedly distorting the application of § 455, not interpreting it as Congress intended. See, e.g., *Examining the State of Judicial Recusals* (Geyh), *supra* note 47, at 27 (decrying "judicial interpretation[s] that contort the rules" of recusal in the face of Congress's maneuvers to make these requirements more stringent); Frost, *supra* note 7, at 533-34 ("[E]ach time the standard for recusal is broadened by Congress, it is narrowed soon thereafter as members of the judiciary apply it to themselves.")

55 See Bassett, *supra* note 32, at 696-97 ("The openness associated with disclosures tends to generate positive reactions even when there is disagreement with the result.")

56 Frost, *supra* note 7, at 560-62 (arguing that the disclosure of the reasoning behind the judiciary's opinion is a source of its legitimacy); N.Y.C. BAR ASS'N COMM. ON GOV'T ETHICS, *supra* note 35, at 36-37 (pointing out that explaining their reasoning forces Justices to confront any unconscious biases); Stempel, *supra* note 45, at 799 ("Recusal practice would be enhanced by reasoned opinions that force judges to give greater reflection to an issue and reduce the chance that decisions will be made hastily or reflexively.")

57 Cravens, *supra* note 21, at 36.

58 N.Y.C. BAR ASS'N COMM. ON GOV'T ETHICS, *supra* note 35, at 34.

59 Frost, *supra* note 7, at 560-65, 589 (promoting the justification of recusal decisions as a means of rationally constraining judicial discretion); Schauer, *supra* note 50, at 649-52 ("[J]ust as making a promise induces reasonable reliance, giving a reason creates a prima facie commitment on the part of the reason giver to decide subsequent cases in accord-

sions overall, but there is also an imbalance in the explanations that are provided, with more published in defense of a Justice's decision to remain on a case (after a motion to disqualify) than are published justifying a decision to recuse.⁶⁰ Consequently, a questioning Justice has less of a foundation to look towards in considering whether to answer a question on recusal in the affirmative.⁶¹

A few non-Constitution-based counterarguments to requiring explanations of recusal decisions deserve mention. First, Justices might give a reason that is legally sufficient but still masks involved bias.⁶² But, for the purpose of ensuring judicial impartiality, the outcome is valid as long as it is supported by some adequate legal reason.⁶³ The risk remains that the reasoning would not yield insight into Justices' true motivations, but it seems highly unlikely that such pretense would occur often enough to eliminate the value in such a proposal. At least, if some reason must be provided, there will be something to evaluate.

Others worry that if Justices do not want to explain their recusal decisions, they may satisfy the reasons requirement by writing a mere cursory statement such as, "I am not biased."⁶⁴ That possibility also does not eliminate the value of a reasons requirement, though, as at least some Justices would provide better explanations. Moreover, the structure of the requirement enacted may be able to limit the provision of explanations that add no value.

ance with that reason."); *See also* Stempel, *supra* note 45, at 800 ("[T]he regular announcement of reasons for voluntary recusals would help to establish working guidelines on the issue for litigants, counsel, and the public.").

60 Frost, *supra* note 7, at 570.

61 *See* Flamm, *supra* note 22, at 760–61 ("[E]xisting judicial disqualification does not provide much guidance . . . as to whether disqualification is warranted in a particular case."); Frost, *supra* note 7, at 589–90 (arguing that a reasons requirement will enable a judge considering recusal to better understand when colleagues have decided similarly and therefore make it easier for him or her to accept doing so).

62 Cravens, *supra* note 21, at 36–37 (noting the possibility of pretext).

63 *Id.* at 28–29, 37–38. Since we cannot know a Justice's "secret reasons" for reaching a given outcome, we must rely on evaluating the legitimacy of the reasoning as he or she explains it. *Id.* at 39. A judge who recuses himself or herself should be required to explain that decision; a judge who decides to sit on the case should be required to explain the legal reasoning underlying the final judgment. *Id.* at 5.

64 Virelli, *supra* note 15, at 1224–25; *see* N.Y.C. BAR ASS'N COMM. ON GOV'T ETHICS, *supra* note 35, at 38 (arguing that such an explanation is insufficient to allay the concerns of § 455 and the ethical guidelines, which center on *appearance* of bias). *See also* Editorial, *Supreme Court Recusals*, WASH. POST (Sept. 28, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/27/AR2007092701819.html> (explaining that one of the reasons that Justices typically do not explain their recusal decisions is the concern that doing so could enable future parties to invent conflicts so as to force a particular Justice to step down from a case).

Finally, reason-giving could shift the focus from particular cases by generalizing recusal decisions.⁶⁵ However, Justices have previously shown themselves capable of determining when a particular set of circumstances does not adequately match an existing precedent. The recusal realm should prove no different.

According to Chief Justice John Roberts, the Justices use the Judicial Conference's Code of Judicial Conduct as guidance in making decisions on recusal, even though it does not bind them; they also discuss these questions amongst themselves in order to benefit from each other's wisdom and objectivity.⁶⁶ If that is true, it is all the more incumbent upon the Justices to publish explanations of their ultimate decisions, so as to reassure the public that they *do* carefully and properly think through these matters.

Despite the clear benefits of explaining recusal determinations publicly, the Supreme Court does not seem inclined to change its current approach to recusal decisions. As the Chief Justice stated in 2011, "I have complete confidence in the capability of my colleagues to determine when recusal is warranted."⁶⁷ Several Justices also testified about judicial ethics and recusal during two Congressional hearings earlier that year, reinforcing the Court's feeling of not being restrained in its recusal practice and the notion that its freedom in this area is not improper.⁶⁸ Back in 1972, then-Chief Justice Rehnquist, in publishing the reasons for his decision to remain on a case in which his impartiality was debated, noted that while the case's "peculiar circumstances" made such explanation appropriate there, "[i]n so doing [he] d[id] not wish to suggest that [he] believe[d] such a course would be desirable or even appropriate" in other cases.⁶⁹ Given this longstanding Court support for a norm of non-explanation of recusal

65 Schauer, *supra* note 50, at 658–59 (arguing that reason-giving does not always achieve the desired results of decision-making).

66 John Roberts, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4–5 (2011), available at www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

67 *Id.* at 10. In this vein, the Court may oppose a requirement to explain its recusal decisions because this would imply that a Justice's bare decision is questionable: "reasons are what we typically give to support what we conclude precisely when the mere fact that we have concluded is not enough. And reasons are what we typically avoid when the assertion of authority is thought independently important." Schauer, *supra* note 50, at 637.

68 Virelli, *supra* note 15, at 1207 (citing the testimonies of Justices Stephen Breyer and Anthony Kennedy at an April 2011 hearing before the Subcommittee on Financial Services & General Government).

69 *Laird v. Tatum*, 409 U.S. 824, 824 (1972). *Contra* *Pub. Utils. Comm'n of D.C. v. Pollak*, 343 U.S. 451, 466–67 (1952) (explaining Justice Felix Frankfurter's decision to recuse himself, where he stated, "I am explicit as to the reason for my non-participation in this case because I have for some time been of the view that it is desirable to state why one takes himself out of a case.").

decisions,⁷⁰ the question becomes whether Congress can impose a reasons requirement without infringing on the Court's constitutional independence.

B. In the Justices' Own Words

Supreme Court Justices rarely publish reasons for their recusal decisions. Yet on the occasions when they have done so, these explanations have both offered insight into how the Justices interpret § 455 as it applies to themselves and proved useful in evaluating the validity of the corresponding decision.

In *Microsoft Corporation v. United States*, then-Chief Justice Rehnquist added to the Court's definition of the perspective from which objectivity must be evaluated under § 455⁷¹ in explaining his decision not to recuse himself.⁷² One of the parties in the case had retained a law firm at which Rehnquist's son was a partner working on related cases.⁷³ The Justice wrote that his presiding was consistent with § 455(b)(5)(iii) because there was no reasonable basis to find that his son's or the firm's interests would be substantially affected by these particular proceedings.⁷⁴ Neither did his participation violate § 455(a) because the inquiry as to whether "impartiality might reasonably be questioned" is objective, "made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances."⁷⁵ Thus, the "reasonable person" standard for impartiality requires not only some distance from the affected Justice, but also full awareness of the facts "as they existed, and not as they were surmised or reported."⁷⁶

The most recent Court explanation of a recusal decision was Justice Scalia's rationalization of why he would not withdraw from *Cheney v. United States District Court*.⁷⁷ The plaintiffs moved for Scalia to disqualify himself based on his recently attending a duck-hunting trip

⁷⁰ See McFarland, *supra* note 32, at 694 ("[T]he Court seems unwilling on its own to address a recusal system that calls into question its impartiality and credibility."); Stempel, *supra* note 37, at 643 ("[C]hange is doubtful, . . . in light of the Court's historical inaction.")

⁷¹ See *infra* note 38.

⁷² 530 U.S. 1301, 1301 (2000) ("I have decided that I ought not to disqualify myself from these cases."). Rehnquist noted that his decision was informed by the relevant legal authorities and discussion with his colleagues. *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 1301–02.

⁷⁵ *Id.* at 1302–03.

⁷⁶ *Cheney v. U.S. Dist. Court for the D.C.*, 541 U.S. 913, 914 (2004) (citing *Microsoft*, 530 U.S. at 1301).

⁷⁷ *Id.* at 913–16.

with U.S. Vice President Richard Cheney, one of the defendants.⁷⁸ Scalia denied the motion and issued a lengthy explanation for so doing.

Scalia noted that the trip was scheduled long before the cert petition in the case was even filed; moreover, his impartiality could *not* “reasonably be questioned” under § 455(a) as he was never alone with Cheney for more than a brief and unintentional instance, and they never spoke about this case.⁷⁹ That the Justice might be a friend of one of the parties (Cheney) is not a ground for recusal, Scalia wrote, where the party is being sued in his official capacity rather than his individual one.⁸⁰ He also harshly criticized the claim that he must recuse because the press demanded it, noting that many of the publications cited in support of the motion lacked the correct facts and legal principles upon which objectivity must be determined.⁸¹

In an oft-criticized move, Justice Scalia provided a policy justification for his decision as well.⁸² He stated that, unlike recusal of a lower court judge who can be replaced, recusal of a Justice undesirably leaves an even number presiding over a case, thus potentially making the Court unable to definitively decide a case before it on appeal.⁸³ Such political concerns are separate from the concern at the heart of § 455—eliminating judicial partiality from tainting the decisions of cases. Yet while decrying excessive recusals, Scalia acknowledged that recusal was sometimes necessary, emphasizing that he had recused himself before, and would do so again, where that course was required.⁸⁴

78 *Id.* at 913–14.

79 *Id.* at 915–16.

80 *Id.* at 916–20. Scalia also noted that his flight on the government plane did not cost the government anything, and moreover that social courtesies such as this—when provided by a party in his official capacity—have not been previously considered grounds for recusal. *Id.* at 920–21.

81 *Id.* at 923–24 (citing *Microsoft*, 530 U.S. at 1302) (explaining that the reasonable observer must be “informed of all the surrounding facts and circumstances”).

82 *Id.* at 915–16.

83 *Id.* Some insist that the Court, as exemplified here, prioritizes policy concerns—a version of the “duty to sit”—over § 455(a)’s objective standard, congressional intent, or lower court interpretations of § 455. Virelli, *supra* note 15, at 1203, 1205–06; Feldman, *supra* note 37, at 337. This view is bolstered by the Chief Justice’s, noting that, “if a Justice withdraws from a case, the Court must sit without its full membership. . . . [E]ach Justice has an obligation to the Court to be sure of the need to recuse before deciding to withdraw from a case.” Roberts, *supra* note 66, at 9.

84 *Cheney*, 541 U.S. at 916 (citing Scalia’s recusal in *Elk Grove Unified Sch. Dist. v. Newdow*, 540 U.S. 945 (*cert. granted*, 2003) because of his connection to the school that was a party in the case).

Justice Scalia's reason-giving in *Cheney* provides a basis for others to understand why he chose to resolve the recusal question there as he did. This fairly minor action, if engaged in more regularly, would enable Congress and others to better understand what drives the Court in the recusal area and perhaps to address those motives if they are improper.⁸⁵ Various scholars have suggested that Congress should require the Justices to issue written opinions on their recusal decisions, at least when the decision is to deny a motion for disqualification.⁸⁶ Moreover, such a requirement—even if imposed by Congress rather than internally by the Court itself—is unlikely to raise constitutional concerns.⁸⁷

C. *Proposals for Change*

In March 2011, U.S. Congressman Christopher Murphy introduced H.R. 862, the Supreme Court Transparency and Disclosure Act, as a proposed addition to § 455 and other existing ethics statutes.⁸⁸ The bill was motivated in part by a letter that 138 law professors from across the United States sent to the House and Senate Judiciary Committees, urging Congress to develop new legislation to “protect the integrity of the Supreme Court” by reforming applicable recusal requirements.⁸⁹ The bill garnered thirty-two cosponsors but ultimately languished. Had it been enacted, it would have been the first official mechanism to oversee the Court's compliance with recusal laws and rules.⁹⁰

85 The Court has acknowledged that enforcing § 455 (albeit with respect to lower court judges) may prevent later substantive injustice by motivating judges and parties to examine more scrupulously any potential grounds for disqualification and to disclose them upon discovery. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 868 (1988). Requiring reason-giving is less than full enforcement of § 455 but may still help achieve the same benefits.

86 *See, e.g.*, Aaronson, *supra* note 53, at 2–3 (urging Supreme Court Justices to publish written opinions when denying recusal motions); Lori Ann Foertsch, *Scalia's Duck Hunt Leads to Ruffled Feathers: How the U.S. Supreme Court and Other Federal Judiciaries Should Change Their Recusal Approach*, 43 HOUS. L. REV. 457, 493–94 (2006) (suggesting that written explanations should be uniformly required, and explaining the numerous benefits of such a reform).

87 *See, e.g.*, N.Y.C. BAR ASS'N COMM. ON GOV'T ETHICS, *supra* note 35, at 27–28, 35 (distinguishing other H.R. 862 proposals as constitutionally dubious and arguing that Congress can mandate an explanation of a decision on withdrawal since it is already seen as authorized to proscribe the circumstances in which Justices should withdraw).

88 Supreme Court Transparency and Disclosure Act, H.R. 862, 112th Cong. (2011); N.Y.C. BAR ASS'N COMM. ON GOV'T ETHICS, *supra* note 35, at 4–5.

89 Aaronson, *supra* note 53, at 1.

90 N.Y.C. BAR ASS'N COMM. ON GOV'T ETHICS, *supra* note 35, at 19–20. Representative Murphy justified his bill, stating that “[w]ithout any real disclosure and transparency re-

H.R. 862 proposed four key ways for Congress to modify existing recusal practices.⁹¹ First, the bill would have imposed the Judicial Conference’s Code of Conduct for United States Judges—which currently applies to all lower federal court judges—on Supreme Court Justices as well.⁹² Second, it would have compelled the establishment of a process for reviewing any allegations that a Justice had violated this Code.⁹³ Third, it would have required each Justice to publicly disclose the reasoning behind his or her recusal or refusal to withdraw in response to a motion to disqualify.⁹⁴ Finally, it would have required implementation of a process for reviewing Justices’ decisions in this area.⁹⁵

This past August, a similar bill was re-introduced in both houses as the Supreme Court Ethics Act of 2013.⁹⁶ This bill aims to subject the Justices to a code of ethics that includes the five canons of the Judicial Conference’s Code of Conduct for United States Judges, “with any amendments or modifications thereto that the Supreme Court determines appropriate.”⁹⁷ Critically, it finds that “Congress has the authority to regulate the *administration* of the Supreme Court,” while recognizing the need to be “mindful of [the Justices’] preeminence in the Federal judiciary.”⁹⁸ Yet, like its predecessor, the bill has not advanced in the legislative process.⁹⁹

Changes proposed by Congress—including a requirement that Justices give reasons for their recusal decisions—have been suggested

quirements, without any enforceability on the code of conduct, we’re just left at believing the word of the justices.” Nina Totenberg, *Supreme Court Ethics and Reviewing the Health Law*, NPR (Aug. 17, 2011) (Transcript), <http://www.npr.org/2011/08/17/139721843/in-top-court-anticipated-health-law-review-raises-ethics-questions>.

91 Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Cong. (1st Sess. 2011), <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.862>:

92 *Id.* § 2.

93 *Id.*

94 *Id.* § 3.

95 *Id.*

96 Supreme Court Ethics Act of 2013, H.R. 2902, 113th Cong. (1st Sess. 2013), <http://thomas.loc.gov/cgi-bin/query/z?c113:H.R.2902>; Supreme Court Ethics Act of 2013, S. 1424, 113th Cong. (1st Sess. 2013), <http://thomas.loc.gov/cgi-bin/query/z?c113:S.1424>:

97 *Id.* § 3.

98 *Id.* § 2 (emphasis added).

99 *See also* H. RES. 377, 113th Cong. (1st Sess. 2013), <http://thomas.loc.gov/cgi-bin/query/z?c113:H.RES.377> (expressing “the sense of the House of Representatives that the Justices of the United States Supreme Court should make themselves subject to the existing and operative ethics guidelines set out in the Code of Conduct for United States Judges,” for the sake of judicial integrity).

via other avenues as well.¹⁰⁰ Additional proposals for improving the Court's approach to recusal have also been made, in an effort to enhance fairness and exude a more positive image of the Court.¹⁰¹ There is significant popular and political support for such measures.¹⁰² Yet any change involving legislative action must also overcome the hurdle of constitutionality: Congress must be legally permitted to impose on the judiciary branch the requirements created.

III. CONSTITUTIONAL CONCERNS

The primary constitutional argument against Congress's involvement in Justices' recusals is that separation of powers prohibits the legislature from encroaching on the judiciary.¹⁰³ Since recusal, unlike

100 See N.Y.C. BAR ASS'N COMM. ON GOV'T ETHICS, *supra* note 35, at 5, 27–28, 36–37 (advocating for written opinions explaining a Justice's decision to recuse or sit on the case); Editorial, *A Way Forward on Judicial Ethics*, N.Y. TIMES, Mar. 11, 2012, www.nytimes.com/2012/03/12/opinion/a-way-forward-on-judicial-ethics.html?_r=0&emc=eta1 (illustrating judicial recusal procedure exercised in a case involving Judge Loren Smith).

101 See, e.g., Bassett, *supra* note 32, at 664–66, 694–97 (proposing that the Court encourage the filing of recusal motions and have each Justice regularly submit “statements of interest” publicly disclosing information that might be considered relevant to his or her qualifications to sit on a case, regardless of the Justice's own view on the matter, to enhance public confidence in the Court without preventing the Justices' participation in most cases); Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 168–70, 173–78 (2004) (proposing an internal Court process by which non-implicated Justices would review any Justice's decision not to recuse, and a reasoned explanation of the final decision would be published, as well as replacements for recused Justices to minimize the impact of avoidance of an equally divided Court on a Justice's decision of whether to recuse); Stempel, *supra* note 45, at 739, 794–97, 799–800 (urging that recusal questions be decided by the entire Court—rather than the challenged Justice—to maintain the requisite objectivity, and that the Justice to whom a disqualification motion is directed be kept unaware of which party made it). See also Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181, 207–14 (2011) (advocating amendments to the Code of Conduct to make the language more similar to that of the ABA Model Code of Judicial Conduct and a presumption against the duty to sit, among several proposed changes to the pre-existing recusal standard framework).

102 See N.Y.C. BAR ASS'N COMM. ON GOV'T ETHICS, *supra* note 35, at 35 (“[T]here is significant support for public disclosure of a Justice's decision to recuse or to deny a motion to disqualify.”); SUPREME COURT RECUSAL PROCESS IN NEED OF TRANSPARENCY AND ACCOUNTABILITY, 157 CONG. REC. E1264, 2011 WL 2651751 (documenting speech by Hon. Louise M. Slaughter with Alliance for Justice report to that effect).

103 Another common argument is that because the Constitution creates only “one supreme Court,” Congress cannot establish mechanisms for replacing disqualified Justices as it can for lower court judges. John Gibeaut, *Sitting This One Out: Health Care Case Again Raises the Controversy of Justices' Recusal*, ABA J. (2012). Also, “one court” arguably means that no one else can act as a Justice, suggesting that any external body created to review Justices' recusal decisions would be unconstitutional. *Id.*

impeachment, is not enumerated in the Constitution as a congressional power over the judiciary, it might be precluded from Congress's reach.¹⁰⁴ Congressional regulation of recusal could also be institutionally intrusive, by enabling the legislature to determine the make-up of the Court bench on a case-by-case basis.¹⁰⁵ On the other hand, if Congress cannot use the authority granted to it in the Necessary and Proper Clause¹⁰⁶ to set stricter recusal standards for the Court, it is unclear how the fairness of that process can be ensured.

The first three Articles of the Constitution divide the main functions of the legislative, executive, and judicial branches respectively, dictating that the primary authority over each of these types of governmental duties belongs to the corresponding branch.¹⁰⁷ This separation was intended to protect against any of the branches gaining too much power, to the detriment of the rest of the government and of the American people. At the same time, maintaining a harmonized society requires some coordination across the federal government.¹⁰⁸ Chief Justice Roberts recently reaffirmed that “the three branches are not hermetically sealed from one another.”¹⁰⁹ Thus, critical to analyzing the constitutionality of recusal reform proposals is determining what comprises those judicial powers upon which Congress may not encroach.

Article III vests the “judicial Power of the United States” in “one Supreme Court” and whatever inferior courts Congress establishes, allowing federal judges to preside over cases of law and equity where their courts have jurisdiction.¹¹⁰ Article I grants a broader swath of power to Congress, authorizing it “to make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States,

104 Virelli, *supra* note 15, at 1211–12 (citing the statutory interpretation canon of “to state the one is to exclude the other”).

105 *Id.*

106 U.S. CONST. art. I, § 8, cl. 18.

107 Virelli, *supra* note 15, at 1192–93; *see also* N.Y.C. BAR ASS'N COMM. ON GOV'T ETHICS, *supra* note 35, at 28, n.97 (“The Constitution enumerates and separates the powers of the three branches of Government in Articles I, II, and III, and it is this ‘very structure’ of the Constitution that exemplifies the concept of separation of powers.” (quoting *Miller v. French*, 530 U.S. at 341 (2000))).

108 Linda D. Jellum, “Which Is To Be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLAL. REV. 837, 857 n.119, 898 (2009) (positing that the U.S. Constitution’s rejection of a strict separation of powers provision such as was included in some of the Colonies’ early constitutions suggests that a more flexible approach was favored).

109 *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011).

110 U.S. CONST. art. III, § 1.

or in any Department or Officer thereof.”¹¹¹ To what extent can that power overlap with, or “trespass” onto, the judiciary’s?

Ultimately, congressional acts affecting the Court will be permissible only if they do not impede upon “inherent” judicial power:¹¹² that conduct that the Constitution reserves to the judiciary in addition to, or at the expense of, any congressional or executive authority.¹¹³ Since the Constitution’s language does not detail the scope of this power, examining other contexts in which inherent judicial functions have been elucidated helps clarify to what degree it may include the Justices’ authority to resolve questions of their own recusals.¹¹⁴

A. *Inherent Powers*

Inherent judicial powers, or core judiciary functions, can be understood as those absolutely required for federal courts to accomplish the duties assigned to them by the Constitution.¹¹⁵ In *Link v. Wabash Railroad Company*, the Supreme Court upheld the dismissal of a suit that was executed without prior notice or hearing when petitioner’s counsel failed, without good reason, to attend a pretrial conference.¹¹⁶ Affirming the decisions below, the Court held the dismissal an exercise of the district court’s inherent power, noting that the authority to appropriately engage in such action is “necessary.”¹¹⁷ Courts’ ability to dismiss cases upon their own determination for failure to prosecute was recognized as a power “governed not by rule or statute but by the control necessarily vested in courts to manage their

111 U.S. CONST. art. I, § 8, cl. 18; *see also* Virelli, *supra* note 15, at 1213 (“[C]ourts and commentators have struggled to reconcile th[e] seemingly broad grant of congressional authority with the vesting clauses of Articles II and III, which unequivocally assign . . . the ‘judicial Power’ to the . . . Supreme Court.”).

112 *Michaelson v. United States ex rel. Chi. St. Paul, Minn. & Omaha Ry. Co.*, 266 U.S. 42, 65 (1924) (averring that a law that “materially interferes with the inherent power of the courts . . . is therefore invalid”). *But see* *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991) (holding that though Congress may not encroach upon the Supreme Court’s use of its inherent power, “the exercise of the inherent power of lower federal courts can be limited by statute and rule”).

113 Virelli, *supra* note 15, at 1213 (discussing the difficulty presented by the question of which branch of government possesses constitutional authority over Supreme Court recusals).

114 *Id.* at 1193–94 (citing U.S. CONST. art. III).

115 *See Michaelson*, 266 U.S. at 65 (describing inherent power as “essential to the administration of justice”).

116 370 U.S. 626, 628–30 (1962).

117 *Id.* at 629–30, 633. The Seventh Circuit Court of Appeals’ decision on the case is at 291 F.2d 542, 542 (1961).

own affairs so as to achieve the orderly and expeditious disposition of cases.”¹¹⁸

There is no universal definition of what comprises core judicial powers.¹¹⁹ Among the powers acknowledged as inherent to the judiciary are regulating the conduct of lawyers and providing tools for docket management by imposing sanctions on people who “abuse the judicial process,” finding them in contempt,¹²⁰ or otherwise penalizing them.¹²¹ Establishing reasonable counsel fees in certain cases has also been deemed an inherent power,¹²² as well as taxing costs in appellate courts if no statute exists on the matter.¹²³

Over the course of U.S. history, standards have been developed for judging the constitutionality of specific types of congressional involvement in court activities. In *Hayburn’s Case*, three federal circuit courts challenged the Invalid Pensions Act of 1792, insisting that the Constitution protected them from having to bear the non-judicial responsibility it imposed on them and preserved their decisions from

118 *Link*, 370 U.S. at 630–31 (citing *Redfield v. Ystalyfera Iron Co.*, 110 U.S. 174, 176 (1884) (acknowledging this particular power)). See also *Michaelson*, 266 U.S. at 63–64 (defining a court’s “inherent” power as that “derived from the Constitution as a part of its judicial power; . . . and unalterable by congressional legislation”).

119 Inherent powers have been called “nebulous,” with their boundaries described as “shadowy.” *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 561 (3d Cir. 1985).

120 See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 799 (1987) (“[W]hile the exercise of the contempt power is subject to reasonable regulation, the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative.”) (internal quotation marks and citation omitted).

121 *Eash*, 757 F.2d at 561. See, e.g., *Levine v. United States*, 362 U.S. 610, 615 (1960) (noting that the power to convict for criminal contempt is inherent to federal courts). Courts have also disbarred, suspended, or reprimanded misbehaving attorneys under the inherent power. See Michael S. Cooper, Comment, *Financial Penalties Imposed Directly Against Attorneys in Litigation Without Resort to the Contempt Power*, 26 UCLA L. REV. 855, 856 (1979) (describing some courts’ tendencies to summarily assess “financial sanctions directly against errant counsel”); Comment, *Involuntary Dismissal for Disobedience or Delay: The Plaintiff’s Plight*, 34 U. CHI. L. REV. 922, 937 n. 96 (1967) (outlining the various sanctions imposed by courts pursuant to their inherent authority to discipline members of the bar); accord *Ex parte Wall*, 107 U.S. 265, 288–89 (1883) (“[T]he action of the court in cases within its jurisdiction is due process of law. . . . [A]n attorney’s calling or profession is his property. . . . he may be excluded from the pursuit of it by the summary action of the court of which he is an attorney.”). And courts have declared “ready for trial” attorneys who choose not to appear at docket call, even though this may lead to automatic entry of a default judgment. See *Williams v. New Orleans Pub. Serv., Inc.*, 728 F.2d 730, 732 (5th Cir. 1984) (“When [the attorney for the defendant] failed to appear, . . . the Court issued an order to show cause why [attorney for the defendant] should not be held in contempt, [and] ordered that he appear in Court . . .”).

122 *Eash*, 757 F.2d at 561 (citing *Schlesinger v. Teitelbaum*, 475 F.2d 137, 138, 142 (3d Cir. 1973)). The Third Circuit broke down “inherent powers” into categories by allowable level of congressional involvement. See *id.* at 562–64.

123 See *Id.* at 561 (citing *Island Dev. Co. v. McGeorge*, 37 F.2d 345, 345 (3d Cir. 1930)).

the external review it authorized.¹²⁴ The matter dissipated before the Supreme Court could rule on the Act's constitutionality, but three circuit courts, hosting five of the six then-Justices in their circuit-riding duties, held it unconstitutional.¹²⁵ The Court later found accordingly in another case, stating that judgments properly issued under Article III "may not lawfully be revised, overturned or refused faith and credit by another Department of Government."¹²⁶

In *United States v. Klein*, the Court held that a statute prescribing rules of decision in particular cases pending before federal courts was an unconstitutional invasion of the judiciary's role.¹²⁷ Years later, the Court noted the limits of that holding, concluding in *Miller v. French* that a statutory provision placing a deadline on the issuance of a Court judgment did not qualify as such a rule of decision.¹²⁸ Specifying an amount of time in which the Court must render its ruling does not encroach on the judiciary's core decision-making function.¹²⁹ Critically, the congressional acts at issue in these two cases differed in the extent to which they dictated the substance of the Court's judgment. In *Klein*, Congress was directly telling the Court how to do its job—adjudication of particular cases—whereas in *Miller*, it was merely setting deadlines, which are much more clearly a procedural matter.

Other cases further helped denote the extent of federal courts' immunity from congressional dictates. In *Plaut v. Spendthrift Farm, Inc.*, the Supreme Court held a provision of the Securities Exchange Act unconstitutional to the extent it required federal courts to reopen final judgments.¹³⁰ The Court found that the section of the Act having that effect "exceeded [Congress's] authority by requiring the federal courts to exercise '[t]he judicial Power of the United States,' . . . in a manner repugnant to the text, structure, and traditions of Article III."¹³¹ Article III was crafted to give the federal judici-

124 2 U.S. (2 Dall.) 409, 410 n.* (1792). The Act permitted disabled veterans to apply to circuit courts for pensions; the courts' decisions on these cases could then be changed by actions of the executive and legislative branches. *See id.* at 409–10.

125 *Id.*

126 *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113–14 (1948).

127 80 U.S. 128, 147 (1871).

128 530 U.S. 327, 349 (2000).

129 *Id.* at 349–50 (conceding that an excessively short time limit could pose a due process concern, but noting that this was not the issue at hand).

130 514 U.S. 211, 213 (1995). Petitioners' earlier suit under the Act was dismissed with prejudice, and that judgment became final. *Id.* at 213–14. They later sought reinstatement under a new section of the Act. The lower courts held that the law did require granting their motion but that such a statutory requirement was unconstitutional. *Id.* at 215 (The Sixth Circuit's affirmation is at 1 F.3d 1487 (1993)).

131 *Id.* at 217–18 (quoting U.S. CONST. art. III, § 1).

ary “the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy.”¹³² Thus, the separation of powers precludes Congress from reviewing courts’ performance of their core functions.¹³³

As early as 1803, the Court held that “[i]t is emphatically the province and duty of the judicial department to say what the law is” in particular cases and controversies.¹³⁴ The laws governing citizens are properly *prescribed* by the legislature, but are to be *interpreted* by the courts alone.¹³⁵ The legislative power comprises the ability to make general law, with the power to apply that law in particular cases reserved to the judiciary.¹³⁶ Thus, any congressional action that seeks to interpret how a statute should be applied, or to evaluate how the laws it has enacted pertain to particular circumstances, would arguably be unconstitutional. Moreover, according to the understanding of the federal courts’ constitutional powers delineated in *Plaut*, decisions of the Supreme Court—to which no federal court is superior—are not subject to review. Therefore, any action by Congress that aims to change a Supreme Court decision or modify its implementation would also be unconstitutional.

B. Procedure Versus Substance

Congressional acts impacting the judicial branch must be evaluated on a case-by-case basis in order to accurately determine their validity. Yet, in distinguishing between those actions that touch on the sphere of core judicial functions and those that do not, a tentative constitutional line can be drawn between changes to substantive recusal rules and changes to merely procedural mechanisms surrounding recusal.

The substantive standards denoting whether recusal is warranted impact a Justice’s ability to decide a case; these may be within the inherent judicial power assigned exclusively to the Supreme Court by Article III, and hence of the kind that Congress cannot regulate under the Necessary and Proper Clause.¹³⁷ Procedural requirements are

132 *Plaut*, 514 U.S. at 218–19.

133 *Id.* at 219.

134 *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

135 *Plaut*, 514 U.S. at 222 (THE FEDERALIST NO. 78 (Alexander Hamilton) (1788) at 523, 525).

136 *Id.* at 224.

137 *Virelli*, *supra* note 15, at 1214–15, 1217, 1220 (explaining why the substantive standards governing recusal decisions are beyond Congress’s reach).

different, as they modify the process for making or publicizing decisions, but not the ultimate result.¹³⁸

Congress has the power to regulate Supreme Court procedure.¹³⁹ The Court itself and most scholars agree that Congress may regulate the Court in all respects except its core function: adjudication.¹⁴⁰ For instance, Congress already regulates the Court's size, the number of Justices required for a quorum, the terms held by the Court, Justices' salaries, and the requisite qualifications for serving as a Justice—all issues that do not impact the Court's ability to decide a case over which it has jurisdiction.¹⁴¹ Following this reasoning, adding further procedural requirements to the Court's recusal activities *without* stripping it of its core decision-making ability would seem to be constitutional.

The proposals in H.R. 862 to make the Judicial Conference's Code of Conduct binding on Justices and to set up external reviewing of Code violations and recusal decisions are the types of reforms that raise significant separation-of-powers concerns.¹⁴² Such alterations in current recusal practice would substantively impact which Justices address each case before the Court, thereby intruding on the Court's core function of decision-making.¹⁴³ Justice Anthony Kennedy noted that while the Justices “have agreed to be bound by the [Code of Judicial Conduct],” “making [it statutorily] binding [presents] a consti-

138 *See id.* at 1221–24 (distinguishing procedural rules about recusal from other congressional involvement in this area); *see also* Frost, *supra* note 7, at 535, 556–57 (arguing that procedural mechanisms such as provision of reasons are justified because they fit within the judiciary power articulated by the Constitution and the role the Framers intended for the federal courts).

139 Paul Taylor, *Congress's Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts Can Teach Today's Congress and Courts*, 37 PEPP. L. REV. 847, 887 (2010); Stephen Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1681, 1688 (2004); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9–10, 14 (1941) (distinguishing between congressional involvement in Court procedure and substance by stating that “Congress has undoubted power to regulate the practice and procedure of federal courts” and defining “procedure” as “the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them”). *See generally* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1001 (3d ed. 2002).

140 *See* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 831 (2001) (detailing the general perception of Congress's authority with respect to the Supreme Court); Burbank, *supra* note 139, at 1681 n.9 (citing *Hanna v. Plumer*, 380 U.S. 460, 473–74 (1965) (noting “the long-recognized power of Congress to prescribe housekeeping rules for federal courts”); *Id.* at 1685, 1688.

141 Virelli, *supra* note 15, at 1221–22; 28 U.S.C. §§ 1–6.

142 *See* N.Y.C. BAR ASS'N COMM. ON GOV'T ETHICS, *supra* note 35, at 28–30 (discussing reforms of the recusal process that would likely exceed Congressional authority).

143 Virelli, *supra* note 15, at 1220–21.

tutional problem.”¹⁴⁴ Chief Justice Roberts has also asserted that it would be improper to formally apply the Code of Conduct to the Supreme Court, because “Congress instituted the Judicial Conference for the benefit of the courts it had created [and] its committees have no mandate to prescribe rules or standards for any other body.”¹⁴⁵ Furthermore, external review of Court actions or decisions on recusal would entail precisely the type of activity deemed a violation of separation of powers in *Hayburn* and *Chicago*.¹⁴⁶ It would threaten the finality of Court determinations, which was also held unallowable in *Plaut*.

By contrast, a requirement by Congress that the Justices issue public statements following their decisions on recusal questions, explaining *why* they came to whatever conclusion they did, would not impact the substance of Court decision-making. A related proposal, to require Justices to submit a “statement of interest” divulging any potential sources of partiality, also impacts only the procedures around formalizing Court decisions.¹⁴⁷ Congress already requires annual financial disclosure reports from Justices.¹⁴⁸ Since the constitutionality of this provision and of § 455 are not challenged,¹⁴⁹ requiring a statement of other potential conflicts seems unproblematic.¹⁵⁰

Requiring after-the-fact notice of a Justice’s reasons for his or her conclusion does not challenge the conclusion itself, but merely reveals what the Justice’s state of mind was in making it. Thus, the proposal to require reasoned decision-making by the Justices on recusal is fully procedural and presents less of a constitutional dilemma than other, substantive reforms.¹⁵¹

144 Eileen Malloy, *Supreme Court Justices Already Comply with Ethics Rules, Kennedy, Breyer Say*, 79 U.S.L. WK. 2389, 2389 (2011).

145 Roberts, *supra* note 66, at 4.

146 *See supra* Part III.A. In conjunction, oversight of the Court is objected to on the ground that Article III vests the judicial power in “one Supreme Court.” N.Y.C. BAR ASS’N COMM. ON GOV’T ETHICS, *supra* note 35, at 30.

147 *See Bassett, supra* note 32, at 694–97 (highlighting characteristics of a procedural reform as opposed to a substantive one).

148 Ethics in Government Act of 1978, 5 U.S.C. App. 4 §§ 101–02, 109 (2012).

149 However, the constitutionality of § 455 has never been tested. Roberts, *supra* note 66, at 7.

150 McFarland, *supra* note 32, at 692.

151 *See Virelli, supra* note 15, at 1223 (“There is one aspect of recusal regulation that does not fall as neatly within the Court’s inherent power to decide cases—procedural rules.”). A proposal to require full Court review of recusal decisions represents a middle ground between purely substantive and purely procedural reforms. Such a change does influence the ultimate result (the reviewing Justices could alter the implicated Justice’s conclusion), but this effect is internal rather than imposed from outside the Court, as the Code of Judicial Conduct would be.

IV. A REASONS REQUIREMENT WOULD NOT INTERFERE WITH CORE JUDICIAL FUNCTIONS

At base, Congress may constitutionally require Justices to publish some explanation of any decision on recusal only if such a requirement would not encroach on those core judiciary functions which Congress, even under its broad Article I powers, may not touch. While the specific structure of any reasons requirement might further complicate the question, at the most general level, such an obligation steers clear of the heart of the judiciary's constitutional duties. Thus, I argue that it may be validly imposed on the Court.

There are two types of congressional infringement on the power of the judicial branch: "aggrandizement of congressional power" at the judiciary's expense and impermissible undermining of the judiciary's role without appreciable expansion of Congress's own power.¹⁵² A requirement that a Justice provide reasons for a decision on recusal does not represent an addition to congressional power; thus, to be unconstitutional, it must impermissibly encroach on the judiciary's constitutional role in some other way.¹⁵³ As the discussion below will elucidate, however, that condition is not met either.

A. *Why A Reasons Requirement Would Be Constitutional*

A requirement that Justices explain their recusal decisions would involve Congress in Court goings-on without altering the results of the Justices' endeavors. Because it would not interfere with the Court's core decision-making function, this would be a procedural reform that would respect the separation of powers principle.

In evaluating the constitutionality of such a rule, insight can be garnered from the recent proposal to require live public broadcasting of Supreme Court proceedings. The question of Congress's power to impose this change on the Court has relevant extrapolations to the extent of Congress's power to impose new procedural requirements on the Court's approach to recusal.

¹⁵² Brandon Smith, *The Least Televised Branch: A Separation of Powers Analysis of Legislation to Televis the Supreme Court*, 97 GEO L.J. 1409, 1420 (2009).

¹⁵³ *See id.* Aggrandizement is a concern when Congress is involved in statutory interpretation, with argument that "[t]he legislature may legitimately try to influence the interpretive outcome to promote specific policy choices. However, when attempting to control the interpretive process without regard for policy choices, the legislature . . . violates separation of powers." Jellum, *supra* note 108, at 840.

Cameras are not currently permitted in the Supreme Court.¹⁵⁴ In December 2011, a bipartisan bill was introduced that would have required the Court to allow public televising of all its open sessions, except if that action would violate a party's due process rights.¹⁵⁵ This legislative proposal met with contentious debate.

Supporters asserted that the proceedings in which the Justices are daily engaged *should* be exposed to the public, who are intimately affected by the tribunal's decisions.¹⁵⁶ Constitutional interpretation also played a key role in the discussion. An apt argument for why the proposed legislation does not violate the separation of powers explains,

[r]equiring the Court to televise proceedings it already makes available to some members of the public, so long as this coverage does not impede individual liberties, does not represent a substantive alteration of the Court's institutional role, nor does it inherently jeopardize the Court's ability to evaluate and judge specific cases. Indeed, given our current capacity to install television cameras in an unobtrusive manner, the proposed law should not really change how the Court conducts its business at all. The proceedings of the Court should look no different before and after the cameras are installed.¹⁵⁷

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- 154 However, several states and lower federal courts do televise their proceedings. See KATHY KIRBY & KAT SCOTT, RADIO TELEVISION DIGITAL NEWS ASS'N, CAMERAS IN THE COURT: A STATE-BY-STATE GUIDE (2014), http://www.rtdna.org/article/cameras_in_the_court_a_state-by-state_guide_updated (current as of 2012) (providing a guide on the practices of courtroom videography across the states); Erwin Chemerinsky & Eric J. Segall, *Supreme Court Proceedings Should Be Televised*, STAR TRIBUNE, (updated Mar. 25, 2012), available at <http://www.startribune.com/opinion/commentaries/144044236.html> (arguing that Supreme Court proceedings should not be shielded from television cameras and reporters).
- 155 S. 1945 (112th Cong.), available at <http://beta.congress.gov/bill/112th-congress/senate-bill/1945>. The late Senator Arlen Specter, an early supporter of this effort, introduced S. 446 in 2009 for the same purpose (available at <http://beta.congress.gov/bill/111th-congress/senate-bill/446/>); see also S. 657 (111th Cong.), available at <http://beta.congress.gov/bill/111th-congress/senate-bill/657/> ("To provide for media coverage of Federal court proceedings.").
- 156 See, e.g., *Access to the Court: Televising the Supreme Court: Hearing on S. HGR. 112-584 Before the Subcomm. on Admin. Oversight & the Courts of the S. Comm. on the Judiciary*, 112th Cong. 8 (2011) (statement of Arlen Specter, Former U.S. Senator, & Attorney at Law) [hereinafter *Access to the Court*] (quoting Senator Specter stressing that the discussions in which the Court engages are the *public's* domain, not the Court's alone, and Senator Klobuchar noting that the "cold record" of proceedings is not an appropriate substitute for what actually transpires in the courtroom).
- 157 Bruce G. Peabody & Scott E. Gant, *Congress's Power to Compel the Televising of Supreme Court Proceedings*, 156 U. PA. L. REV. PENUMBRA 46, 51 (2007). Professor Peabody further notes that such legislation is allowable under the Necessary and Proper Clause of Article I, which has been used to justify many other laws regulating the Court and helping to execute the judicial power vested in it, as it meets the condition of advancing *some* legitimate government power or aim. *Id.* at 48-49.

These characteristics, hallmarks of congressional action that does not unconstitutionally intrude upon the Court's activities, are similarly present in the proposal to require implicated Justices to publish rationales for their recusal decisions.

The constitutionality of such a reform could be challenged in a few ways, relying primarily on alleging that it would violate the separation of powers. Some might argue that legislation mandating reasons would impermissibly undermine the judiciary in the performance of its constitutional role: to decide cases and controversies.¹⁵⁸ By requiring the Court to spend more time on a subsidiary issue, it could draw the Justices' attention away somewhat from the focus assigned to them by the Constitution.

The requirement might also be accused of departing from Congress's longstanding refusal to trespass on the Court's autonomy and its authority to direct its own proceedings.¹⁵⁹ Besides enacting § 455 (a broad standard), Congress has remained generally uninvolved in evaluating the Court's recusal process or decisions. Moreover, the Court must be free to protect the functioning of its decision-making processes.¹⁶⁰ Since the core Article III judicial power to decide cases and controversies is accompanied by ancillary powers that are necessary to execute it, the Court can impose restrictions surrounding its substantive decision-making in order to protect the integrity of that process.¹⁶¹ If being required to explain recusal decisions could be shown to threaten the Court's substantive work, then such a requirement could be found unconstitutional.

However, the arguments in support of the reform's constitutionality are equally or more compelling. A reasons requirement would *not* encroach on inherent judicial powers because it would not alter the actual decision-making on cases and controversies. Even more so than the proposal to televise Court proceedings, it leaves the actual

158 This was an argument made in the televising debate. See Smith, *supra* note 152, at 1411, 1419, 1427 (describing the argument that allowing cameras into the Supreme Court would violate the separation of powers because it would interfere with the judiciary's fulfillment of its constitutional duties); see also Peabody & Gant, *supra* note 157, at 47 (quoting Justice Thomas's statement that the proposal to televise Court proceedings "runs the risk of undermining the manner in which [the Court] consider[s] cases").

159 See *Access to the Court*, *supra* note 154, M. Mahoney statement at 13 ("Although Congress surely has some power to adopt laws that affect the Court, it cannot, as the court says, 'impermissibly intrude on the province of the judiciary,' or disregard a 'postulate of Article III' that is 'deeply rooted' in the law." (citation omitted)).

160 Smith, *supra* note 152, at 1411; *Access to the Court*, *supra* note 156, at 13–14 (Mahoney).

161 *Id.* at 70 n.5.

process of deciding cases and controversies to the Supreme Court.¹⁶² All that a reasons requirement would change is what the Justices do surrounding that process—on the side matter of who is involved in deciding the case, and not even affecting the substance of that but only how it is announced. That it would give *some* congressional discretion over Court operations does not itself constitute an abrogation of the separation of powers, as Congress frequently makes rules and policies impacting the Court and is “implicitly recognize[d]” by the Constitution and U.S. legal traditions as the general rule-making body for all branches of the federal government.¹⁶³

A reasons requirement would come into play only *after* the implicated Justice’s independent decision of whether to participate in a case was made, at the point when that choice—free of any possible external influence—is to be publicized anyway. It therefore would not affect the decision reached, or the process of reaching it, at all.¹⁶⁴ One might argue that such a requirement would oblige a Justice to more closely consider a decision prior to making it (to be able to give reasons for it). However, that is merely a likely consequence, not something the requirement would mandate. Moreover, any decision will be based in *some* reason (especially given the Court’s emphasis on the significance of having one less Justice on a case)¹⁶⁵; the requirement would merely impose an obligation to put that reason to paper. Thus, “[t]he proceedings of the Court should look no different before and after”¹⁶⁶ it is implemented.

Congress is not supposed to be involved in decision-making processes that lead to case results.¹⁶⁷ Yet recusal is one step removed from this core judiciary function:¹⁶⁸ A Justice’s decision of whether or not to recuse determines whether he or she will then be involved in deciding the particular case’s outcome. A persuasive argument exists

162 With the latter proposal, the Court’s oral arguments would be broadcast publicly, so the Justices would have to consider the large audience that might be watching them as they engage in their decision-making. See Kathleen Kirby, *Senate Judiciary Committee Hears Testimony on Cameras in the Courtroom*, RADIO TELEVISION DIGITAL NEWS ASSOC. (Nov. 13, 2012), http://www.rtdna.org/article/senate_judiciary_committee_hears_testimony_on_cameras_in_the_courtroom (reporting The Senate Judiciary’s Subcommittee on Administrative Oversight and the Court’s hearing concerning cameras in federal courtrooms).

163 Peabody & Gant, *supra* note 157, at 50.

164 See also Smith, *supra* note 152, at 1427–28 (affecting the judiciary’s decision is impermissible, as doing so treads on that branch’s core function).

165 See Stempel, *supra* note 45, at 800 (recognizing the concern about recusal reducing the number of participating Justices).

166 Peabody & Gant, *supra* note 157, at 50.

167 Smith, *supra* note 152, at 1422.

168 See Plaut, 514 U.S. at 218–19 (explaining core judicial functions).

that the legislature cannot dictate, constitutionally, when a particular Justice must recuse, as by affecting the make-up of the Court bench for a given case, it would directly impact that case's adjudication.¹⁶⁹ However, merely requiring the Justices to explain determinations that they themselves make about who is involved in the decision-making on a case is much less egregious.

Moreover, requiring that a Justice's recusal choice be accompanied by reasons falls in the category of regulating the *form* of a decision, which has been viewed as constitutional.¹⁷⁰ Congress may, consistent with the separation of powers, establish procedural rules for federal courts as long as these rules do not obstruct the courts' ability to decide cases; it may even legislate in an area governed by inherent powers if doing so does not preclude courts' effective exercise of the judicial power.¹⁷¹ Requiring the Justices to publish reasons for their decisions on recusal presents no such threat. It would not place a significant burden on the Court¹⁷² and only ensures that there will later be a public record of what led to these decisions. A simple mandate that Justices explain, in some way, the rationales behind their recusal-related actions would therefore not be unconstitutional.

B. What A Reasons Requirement Might Look Like

If Congress decides to impose a reasons requirement on the Supreme Court, the next question is what that requirement will, and can, entail. Little guidance exists on this front. For instance, H.R. 862 states only that whenever a Justice recuses himself or herself, or

169 See Bassett, *supra* note 32, at 688–90 (commenting that even the 1974 amendment of § 455 may exceed what the separation of powers entitles Congress to do with respect to the Court); see Pushaw, *supra* note 140, at 853 (establishing that federal courts have inherent power to determine their system for assigning cases, as “[m]ost aspects of judicial administration and management are indispensably necessary either to adjudication or to maintaining the status of a ‘court’”).

170 Pushaw, *supra* note 140, at 854 (indicating that Congress generally “regulate[s] only the form of judgments and other minor details”).

171 See Joseph J. Anclien, *Broader Is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 74–75 (2008) (arguing that a “functional separation-of-powers approach” must be employed to determine whether Congress is permitted to govern in a particular inherent-power-based area).

172 See N.Y.C. BAR ASS'N COMM. ON GOV'T ETHICS, *supra* note 35, at 37–40 (noting that recusals are not so frequent and that the requirement could be structured so as to limit when a lengthy memorandum is called for). To the extent that a reasons requirement imposes an added burden on a Justice (e.g., by taking too much time), that Justice arguably has not sufficiently worked out his or her reasoning; “[t]he extra time required to reduce the reasoning to written form, in the vast majority of cases, should not be significant.” Cravens, *supra* note 21, at 47.

denies a motion for disqualification, under § 455, “the justice shall disclose in the public record of the proceeding the reasons for” that action.¹⁷³

To serve the aims for which this reform is advocated, any reason will likely have to rationalize the Justice’s decision by referencing some broader, accepted principle.¹⁷⁴ Congress might be “explicit in dictating the requirements” of such an amendment, so that Justices cannot merely avoid it—making clear that Justices must produce written memoranda in response to any party motion for recusal and whenever they recuse on their own initiative.¹⁷⁵ Beyond that, Congress may want to give the Court free rein on the specifics so as to mitigate the impression that it is trying to control the Justices.

It is vital that the reasons requirement be abided by in all cases where recusal is genuinely considered (regardless of whether a corresponding motion is filed), so as to provide the public with a consistent source by which to understand the Justices’ actions and build a record of Supreme Court recusal practice that can be referenced in future decisions.¹⁷⁶ In relatively straightforward cases, a Justice’s explanation may not need to be particularly long or involved.¹⁷⁷ The New York City Bar Association, a key supporter of the Court’s providing reasons for its recusal decisions, opines, “the explanatory standard should remain fluid enough to accommodate all cases while being sufficiently specific to ensure a substantive explanation.”¹⁷⁸ If realized, such a framework can balance the need to ensure that the reasons given by Justices meet a bare minimum, thus providing more insight into the Court’s decision-making than is currently available, with the need to ensure that the Court’s core judicial functions remain uninhibited.

While I argue that Congress can constitutionally mandate that the Justices provide reasons for their recusal decisions, the basis for that finding leads to the conclusion that Congress cannot require very

173 H.R. 862, *supra* note 91, at § 3(a)(1).

174 Schauer, *supra* note 50, at 641 (“[O]rdinarily, to provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself.”).

175 McFarland, *supra* note 32, at 692.

176 *See* Frost, *supra* note 7, at 589 (“Decisions articulating grounds for recusal will provide a body of precedent . . .”).

177 *Id.* One scholar suggests that a Justice’s explanation need not necessarily be published but should at least be accessible by request (upon a showing of cause, if it is kept under seal). Cravens, *supra* note 21, at 45–46.

178 N.Y.C. BAR ASS’N COMM. ON GOV’T ETHICS, *supra* note 35, at 38 (noting that the level of detail required might depend on whether disqualification is being considered under § 455(a) or (b)).

specific contents for such explanations. In order to maintain respect for the separation of powers, the Court must remain free to engage in its decision-making as it wants, and that process may not be conducive to producing a certain type of explanation.¹⁷⁹ Therefore, restricting the Justices to providing reasons in a certain format, or of a certain length, would likely exceed Congress's constitutional bandwidth on this front. To be constitutional, a reasons requirement cannot obstruct the Court's assertion of its implied power to "manage [its] affairs to ensure the orderly, expeditious, and efficient administration of justice."¹⁸⁰

If Congress structures the requirement in a fairly open-ended manner, leaving determination of the specific contents of the reasoning up to the Justices, it could avoid a dilemma. The Court must interpret any statute that has more than one plausible meaning with an eye to avoiding constitutional conflict and upholding its constitutionality.¹⁸¹ If Congress dictates how Justices must provide their recusal explanations to the degree of minutiae, there will be no ambiguity. Since the Court cannot *re-write* a statute to make it constitutional, it might then simply find the requirement's existence to exceed Congress's power.¹⁸² On the other hand, giving the Court leeway in application of a reasons requirement would increase the likelihood that the Court could—and therefore would have to—interpret the requirement in such a way that it would be constitutional.

179 See Roberts, *supra* note 101, at 166 (suggesting that Congress and the judiciary likely have concurrent authority in the area of reforming Supreme Court recusal, the specific division of which will depend on the scope of the reforms implemented).

180 This power has generally concerned federal courts' control of their dockets, so would likely be implicated with respect to Justices' recusal decisions only to the extent that the need to publish reasons for such decisions interfered with the Court's ability to timely handle other cases. Pushaw, *supra* note 140, at 760.

181 See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593 (2012) ("It is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so."); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009) ("The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts."); AMENDOLA, ET AL., 16 C.J.S. CONST. LAW § 191 (per the "constitutional avoidance" or "constitutional doubt" canon of statutory interpretation, "[a] statute or regulation must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also any serious doubt about its constitutionality").

182 The constitutional avoidance canon "does not . . . license a court to usurp the policymaking and legislative functions of duly elected representatives. [A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it." Heckler v. Mathews, 465 U.S. 728, 741–42 (1984) (alteration in original) (citations omitted) (internal quotation marks omitted).

CONCLUSION

Supreme Court recusal is a subject that is today fraught with much questioning, speculation, and disagreement. One of the most significant problems is that, since Justices are not required to explain their decisions in this area, the public is usually left ignorant as to why recusal does or does not occur in any given case. This Comment argues that, if the Court does not modify its approach to recusal on its own,¹⁸³ Congress could validly step in and mandate that the Justices provide some explanation for their decisions to recuse or not to disqualify themselves. Such legislation would be consistent with the Constitution's separation of powers requirement because it would not unduly interfere with the Court's decision-making processes; in fact, it would hardly impact them at all.

Pursuant to the separation of powers, Congress and the Executive branch must refrain from impinging on federal courts' execution of their constitutional duty—the core judicial function of deciding particular cases. A requirement that Supreme Court Justices publish reasons for their recusal decisions would be purely procedural. It would affect a Justice's activities *after* his or her decision on recusal was already made, rather than revamping how it is made or the ultimate substantive result. Therefore, as long as it were structured deferentially to the Court, it would satisfy the test of constitutionality. Congress should seriously consider enacting such a reform as a way to bolster the Court's legitimacy and enhance the public's confidence in its work.

¹⁸³ In 2009, the Michigan Supreme Court amended its own rules to require its Justices to explain their decisions on recusal. See Mich. Ct. R. 2.003 (D)(3)(b) ("In the Supreme Court, if a justice's participation in a case is challenged by a written motion or if the issue of participation is raised by the justice himself or herself, the challenged justice shall decide the issue and publish his or her reasons about whether to participate.").