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REGULATING SUPREME COURT RECUSALS

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This article presents a critical analysis of the approach of the U.S. Supreme Court to recusal motions aimed at one of the Justices of the Court. The catalyst was the controversy arising from the weekend duck-hunting trip of U.S. Vice-President Richard Cheney and Supreme Court Justice Antonin Scalia, after which Justice Scalia denied a motion to recuse himself from a pending case in which his hunting partner, Mr Cheney, was a party. This startling decision is final and conclusive since the Supreme Court refuses to intervene in such decisions. Such an approach by the Court is untenable and contrasts starkly with that of the House of Lords, which did not shrink from disqualifying Lord Hoffmann on grounds of bias in the *Pinochet* case. A comparative study of comparable common law jurisdictions exposes the U.S. Supreme Court as an island of isolation over this issue. It also provides accessible solutions that are disarming in their simplicity. The particular responses that are commended in this article are formalized self-regulation and substitution.

I. INTRODUCTION

The right to a fair hearing before an independent, impartial and unbiased tribunal is a standard feature of modern constitutions. A common component of this right in common law jurisdictions is the *nemo iudex* rule (or "the rule against bias"), which requires judicial decision-makers to recuse themselves from any case in which their impartiality may be compromised by interest or favour. The *nemo iudex* rule has long progressed from being simply a rule of natural justice or procedural fairness into an important constitutional safeguard. It is fundamental to any modern concept of fair hearing, and of an independent and impartial judiciary. It underpins public confidence in the administration of justice, and free societies ignore it at peril—a fact generally recognized by judges and lawmakers in the Anglo-American legal traditions. For this reason, recusals and disqualifications of judicial officers on the ground of possible bias are not uncommon.

The applicable principles (of apprehended, apparent or "objective"[1] bias) are usually clear, even if not always consistent in application. In England, apprehended

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1 Auld LJ. in *Aaron v. Law Society* [2003] EWHC 2271 (Admin) at para. 4; see also *Orange Ltd. v. Director of Telecoms (No. 2)* [2000] 4 I.R. 159.

or apparent bias means a "real possibility" of bias.[2] Elsewhere in the Commonwealth, it means a "reasonable apprehension" or "reasonable suspicion" of bias.[3] In the United States federal law, it refers to any case in which a judge's impartiality "might easonably be questioned"[4]—a "purely objective" standard.[5] The aim is to ensure that justice is "seen to be done"[6]—a widespread principle also enshrined in the jurisprudence of the European Court of Human Rights.[7] In this respect, "what matters is not the reality of bias or prejudice, but its appearance".[8] Therefore, while there is a presumption of judicial impartiality,[9] the question whether a judge is disqualified on grounds of apparent or apprehended bias is examined, not from the point of view of the affected judge, but from the point of view of a reasonable, impartial, well-informed, objective observer[10]—a notional individual imbued with amazing talents and attributes.[11]

When a judge does not step down in an appropriate case, any ensuing decision is said to be tainted by bias. Normally, a higher court would step in to correct this error, and would normally, if final judgment has already been delivered, vacate that

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2 See *Porter v. Magill* [2002] 2 A.C. 357; *In re Medicaments and Related Classes of Goods (No. 2)* [2001] 1 W.L.R. 700; *Lawal v. Northern Spirit Ltd.* [2003] UKHL 35; *Davidson v. Scottish Ministers* [2004] UKHL 34. The original test was the "real danger of bias" test propounded in *R. v. Gough* [1993] 2 All E.R. 724. *Porter v. Magill* modified the test, bringing English law in line with the requirements of the ECHR and with the jurisprudence of the European Court of Human Rights.

3 See *e.g.* Australia—see *R v. Webb* (1994) 181 C.L.R. 41 (H.C.A.); Ireland—see the Supreme Court decisions: *Dublin Wellwoman Centre Ltd. v. Ireland* (1995) 1 I.L.R.M. 408, *Radio One Limerick v. Independent Radio & Television* (1997) I.R. 291 and *Orange Ltd. v. Director of Telecoms (No. 2)* [2000] 4 I.R. 159; New Zealand—see *Cook v. Patterson* [1972] N.Z.L.R. 861 (C.A.), *E.H. Cochrane Ltd. v. Ministry of Transport* [1987] 1 N.Z.L.R. 146 (C.A.), *R v. Te Pou* [1992] 1 N.Z.L.R. 522 (C.A.), *Matua Finance Ltd. v. Equiticorp Industries Group Ltd.* [1993] 3 N.Z.L.R. 650 (C.A.), *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142 (C.A.); Canada—see *Committee for Justice and Liberty v. National Energy Board* (1976) 68 D.L.R. (3d) 716 (S.C.); *R v. S (RD)* (1997) 151 D.L.R. (4th) 193 (S.C.); South Africa—see *SACCAWU v. Irvin & Johnson* [2000] 8 B. Const. L.R. 886, 2000 (3) SA 705 (S. Afr. Const. Ct.); *President of the Republic of South Africa and others v. South African Rugby Football Union and others* [1999] 7 B. Const. L.R. 725, 1999 (4) SA 147, [1999] Z.A.C.C. 9 (S. Afr. Const. Ct.) [*SARFU* cited to Z.A.C.C.].

4 28 U.S.C. § 455(a).

5 See *United States v. Cooley* 1 F.3d. 985 (10th Cir. 1993) [*Cooley*] at 993; *Liteky*, *supra* note at 486; *Liljeberg v. Health Services Acquisition Corp.* 486 U.S. 847 (1988) [*Liljeberg*]; *Microsoft Corp. v. U.S.* 147 L. Ed.2d. 1048 (2000) [*Microsoft*] at 1049.

6 See *e.g. R. v. Sussex Justices exp McCarthy* [1924] 1 K.B. 256 at 259; *Millar v Dickson* [2002] S.C. 30 (P.C.) at para. 63; *Public Utilities Commission v. Pollak* 343 U.S. 451 (1952) at 476; *In re United States* 666 F.2d. 690 (1st Cir. 1981) at 694; *Ebner v. Official Trustee in Bankruptcy* [1999] FCA 110, aff'd [2000] HCA 63, *Erris Promotions v. Inland Revenue* [2003] NZCA 163 at para 24.

7 See *e.g. De Cubber v. Belgium* (1984) 7 E.H.R.R. 236 at para. 26 (E. Ct. H.R.).

8 *Liteky v. U.S.*, 127 L. Ed.2d. 474 (1994) [*Liteky*] at 486, *per* Scalia J. See also the E. Ct. H.R. in *Hauschildt v. Denmark* (1989) 12 E.H.R.R. 266 at para. 48 (referring to *De Cubber v. Belgium*, *ibid.*).

9 See *e.g.* Frankfurter J. (for the Court) in *U.S. v. Morgan*, 313 U.S. 409 at 421 (1941); also, *Wewaykum Indian Band v. Canada* [2003] 2 S.C.R. 259, 2003 SCC 45 at para. 59; *Jaipal v. The State* (18 Feb 2005), Case CCT 12/04 at para. 42 (S. Afr. Const. Ct.); *SARFU*, *supra* note 8 at para. 40; *Hauschildt v. Denmark* (1989) 12 E.H.R.R. 266 (E. Ct. H.R.) at para. 47.

10 *Liteky*, *supra* note 8 at 497; *In Re United States*, 666 F. 2d. 690 (1st Cir. 1981) at 695; *Taylor v. Lawrence* [2002] EWCA Civ. 90 (C.A.); *Lawal v. Northern Spirit Ltd.* [2003] UKHL 35; *Laws v. Australian Broadcasting Tribunal* (1990) 170 C.L.R. 70 (H.C.A.); *Johnson v. Johnson* [2000] HCA 48; *Jaipal v. State* [2004] Z.A.S.C.A. 5 (S. Afr. S.C.); *Valente v. The Queen* [1985] 2 S.C.R. 673 (S.C.).

11 See the general discussion and exhaustive list by Kirby J. of the High Court of Australia in *Johnson v. Johnson* [2000] HCA 48.

judgment. Where, however, the alleged error of not stepping down when recusal is required is committed by a judge of a court of last resort, a question arises as to the appropriate response of the legal system. In the United States, the answer to that question is "nothing".

Against this background come a number of recent instances involving Justices of the Supreme Court of the United States. Notable among these is the celebrated *Bush v. Gore*[12] election case, in respect of which it has been argued that a number of the Justices should have withdrawn from the case on grounds of apparent bias.[13] Then there was *Microsoft Corp v. U.S.*,[14] from which Chief Justice Rehnquist refused to withdraw even though his son was a partner in a law firm that had been retained by Microsoft as local counsel in private antitrust litigation, and was one of the lawyers working on those cases. Most recently, there was the hunting trip of U.S. Vice President Richard (Dick) Cheney and Supreme Court Justice Antonin Scalia ("Scalia J.").

Scalia J. and Mr. Cheney had a "cozy relationship" as friends.[15] They spent a weekend hunting ducks at a private camp in Louisiana. Scalia J. and some members of his family had accepted a free ride on Mr. Cheney's "Air Force 2" jet to this hunting location. At the time of the hunting trip, the Supreme Court was due to hear a case in which Mr. Cheney was involved as a party,[16] and Scalia J. was one of the Supreme Court Justices who would hear that case. One of the parties in the case filed a formal motion for Scalia J. to recuse himself.[17] However, Scalia J. refused to step down. He delivered a lengthy and controversial opinion explaining his decision to stay on the case.[18] The Supreme Court proceeded to hear the appeal with his full participation, and, in a 7-2 majority judgment, decided the appeal in favour of Mr. Cheney.[19] Scalia J. was one of the majority.

This case epitomises the problems addressed in this article. Regardless of how aggrieved the parties may have been of Scalia J.'s refusal to recuse himself, they had no recourse because Scalia J.'s decision is final and conclusive. The reasons for this state of affairs will appear presently—but it is an unsatisfactory situation—not because Scalia J. was "wrong" to have refused to withdraw from the case (and I express no view here on that point), but because his decision was final and conclusive (as would be that of any other Supreme Court Justice on his or her own recusal). If the *nemo iudex* rule is meant to preserve public confidence in the administration of justice, the situation just described will hardly contribute to such confidence. It is also needless because there are alternative and arguably "better" responses—particularly,

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12 531 U.S. 98 (2000).

13 See for example Ifill's interesting analysis in S. Ifill, "Do Appearances Matter?: Judicial Impartiality and the Supreme Court in *Bush v. Gore*" [2002] 61 Md. L. Rev. 606.

14 147 L. Ed.2d. 1048 (2000).

15 See P. Parenteau, "Anything Industry Wants: Environmental Policy Under Bush II" [2004] 14(2) Duke Envtl L. & Pol'y F. 363 at 369, fn38.

16 *Judicial Watch, Inc. v. National Energy Policy Development Group*, 219 F. Supp.2d. 20 at 42 (finally disposed of as *Cheney v. U.S. District Court for the District of Columbia* 159 L. Ed.2d. 459 (2004)).

17 David G. Savage, "Sierra Club Asks Scalia to Step Aside in Cheney Case; The rare recusal motion raises the issue of impartiality because of the duo's hunting trip", Los Angeles Times (24 February 2004) A17.

18 *Cheney v. U.S. District Court* 124 S. Ct. 1391; 158 L. Ed.2d. 225 (18 March 2004) [*Cheney* cited to L. Ed.2d.].

19 *Cheney v. U.S. District Court for the District of Columbia* 159 L. Ed.2d. 459 (2004).

formalized self-regulation, and substitution. In this article, I will argue the case for these responses. But first, the problem.

II. The Real Problem

As has been seen, one concern of the rule against bias is to ensure that justice is done and that litigants receive their constitutional rights to a fair trial before an independent, impartial and unbiased tribunal. Thus judges who are compromised or embarrassed by interest or favour in respect of a case in which they are sitting are required to withdraw from the case. The compromising or embarrassing factor may be partisanship (by association with one of the litigants), acting on information that the other judges (or the parties) do not have, holding opinions that make the judge less likely to be even-handed in hearing the case, or personal interest.

Just as important is a second concern of the rule against bias—*i.e.*, to ensure that, when justice is in fact being done, it is also clearly being seen to be done. As Lord Nolan said in *Re Pinochet Ugarte (No. 2)*, in any case where the impartiality of a judge is in question the appearance of the matter is just as important as the reality.[20] This is what the Lord Justice-Clerk described in *Robbie The Pict v. Her Majesty's Advocate*[21] as "the objective appearance of impartiality". It is precisely in order to maintain this objective appearance of impartiality that the question is examined, not from the point of view of the affected judge, but from the point of view of a reasonable, impartial, well informed, and objective observer.

This is a trite principle. In enunciating it, the point is often made that the "judge's actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the issue."[22] It is also clear that the inquiry into whether recusal is required in any case is limited "to outward manifestations and reasonable inferences drawn therefrom"[23] and that it is "objectively ascertainable" facts, rather than the explanations of judges that "can avoid the appearance of partiality".[24] This is a "manifestation of a broader preoccupation about the image of justice,"[25] in which "justice must satisfy the appearance of justice"[26]—a principle inextricably linked with due process.[27]

For these reasons the views and recusal decision of an impugned judge ought not to be final and conclusive. For, if the decision of the impugned judge is final, it becomes impossible to maintain the objective appearance of impartiality, and justice cannot be seen to satisfy the appearance of justice. This would frustrate the objectives of the rule against bias, because the affected judge would, both in appearance and

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20 *R. v. Bow Street Metropolitan Stipendiary Magistrate, exp Pinochet Ugarte (No 2)* [1999] 1 All E.R. 577 [*Pinochet*] at 592.

21 [2002] Scot. HC 333, [2003] S.C.C.R. 99 (H.C.J. Scot.) at para. 24.

22 *Cooley*, *supra* note 5; *Hall v. Small Business Admin.* 695 F.2d. 175 (5th Cir. 1983) at 179; *In Re School, Asbestos Litigation* 977 F.2d. at 782; *In Re Murchison* 99 L. Ed. at 946.

23 *Cooley*, *ibid.* at 993.

24 Stevens J. (referring to Clark C.J. in the lower court) in *Liljeberg*, *supra* note 5 at 860.

25 See the Supreme Court of Canada in *Wewaykum Indian Band v. Canada* [2003] 2 S.C.R. 259, 2003 SCC 45 at para. 66.

26 Frankfurter J. in *Offutt v. United States* 99 L. Ed. 11 (1954) at 16.

27 Black J. in *Re Murchison* 99 L. Ed. 942 (1955) at 946; also Marshall J. in *Marshall v. Jerrico Inc.* 446 U.S. 238 (1980) at 242.

reality, be a judge in his or her own cause. Public confidence in the administration of justice would suffer.

As has been indicated, it is not my object here to engage with the question whether Scalia J. in *Cheney*, or Rehnquist C.J. in *Microsoft*, or any of the allegedly compromised Justices in *Bush v. Gore*[28] (or any other Justice of the Court in a recusal case) were "wrong" to have failed to recuse themselves. Neither is it my intention to address the general question of judicial ethics (the propriety of a recusal decision in a given set of circumstances) in the United States. While these are live topics, my focus is more specific and restricted in scope. I seek to address here the anomalies and lacunae in U.S. federal law that these cases have exposed. In particular, I wish to engage with the finality and conclusiveness (and hence subjectivity) of recusal decisions by Justices of the Supreme Court. I will first address briefly the question of finality.

III. Finality

The Supreme Court's approach to the issue of recusal of its Justices is that recusal is a matter for the individual Justices,[29] and that a Justice's decision on that matter cannot be reviewed,[30] meaning that a party aggrieved thereby has no legal recourse. While this is arguably the inevitable outcome of a decision of a court of final recourse, such a result does not necessary follow. First there is the question whether the recusal decision of an individual Justice is, in reality, a decision of the Supreme Court itself. If so, does that have to be the end of the matter? If not, then what is its status? And what stops it, as with decisions of judges of lower courts, from being reviewed by the whole Court on grounds of abuse of process? These questions will be revisited shortly. Secondly, we have the example of the House of Lords, which has not shied away from disqualifying one of its members in *Pinochet*,[31] when it was decided that he should have stepped down. While the circumstances in the U.K. are clearly different from the U.S. and there are significant differences in the operations of the apex courts in the two jurisdictions, the *Pinochet* decision demonstrates that it is not self-evident that a recusal decision of a judge of an apex court must be unreviewable.

For a recusal decision to be beyond review is objectionable if only because, as a general principle, no court in a civilized country should be in a position where a plainly biased member can decide to sit tight on a case where it is plain to everyone that he or she should recuse himself or herself (*e.g.*, where the judge, or his or her spouse/partner, close relative or close friend, stands to lose a personal fortune upon the decision going a particular way), and for that court or any other court to be unable to do anything about it. This is a fundamental issue that transcends the individual cases referred to above, although these cases highlight the problem. Rehnquist C.J. and Scalia J. did not, of course, fit within the above description, since neither of them was "plainly biased". Even if their decisions to stay on those cases were "wrong",

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28 *Supra* note 12.

29 See *Jewell Ridge Coal Corp. v. United Mine Workers of America* 325 U.S. 897 (1945) [*Jewell Ridge*], *per* Jackson J. (Frankfurter J. concurring); *Laird v. Tatum* 409 U.S. 824 (1972) *per* Rehnquist J; *Hanrahan v. Hampton* 446 U.S. 1301 (1980) [*Hanrahan*], *per* Rehnquist J.

30 Jackson J. in *Jewell Ridge*, *ibid.*

31 I shall say more about this case later.

those situations were arguably not ones in which it was "plain to everyone" that they should have recused themselves, the matter being one on which reasonable minds could (and did) disagree. But either of them could easily have been seriously compromised, and still refuse to step down. What then? One might answer: "Of course that would be inconceivable! Surely a Supreme Court Justice would step down in such an obvious case!" That would be mere supposition. And such an answer misses the point—the point being that, if a Justice of the Court refused to do so when it is plain that he or she should (and there *are* plain cases), there is nothing that anyone (including the Supreme Court itself) would do about it. This is just another way of saying that the Supreme Court and its decision-making, and, hence, the administration of justice and the whole notion of fair hearing in the United States, are vulnerable to being subverted by a single errant Supreme Court Justice.

IV. A Better Way

There are better ways of resolving the issue of recusal. The first is what I have called "formalized self-regulation", and the second is "substitution". Each of these deals with a different problem. Formalized self-regulation (in reality, formal review and resolution by the Court itself) addresses the problems inherent in the notion of the finality of a recusal decision of an individual judge. Substitution, on the other hand, addresses the issue of the consequences for the Supreme Court of disqualifications/recusals of its members—*i.e.*, the depletions in the numbers of Justices hearing a case. Both solutions are essential to ensure that no single judge can become a law unto himself or herself, while ensuring that the Supreme Court and individual Justices in particular do not feel any pressure to deny recusal motions because of the fear of depletions in their numbers.

V. Flawed Finality

The cases referred to above raise pertinent questions about how the Supreme Court operates. Arguably, this situation arises partly because the Court sits *en banc* (although it is not unique in this respect), and, since there is ever only one panel, and the individual Justice considering a motion for his or her recusal is a member of that panel, there is no reviewing judicial authority. Thus even the most blatantly obvious error on a recusal motion is arguably not an error, since there is no one to decide authoritatively that it is an error. However, it has already been argued that such an outcome is not inevitable. The real cause of this outcome is the Court's stance of staying out of recusal motions.[32] This is a major flaw. It is an essential aspect of the work of appellate judges that their opinions only really count where a sufficient number of their brethren agree with them on the merits of the case. However, we have in the case of Supreme Court Justices' recusals a situation where an appellate judge might not have any of his or her brethren agreeing (at least, not officially and publicly) with him or her, and yet his or her decision is untouchable by any judicial tribunal.

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[32] See *e.g.* *Jewell Ridge*, *supra* note 29; *Hanrahan v. Hampton*, *supra* note 29.

There is of course nothing legally stopping the Supreme Court from developing a practice whereby, on the presentation of recusal motion before the Court, each Justice writes an opinion (or the Court as a whole makes a decision, taking a vote, if necessary) on that recusal motion, in either case, with or without the participation of the impugned justice.[33] This is one permutation of formalized self-regulation. It would make the ensuing decision in reality a decision of the Court, and not just a decision of an individual Justice. The current situation, using Scalia J. in the *Cheney* case as an archetype, is thus: Scalia J.'s ruling on his own recusal is reported officially in the law reports.[34] This is standard in the rare cases wherein a written decision is given.[35] So the decision looks and feels like a decision of the Court, but in fact (since a decision of the Court requires a quorum and a majority vote) it is not.[36] And no one really knows what the other Justices of the Court think about the question whether Scalia J. (or any other Supreme Court justice in a recusal case) was disqualified.[37] And, if a decision of a single Justice somehow seeks to purport to be a decision of the Court, then it should and would fail on grounds of quorum.[38]

While there is nothing legally stopping the Supreme Court from implementing this kind of formalized self-regulation, some may question its feasibility. It is trite that the Court is split ideologically, and, it is not beyond the bounds of imagination (albeit unlikely) that it might divide on political grounds in such cases, particularly, if this would even the odds in a five-four Court. If so, then such an approach by the Court is potentially just as effective in getting rid of a Justice that a party does not want on the case as the nefarious "investigative journalism" that Scalia J. disparaged.[39] Furthermore, the outcome of any such division along ideological lines would be predictable, and the whole exercise might become farcical. It would also become particularly problematic in the case of a five-four Court, if the impugned justice is one of the five, and does not participate in the hearing of the recusal motion. This would leave an evenly divided panel, and the recusal issue might then become irresolvable by the Court. As indicated, a farcical outcome like this is unlikely, since one would imagine that the Court would be more interested to protect its reputation and integrity than to score political points.

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33 Such participation could be problematic—but, depending on the number of Justices whose recusal is sought, non-participation of the impugned may even be more problematic.

34 *Supra* note 18.

35 See *e.g*. *Microsoft*, *supra* note 5, involving Rehnquist C.J.

36 Compare *Collier v. A-G* [2001] NZCA 328, where the New Zealand Court of Appeal (at para. 17) said that the "act of a Judge insisting on sitting even if apparently unwell" would not constitute a decision of the Court.

37 Contrast *Microsoft, supra* note 5 at 1049, where Rehnquist C.J. indicated in his ruling that he had the agreement of his colleagues. It is not clear what effect such a statement was supposed to have on the reader. Indeed, Ifill has described Rehnquist C.J.'s reasons for not recusing in this case as "deeply flawed". See Ifill, *supra* note 13 at 626.

38 See 28 U.S.C. § 1, which states that "The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum."

39 He said (see generally *Cheney*, supra note 18 at 239-240) that his recusal because of pressure from the press, "would give elements of the press a veto over participation of any Justices who had social contacts with, or were even known to be friends of, a named official." In his view, that would be an "intolerable" situation. He also felt that his recusal would "encourage so-called investigative journalists to suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons."

Clearly, for the Court to adopt the practice of adjudicating *en banc* on recusal motions involving its own Justices would go against the long-standing principle that recusal is, at least, in the first instance, a matter for the individual judge. However, while this principle is fine enough for lower courts because of the possibility of appellate review or *mandamus*, the unique position of the Supreme Court may render it desirable to adopt a modified principle for itself. Whether this is so depends partly on the answer to a question that has been raised earlier—*i.e.*, "what is the legal status of a recusal ruling by a single Supreme Court Justice?" Does it have the same status as a judgment of the Court itself? If not (as has been argued above), then what is to prevent collateral challenges in a federal court? Such challenges would represent a far worse option than formalized self-regulation.

Decisions of American judges on their own recusals are generally open to review on grounds of abuse of discretion.[40] Decisions of the Supreme Court are not, of course, open to review by other courts. However, perhaps decisions of individual Justices on the issue of recusal should be. That is, the fact that the Supreme Court will itself neither consider a motion for the recusal of one of its Justices,[41] nor review a recusal decision of one of its Justices[42] does not mean that another federal court should not be able to do so. For example, while it is probably unthinkable, there should arguably be nothing in principle preventing litigants from filing an application in the U.S. District Court, applying for the disqualification of Scalia J. in the *Cheney* case. After all, the decision not to recuse is that of Scalia J., not that of the Supreme Court. However, such an unedifying spectacle, if it ever occurred, would, if the District Court somehow managed to find the gall to vacate Scalia J.'s ruling on grounds of abuse of process, eventually (in this kind of case, where the Supreme Court has gone on to hear and decide the case) result in the District Court having to vacate the subsequent judgment of the Supreme Court that was tainted by the participation of the Justice concerned.[43] This is something that, in light of

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[40] See *e.g. Stampfler v. Snow* 735 N.Y.S.2d. 255 at 257 (2002); *Gulf Maritime Warehouse Co. v. Towers* 858 S.W. 2d. 556 at 558 (Tex.App—Beaumont, 1993); *Nichols v. Alley* 71 F.3d. 347 at 350 (10th Cir. 1995); *Cooley*, *supra* note 5 at 994; *Moran v. Clarke* 296 F.3d. 638 at 648 (8th Cir. 2002); *United States v. Pollard* 959 F.2d. 1011 (D.C. Cir. 1992) at 1031.

[41] In contrast, recusal motions in appeals before the New Zealand Court of Appeal seem to attract the attention and ruling of the Court, rather than simply being left to the individual judge—see *e.g. Collier v. A-G, supra* note 36; *Nottingham v. T & Ors* [2001] NZCA 108 at para. 19.

[42] The High Court of Australia, on the other hand, entertained an "appeal" against a recusal decision of one of its Justices in *Bienstein v. Bienstein* [2003] HCA 7. Compare the landmark decision of the South African Constitutional Court in *SARFU*, *supra* note 3. Both cases are discussed below.

[43] It is clear that, the disqualification of a single judge in a multi-member tribunal can lead to the vacation of the judgment of the whole court—see *e.g. Aetna Life Insurance Co. v. Lavoie* 475 U.S. 813 (1986) [*Aetna Life*], which involved a justice of the Supreme Court of Alabama, who had given the casting vote in a five-four decision, and had written the majority opinion. The Supreme Court of Canada, in *Wewaykum Indian Band v. Canada* [2003] 2 S.C.R. 259, 2003 SCC 45 at paras. 91-93, seemed to doubt that disqualification of a judge in circumstances wherein his/her vote did not swing the decision would be a sufficient basis for vacating the judgment of the whole court. However in *Davidson v. Scottish Ministers* [2002] ScotCS 256, the Lord Justice Clerk, in para. 35, said: "the whole decision falls to be set aside, regardless of the question of quorum. One must assume that the members of such a court discussed the issues and that the views of the judge concerned may have contributed to the decision that was reached by all the members of the court. That consideration is sufficient in my view for the conclusion that the decision itself cannot stand." Compare Lord Hope of Craighead in *Millar v Dickson* [2002] S.C. (P.C.) 30 at para. 65. See also the *Pinochet* case, supra note 20.

principles of precedence, the District Court would have no jurisdiction to do, and so such proceedings would achieve nothing. Where, however, the collateral challenge takes place before the Supreme Court has heard and decided the case, the situation becomes more interesting, if still somewhat unwholesome. It is inconceivable that such proceedings could take place[44] and the Supreme Court should not wait until a crisis of this kind arises before addressing this problem.

The current situation is a mess. It presents fertile ground for trouble, and needs to be resolved. The real question is "how"? There are a number of possible solutions, some in the hands of the Supreme Court itself, and one in the hands of Congress. As far as the Supreme Court itself is concerned, a number of questions need to be addressed. Would or should the Supreme Court hear and determine on their merits motions for the disqualification of its own Justices? If not, would or should it hear and determine on its merits a motion (or "appeal" or whatever nomenclature is deemed appropriate) challenging a recusal decision of one of its own Justices? In either case, would or should the Court hear and determine on its merits a motion to vacate one of its own decisions on grounds of the apparent bias of a non-recusing Justice? These kinds of questions embody what I refer to as formalized self-regulation, and have exercised appellate courts not just in the United States, but also in other common law jurisdictions.

The discussion that follows explores the responses of appellate courts in a number of Commonwealth jurisdictions. The object is to examine how these jurisdictions have responded to similar situations, to identify possible common themes and approaches, and to establish whether there are any solutions that can be devised from the experiences of other common law systems. As will presently appear, formalized self-regulation is a common theme in appellate courts and courts of final resolution in many of the world's leading common law jurisdictions. And this is one of the solutions that I am proposing.

Before embarking on the comparative study, I will deal with some of the arguments that have been raised about the unique position of the U.S. Supreme Court in recusal cases. Scalia J. in *Cheney*, responding to the argument that he should resolve any doubts in favour of recusal, said that, while this might be "sound advice"[45] were he sitting on a Court of Appeals (since his place would be taken by another judge and the case would proceed normally) the consequence was different in respect of the Supreme Court because, if one of the Justices of the Court recuses himself/herself, then the Court:

> [P]roceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case … Even one unnecessary recusal impairs the functioning of the Court.[46]

He also pointed out that the granting of the recusal motion would, as far as the outcome of the case was concerned, be the same thing as casting a vote against

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[44] In *Liljeberg*, *supra* note 5 at 862-863, Stevens J. considered some circumstances in which the *Federal Rule of Civil Procedure*, s. 60(b), which provides a procedure whereby, in appropriate cases, a party may be relieved of a final judgment, might be invoked. That was in the context of a District Judge however, and it is doubtful however whether such a procedure could ever be invoked in cases involving Supreme Court Justices.

[45] *Supra* note 18 at 230.

[46] *Ibid.* at 231.

Mr. Cheney:

> The petitioner needs five votes to overturn the judgment below, and it makes no difference whether the needed fifth vote is missing because it has been cast for the other side, or because it has not been cast at all.[47]

These considerations actually provide support for the solutions that I am presenting in this article. First, no one is arguing in favour of "unnecessary" recusals. Rather, what should cause greater concern are unwarranted *non*-recusals. In this current inquiry, my focus is not as much on *what* constitutes an appropriate case for recusal, but rather, on *who* decides whether a recusal is "necessary" or required in any particular case. To put it more precisely, the true question is "who has and who should have the final word?" Since the question whether a judge's impartiality "might reasonably be questioned"[48] is a "purely objective" standard,[49] it would seem to follow logically that the judge whose impartiality is being challenged should not have the final word on the question whether his or her recusal is "necessary" or required. Otherwise, there is no way (and no one) to police or secure objectivity. This is the role that formalized self-regulation will play. Secondly, the issue of proceeding with eight Justices, and the attendant consequences thereof, and the issue of a recusal being the same as casting a vote against Mr. Cheney, are precisely what substitution is meant to avoid.

Nothing just referred to above is an argument against either formalized self-regulation or substitution. Indeed, it is hard to object to either solution on grounds of principle. The main objections are technical or procedural, and we will come to these in due course. But, first, the comparative study.

VI. Commonwealth Caselaw

A. *England*

I will mention briefly two celebrated House of Lords decisions. The first involved an individual decision of a Lord Chancellor. In the case of *Dimes v. Grand Junction Canal*[50] a decision of the Lord Chancellor was set aside on account of his substantial shareholding in a company that was a party in proceedings before him. Lord Campbell made his famous statement that, while no one would suppose that the Lord Chancellor could be influenced by the interest that his shareholding gave him in the company, "it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred".[51] I mention this case, not because of the legal principle espoused in it, but for the fact that the House of Lords did not shy away from disqualifying the Lord Chancellor, albeit, sitting in a different court, and *ex post facto*.

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47 *Ibid.*

48 28 U.S.C. § 455(a).

49 See *Cooley*, *supra* note 5 at 993; *Liteky*, *supra* note 8 at 486; *Liljeberg*, *supra* note 5; *Microsoft*, *supra* note 5 at 1049.

50 (1852) 3 H.L. Cas. 758; 10 E.R. 301 [*Dimes* cited to E.R.].

51 *Ibid.* at 315.

The case of *Pinochet* is even stronger because it involved the disqualification of a Law Lord, sitting in the House of Lords itself. Lord Hoffmann was an unpaid Director and Chairman of a charity connected with one of the parties in an appeal before the House, in which Lord Hoffmann had participated. This connection subsequently came to light, upon which "Senator" Pinochet (the losing party in that appeal) petitioned the House of Lords to set aside the judgment in which Lord Hoffmann had participated, on the basis that Lord Hoffmann was disqualified from hearing the case. The House of Lords granted the petition, and set aside the earlier decision. The tortured reasoning of their Lordships in treating this as a case of automatic disqualification for "interest", rather than as a case of apprehended bias, has been criticized elsewhere[52] and is beyond the scope of this paper. The pertinent point is that the House of Lords was willing to vacate one of its own judgments, and to disqualify one of its members on the ground of apparent bias. This is a clear example of formalized self-regulation. By taking such an approach in this case, the House of Lords was able to enforce and implement the principle that the question of judicial disqualification for apprehended bias is "purely objective". It was able to secure that the "last word" did not lie with the judge whose impartiality was being challenged. Had the House of Lords adopted the approach of the U.S. Supreme Court and refused to intervene, no one would sensibly argue that such an outcome would promote public confidence in the administration of justice.

B. *Canada*

Just as monumental as the English cases is the recent action of the Supreme Court of Canada in adjudicating fully on a motion to vacate one of its own previous (unanimous) judgments on the basis of the alleged bias of one of its Justices. In *Wewaykum Indian Band v. Canada*[53] the Supreme Court was faced with a motion for directions and to vacate its earlier judgment.[54] Two months after the first judgment in the case, an access to information request to the federal Department of Justice by one of the parties revealed a number of internal memoranda which indicate that, in late 1985 and early 1986, Binnie J. (Associate Deputy Minister of Justice between 1982-1986, but who had written and delivered the impugned judgment of the Supreme Court in this case) had received some information concerning the claims of that party and he had attended a meeting where the claim was discussed. As Associate Deputy Minister, Binnie J.'s duties "would have included responsibility for all litigation, civil as well as criminal matters, involving the Government of Canada as a party, arising in the common law provinces and territories of Canada; in that context he would have had under his general supervisory authority thousands of cases."[55] The Crown filed a motion seeking directions as to any steps to be taken, and the private parties sought an order setting aside that judgment. Binnie J. recused himself from any further proceedings in the matter and filed a statement setting out that he had no recollection

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[52] See A. Olowofoyeku, "The *nemo iudex* rule: the case against automatic disqualification" [2000] P.L. 456.

[53] [2003] 2 S.C.R. 259, 2003 SCC 45 [*Wewaykum* cited to SCC].

[54] The earlier judgment in respect of which the motion was filed is reported at: [2002] 4 S.C.R. 245, 2002 SCC 79.

[55] *Supra* note 53 at para. 20.

of personal involvement in the case, and the Court proceeded to hear and determine the motion to vacate the judgment on its merits, on the basis that it could succeed if "it is established that reasonable, right-minded and properly informed persons would think that Binnie J. was consciously or unconsciously influenced in an inappropriate manner by his participation in this case over 15 years before he heard it here in the Supreme Court of Canada."[56]

While the Supreme Court held that the actual facts of the case did not disclose any reasonable apprehension of bias and that Binnie J. was therefore not disqualified, it is instructive that the Court as a whole decided the case on its merits, and did not shy from hearing the case as an even-numbered court (eight Justices). An indication of the seriousness with which the Court took the matter can be found in the following excerpt from its (unanimous) judgment:

> An allegation that a judgment may be tainted by bias or by a reasonable apprehension of bias is most serious. That allegation calls into question the impartiality of the Court and its members and raises doubt on the public's perception of the Court's ability to render justice according to law. Consequently, the submissions in support of the applicant bands and the other parties have been examined in detail as reflected in the following reasons.[57]

C. *Australia*

A variety of approaches are discernible from Australian case law, but they are now converging. First we see the High Court of Australia referring in *Ebner v. The Official Trustee in Bankruptcy*[58] to the considerations of "necessity" that may be called for in the case of some disqualifications in a final appeal court such as itself. Kirby J. thus explained these considerations:

> In some circumstances, the interests of justice require that, notwithstanding an interest in the subject matter of, or in a party to, litigation, a judge of that court may participate in the decision out of "necessity". A special rule governing necessity applies to ultimate courts of appeal. This is so either because there is usually no way of substituting ad hoc judges for a particular case or because no other court can correct the decision of the ultimate court.

The doctrine featured prominently in some earlier cases. One such example is the High Court of Australia's decision in *Laws v. Australian Broadcasting Tribunal*.[59] Mason C.J. and Brennan J. said in that case that even if there was a case for holding that a reasonable apprehension of bias attaches to all the members of the Tribunal, the operation of the rule of necessity would ensure that the Tribunal is not disabled from performing its statutory functions, and that "the rule of necessity permits a member of a court who has some interest in the subject-matter of the litigation to sit in a case

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56 *Ibid.* at para. 73.
57 *Ibid.* at para. 2.
58 [2000] HCA 63 [*Ebner*].
59 [1990] HCA 31, (1990) 170 C.L.R. 70 [*Laws* cited to HCA]. See also *Dickason v. Edwards* (1910) 10 C.L.R. 243.

when no judge without such an interest is available to sit". According to them:

> The rule of necessity gives expression to the principle that the rules of natural justice cannot be invoked to frustrate the intended operation of a statute which sets up a tribunal and requires it to perform the statutory functions entrusted to it. Or, to put the matter another way, the statutory requirement that the tribunal perform the functions assigned to it must prevail over and displace the application of the rules of natural justice. Those rules may be excluded by statute.[60]

The other Justices of the Court seemed to accept the existence of the principle, although their support was not as unequivocal. Deane J. said that it was available "to prevent a failure of justice or a frustration of statutory provisions", and that it "operates to qualify the effect of what would otherwise be actual or ostensible disqualifying bias so as to enable the discharge of public functions in circumstances where, but for its operation, the discharge of those functions would be frustrated with consequent public or private detriment."[61] But he also referred to two "qualifications":

> First, the rule will not apply in circumstances where its application would involve positive and substantial injustice since it cannot be presumed that the policy of either the legislature or the law is that the rule of necessity should represent an instrument of such injustice. Second, when the rule does apply, it applies only to the extent that necessity justifies.[62]

Gaudron and McHugh JJ. also expressed some doubts, saying:

> Whatever the precise scope of the doctrine of necessity in the natural justice context, it seems contrary to all principles of fairness that, on the ground of necessity, a person should have to submit to a decision made by a person who has already prejudged the issue. Likewise, there seems much to be said for the view that, in the absence of a contrary statutory intention, the ground of necessity should not require a person to submit to a decision made or to be made by a person who is reasonably believed to have prejudged the issue.[63]

Gaudron J.'s doubts in *Laws* seemed to have transformed into serious misgivings in *Ebner*. According to Gaudron J.:

> Because the requirements of impartiality are, in my view, constitutional requirements, notions of necessity should be resorted to only in a case where, if the judge in question does not sit, a court cannot be constituted to hear and determine the matter in issue. Constitutional requirements cannot yield to expediency or convenience … The common law's requirements with respect to impartiality and the appearance of impartiality derive from the need to maintain the rule of law. Important though that be, the constitutional requirements are directed to maintaining public confidence in the judiciary not simply to promote the rule of

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60 *Laws*, *ibid.* at para. 39 of Mason C.J. and Brennan J.'s joint judgment.
61 *Ibid.* at para. 12 of Deane J.'s judgment.
62 *Ibid.*
63 *Laws*, *supra* note 59 at para. 9 of Gaudron and McHugh JJ.'s joint judgment.

> law but because the judiciary has a central role in maintaining the federal compact embodied in the Constitution and, ultimately, the Australian nation. For this reason, the notion of necessity must, in my view, be limited.[64]

Kirby J. also dealt with the issue of how much inconvenience would be required to justify a conclusion of necessity. He accepted that ordering a retrial would be inconvenient, costly and a serious burden on the parties and the community, but noted that that was "commonly the case where courts conclude that a judge, who has conducted a trial, was disqualified." According to him, "[r]etrial is the price that is paid by our system of law for upholding fundamental legal and civil rights. It is a price worth paying if it reinforces the community's confidence in the administration of justice…"[65]

Thus, in spite of the theoretical acceptance of a rule of necessity that may, under certain circumstances, and, subject to certain qualifications, apply to judges in bias cases, there seems to be a greater emphasis on the overarching considerations of the constitutional requirements of fairness, maintenance of the rule of law, and of public confidence in the administration of justice. The move to restrict necessity to cases where there is no other realistic alternative and where there would clearly be no injustice resulting from the doctrine indicates that the doctrine is not one that will readily be called upon to justify non-recusal of Justices of the High Court, and, more importantly, to justify non-intervention by the Court itself when intervention is appropriate.

The decision in *Ebner* also contains a number of rather interesting propositions. In a thought-provoking paragraph, Callinan J. said:

> A claim of apprehended bias is not infrequently made at the outset, or very early in the proceedings … That decision has conventionally been made by the judge in respect of whom the claim is advanced. The decision of the primary judge here was made in accordance with that established practice. Neither party, either in the courts below or here suggested a departure from it. The practice may however place a judge in what Mandie J. in the second matter described as an invidious position. I doubt whether the Federal Court Act 1946 (Cth) or any State acts dealing with, or affecting the jurisdictions of the respective courts, or any rule of common law which may apply to them, require that a decision whether in the circumstances a reasonable apprehension of bias arises, necessarily be the decision of the judge under challenge. If there is no legal inhibition upon it, and if it is convenient for it to be so made, I think it preferable that such a decision be made by another judge. That procedure would better serve the general public interest and the litigants in both the appearance and actuality of impartial justice. Although the judge in a particular jurisdiction could hardly order that another judge of it not sit on, or decide a matter, it may well be possible for the former to decide a question whether the relevant facts are capable of giving rise to an apprehension of bias on the part of the latter if that judge were to sit on the case. No matter what the status of the rejection or upholding of such an application may be, and regardless that it is not an issue between the parties, it is still a matter that has to be decided by the Court … In saying what I have, I do not mean to cast any doubt on what was said by the Court of Criminal Appeal of New South Wales

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64 *Ebner*, *supra* note 58 at paras. 102-103. See also Kirby J. at para. 179.

65 *Ibid.* at para. 179.

> (Gleeson CJ, Wood and Brownie JJ) in *Roger Caleb Rogerson* that the refusal of a judge to disqualify himself after an application did not constitute a judgment or order within the statutory meaning of those terms against which it was possible to appeal to the Court of Appeal there although such a refusal might constitute a ground of appeal against the ultimate decision in the case in the course of which the application was made.[66]

The argument in this passage that recusal cases should be heard by another judge does not reflect the view of the whole High Court[67] or even of lower courts. However, it is an eminently sensible proposition, and, in the context of an appellate court, could constitute an excellent example of formalized self-regulation if the judges hearing the petition are the rest of that court.

The excerpt from the judgment of Callinan J. also puts forward another proposition—that the refusal of a judge to recuse himself is not a judgment or order of the court against which an appeal is possible.[68] This is the position that has been taken by the New South Wales courts[69] although that approach is beginning to be questioned in South Wales itself[70] and elsewhere in Australia,[71] and, as the Full Court of Federal Court of Australia noted in *Bizuneh v. Minister for Immigration & Multicultural & Indigenous Affairs*,[72] there is conflicting Australian authority on the point. The New South Wales Court of Appeal recently said in *Wentworth v. Graham* that the question:

> [W]hether the Court should change this practice in any relevant respect with respect to other situations in which recusal applications are rejected by a judge sitting alone, will now have to be dealt with in the light of subsequent authority, not least the litigation in England involving Lord [Hoffmann] and his failure to recuse himself in the case involving General Pinochet.[73]

The Court of Criminal Appeal raised the same query in *R v. Reid*,[74] but said that it was possible to distinguish *Pinochet* on the basis that "the reasoning applies to a final court of appeal because there could be no further appeal". It decided that this was not the appropriate opportunity to review *Barton v. Walker*.[75] In *IOOF Aust Trustees Ltd. v. Seas Sapfor Forests & Ors*[76] the Full Court of the Supreme Court of South Australia, in entertaining an appeal against a recusal decision of

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66 *Ibid.* at para. 185.

67 Indeed, Gleeson C.J., McHugh, Gummow and Hayne JJ. in *Ebner*, *ibid.* at para. 74, refused to subscribe to it.

68 See also *R. v. Watson Ex parte Armstrong* (1976) 136 C.L.R. 248 at 266.

69 *Barton v. Walker* [1979] 2 N.S.W.L.R. 740 (C.A.); *Rogerson v. R.* (1990) 45 A. Crim. R. 253 at 255 (C.C.A.); *Wentworth v. Graham* [2002] NSWCA 399, *per* Santow JA.; *Wentworth v. Graham* [2003] NSWCA 104, *per* Spigelman C.J., Mason P., and Handley JA.; *Idoport Pty. Ltd. & Anor v. National Ausralia Bank Ltd. & 8 Ors* [2004] NSWSC 270, *per* Einstein J. Compare *Minister for Immigration and Multicultural Affairs v. Wang* [2003] HCA 11 at para. 12.

70 See *e.g. Australian National Industries Ltd. v. Spedley Securities Ltd. (in liquidation)* (1992) 26 N.S.W.L.R. 41; *Chow v. Director of Public Prosecutions* (1992) 28 N.S.W.L.R. 593.

71 See *e.g. Barton v. Walker* in *Gas & Fuel Corp. Superannuation Fund v. Saunders* (1994) 52 F.C.R. 48; *Brooks v. The Upjohn Company* (1998) 156 A.L.R. 622.

72 [2003] FCAFC 42 at para. 5.

73 [2003] NSWCA 104 at para. 13.

74 [2004] NSWCCA 301 at para. 12.

75 *Supra* note 69.

76 [1999] SASC 249 at para. 205.

one of its judges, deftly sidestepped the issue of whether *Barton v. Walker* should be followed by considering it "unnecessary to decide whether the applications for leave to appeal against the disqualification decisions are incompetent", since the defendants "accepted that, if an order is made by a judge that can be appealed, with or without leave, before the action is finally disposed of, a complaint of bias can be raised in connection with the appeal against the relevant order." It therefore dealt with the challenges against the judge's refusal to recuse himself (which were eventually rejected) along with other substantive issues raised in the application. Finally, in *AGF & LLS*[77] the Full Court of the Family Court of Australia considered an appeal under section 94 of the *Family Law Act 1975*[78] against a recusal decision of a single judge of the Court sitting alone. The Full Court decided that the judge was wrong not to have recused himself, and allowed the appeal.

How would the High Court itself respond to a challenge to its own decision on grounds of bias? There have of course been recusal cases involving judges of the High Court. For example, in *Kartinyeri v. The Commonwealth*[79] Callinan J. was faced with a submission that he should not sit in the case on the basis that a joint opinion that he had presented to the Senate Legal and Constitutional Affairs Committee in relation to the *Hindmarsh Island Bridge Bill 1996* prejudged the issues in the appeal. According to Callinan J.'s ruling, "no formal motion has been filed or is necessary".[80] After some discussion, he declined to recuse himself. This decision was apparently not challenged. But a challenge was launched in *Bienstein v. Bienstein*.[81] In this case, Hayne J. was (in exercising the jurisdiction of the High Court as a single judge) hearing an application to remove certain proceedings from the Full Court of the Family Court of Australia into the High Court. The applicant requested that he recuse himself for apparent bias. He rejected the application to recuse himself because he did not consider that there were any reasonable grounds to doubt his impartiality. He also refused the application for the case to be moved to the High Court. The applicant then appealed against both refusals to the Full Court of the High Court under section 34 of the *Judiciary Act 1903*.[82] The main question in the case was whether leave was required under section 34(2) or whether Hayne J.'s decisions were "final" and therefore an appeal lay as of right. The High Court (McHugh, Kirby and Callinan JJ.) held that the appellant did require leave because neither order of Hayne J. was "final". The appeal would be dismissed as incompetent on that ground. It was however also held that, if the appellant had applied for leave, it would have been refused because her appeal would have had no prospect of success.[83] The High

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77 [2005] Fam. CA 13.

78 (Cth.), s. 94(1AA) uniquely caters for recusal decisions, providing that that "An appeal lies to a Full Court of the Family Court from a decree or decision of a Judge exercising original or appellate jurisdiction under this Act rejecting an application that he or she disqualify himself or herself from further hearing a matter."

79 [1998] HCA 52.

80 *Ibid.* at para. 2.

81 [2003] HCA 7.

82 (Cth.), s. 34(1) provides that "The High Court shall, except as provided by this Act, have jurisdiction to hear and determine appeals from all judgments whatsoever of any Justice or Justices, exercising the original jurisdiction of the High Court whether in Court or Chambers". Compare s. 24(1) of the *Federal Court of Australia Act 1976* (Cth.), with regard to the appellate jurisdiction of the Australian Federal Court.

83 See *Bienstein*, *supra* note 81 at paras. 29 and 37.

Court considered the authorities on apprehended bias and the facts of the case and concluded that Hayne J. was correct in not recusing himself, since the allegations regarding apprehended or demonstrated bias on his part were "without basis".[84]

While this case relates to the actions of a single justice exercising the Court's original jurisdiction, section 34 does not seem to draw any distinction between the actions of a single justice or of a panel of Justices.[85] Therefore there seems to be no reason in principle why a similar invitation cannot be made to the High Court to vacate a decision of a Full Court. The High Court is of course fully aware of the decision of the House of Lords in *Pinochet*, and cited it several times in *Ebner*. Whether this means that it will act in the same way (*i.e.*, vacate one of its own Full Court decisions) in a similar situation is not so clear, but, despite the talk about "necessity" in *Ebner*, it would be reasonable to assume that it will.[86] For these purposes there is no logical reason to draw distinctions based on the number of Justices that decided a case. It is instructive also that Justices of the Court have not tried to invoke the doctrine of necessity in cases involving their own recusal. The *Pinochet* case also shows that there may be no necessity at all in such cases, since there are viable alternative courses of action.

So we see in Australia a number of instances of a species of formalized self-regulation, albeit some under statutory authority.

D. *New Zealand*

I will address briefly two relevant decisions of the New Zealand Court of Appeal. In *Collier v. A-G*[87] a man appealing against a judgment of the Full Court of the High Court to the Court of Appeal requested that the members of the Court of Appeal panel recuse themselves unless they could answer "No" to a series of questions that he posed to them. Two of the judges answered "No" to one of the questions but declined to answer the others. One judge simply stated that there were no grounds for recusal, otherwise he would not be sitting. The Court of Appeal refused the appellant's request for conditional leave to appeal to the Privy Council. The Court, giving its reasons for refusing the application for conditional leave, pointed out that, while rulings that have a substantial effect on rights and liabilities in issue can be appealed, rulings ancillary to the substantive hearing, such as rulings on adjournment applications or as part of the conduct of the appeal, do not found jurisdiction to appeal.[88] However, Court seemed to suggest that the decisions of individual judges could be reviewed by the whole court when it said that, whether constituting a bar to jurisdiction to grant conditional leave, or whether, if it can be characterized as a judgment, as justifying

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84 *Ibid.* at para. 36.

85 Compare the statement of the High Court in *Watson v. Federal Commissioner of Taxation* (1953) 87 C.L.R. 353 at para. 3: "[I]t is generally true that the original jurisdiction of the High Court is exercisable by a single judge … The Judiciary Act always speaks of the High Court independently of the manner in which it is constituted and uses the Full Court to mean the Full Court of the High Court. There appears to us to be no ground for construing the High Court as meaning the Full Court of the High Court."

86 See for example *R v. Reid* [2004] NSWCCA 301 at para. 12, where the New South Wales Court of Criminal Appeal indicated that the reasoning in *Pinochet* applied to courts of last resort.

87 [2001] NZCA 328.

88 *Ibid.* at para. 18.

refusing leave, the appropriate course "is to defer such matters until completion of the substantive hearing and decision where on examination of all relevant circumstances *the court, or the Privy Council on appeal*, can set aside the substantive decision if satisfied that the Judge was disqualified."[89]

The suggestion that the court itself can set aside the substantive decision if satisfied that the judge was disqualified is borne out by *Man O'War Station Ltd. v. Huruhe Station Ltd. & Ors*[90] where the Court was invited to set aside, or, alternatively, to recall, one of its own decisions on the basis of the alleged apparent bias of one of its judges who had participated in that decision. The Court heard the motion (without the participation of the relevant judge), and denied it on its merits (on the grounds that the facts did not disclose any reasonable ground for apprehending bias in the judge) after the Court had invited a written statement from the judge responding to the claims of the petitioners, and had undergone a full analysis of the legal authorities and factual circumstances. While the applicant was unsuccessful in his request that the earlier judgment be set aside by the Court, the Court clearly did not dismiss the motion as incompetent, and arguably would have been prepared to vacate the decision if necessary. The Court of Appeal's decision was affirmed by the Privy Council.[91] On the issue of the competence of the Court of Appeal to hear the application, Lord Steyn, delivering the opinion of the Board, said:

> [T]he Court of Appeal decided that Gault, Keith and Tipping JJ. would hear the application. It was within their power to hear and determine the application. Nothing was said before the Privy Council which could throw any doubt on the legality, regularity or appropriateness of the proceedings of the Court of Appeal so constituted in hearing and deciding the application.[92]

The Privy Council has since been replaced by the Supreme Court of New Zealand,[93] currently New Zealand's final appellate court, with its founding Justices drawn mainly from the most senior ranks of the original Court of Appeal, including all those who decided the *Man O'War* case in the Court of Appeal. There is no indication that they, in their new roles, would depart from this precedent.

E. *South Africa*

The decision of the South African Constitutional Court in *SARFU*[94] is of direct relevance. The case involved applications for the recusal of half of the members of the Court and allegations and complaints against some of its members. The Court invited counsel on all sides to address it on the appropriate procedure to be followed in such a case. Counsel agreed that the applications should be heard simultaneously

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89 *Ibid.* at para. 19 [emphasis added].

90 [2000] NZCA 352.

91 *Man O'War Station Ltd. v. Auckland City Council (Judgment No. 1)* [2002] 3 N.Z.L.R. 577, [2002] UKPC 28.

92 *Ibid.* at para. 4.

93 See *Supreme Court Act 2003* (N.Z.), 2003/53. The Supreme Court of New Zealand came into being on 1 January 2004 and started hearing appeals on 1 July 2004 (s. 55).

94 *Supra* note 3.

by the whole Court, which the Court duly did. According to the Court:

> A judge who sits in a case in which she or he is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that such judge might be biased, acts in a manner that is inconsistent with section 34 of the Constitution, and in breach of the requirements of section 165(2) and the prescribed oath of office. We have no doubt, therefore, that the application for recusal raised a "constitutional matter" within the meaning of section 167(3), and that it was the duty of this Court to give collective consideration to the question whether the judges concerned should recuse themselves.[95]

The Court, pointing out the obvious fact that judges have jurisdiction to determine applications for their own recusal, noted that wrong decisions on recusal by trial judges can be corrected on appeal, whereas no provision existed for an appeal against a decision of the Constitutional Court.[96] It noted (referring to the House of Lords' decision in *Pinochet*) that, as the ultimate court of appeal in constitutional matters, it was the only court that had the power to set aside one of its own judgments or to correct an error made by it. It said that, in the light of the Court's clear duty to act constitutionally, it did not need to decide in the present case whether such a power actually existed, and, if so, the circumstances in which it would be exercised.[97] However, in light of its constitutional duty, the Court took the view that, if one or more of its members was disqualified from sitting in a particular case, it had "a duty to say so, and to take such steps as may be necessary to ensure that the disqualified member does not participate in the adjudication of the case."[98] The Court also said that "[i]f one judge, in the opinion of the other members of the Court, incorrectly refuses to recuse herself or himself, that decision could fatally contaminate the ultimate decision of the Court, and the other members may well have a duty to refuse to sit with that judge."[99]

VII. Formalized Self-regulation in the Supreme Court of the United States

The preceding discussions in respect of Commonwealth decisions expose the U.S. Supreme Court as an isolated island in the sea of common law appellate courts, including courts of final resort. The approaches of the South African Constitutional Court and the New Zealand Court of Appeal in respect of the review of interim decisions on recusal, and the other examples of formalized self-regulation by appellate courts and apex courts in the Commonwealth in cases of alleged bias of their members, stand in marked contrast to the *laissez faire* approach of the U.S. Supreme Court. In displaying a reluctance to review individual recusal decisions, the U.S. Supreme Court leaves open the spectre of motions to vacate allegedly tainted judgments of the whole Court. In this respect, the decisions of the Supreme Court of Canada, the New Zealand Court of Appeal and the House of Lords in relation to post-judgment

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95 *Ibid.* at para. 30.
96 *Ibid.* at para. 31.
97 *Ibid.*
98 *Ibid.*
99 *Ibid.* at para. 32.

challenges discussed above, present stark warnings to the U.S. Supreme Court, in the sense of prevention (*i.e.*, dealing with the issue of recusal before a final decision of the Court has been reached on the substantive issues in the case) being better than cure (dealing with a motion to vacate a judgment on the substantive issues). In some situations (*e.g.* the decision of the House of Lords and the Supreme Court of Canada referred to above), an *ex post facto* challenge is unavoidable because final judgment had already been delivered before the allegedly disqualifying factors became known. However any untoward consequences of the practice of the U.S. Supreme Court of not reviewing individual recusal decisions would be self-inflicted. If the option for *ex post facto* motions to vacate is available, then follows the perverse situation that those who move for recusal *before* final judgment do not get the attention of the whole Court, but those who wait until final judgment and *thereafter* move to vacate that judgment do get the attention of the whole Court.

Unless the U.S. Supreme Court abandons its stance of not getting involved in recusal motions affecting one of its own Justices, the potential for damaging public confidence in the administration of justice will continue to exist. Given the will, the Supreme Court has the means to implement change in the direction of formalized self-regulation on this question. Persuasive Commonwealth authority shows that such a step would not be arbitrary or unprecedented. With or without the support of Commonwealth authority, the constitutional requirements of fair hearing, judicial impartiality and independence and due process provide the Supreme Court with sufficient mandate to implement change, as do the provisions of 28 U.S.C. § 455(a) itself.

Some may question why the preceding comparative material should be taken notice of at all, since the United States is obviously very different from the Commonwealth countries covered in the comparative study. The answer is simple. First, as far as the content of the principles relating to judicial impartiality and disqualification for bias are concerned, we have seen that the position in the U.S.A. is not very different from those of other developed common law jurisdictions. The leading authorities in the U.S.A., Canada, Australia, New Zealand, South Africa, and the United Kingdom share common themes and are generally compatible with each other, both in theory and in substance. Secondly, while it is true that the U.S. Supreme Court typically sits *en banc*, and that this may put it under pressures that some other apex courts would be free from, it is also clear that the U.S. Supreme Court is not unique in this respect. For example, the High Court of Australia and the Supreme Court of Canada are in the same situation; therefore any pressure arising from the feeling that everyone possible should hear each case is not unique to the U.S. Supreme Court. Even in apex courts that sit in divisions such as the House of Lords, the recusal of one member would mean reconstituting the panel, and there may not necessarily be another person is who is immediately free to step into the gap.

There is therefore nothing to prevent learning from the experiences of other jurisdictions with a shared heritage. The object is not to pretend that there is a common body of common law doctrine and to try to determine the "true" set of precedents. Rather, I am arguing for a set of principles, which contrast with the current practice of the U.S. Supreme Court. What is at stake is the integrity of the system of justice and public confidence in the administration of justice, and, underpinning my argument

is the view that, in any case wherein the impartiality of a judge is being challenged or questioned, it is wholly inappropriate for that judge to be the final arbiter of that question.

Before proceeding further on the question of formalized self-regulation, I will examine some rationalisations of the Supreme Court's current non-interventionist approach. In *Jewell Ridge*[100] Jackson J. said:

> The unusual feature of the petition in this case is that it suggests to the Court a question as to the qualification of one of the Justices to take part in the decision of the cause. This petition is addressed to all of the Court and must either be granted or denied in the name of the Court and on the responsibility of all of the Justices. In my opinion the complaint is one which cannot properly be addressed to the Court as a whole and for that reason I concur in denying it.
>
> No statute prescribes grounds upon which a Justice of this Court may be disqualified in any case. The Court itself has never undertaken by rule of Court or decision to formulate any uniform practice on the subject. Because of this lack of authoritative standards it appears always to have been considered the responsibility of each Justice to determine for himself the propriety of withdrawing in any particular circumstances. Practice of the Justices over the years has not been uniform, and the diversity of attitudes to the question doubtless leads to some confusion as to what the bar may expect and as to whether the action in any case is a matter of individual or collective responsibility.
>
> There is no authority known to me under which a majority of this Court has power under any circumstances to exclude one of its duly commissioned Justices from sitting or voting in any case. As to the other and usual grounds, applications for rehearing in this Court, as in other bodies, are addressed to the majority which promulgated the decision. This is so formulated by our Rule 33, 28 U.S.C.A. following section 354. It is always obvious that unless one or more of them is willing to reconsider his position no good can come of reargument. Hence, being in dissent, I have no voice as to rehearing, except that I continue to adhere to the dissent.

On the basis of this, each Justice treats a motion for his/her recusal (which is normally addressed to the Court as a whole) "as addressed to me individually".[101]

Much of what Jackson J. said may have been true in 1945 when the decision in *Jewell Ridge* was handed down. But even if it was correct in 1945, this was well before the promulgation of the current version of 28 U.S.C. § 455(a), which acquired its present form in 1974.[102] The section provides thus: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Clearly, this statute, applying as it does to all federal judges, does prescribe grounds in which a justice of the Supreme Court may be disqualified. While it may be argued that the provision, in stating that a judge "shall disqualify himself" reinforces the principle that recusal is an individual matter, the objective nature of the

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[100] *Supra* note 29.

[101] See *e.g.* Rehnquist J. in *Hanrahan*, *supra* note 29.

[102] The history of the provision was usefully traced by Scalia J. in *Liteky*, *supra* note 29 at 486.

wording of the conditions for disqualification (*i.e.*, "in which his impartiality might reasonably be questioned") makes it clear that it is not meant to just be a matter for individual Justices' preferences, practices and whims. The case law, as has been shown, clearly establishes this to be the case, both in providing that the question whether the conditions are met is purely objective, and in providing for review (in respect of judges of lower courts) on grounds of abuse of process.

Jackson J. also said that there was no authority known to him under which a majority of the court had any power to exclude one of its duly commissioned Justices. Arguably, 28 U.S.C. § 455(a) is such an authority—unless if what Jackson J. is saying is that the section somehow insulates individual Supreme Court Justices from scrutiny in respect of their decisions under it. By effectively treating the recusal decisions of its own Justices as subjective (in not subjecting them to any judicial scrutiny) the Supreme Court is not enforcing or applying 28 U.S.C. § 455(a)—rather, it is subverting it. Additionally, the requirements of fair hearing and due process also provide the authority that Jackson J. was looking for. It would be nonsensical for the Court to throw up its hands helplessly in despair in situations where there is clear evidence of bias, or where it is clear that one of its Justices is compromised, such that the requirements of fair hearing and due process were not being observed. If so, then it would be illogical to restrict any possible intervention by the Court to "clear cases".

Finally, Jackson J. pointed out that there were no authoritative standards that had been laid down by the Court. He also noted that some "confusion" had been engendered by the differential standards applied by individual Justices. Leaving aside the obvious fact that this case was itself sufficient opportunity for the Court to develop some "authoritative standards", with due respect to Jackson J., the confusion that he referred to is itself reason enough for the Court to address the question. It seems odd that the Court would comment on differential standards and the confusion caused thereby, and still leave things unchanged. With the obstacles identified by Jackson J. having been disposed of, formalized self-regulation now presents a clear way out of the current quagmire.

"Self-regulation" in this context can mean one of two things—*en banc* resolution of every recusal motion, or, short of that, *en banc* review of the recusal decisions of individual Justices. The former precludes any possibility (even if doomed to failure) of collateral challenges in other *fora* (such as the U.S. District Court). The latter would render such challenges unnecessary, but would not entirely preclude them, since there is no reason why the litigants should look to the Supreme Court rather than to a District Court for review of individual recusal decisions. While either approach would be an improvement on the current situation, the former is preferred for the reasons just stated. In either case, the Court still has to countenance the possibility of applications for the vacation of judgments of the Court tainted by the apparent bias of one of its Justices.

VIII. Substitution and the Supreme Court of the United States

As indicated above, Scalia J. made the point in his ruling in the *Cheney* case about the dangers of having an even-numbered court in the event of his recusal, pointing out that, if one of the Justices of the Court recuses himself/herself, then the Court

would have to proceed with eight Justices, "raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case."[103] This is of course a significant factor for consideration, and it is clear that the prospect of a hung court can serve as a disincentive to recusal in marginal and even clear cases, or it may carry undue weight in the minds of judges.

This is however no convincing argument for not recusing in appropriate cases, as Scalia J. himself recognized in the *Cheney* case. On the other hand, it serves as impetus for an alternative solution. And, the problem potentially raised by a missing Justice is superable, through the principle of substitution. This is not a new idea in the U.S.A., as other jurisdictions in the U.S.A. have provision for substitution. The Supreme Court itself referred in *Aetna Life Insurance Co. v. Lavoie*[104] to the Alabama provision,[105] which authorizes the appointment of special Justices for the Alabama Supreme Court in the event of disqualifications resulting in an even-numbered court that is evenly divided on a matter. There are further examples elsewhere, outside of the U.S.A. The Supreme Court of Canada, for instance, has provision for substitution of its Justices. The *Supreme Court Act*[106] provides in section 30(1) for the appointment of "*ad hoc*" judges where there would otherwise not be a quorum "owing to a vacancy or vacancies, or to the absence through illness or on leave or in the discharge of other duties assigned by statute or order in council, or to the disqualification of a judge or judges" of judges of the Federal Court, or (in the absence of Federal Court judges), of judges of provincial superior courts (judges of the Court of Appeal or the Superior Court of that Quebec as appropriate). Similar provisions exist in respect of the Supreme Court of New Zealand,[107] and the South African Constitutional Court.[108]

There is nothing preventing the enactment of a similar provision in respect of the U.S. Supreme Court as well, covering not only inquorate courts, but also situations in which a Justice cannot sit for some reason. Currently, the situation of an inquorate U.S. Supreme Court results in a case being referred to a Circuit Court of Appeals for final resolution, or postponement to the next term, or to an "order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court."[109]

It should be uncomplicated to appoint special or "*ad hoc*" Justices from within the ranks of the Chief Judges (and other Justices) of the United States Circuit Courts of Appeal, and/or retired federal judges, and/or the Chief Justices of the State Supreme Courts. This would not be too different from the U.K., where retired Law Lords and other peers who hold or have held high judicial office in the Commonwealth can

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[103] *Cheney*, *supra* note 18 at 231.

[104] *Aetna Life*, *supra* note 43 at 828.

[105] Ala. Code, § 12-2-14 (1975). Compare 28 U.S.C. § 46(b) in relation to United States Circuit Courts of Appeals—"In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness".

[106] *Supreme Court Act*, R.S.C. 2002, c. S-19, s. 1.

[107] *Supreme Court Act 2003* (N.Z.), 2003/53, s. 23.

[108] *Constitution of the Republic of South Africa 1996*, No. 108 of 1996, s. 175(1).

[109] 28 U.S.C. § 2109.

sit and hear appeals in the House of Lords. This has worked remarkably well, and ensures that questions such as whether a sitting of the apex court is even-numbered are a non-issue. With the U.S. Supreme Court, as with the Canadian Supreme Court, such special or *ad hoc* Justices only need be appointed exceptionally (as opposed to the U.K., where there is currently a standing eligibility of those mentioned above). Provision for the appointment of special or *ad hoc* Justices in such exceptional circumstances would be a quick and effective solution. Lest such an appointment be seen as an opportunity to change the balance of a politically split five-four court, it may be stipulated that the nominees for special appointment be proposed by the recusing Justice only.

Currently, the situation is that thus described by Rehnquist C.J. in *Microsoft*:

> [I]t is important to note the negative impact that the unnecessary disqualification of even one Justice may have upon our Court. Here—unlike the situation in a District Court or a Court of Appeals—there is no way to replace a recused Justice. Not only is the Court deprived of the participation of one of its nine members, but the even number of those remaining creates a risk of affirmance of a lower court decision by an equally divided court[110].

This raises two separate issues. First is the issue of the Court being deprived of the participation of one of its members. This would in any case be inevitable if a Justice is recuses himself/herself. Recusal of Justices is common enough,[111] and so this factor in itself is not significant here. It certainly is no justification for a justice not recusing in a proper case. Therefore it is not clear what point is being made. If the point is that unnecessary and inappropriate recusals are wrong and should be avoided, that point is clear enough without resorting to the deprivation argument. If the point is to excuse non-recusal in clear or very marginal cases, then it cannot be supported at all.[112] More serious is the issue of an even-numbered court and the problems that would be raised (vividly explained by both Scalia J. in *Cheney* and Rehnquist C.J. in *Microsoft*) if such a Court were to divide evenly.[113]

This dilemma exists because, as Rehnquist C.J. pointed out in *Microsoft*, "there is no way to replace a recused Justice". On the issue of the appointment of special or *ad hoc* Justices to replace a recused Justice, 28 U.S.C. § 294(a) provides:

> Any retired Chief Justice of the United States or Associate Justice of the Supreme Court may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit, including those of a circuit justice, as he is willing to undertake.

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[110] *Microsoft*, *supra* note at 1049.

[111] Jerome I. Braun in his editorial in (2004) Appellate Advocate 16, referring to an article by Tony Mauro in the *Legal Times*, March 3, 2004, gave some statistics: "For the record, here are the justices' average yearly recusals as Mauro computed them: Breyer 42, Souter 32, O'Connor 31, Stevens 17, Thomas 17, Kennedy 12, Scalia 12, Ginsburg 7, Rehnquist 7."

[112] Although Rehnquist J. said in *Laird v. Tatum* 409 U.S. 824 at 837 that: "The undesirability of such a disposition is obviously not a reason for refusing to disqualify oneself where in fact one deems himself disqualified, but I believe it is a reason for not 'bending over backwards' in order to deem one's self disqualified."

[113] Note that such a problem does not prevent statute (28 U.S.C. § 1) from specifying an even number (six) as the quorum for the Court. The effect of an inquorate Court can be the same as that of an evenly divided Court (see 28 U.S.C. § 2109).

28 U.S.C. § 294(c) provides:

> Any retired circuit or district judge may be designated and assigned by the chief judge or judicial council of his circuit to perform such judicial duties within the circuit as he is willing and able to undertake. Any other retired judge of the United States may be designated and assigned by the chief judge of his court to perform such judicial duties in such court as he is willing and able to undertake.

So U.S. federal law already makes provision for the appointment of special judges from the ranks of retired federal judges, as proposed earlier. The problem is in the provision of 28 U.S.C. § 294(d) that "No such designation or assignment shall be made to the Supreme Court".

This is a very short statement at the end of a fairly lengthy sub-section. It remains the single obstacle to progress on this issue, and its repeal or amendment would resolve the whole situation as described. Considering the considerable influence that the Chief Justice and other Justices of the Supreme Court wield, the repeal of that short provision is not likely to be a difficult task for them to secure—assuming that they are willing in the first place for this to happen. If the judges are not willing to press for this change, then it is something that can and should be initiated from within Congress itself.

IX. Conclusion

In the final analysis, the real obstacles to the resolution of the problems highlighted in this paper on the question of recusals in the U.S. Supreme Court lie in the outdated legislation against special Justices being designated for the Supreme Court, and the outdated positions of the Court itself, in treating motions for recusal as being addressed to the individual Justices and not to the Court itself, and, of not reviewing the recusal decisions of those individual Justices. The natural consequences of this are the "confusion" referred to by Jackson J. in *Jewell Ridge*, and the lament that "Supreme Court recusal decision-making is somewhat shrouded in mystery."[114] It is clear that any notion of "necessity" cannot reasonably be invoked when there are clear and accessible solutions.

Scalia J. refused to recuse in the *Cheney* case in highly controversial circumstances. Other Justices of the Supreme Court have similarly refused to recuse in controversial circumstances.[115] Under the current practice of the Supreme Court, such non-recusing Justices are perfectly entitled to do as they wished, and the litigants have no recourse. It was no less than Lord Denning M.R. who said in *Metropolitan Properties Ltd. v. Lannon*[116] that justice is rooted in confidence, and that confidence is destroyed when right-minded people go away thinking that the judge was biased.

The tests for apprehended bias in the U.K. and the Commonwealth are not much different from that in 28 U.S.C. § 455(a). The question is whether there are "right-minded people" who would have gone away thinking that Scalia J. in *Cheney*, Rehnquist C.J. in *Microsoft*, or the Justices in *Bush v. Gore* named in Ifill's article, were or might have been biased. It would be impossible to answer "no" in the

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[114] Ifill, *supra* note 13 at 620.

[115] For example, Rehnquist C.J. in *Microsoft*, *supra* note 5.

[116] [1969] 1 Q.B. 577 at 599.

cases just mentioned, and, no doubt, in many other cases. However controversial those decisions may have been, the greater evil lies in the fact that such decisions by individual Justices escape the scrutiny of the whole Court and give the litigant no recourse in respect of what might, if done by a judge of a lower court, be seen as a violation of basic principles of fair hearing and due process.

When right-minded people go away thinking that the judge might have been biased, and understand that it is that same judge who has said "I am not biased, and I am staying put, and that is that", and that his or her judicial brethren (regardless of what they might think privately) are not going to do anything about it, it is arguable that their confidence is even further destroyed. So if the question is whether the Supreme Court's current doctrine is one that is helping to preserve public confidence in the administration of justice, then I would argue not. And the situation is so easily remediable, as I have endeavoured to show.