"Bias is Easy to Attribute to Others and Difficult to Discern in Oneself": The Problem of Recusal at the Supreme Court

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Introduction

On January 5, 2003, Supreme Court Justice Antonin Scalia and Vice President Richard B. Cheney flew together on a government plane and spent two days duck hunting together in Louisiana with a group of mutual friends.[1] While social contact between government officials might normally be uncontroversial, this particular trip took place three weeks after the Supreme Court granted certiorari in *Cheney v. U.S. District Court for the District of Columbia*, in which Vice President Cheney's official actions were at issue.[2] One of the litigants in that case, the Sierra Club, filed a motion to recuse Justice Scalia shortly after the trip, noting that that the incident had generated dozens of media reports and that "8 of the 10 newspapers with the largest circulation in the United States . . . have called on Justice Scalia to step aside because his vacation with the Vice President . . . has created an appearance of impropriety in this case."[3]

In a highly unusual move, Justice Scalia issued a public denial of the motion to recuse, which the *New York Times* called a "mocking criticism" of the idea that "he would be biased toward his longtime friend."[4]

In addition to *Cheney v. United States District Court*, *United States v. Morrison,*[5] *Microsoft v. United States*,[6] and *NFIB v. Sebelius*[7] have generated

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1. Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913 (2004) (Scalia, J., respecting recusal).

2. *See* Cheney v. U.S. Dist. Court for D.C., 542 U.S. 367, 374 (2004); Steve Twomey, *Scalia Angrily Defends His Duck Hunt with Cheney*, N.Y. Times (Mar. 5, 2004), https://www.nytimes.com/2004/03/18/politics/scalia-angrily-defends-his-duck-hunt-with-cheney.html [https://perma.cc/FH38-DN4C].

3. Mot. to Recuse, Cheney v. U.S. Dist. Court for D.C., 542 U.S. 367 (2004) 2004 WL 3741418, at *1–3.

4. *See* Twomey, *supra* note 2. Justice Scalia's denial of the motion to recuse is discussed in detail in Part II.A, *infra*.

5. *See* United States v. Morrison, 529 U.S. 598 (2000). In this instance, Chief Justice Rehnquist publicly lobbied against the civil remedy of the Violence Against Women Act prior to its passage, and subsequently authored the majority opinion striking down the law on similar terms to those that he had alleged previously. The opinion was not only controversial on the merits, but also raised important questions about the appropriateness of Rehnquist's ruling after engaging in what was perceived as inappropriate political lobbying against the bill. *See* Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. Cal. L. Rev. 269, 271–75 (2000).

6. Chief Justice Rehnquist declined to recuse himself in this landmark antitrust suit after considering his son's partnership at a law firm representing Microsoft and his son's work on behalf on Microsoft in other cases. *See* Microsoft Corp. v. United States, 530 U.S. 1301, 1301–02 (2002) (Rehnquist, C.J., respecting recusal).

similar controversies centered on the behavior, personal political views, or perceived biases of various Supreme Court Justices.[8] Notwithstanding such scrutiny, Supreme Court Justices are generally reluctant to recuse themselves.[9]

Recusal, or the exclusion of a judge or Justice from an individual case because of bias or the appearance of bias,[10] is one of the primary tools that the judiciary uses to ensure the impartiality and ethical integrity of a judge or Justice. "Indeed, promot[ing] public confidence in the impartiality of the judicial process is a primary purpose" of recusal.[11] Perhaps unsurprisingly, recusal is "as old as the history of the courts."[12]

At the Supreme Court level, a motion to recuse is assigned to the Justice it aims to remove.[13] That Justice would then consult the federal recusal statute, 28 U.S.C. § 455(a), which states that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned,"[14] to determine if the legal standard is satisfied. In practice, the Justices almost never explain their decisions granting or denying recusal motions.[15] These decisions are unreviewable and "can never be reversed."[16]

The question of recusal at any level "is of very significant concern for individual litigants, the particular judges [or Justices] involved, the public at large, and

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7. While no motions for recusal were filed, "persistent national discussion" of the case centered on whether Justices Clarence Thomas and Elena Kagan should recuse themselves from this case. Proponents of the Patient Protection and Affordable Care Act, including seventy-four Congressional Democrats, sought the recusal of Justice Thomas because his wife received over $700,000 for her work in opposition to the act. Others sought Justice Kagan's recusal because she served as solicitor general in the Department of Justice during the Act's enactment. This controversy is particularly notable because, had Kagan in fact recused herself, that decision would likely have been outcome determinative and deprived the majority of its crucial fifth vote. For further discussion of this "duty to sit," see *infra* Part II.C. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); LOUIS J. VIRELLI III, DISQUALIFYING THE COURT: SUPREME COURT RECUSAL AND THE CONSTITUTION 35 (2016).

8. *See* VIRELLI, *supra* note 7, at xv.

9. *See* Rebekah Saidman-Krauss, *A Second Sitting: Assessing the Constitutionality and Desirability of Allowing Retired Supreme Court Justices to Fill Recusal-Based Vacancies on the Bench*, 116 PENN ST. L. REV. 253, 257 (2011).

10. Technically, recusal is only the judge's *sua sponte* withdrawal from a case, and disqualification is judicial removal required by statute or by a party's motion. Regardless, the terms are frequently used interchangeably. *Id*. at 235.

11. Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181, 196 (2011) (quoting H.R. REP. No. 93-1453, at 5 (1974), reprinted in 1974 U.S.C.C.A.N. 635; S. REP. No. 93-419, at 5 (1974)).

12. John A. Meiser, *The (Non)Problem of a Limited Due Process Right to Judicial Disqualification*, 84 NOTRE DAME L. REV. 1799, 1803 (2009) (quoting RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION § 1.2, at 5 (2d ed. 2007)).

13. *See* Laurel A. Rigertas, *The Supreme Court and Recusals: A Response to Professor Lubet*, 47 VAL. U. L. REV. 939, 942 (2014).

14. 28 U.S.C. § 455(a) (2018). The recusal statute is examined in detail in Part II.A, *infra*.

15. *See* Rigertas, *supra* note 13.

16. *Id*.

the administration of justice."[17] At a minimum, the American public expects judges to be "fair and independent . . . [and able] to resolve disputes objectively by applying the relevant law to the available facts."[18] These concerns are "magnified" at the Supreme Court, where the ethical integrity of the Justices is vital to the Court's ability to function as part of the constitutional system.[19] However, the current "conspiracy of silence" around Supreme Court recusals, in which the Justices decline to provide reasons for their recusal decisions, undermines the Supreme Court's appearance of integrity and democratic legitimacy.[20]

Not only has public confidence in the Supreme Court declined over the past thirty years,[21] but Congress and the Justices themselves have increasingly been forced to publicly discuss recusal to defuse various controversies.[22] For example, in just the last ten years, Congress has twice introduced bills that would impose a code of conduct and formal recusal procedures on the Justices, sitting Justices have testified about recusal before Congress, and Chief Justice John Roberts devoted the entirety of his *2011 Year-End Report on the Federal Judiciary* to ethics and recusal.[23]

Part I of this Note will explore the general goals of recusal and its importance in the constitutional system. Part II will provide an overview of competing "traditionalist" and "reformist" views of recusal at the Supreme Court. This Part will also explore the implications of two recent recusal cases decided by the Supreme Court, *Caperton v. A.T. Massey Coal Company*[24] and *Williams v. Pennsylvania*,[25] both of which found that recusal can be required by the Fifth and Fourteenth Amendment's Due Process Clauses. Part III will explore potential solutions to the current problems associated with Supreme Court practice, including recent legislation seeking to regulate Supreme Court recusal, letting retired Justices hear cases, and allowing for *en banc* review of recusal decisions. This Note will argue that current recusal practices are untenable, and perhaps unconstitutional, and will make recommendations for proposed alternatives.

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17. R. Grant Hammond, *Judicial Recusal: Principles, Process, and Problems*, *in* JUDICIAL ETHICS 203 (Keith Swisher ed., 2017).

18. *See* VIRELLI, *supra* note 7, at xii–xiii.

19. *See id.* at xiii.

20. *See* ROBERT J. HUME, ETHICS AND ACCOUNTABILITY ON THE SUPREME COURT: AN ANALYSIS OF RECUSAL PRACTICES 2 (SUNY Press 2017) (quoting Warren Weaver, Jr., *High Court and Disqualification*, N.Y. TIMES, Mar. 3, 1975, at 22.).

21. Amelia Thomas-DeVeaux & Oliver Roeder, *Is the Supreme Court Facing a Legitimacy Crisis?*, FIVETHIRTYEIGHT (Oct. 1, 2018, 6:00 AM), https://fivethirtyeight.com/features/is-the-supreme-court-facing-a-legitimacy-crisis/ [https://perma.cc/XQ44-7D6Q].

22. *See* VIRELLI, *supra* note 7, at xv.

23. *Id.*

24. 556 U.S. 868, 883–84 (2009).

25. 136 S. Ct. 1899, 1904–06 (2016).

I. THE TWIN PURPOSES OF RECUSAL

Every federal judge, up to and including Supreme Court Justices, must take an oath wherein they pledge to "administer justice without respect to persons, . . . [and] faithfully and impartially discharge" their duties under the Constitution.[26] The oath of office acknowledges the specter of judicial bias and underscores a judge's impartiality as "central to both our system of justice and our sense of justice."[27] The American Bar Association's *Model Code of Judicial Conduct*, which has been adopted in some form by forty-nine states,[28] defines impartial as an "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge."[29]

Judicial recusal is critical to a court's ability to remain impartial, or at the very least, to maintain the appearance of impartiality.[30] Indeed, "[f]ew situations more severely threaten trust in the judicial process than the perception that a litigant never had a chance because the decisionmaker may have owed the other side special favors."[31] To that end, recusal serves twin purposes: it protects litigants from bias or the appearance of bias, and it preserves judicial legitimacy as a whole.[32]

A. RECUSAL PROTECTS LITIGANTS FROM BIAS

One of the primary goals of the American legal system is to provide litigants a fair trial where the outcome of the case is accepted by both the prevailing and the losing party.[33] After all, "the existence of a legal system depends heavily on voluntary compliance . . . [and] citizens may not comply with that which they do not trust."[34] Due to the adversarial system of litigation, the ethical rules for lawyers are designed to protect the interests of the client; "lawyers are not expected to be impartial."[35] The many procedural and evidentiary protections offered to ensure a

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26. 28 U.S.C. § 453 (2018). The full oath reads:

> "Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.'"

27. *See* Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 661 (2005).

28. *See* Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned"*, 14 GEO. J. LEGAL ETHICS 55, 55 (2000).

29. MODEL CODE OF JUDICIAL CONDUCT terminology (2011).

30. *See* VIRELLI, *supra* note 7, at xii.

31. Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 483 (1986).

32. *See* VIRELLI, *supra* note 7, at xii.

33. Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 20–21 (1994).

34. *See* Hammond, *supra* note 17, at 203–04.

35. Bassett & Perschbacher, *supra* note 11, at 195 (quoting DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 57 (2000)).

fair trial are meaningless if the judge has an interest in the controversy or bias against a litigant.[36] Thus, the judge's independence becomes central to the success and functioning of the system overall.

Because "judges are human beings too and thus are not free from bias," recusal provides a way for judges to recognize that they will "from time to time, have biases, prejudices, or interests that prevent truly unbiased decision-making—or that at least suggest some potential for bias."[37] Federal law and the Judicial Conference's *Code of Conduct for United States Judges* also recognize the danger posed by bias and seek to ensure that litigants have access to a neutral arbiter by requiring that judges and Justices recuse themselves where their "impartiality might reasonably be questioned."[38]

The Supreme Court explained the rationale for this standard in *In re Murchison*:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . [And] to perform its high function in the best way 'justice must satisfy the appearance of justice.'[39]

The foundation of this standard is that "the appearance of fairness is as important as fairness itself."[40] Such a standard ensures that the losing party is not left wondering whether a "judge's prior involvement with the subject matter of the litigation . . . [had] something to do with his or her decision."[41]

B. RECUSAL PRESERVES JUDICIAL LEGITIMACY AS A WHOLE

In addition to the important goal of protecting litigants, recusal protects the legitimacy of the judiciary as a whole. "Society rightly looks to the courts as bastions of the Rule of Law"[42] and invests a great deal of resources, including life tenure and salary, in federal judges in order to ensure their independence and impartiality.

Nonetheless, federal judges lack "both electoral legitimacy and political force, making the judiciary's success depend in large part on the public's acceptance of its authority."[43] If the public declined to acknowledge the force of judicial decisions, "the notion that 'we are a government of laws' would necessarily

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36. *See* Bassett, *supra* note 27, at 661.
37. *See id*. at 658.
38. Bassett & Perschbacher, *supra* note 11, at 192.
39. In re Murchison, 349 U.S. 133, 136 (1955) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)).
40. *See* Abramson, *supra* note 28, at 66.
41. *See* Hammond, *supra* note 17, at 203.
42. *Id*.
43. Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 BYU L. REV. 943, 968 (2011).

collapse."[44] To that end, the appearance of impartiality to individual litigants is not sufficient. Rather, the legitimacy of the courts as a whole relies on the public's view that the courts are impartial and committed to the rule of law. In this way, the public's perception of the judiciary's impartiality is a "primary source of its legitimacy, and ultimately its power."[45]

The American Bar Association's *Model Codes of Judicial Conduct*,[46] the *Code of Conduct for United States Judges*,[47] and federal and state statutes all seek to ensure judges' impartiality and acknowledge recusal's important place in the ethical structure of the judiciary.[48] In this way, recusal is one of the primary mechanisms of fortifying public confidence in the legitimacy and integrity of the otherwise unaccountable judiciary.

II. THE SUPREME COURT: A SPECIAL CASE

While recusal in general serves important purposes in ensuring a fair forum for litigants and strengthening the legitimacy of the judiciary, self-recusal at the Supreme Court is particularly fraught due to the Court's constitutional design, its vulnerability compared to other branches, and the current self-recusal procedure (or lack thereof) at the Court.

First and foremost, the Supreme Court as an institution is unique. Article III of the Constitution requires that there be a Supreme Court,[49] which suggests that it has "a stronger claim to judicial power" than congressionally created inferior courts.[50] This creates vexing separation of powers problems where Congress seeks to regulate "the removal, disqualification, and disciplining of the most powerful federal judicial officers."[51]

Further, alone among the three branches, the Supreme Court is powerless to enforce its will. "It has the power to decide many of our most pressing and controversial national questions, but it has no power to enforce its decisions. . . . [Instead, it relies on] the other branches of government, and by extension the people they represent, to fulfill its constitutional responsibilities."[52] This is part of the

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44. *Id.*

45. Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 532 (2005).

46. While the *Model Code* carries no independent authority, 49 states have adopted it in some form. Abramson, *supra* note 28, at 55.

47. The *Code of Conduct for United States Judges*, which was adopted by the Judicial Conference of the United States, applies to "United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges." CODE OF CONDUCT FOR UNITED STATES JUDGES intro. (2019) https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#a [https://perma.cc/6PSM-A67J].

48. *See generally* Bassett & Perschbacher, *supra* note 11, at 183–84.

49. 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 from time to time ordain and establish.").

50. *See* VIRELLI, *supra* note 7, at xiii–xiv.

51. *Id.* at xiv (internal citation omitted).

52. *Id.* at x.

Constitutional design, as Alexander Hamilton noted that the Supreme Court "has no influence over either the sword or the purse; . . . neither FORCE NOR WILL, but merely judgment. . . . [T]he judiciary is beyond comparison the weakest of the three departments of power."[53] As Justice O'Connor succinctly explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, "[t]he Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."[54] "This requires not only that the Court's decisions themselves be defensible but also that they appear so to a watchful nation."[55]

Additionally, unlike lower federal judges and state supreme court justices, each of the Supreme Court Justices' recusal decisions are absolutely insulated from review and they are unbound from any formal ethical code.[56] While federal law nominally requires Justices to recuse themselves when "[their] impartiality might reasonably be questioned,"[57] there is no procedure requiring Justices to explain their recusal decisions, nor is there one for recusal decisions to be reviewed.[58] In other words, recusal decisions at the Court are "unreviewable, individualized determinations by each Justice of his or her own qualification to sit in a particular case, without any obligation to justify or otherwise explain that determination."[59]

Given these complicating factors, it is not surprising that recusal at the Court is receiving increased media and scholarly attention. In fact, a robust body of literature has emerged and is largely segregated into competing camps of traditionalist and reformist views of the Court's recusal procedures.[60] Though they rarely speak on this issue, the Justices themselves often present the best case of the "traditionalist" approach to recusal at the Supreme Court. However, many commenters, including legal scholars and Congressional representatives, have found the traditionalist arguments unavailing.[61] Rather, increased political polarization and "inadequate attention to—or perhaps in some cases, arrogance or callous disregard for—the recusal standards" have increased attention to a reformist approach to recusal that demands new laws, policies, and procedures.[62]

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53. THE FEDERALIST NO. 78 (Alexander Hamilton).
54. 505 U.S. 833, 865 (1992).
55. *See* VIRELLI, *supra* note 7, at xii.
56. *See* Rigertas, *supra* note 13, at 939, 942.
57. 28 U.S.C. § 455(a).
58. *See* VIRELLI, *supra* note 7, at xiv.
59. Louis J. Virelli, *The (Un)Constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181, 1202 (2011).
60. *See* VIRELLI, *supra* note 7, at 40.
61. *See id.*; Bassett & Perschbacher, *supra* note 11, at 181.
62. *See* Bassett & Perschbacher, *supra* note 11, at 184.

A. THE "TRADITIONALIST" VIEW OF RECUSAL AT THE COURT

Justice Scalia's denial of a motion to recuse in *Cheney v. U.S. District Court for D.C.*[63] and Chief Justice Roberts' *2011 Year-End Report on the Federal Judiciary*[64] present a fairly complete case for the traditionalist approach to Supreme Court recusal. While both gesture toward federal statutes and various Codes that bind lower court judges, each essentially boils down to the belief that "the Court's unique nature justifies a less-demanding recusal standard."[65] The argument for maintaining the status quo has three main features: the common law "duty to sit," the potential for politically motivated agitation for a Justice's recusal, and the constitutional power of the Court to control recusal.

The common law "duty to sit" doctrine "required judges to decide borderline recusal questions in favor of participating in the case" in the name of judicial efficiency and to prevent judge shopping.[66] In the Supreme Court, the duty to sit manifests as a duty to hear cases able to generate majority opinions that clearly establish the law, which in turn justifies a more lenient recusal standard.[67] Justice Scalia gestured toward this notion in his denial of recusal, saying that the idea that he should resolve doubts in favor of recusal "might be sound advice if [he] were sitting on a Court of Appeals."[68] But, he said, the "Supreme Court is . . . different" because the possibility of a 4-4 split would leave the Court "unable to resolve the significant legal issue presented by the case."[69] Chief Justice Roberts made a similar claim, stating that the Justices "always sit together, and 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."[70] However, "Congress believed it had abolished the duty to sit by amending 28 U.S.C. § 455 in 1974."[71] Further, there is evidence that the perceived threat of a 4-4 split is overstated. Currently, a number of cases are decided each term by eight Justices, and yet the 4-4 split remains "exceedingly rare."[72] Additionally, the Court has had an even number of

63. Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913, 913 (2004) (Scalia, J., respecting recusal).

64. John Roberts, 2011 Year-End Report on the Federal Judiciary.

65. *See* Bassett, *supra* note 27, at 681.

66. *Id*. at 672.

67. *Id*. at 684.

68. *Cheney*, 541 U.S. at 915 (Scalia, J., respecting recusal).

69. *Id*.

70. Roberts, *supra* note 64, at 9.

71. Steven Lubet & Clare Diegel, *Stonewalling, Leaks, and Counter-Leaks: SCOTUS Ethics in the Wake of NFIB v. Sebelius*, 47 VAL. U. L. REV. 883, 900 (2014) (citing H.R. REP. NO. 93-1453, at *6355 (1974) ("The language [of the statute] also has the effect of removing the so-called 'duty to sit.'")).

72. *Id*. (citing a study by two political scientists finding that "there were only eleven such stalemates during the period 1986–2003; fewer than one per year. During the entire post-war era, 1946–2003, 599 cases were decided by eight-member Courts, but only 49 resulted in 4-4 deadlocks.").

members at various points in its history, including from its inception in 1789 until 1807, making fears of such splits less persuasive.[73]

Furthermore, the Justices both cite a fear of politically motivated agitation for recusals as a reason to maintain the current recusal practice. Justice Scalia stated that, on the facts of his case, "[m]y recusal would also encourage so-called investigative journalists to suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons."[74] Chief Justice Roberts, on the other hand, worried about such agitation from the Courts' own members if *en banc* review of recusal decisions were possible:[75] "Indeed, if the Supreme Court reviewed [each other's recusal] decisions, it would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate."[76]

Political gamesmanship is a legitimate concern. However, the Justices face political pressure in practically all aspects of their jobs, and it is not clear why pressure to recuse is any more coercive than pressure to vote one way or another in a controversial case. Additionally, several proposals for reform would remove the recusal decision from an individual Justice in the first instance, which in turn would eliminate the potential for gamesmanship.

Finally, as Chief Justice Roberts obliquely pointed out, "the limits of Congress's power to require recusal have never been tested," even in regard to section 455.[77] Roberts was certainly suggesting that "recusal is an aspect of 'judicial power' under the Constitution and therefore the exclusive province of the judiciary."[78] While that may be true, the statute (or one like it) is unlikely to be challenged and is essentially unenforceable short of impeachment.[79] Additionally, several Justices, including Rehnquist, Scalia, Roberts, and Breyer, have implicitly conceded the validity of section 455.[80] Thus, it is unlikely that the constitutionality of a modest statute aimed at recusal would be challenged.

At bottom, the Supreme Court's current practice relies on a long history of common law practices, pragmatic considerations about political gamesmanship, and possibly dormant constitutional power. In the most flattering light, expressed by Chief Justice Roberts, traditionalists believe that the Justices are "jurists of exceptional integrity and experience whose character and fitness have been examined through a rigorous appointment and confirmation process. . . . [T]hey each

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73. *Id*. at 903.

74. *Cheney*, 541 U.S. at 927 (2004) (Scalia, J., respecting recusal).

75. This possibility is examined in detail in Part III, *infra*.

76. Roberts, *supra* note 64, at 9.

77. *Id*. at 7.

78. *See* Lubet & Diegel, *supra* note 71, at 902. For a full discussion of the constitutional challenges to congressional regulation of recusal, see Virelli, *supra* note 59.

79. *See* Bassett, *supra* note 27, at 692.

80. *See* Microsoft Corp. v. United States, 530 U.S. 1301, 1302 (2002) (Rehnquist, C.J., respecting recusal); Lubet & Diegel, *supra* note 71, at 902; Roberts, *supra* note 64, at 7–8.

give careful consideration to any recusal questions that arise in the course of their judicial duties."[81] Alternatively, in the words of Justice Scalia, traditionalists believe that the Justices should continue "stumbl[ing] along the way [they] are."[82]

B. THE "REFORMIST" ATTACK ON SUPREME COURT RECUSAL

Since 2010, the reformist view has gained increased attention. Indeed, "multiple Supreme Court recusal statutes have been introduced in Congress, sitting Justices have testified about recusal before Congress, . . . and the conduct of several Justices was questioned by members of Congress, the press, and the public . . . ."[83] From these various perspectives, a "singular theme has emerged: more rigorous congressional regulation of Supreme Court recusal practice is needed to protect the integrity and legitimacy of the Court."[84] While there may be more tools available than simply congressional regulation, reformists have been quick to point out the problems with the traditionalist point of view, namely the increased social science evidence of bias in judicial decision-making and the due process problems inherent in a judge or Justice being the "judge in his own case"[85] when determining recusal motions. Reformist arguments were—perhaps ironically—boosted by the two most recent recusal cases considered by the Supreme Court: *Caperton v. Massey*[86] and *Williams v. Pennsylvania*.[87]

Recusal standards have long been premised on the idea that judges can be fair and impartial in making determinations about their own bias. Indeed, Blackstone explained that "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."[88] While this assumption might be tolerable in a trial or appellate court, where there is at least a hope of reversal on appeal, it is less so at the Supreme Court where there is no explanation or opinion offered, and where national law might be premised on improper bias.

In any case, Blackstone's assumption has not withstood the emergence of modern psychological science. For example, "[n]umerous social science studies have shown that judges, like all people, are prone to certain cognitive errors, including

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81. Roberts, *supra* note 64, at 10.

82. See VIRELLI, *supra* note 7, at 37 (quoting *Considering the Role of Judges under the Constitution of the United States: Hearing Before the S. Committee on the Judiciary*, 112th Cong., 1st Sess. 29 (2011) (Statement of Scalia, J.)).

83. *See* Virelli, *supra* note 59, at 1184.

84. *Id.*

85. In re Murchison, 349 U.S. 133, 136 (1955).

86. 556 U.S. 868 (2009).

87. 136 S. Ct. 1899 (2016).

88. Dmitry Bam, *Our Unconstitutional Recusal Procedure*, 84 MISS. L.J. 1135, 1154 (2015) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *361.).

a tendency to see oneself and one's conduct in the best light."[89] In an empirical study of federal magistrate judges, "87.7% . . . rated themselves as less likely to be overturned than the average judge."[90] As explained by Judge Richard Posner, judges "use introspection to acquit [themselves] of accusations of bias, while using realistic notions of human behavior to identify bias in others."[91] The existence of these unconscious biases means that even "honest and well-intentioned judges cannot necessarily trust in their own subjective belief that they are and will remain impartial."[92]

The existence of these biases and cognitive blind spots are compounded where judges are called upon to evaluate their own biases and potentially admit them to litigants and colleagues. Beyond the possible unconscious desire to see oneself in the best light, judges have conscious ethical and professional incentives to deny motions for recusal.[93] Further, the more biased a judge is, "the less likely that judge is to recuse himself, because recusal disables the judge from being able to rule in favor of the side toward which he is predisposed, or against the side toward which the judge harbors a bias."[94]

These concerns have emerged in the two most recent Supreme Court precedents on point: *Caperton* and *Williams*. In *Caperton*, Massey's CEO, Don Blankenship, contributed more to West Virginia Supreme Court Justice Brent Benjamin's election campaign than all other donors combined at the precise moment that a $50 million lower-court judgment against his company was on appeal.[95] Once elected, Justice Benjamin denied a motion for recusal and cast the deciding vote overturning the verdict.[96]

The Court ruled that, at least in "extreme" cases such as the one at bar, a state judge who had received substantial campaign contributions from a litigant must recuse himself from a case involving that donor.[97] While the Court was at pains to note that due process merely provided the "outer boundaries of judicial disqualifications," *Caperton* represents an expansion of a due process right to recusal where "under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately

89. MATTHEW MENENDEZ & DOROTHY SAMUELS, JUDICIAL RECUSAL REFORM: TOWARD INDEPENDENT CONSIDERATION OF DISQUALIFICATION 4 (Brennan Center for Justice at the New York University School of Law 2016).

90. Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 818 (2001).

91. RICHARD A. POSNER, HOW JUDGES THINK 121 (2008).

92. *See* Bassett & Perschbacher, *supra* note 11, at 207.

93. In fact, one commenter suggested that "a judge who grants a party's recusal motion is arguably admitting a violation of the Code of Judicial Conduct, which requires the judge to recuse herself *sua sponte*. Undoubtedly, the judge has a self-interest in not admitting an ethical violation." Bam, *supra* note 88, at 1173.

94. *Id*. at 1170.

95. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 873–76 (2009).

96. *Id*. at 876.

97. *Id*. at 885-87.

implemented."[98] The question, the Court explained, is "not whether the judge is actually, subjectively biased, but whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias."[99]

In *Williams*, District Attorney Ronald Castille granted his approval to seek the death penalty against Terrance Williams after he had been convicted of murder.[100] Almost three decades later, Williams filed a petition for post-conviction relief seeking a stay of execution, arguing that the prosecutor had obtained false evidence and withheld exculpatory evidence in his trial.[101] The motion was granted, and Pennsylvania appealed to the state supreme court, which was then presided over by Chief Justice Ronald Castille, the former District Attorney who had approved the death penalty.[102] The Chief Justice denied William's motion to recuse and voted with the majority to reinstate the death penalty.[103]

On appeal to the United States Supreme Court, the Court found "an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case."[104] Importantly, the Court noted in dicta that "[b]ias is easy to attribute to others and difficult to discern in oneself."[105] The Court proceeded to reiterate the "potential for bias" test from *Caperton*.[106]

The *Williams* Court was certainly right about bias. In both *Caperton* and *Williams*, the state supreme court justices each "publicly protested that they harbored no bias whatsoever."[107] In fact, the judge in *Williams* cited Supreme Court precedent in denying his motion for recusal and argued that "[t]he individual [judge or Justice] involved should make the decision."[108]

Given the psychological biases and perverse incentives inherent in current self-recusal standards, one prominent reformist constitutional law scholar, Dmitry Bam, has taken the next step and proposed that "judicial recusal

98. *See id*. at 883–84 (internal quotation marks omitted). *See also id*. at 890 (Roberts, C.J., dissenting) ("Vaguer notions of bias or the appearance of bias were never a basis for disqualification, either at common law or under our constitutional precedents. Those issues were instead addressed by legislation or court rules. Today, however, the Court enlists the Due Process Clause to overturn a judge's failure to recuse because of a 'probability of bias.'").

99. *Caperton*, 566 U.S. at 881 (internal citations omitted).

100. Williams v. Pennsylvania, 136 S. Ct. 1899, 1903–04 (2016).

101. *Id*. at 1904.

102. *Id*.

103. *Id*. at 1904–05.

104. *Id*. at 1905.

105. *Id*.

106. *Id*. at 1905 (quoting Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 881 (2009)).

107. MENENDEZ & SAMUELS, *supra* note 89, at 2.

108. Adam Liptak, *Supreme Court, in Recusal Case, May Find Itself Looking Inward*, N.Y. TIMES (Jan. 4, 2016), https://www.nytimes.com/2016/01/05/us/politics/supreme-court-in-recusal-case-may-find-itself-looking-inward.html [https://perma.cc/R9PL-T97A].

procedures—in particular the procedures followed by the United States Supreme Court—violate the guarantees of due process."[109]

Bam's due process argument proceeds as follows: no man can be the judge of his own case.[110] Recusal motions are directed at the judge rather than the opposing party, and so "[f]unctionally, then, the recusal dispute is between the moving party and the judge, not between two litigants."[111] Thus, "any recusal procedure that allows a party to the dispute (here, the judge) to resolve the dispute faces a strong presumption of unconstitutionality."[112] Indeed, he argues, "[n]o reasonable person . . . perceives the judge whose impartiality is under attack as . . . an impartial decisionmaker."[113]

Arguably, the *Caperton* and *Williams* decisions provide another basis for constitutional attack. Though the holdings of these cases were limited, the Court employed expansive dicta that acknowledged that "psychological tendencies and human weakness"[114] can implicate the due process clause and acknowledged that "[b]ias is easy to attribute to others and difficult to discern in oneself."[115] It is difficult to imagine a decision more susceptible to psychological weakness and cognitive blind spots than an unexplained, unreviewable decision not to recuse oneself when directly attacked by a litigant, especially where the decision to recuse might be outcome determinative in a case of national importance. As explained above, the judge in *Williams* essentially made an argument for self-recusal that paralleled the Supreme Court's current recusal practices and was rejected. While the Supreme Court is unlikely to entertain a direct attack on its own practices, these somewhat analogous cases serve to underscore the practice's tenuousness.

The reformist critics of current Supreme Court practice demonstrate that self-recusal at the Supreme Court fails on both accounts: it undermines litigants' sense that they have a fair forum for their decisions and it fails to preserve judicial legitimacy. While recusal is intended to ensure that each party has confidence that the outcome of their case did not depend on the judge, "it is hard to imagine that a party that perceives such a bias will be satisfied by the self-recusal procedure,"[116] especially at the Supreme Court level where such decisions are made with no fact-finding, explanation, or opportunity for review. For example, after Scalia's denial was issued in *Cheney v. U.S. District Court*, the Sierra Club said that it would accept the ruling, "even though it believed his recusal was still warranted

109. Bam, *supra* note 88, at 1139.
110. *Id.* at 1140.
111. *Id.*
112. *Id.*
113. *Id.* at 1141.
114. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 883 (2009) (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975).
115. Williams v. Pennsylvania, 136 S. Ct. 1899, 1905 (2016).
116. *See* Bam, *supra* note 88, at 1180.

to ensure public faith in the integrity of the court."[117] In sum, self-recusal taints the judicial process and "undermines the appearance of justice and the public's trust and confidence in the judiciary."[118] "Consequently, judicial refusal to recuse, especially when endorsed by the highest Court, undermines the integrity of the American adjudicatory system by decreasing public confidence in the Judiciary."[119] Indeed, "the public is growing increasingly attentive and suspicious . . . of the integrity of the justices' recusal decisions."[120]

III. POTENTIAL SOLUTIONS TO THE LACK OF RECUSAL STANDARDS AT THE COURT

Given the myriad of problems with recusal at the Supreme Court, what solutions exist to resolve these concerns? Many commenters have offered solutions, which will be examined in turn based on their responsiveness to the twin purposes of recusal and the unique constitutional position occupied by the Court.

Perhaps the most obvious method of recusal would be one of the two bills proposed in Congress. The first, the Supreme Court Transparency and Disclosure Act of 2011, would permit the Judicial Conference of the United States to develop procedures to enforce recusal standards and a mechanism for review of recusal decisions at the Supreme Court.[121] Additionally, it would impose disclosure requirements for all recusal decisions.[122] Such procedures would alleviate many of the problems associated with self-recusal and subject the Court to essentially the same pressures as the lower federal courts' judges. Litigants would presumably feel more protected from bias in instances where Justices explained their reasoning and all of the facts involved. The public, on the other hand, would presumably see recusal decisions as more transparent and legitimate where the Justices began to amass a body of precedents that would aid the public's understanding and align recusal with the public's general expectation that the Justices explain their reasoning.[123]

The second bill, Senate Bill 3871, based on a recommendation by Justice John Paul Stevens,[124] would seek to eliminate the lingering "duty to sit" by permitting retired justices to substitute for a recused justice.[125] For a retired Justice to be

117. *See* Twomey, *supra* note, at 2 (internal quotations omitted).

118. *See* Bam, *supra* note 88, at 1179.

119. Saidman-Krauss, *supra* note 9, at 282.

120. *See* VIRELLI, *supra* note 7, at 96.

121. *See* Supreme Court Disclosure and Transparency Act of 2011, H.R. 862, 112th Cong. § 2 (2011).

122. *See id.*

123. Rigertas, *supra* note 13, at 939, 944.

124. Saidman-Krauss, *supra* note 9, at 253 (Justice Stevens asked: "Could we not have a provision in the law for some mechanism that retired Supreme Court Justices could be asked to sit on the Court when there is a recusal[?]").

125. *See* A Bill to Amend Chapter 13 of Title 28, United States Code, to Authorize the Designation and Assignment of Retired Justices of the Supreme Court to Particular Cases in Which an Active Justice is Recused, S. 3871, 111th Cong. § 2 (2010).

assigned to the Supreme Court, this proposal requires: 1) that "an active justice is recused" from that case and 2) that "a majority of active justices vote to designate and assign that retired Chief Justice or Associate Justice."[126] This procedure would be desirable because "not only may Justices feel more inclined to recuse themselves when their impartiality has been reasonably questioned, but litigants may also feel more comfortable questioning judicial impartiality knowing that this judicial proxy system will prevent the possibility of an equally divided Court."[127] This would also increase the Court's legitimacy by lessening perceptions that Justices decline to recuse themselves for political reasons. Additionally, the constitutionality of permitting an already-confirmed Justice to sit on the Court is likely sound.[128]

Legal academics have suggested other potential reforms. For example, one commenter suggested amending section 455 to allow any party "aggrieved by the refusal of a Supreme Court Justice to disqualify himself [to], on timely motion, obtain review by the full Supreme Court. To be sustained, an individual Justice's decision refusing to disqualify himself must be affirmed by a majority of those Justices participating in the review."[129] Despite the potential that the Justices would simply defer to their colleagues and affirm such motions, the Court as a whole nevertheless "provides a more neutral, less self-interested arbiter of recusal decisions than does the individual challenged Justice."[130] This would ensure that litigants at least have *some* level of review and thus might be more willing to accept the decision of the Court. Additionally, it would likely appease the public by increasing transparency and accountability in those rare instances where it was used.

Unfortunately, as discussed in Part II.A *supra*, the Justices might agitate against increased congressional control over the Court's recusal policy, and as Chief Justice Roberts suggested in his *2011 Year-End Report*, the constitutionality of such laws is unclear.[131] In this case, it is likely that the less intrusive proposals, such as disclosure requirements or *en banc* review of recusal decisions would be accepted, since the Justices already tolerate similar forms of regulation and would maintain their judicial power.

CONCLUSION

Current Supreme Court recusal procedure fails on all accounts: it does not adequately protect litigants from the appearance of bias and it undermines judicial legitimacy. Moreover, current practices rest on an assumption about judicial

126. *Id.*

127. Saidman-Krauss, *supra* note 9, at 279.

128. *See generally id.*

129. Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 644 (1987).

130. *Id.* at 654.

131. *See* Roberts, *supra* note 64, at 7 (noting that "the limits of Congress's power to require recusal have never been tested").

independence dating back to Blackstone that has been largely discredited by modern phycological science and by the Supreme Court's own recent jurisprudence. The Supreme Court itself has begun, albeit glancingly, to acknowledge some of the problems with its own current practices. Finally, as recent controversies have shown, the public is increasingly aware—and wary—of the Justice's individual recusal decisions.

However, there are several viable avenues for reform. The Justices could, at any time, develop their own procedures or explain the reasons for their decisions. Moreover, Congress has several proposals that the Justices could adopt to increase transparency and accountability at the Court. These proposals promise to break through the "conspiracy of silence" and increase, at least the appearance of, impartiality and transparency on the highest court in the land. These reforms could assure both litigants and the public that choices were being made for principled reasons in a time of increasing partisanship.