

**SUPREME COURT ETHICS:  
THE NEED FOR GREATER TRANSPARENCY  
IN A JUSTICE'S DECISION TO HEAR A CASE**

New York City Bar Association

Committee on Government Ethics

September 28, 2012

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*I...do solemnly swear 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...under the Constitution and laws of the United States.*

*So help me God.*<sup>1</sup>

The ethical obligations of Supreme Court Justices are and will continue to be a source of considerable debate. In particular, the decisions of two Justices not to recuse themselves from the Court’s deliberations on the Patient Protection and Affordable Care Act (the “Health Care Law”) were the subject of considerable discussion in advance of the oral argument on the Health Care Law and the Court’s ultimate decision narrowly sustaining it.<sup>2</sup> According to some conservative critics, Justice Elena Kagan should have recused herself because President Barack Obama’s administration began preparing its defense of the Health Care Law when Kagan was Solicitor General. And to some liberal critics, Justice Clarence Thomas should have recused himself because his wife, Virginia Thomas, was involved with conservative groups that had advocated for the Law’s repeal. Any doubt that the pre-oral argument debate reached the halls of

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<sup>1</sup> 28 U.S.C. § 453 (emphasis added).

<sup>2</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. \_\_\_, 132 S. Ct. 2566 (2012). Examples of debate include Dan Rivoli, *Health Care Reform Law: The Cases Against Elena Kagan and Clarence Thomas*, INTERNATIONAL BUSINESS TIMES, Oct. 25, 2011, available at <http://www.ibtimes.com/articles/237120/20111025/health-care-reform-law-elena-kagan-clarence-thomas.htm>; Doug Mataconis, *Should Justice Kagan Recuse Herself from Health Care Reform Case?*, OUTSIDE THE BELTWAY, Nov. 5, 2011, available at <http://www.outsidethebeltway.com/should-justice-kagan-recuse-herself-from-health-care-reform-case/>; Jeremy B. White, *Weiner Asks Clarence Thomas to Recuse Himself from Possible Healthcare Hearing*, OBSERVER, Feb. 9, 2011, available at <http://www.observer.com/2011/02/weiner-asks-clarence-thomas-to-recuse-himself-from-possible-healthcare-hearing/>.

the Court itself was eliminated by Chief Justice John Roberts himself, when he chose to devote much of his annual report on the judiciary for 2011 to this issue. Chief Justice Roberts expressed “confidence in the capability of my colleagues to determine when recusal is warranted.”<sup>3</sup>

The Court denied a request for debate on Justice Kagan’s recusal decision.<sup>4</sup> Significantly for purposes of the issues considered by this Report, the denial was issued without comment. Justice Kagan herself, as well as Justice Thomas, made no public statement on the issue and simply proceeded to hear the case and cast their votes. As this and other controversies swirled around the Court in connection with its consideration of the Health Care Law, polls indicated that public confidence in the Court was reaching historic lows, while the belief that Justices are influenced by personal or political considerations was reaching historic highs.<sup>5</sup>

Consideration of the ethical issues posed by the recusal controversy must proceed against the backdrop of the Court’s history – in which political controversy has been a constant theme – and its constitutional structure. The framers intended to insulate Justices from public

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<sup>3</sup> 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 10, *available at* <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf> [hereinafter YEAR-END REPORT].

<sup>4</sup> *See* Adam Liptak, *Chief Justice Defends Peers’ Hearing Case on Health Law*, N.Y. TIMES, Dec. 31, 2011, *available at* <http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html?pagewanted=all>; Jennifer Haberkorn, *Supreme Court Says No to Debate Over Elena Kagan Health Care Role*, POLITICO, Jan. 23, 2012, *available at* <http://www.politico.com/news/stories/0112/71819.html>.

<sup>5</sup> Adam Liptak and Allison Kopicki, *Approval Rating for Justices Hits Just 44% in New Poll*, N.Y. TIMES, Jun. 7, 2012, *available at* <http://www.nytimes.com/2012/01/01/us/chief-justice-backs-peers-decision-to-hear-health-law-case.html?emc=eta1> (“Just 44 percent of Americans approve of the job the Supreme Court is doing and three-quarters say the Justices’ decisions are sometimes influenced by their personal or political views.... Those findings are a fresh indication that the court’s standing with the public has slipped significantly in the past quarter-century, according to surveys conducted by several polling organizations. Approval was as high as 66 percent in the late 1980s, and by 2000 approached 50 percent.”).

pressures and political restraints by appointing them for life. Article III of the United States Constitution provides that:

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. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.<sup>6</sup>

The presumptive lifetime tenure of Supreme Court Justices can be ended only through resignation, death, or impeachment proceedings pursuant to which a Justice can be removed from office for “Treason, Bribery, or other High Crimes and Misdemeanors.”<sup>7</sup> Alexander Hamilton, a supporter of life tenure, called this constitutional protection

one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.<sup>8</sup>

Critics of Hamilton and life tenure warned that it would make judges “independent of the people, of the legislature, and of every power under heaven.”<sup>9</sup>

Where, then, is the line between a politically inspired demand for recusal that, from an ethical standpoint, perhaps is fairly disregarded, and a demand for recusal with enough ethical substance that it might fairly affect public confidence in the Court and, at least, calls for a

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<sup>6</sup> U.S. CONST. art. III § 1. *See also* 28 U.S.C. §§ 44(b), 134(a) (providing lifetime tenure for federal judges).

<sup>7</sup> U.S. CONST. art. II, § 4.

<sup>8</sup> THE FEDERALIST NO. 78.

<sup>9</sup> THE ANTIFEDERALIST PAPERS NO. 78-79 (Robert Yates).

reasoned public response? The merit of Justices Kagan’s and Thomas’s decisions to participate in the Court’s deliberations on the Health Care Law is not at issue here.<sup>10</sup> The question is broader: what, if anything, should the public know about how a Justice arrives at the decision to hear a case after his or her impartiality has been called into question, and how, if at all, should that decision be reviewed?

A bill entitled the Supreme Court Transparency and Disclosure Act of 2011 (the “Transparency & Disclosure Act”), which was introduced last year in the House of Representatives, proposes that (1) Supreme Court Justices be held to the ethical Code of Conduct for United States Judges adopted by the Judicial Conference of the United States and applicable to other federal judges; (2) there be a process for review of complaints alleging that a Justice violated the Code; (3) a Justice disclose publicly the reasoning behind his or her recusal from a case or refusal to withdraw in response to a motion to disqualify;<sup>11</sup> and (4) there also be a process for reviewing these decisions.<sup>12</sup> These proposed restrictions on a Justice’s conduct would supplement ethics laws already in effect. Those laws apply to the Court and mandate recusal

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<sup>10</sup> Joan Biskupic, *Calls For Recusal Intensify In Health Care Case*, USA TODAY, Nov. 20, 2011, available at <http://www.usatoday.com/news/washington/story/2011-11-20/supreme-court-obamacare-health/51324806/1> (quoting comment of Professor Stephen Gillers that “I have seen nothing that would require Justice Kagan to recuse” and, as to Justice Thomas, that “I think we have to adamantly avoid imputing to a judge even the most vociferously expressed views of a spouse”; also quoting comment of Professor Steven Lubet that “[t]his is the paradigm case where the participation of all the justices is important”).

<sup>11</sup> Judicial recusal describes a judge’s *sua sponte* withdrawal from a case. Disqualification refers to withdrawal that is required by statute or prompted by a party’s motion. See BLACK’S LAW DICTIONARY (7th ed. 1999).

<sup>12</sup> H.R. 862, 112th Cong. (2011).

under certain circumstances and subject Justices to the federal government-wide financial disclosure and gift regulations.<sup>13</sup>

This report seeks to distinguish the attacks on Justices Kagan and Thomas—which appear only to be examples of how the Supreme Court has reflected national political divisions throughout its history—from examples of Justices whose impartiality or ethics were objectively questionable (Part I); to examine the laws and ethical codes that currently regulate a Justice’s conduct and how the Transparency & Disclosure Act or any comparable legislation might alter that regulatory framework (Part II); and to analyze whether these current regulations are sufficient, or if some or all of the reforms proposed in the Transparency & Disclosure Act are necessary and, more importantly, constitutional (Part III). The report’s conclusion is that Justices should as a matter of practice provide or, if necessary, be required by law to provide, a written explanation of their decision to recuse or their refusal to disqualify on a motion for recusal. Opening the Court’s “black box” in this limited respect will help the parties and the public to have confidence that the judicial oath to hear cases “faithfully and impartially” is honored in practice by the highest court in the land.

**I. There Is A Distinction Between A Justice Acting Politically And Acting Unfaithfully Or Displaying Bias.**

Politics plays an undeniable role in the life of the Court, starting with the selection of Justices. A nominee’s judicial philosophy, ideology, constitutional values and known positions on specific legal controversies are matters of great focus during the confirmation process. Even though Justices are selected through a highly politicized process, since 1789, when the first Justices were appointed, the Senate has confirmed the vast majority of nominees

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<sup>13</sup> 28 U.S.C. § 455 and 5 U.S.C. App. 4 § 101 *et seq.*, respectively.

for the Court.<sup>14</sup> Thus, a sitting president is almost assured of the opportunity to affect the Court’s ideological balance, and potentially to alter past rulings.<sup>15</sup> Particularly in recent years, as many of the Court’s most controversial decisions have been decided by a five-to-four vote—the division between its more “liberal” and “conservative” members—each nomination to the Court increasingly is seen as critical. This opportunity to gain an edge over political opponents, while widely commented on today, was no less of an influence on a President’s choice of nominees beginning in 1789.

Once confirmed, Justices take an oath of impartiality before performing their duties, swearing to “administer justice[, and] faithfully and impartially discharge and perform [his or her] duties.”<sup>16</sup> Politics aside, there have been instances in which the impartiality of a Justice, as distinct from a political bent, has been brought into question. The Court itself has outlined three types of impartiality: (1) “lack of bias for or against either *party* to a proceeding,” (2) “lack of a preconception in favor of or against a particular *legal view*,” and (3) “open-mindedness [or] that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case.”<sup>17</sup> The second type of impartiality, pertaining to a particular legal view, is of the variety influenced by a Justice’s “liberal” or

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<sup>14</sup> See Denis Steven Rutkus, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate*, CONGRESSIONAL RESEARCH SERVICE, July 6, 2005, at i, available at <http://fpc.state.gov/documents/organization/50146.pdf> (“Since the appointment of the first Justices in 1789, the Senate has confirmed 120 Supreme Court nominations out of 154 received.”); see also United States Senate, *Nominations*, <http://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm> (last visited Apr. 5, 2012).

<sup>15</sup> See Rutkus, *supra* note 14, at 32.

<sup>16</sup> 28 U.S.C. § 453.

<sup>17</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 775-778 (2002) (emphasis in original).

“conservative” nature, legal training, and life experience. It should be distinguished from the first type of impartiality, lack of bias as to either party, which is “essential to due process” and guarantees “a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party,”<sup>18</sup> and the third, which involves cases where Justices have already “committed themselves on legal issues,”<sup>19</sup> which does not affect due process and presents a less clear case for disqualification.

A. Recent Criticism of Supreme Court Justices’ Political Bents Should Be Weighed Against the Political Aspects Inherent in the Court’s History.

Politics has influenced the Court over the course of its history. The debate over Justices Kagan’s and Thomas’s participation in the Health Care Law decision was simply another in a long line of politically charged controversies that the Court has navigated. From its inception, the Court was not isolated from the political pressures that define the other two branches of the federal government. As Chief Justice from 1801 to 1835, John Marshall was the person most responsible for how the Court functions in American government—making it the final arbiter of constitutional interpretation<sup>20</sup>—but his appointment to the Court was one of many by President John Adams designed to pack the Court with Federalists.<sup>21</sup>

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<sup>18</sup> 536 U.S. at 776.

<sup>19</sup> 536 U.S. at 779.

<sup>20</sup> *See Marbury v. Madison*, 5 U.S. 137 (1803) (establishing doctrine of judicial review, which reserves to Supreme Court final authority to determine whether actions of President or of Congress are Constitutional).

<sup>21</sup> *See* CLIFF SLOAN AND DAVID MCKEAN, *THE GREAT DECISION: JEFFERSON, ADAMS, MARSHALL, AND THE BATTLE FOR THE SUPREME COURT* 31-52 (2010) (there was, however, significant dissension among Federalists over whether Marshall was the right Federalist for the job), available at <http://books.google.com/books>.

Jefferson sought to undo Adams's appointments to the bench by abolishing the lower courts established by the Judiciary Act of 1801 and terminating the Federalist judges appointed by Adams, despite lifetime tenure. Justice Samuel Chase, who served on the Court from 1796 until his death in 1811, denounced Jefferson's actions as an affront to judicial independence. In 1803, Chase insisted that Jefferson's action would "take away all security for property and personal liberty...and our Republican constitution will sink into a mobocracy, the worst of all popular governments."<sup>22</sup> Jefferson in turn called for Chase's impeachment, and the House of Representatives complied in 1804, setting forth eight articles of impeachment. Chase was ultimately acquitted by the Senate in 1805.<sup>23</sup>

The presidency of Andrew Jackson, from 1829 to 1837, is known for its intrusion into what had been thought of as congressional prerogatives, which led to significant friction in the nomination process. Jackson, a Democrat, twice nominated Roger B. Taney, the architect of Jackson's plan to dismantle the Second Bank of the United States, to the Supreme Court: first as a Justice and then as Chief Justice. The former attempt was rejected by a Whig-dominated Senate, but the latter passed through the Senate under a slim margin of Democratic control.<sup>24</sup>

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<sup>22</sup> WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 52 (Morrow 1992) (omission in original).

<sup>23</sup> See Jerry W. Knudson, *The Jeffersonian Assault on the Federalist Judiciary, 1802-1805; Political Forces and Press Reaction*, 14 AM. J. LEGAL HIST. 55, 63 (1970) (the House charged Chase with being "highly indecent, extra-judicial, and tending to prostitute the high judicial character with which he was invested, to the low purpose of an electioneering partizan"); see also Edward J. Schoenbaum, *A Historical Look at Judicial Discipline*, 54 CHI.-KENT L. REV. 1, 5-8 (1977) ("When impeachment has been used against judges, the reasons for its use have often included political retaliation.").

<sup>24</sup> See United States Senate, *Nominations*, <http://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm> (last visited April 5, 2012).

While Taney’s nomination plainly stemmed from his close allegiance with Jackson, as Justice Antonin Scalia has noted, “[m]any Justices have reached this Court precisely because they were friends of the incumbent President or other senior officials—and from the earliest days down to modern times Justices have had close personal relationships with the President and other officers of the Executive,”<sup>25</sup> which includes Justice Scalia himself and the rest of the current Justices.

The “liberal” and “conservative” balance currently associated with the Court was very much in force during President Franklin D. Roosevelt’s first term in office, from 1933 to 1936, when the Court, led by the so-called “Four Horsemen,” struck down several provisions and statutes included in the New Deal legislation. Among the acts championed by Roosevelt to combat the effects of the Great Depression, but struck down by the Court, were the National Industrial Recovery Act,<sup>26</sup> the Agricultural Adjustment Act<sup>27</sup> and the Bituminous Coal Conservation Act.<sup>28</sup> A frustrated Roosevelt announced his “court-packing” plan in 1937, whereby he would nominate six new Justices to the Court as it expanded to fifteen members. The plan was rejected by Congress, as the majority of the Court slowly shifted to pro-New Deal on its own.<sup>29</sup> The last of the Four Horsemen, Justice James Clark McReynolds, finding himself

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<sup>25</sup> *Cheney v. U.S. Dist. Ct.*, 541 U.S. 913, 916 (2004) (mem.) (Scalia, J.) (providing numerous subsequent examples).

<sup>26</sup> *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935).

<sup>27</sup> *U.S. v. Butler*, 297 U.S. 1 (1936).

<sup>28</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

<sup>29</sup> *See generally* MARIAN CECILIA MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937* (Fordham Univ. Press 2002), available at <http://books.google.com/>.

now in the minority, consistently wrote vigorous dissents and when he abruptly retired in 1941, famously said that “any country that elects Roosevelt three times deserves no protection.”<sup>30</sup>

Under Chief Justice Earl Warren, who served from 1953 to 1969, the Court handed down a succession of rulings that caused profound changes in American society. These decisions declared public school segregation unconstitutional,<sup>31</sup> revolutionized the way state legislatures are elected,<sup>32</sup> recognized various broad protections under the Bill of Rights<sup>33</sup> and protected the rights of criminal suspects.<sup>34</sup> Critics of the Warren Court argue that it ignored constitutional text and misrepresented constitutional history in arriving at these “liberal” holdings.<sup>35</sup> Supporters argue that the decisions made the court system into a place that people can turn to achieve equality and social justice.<sup>36</sup>

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<sup>30</sup> ARTEMIS WAR, *DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT* 142 (SUNY Press 2003), available at <http://books.google.com/>.

<sup>31</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>32</sup> *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>33</sup> *Engel v. Vitale*, 370 U.S. 421 (1962); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>34</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>35</sup> For example, in 1957, the Georgia General Assembly passed a joint resolution calling for “The Impeachment of Certain U.S. Supreme Court Justices.” J. Res. 100 (Ga. Mar. 13, 1957), available at <http://georgiainfo.galileo.usg.edu/1957resn-9.htm>. The resolution targeted Chief Justice Warren and Justices Hugo Black, William O. Douglas, Tom Campbell Clark, Felix Frankfurter, and Stanley Forman Reed for, among other things, misconduct and “the promotion of the cause of and shielding adherents to communism” through “pro-communist racial integration policy and decrees” which allegedly constituted the “giving of aid or comfort to the enemies of the United States within the meaning of the 14<sup>th</sup> Amendment.”

<sup>36</sup> See, e.g., David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 847 (2007).

The Court's decision on the Health Care Law fits squarely into this history of partisan controversy; there has been endless parsing of the four more liberal justices (including Justice Kagan) voting as a bloc to uphold the law, the five more conservative justices rejecting a broad reading of the Commerce Clause, and the Chief Justice joining the liberals to narrowly uphold the law as an expression of the taxing power. How each Justice's vote ultimately fell in the decision could perhaps be characterized in political terms, but could also be characterized as a function of the Justice's legal education and life experience, in keeping with Justice Stephen Breyer's recent remark that he has not seen a decision influenced by politics in his 17 years on the Court.<sup>37</sup> This does not mean that the public should never have cause for concern when a Justice has decided to participate in a case. There may be reason to question a Justice's hearing of a particular case, or even their seat on the Court's bench. The thesis of this report is that concerns of this kind should be isolated to instances in which a Justice may have acted unfaithfully or with bias. This is the standard under which Justices Kagan's and Thomas's qualification to hear the Health Care Law presumably was analyzed within the Court, and it is the appropriate one.

B. The Public Has a Duty to Question a Justice's Failure to Faithfully and Impartially Administer Justice.

Politics aside, there are cases where recusal, or even a Justice's complete removal from the Court, may be warranted. From the inception of the Court, Justices have attempted to avoid the specter of impartiality that would affect a due process right by disqualifying themselves in cases involving direct pecuniary interest. The practice was initiated in 1813 by Justice Henry Livingston and immediately followed by Chief Justice Marshall later that same

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<sup>37</sup> Emmarie Huetteman, *Breyer and Scalia Testify at Senate Judiciary Hearing*, N.Y. TIMES, Oct. 5, 2011, available at <http://www.nytimes.com/2011/10/06/us/politics/breyer-and-scalia-testify-at-senate-hearing.html>.

year.<sup>38</sup> This has remained the practice through the modern era. Justice Sandra Day O'Connor recused herself from so many cases because she held stock in one of the parties that she generated her own acronym among Court watchers: OOPS ("O'Connor Owns Party Stock").<sup>39</sup>

A more difficult situation has arisen when Justices have received money that may not alter their bias in any particular case, but the sources of which negatively impact their reputation or the credibility of the entire Court. For example, in the 1960s Justice Abe Fortas accepted \$15,000, a large amount of money at the time he took it, for speaking engagements that occurred at a university but were financed by private sources affiliated with frequent corporate litigants, including Phillip Morris. In 1968, when President Lyndon Johnson tried to elevate Fortas to Chief Justice to replace the retiring Warren, he faced the first filibuster of a Supreme Court nominee, due in part to these payments. Fortas resigned from the Court the following year after another revelation that he had entered into a \$20,000 per year consulting contract with Louis Wolfson, a Wall Street financier later convicted of selling unregistered securities, perjury, and obstruction of justice.<sup>40</sup> Fortas would later say that he "resigned to save Douglas,"<sup>41</sup> as efforts were also being made to impeach Justice William Douglas for accepting money from

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<sup>38</sup> *Livingston & Gilchrist v. Maryland Insurance Co.*, 11 U.S. 506 (1813) and *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603 (1813), respectively.

<sup>39</sup> See Jeff Bleich & Kelly Klaus, *Deciding Whether to Decide*, 48-Feb. FED. LAW. 45, 47 (2001).

<sup>40</sup> See LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* 345-79 (Yale Univ. 1960). In addition to the fees for his speaking engagements, Fortas had frequent contact with President Johnson while he was sitting on the Court, which his opponents claimed represented a threat to the independence of the judiciary. In fact, Fortas assisted in drafting Johnson's 1966 State of the Union speech. *Id.* at 351-358.

<sup>41</sup> *Id.* at 374.

other questionable sources.<sup>42</sup> The proceedings against Justice Fortas eventually were terminated without a full vote on impeachment by the House Judiciary Committee.<sup>43</sup>

Critics of current Justices, particularly Justice Thomas in light of his wife's connection to the conservative Heritage Foundation, have attempted to draw parallels to the Fortas case.<sup>44</sup> Justice Thomas also has been criticized for his relationship with wealthy conservative contributor Harlan Crow.<sup>45</sup> Justices Scalia and Thomas both have been criticized for attending dinners sponsored by the conservative Koch brothers.<sup>46</sup> Similarly, Justice Samuel Alito has drawn scrutiny for his attendance at fundraising dinners for the conservative American

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<sup>42</sup> This was the second attempt to impeach Douglas. The first resulted from his grant of a temporary stay of execution to Ethel and Julius Rosenberg on the grounds that they had been sentenced to death without the consent of a jury and failed to gain traction in Congress. *See House Move to Impeach Douglas Bogs Down; Sponsor Is Told He Fails to Prove His Case*, N.Y. TIMES, July 1, 1953, at 18, available at <http://query.nytimes.com/mem/archive/pdf?res=.F10611FB3955107B93C3A9178CD85F478585F9>.

<sup>43</sup> *See* BRUCE ALLEN MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS 438-442 (Random House 2003) (the impeachment subcommittee of the Judiciary Committee by a three-to-one vote found no grounds to support any impeachment charges, even though it did find that Douglas had a number of highly questionable personal connections).

<sup>44</sup> *See, e.g., Justices Have Been Forced to Resign for Doing What Clarence Thomas Has Done*, THINK PROGRESS JUSTICE, Jun. 19, 2011, <http://thinkprogress.org/justice/2011/06/19/248151/clarence-thomas-resign>; *Clarence Thomas' Abe Fortas Problem*, POLITICAL ANIMAL, Jun. 20, 2011, [http://www.washingtonmonthly.com/political-animal/2011\\_06/clarence\\_thomas\\_abe\\_fortas](http://www.washingtonmonthly.com/political-animal/2011_06/clarence_thomas_abe_fortas).

<sup>45</sup> *See* Mike McIntire, *The Justice and the Magnate*, N.Y. TIMES, June 19, 2011, at A1, available at <http://www.nytimes.com/2011/06/19/us/politics/19thomas.html?emc=eta1>.

<sup>46</sup> *See* Nan Aron, *An Ethics Code for the High Court*, WASH. POST, Mar. 14, 2011, at A19, available at [http://www.washingtonpost.com/opinions/an-ethics-code-for-the-high-court/2011/03/11/ABILNzT\\_story.html](http://www.washingtonpost.com/opinions/an-ethics-code-for-the-high-court/2011/03/11/ABILNzT_story.html); Nina Totenberg, *Bill Puts Ethics Spotlight on Supreme Court Justices*, NPR, (Aug. 17, 2011), <http://www.npr.org/2011/08/17/139646573/bill-puts-ethics-spotlight-onsupreme-court-justices>.

Spectator magazine.<sup>47</sup> On the Court’s liberal wing, Justices Breyer, Ruth Bader Ginsburg, and Sonia Sotomayor have been scrutinized for accepting paid trips with the American Bar Association (the “ABA”), the American Sociological Association and the American Civil Liberties Union, respectively.<sup>48</sup>

Although a Justice’s pecuniary interests may not always readily indicate bias, such interests are at least easier to evaluate than the effect of personal relationships on a Justice’s decision-making. The Court has never had a uniform set of rules for how it addresses the latter issue.<sup>49</sup> An example that became national news is the case of *Jewell Ridge Coal Corporation v. Local 6167, United Mine Workers of America*,<sup>50</sup> in which Justice Hugo Black failed to recuse himself although his former law partner represented the mine workers.<sup>51</sup> Black sided with the majority in deciding that the workers were owed additional compensation under the Fair Labor Standards Act.<sup>52</sup> Justice Robert Jackson, who penned a strong dissent in the case, wrote a concurring opinion in the denial of the coal company’s motion for a rehearing on the ground of Black’s participation. The concurrence stressed that it was only due to the “lack of authoritative

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<sup>47</sup> See Totenberg, *supra* note 46.

<sup>48</sup> See *The Justices’ Junkets*, WASH. POST, Feb. 21, 2011, at A14, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022003128.html>.

<sup>49</sup> See Bleich & Klaus, *supra* note 39, at 47 (“[M]ost reasonable people might be relatively unconcerned that Justice O’Connor would be influenced in her vote on a case by how the Court’s decision might affect the value of a few shares of stock that she owns, and far more concerned if she were voting to grant or deny a petition that would bankrupt a close friend. However, under the current standards, disqualification in the former is automatic, and in the latter it is virtually unheard of.”).

<sup>50</sup> 325 U.S. 161 (1945).

<sup>51</sup> John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605 (1947).

<sup>52</sup> 325 U.S. at 163.

standards” governing recusal that it became “the responsibility of each Justice to determine for himself the propriety of withdrawing in any particular circumstances,” and for that reason alone Justice Jackson felt he could not second-guess Black’s decision to hear the case.<sup>53</sup> In truth, Jackson vehemently disagreed with Black, warning that “if [the practice] is ever repeated while I am on the bench I will make my Jewell Ridge opinion look like a letter of recommendation by comparison.”<sup>54</sup>

Jackson’s vitriol notwithstanding, other Justices have heard cases argued by lawyers with whom they practiced.<sup>55</sup> Jackson regularly sat on cases involving his former colleagues in the Justice Department.<sup>56</sup> In order to avoid such a situation, Justice Thurgood

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<sup>53</sup> *Jewell Ridge Coal Corp. v. Local 6167, United Mine Workers of Am.*, 325 U.S. 897 (1945). A more serious association than an old law partner was Black’s known membership in the Ku Klux Klan in the 1920s—arguably a greater threat to his decision-making than Justice Thomas’s connection to conservative groups or Justice Kagan’s ties to the Obama Administration. Black attempted to assuage the public’s concern over this connection by arguing that “[b]efore becoming a Senator I dropped the Klan. I have had nothing to do with it since that time. I abandoned it. I completely discontinued any association with the organization. I have never resumed it and never expect to do so.” HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 98 (Oxford Univ. 1996), available at <http://books.google.com>.

<sup>54</sup> *Text of Jackson’s Statement Attacking Black*, N.Y. TIMES, June 11, 1946, at 2, available at <http://query.nytimes.com/mem/archive/pdf?res=FA0D10F6345413738DDDA80994DE405B8688F1D3>.

<sup>55</sup> *See, e.g.*, Frank, *supra* note 51, at 632-34 (prior to the *Jewell Ridge* case, “Justice Field sat in cases argued by David Dudley Field, his brother and living companion, and also his former law associate. Justice Harlan heard his former partner and close friend, Benjamin Bristow, on at least one occasion and Justice Pierce participated in denying *certiorari* in a case presented by his former firm. Similarly Justice Blatchford seems to have seen no impropriety in hearing cases argued by an ex-partner. Justice Brandeis did not disqualify himself when his former associate, Edward F. McClennan appeared before the Court. ...Justice Cardozo [heard] argument by his former associate Walter Pollak...in the two *Scottsboro* cases.”).

<sup>56</sup> *See, e.g.*, *Comm’r of Internal Revenue v. Court Holding Co.*, 324 U. S. 331 (1945) (Assistant Attorney General Samuel Clark appearing; Jackson had also been an Assistant Attorney General).

Marshall recused himself from all cases involving the NAACP when he joined the Court in 1967. In 1984, Justice Marshall determined that enough time had passed since he left the organization that he no longer needed to continue his self-imposed blanket disqualification rule.<sup>57</sup>

There is also precedent for a Justice to hear a case even if he was involved in the underlying facts. For example, Chief Justice Marshall wrote the opinion of the Court in *Marbury v. Madison*<sup>58</sup> although he was the Secretary of State who had failed to deliver the papers in question. Chief Justice Chase voted to invalidate the legal tender laws which were the basis of his own fiscal policy as Secretary of the Treasury.<sup>59</sup> In the Court's modern era, William Rehnquist, at the time an Associate Justice (and later Chief), drew criticism for participating in *Laird v. Tatum* and addressed these concerns in the Court's first memorandum from a Justice on a recusal decision.<sup>60</sup> Before his appointment to the Court, Rehnquist had been the Assistant Attorney General for the Office of Legal Counsel. In that capacity, while the appeal in *Laird* was pending, he had argued that "no legitimate interest of any segment of our population would be served by permitting individuals or group[s] of individuals to prevent by judicial action, the government's gathering [of] information."<sup>61</sup> Rehnquist determined that he was qualified to hear

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<sup>57</sup> See Ross E. Davies, *The Reluctant Recusants: Two Parables of Supreme Judicial Disqualification*, GREEN BAG, Vol. 10, No. 1, 79, at 81, Autumn 2006, George Mason Law & Economics Research Paper No. 06-51, available at <http://ssrn.com/abstract=945552>.

<sup>58</sup> 5 U.S. 137.

<sup>59</sup> *Hepburn v. Griswold*, 75 U.S. 603 (1870) and *Legal Tender Cases*, 79 U.S. 457 (U. S. 1871), respectively.

<sup>60</sup> 409 U.S. 824 (1972) (mem.) (Rehnquist, J.). For additional perspective on Kagan's disqualification from hearing the Health Care Law, see *id.* at 831 (list of justices who did disqualify themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench).

<sup>61</sup> Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK L. REV. 589, 600 (1987) (testimony before Senate Subcommittee on Constitutional Rights).

the case; he was one of five members of the Court who voted to reverse the Court of Appeals on the basis that the case was not justiciable.<sup>62</sup>

In addition to involvement in the underlying facts, Justices have interacted with the very parties to cases. When Jefferson's former Vice President, Aaron Burr, was tried for treason for attempted secession of the Western states and territories, before his trial Burr dined with Chief Justice Marshall, who presided over his case while riding circuit.<sup>63</sup> Justice Scalia's recusal was sought in *Cheney v. United States District Court*,<sup>64</sup> because he accompanied Vice President Dick Cheney on a private hunting trip, using Air Force Two for travel, just weeks after the Court granted *certiorari* in an energy policy task force case in which Cheney was a named participant. In a memorandum addressing the motion, Justice Scalia acknowledged the facts, but refused to withdraw.<sup>65</sup>

Familial relationships have also led to contention. Although Justice Thomas did not recuse himself from hearing the Health Care Law on account of his wife's activities, he did recuse himself from hearing an appeal challenging the refusal of the Virginia Military Institute to admit women, presumably because his son was a student there.<sup>66</sup> In *Microsoft Corporation v.*

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<sup>62</sup> 408 U.S. 1 (1972).

<sup>63</sup> See ALF J. MAPP, JR., THOMAS JEFFERSON: PASSIONATE PILGRIM 131 (1991), available at <http://books.google.com/>.

<sup>64</sup> 542 U.S. 367 (2004).

<sup>65</sup> 541 U.S. at 924.

<sup>66</sup> *U.S. v. Va.*, 518 U.S. 515 (1996); but see Jackie Calmes, *Activism of Thomas's Wife Could Raise Judicial Issues*, N.Y. TIMES, Oct. 9, 2010, at A1, available at <http://www.nytimes.com/2010/10/09/us/politics/09thomas.html> (Virginia Thomas has played "the most partisan role ever for a spouse of a justice").

*United States*,<sup>67</sup> the issue of recusal was raised because Chief Justice Rehnquist's son was a lawyer who was helping to defend Microsoft in a separate, private antitrust case. Nonetheless, in a memorandum, Rehnquist refused to recuse himself.<sup>68</sup> In 2000, five Justices ended the presidential election in *Bush v. Gore*<sup>69</sup> by ordering an end to the ongoing hand recount of the votes cast in Florida on equal protection grounds. Among the voting Justices was Justice Scalia, whose sons were attorneys in firms representing George W. Bush, and Justice Thomas, whose wife was collecting applications from candidates who wanted to be recommended by the Heritage Foundation for positions in a Bush Administration.<sup>70</sup>

Whether or not a Justice's faithfulness or impartiality was actually undermined in the above examples, there is some basis for objective concern in all of them. The merit of a Justice's decision in these instances is, however, not at issue here. The problem is that in only three of the cases discussed above—*Laird*, *Microsoft*, and *Cheney*—did the Justice provide the public with a memorandum addressing the reasoning behind his decision. In fact, Chief Justice Rehnquist's 1972 memorandum in *Laird* was the first of its kind.<sup>71</sup> Additional memoranda have

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<sup>67</sup> 530 U.S. 1301 (2000) (mem.) (Rehnquist, J).

<sup>68</sup> 530 U.S. at 1302.

<sup>69</sup> 531 U.S. 1048 (2000).

<sup>70</sup> See Christopher Marquis, *Contesting the Vote: Challenging a Justice*, N.Y. TIMES, Dec. 12, 2000, at A26, available at <http://www.nytimes.com/2000/12/12/us/contesting-vote-challenging-justice-job-thomas-s-wife-raises-conflict-interest.html>.

<sup>71</sup> 409 U.S. at 824 (“Respondents in this case have moved that I disqualify myself from participation. While neither the Court nor any Justice individually appears ever to have done so, I have determined that it would be appropriate for me to state the reasons which have led to my decision with respect to respondents’ motion. In so doing, I do not wish to suggest that I believe such a course would be desirable or even appropriate in any but the peculiar circumstances present here.”).

followed from other Justices, but only occasionally.<sup>72</sup> There is rarely any transparency with respect to how Justices make recusal decisions, even though questions of unfaithfulness and bias, which have arisen since the Court's inception, will only continue to be raised. This is because the Court adheres to no uniform policy in making recusal or disqualification decisions. In an era of low and declining public confidence in the Court as an institution, questions are fairly raised about whether this history of non-transparency should continue.

## **II. The Transparency & Disclosure Act Would Add To The Statutory Regulation Of Justices' Conduct And Guidance Provided By Codes Of Conduct.**

As addressed above, the principal constitutional check on a Justice's independence is the threat of impeachment. Outside of being impeached, Justices have the prerogative under the Constitution to decide their qualification for hearing a case themselves. Federal laws requiring a Justice's recusal under certain circumstances and the disclosure of their finances are more recent statutory requirements. In addition, Justices assert that they consult the codes of judicial conduct constructed by the ABA and the Judicial Conference. Short of impeachment proceedings, however, there is no official mechanism for oversight of the Supreme Court's compliance with these laws and rules, which is the principal aim of the Transparency & Disclosure Act.

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<sup>72</sup> See, e.g., *Mr. Rehnquist's Dilemma*, N.Y. TIMES, Oct. 2, 2000, at A26, available at <http://www.nytimes.com/2000/10/02/opinion/issues-for-the-supreme-court-mr-rehnquist-s-dilemma.html> ("For a judge to reveal the thinking behind a recusal decision is all too rare.").

A. Congress Has Enacted a Law that Demands a Justice’s Recusal in Specified Circumstances.

Since 1974, the United States Code has contained a law requiring Justices to withdraw in instances of conflict of interest or bias.<sup>73</sup> A Justice’s recusal is mandated under Title 28, Section 455(a) “in any proceeding in which [a Justice’s] impartiality might reasonably be questioned.” In addition to that catch-all provision, subsection (b) of the statute lists various mandatory recusal situations including instances of personal bias or prejudice concerning a party, association with the matter during a judge’s time in private practice or government employment, financial interest in the matter, and familial relationship with a party, lawyer, witness or person with a substantial interest in the proceeding. These limitations closely follow the provisions of the ABA’s Model Code of Judicial Conduct and the Judicial Conference’s Code of Conduct with respect to recusal.<sup>74</sup>

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<sup>73</sup> 28 U.S.C. § 455. Section 455 applies to “Any justice, judge, or magistrate of the United States”, which includes Supreme Court Justices. In addition to Section 455, Justices are bound by 28 U.S.C. § 47, which provides that “[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him.”

<sup>74</sup> *See Laird*, 409 U.S. at 825 (“...I do not read these particular provisions as being materially different from the standards enunciated in the congressional statute...”); H.R. Rep. No. 93-1453, at 1, *reprinted in* 1974 U.S.C.C.A.N. 6351, 6351-52 (“The purpose of the amended bill is to amend section 455 of title 28, United States Code, by making the statutory grounds for disqualification of a judge in a particular case conform generally with the recently adopted canon of the Code of Judicial Conduct which relates to disqualification of judges for bias, prejudice or conflict of interest.”). The ABA’s Model Code of Judicial Conduct and Judicial Conference’s Code of Conduct are discussed further at *infra* § II (C).

Section 455 does not require public disclosure of a Justice’s reasoning behind a recusal decision. Furthermore, the statute does not specify any penalty or remedy for violations. There is no procedural component; the language of the statute indicates that it is self-enforcing.<sup>75</sup> Section 455’s recusal standard is a strictly objective one, which means that “the judge does not have to be subjectively biased or prejudiced, so long as it appears to be so.”<sup>76</sup> Thus, what should matter to a Justice is only the appearance of bias or prejudice.<sup>77</sup>

Some Justices have limited Section 455’s application to themselves. The decisions not to recuse in *Microsoft*, *Bush* and *Cheney* were informed in part by the Justices’ adoption of the Court’s 1993 Statement of Recusal Policy, which elaborates on Section 455(b)(5)(ii)’s obligation to recuse in instances where a Justice’s relative is a lawyer in the proceeding.<sup>78</sup> The Statement reads in pertinent part: “We think that a relative’s partnership in the firm appearing before us, or his or her previous work as a lawyer on a case that later comes

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<sup>75</sup> See *U.S. v. Story*, 716 F.2d 1088, 1091 (6th Cir. 1983) (“[S]ection 455 is self-executing, requiring the judge to disqualify himself for personal bias in the absence of a party complaint.”); see also *Aronson v. Brown*, 14 F.3d 1578, 1581 (Fed. Cir. 1994); *Taylor v. O’Grady*, 888 F.2d 1189, 1200 (7th Cir. 1989).

<sup>76</sup> *Liteky v. U.S.*, 510 U.S. 540, 553 n.2 (1994). The previous version of Section 455 contained a subjective standard and provided: “Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, *in his opinion*, for him to sit on the trial, appeal, or other proceeding therein.” H.R. Rep. No. 93-1453, at 2 (1974), *reprinted in* 1974 U.S.C.C.A. 6531, 6352 (emphasis added).

<sup>77</sup> *Microsoft*, 530 U.S. at 1302 (quoting *Liteky v. U.S.*, 510 U.S. at 548) (Chief Justice Rehnquist acknowledges that “what matters under § 455(a) ‘is the not the reality of bias or prejudice but its appearance.’”).

<sup>78</sup> Signed on November 1, 1993 by Chief Justice Rehnquist and Justices John Paul Stevens, O’Connor, Scalia, Anthony Kennedy, Thomas and Ginsburg. Press Release, Chief Justice Rehnquist, *et al.*, *Statement of Recusal Policy* (Nov. 1, 1993). Justices Harry Blackmun and David Souter did not sign. Chief Justice Roberts and Justice Alito have also announced their adoption of the 1993 Statement.

before us, does not automatically trigger these provisions [of Section 455(b)(5)(ii)]. Absent some special factor, therefore, we will not recuse ourselves by reasons of a relative’s participation as a lawyer in earlier stages of the case.” This shifts the burden back to the moving party seeking recusal of a Justice under Section 455(b)(5)(ii) to point to a special factor, whereas recusal would be automatic under similar circumstances for other judges.<sup>79</sup>

B. Justices Are Subject to Government-Wide Financial Disclosure and Gift Regulations.

In 1978, Congress enacted an ethics law applicable across the federal government that requires financial disclosure and regulates gifts, with the intent of increasing public confidence in the government.<sup>80</sup> Federal judges, including members of the Supreme Court, are required, as are members of the executive and legislative branches, to file an annual financial disclosure form, so that all of their sources of income, stock holdings, board memberships, and other financial interests are on public record.<sup>81</sup> The Transparency & Disclosure Act would not alter this law and it is mentioned here in part because much has been made of it recently in

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<sup>79</sup> 1993 Statement of Recusal Policy reversed what appear to be a modern trend to recuse in cases involving family. *See* Frank, *supra* note 51, at 617 (Arguing that as of 1947 there was actually “an increasing tendency in the Supreme Court for Justices to disqualify themselves in cases argued by relatives. [Whereas, n]ineteenth century practice appears to have been less strict.”).

<sup>80</sup> 5 U.S.C. App. 4 § 101 *et seq.* (Ethics in Government Act of 1978). *See also* S. Rep. No. 95-170, at 21-22 (1977), reprinted in 1978 U.S.C.C.A.N. 4216, 4237-38 (Senate report setting forth the congressional objectives sought to be achieved by public disclosure, including “public confidence in the government”).

<sup>81</sup> *See* 5 U.S.C. App. 4 § 109 (Any “judicial officer” is required to file a financial disclosure form, which means the Chief Justice of the United States, the Associate Justices of the Supreme Court, and the judges of the United States courts of appeals, United States district courts...and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior”).

relation to the debate over Supreme Court ethics.<sup>82</sup> The Justices have complied with the law, albeit with some criticism as to the particulars of their compliance, and their reports are publicly available.<sup>83</sup>

C. The Justices Assert That They Consult Codes of Conduct on Ethical Issues.

The Code of Conduct applicable to federal judges on the district and circuit courts, and adopted in various forms by most states, does not by its express terms apply to the Supreme Court.<sup>84</sup> The Judicial Conference of the United States, which was created by Congress

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<sup>82</sup> In September 2011, House Democrats sent a letter to the Secretary of the Judicial Conference of the United States requesting that a referral be made to the Department of Justice concerning Justice Thomas's failure to disclose his wife's income of nearly \$700,000 from the Heritage Foundation for five years running, which the writers allege "may constitute a willful failure to disclose" in violation of the law. Press Release, Rep. Slaughter, *Letter to James C. Duff, Secretary to the Judicial Conference of the United States, from Louise M. Slaughter, Member of Congress, and others* (Sept. 29, 2011), available at [http://www.louise.house.gov/index.php?option=com\\_content&view=article&id=2559:slaughter-19-colleagues-call-for-investigation-into-justice-thomass-non-disclosure&catid=95:2011-press-releases&Itemid=55](http://www.louise.house.gov/index.php?option=com_content&view=article&id=2559:slaughter-19-colleagues-call-for-investigation-into-justice-thomass-non-disclosure&catid=95:2011-press-releases&Itemid=55).

<sup>83</sup> See, e.g., Michael Beckel, *Supreme Court Justices' Personal Financial Disclosures Now Featured on OpenSecrets.org*, OPENSECRETS BLOG, Feb. 18, 2011, <http://209.190.229.99/news/2011/02/supreme-court-justices-personal-finances.html>. Justice Thomas eventually filed revised disclosure forms going back 13 years. See, e.g., Jennifer Epstein, *Thomas Revises Disclosure Forms*, POLITICO.COM, Jan. 24, 2011, <http://www.politico.com/news/stories/0111/48086.html>.

<sup>84</sup> CODE OF CONDUCT FOR UNITED STATES JUDGES, available at <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx> [hereinafter CODE OF CONDUCT] ("This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges. Certain provisions of this Code apply to special masters and commissioners as indicated in the "Compliance" section. The Tax Court, Court of Appeals for Veterans Claims, and Court of Appeals for the Armed Forces have adopted this Code."); JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 1.03 (4th ed. 2007) (only Montana has not yet passed a version of the model codes); *Harris v. Smartt*, 57 P.3d 58, 71-72 (Mont. 2002) (Montana ethical guidelines follow a format similar to the 1924 Canons of Judicial Ethics, a predecessor of the ABA's Model Code of Judicial Conduct).

in 1922 to provide national guidance to the lower federal courts,<sup>85</sup> in 1973 adopted the ABA's Model Code of Judicial Conduct with slight modifications as the Code of Conduct "to be applicable to all federal judges, full-time referees in bankruptcy and full-time magistrates."<sup>86</sup> These codes provide judges with a simple, cohesive framework of the ethical obligations of their position and the guidance that should help them avoid acting unfaithfully or impartially. There are currently four canons in the ABA's Model Code:<sup>87</sup>

- Canon 1: A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.
- Canon 2: A judge shall perform the duties of judicial office impartially, competently, and diligently.<sup>88</sup>
- Canon 3: A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

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<sup>85</sup> 28 U.S.C. § 331 ("The conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the conference may deem desirable to promote...*just determination of litigation*...") (emphasis added). The Chief Justice chairs the Judicial Conference, which includes the chief justice of each of the 13 federal judicial circuits and a district judge from each circuit.

<sup>86</sup> PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, APRIL 5-6, 1973, at 9-11, *available at* <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1973-04.pdf>.

<sup>87</sup> ABA MODEL CODE OF JUDICIAL CONDUCT (2011), *available at* [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_code\\_of\\_judicial\\_conduct/model\\_code\\_of\\_judicial\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_table_of_contents.html) [hereinafter ABA MODEL CODE].

<sup>88</sup> Among the standards that are set forth within this Canon is one for disqualification that substantially mirrors Section 455 and served as the model for that legislation. *See* ABA MODEL CODE, Rule 2.11 ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned...").

Canon 4: A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the integrity or impartiality of the judiciary.

The vast majority of judges in the United States look to these simple rules, which are elaborated upon in the codes' commentary, for guidance on their conduct. Among the exceptions are, most notably, the nine justices of the United States Supreme Court. Even though the Court is not required to consult a code of judicial ethics, Chief Justice Roberts stated in his 2011 Year-End Report that “[a]ll Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations” and other Justices have noted their consultation of the ABA’s Model Code.<sup>89</sup>

D. The Transparency & Disclosure Act Arguably Would Somewhat Curtail Supreme Court Justices’ Independence.

In March 2011, amidst widespread expressions of dissatisfaction with the Justices’ self-policing of ethical issues, Representative Christopher Murphy, a Democrat from Connecticut, joined by 28 co-sponsors, introduced the Transparency & Disclosure Act.<sup>90</sup> The bill proposed to change the way Justices address ethical issues, because “the public’s trust in the

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<sup>89</sup> YEAR-END REPORT at 4; *U.S. v. Will*, 449 U.S. 200, 211-12 (1980) (“Jurisdiction being clear, our next inquiry is whether 28 U.S.C. §455 or traditional judicial canons operate to disqualify all United States judges, including the Justices of this Court, from deciding these issues.” (citing to the ABA MODEL CODE)); *Hanrahan v. Hampton*, 446 U.S. 1301, 1301 (1980) (mem.) (Rehnquist, J.) (addressing a motion to recuse and stating, “I have considered the motion, the Appendices, the response of the state defendants, 28 U.S.C. §455 [citations omitted], and the current American Bar Association Code of Judicial Conduct, and the motion is accordingly denied”).

<sup>90</sup> H.R. 862. A group of 138 law professors proposed similar measures in a letter sent to the House and Senate Judiciary Committees outlining the need for new mandatory ethical rules and recusal legislation for the Supreme Court. The letter urged that the Code of Conduct be made applicable to the Supreme Court, because using the Code “for mere ‘guidance’” is inadequate to “protect the integrity of the Supreme Court,” and that Justices be required to provide a “written opinion when [they] den[y] a motion to recuse” and instituting “a procedure...for review of a decision by a Supreme Court justice not to recuse.” Letter to the Chairmen and Ranking Minority Members of the House and Senate Judiciary Committees (Mar. 17, 2011), *available at* [http://www.afj.org/judicial\\_ethics\\_sign\\_on\\_letter.pdf](http://www.afj.org/judicial_ethics_sign_on_letter.pdf).

Supreme Court has been damaged,” claims Murphy.<sup>91</sup> The Transparency & Disclosure Act would mandate that:

1. The Code of Conduct be applied to Supreme Court justices to the same extent as the Code already applies to all other federal judges;
2. The Judicial Conference develop procedures to review and act on, where appropriate, complaints alleging that a justice violated the Code of Conduct;
3. Supreme Court justices disclose publicly their reasoning behind a recusal when they withdraw from a case and behind a refusal to recuse themselves after a motion is made for them to do so; and
4. The Judicial Conference develop a process for review of decisions by justices who have refused to recuse themselves from a case.

The Act was referred to the Subcommittee on Courts, Commercial and Administrative Law, where it languished.<sup>92</sup> In September 2011, Representative Murphy and 43 other members of the House called on the Subcommittee’s Chairmen to schedule hearings on the bill.<sup>93</sup> The opportunity for debate on the Transparency & Disclosure Act is itself important; debate could offer an important lens into how the Court answers questions of unfaithfulness and bias in order

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<sup>91</sup> See Press Release, Rep. Christopher Murphy, *Murphy Unveils Legislation to Increase Transparency and Accountability at Supreme Court* (Mar. 1, 2011), available at [http://www.chrismurphy.house.gov/index.php?option=com\\_content&task=view&id=484&Itemid=55](http://www.chrismurphy.house.gov/index.php?option=com_content&task=view&id=484&Itemid=55) (legislation “would bring greater transparency and accountability to the nation’s highest court”).

<sup>92</sup> Library of Congress, Thomas, <http://thomas.loc.gov> (3/1/2011: Referred to the House Committee on the Judiciary; 3/21/2011: Referred to the Subcommittee on Courts, Commercial and Administrative Law.).

<sup>93</sup> Press Release, Rep. Murphy, *43 House Members Call for Hearing on Murphy’s SCOTUS Transparency Bill*, (Sept. 9, 2011), available at [http://www.chrismurphy.house.gov/index.php?option=com\\_content&task=view&id=515&Itemid=55](http://www.chrismurphy.house.gov/index.php?option=com_content&task=view&id=515&Itemid=55).

to protect its integrity and improve its public image.<sup>94</sup> Representative Murphy has argued that the Transparency & Disclosure Act would “restore [the public’s] trust by making the Supreme Court accountable and transparent.”<sup>95</sup>

### **III. There Is Merit To The Transparency & Disclosure Act’s Proposal That Justices Publicly Disclose The Basis Of Their Decision To Recuse Or When Denying A Motion To Disqualify.**

Transparency is of course critical to maintaining public confidence in the government, including the Supreme Court. As Justice Kennedy said, “[c]ourts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen’s respect for judgments depends in turn upon the issuing court’s absolute probity.”<sup>96</sup>

With the goal of increasing the public’s respect for the Court in mind, the Association supports the Transparency & Disclosure Act’s requirement that Justices disclose publicly their reasoning behind recusing from a case or upon refusing to withdraw after a motion to disqualify is made. Justices should provide a written explanation of their decisions like those mentioned previously

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<sup>94</sup> See, e.g., *The Court’s Recusal Problem*, N.Y. TIMES, Mar. 15, 2011, available at [http://www.nytimes.com/2011/03/16/opinion/16wed3.html?\\_r=2](http://www.nytimes.com/2011/03/16/opinion/16wed3.html?_r=2); Nan Aron, *An Ethics Code for the High Court*, WASH. POST, Mar. 13, 2011, available at [http://www.washingtonpost.com/opinions/an-ethics-code-for-the-high-court/2011/03/11/ABILNzT\\_story.html](http://www.washingtonpost.com/opinions/an-ethics-code-for-the-high-court/2011/03/11/ABILNzT_story.html); *Cloud over the Court*, N.Y. TIMES, June 22, 2011, at A26; Dahlia Lithwick, *Ethics Are for Other People*, SLATE, Apr. 15, 2011, available at [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/04/ethics\\_are\\_for\\_other\\_people.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/04/ethics_are_for_other_people.html); Herman Schwartz, *SCOTUS Needs an Ethics Code*, POLITICO, May 13, 2011, available at <http://dyn.politico.com/printstory.cfm?uuid=879EA44D-9C9E-4253-B17F-C35806412FF1>; Russell Wheeler, *Regulating Supreme Court Justices’ Ethics—“Cures Worse than the Disease?”*, BROOKINGS INST., Mar. 22, 2011, available at [http://www.brookings.edu/opinions/2011/0321\\_justices\\_ethics\\_wheeler.aspx](http://www.brookings.edu/opinions/2011/0321_justices_ethics_wheeler.aspx); Russell Wheeler, *What’s So Hard about Regulating Supreme Court Justices’ Ethics?—A Lot*, BROOKINGS INST., Nov. 30, 2011, available at [http://www.brookings.edu/papers/2011/1128\\_courts\\_wheeler.aspx?p=1](http://www.brookings.edu/papers/2011/1128_courts_wheeler.aspx?p=1).

<sup>95</sup> Murphy Mar. 1, 2011 Press Release, *supra* note 91.

<sup>96</sup> *Rep. Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J. concurring).

in *Laird*, *Microsoft* and *Cheney*. While the goals of the Transparency & Disclosure Act are laudable, the Association does not endorse the remainder of the bill because of constitutional concerns, specifically the separation of powers doctrine and the need to maintain the Court's independence.

The separation of the three branches of government is symbolized by their discrete treatment in Articles I, II, and III of the Constitution.<sup>97</sup> By insisting upon separation of powers, the Framers sought “not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among the three departments, to save the people from autocracy.”<sup>98</sup> Within this scheme, “impeachment was designed to be the *only* check on the Judicial Branch by the Legislature.”<sup>99</sup> As Alexander Hamilton stated in the *Federalist Papers*:

The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives, and tried by the Senate, and if convicted, may be dismissed from office and disqualified for holding any other. This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges.<sup>100</sup>

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<sup>97</sup> See also *Miller v. French*, 530 U.S. 327, 341 (2000) (“The Constitution enumerates and separates the powers of the three branches of Government in Articles I, II, and III, and it is this ‘very structure’ of the Constitution that exemplifies the concept of separation of powers.”); Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 700 (1980) (“Because of the unique position of the federal judiciary as the principal guardian of the rights conferred by the Constitution, encroachments upon its protected sphere must be weighed with acute sensitivity.”).

<sup>98</sup> *Myers v. U.S.*, 272 U.S. 52, 85 (1926) (Brandeis, J. dissenting).

<sup>99</sup> *Nixon v. U.S.*, 506 U.S. 224, 235 (1993) (emphasis in original).

<sup>100</sup> THE FEDERALIST NO. 79, 532-533.

Guarding the Supreme Court's independence is particularly important in light of the judiciary's lack of power over either "the sword or the purse."<sup>101</sup>

As an initial matter, the imposition of the Code of Conduct would alter the Court's historical independence but with what would seem to be limited beneficial consequences. Justice Kennedy stated as much during testimony before a House Subcommittee, when he claimed that "it would be structurally unprecedented for the Supreme Court to be bound by rules created for the lower courts."<sup>102</sup> Chief Justice Roberts echoed these sentiments in his 2011 Year-End Report and explained that the Code of Conduct should apply only to the lower federal courts, because "Congress instituted the Judicial Conference for the benefit of the courts it had created [and] its committees have no mandate to prescribe rules or standards for any other body."<sup>103</sup> The Kennedy and Roberts arguments falter somewhat given that the ABA's Model Code, upon which the Code of Conduct is modeled, was written with all judges in mind. Nevertheless, formal adoption of any ethical code would not significantly alter the Court's ethical dynamic, as both are meant only to "provide guidance [to] judges"<sup>104</sup> or state what they "should"<sup>105</sup> do in particular circumstances, and the Court has repeatedly insisted that it already consults both.<sup>106</sup> Arguably adoption of a code of conduct may have the effect of bolstering the

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<sup>101</sup> THE FEDERALIST NO. 78, at 465-67 (Hamilton).

<sup>102</sup> *See Justices Kennedy and Breyer Testify at House Appropriations Hearing*, ABC NEWS, Apr. 14, 2011, <http://abcnews.go.com/Politics/justices-kennedy-breyer-testify-house-appropriations-hearing/story?id=13376677&page=2>.

<sup>103</sup> YEAR-END REPORT at 4.

<sup>104</sup> ABA MODEL CODE at Preamble.

<sup>105</sup> CODE OF CONDUCT ("should" used throughout).

<sup>106</sup> *See supra* note 89.

public's opinion of the Court, as it will have the confidence that the Court is held to the same ethical standards as other judges. But empirical evidence shows no connection between the implementation of codes of conduct and increased public confidence in the implementing court.<sup>107</sup> Moreover, a real change in conduct would be slight without a system of oversight beyond the Court, which would not seem to pass constitutional muster in light of separation of powers concerns.

The separation of the three branches' powers is of greatest concern under the Transparency & Disclosure Act's provisions requiring review of Code of Conduct violations and recusal decisions. The Constitution vests the judicial power in "one supreme Court."<sup>108</sup> In particular, any proposal for oversight of the Court must take into account the unique effect of a Justice's withdrawal has on the Supreme Court.<sup>109</sup> The reason recusal and disqualification decisions have been a Justice's individual decision, as Justice Jackson noted in *Jewell Ridge*,<sup>110</sup> and should remain so, is that they are best made by a Justice acting alone. Justice Breyer and Chief Justice Roberts have emphasized the importance of a Justice being independent in determining whether to withdraw himself or herself from a case, because of the impact such a decision will have on the whole Court.<sup>111</sup> Review of these decisions by another body would threaten to make recusal decisions subject to undue political maneuvering.

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<sup>107</sup> Note, Benjamin B. Strawn, *Do Judicial Ethics Canons Affect Perceptions of Judicial Impartiality?*, 88 B.U. L. REV. 781, 806 (2008).

<sup>108</sup> U.S. CONST. art. III § 1.

<sup>109</sup> Frank, *supra* note 51, at 605 ("If a justice sits who should not, great interest may be jeopardized; but if a justice disqualifies who should not, vital questions may be needlessly left without authoritative decision.").

<sup>110</sup> *See supra* note 53.

<sup>111</sup> *See ABC NEWS, supra* note 98 and YEAR-END REPORT at 9, respectively.

Review of withdrawal decisions within the Court also may destroy the collegiality of such a small group. Roberts emphasized this possibility in the Year-End Report, stating that “the Supreme Court does not sit in judgment of one of its own Members’ decision whether to recuse in the course of deciding a case. Indeed, if the Supreme Court reviewed those 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.”<sup>112</sup> Subsequent to Chief Justice Roberts’s 2011 Year-End Report, the other eight members of the Court did apparently address Justice Kagan’s qualification to hear the Health Care Law.<sup>113</sup> This particular instance aside, putting such decisions to the whole Court as a matter of course would likely have negative consequences.

In addition, a Justice’s decision to withdraw from a case before the Court is unlike any other judge’s and may be difficult or impossible for others to evaluate. The “duty to sit” and “rule of necessity” concepts give priority to the sitting of the Court’s full membership, because, for as Chief Justice Rehnquist argued, “[t]here is no way of substituting Justices of this Court as one judge may be substituted for another in the district courts.”<sup>114</sup> The fact that there is no other court beyond the Supreme Court informed both Chief Justice Rehnquist’s and Justice Scalia’s

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<sup>112</sup> YEAR-END REPORT at 9.

<sup>113</sup> *See supra* note 4.

<sup>114</sup> *Laird*, 409 U.S. at 837. The “duty to sit” holds that in cases where a judge faces an ambiguous disqualification decision, the judge should decide against withdrawal and in favor of sitting. *See Edwards v. U.S.*, 334 F.2d 360, 362 n.2 (5th Cir. 1964) cert. denied, 379 U.S. 1000 (1965). The “rule of necessity” holds that where no other judge can hear the case, the judge facing the case must of necessity hear and decide it. *See U.S. v. Will*, 499 U.S. 200, 213-16 (1980).

decisions not to recuse themselves in *Microsoft* and *Cheney*, respectively.<sup>115</sup> The disqualification of just one Justice raises the possibility of an affirmance of a judgment by an equally divided Court. The consequence of such a result, of course, is that the issues of law presented by those cases are left unsettled.<sup>116</sup> For example, between 1981 and 2005, Justice O'Connor recused herself in forty-one cases, primarily in the "OOPS" cases discussed above. In seven of those cases, tie votes resulted.<sup>117</sup> Research suggests that tie votes resulting from discretionary withdrawal are more rare than the "OOPS" sampling might suggest, but it is nevertheless a possibility and is clearly of concern to the Justices.<sup>118</sup> Moreover, numerous withdrawals can result in the Court being unable to muster a quorum of six and thus unable to act at all.<sup>119</sup>

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<sup>115</sup> *Microsoft*, 530 U.S. at 1301 (“[I]t is important to note the negative impact that the unnecessary disqualification of even one Justice may have upon our Court.”); *Cheney*, 541 U.S. at 915 (Stating that if he recuses “The Court proceeds 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.”).

<sup>116</sup> *Laird*, 409 U.S. at 837-38.

<sup>117</sup> Ryan Black & Lee Epstein, *Recusals and the “Problem” of an Equally Divided Supreme Court*, 7 J. APP. PRAC. & PROCESS 75, 87 n.54 (2005).

<sup>118</sup> *Id.*, at 85-86 and 91. Of the 6815 cases heard by the Court between 1946 and 2003, a tie was possible in 1319 cases, and an actual tie resulted in 74, or fewer than 6% of the 1319 possible. Discretionary recusal—recusal for neither health nor appointment date—led to 599 cases in which a tie could have resulted, but in only 49 or 9% did a tie actually result. The reasons for these statistics include reluctance to withdraw when the Justice knows the decision will be close or a desire to join a five-to-three decision rather than affirm on a tie.

<sup>119</sup> 28 U.S.C. 1; *see also* Frank, *supra* note 51, at 626 (noting three instances of disqualification resulting in loss of quorum). If the Court is unable to muster a quorum, there are two alternatives: (1) if the case came to the Supreme Court by direct appeal from a district court, the Chief Justice may send the case to the applicable circuit court; (2) in all other cases, if the majority of the Justices do not believe that a quorum will become available in the next Term, the Court must affirm the judgment, with the same effect as if the judgment had been affirmed by an equally divided Court. 28 U.S.C. § 2109.

The Association's support for the Transparency & Disclosure Act's public disclosure requirement, or of a policy within the Supreme Court that a written analysis must be made of a Justice's decision to recuse himself or herself or when denying a motion to disqualify, stems from the fact that the memoranda in *Laird*, *Microsoft* and *Cheney* detailing a Justice's rationale are rare. The public typically learns that a Justice has withdrawn only by way of a statement in the decision to the effect of "Justice X took no part in consideration or decision of the case."<sup>120</sup> Chief Justice Rehnquist acknowledged that "while a member of the Court will often consult with colleagues as to whether to recuse in a case, there is no formal procedure for Court review of the decision of a Justice in an individual case."<sup>121</sup> Most recently, the Court did not elaborate upon its determination that Justice Kagan need not recuse herself from hearing the Health Care Law, which was preceded by a federal judge turning aside a request that the Justice Department release documents related to her involvement with the law's passage while she served as Solicitor General.<sup>122</sup> Notably, a formal motion was neither made for Kagan's recusal nor that of any other Justice, but there should be some formal procedure for responding to such a motion when it is made.

It should be emphasized that history does not give substantial cause for concern that Justices are actually, or at least frequently, making self-interested or unethical decisions.

The issues to be addressed are (1) public perception and confidence, which have particular value

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<sup>120</sup> See, e.g., *U.S. v. Va.*, 518 U.S. at 515 ("Justice Thomas took no part in consideration or decision of case."); *Khadr v. Obama*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2900 (2011) ("Justice Kagan took no part in the consideration or decision of this petition.").

<sup>121</sup> Davies, *supra* note 57, at 87 (quoting Letter from Chief Justice William H. Rehnquist to Senator Patrick Leahy, Jan. 26, 2004).

<sup>122</sup> Bill Mears, *Judge Blocks Release of Government Documents Over Kagan's Role in Health Care Law*, CNN, Oct. 14, 2011, <http://politicalticker.blogs.cnn.com/2011/10/14/judge-blocks-release-of-government-documents-over-kagans-role-in-healthcare-law/>.

in the case of this precious institution and would be bolstered by more frequent public statements of the rationale behind recusal decisions, and (2) in the rare instances where a Justice is inclined to participate in a case where ethical constraints argue against doing so, the requirement of a writing would create valuable counterpressure.

While Section 455 of the existing law also raises separation of powers concerns not unlike those raised by the Transparency & Disclosure Act, these are offset in some respects by the due process rights it supports and its close similarity with the ABA's Model Code of Judicial Conduct and the Code of Conduct. Section 455 is an extension of the Supreme Court's holding that "an impartial judge is essential to due process."<sup>123</sup> Thus, while the law adds to the "only check" on the Court, it protects in part a right guaranteed by the Fifth and Fourteenth Amendments. Section 455, however, expands upon the constitutionally mandated grounds for withdrawal that the Court has recognized. In fact, "most matters relating to judicial disqualification [do] not rise to a constitutional level."<sup>124</sup> At common law, a judge was disqualified only for direct pecuniary interest.<sup>125</sup> Over time, case law has developed an additional ground for disqualification "because of a conflict arising from [a judge's] participation

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<sup>123</sup> *Republican Party of Minnesota v. White*, 536 U.S. 765, 776 (2002). See also *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (finding that a particular judge's participation in the case "violated appellant's due process rights"); *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial is a basic requirement of due process.").

<sup>124</sup> *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948); see also *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) ("All questions of kinship, personal bias, state policy, remoteness of interest, would seem generally be matters of merely of legislative discretion.").

<sup>125</sup> Frank, *supra* note 51, at 609. The Court has said that the test in instances of pecuniary interest is an objective standard like Section 455's, which means that proof of actual bias is not required. See *Tumey*, 273 U.S. at 532; *Mayberry v. Penn.*, 400 U.S. 455, 465 (1994); *Lavoie*, 475 U.S. at 820.

in an earlier proceeding.”<sup>126</sup> While Section 455 augments the constitutional basis for disqualification, Justices in the past have not maintained that Section 455 itself is unconstitutional.<sup>127</sup> According to Chief Justice Rehnquist, “[e]ach of us strives to abide by the provision of 28 U.S.C. § 455.”<sup>128</sup> Moreover, the drafting of Section 455 was heavily influenced by the ABA’s Model Code of Judicial Conduct and the Code of Conduct, which the Court consults.<sup>129</sup> Congress has long been recognized as having the power under the law to decide when a Justice should withdraw, likewise, it ought to have the power to compel a statement of the reasons for a decision to withdraw or not. Whether or not Congress acts in this regard, the Association is hopeful that the Court will adopt a writing policy of its own initiative.

Outside of the Transparency & Disclosure Act, there is significant support for public disclosure of a Justice’s decision to recuse or to deny a motion to disqualify. The ABA Model Code of Judicial Conduct itself states that “[a] judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.”<sup>130</sup> Further, a writing requirement is not dissimilar to the personal financial statements the Justices are already required to make.<sup>131</sup> From these statements, if they are made

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<sup>126</sup> *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, \_\_\_, 129 S. Ct. 2252, 2261 (2009); *but see* dissent of Chief Justice Roberts therein.

<sup>127</sup> *But see* YEAR-END REPORT at 7 (Chief Justice Roberts noted that the constitutionality of Section 455 has not been tested).

<sup>128</sup> Davies, *supra* note 57, at 87.

<sup>129</sup> *See supra* note 71.

<sup>130</sup> ABA MODEL CODE, Rule 2.11, cmt. 5.

<sup>131</sup> *But see* YEAR-END REPORT at 6 (Chief Justice Roberts noted that Congress’s power to require this type of disclosure from Justices has not been tested).

accurately, the public likely can tell when a Justice withdrew over a pecuniary interest.

Requiring a writing in all cases merely eliminates the need for the public to try and “connect the dots,” and expands this disclosure regime to include instances involving a Justice’s personal bias or prejudice concerning a party, association with the matter in private practice or government employment, and instances in which the Justice is related to a party involved in the case.<sup>132</sup>

While there may be some negative public reaction to certain disclosures, on the whole, additional transparency should improve the public’s perception of the Court.

Requiring a writing on a Justice’s recusal or disqualification decision achieves the dual purpose of informing the public of the Justice’s reasoning and forcing the Justice to examine his or her own biases. As Justice Jackson stated in his attack on Justice Black, “[w]e do not sit like local judges, where lawyers and litigants know our relationships and characters. Our lawyers and litigants are usually, except when appearing for the Government, strangers who know us only by publicity, by our work and by appearances.”<sup>133</sup> A writing shows that Justices take both their positions and motions to disqualify seriously. Justices, including those who subscribe to the 1993 Statement of Recusal Policy, will make such a showing by providing complete answers to questions bearing upon their ability to be impartial.

A writing could also be critical to a Justice’s recognition of his or her own unconscious bias in a particular case. Although a Justice’s conscious awareness of bias does not

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<sup>132</sup> 28 U.S.C. § 455(b).

<sup>133</sup> *Text of Jackson’s Statement*, *supra* note 51; *see also Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 865 (1992) (“[T]he Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court’s power lies, rather, in its legitimacy, a product of substance and perception that shows itself in people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”); ABA MODEL CODE, Rule 1.2, cmt 3 (“Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary.”).

eliminate all concern, unconscious bias is even more problematic because the Justice lacks the awareness to eliminate preferences. Research shows that prejudiced responses are largely unconscious.<sup>134</sup> As such, forcing a Justice to reason through his or her qualification to hear a case on a motion for disqualification may force a realization of such prejudices.

The requirement that a writing be made upon a Justice's decision to recuse or to deny a motion to disqualify will place a limited burden on the Court. A Justice withdraws for reasons other than health in approximately twelve percent of all cases.<sup>135</sup> This includes withdrawal based on a Justice's own decision to recuse and on party and non-party motions to disqualify. Motions to disqualify by parties are rare in part because parties at times are willing to allow a Justice to hear the case and then, upon receiving an unfavorable ruling, to make a motion

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<sup>134</sup> See Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 698 n.52 (2005) (citing Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 181, 181 (1995) (finding unconscious gender stereotyping in judgments of fame, and finding that explicit expressions of sexism or stereotypes were uncorrelated with the observed unconscious gender bias); Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142, 1142 (1996) (concluding that "stereotypes may be automatically activated"); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1989) (finding that stereotypes are "automatically activated in the presence of a member (or some symbolic equivalent) of the stereotyped group and that low-prejudice responses require controlled inhibition of the automatically activated stereotype"); John F. Dovidio *et al.*, *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 512 (1997) (noting that "[a]versive racism has been identified as a modern form of prejudice that characterizes the racial attitudes of many Whites who endorse egalitarian values, who regard themselves as nonprejudiced, but who discriminate in subtle, rationalizable ways"); Kerry Kawakami *et al.*, *Racial Prejudice and Stereotype Activation*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 407, 407 (1998) ("[H]igh prejudiced participants endorsed cultural stereotypes to a greater extent than low prejudiced participants. Furthermore, for high prejudiced participants, [African-American] category labels facilitated stereotype activation under automatic and controlled processing conditions.")).

<sup>135</sup> Black & Epstein, *supra* note 117, at 90 n.50 (817 cases of the 6815 mentioned previously involve one discretionary recusal, 120 had two, and nine had three for a total of 943 discretionary recusals between 1948 and 2003 that would have required a writing).

for rehearing on the basis of the Justice’s participation.<sup>136</sup> Although the Transparency & Disclosure Act’s standard for when a writing should be made was not implicated, the Association would encourage Justices to be liberal in their production of writings, especially in cases under intense public scrutiny.

The Transparency & Disclosure Act does not address the issue of what form public disclosure should take. The form and content of the writing advocated for by the Association may be elaborated upon at a later date. For now, we note only that the explanatory standard should remain fluid enough to accommodate all cases while being sufficiently specific to ensure a substantive explanation. A bare-bones statement such as “I’m not biased” would miss the point because both Section 455 and the ethical guidelines, by their terms, do not require actual bias in fact, but instead require withdrawal when circumstances might suggest bias to an outsider. More detail must be provided, the level of which may depend upon whether a motion to disqualify cites to the provisions of Section 455(a) or (b). Subsection (c), relating to waiver, distinguishes the two provisions, allowing parties to waive violations of subsection (a), but not (b).<sup>137</sup> Continuing to differentiate between subsections (a) and (b) in the requirements of a writing acknowledges that “not every attack on a judge disqualifies him from sitting”<sup>138</sup> and would limit significant memoranda to instances in which one of the particular circumstances set forth in subsection (b) can be identified. This distinction should also have the effect of curtailing meritless non-party motions, as a lengthy memorandum could only be obtained when the facts necessitate one.

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<sup>136</sup> See, e.g., *Jewell Ridge Coal Corp.*, 325 U.S. 897.

<sup>137</sup> 28 U.S.C. § 455(c).

<sup>138</sup> *Mayberry*, 400 U.S. at 465.

#### **IV. Conclusion.**

It is the hope and recommendation of the Association that the Court should adopt the practice of requiring Justices to issue written explanations for their recusal from a case or when denying a motion to disqualify and to formulate a set of requirements for what that writing should entail. The adoption of this practice, whether by the Court's initiative (the preferred method) or by congressional action, would help increase public confidence in the Court and provide Justices with a valuable structure for guiding the public disclosure of their recusal decisions.